



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 8000329/2024**

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**Held in Glasgow on 9 and 10 July 2024**

**Employment Judge M Robison**

10 **Mr M Flavin**

**Claimant  
In Person**

15 **WH Malcolm Limited**

**Respondent  
Represented by  
Mr G Mitchell  
Solicitor**

### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

20 The judgment of the Employment Tribunal is that the claim for unfair dismissal is not well-founded and is dismissed.

### **REASONS**

#### **Introduction**

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1. The claimant lodged a claim with the Employment Tribunal on 19 March 2024 claiming unfair dismissal. The respondent entered a defence resisting the claim, asserting that dismissal by reason of gross misconduct was fair.
  2. The issue for the Tribunal to determine was whether the respondent acted reasonably in treating that as a sufficient reason in all the circumstances, and whether the sanction of dismissal was within the range of reasonable responses open to the respondent.
  - 30 3. At this final hearing, the Tribunal heard evidence for the respondent from Mr Graham LeMay, disciplinary hearing chair and decision-maker, and from Mr

Donald Malcolm, director and appeal hearing chair; as well as from the claimant.

4. The respondent lodged a file of productions as directed. Although this was not a joint file, the claimant accepted that it contained all the documentary evidence relevant to the claim, referred to throughout the hearing.

5. Mr Mitchell made an application for the Tribunal to view CCTV. Although I queried whether that was necessary in this case given that it is a claim only for unfair dismissal, the claimant was content for it to be shown and I was persuaded by Mr Mitchell that it would be helpful.

#### 10 **Findings in fact**

6. On the basis of the evidence heard and the productions lodged, the Tribunal finds the following relevant facts admitted or proved.

7. The claimant worked for the respondent from 29 October 2000 until he was dismissed for gross misconduct on 24 October 2023, following an incident which took place on 4 October 2023.

8. The respondent provides construction and logistic services throughout the UK. The headquarters of the logistics division is located at Newhouse. In or around 2022, the respondent commenced work to expand its facilities there including building a new warehouse. This involved various employees from the respondent's construction division working on the site throughout 2023.

9. The claimant was a site foreman who would be deployed to different sites to oversee work and supervise personnel. Around mid-2023, the claimant was transferred to work at the Newhouse site, to take over from another foreman who was in turn posted to another job. The role of supervision of groundworks and associated personnel was delegated to him by Craig Wilson, who was the project manager with overall responsibility for the site (also referred to as site manager).

10. The claimant had completed relevant training which related to the roles which he undertook as site foreman. He was aware of the respondent's health and safety policy, which includes the following:
- 5 • supervisors, chargehands and other persons in positions of authority will be responsible for taking such action regarding health and safety matters as is appropriate in their own work areas;
  - 10 • all employees have the responsibility to cooperate with supervisors and managers to achieve a healthy and safe workplace and to take reasonable care of themselves and others. This responsibility includes following the company's written rules and instructions;
  - 15 • whenever an employee, supervisor or manager notices a health or safety problem which they are unable to put right themselves, they must straightaway tell the appropriate person in the company who they think can take action. They must also tell a safety representative if there is one. If a safety issue is raised by an employee that means they refuse to carry out a particular task then the company will investigate this fully without any reprisals for the employee concerned.

*Excavation of site to install fire main*

- 20 11. One of the jobs to be undertaken on the Newhouse site was the installation of a fire main which required the digging of a trench.
12. Method statements require to be completed for certain operations on site, including for this job of digging a trench to install a fire main.
- 25 13. On 25 September 2023 a method statement form was completed for the excavation and backfilling of service tracks for this job. The originator was John Kerr, who was the contracts manager responsible for several projects and sites, of which this Newhouse project was one. The form identified that the project manager for the site was Craig Wilson, the site foreman was the claimant and the site engineer was Scott Brady.
- 30 14. The form states that the responsibility to communicate the assessment/ methodology and to manage and monitor the assessment is that of the site

manager and/or foreman. It sets out the plant and equipment required, the training requirements of the operatives assigned to the job and the material to be used.

