EMPLOYMENT TRIBUNALS

Claimant: **Mr Pritpaul Singh**

Respondent: **Cadent Gas Limited**

Heard at: **Leicester** **On:** **Tuesday 3 October 2017**

Before: **Employment Judge Evans (sitting alone)**

Representatives

Claimant: **Mr Bronze of Counsel**
Respondent: **Ms Balmer of Counsel**

JUDGMENT

1. It does not appear to the Tribunal that it is likely that on determination of the Claimant's claim of unfair dismissal the Tribunal hearing that claim will find that the Claimant was unfairly dismissed by virtue of section 152 of the Trade Union and Labour Relations (Consolidation) Act 1992 ("the 1992 Act") or by virtue of section 100 of the Employment Rights Act 1996 ("the 1996 Act").

2. The Claimant's applications for interim relief under section 128 of the 1996 Act and under section 161 of the 1992 Act are therefore dismissed.

REASONS

Background and Preamble

1. The Claimant was employed by the Respondent until he was summarily dismissed on 14 September 2017.

2. On 20 September 2017 the Claimant presented a claim that he had been unfairly dismissed. The Claimant contended in his claim that his dismissal was automatically unfair under section 100 of the 1996 Act and under section 152 of the 1992 Act. At the same time, the Claimant presented applications for interim relief under section 128 of the 1996 Act and section 161 of the 1992 Act.

3. The applications for interim relief came before me at a hearing on 3 October 2017. In support of his applications the Claimant produced a witness statement dated 3 October 2017 and a bundle of documents containing 103

pages. The Respondent resisted the applications and produced a witness statement from Mr Peter Wilson, the Network Manager of the Respondent's East Anglia Operations, and a bundle of documents containing 215 pages. References to pages in the Claimant's bundle are prefixed "C" and references to pages in the Respondent's bundle are prefixed "R".

4. The Claimant was represented at the Hearing by Mr Bronze of Counsel, who produced a skeleton argument. The Respondent was represented by Ms Balmer of Counsel who also produced a skeleton argument.

5. Mr Bronze and Ms Balmer agreed that I should decide the applications for interim relief without hearing live evidence. Rather I should decide the applications having read the witness statements (and documents referred to in them) and after hearing submissions. I therefore rose briefly to read the witness statements and documents. I then heard submissions from Mr Bronze and Ms Balmer before giving my decision with reasons extempore at the end of the day.

6. I dismissed the applications for the reasons given below. A closed preliminary hearing was then held in order to make case management orders for the future conduct of the claim. Those orders are contained in a separate document which has already been sent to the parties.

7. I indicated at the end of the Hearing that my extempore reasons would be typed up and sent to the parties. However the file to which the tape containing my extempore reasons was attached was subsequently lost before my reasons had been typed up. Consequently I have used the detailed notes which I had before me when I gave my reasons extempore to prepare these written reasons.

The issues and the discussion at the beginning of the Hearing

What was argued by the Claimant

8. Mr Bronze for the Claimant contended that the relevant provisions for the purposes of his applications were section 100(1)(e) of the 1996 Act and section 152(1)(b) of the 1992 Act.

9. Mr Bronze explained that the following factual matters were relied on:

9.1. **Trade union activities (section 152(1)(b) of the 1992 Act)**: in relation to his claim under section 152(1)(b) the "activities of an independent trade union" which he said he had been dismissed for taking part in were:

9.1.1. Bringing the results of a stress survey to the Respondent's attention. In this respect the Claimant relied on a series of emails between 23 March 2017 and 9 June 2017 (pages C27-41);

9.1.2. Raising a grievance in relation to a fatigue risk assessment not being fit for purpose (page C29);

9.1.3. His involvement in pay negotiations with the Respondent which were as at the date of the Hearing still ongoing and which had begun

in June or July 2017.

9.2. The Respondent accepted that by doing these things the Claimant had been taking part in the activities of an independent trade union at an appropriate time. It denied that these activities had anything to do with the Claimant's dismissal.

