EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr Philip Toms	AND	Sky-In-Home Service Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter **ON** 1 February 2017

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: **In person**
For the Respondent: **Miss S Berry of Counsel**

JUDGMENT

The judgment of the tribunal is that the claimant's claims are dismissed.

REASONS

1. In this case the claimant Mr Philip Toms claims that he has been unfairly dismissed, and brings other claims of breach of contract for his notice pay, and for unlawful deduction from wages. The respondent contends that the reason for the dismissal was gross misconduct, that the dismissal was fair, and denies the remaining claims.
2. I have heard from the claimant, and I have heard from Mr Graham Beer and Mr Chris Davey on behalf of the respondent. I was also asked to consider a statement from Mr S Humphries on behalf of the claimant, but I can only attach limited weight to this because he was not here to be questioned on this evidence.
3. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
4. The respondent company employs engineers to install and repair satellite, telephone and broadband at the respondent's customers' homes and businesses. The claimant was employed by the respondent as an engineer from 27 July 2009 to 24 November 2015 when he was dismissed for gross misconduct.

5. The respondent's engineers often work at height with ladders in a range of weather conditions. Because of the obvious dangers they are required to work in a safety critical environment. All engineers are required to work safely when working at height to avoid injuring themselves, other engineers, customers and the public. The respondent's engineers work alone and are allocated a list of jobs each day to attend. The respondent considers the health and safety of its engineers to be of paramount importance and it regularly trains and monitors its engineers to ensure compliance with its procedures. The non-exhaustive list of examples of gross misconduct in the respondent's disciplinary procedure (referred to as its Conduct Policy) includes: "Any action that puts yours or anyone else's safety at risk".
6. The respondent's engineers are given thorough health and safety training when they join the respondent and receive refresher training at regular intervals during their employment. Some training courses are specifically on health and safety, and the majority of training includes some aspect of health and safety as part of the course. The claimant had undertaken a full health and safety course on his introduction to the respondent. This included training on a flowchart known as the Ladder Hierarchy which is found in the back of all the respondent's vans and which provides guidance to engineers on what to do if they cannot use a particular piece of equipment for any reason. In addition the training requires an employee to escalate to his team manager any circumstances in which he was unsure to seek his manager's authority before the work was undertaken.
7. In 2012 the claimant attended a course named "Keeping Yourself Safe" which dealt with health and safety issues and safety with ladder work. In November 2014 the claimant attended a course on manual handling and safe use of the combination ladder system which covered health and safety issues related to ladder work. In addition the engineers are issued with an iPad tablet computer which has reference to various instructions and policies.
8. When working to install a satellite dish at height, all engineers are required to use single, double or triple section ladders, which vary between six and 30 feet from the ground. When using these ladders engineers must use full fall arrest equipment. This involves a three point of contact system where the ladder is secured to the wall using an eyebolt, a ladder-mate is used to stabilise the base, and a micro-lite is used to stabilise the top of the ladder. The relevant safety procedures are clearly set out in a policy known as the Guide to the Lyte Combination Ladder. The eyebolt is a small device which is drilled into the brickwork to secure the ladder to the building. A ratchet strap then passes through the rung of the ladder and through the eyebolt and the strap is tightened to ensure that the ladder cannot move. Engineers are then secured to the ladder by the use of a rope grab and harness which forms part of the full fall arrest equipment.
9. The respondent now monitors compliance with health and safety processes and procedures by way of its Homesafe Assessment process. This usually involves the engineer's line manager attending a job to check that the engineer is working safely in accordance with the relevant health and safety procedures. Failing this check can result in investigation and disciplinary action. If an engineer is faced with a situation that requires varying standard working practices they are expected to escalate this to their line manager for authorisation and not to determine their own working practice.
10. On 17 September 2015 the claimant's team manager attended a customer's house to assess damage which followed a complaint. On inspecting the work carried out by the claimant, there appeared to be a health and safety breach in that the claimant had failed to use an eyebolt to secure his ladder. The claimant asserts that the customer did not wish to have an eyebolt fitted, and insisted that he fitted the satellite dish in the wrong place. When it had to be moved, he then used an eyebolt to secure the base of the ladder before putting the dish in the correct position. On the following day another team manager Mr Joint went to discuss this matter with the claimant and conducted a visit at another customer's home. The claimant had not used an eyebolt to secure his ladder at this particular property either. In fact, the claimant had used an existing cable ring which BT had used to secure a telephone cable. The claimant asserted that he had carried out