- 5 15. As well as identifying the risk assessments required, the form sets out the work method in detailed numerated paragraphs. This includes at 1. "Ensure that Permit to Dig is in place, detailing existing services (if any) in the area" and at 2. "Any services located to be hand dug and exposed".
- 10 16. The excavation job was instructed by Mr Wilson. On 2 October 2023, he gave a briefing on the method statement to the operatives involved, who confirmed that it had been delivered by signing the form. This was signed by Edward Shephard, Matthew Jackson, Ceri Davies and Brian Goldie on 2 October 2023. Two other operatives, David Maclean and Jordon Collon, signed it on 4 October 2023.
- 15 17. A risk assessment was also completed for this job, as required. That identified the risk as level six which is an unacceptable level of risk requiring intervention. The hazard control measures required to bring the residual risk down to two (which is acceptable) included the following:
- Scan the whole area using a service detector. All underground service positions should be clearly marked on the ground using waterproof paint or timber posts with warning signs.
  - Depths of services do vary – never assume depth without hand digging. Exact location of services to be confirmed by hand digging. Always dig near buried services using only insulated rounded shovels, rather than picks or forks. Where suitable consider use of vacuum excavation.
  - Do not use plant machinery or handheld power tools within 500 mm of a marked service or directly above the marked line.....
  - Prior to ground being disturbed (excluding hand digging) an MCS 'Permit to Disturb Ground' must be in place.
- 30 18. Thus wherever a service such as an electrical cable is present, it should be exposed by hand digging and no mechanical digger should be used within

500 mm. If hand digging is not possible because of the type of ground, then a vacuum system can be used as an alternative to hand digging.

19. Before any ground is disturbed a designated person must complete the permit to disturb ground form. As site foreman, the claimant was one of the people designated as responsible for filling out the permit to disturb ground.
20. On 2 October 2023, in preparation for the work building the trench to install the fire main, the claimant filled out a permit to disturb ground.
21. Part A of that form states that it is to be completed by a site manager, and indicated that the purpose of the excavations was to evacuate to install fire main located at the perimeter of a concrete road. It stated that the depth of the excavation was 1.2 metres (and that where excavations are deeper than that they will require to be supported or benched, but that was not required for this job).
22. Section 5 asks “do you have up to date drawings on site”, and boxes for electricity, gas, water and telecoms are ticked (without such drawings it states that excavations should not start).
23. The next section asks questions about utilities. In this case, the section on electricity is completed with:
- a tick at “service on drawing in area of evacuation?”
  - a cross at “any visual signs present?”,
  - a tick at “has CAT identified a service?”;
  - a tick at “are known services marked?” and
  - a tick at “hand dug and exposed?”
24. The box “hand dug and exposed” is highlighted and states that if the box is crossed then the permit cannot be issued. The permit is stated to be valid until 7 October 2023 and that a 14 ton excavator and dumper will be required.
25. Under Part B (to be signed by responsible person (RP) and excavator operation (EO), the form was signed on 2 October 2023 by Edward Sheperd as RP; and Mathew Jackson as EO, who confirmed that “the measures listed

in Part A section 5 have been carried out. The excavation works described are ready to commence subject to the conditions laid out in Risk Assessment 001 and any relevant Method Statement. I have referred to all the relevant service drawings indicated above”.

- 5 26. Part C was to be signed by supervisor/competent person who was to “confirm that the measures listed in part A section 5 have been carried out and that the excavation works described are ready to commence subject to conditions laid out in Risk Assessment 001”. That section was not signed. On this occasion, it should have been signed by the claimant, who had completed the form.

10 *Events of 4 October 2023*

27. The excavation of the trench to install the fire main commenced around 7 am on 4 October 2023. The excavator was operated by Matthew Jackson and a dumper used to collect materials was operated by Brian Goldie.
- 15 28. Although the permit to disturb ground completed by the claimant had indicated through a tick that the area had been hand dug, in fact it had not. The claimant did not order hand digging to be undertaken. The digging of the trench was carried out entirely by machine.
29. Initially the area where the HV cable was known to be located was scanned by Mr Shepherd, who marked the location of the cable using blue paint.
- 20 30. Around 11.45, the trench was being excavated along the route towards the existing HV cable. Mr Wilson stopped at the job while passing in a telehandler and had a very short conversation with Mr Shepherd.
- 25 31. The excavation then stopped within approximately 2m of the blue paint marked by Mr Shepherd earlier. Mr Brady, site engineer, then CAT scanned the area because he had the necessary qualifications to do so (unlike Mr Shepherd). He re-marked the location of the HV cable using blue paint, based on the results of the CAT scan. The claimant visited the works area as the CAT scan was being carried out by Mr Brady.

