



EMPLOYMENT TRIBUNALS

Claimant: Mr. David Stanworth

Respondent: West Midlands Trains Limited

Heard at: Birmingham Employment Tribunal

On: 21 and 22 December 2023

Before: Employment Judge G Smart

Representation

Claimant: Mr. Nicholas Toms (Counsel)

Respondent: Mr. Sebastian Purnell (Counsel)

RESERVED JUDGMENT

The Judgment of the Tribunal is:

1. The Claimant's claim for unfair dismissal is not well founded and is dismissed.

Public access to employment Tribunal decisions: Note that both judgments and reasons for the judgments are published in full online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the parties.

Recording and Transcription - Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

REASONS

The Claim

1. The Claimant brings a claim of unfair dismissal following an incident where he was dismissed for gross misconduct. He was dismissed because a child became injured having been run over by a controlled emission toilet truck or “CET” for short.
2. Unfortunately, and tragically, the boy suffered several fractures as a result of his foot being run over by the CET which was on a wheeled truck and being manoeuvred by the Claimant at the time of the incident.
3. The Respondent argued that the Claimant acted in breach of safety rules. The Claimant argues that his dismissal was unreasonable.
4. At various points in this judgment, I refer to “SSOW” this means “safe system of work”.

The hearing

5. At the start of the hearing, the parties suggested that because there was a final salary pension scheme applicable to the Claimant’s employment, that they would simply deal with liability and requested that remedy was dealt with at a separate hearing if appropriate. Issues of Polkey and contributory fault were not discussed and the hearing proceeded on the basis of liability only.
6. Whilst unusual, I could see the benefit of a separate remedies hearing and as both sides agreed to this approach, I could see no reason why we could not proceed on that basis.
7. When it came to submissions, I was concerned to note that despite the agreement to consider liability only, submissions were being made by both counsel in their written closing arguments about these issues. Neither counsel put any issues about remedy to any of the witnesses.
8. This was raised and discussed before submissions were made and I decided that as the hearing had proceeded on the basis that there was an agreement between the parties before it commenced that they would try to deal with liability only, then it was not proper to consider any issues of remedy.

Public access to employment Tribunal decisions: Note that both judgments and reasons for the judgments are published in full online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the parties.

Recording and Transcription - Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

9. The Claimant gave evidence himself and the Claimant's union representative Craig Johnston had also produced a witness statement. Mr. Johnston was not present on the day and gave no evidence other than his unsworn statement.
10. However, before the hearing commenced, the Respondent stated that it had no questions for Mr. Johnston and was willing for the statement to be admitted unchallenged. This had been discussed with counsel for the Claimant and was agreed, hence why Mr. Johnston did not attend the hearing. The statement therefore stands unchallenged.
11. After cross examination of the Respondent's witnesses, the Claimant swore in his statement. Counsel for the Respondent had no questions to cross examine the Claimant and the Claimant's statement therefore stood unchallenged.
12. There were no issues with the bundle and no other preliminary issues. The Respondent handed up a reading list before the hearing. I did not get the opportunity to make any significant impact on that list given the size of the bundle.
13. I therefore had as evidence before me a bundle of 571 pages and four witness statements. I heard evidence from two of witnesses for the Respondent namely Max Taylor the dismissal decision maker and Sean McBroom the appeal decision maker. I heard evidence from the Claimant and Mr. Johnston's statement stood unchallenged albeit unsworn.
14. Before hearing the evidence, there was a discussion about whether viewing the CCTV was relevant. Stills were in the bundle. In my judgment, it was relevant because CCTV had been referred to during the investigation and during the disciplinary process in particular at the appeal.
15. I therefore watched two CCTV videos. The first was CCTV video number 09250500 from 2 August 2021. The second was CCTV video 10450500 from the date and time of the incident.

Issues

16. Dismissal was admitted. References to "GOC" are references to the Grounds of Claim.
17. Counsel for the Claimant confirmed at the start of the hearing that no issues about the investigation process were being taken.

Public access to employment Tribunal decisions: Note that both judgments and reasons for the judgments are published in full online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the parties.

Recording and Transcription - Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

18. It was admitted by the Claimant that there was a potentially fair reason for the dismissal, namely the Claimant's conduct. GOC para 19.
19. However, the Claimant's case was that he was not dismissed for the charge in the disciplinary invite letter, he was dismissed for other reasons and that meant that the Respondent's belief of guilt was not genuine or based upon reasonable grounds. GOC para 20.
20. That dismissal was not within the band of reasonable responses open to a reasonable employer GOC para 24.
21. The unfairness of the Respondent's decision to dismiss was not remedied on appeal GOC para 25.
22. Consequently, I needed to determine the following issues:
 - 22.1. Did the Respondent have reasonable grounds for concluding that the Claimant was guilty of the charge alleged?
 - 22.2. Was the Claimant dismissed for the charge put forward or for other reasons and was the charge a clear one?
 - 22.3. Was the decision to dismiss and all other decisions in dispute within the band of reasonable responses open to a reasonable employer?
 - 22.4. Did the Respondent behave reasonably or unreasonably in treating the reason for dismissal as a sufficient reason to dismiss the Claimant in all the circumstances of the case including:
 - 22.4.1. The size and administrative resources of the Respondent;
 - 22.4.2. The equity and substantial merits of the case.

Background

23. The Claimant commenced his employment with the Respondent on 29 July 1991 and has over 30 years' service.
24. Whilst there have been previous concerns about the Claimant's use of the CET trolley, that have resulted in re-briefing or additional coaching or training, the Claimant has a clean disciplinary record.

Public access to employment Tribunal decisions: Note that both judgments and reasons for the judgments are published in full online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the parties.

Recording and Transcription - Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

25. At various times in the past, the Respondent has changed its name as rail service contracts have changed and, even though the contract of employment states the Claimant was employed by London and Birmingham Railway Limited, his service is continuous and he is now employed by the Respondent. This is common ground.
26. The Claimant had held various roles in the Respondent and the penultimate role he held was as a Revenue Officer. However, the Claimant was redeployed after an incident where he had challenged a passenger about fares as part of his job role and he was threatened with a firearm as per the Claimant's statement at paragraph 1.
27. After the firearm incident on 25 November 2018, the Claimant was transferred to a non-customer facing role, which was that of Controlled Emission Toilet Operative or "CET Operative" for short. This role was based at Redditch station. This was common ground amongst the parties.
28. Both witnesses for the Respondent namely Max Taylor, Head of Business Planning, and Sean McBroom, Head of On Train (LNR), knew of this previous incident with a firearm.
29. The Claimant's disciplinary policy namely at page 57 in the bundle listed as allegations of gross misconduct the following:
 - 29.1. *serious or repeated breaches of health and safety rules and procedures;*
 - 29.2. *causing loss, damage or injury through serious negligence.*
30. On 10 December 2018, the Claimant underwent CET operation training as per the briefing record card at page 326 in the bundle.
31. The training given was site specific and covered the operation of the CET tank, the moving of the CET tank, the daily schedule for CET work and the CET risk assessment documents. Some of the precise aspects of the training are mentioned during the investigation, which I will come onto later.
32. I was referred to a number of Safe System of Work documents in the bundle. The chief document referred to was the safe system of work at pages 327 – 341.

Public access to employment Tribunal decisions: Note that both judgments and reasons for the judgments are published in full online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the parties.