the correct procedure but the respondent felt that he was in breach. In particular Mr Joint was of the view that the BT cable ring was not sufficiently robust to secure the ladder properly. The claimant was therefore suspended on full pay pending further investigation. Previous jobs completed by the claimant were also then investigated and it appeared that the claimant had failed to complete a risk assessment on two other jobs. The claimant asserts that he completed manual risk assessments correctly and then made mistakes subsequently when trying to input the risk assessments on his iPad because the iPad was defective.

11. The claimant was then called to a disciplinary meeting. He was afforded the right of representation and was accompanied by his trade union representative. He was made aware of the allegations against him and provided with the relevant documents in support of the respondent's case. He was aware that he was facing allegations of gross misconduct which might result in his dismissal, namely failing to carry out risk assessments, and serious breaches of health and safety procedures which had endangered himself and others. The disciplinary hearing took place on 24 November 2015 and was chaired by Mr Graham Beer who gave evidence to this tribunal.
12. The claimant contended that his method of working had been approved by two previous managers, namely Mr Abrahams and Mr Phillips, and that there was a lack of support from management. In particular the claimant asserted that his previous manager Mr Phillips had authorised him not to use an eyebolt if there was an alternative safe system of fixing available, and that this alternative method did not need to be escalated to a manager for prior approval. Mr Beer knew they had both left the respondent's business more than 18 months previously, and felt that it was the claimant's responsibility to keep up to date with the latest procedures in which he had been trained. In addition, the correct processes and procedures for attaching ladders to walls had not changed for many years. The claimant also contended that he had had reliability issues with his iPad which was why there had been inadequate risk assessments and he had been unable to raise any issues about the lack of support to his team manager or anyone else. The claimant also asserted that the respondent had issued a brief to employees to confirm it was acceptable to strap the ladder to other fixings. Mr Beer was of the view that there had never been any such brief and the manuals were quite clear that an eyebolt must always be used. Only when an eyebolt could not be fitted would it be acceptable to secure the ladder to another fixing, and even then this required prior authority from a manager. It was clear that the claimant had fitted eyebolts correctly on other properties and was aware of the correct procedure. The claimant also suggested that he not received sufficient coaching or training but it was clear from the relevant manuals that all appropriate training had been provided to the claimant.
13. With regard to the second property the claimant confirmed that he had strapped the ladder to a BT cable ring, and not an eyebolt. He also said that he reported his IT issues with his iPad to his manager Mr Joint. Mr Steer spoke to Mr Joint who clarified that the claimant had contacted him on two or three occasions during the last six months and he had told him how to do a quick fix but also told the claimant to contact the IT department to resolve the matter.
14. Mr Beer believed that the claimant had been provided with all the relevant health and safety manuals and documentation and had received the appropriate training. He was satisfied that the claimant was aware of the correct health and safety processes and procedures whilst working at height and that he had deliberately failed to follow them. There was a clear risk of the claimant falling from height and injuring himself or a third party. Mr Beer decided not to proceed with one allegation relating to a risk assessment, but found the other charge to have been upheld. Mr Beer concluded that the claimant had been unable to raise matters by way of reasonable mitigation, and the claimant failed to accept that he had acted inappropriately. Mr Beer decided to dismiss the claimant summarily by reason of gross misconduct.
15. The reasons for the claimant's dismissal were confirmed in a letter dated 25 November 2015, and the claimant was afforded the right of appeal. The reasons as set out in the letter were as follows: (i) Breach of health and safety process and procedures for safe

ladder working whilst on a triple section combination ladder on job number 124625542, specifically failing to use an eyebolt and ratchet strap; (ii) Breach of health and safety process and procedures for safe ladder working whilst on a triple section combination ladder on job number 125064906, specifically failing to use an eyebolt and ratchet strap; and (iii) Failing to complete an accurate risk assessment on job number 124245930 specifically stating that the dish was realigned when it was not.