9.3. **Health and safety issue (section 100(1)(e) of the 1996 Act):** the Claimant said that the circumstances of danger which he reasonably believed to be serious and imminent were that he had worked 15 hours, he should have had a rest break and he had been granted the same for 4 hours by his manager. However Despatch had then sent him on another job (to deal with a gas escape). He needed food before he could attend because he did not know how long he would be working for. He was therefore taking appropriate steps to protect himself from the danger when he went to buy food before attending the job but he had been dismissed for doing this.

9.4. The Respondent did not accept that the factual circumstances were as described by the Claimant. However, even if they were, they would not amount to "circumstances of danger which the employee reasonably believed to be serious and imminent".

What was argued by the Respondent

10. The Respondent argued that the Claimant had been dismissed for misconduct. In brief, he had gone to buy fast food before attending a gas leak. He should have gone directly to the gas leak; alternatively, he should have raised his need to eat with Dispatch.

Preliminary considerations

11. The Respondent accepted that the Claimant had presented a certificate in writing complying with the requirements of section 161(3) of the 1992 Act. This certificate had been provided by Mr Jed Purkis, an organiser of the GMB trade union.

Issue to be decided

12. It was agreed that the question for me was whether it appeared likely that on determining the Claim to which the applications related the Tribunal would find that by virtue of (as relevant in this case) section 100 of the 1996 or section 152 of the 1992 Act the Claimant's dismissal was automatically unfair.

13. If it did appear likely, I would then consider questions of re-instatement, re-engagement or an order for the continuation of the Claimant's contract as appropriate.

The Law

14. Section 100(1)(e) of the 1996 Act provides:

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal

reason) for the dismissal is that - …

… (e) in circumstances of danger which the employee reasonably believed to be serious and imminent he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

15. Section 152(1)(b) of the 1992 Act provides that:

For purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or, if more than one, the principal reason) was that the employee –

(b) had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time.

16. Sections 128 to 132 of the 1996 Act and sections 161 to 167 of the 1992 Act deal with applications for interim relief. Section 129 of the 1996 Act and section 163 of the 1992 Act provide that if it appears to the Tribunal "likely that on determining the complaint" to which the application relates the Tribunal will find that the dismissal is unfair by virtue of (as is relevant in this case) section 100 of the 1996 Act or section 152 of the 1992 Act, then certain provisions shall apply.

17. Those provisions state that the Tribunal shall announce its findings and explain its powers to the parties. Its powers are: to make an order for reinstatement if the Respondent is willing to reinstate; to make an order for re-engagement if the Respondent is willing to re-engage the Claimant in another job on specified terms and conditions, provided the Claimant is willing to accept the job on those terms and conditions; to make an order for the continuation of the Claimant's contract of employment if the Respondent is not willing to reinstate or re-engage or if the Claimant reasonably refuses an offer of re-engagement.

18. It is "likely" that a Tribunal will find that a dismissal is unfair by virtue of section 100 of the 1996 Act or section 152 of the 1992 Act, Mr Bronze and Ms Balmer agreed, if there is a "pretty good chance of success". It was agreed that this meant more than a 51% chance of success.

What is agreed, the parties' respective cases and my conclusions

19. In reaching the conclusions that I now set out I have taken account of all the evidence before me and of all the submissions made. However of necessity I do not refer to them all in my conclusions.

What is not in dispute

20. It is not in dispute that:

20.1. On 18 June 2017 the Claimant who is a first call operative accepted a job to deal with a "P1" gas escape;

20.2. The Claimant did not travel directly to the job. He had already worked a long day. Instead he went first to a MacDonald's restaurant

(which was closed) and then to a KFC fast food restaurant to obtain food. He then travelled to the job;

20.3. The Respondent has operational procedures for dealing with gas escapes and other emergencies. The document "National Grid Gas Operational Procedures for Dealing with Gas Escapes and other Emergencies" ("the Gas Escapes Procedure") appeared at page R27. It was agreed that this procedure applied. At page R28 it states:

Mandatory and Non-Mandatory requirements

In this document:
Shall: *indicates a mandatory requirement*
Should: *indicates best practice and is the preferred option…*

Background
…
Failure to comply with the requirements of this document could also result in individual disciplinary action.