Recording and Transcription - Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

33. The crucial parts of that document are as follows at page 327:

- 33.1. *“The unit where practical shall only be moved in a forward direction to ensure line of sight of passengers can be seen by the operator.”*
- 33.2. *“The operator is to ensure they have sufficient time to carry out CET operation in a safe manner...”*
- 33.3. *“remember safety is everyone is responsibility work safely follow all rules and instructions if unsure stop and seek guidance.”*

34. Other crucial parts are contained within task sheet number four of the safe system of work at page 336:

- 34.1. *“the CET unit can only be positioned for operation when a train has come to a stand and passengers have dispersed- not before. Passengers have priority if they need to use the ramp to access the train. Ensure good observation of the platform to manage passenger access to train.”*
- 34.2. *“Be aware of passengers when manoeuvring takes place”*
- 34.3. *“manoeuvre CET into recess one or two as appropriate for three or six car trains. See diagram sheet. Upon arrival of train ensure not to be moved board is to be placed on the conductor's end of a three car cab 3 on a six car formation in the direction of travel.”*
- 34.4. *“Move the unit in a forward direction (to ensure line of sight) to the designated area of operation using the designated route only.”*

35. Unfortunately, no diagram sheet mentioned in the SSOW was in the bundle or referred to by the witnesses. No issue was taken about this by either party.

36. The risk assessment is in the bundle of pages 342 to 343. This identifies that entrapment/ crushing is a risk and that to reduce or remove the risk, appropriate personal protective equipment is to be worn, the safe system of work is to be followed and the listed safety induction competence assessment and training needs to be completed with the Claimant.

37. As with any situation that could involve the movement of human beings in the environment where machinery needs to be used, I was mindful that I needed to look at the decision makers findings when coming to decisions about the allegation

Public access to employment Tribunal decisions: Note that both judgments and reasons for the judgments are published in full online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the parties.

Recording and Transcription - Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

of gross misconduct in the context that sometimes people, particularly children, do not behave in an expected or predictable way.

Previous incidents involving the Claimant

38. This was not the first time that the Claimant had an incident where he had collided or in some way made contact with a passenger on the platform. Another incident is logged at page 106 in the bundle as follows:

“at approx 11:30 hrs on 4. 10. 19, the CET operator based Redditch station was completing his duties and manoeuvring the machine back to the drainage point when he collided with a passenger on the platform. Root cause: the accident/ incident occurred due to the CET operator not seeing the customer on the platform. The machine was being pushed along and the operator therefore did not have line of sight, therefore unable to see what was in front of the machine.”

39. The Claimant received retraining after this incident as he accepted at page 91 in the bundle during the investigation meeting on 2 September 2021.

40. There was also an incident on the 22nd of July 2021 where various failures were identified and that the Claimant had not followed the safe system of work when attaching pipes to the train. It is documented that the Claimant did not attach the do not move board to the train when conducting the transfer of fluids between the CYT machine and the train.

41. The do not move board is an indicator to the train driver and others around that something is attached to the train and therefore the train should not be driven off under any circumstances until they do not move board is taken off indicating it is then safe to move the train.

42. It is fair to say that in my judgement the above incidents are both serious breaches of safe systems of work, not simply minor ones.

43. All of the above incidents are documented as resulting in retraining, coaching and also revisions of some of the risk assessments in place at the Respondents. The Claimant was also spoken to about the various breaches of safe systems of work and coached on what he should be doing.

Public access to employment Tribunal decisions: Note that both judgments and reasons for the judgments are published in full online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the parties.

Recording and Transcription - Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

CCTV from 2 August 2021

44. I was referred to CCTV footage of the Claimant working on day prior to the incident with the child namely 2 August 2021. This footage was clear and showed that the Claimant was in some instances pushing the CET instead of pulling it. It was common ground among the parties that the CET should always be pulled so there was clear line of site with the CET being behind the operative.
45. It was also clear that the Claimant was manoeuvring the trolley with the CET tank on it when passengers were very close by, within inches of the moving machine. It was common ground amongst the parties and indeed relied upon by the Claimant that when people move close to the trolley when it is being pulled or moved by the operative, the operative should immediately cease moving the trolley until it is safe to continue moving it once the people have moved a safe distance away. Indeed, the safe system of work states that passengers should be given right of way.
46. It was therefore clear, in my judgement, that despite the Claimant being trained and coached repeatedly on how to safely use and manoeuvre the tank equipment and the trolley used to transport it, It was reasonable on any view of the CCTV together with knowledge of past incidents including a collision with a passenger, for the Respondent to conclude generally that the Claimant was a habitual violator of the safe system of work for CET use, his training and his instructions after re-briefs about past incidents.

3 August 2021 - injury of the boy running on the platform

47. The incident involving the child, took place on the 3rd of August 2021 on a train platform at Redditch station. An accident report form was completed, at the time, by the Claimant and is in the bundle of pages 72 to 73.
48. After the incident occurred, there was a fact Finder meeting which took place on the date of the incident which is in the bundle at pages 74 – 75. The fact Finder meeting was completed by Honour Grace the Area Train Presentation Manager.
49. The Claimant described what happened and said that he thought it was simply an accident. He said that he couldn't see the boy in front of the machine, but had seen the boys running about on the platform whilst he was maneuvering the machine. He says he think he stopped the machine to see where he was going and after he saw where the boy went, he started to move the trolley again. He heard a scream and that was the first he knew of the boy being near to the machine after running past him on the platform.

Public access to employment Tribunal decisions: Note that both judgments and reasons for the judgments are published in full online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the parties.

Recording and Transcription - Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

50. The accident form and fact finder version of events put forward by the Claimant were largely similar.

51. An investigation then commenced.

Eye witnesses

52. When looking at the eyewitness accounts together, namely those of the grandparents of the boys, the police officer, the driver, and the Claimant, none of the statements allege that the Claimant did anything wrong.

53. However, I was presented with no evidence to suggest that any of these eyewitnesses, including the driver, with the exception of the Claimant had any knowledge or training in how to correctly use or manoeuvre the CET machine and more importantly that such evidence was available in the investigation documentation before the decisions makers at the time.

54. It appears that what happened was that the two boys ran up behind the Claimant when he was manoeuvring the CET. One boy went to the left the other boy went to the right and the Claimant had not appreciated that one boy remained near the vehicle, because his attention was focusing on the other boy.

55. However, what is really important is what the decision makers found had happened as a result of the investigation material in front of them and what was said and done at the various meetings throughout the disciplinary process. This is discussed later.

56. The two eyewitnesses who fully saw the incident were the boys' grandparents.

57. The statement of the grandfather Stephen Cooke is in the bundle of page 304. He describes the incident clearly and concisely as a situation where the boys had each ran round a different side of the truck. The Claimant had spotted the older boy but not the younger boy, and the younger boy had stopped in front and to the side of the truck looking to see where his grandparents were. The Claimant had not noticed that the boy was there, started the machine again and knocked the boy to the floor as the trolley turned and then continued to move running over his foot and his leg, which was under the trolley after the fall. The Claimant then reversed the vehicle back upon hearing the scream, going over the boy's foot and leg again until the trolley was off the boy.

Public access to employment Tribunal decisions: Note that both judgments and reasons for the judgments are published in full online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the parties.

Recording and Transcription - Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

58. The statement of the grandmother is at pages 305 to 306 in the bundle. She describes the incident in very similar terms.

Suspension

59. As a result of the incident, the Claimant was suspended on full pay whilst further investigations took place. This was done at a post incident review meeting on the 5th of August 2021, the notes of which are in the bundle at pages 78 – 81.