16. The claimant appealed by letter dated 27 November 2015. There was then quite some delay owing to the lack of availability of the claimant's trade union representative and the fact that the claimant wanted to wait for the receipt of a subject access request (concerning a disputed deduction from his wages) before proceeding. There was then an appeal hearing on 8 April 2016 which was chaired by Mr Chris Davey the Regional Manager who also gave evidence to this tribunal. The claimant was again represented by his trade union representative.
17. The first ground of appeal was that of inconsistency, and the claimant said he was aware of three other engineers who had been caught using ladders without safety equipment and had not been dismissed. In addition, the charge of failing to complete a risk assessment appropriately had been classed as gross misconduct for the claimant, when the allegations had only been classed as misconduct at a recent disciplinary process for a different engineer. The claimant also asserted that Mr Phillips had encouraged the use of other objects rather than fitting an eyebolt, and that his iPad issues had caused difficulties in completing the risk assessments. The claimant also complained of a delay between the issue being raised and his being investigated.
18. Mr Davey investigated these various points. He concluded that the earlier disciplinary proceedings against another engineer had been mistaken in not classing his breaches as sufficiently serious. He was satisfied that where there had been a serious health and safety breach which might result an employee injuring himself or a third party, the starting point is one of potential gross misconduct unless there are strong mitigating circumstances. Next, the manager referred to Mr Phillips was no longer with the company and so Mr Davey contacted four employees who had previously worked under him. They all confirmed that they were aware of the correct use of eyebolts and that Mr Phillips had insisted on them using the same properly. Effectively they confirmed that Mr Phillips had not authorised any one of them to disregard company health and safety policy without the need to escalate any such suggestion for prior managerial approval.
19. Mr Davey also investigated the IT issues which revealed that the claimant had made contact with the IT department only three times in the previous two years: August 2013, April 2014, and March 2015. He concluded that the claimant had not tried to rectify any problems with his IT as he had been instructed to do. Mr Davey also rejected the argument that there had been an unreasonable delay between the respondent first being aware of any safety issues and then taking action. Mr Davey concluded that the respondent had acted promptly once it was aware of the difficulties. It was also appropriate for the respondent to carry out a full investigation, and that any subsequent delay was at the request of the claimant. Mr Davey felt that any delay had had no impact on the decision to dismiss.
20. The claimant had raised the circumstances of three other employees who had been issued with final written warnings for similar offences, rather than having been dismissed. Mr Davey had investigated these and concluded that there were significant differences between the claimant's circumstances and those of the three other employees. In each of these cases there had been strong mitigating factors which had been taken into account. The first case was that of Stephen Humphries who had been disciplined for failing to use the full fall arrest system. He had accepted that he had done wrong and apologised and advanced medical reasons by way of mitigation which were taken into account. A final written warning was issued. The second employee was Lee Holden who again received a final written warning when a fall arrest system was not in place. He had only recently transferred under TUPE two weeks previously from another company. He accepted that he had done wrong but had not been fully trained on the respondent's systems, and this was taken into consideration as mitigation. In the third case, that of Gary Spiers, again

there was a breach of health and safety involving no fall arrest, but again he accepted that he had done wrong and there was mitigation by way of medical reasons and his mental health which were taken into account. Mr Davey was satisfied that the claimant had not been dealt with inconsistently because in each case the employee had accepted a serious breach of the company's health and safety policies and had compelling reasons by way of mitigation. That was not the case with the claimant and Mr Davey concluded that the circumstances of the claimant's dismissal were simply not the same. In addition, Mr Davey was aware of a number of examples where the company had dismissed other engineers for a serious breach of the health and safety requirements, even where this was the first offence.