32. Then the excavation recommenced, shortly after which the claimant, Mr Brady and Mr Shepherd had a discussion. The claimant and Mr Brady observed Mr Jackson excavate beyond the blue marker. Very shortly after when it started to rain, the claimant and Mr Brady returned to the office and work stopped.  
5 When it resumed shortly after when the rain stopped, the excavator continued to excavate the route beyond the blue markings. Rocks and boulders were removed including a large boulder which was deposited in the dumper.
33. Some 20 seconds after that boulder was removed, at 12.35:30, the excavator struck the HV cable with a resultant large puff of smoke and a small flame  
10 being emitted from the cable.
34. Mr Shepherd moved back and made a phone call. Mr Jackson lifted the bucket out of the track, but continued to scrape the surface of the ground around track and drag material out of the track where the cable was struck.
35. Shortly after, Mr Wilson arrived to inspect the excavation. He instructed Mr  
15 Jackson to continue excavating for a short time to clear spoil from inside and around the track excavation.
36. Shortly after, the claimant arrived on the scene. Mr Wilson then made a number of phone calls to inform appropriate personnel. That included, at around 1 pm, Mr John Bringan, the health and safety adviser, who arrived on  
20 site some one and half hours later. Personnel from Scottish Power were contacted and attended, although they were already aware of the incident.

### *Investigation*

37. On 4 October 2023, Mr Wilson took statements from Mr Shepherd, Mr  
25 Jackson and Mr Brady which he noted in his works diary headed "HV cable strike". These operatives stated that while excavating they had encountered a large rock which was clipped by the excavator bucket, as loose material was cleared from the track.
38. On 5 October 2023, the claimant had been moved to a job in Irvine. As requested, he wrote out a statement, as follows: "Regarding incident at  
30 Newhouse (cable strike) the quad of 3 were tasked with digging fire main.

Track known services in the area. The engineer CAT scanned area and marked out where cable was at time of cable strike I was on my lunch break before tea break I was working on another task backfilling a track with new cable duct for huts up at tipping area. I did issue permit to dig but didn't issue method statement for this task. I did see machine man and banksman working together. At the times of passing the squad I never seen them physically hand digging in passing at the time, not to say they had not prior to excavating".

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39. An investigation was carried out by Mr Bringan. This included an inspection of the site and review of the relevant permit, method statement and risk assessment. He then compiled a report, dated 9 October 2023, noting that there were flaws in the permit. Subsequently, Donald Malcolm brought to the attention of Mr Bringan that there would be CCTV footage of the area.

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40. On 13 October 2023, having viewed the CCTV footage, he interviewed those involved. He first showed the CCTV footage then asked prepared questions.

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41. When questioning the claimant, specifically whether the confirmation that the electricity service was hand dug and exposed was correct, the claimant said that he had assumed that had been done because the squad was experienced. He stated that he had discussed the hand digging when he was seen to be speaking to the other operatives in the CCTV footage.

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42. However, during his interview Mr Brady said that he did not recall discussing this with the claimant, rather that the discussion was about taking care as they approached the zone. Nor did Mr Jackson recall a discussion with the claimant. He said he did not know about the hand digging and that it was not for him to instruct it to be done. Mr Shepherd likewise did not recall any discussion or instructions to hand dig.

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43. On 16 October 2023 Mr Bringan prepared a further report based on those statements concluding that, "After completing a more detailed timeline investigation from review of CCTV, it has become apparent that no hand digging for this known service transpired. CCTV confirmed the area was indeed CAT scanned and marked. Further statements from all involved have been taken and logged".

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44. On 18 October 2023 he recorded a further statement from Mr Shepherd and then logged the incident on the health and safety incident reporting system.

*Disciplinary hearing and dismissal*

5 45. On 19 October 2023, the claimant was invited to attend a disciplinary hearing to take place on 24 October 2023. Similar letters were sent to Mr Wilson, Mr Brady and Mr Jackson.

10 46. The disciplinary hearings were chaired by Graham Le May, operations manager. A note of the meeting with the claimant was taken by Paul Hobday, group HR manager. The claimant did not take up the offer to be accompanied by a colleague.

47. At the end of the meeting the claimant was advised that he was summarily dismissed. That decision and the reasoning was confirmed in a letter from Mr LeMay to the claimant dated 1 November 2023.