60. No issue is taken in this claim about the suspension.

Investigation

61. The investigation report is in the bundle at pages 105 – 116. It describes concerns about the incident namely:

61.1. *“not placing the safety barriers in designate[d] position.*

61.2. *Turning the machine in a non-designated area.”*

62. The evidence discussed during the process largely came from the eyewitness accounts at the time, because the CCTV footage did not cover the precise area where the accident had occurred training records and the safe system of work documents.

63. The evidence obtained during the investigation comes to some 333 pages including the report.

64. The steps taken in the investigation itself are not challenged by the Claimant.

65. Having considered the evidence, the investigation manager, Honour Grace, found there was a case to answer for possible breaches of safe systems of work.

66. The suspension was confirmed in writing by letter also dated 5th of August 2021 at pages 82 to 83 in the bundle.

The investigation meetings

67. On 31st of August 2021 the Claimant was invited to an investigation meeting at pages 84-85 in the bundle. He was given the right to be accompanied by a work colleague or trade union representative and was informed that the allegation being

Public access to employment Tribunal decisions: Note that both judgments and reasons for the judgments are published in full online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the parties.

Recording and Transcription - Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

looked into was *“the alleged failure to follow safe systems of work in operating the CET machine, which contributed to the injury of a child using Redditch station.”*

68. It is important to note that the allegation at this stage was *“contributed to”* the injury to the child. I revisit this later.
69. The key argument the Claimant and his representative from the union put forward at that meeting was that, in their view, there was a lack of training of the Claimant in the appropriate manoeuvring methods all certificates required to safely do the job.
70. On 2nd of September 2021 there was a fact Finder meeting with the Claimant. The notes of that meeting are at pages 309-314 in the bundle the Claimant's account of what happened remained largely the same as in previous meetings, discussions or reports already done during the investigation process so far.
71. On the 15th of September 2021 the Claimant was invited to attend a further investigation meeting for the same allegation at pages 92-93 in the bundle.
72. It was identified at that meeting that, when looking at the training, Raymond Burr of the Respondent had conducted the training leading to a statement of interview being produced as part of the investigation meeting. Having checked the Claimant's training record, the investigating manager went through the references she had found, which challenged the Claimant's view on training and certificates at the previous investigation meeting.
73. The notes of this meeting in the bundle at pages 94-102. Issues were discussed about whether appropriate barriers were in place, previous incidents where the Claimant collided with a passenger and whether there were any personal issues involving a colleague called Phil Goddard.
74. No issues about barriers, or Phil Goddard were pursued as part of the claim. No cross examination about these issues on either side took place.

Statement of Ray Burr

75. As part of the investigation, the investigation manager interviewed and showed the CCTV footage of the 3rd August to the Respondent's CET trainer, Ray Burr.

76. Having reviewed the footage, Mr Burr makes the following points:

Public access to employment Tribunal decisions: Note that both judgments and reasons for the judgments are published in full online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the parties.

Recording and Transcription - Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

- 76.1. the Claimant was not aware of his surroundings when moving the machine with customers behind him that he could not see. Mr Burr stated that had the Claimant moved up to the other end of the platform earlier and turned his machine like he had been trained to do, then he would have seen the passengers coming onto platform to be able to check what was going on. In his opinion, the Claimant appeared to him to have no intention of turning the CET truck because it looked like the Claimant was going to connect the CET to the front of the train.
- 76.2. Mr Burr concludes by saying that, in his view of the CCTV footage shown to him, He believed that SSOWs are being followed to some extent but corners were being cut by the Claimant at page 409 in the bundle.

The disciplinary invite letter

77. On 18th October 2021, the Claimant was invited to attend a disciplinary meeting. The letter is in the bundle of page 103 to 104.
78. The “charge” as the Respondent called it, was one of gross misconduct and was worded as follows *“on 3rd August 2021 while operating mobile CET equipment at Redditch station, you wilfully failed to follow the required safe systems of work, with your actions resulting in serious physical injury to a child using the station.”*
79. In my view, it is important to note that, at the point of the disciplinary invite letter, the allegation had changed slightly. Instead of the use of the equipment “contributing” to the injury of the child, the allegation wording had changed to the actions “resulting” in serious physical injury to the child.
80. It was therefore clear to me that both issues of contributing and resulting in the injury to the child were at play during the disciplinary meeting and the Claimant had notice of both sets of wording for the allegation.
81. In addition, the Claimant’s Union representatives are clearly arguing points at the meeting based on contribution to the boy being injured as well. For example, at page 446 in the bundle during the disciplinary meeting, Craig Hill states *“DS may not have followed the SSOW but this hasn’t contributed to the accident.”*
82. Equally at the appeal meeting, as noted at page 466 in the bundle, Craig Hill says *“However, Mr Taylor suggested that language is tautology and focused on recesses, instead he found Mr Stanworth might have increased the risk by some*

Public access to employment Tribunal decisions: Note that both judgments and reasons for the judgments are published in full online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the parties.

Recording and Transcription - Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

of his actions by not placing the CET in the recess it's not easy to see how that caused or contributed to [the] accident."

83. It is therefore clear that regardless of whether the allegation was worded as contributed to the injury of the child or resulted in the injury to the child, the Claimant and his representatives were clearly in contemplation of the allegation being one of contribution to the child's injury rather than the allegation was that breaches of the SSOW were the sole cause of the injury.

84. It is also clear therefore that the point about the Claimant contributing to the injury of the child had effectively been put to the Claimant throughout the disciplinary process and he had had a chance to respond to that allegation especially as it was the allegation that was used during the entirety of the investigation process where the Claimant had no less than four meetings in which he was able to put his version of events forward not including the disciplinary meeting and the two appeal meetings.

The disciplinary meeting

85. On 27th of October 2021 the disciplinary meeting about the allegation took place. The meeting was conducted by Max Taylor head of business planning. It was attended by the Claimant and his union representative Craig Hill and Richard Allinson HR case manager was there to take notes.

86. The notes of the meeting are in the bundle at page 441-450. After listening to what the Claimant and the Claimant's union representative had to say, Mr Taylor adjourned the meeting for approximately an hour and a half to come to his decision.

87. At the outset of the disciplinary meeting, Mr Taylor indicated that he will only be considering the allegation of not following a safe system of work as stated in the invite letter.

88. An important exchange in this case took place at the disciplinary meeting between Mr Taylor and Mr Stanworth's union representative at page 443. It went as follows:

"CH: can you tell us which SSO W specifically that he didn't follow which then led to the injury of the child?"

MT: There is an important distinction. The failure to follow the SSO W didn't directly result in the injury to the child, it is the situation and actions around it that we are concerned with.

Public access to employment Tribunal decisions: Note that both judgments and reasons for the judgments are published in full online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the parties.

Recording and Transcription - Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

CH: if it isn't following the SSO W that has resulted in the injury to the child, then that is an important distinction.

MT: Looking at the safe method of work at Redditch, we're referring specifically to the checklist not being completed the correct procedure is stated in task sheet number 4 in the safe method of work for mobile CET at Redditch station."

89. In addition, Mr Taylor had asked the investigating manager some questions after he had reviewed all of the investigation material. As part of the responses to that e-mail Ms Grace completed answers to the questions put in red and also suggested that she would take photographs of the recess points named as points one and two on the platform as per task sheet four in the safe system of work. Ms Grace answers by saying that she is in the process of ascertaining a photo of the two recess points on the platform and that she will send it over once she has it at pages 439 – 440 in the bundle.

90. I was not shown any photograph of the recess points and note photos of the recess points appear to be in the bundle. Mr Taylor also does not mention these photographs in his statement.

91. Mr. Taylor did not review the CCTV footage of the incident and instead relied on the still photos of parts of the footage.