21. Mr Davey concluded that the claimant had deliberately failed to follow the required and established health and safety procedures, and in doing so had posed a significant risk to himself and others. He concluded that the decision to dismiss the claimant summarily for gross misconduct was reasonable and proportionate. He therefore dismissed the claimant's appeal.
22. Turning to the claimant's claim for unlawful deduction from wages, this involves a deduction of £300 which was made from his final salary. The respondent is authorised to make such deductions in respect of damage caused to its vehicles by its employees. On this occasion the claimant had been the innocent victim of a road traffic accident caused by the negligence of a third party. The respondent's van which the claimant had been using was sent for repairs following that accident. After his dismissal the claimant was charged for other damage to the vehicle which the claimant now asserts was only caused by the accident in question. The respondent argues that it was pre-existing damage and that it had the right to deduct the value of this damage. At the outset of these proceedings the respondent requested the claimant to set out his claim by way of further information if he intended to pursue it, and nothing appears to have happened. The claimant did not address the matter in his witness statement. Unfortunately I have not been provided with sufficient information by way of any further information relating to this allegation to determine whether the deduction, which appears in principle to be authorised, was an appropriate deduction in the circumstances.
23. Having established the above facts, I now apply the law.
24. The reason for the dismissal was conduct which is a potentially fair reason for dismissal under section 98 (2) (b) of the Employment Rights Act 1996 ("the Act").
25. I have considered section 98 (4) of the Act which provides "…. 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".
26. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2015 ("the ACAS Code").
27. The claimant's claim for breach of contract is permitted by article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 and the claim was outstanding on the termination of employment.
28. The claimant also claims in respect of deductions from wages which he alleges were not authorised and were therefore unlawful deductions from his wages contrary to section 13 of the Employment Rights Act 1996.
29. I have considered the cases of Post Office v Foley, HSBC Bank Plc (formerly Midland Bank plc) v Madden [2000] IRLR 827 CA; British Home Stores Limited v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT; Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR; and Polkey v A E Dayton Services Ltd [1988] ICR 142 HL. The tribunal directs itself in the light of these cases as follows.
30. When considering the fairness of a dismissal, the Tribunal must consider the process as a whole Taylor v OCS Group Ltd [2006] ICR 1602 CA. A sufficiently thorough re-hearing

on appeal can cure earlier shortcomings, and see Adeshina v St George's University Hospitals NHS Foundation Trust and Ors EAT [2015] (0293/14) IDS Brief 1027

31. The starting point should always be the words of section 98(4) themselves. In applying the section the tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair. In judging the reasonableness of the dismissal the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.
32. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. A helpful approach in most cases of conduct dismissal is to identify three elements (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral): (i) that the employer did believe the employee to have been guilty of misconduct; (ii) that the employer had in mind reasonable grounds on which to sustain that belief; and (iii) that the employer, at the stage (or any rate the final stage) at which it formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.
33. In the first place I find that the respondent had carried out a full fair and reasonable investigation. It is arguable that Mr Beer should have done more to have investigated the claimant's allegations that his previous manager Mr Phillips had authorised his actions. Nonetheless this was covered in detail by Mr Davey on appeal. Mr Phillips had left the respondent's employment but Mr Davey spoke to a number of other employees who worked for Mr Phillips and they all denied that Mr Phillips had authorised them to disregard the health and safety requirements without the need to escalate to a manager. In addition, the claimant had had three line managers after Mr Phillips, and had attended most of his training at times when he was no longer managed by Mr Phillips. Mr Davey was entitled to conclude on appeal that the claimant knew of the respondent's health and safety requirements and was not authorised to disregard them without escalating to a manager for specific authority.
34. In addition, the process adopted by the respondent was fair and reasonable and in accordance with the ACAS code and generally accepted norms of industrial relations. The respondent's disciplinary procedure referred to the gross misconduct in question as being likely to result in summary dismissal. The claimant was suspended on full pay pending an investigation. He was called to a disciplinary meeting at which he had the opportunity to state his case against those allegations in the presence of his chosen trade union representative. He was afforded the right of appeal which was chaired by a senior manager who was independent of the investigation and the first instance decision. I find that the respondent's investigation and disciplinary process was fair and reasonable in all the circumstances.
35. It is also clear that both Mr Beer and Mr Davey genuinely believed that the claimant had committed the gross misconduct of which he had been charged. As to whether that belief was reasonable, I conclude that it was for the following reasons.
36. In the first place the claimant was fully trained on the respondent's health and safety requirements. It is obvious that any fall from height could have had very serious consequences, not least to the employees working at height on ladders, but also to those around them. The respondent's requirements for its employees to maintain appropriate health and safety in this regard is clearly necessary and reasonable. Given the training which had been supplied to the claimant, and his access to the various flowcharts and manuals, it was reasonable of the respondent to conclude that the claimant was fully