20.4. Then, at page R30, the document categorises emergency jobs. It states:

Priority Code	***Response Time***	***Description of emergency situation***
Priority escape	*1 hour*	*Where a smell of gas is apparent within a cellar/basement or highly populated building, gas related fire or explosions, injury or fatality as a result of a gas or suspected carbon monoxide (CO).*

…

4. Site priorities and Initial actions

4.1 Arrival on site

On receipt of a work order the Operative shall:
- *Confirm receipt of the work order;*
- *Plan the journey and commence travel to site without delay;*
- *Take the most appropriate route (shortest practicable time);*
- *Promptly report arrival on site to Dispatch;*

If delayed en route (e.g. van breakdown) Dispatch shall be contacted to enable the use of alternative resources to be considered.

20.5. The Claimant accepted at his disciplinary hearing that he had acted in breach of this procedure by stopping to buy food en route to the job.

The Respondent's case

21. The Respondent's case was, in summary, that its Code of Conduct required compliance with procedures such as the Gas Escapes Procedure. An employee who fails to comply with such procedures may face disciplinary action.

22. The Claimant had not complied with the Gas Escapes Procedure. There had been a detailed investigation by Mr Chris Brown and the matter had then been referred to Mr Wilson, the Network Manager. Mr Wilson had carefully considered the matter. He had concluded that the Claimant was guilty of gross misconduct. He had considered the mitigation put forward. He had concluded that this did not warrant a lesser penalty and so had summarily dismissed the Claimant.

The Claimant's case

23. The Claimant submitted that the following matters pointed to the reason for his dismissal being his trade union activities or the section 100(1)(e) reason described above:

23.1. The way the investigative procedure was followed was out of kilter with the Claimant's previous experience. The Respondent had used the wrong procedure;

23.2. The prior relationship between the Claimant and the Respondent demonstrated that the Claimant was seen by the Respondent as a thorn in its side;

23.3. The timing of the dismissal was opportune in terms of the ongoing pay negotiations;

23.4. The Respondent was hostile towards the Union;

23.5. The points the Claimant had raised in mitigation meant that he should not have been dismissed in any event and the fact that he had been therefore pointed towards there being an ulterior reason for his dismissal.

My conclusions

24. I have concluded that the Claimant does not have a "pretty good chance" or a "more than a 51% chance" of persuading the Tribunal that finally determines the Claim that the reason or, if more than one, the principal reason for his dismissal was either his involvement in trade union activities or that he took steps to protect himself from danger that he reasonably believed to be serious and imminent. I have reached this conclusion for the following reasons:

25. First, he admitted conduct which *prima facie* one might well expect to lead to disciplinary action and the documents support the Respondent's case that the disciplinary action taken relates to that conduct. Specifically:

25.1. The Claimant admits that he failed to travel directly to a gas leak. He says that he had good reasons for not having done so. However he also admits that this was a breach of the Respondent's procedures. It is in principle unsurprising that disciplinary action followed;

25.2. The Gas Escapes Procedure of the Respondent makes plain that such a breach may be considered a disciplinary matter. This is unsurprising since the possible consequences of a failure to attend a gas leak as quickly as possible are obvious;

25.3. The Respondent conducted an investigation which is extensively documented;

25.4. The Respondent conducted a disciplinary hearing at which the Claimant was appropriately represented;

25.5. The Respondent produced a detailed dismissal letter which dealt with the points raised by the Claimant during the disciplinary process.