92. Mr Taylor made the following findings from the disciplinary meeting:

92.1. he concluded that before the train arrived, the CT machine should have been parked in a recess at page 444;

92.2. He concluded that if the CET machine had been parked in the recess properly and then manoeuvred by pulling it forwards ready for the train, the Claimant would have had a full view of the platform and then being able to spot people moving up and down the platform in both directions in readiness for the imminently arriving train;

92.3. He concluded that the trolley should have been parked at the 90° angle to give a better field of view and that the CET machine was not parked in the recess and concluded this because it was more convenient for the Claimant;

Public access to employment Tribunal decisions: Note that both judgments and reasons for the judgments are published in full online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the parties.

Recording and Transcription - Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

- 92.4. He further concluded that the machine was moving away from a place where it should not have been and therefore by moving it when there were passengers around and the Claimant could not see behind him increased the probability of an accident happening.
- 92.5. He concluded that the SSOW was, in his view, clear about moving the machine and that however you looked at it, it was saying you simply needed to be aware of people when you were manoeuvring the equipment.
- 92.6. That the various issues in the CCTV stills from before the incident show a pattern of behaviour where you are choosing not to follow a safe system of work.
- 92.7. That the Claimant's failure to follow the safe system of work created the opportunity for the accident to happen; and
- 92.8. He also agrees that the SSOW appears to be contradictory in at least one place, but felt that the message from the SSOW was clear, namely be aware of people and don't move the CET until passengers have dispersed.
93. Before coming to the decision about the sanction, Mr. Taylor stated that he had considered the Claimant's prior service at page 449 and his years' service as a CET operator. He also considered the Claimant's genuine concern for the child.
94. Mr. Taylor did not make specific reference to 30 years' service. However, he does make reference to considering the Claimant's prior service.
95. He decided that, when considering the sanction, it was necessary for him to consider the previous issues that had occurred in October 2019 and July 2021. He believed that these were relevant as they were similar issues to before.
96. Mr. Taylor concluded that the sanction needed to be summary dismissal because he had no trust that the Claimant would not breach SSOW in the future and contribute to another accident, and there were no non-safety critical roles the Claimant could be redeployed to at page 449 and paragraph 29.1 (b) of his witness statement, which was effectively unchallenged by the Claimant.
97. The effective date of termination was therefore 27 October 2021.

Public access to employment Tribunal decisions: Note that both judgments and reasons for the judgments are published in full online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the parties.

Recording and Transcription - Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

98. Mr Taylor's decision was sent to the Claimant in writing on 2nd of November 2021 at pages 451-452 in the bundle.

99. When questioned about what he had found the cause of the boy becoming injured was, Mr. Taylor stated it was *“ultimately Mr Stanworth not being aware of the child coming up behind him.”*

100. In my judgment, the reason why Mr. Taylor dismissed the Claimant was because he believed the Claimant had done the following:

100.1. Deliberately failed to follow the SSOW by not storing the CET in the recess when awaiting the Train's arrival;

100.2. This had caused an increased risk of an incident taking place where a passenger could be injured because the way the Claimant had positioned the CET trolley, meant that the Claimant was unaware of the children running towards him; and

100.3. This contributed to the child becoming injured.

101. This is clear from the answers Mr. Taylor gave when he was asked about what the ultimate cause of the accident was. He said it was the Claimant being unable to see the children running towards him from behind. In my view, this links in with the totality of his other evidence at the time he made the decision to dismiss, namely that the reason the Claimant was unable to see the children was because he failed to park the trolley in the recess at 90 degrees to the fence before the train arrived, which would have afforded the Claimant a full view of the platform. He would then have seen the children coming and not manoeuvred the trolley until they were on the train.

The Disciplinary Appeal

102. On 8th November 2021, the Claimant appealed against the decision to dismiss him. The sole point of appeal, was the severity of the outcome of the disciplinary hearing. This e-mail is at page 453 in the bundle.

103. On 12th November 2021, the Claimant was invited to attend a grievance appeal meeting to take place on 8 December 2021.

Public access to employment Tribunal decisions: Note that both judgments and reasons for the judgments are published in full online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the parties.

Recording and Transcription - Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

104. When considering whether this appeal was a review of Mr Taylor's decision or whether it was a complete rehearing of the evidence, Mr McBroom confirmed, during questioning, that this was a review of Mr Taylor's decision.
105. Despite the appeal letter only raising one point of appeal, at the appeal meeting the union representative on behalf of the Claimant raised a significant number of other issues. These were as follows:
 - 105.1. Whether there were appropriate signatures for the safe systems of work signed by both the Claimant and the company;
 - 105.2. That the Claimant had no previous warnings or concerns about capability;
 - 105.3. Whether the re-briefing of the Claimant, following the incidents in October 2019 and July 2021, had actually taken place and were evidenced within the pack;
 - 105.4. Whether alternative roles were looked into prior to making the decision to dismiss;
 - 105.5. Whether the role required there to be a valid Personal Track Safety - PTS training for the role and if so with the Claimant have the appropriate training;
 - 105.6. That there was a contradiction in the safe system of work about whether or not the platforms needed to be completely clear of passengers before the CET trolley could be moved;
 - 105.7. That the Claimant did not appear to have had refresher training.
106. The Claimant's explanation about what happened described by him at the appeal meeting is largely consistent with what he has said happened on previous occasions both during the disciplinary meeting and during the investigation.
107. The first appeal meeting was adjourned whilst Mr McBroom looked into the issues raised at the meeting.
108. The reconvened appeal hearing took place on the 19th of January 2022, with the same attendees as the previous appeal meeting.

Public access to employment Tribunal decisions: Note that both judgments and reasons for the judgments are published in full online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the parties.

Recording and Transcription - Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

109. The following points of note happened at the hearing:

- 109.1. Mr McBroom had looked into the issue of the PTS training and discovered that this had been withdrawn from the safe system of work as at March 2021;
- 109.2. That Mr Taylor had focused on the child being injured, rather than the Claimant being at fault for what happened and, therefore, Mr Taylor did not have a reasonable belief that the gross misconduct allegation was made out;
- 109.3. That the CCTV footage was not reviewed by Mr Taylor before making his decision;
- 109.4. That Mr Taylor had allegedly acknowledged that the failure to follow the safe system of work was in no way responsible for the incident occurring involving the injury of the child;
- 109.5. Mr McBroom said at the appeal meeting “...*the fundamental basis of this issue is around operating the CET safely and it's clear he understands how to operate that equipment safely but chose not to do so. He has said he had done it that way on the day, CCTV doesn't look like he did.*”
- 109.6. The bottom line in the Claimant's view, as put by his union representative, was that his actions did not lead to the accident involving the child and the charges that his actions did made no sense at all;
- 109.7. That dismissal was outside the band of reasonable responses because it is not a case of gross negligence, the grandparents did not blame the Claimant for the incident and there was no complaint from the parents from what can be seen.

110. After an adjournment of 15 minutes, Mr McBroom gave his decision. He decided as follows:

- 110.1. That there were some procedural issues with the case but that didn't detract from the fact that the Claimant knew how to safely operate the CET machine at the station;

Public access to employment Tribunal decisions: Note that both judgments and reasons for the judgments are published in full online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the parties.