aware of its health and safety requirements. Of course the claimant did not deny that he was aware of the requirements, but asserted that he had been authorised by Mr Phillips to disregard them without the need to escalate to a manager for authority if he felt that there was a safe alternative available. The respondent doubted that any manager would give such authority. They were unable to check with Mr Phillips, but were able to check with a range of employees who had worked for him, all of whom denied that Mr Phillips had given them authorisation to disregard the policy. In these circumstances it was reasonable in my judgment for the respondent to conclude that the claimant had known about the health and safety requirements but had deliberately decided to disregard them.

37. The third finding of gross misconduct related to what at first glance appears to be an inaccurate risk assessment. The claimant contends that he completed an accurate risk assessment manually, and that he made an input error when he later entered the data on his iPad which had been defective on site. In my judgment the defective nature of the iPad is something of a red herring. The misconduct in question was actually recording that the claimant had realigned a satellite dish when as a matter of fact it had not been.
38. The claimant on occasions asserted that there were mitigating factors such as his previous ill health and an occupational health report which referred to his stress at work. In addition he had recently suffered a family bereavement. However, the claimant has never accepted that he acted in breach of the respondent's policies and only did so because of mitigating factors relating to his stress or for other reasons. On the contrary, he has always alleged that he only did what had been authorised by Mr Phillips. For this reason these arguments again seem to be something of a red herring.
39. The respondent also considered in detail the claimant's contention that there was inconsistency of treatment, and in particular with the three named engineers who had been found to have committed similar misconduct but had only been given final written warnings. In the first place it is clear that the respondent can point to a number of examples of where other employees had been dismissed for breaches of health and safety procedures even as a first occurrence. In addition there were factors in each of the three other examples referred to which make it clear that the circumstances were not the same or very similar to those of the claimant. In the first place all three employees accepted that they had done wrong in breaching the health and safety procedures and apologised. On the other hand the claimant continually disputed that he had done anything wrong. In addition, each of the three had separate mitigating factors: two of them had health issues which were taken into account, and the third had only recently transferred to the respondent and could be said to have had inadequate training. The same cannot be said for the claimant.
40. For these reasons in my judgment it was reasonable for Mr Beer and Mr Davey to believe that the claimant had committed gross misconduct, and that there were no salient mitigating factors which should have been taken into account.
41. It is not for the tribunal to substitute its own decision for that of the employer. There is a band of reasonable responses to the employee’s conduct within which one employer might take one view, and another might quite reasonably take another. The function of the tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair. In my judgment, particularly given the potentially serious nature of health and safety breaches and the risk of falling from height, the decision to dismiss the claimant was within the band of reasonable responses open to the respondent when faced with these facts.
42. In conclusion therefore there was a full and fair investigation; the respondent genuinely believed that the claimant had committed gross misconduct; and that belief was based on reasonable grounds. Dismissal was within the band of reasonable responses open to an employer when faced with these facts. Accordingly I find that even bearing in mind the size and administrative resources of this employer the claimant’s dismissal was fair and reasonable in all the circumstances of the case, and I therefore dismiss the claimant’s unfair dismissal case.

43. In circumstances where the claimant committed the gross misconduct for which he was summarily dismissed he is not entitled to contractual notice and I also dismiss his claim for breach of contract in respect of his notice pay.
44. Finally, I do not have sufficient information to determine the claimant's claim for unlawful deduction from wages. The burden of proof is on the claimant to prove his claim in this respect, and he has not discharged that burden. Accordingly I cannot conclude that the respondent has unlawfully deducted the sum of £300 from the claimant's wages as alleged, and I also dismiss this claim.
45. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 4 to 22; a concise identification of the relevant law is at paragraphs 24 to 32; and how that law has been applied to those findings in order to decide the issues is at paragraphs33 to 44.

_____
Employment Judge N J Roper

Dated: 1 February 2017

Sent to the parties on:

9th February 2017

……...

For the Tribunal:

…….