26. Secondly, whilst on the one hand there has been an extensive disciplinary process in relation to a matter which the documents before me suggested that the Respondent was entitled to treat as a disciplinary matter, there was very limited evidence supporting the Claimant's argument as set out above:

26.1. The Claimant argued that the delay in him attending the gas escape should have been treated as a "safety matter" and not a "disciplinary matter" but Mr Bronze was unable to point to any documentation which showed that that was the case;

26.2. The evidence before me suggesting that the Claimant as a union representative was regarded by the Respondent as a "thorn in the side" was very limited. Mr Bronze placed much reliance on the email exchange at pages C27 to 43 relating to a stress survey. However what the email exchanges demonstrate above all is that the Respondent believed the matter should be dealt with at a collective level between itself and the unions. The email exchange is not really about the Claimant at all;

26.3. The Claimant says that the timing of his dismissal was opportune because pay talks were ongoing. However the Claimant pointed to no documents or other evidence of significance showing the Respondent as hostile to the Claimant's involvement in the pay talks;

26.4. The Claimant produced no documents or other evidence of significance which tended to suggest that the Respondent was hostile towards the union;

26.5. The Claimant argued that there were cases in which employees had in comparable circumstances been treated less severely. However the Respondent's letter of dismissal gives details which the Respondent says distinguish the Claimant's case from the others he has raised. Clearly this is a matter which will be tested at the final hearing of the Claim but on the face of the evidence before me: (1) the Respondent has

explained why the circumstances of those who were not dismissed were different; and (2) the Respondent has produced evidence of other employees being dismissed who were found to be guilty of comparable misconduct;

26.6. The Claimant argued that there was a "smoking gun": on page 6 of the letter of dismissal (page C87) the Respondent wrote:

> *As an H&S Rep, you above all people should have been aware of the seriousness of your actions. This is, therefore, a case of gross misconduct, for which summary dismissal is the appropriate sanction.*

26.7. However I do not accept that this is a "smoking gun" which shows that the Claimant is being held to a higher standard of behaviour. On the face of the letter the Respondent is not saying that the Claimant should be treated more severely because he is a health and safety representative. Rather the Respondent is saying that he cannot plead ignorance;

26.8. Whilst the Claimant's union, the GMB, provided the certificate required by section 161(3) of the 1992 Act, the letter subsequently sent by its National Officer, Stuart Fegan, dated 28 September 2017 (page R193), does not provide full-throated support for the Claimant's applications for interim relief. Rather it says:

> *It is important to note that Paul has bought [sic] many concerns to the business around safety in his role as a GMB Representative, many of which have been ignored or left unresolved. Some managers may perceive Paul's insistence that legislation and policies are complied with as a problem and* ***their opinion conceivably may have had an influence*** *[sic] your decision to dismiss Paul. The same manager who told Paul he was being investigated three weeks after the alleged allegation took place, was also the same manager who appointed the investigating officer and made requests for personal data, finally making the decision to investigate this as a gross misconduct allegation.* [Emphasis added.]

26.9. "May conceivably have had an influence" on is not evidence which tends to suggest that it is "likely" that the reason for dismissal was as the Claimant alleged.

27. In summary, taking things in the round, the documentation before me does not suggest that it was surprising that a disciplinary procedure was followed as a result of the actions of the Claimant on 18 June 2017 and, in reality, many of the points raised by the Claimant go to the argument that there were mitigating factors which meant that dismissal was too severe a penalty rather than that there should not have been disciplinary action at all. On the other hand, the evidence the Claimant has produced simply does not enable me to conclude that there is a "pretty good chance" that he will persuade the Tribunal hearing his claim that the principal reason for dismissal was either the fact that he had taken part in trade union activities at an appropriate time or that he had taken appropriate steps to protect himself from danger which

he reasonably believed to be serious and imminent.

28. For these reasons I dismiss the Claimant's applications for interim relief. However I should emphasize that this decision is taken on the evidence before me and without the benefit of hearing live evidence from the Claimant or from the Respondent's witnesses. Clearly at the final hearing much will depend on how witnesses perform under cross-examination.

Employment Judge Evans

Date: 27 November 2017

JUDGMENT SENT TO THE PARTIES ON

07 December 2017

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FOR THE TRIBUNAL OFFICE