Recording and Transcription - Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

- 110.2. That he was happy with the initial charges and was comfortable that he believed that the actions on the day of the incident had contributed to the child receiving injuries;
- 110.3. That the Claimant's inability to follow the correct rules over a period of time had been evidenced by the CCTV and that had he followed the safe system of work he believes the accident would not have happened on that day.
111. At this point, Mr McBroom asked whether there was anything else the Claimant wanted to add to the situation. Mr Johnston stated that he thought that Mister McBroom was going further in his conclusions than Mr Taylor and that his decisions were not within the band of reasonable responses.
112. Mr McBroom then adjourned for a further 25 minutes and gave the remainder of his decision. He decided further as follows:
- 112.1. when considering the sanction, he decided that there was clearly an underlying inherent inability for the Claimant to follow the rules and that no satisfactory explanation as to why the rules were not followed has been provided;
- 112.2. Consequently, he decided that Mr Taylor's decision to summarily dismiss the Claimant was upheld I'm not exhausted to the appeal process.
113. The appeal outcome decision was confirmed to the Claimant in writing by letter dated the 7th of February 2022 at pages 471-472 in the bundle.
114. In the outcome letter at page 472 in the bundle, Mr McBroom says as follows "*I have reviewed the CCTV available on the day which provided a contrasting picture to your explanation provided. Because of this dubiety CCTV was reviewed of the previous working day which again showed you operating the CET machine outside of the safe method which you described to me and assert that you always followed. This led me to form the view that you know how to safely carry out your role in line with the documented processes designed to keep you and our customers safe but choose not to follow this.*"
115. When taking the totality of the evidence about the decision Mr. McBroom came to at the time of the appeal meeting, his outcome differs from Mr. Taylor's in only one key respect and, that is, Mr. McBroom took the evidence from 2 August 2021 into account when deciding if the charge was made out rather than just when determining sanction.

Public access to employment Tribunal decisions: Note that both judgments and reasons for the judgments are published in full online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the parties.

Recording and Transcription - Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

116. The other conclusions are largely the same as Mr. Taylor's, the key point being that he believed that the Claimant's failure to follow SSOW had contributed to the child becoming injured during the incident in question.
117. When considering whether Mr. McBroom considered the Claimant's length of service when coming to his decision, whilst he does not mention it explicitly in his outcome letter, he does state "*I have considered all the reasons that Mr. Taylor outlined in his outcome letter to you on 2 November 2021 and do not disagree with any points he makes in coming to his decision to dismiss you.*"
118. Given the above and how adamant Mr. McBroom was when cross examined on whether he took the Claimant's length of service into account, I believe Mr. McBroom when he says he considered the Claimant's service.

The law

119. The relevant law of unfair dismissal for this case is summarised in section 98 of the Employment Rights Act 1996, which says:

"98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

Public access to employment Tribunal decisions: Note that both judgments and reasons for the judgments are published in full online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the parties.

Recording and Transcription - Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

(b)“qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a)depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

(5)

(6) Subsection (4) is subject to—

(a)sections 98A to 107 of this Act, and

(b)sections 152, 153, 238 and 238A of the Trade Union and Labour Relations (Consolidation) Act 1992 (dismissal on ground of trade union membership or activities or in connection with industrial action).”

120. The Tribunal must also focus on the following key principles:

120.1. The Tribunal must focus on the reasonableness of the decision, based upon what the Tribunal finds the reason for the Respondent dismissing the Claimant was (**Beaumont v Costco Wholesale limited EAT UKEAT/0080/15/DA**).

120.2. The Tribunal should decide whether the action or inactions of the Respondent, including the dismissal, fell within the band of reasonable responses open to a reasonable employer. This includes all procedural steps and decisions (**British Leyland v Swift [1981] IRLR 91** and **Sainsburys Supermarkets limited v Hitt [2002] EWCA Civ 1588**).

120.3. When considering any decisions made, the Tribunal must focus on what information and circumstances were present and in the mind of the dismissal and appeal managers at the time they made their decisions (**West Midlands Coop v Tipton [1986] IRLR 112 HL**)

120.4. The Tribunal must also not fall into the trap of substituting its view for that of the disciplinary and appeal decision makers, unless there is only one possible outcome from the application of the relevant legal principles to the case **London Ambulance Service v Small [2009] EWCA Civ 220**

Public access to employment Tribunal decisions: Note that both judgments and reasons for the judgments are published in full online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the parties.

Recording and Transcription - Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

- 120.5. In a conduct case, the Respondent must also prove that its decision makers at the time the dismissal or appeal outcome decision was made, had a genuine belief of guilt, based upon reasonable grounds after conducting as sufficient an investigation as was reasonable in all the circumstances **British Home Stores Limited v Burchell [1978] IRLR 379.**
- 120.6. If the Burchell test is overcome by the Respondent, the burden of proving whether the dismissal was fair under section 98 (4) is neutral **Boys and Girls Welfare Society v McDonald [1996] IRLR 129.**
- 120.7. It is important that at the disciplinary meeting stage the allegations made against the employee are known. The Employer must put the allegation clearly to the employee so that on a fair and common sense reading of the relevant documentation, the employee could be expected to know what charges he or she has to address. This duty is not satisfied if the Employee has to speculate what may be in issue and what may not be **Sattar v Citibank NA [2020] IRLR 104.**
- 120.8. Whether misconduct is labelled as gross misconduct for the purposes of determining if a dismissal is fair or unfair under the Employment Rights Act 1996 is not relevant. The question is not whether the dismissal was wrong or wrongful in any way, that is a common law concept. The correct question is whether the dismissal was unfair in accordance with section 98 of the 1996 Act, **Weston Recovery Services v Fisher UKEAT/0062/10/ZT.**
- 120.9. A single serious act of misconduct can be a sufficient reason to terminate an employee's contract of employment as can a series of acts that would not necessarily amount to gross misconduct either individually or cumulatively. It is whether the totality of the conduct was a sufficient reason to dismiss that is relevant not whether the misconduct was "gross" **Beardwood Humanities College Governors v Ham UKEAT/0379/13/MC.**
- 120.10. When considering the fairness of a disciplinary procedure, the Tribunal must look at the whole process from start to finish and decide whether the procedure was unfair overall **Taylor v OCS Group Limited [2006] ICR 1602.**

Public access to employment Tribunal decisions: Note that both judgments and reasons for the judgments are published in full online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the parties.

Recording and Transcription - Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

SUBMISSIONS, ANALYSIS AND CONCLUSIONS

121. Both parties handed up detailed written submissions, which I have considered carefully and fully. I do not intend to go through every submission, just key arguments that aren't resolved by my general findings.

Was the charge clear enough for the Claimant to know the case against him?

122. The Claimant argued that the charge was not clear and he basically did not know what case he had to meet at any stage in the disciplinary procedure.

123. It is clear from the investigation reports and various meetings that for reasons that have not been made clear by the Respondent, at disciplinary stage the charge changed from "contributed" to the child's injury to "resulting in" the child's injury. This wasn't terribly helpful to the Claimant or the Respondent.

124. However, having considered the law on this issue and, in particular, the quote in **Sattar**, in my view, I have to determine the following:

124.1. When looking at the common sense reading of the relevant documentation should the employee be expected to know what the charge was that he had to address? (my emphasis)

124.2. If this was not clear, when looking at the disciplinary process from start to finish, was this sufficient to amount to unfairness in all the circumstances of the case under section 98 (4)?

125. I have concluded that the documentation that needs to be considered in answering question 1 is the entirety of the investigation documentation and the invite to disciplinary meeting letter.

126. When looking at what the Claimant knew or understood the charge to be, help can be found in what was said and done in the disciplinary and appeal meetings.

127. In my judgment, the Claimant and his representatives knew that the charge was whether the Claimant had in any way caused or contributed to the injury.

128. Yes, the wording of the invite to disciplinary meeting could have been better and could have reflected the investigation charge. However, it is clear to me that both sides knew what was meant because both sides speak about, not only the sole cause of the child's injury but also whether the Claimant's actions contributed to the injury, in both the disciplinary and appeal meetings.

Public access to employment Tribunal decisions: Note that both judgments and reasons for the judgments are published in full online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the parties.

Recording and Transcription - Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

129. On a common sense reading of the actual charge, “resulting in injury” has a plain meaning. It means causing the injury. As we all know, there is rarely one cause of an accident. There are often multiple factors leading up to an event. Some may be culpable, others may simply create a bigger chance of an accident taking place and then the accident does take place. Either way, the common sense meaning of “caused” in my view includes contributing to the cause of the accident, partially causing the accident or directly causing the accident.
130. Ultimately, the Claimant had advance warning, on several occasions, that the issue in question was either properly causing the accident or contributing to causing the accident.
131. I therefore find that the Claimant ought reasonably to have known, and did know, what the charge was. Since dismissal, the Claimant’s advisors after the event have then attempted to use a microscope to dismantle the wording used in the invite letter alone, to argue that the charge should be limited to the strict wording in only one document. In my judgment, that is not a view that I am permitted to entertain. I need to take a broader, less forensic view in all the circumstances, rather than hiving off one word in one letter, which may differ from previous documents.
132. The next question is, did the change in wording or its effects make the dismissal itself or any part of the procedure unfair. I conclude that, on its own, this issue does not. The Claimant knew that part of his conduct the Company was concerned about was breaches of SSOW that contributed to the injury of a child. He had at least 6 meetings in which to put forward his responses to that allegation and had ample opportunity to disprove it. The approach taken by both him and his union representatives did not really change, to any significant degree anyway, throughout the investigation and the disciplinary meeting. Therefore, on its own, this did not make the dismissal or procedure unfair. Imperfect yes, unfair no.

Procedure

133. No positive points about the procedure were put forward by the Claimant and no issue was taken with the investigation.
134. I am content that when looking at the procedure as a whole applying **Taylor**, the Respondent conducted a fair process. There were numerous opportunities

Public access to employment Tribunal decisions: Note that both judgments and reasons for the judgments are published in full online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the parties.

Recording and Transcription - Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

for the Claimant to put forward his case and respond to any points the Respondent made.

135. There were three investigation meetings, a post incident debrief, a fact finder meeting, a disciplinary meeting and two appeal meetings.
136. Likewise, the Respondent looked into virtually all the points put forward by the Claimant at both the disciplinary and appeal stages.
137. The Claimant submitted that Mr. Taylor was not clear about what SSOW breaches were relied upon by the Respondent in the disciplinary meeting. I reject that submission. Mr. Taylor was clear that his primary concern was the fact that the Claimant had not manoeuvred the CET trolley into a recess whilst waiting for people to disperse or be clear of the platform in the vicinity of where the CET needed to be turned or moved. He said that this had meant the Claimant had no view of what was going on behind him, namely the children running up the platform towards him. The Claimant therefore had an opportunity to respond to these points made and was informed by Mr. Taylor at the time, what the issues were that he thought were in breach of the SSOW.

Differences in the approach and decisions of Mr. Taylor and Mr. McBroom

138. Another criticism of the Respondent was that Mr. Taylor had not reviewed the CCTV footage and had instead simply relied on stills in the investigation pack. Mr. McBroom on the other hand did review CCTV. The Claimant levelled criticism at Mr. Taylor, not Mr McBroom about this point.
139. Would I have watched the CCTV in any part of the process had I been involved, yes I would. However, I reminded myself that when considering this point, it is not what I would have done or what anyone else would have done here that is relevant. It is whether Mr. Taylor's decision to rely only on the stills was within the band of reasonable responses given that it had been identified in the investigation documents, that the CCTV did not cover the incident itself.
140. I conclude that it was within the band of reasonable responses. Some managers would have relied only on the stills knowing the footage didn't show the actual accident. Others would have reviewed the footage. Both were reasonable given the incident wasn't covered by the CCTV. Was reviewing the actual footage more reasonable – in my view undoubtedly yes. However, the test does not require the most reasonable option to be taken. The decision simply needs to be reasonable in itself.

Public access to employment Tribunal decisions: Note that both judgments and reasons for the judgments are published in full online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the parties.

Recording and Transcription - Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

141. Another argument made during the hearing, was that Mr. McBroom took into account the apparent breaches of the SSOW from 2 August 2021, the day before the incident, whereas Mr. Taylor did not. This was argued as going further than Mr. Taylor's decision and meant that Mr McBroom had made a decision based on different grounds to Mr. Taylor. Mr. Taylor only took the 2 August 2021 SSOW breaches into account when considering the sanction.
142. The question again is whether Mr. McBroom's decision to do that fell within the band of reasonable responses.
143. It is clear from the investigation pack that CCTV from both the 2nd and 3rd August 2021 was discussed with the Claimant at investigation stage. He knew of the footage, had viewed the footage and had the chance to respond to it.
144. When any accident happens, you cannot always simply look at the accident itself in isolation.
145. I find Mr. Taylor's analysis of the incident to be the following:
 - 145.1. He believed that the CET truck should not have been parked in the middle of the platform because this caused the Claimant to have a restricted view and was in breach of the safe system of work. It should have been parked in a recess.
 - 145.2. The CET machine was therefore in an unsafe position at the start of the procedure to connect it up to the train;
 - 145.3. Because it was not parked in a recess, the Claimant could not see the two children running behind the machine, which made an accident more likely to happen.
 - 145.4. The CET was then manoeuvred causing the injury to child.
 - 145.5. Whilst Mr. Taylor did not go as far as believing that that Claimant deliberately harmed the child, he did believe that the Claimant deliberately breached the SSOW by parking it in the wrong place to start off with rather than a recess, which contributed to the injury of the child.
 - 145.6. He took no previous incidents into account at this stage.

Public access to employment Tribunal decisions: Note that both judgments and reasons for the judgments are published in full online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the parties.

Recording and Transcription - Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

146. Mr. McBroom's analysis was slightly different in that he believed that the previous incidents caught on CCTV footage showing a breach of SSOW proved that the Claimant had breached SSOW during the incident with the client.
147. Do either of these decisions fall within the band of reasonable responses? In my view of course they do. They are just two different approaches into looking into the same issue.
148. Mr. McBroom clearly explains his decision to look at the CCTV from the day before in his appeal outcome letter. He says he did this because the Claimant's explanation of how he operated the CET on 3 August 2021 contrasted with his view of the CCTV from the same day. He therefore looked at the CCTV from the day before, to see which version of events was most likely to be true. The 2 August CCTV showed multiple breaches of SSOW in his view. He therefore decided that unsafe CET operation caused the incident because with their being breaches on CCTV from the day before too, this tipped the balance of probabilities against the explanation of the Claimant. Behaviour on one day informed him about behaviour the next day.
149. Consequently, was this decision within the band of reasonable responses? In my judgement it clearly was and there were reasonable grounds for Mr. McBroom to believe what he did, given the obvious breaches of SSOW shown by the CCTV footage from both days.
150. An incident cannot usually be taken in a vacuum. In many cases, the days preceding and the days following an incident can be informative about what actually happened on the day of the incident in question.
151. What also matters when considering general fairness about this point, is whether the Claimant had a chance to consider and respond to the information about 2 August 2021. He clearly did and this was therefore not unfair to him either substantively or procedurally.

Genuine belief of guilt

152. The only challenge, attacking the Respondent's managers' genuine belief of guilt was the Claimant's argument that the managers were simply looking to scapegoat the Claimant because a child became seriously hurt and they needed

Public access to employment Tribunal decisions: Note that both judgments and reasons for the judgments are published in full online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the parties.

Recording and Transcription - Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

someone to blame so they could say they had taken action should a complaint be made.

153. I have no hesitation in rejecting that submission. There is no evidence to support it.
154. There is no hint that any complaint was going to be made by the parents or anyone else. Everyone who witnessed the event even as early as the day of the incident, were not blaming the Claimant for what happened and consequently there was no motive for the Respondent's managers to behave this way.
155. If this allegation were true, then that would also probably ensnare Honour Grace (investigation manager) in that behaviour too. No issue was taken about the investigation or Ms Grace, which therefore undermined what was already a weak argument.
156. Having looked at all the evidence, I conclude that both Mr. Taylor and Mr. McBroom both had a genuine belief that the Claimant committed the charge alleged at the time they made their decisions in this case and they believed it was deliberate.

Based upon reasonable grounds

157. I conclude as follows about the conclusions Mr. Taylor made:

- 157.1. ***that before the train arrived, the CT machine should have been parked in a recess at page 444;*** – There were clearly reasonable grounds for concluding this. It is mentioned clearly in the SSOW task sheet 4 at page 336 which says “*Manoeuvre CET into recess 1 or 2 as appropriate for 3 or 6 car trains.*”
- 157.2. ***that if the CET machine had been parked in the recess properly and then manoeuvred by pulling it forwards ready for the train, the Claimant would have had a full view of the platform and then being able to spot people moving up and down the platform in both directions in readiness for the imminently arriving train;*** - This was also a reasonable belief to have and was fairly obvious. If you have to be positioned in front of the CET because there is nowhere else for you to stand when it is in a recess, then you would naturally then be able to look up and down the full length of the platform absent any obstructions. This is also what Mr. Burr's evidence suggested at the time.

Public access to employment Tribunal decisions: Note that both judgments and reasons for the judgments are published in full online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the parties.

Recording and Transcription - Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

- 157.3. **that the trolley should have been parked at the 90° angle to give a better field of view and that the CET machine was not parked in the recess and concluded this because it was more convenient to the Claimant-** Clearly here, given the Claimant's account in the disciplinary meeting at page 444 and what Mr. Burr said at pages 408 - 409 were reasonable grounds for making these conclusions. There is no reason why Mr. Taylor would not be persuaded by what Mr. Burr said when Mr. Burr reviewed the CCTV and opined that it appeared that the Claimant was rushing because he has left insufficient time to move the machinery up the platform to where he was supposed to be. The Claimant also took issue with the fact that if the trolley was in the recess it would be sticking out at a 90 degree angle when that would have created a better field of view for him. The Claimant's comment implies that it was inconvenient as Mr. Taylor concluded.
- 157.4. **He further concluded that the machine was moving away from a place where it should not have been and, therefore, by moving it when there were passengers around and the Claimant could not see behind him increased the probability of an accident happening** – this is clearly a reasonable view of the evidence. The statement of the police officer independently confirms that the CET was parked in the middle of the platform not in a recess and the statement of Mr. Burr confirms that the field of view would be better if it was parked in a recess. There were reasonable grounds to make this conclusion.
- 157.5. **He concluded that the SSOW was, in his view, clear about moving the machine and that however you looked at it, it was saying the CET operator simply needed to be aware of people and where they were when manoeuvring the equipment.** This is plainly a reasonable conclusion to reach based on the wording of the SSOW and when considering the thrust of the SSOW and risk assessment as a whole.
- 157.6. **That the various issues in the CCTV stills from before the incident show a pattern of behaviour where the Claimant was choosing not to follow a safe system of work.** Again, this was a reasonable conclusion to reach. For example, at pages 417 into 418, the stills show the Claimant pushing the CET instead of pulling it.
- 157.7. **That the Claimant's failure to follow the safe system of work created the opportunity for the accident to happen;** Again, when considering the investigation material as a whole, had the SSOW been followed, it strikes me that the evidence suggests that a full field of view of the

Public access to employment Tribunal decisions: Note that both judgments and reasons for the judgments are published in full online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the parties.

Recording and Transcription - Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

platform could have been achieved and therefore both boys could have been spotted before the truck needed to be moved. This was therefore a reasonable conclusion for Mr. Taylor to come to.

- 157.8. **He also agrees that the SSOW appears to be contradictory in at least one place, but felt that the overall message from the SSOW was clear, namely be aware of people and don't move the CET until passengers have dispersed.** This was a reasonable view for Mr. Taylor to take. Support for his view is in the comments in the SSOW to give pedestrians right of way and to ensure that the CET isn't moved until passengers have left the area.
158. Mr. McBroom did not challenge Mr. Taylor's findings. In my view, he was reasonable not to because Mr. Taylor's conclusions were based upon reasonable grounds.
159. When considering the additional CCTV footage from before the incident that Mr. McBroom considered, he concluded that this showed that the Claimant's version of events, namely that he was following the SSOW at the time of the incident, was unlikely to be correct. In my judgment, that was a reasonable view to come to given what appear to be obvious breaches of the SSOW from both the day before the incident and earlier on the same day of the incident.

Was dismissal within the band of reasonable responses and a sufficient reason to dismiss

160. Much was made of the fact that the Respondent's managers do not appear to have made specific reference to the Claimant's particular length of service. In my view, both managers appropriately considered the Claimant's length of service.
161. In support of this argument, Counsel for the Claimant relied upon **Arnold Clark Automobiles Ltd v Spoor (2017) IRLR 500 EAT**. However, this case is not relevant to the case before me. In **Spoor**, it decided that the employer had refused to consider the employee's 42 years' service. In this case, the Respondent did no such thing. I have found that both managers considered the Claimant's length of service and disciplinary record.
162. The other case relied upon is a first instance decision and does not bind me namely **Cunnington v Sainsbury's Supermarkets Limited ET/1309682/20**. It is also distinguishable from this claim in that, again, the Respondent did consider the Claimant's record and length of service. The Claimant's

Public access to employment Tribunal decisions: Note that both judgments and reasons for the judgments are published in full online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the parties.

Recording and Transcription - Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

misconduct was not inadvertent. I find that the Respondent's view that the Claimant deliberately failed to follow SSOW was a reasonable one. The respondent's view that the Claimant had also been adequately trained was reasonable and he knew the allegations being put to him at the disciplinary and appeal meetings.

163. It was also clear to me that both managers did not view breaches of SSOW as an isolated one-off incident. Both concluded that there had been repeated breaches of SSOW on past occasions, one of which had already resulted in the collision with a passenger and the second contact made with a passenger, resulted in the boy being seriously injured.
164. Whilst the Claimant did not intentionally choose to hurt the boy, it is clear that on multiple occasions the managers believed he had chosen to breach the SSOW despite being correctly trained, despite previous incidents that can only be described as near misses and despite one previous documented incident resulting in a collision with another passenger. The Claimant also clearly understood his role and what he should have been doing.
165. Mr. Taylor's outcome letter documents that he took into account other mitigation, namely the Claimant's concern for the child. I believe him.
166. Applying **Swift** and **Beardwood** together, I must focus on the following:
 - 166.1. Was the nature and quality of the Claimant's conduct in its totality sufficient for dismissal to be a reasonable sanction; and
 - 166.2. Was the impact of that conduct such to make the employment relationship not reasonably sustainable.
 - 166.3. Together, did the above mean that the dismissal fell within the band of reasonable responses open to a reasonable employer.
167. In my judgment, looking at all the circumstances of this case and given that the Respondent's managers concluded (and I agree with their view), that the Claimant habitually and deliberately breached SSOW whilst working for the Respondent, I conclude the nature and quality of the Claimant's conduct to be serious, placed any people in his vicinity whilst using the CET and truck at increased risk of serious injury and did eventually contribute to the cause of the boys serious injuries.

Public access to employment Tribunal decisions: Note that both judgments and reasons for the judgments are published in full online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the parties.

Recording and Transcription - Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

168. It is also my judgment that the Respondent could not risk any further incidents with the Claimant that risked injuring others.
169. Was it therefore reasonable for the Respondent to consider dismissal as an appropriate sanction despite his long service, loyalty and other mitigation? Yes it was.
170. In submissions the Claimant argued that Mr. Taylor did not know what happened during the incident or how the incident was caused and was not in a position to say that it was due to gross negligence by the Claimant.
171. In my view it is rare for any manager dealing with a disciplinary situation to know fully what happened. They usually weren't there. That's why they have to decide what they think happened on balance. Mr Taylor clearly came to the view at the time of his decision, that the CET was not parked in the correct place, the Claimant was not in a position to see the platform properly and hadn't seen one of the children when he moved the CET causing injury. His answers given in cross examination now, some years after the meeting was conducted, in my view did not detract from his view made on the evidence in front of him at the time.
172. In fairness to Mr. Taylor, he also did not accept that he was dealing with a "gross" negligence situation. In cross examination my notes confirm he answered "yes" when asked whether he was considering it as a "serious" negligence issue not gross negligence. Gross negligence was the label put on it by counsel for the Claimant in his submissions.
173. Either way, the allegation alleged against the Claimant was clearly similar to either, repeated breaches of health and safety rules and procedures, and/or serious negligence causing loss, damage or injury.
174. In any event, applying **Beardwood** and **Fisher**, it is not the correct test to consider whether the conduct in question was "gross" or "serious" when determining unfair dismissal claims. That is not the test under section 98 (4). It is simply whether the Respondent behaved reasonably or unreasonably in treating the reason for dismissal as a sufficient reason to dismiss the Claimant.
175. It is also not the correct test to ask whether this could or should have been dealt with as a capability issue. If the potentially fair reason the Respondent has put forward is conduct and that has been proven as being the sole or

Public access to employment Tribunal decisions: Note that both judgments and reasons for the judgments are published in full online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the parties.

Recording and Transcription - Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

principal reason for the dismissal, whether or not another label such as capability might have produced a more favourable outcome for the Claimant is also not the correct test.

176. Looking at the correct test, I conclude that the band of reasonable responses here fell between a final written warning and dismissal inclusive for the conduct the Claimant was found to have committed. Despite the repeated breaches of SSOW, some employers may well have taken the view that to dismiss someone without any previous disciplinary warnings being live or only recently spent was too harsh and a final written warning would have sufficed. However, given the clearly habitual nature of the Claimant's breaches of SSOW which had contributed to the serious injury to a person, there is also no doubt in my mind that despite the Claimant's service and there being no live or recently spent warnings, some employers, particularly in highly regulated and safety critical businesses serving the public like the Respondent, would have reasonably taken the decision to dismiss.
177. It is also clear in my judgment, that the Respondent took a reasonable view of the situation when deciding that they could no longer trust the Claimant to follow SSOW in the future. This was plainly a reasonable response to the evidential material each manager had before them at the time of the disciplinary and appeal decisions and given the Respondent's managers' specialist knowledge of the situation, it is not for me to substitute my view for theirs.
178. The Respondent says it looked at potential non-safety critical roles for the Claimant and could not find any. No evidence has been put forward to challenge that argument and I conclude the Respondent undertook this search as it says it did.

Other circumstances argued as proving the dismissal was unfair

179. The first point the Claimant makes is that the CET machine has to be manoeuvred when there are people on the platform, otherwise the CET task would never be completed because there are nearly always people on the platform. I accept that, as did Mr. Taylor.
180. Mr. McBroom was more polarised in his view that the platform had to be completely clear before the CET machine could be moved, but when looking at the answers to the questions put to him during cross examination and the evidence from discussion at the time of the appeal meeting, what he meant

Public access to employment Tribunal decisions: Note that both judgments and reasons for the judgments are published in full online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the parties.

Recording and Transcription - Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

was that the platform should be clear of passengers in the vicinity of the CET truck and that there is a clear path in front of the direction of travel.

181. Similarly, during the appeal meeting, the following exchange occurred at page 462 in the bundle:

*“SM When do you consider it safe to move the CET about?
DS When I feel its safe – if I’ve got enough time and let it go. I must ensure its clear of people and I have a clear path down the platform in front of me”*

182. It struck me that, at the time these decisions were made, everyone seemed to be in agreement that people should be well clear of the CET trolley when it was either moving, or about to be moved. This is also what the SSOW envisaged.

183. The Claimant also submitted that it was a significant factor that no one blamed the Claimant when the accident happened. This argument was not put to Mr. Taylor during the disciplinary meeting, so he could not have considered it at the time. It was raised in the appeal meeting before Mr. McBroom and, although he doesn’t specifically discuss this in his decision, Mr. McBroom must have rejected the point when he upholds the decision to dismiss. Did the fact that he doesn’t mention this point make anything unfair, in my judgment, it does not.

184. A further point was made about the exchange between Mr. Taylor and Mr. Hill at the disciplinary meeting where Mr. Hill asks Mr. Taylor what precise SSOW rules were broken by the Claimant. In response, Mr. Taylor said that no breach of SSOW directly resulted in the injury to the child and later concluded that the breaches to the SSOW created an environment where an accident was allowed to happen. In cross examination, Mr. McBroom agreed with counsel for the Claimant that the wording used tended to show the charge was not made out. This, the Claimant submits, shows the charge was not proven so there could have been no genuine belief of guilt based upon reasonable grounds from either manager.

185. I reject that submission. Yes, Mr. McBroom has answered a question put to him two years after the event, in a hearing, which looks like he concedes a point. However, applying **Tipton**, there is no evidence that this was his view at the time he was making the decision and that is where I need to focus my analysis not his answers two years after the event. Both his decision at the appeal meeting and the outcome letter are clear that he upholds all of Mr. Taylor’s reasons for the dismissal. The answer given with hindsight during

Public access to employment Tribunal decisions: Note that both judgments and reasons for the judgments are published in full online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the parties.

Recording and Transcription - Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>

cross examination, in my view, does not alter what he thought at the time he made the decisions he did. In any case, later on in his answers, he stands by his evidence that he had a reasonable belief of guilt at the time contradicting his previous evidence.

186. Consequently, dismissal of the Claimant was within the band of reasonable responses and was a sufficient reason to dismiss the Claimant.

Outcome

187. The Respondent has proven the reason for dismissal as being the Claimant's conduct, dismissed him for that reason, followed a fair procedure and dismissal fell within the band of reasonable responses.
188. When considering all the circumstances and the substantial merits of the case, the Respondent behaved reasonably in treating the reason for the Claimant's dismissal as a sufficient one and no alternatives to dismissal could be found by the Respondent.
189. Consequently, the Claimant's claim for unfair dismissal fails and is dismissed.

Employment Judge G Smart

8 January 2024

Public access to employment Tribunal decisions: Note that both judgments and reasons for the judgments are published in full online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the parties.

Recording and Transcription - Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here: <https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/>