15 48. In the letter he stated that the claimant had issued the permit incorrectly confirming that the cable had been hand dug and exposed, which he failed to sign. The letter then states that, "There was a clear and present danger however you did not intervene to stop the machine or instruct that hand digging only should be carried out. You were asked at our meeting whether you said to the banksman (a sub-contractor) that hand digging only should be carried out to which you answered "not in so many words" and instead you expected that the squad would do what was expected".

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25 49. The letter goes on to state that the claimant thereby failed in his responsibilities as set out in the method statement; that he took ten minutes to attend at the site after being informed that a cable had been struck and that, "you displayed no urgency to investigate whether anyone was injured or any damage caused. I believe you showed a shocking disregard for the safety of others....the machine operator and banksman were put at the most alarming risk of serious injury or worse... personnel from Scottish Power attended the project clearly placing the company's reputation at risk. Senior company and health and safety personnel have been diverted to investigate

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and manage this avoidable event and the disruption to the overall project is considerable”.

50. Mr LeMay stated after considering all the information and evidence available as well as the claimant’s account of events during the adjournment he had concluded that his “actions and omissions [were] wholly unacceptable and amounted to gross misconduct under the company’s disciplinary procedure...[which] lists the following as examples of gross misconduct:

- disregard of health and safety rules or the endangering of one’s self and/or others;
- fraud or other serious breach of integrity including the completion of false or inaccurate self certificates or other documents;
- performing, arranging or carrying out any work or activity adversely affecting the company’s interests;
- deliberate disregard of the company’s rules.

51. Mr Le May also concluded that, “you have irrevocably broken the bond of trust and confidence which must exist between employer and employee as a result of your actions”.

### *Appeal*

52. By letter dated 6 November 2023, the claimant intimated his intention to appeal, setting out his grounds of appeal, namely that:

- the action was unjust;
- did not accurately reflect his dedication to the company and commitment to maintaining a safe working environment over 24 years of service during which time he had an unblemished record;
- he did not have direct supervisory responsibility for the machine operator;
- the site manager was directly responsible for supervision of subcontractors;
- he took all reasonable steps to prevent the incident;
- the site manager was aware of the electrical cables and failed to fulfil his responsibilities to take appropriate precautions;

- this was an isolated incident which while serious did not justify dismissal;
- the decision was disproportionate; and
- the decision should be reconsidered and he should be reinstated with a verbal or written warning, when he would uphold highest health and safety standards.

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53. On 29 November 2023 an appeal hearing took place chaired by Donald Malcolm, director. Notes were again taken by Mr Hobday. The claimant was accompanied by a colleague, Mark McLaren.

10 54. During the course of the appeal hearing, the claimant raised for the first time an allegation that the method statement and risk assessment had been completed by Mr Wilson and Mr Kerr on 4 October 2023 after the strike. He is noted as saying “you can check on the laptop. I think that makes the Method Statement null and void. That’s something for you to investigate”.

15 55. Mr Malcolm interviewed Mr Wilson and Mr Kerr regarding this allegation. He noted that the method statement had been signed by four operatives on 2 October 2023 and two on 4 October 2023. He noted that Mr Collon had been absent on 2 October to attend a funeral.

20 56. Mr Malcolm advised the claimant in a letter dated 15 December 2023 that he was upholding the decision to dismiss.

57. In regard to the claimant’s appeal ground that the decision to dismiss was too harsh, he stated that he had reviewed Mr Le May’s findings and the process used to reach his decision. As a senior and very experienced manager, he was satisfied that his decision to dismiss was appropriate given his findings.

25 58. With regard to the claimant’s unblemished record and commitment to the highest standards of safety, he was satisfied that the conclusion to dismiss was appropriate given the very serious breach of health and safety which took place. He stated that a good record prior to this event would not provide sufficient mitigation for such a serious breach.

59. With regard to the claimant's argument that he did not have direct supervisory responsibility for the machine operator or subcontractors, Mr Malcolm referenced the method statement and stated that as foreman he had direct supervisory responsibility for the operation; was present on site of a known electric cable; and failed to fulfil his responsibilities by failing to intervene. Further, Mr Malcom investigated the claimant's claim made at the disciplinary hearing that he was responsible only for the "concrete boys" and that responsibility for other operations was not delegated to him. He found having interviewed Mr Wilson and Mr Kerr that it was clearly communicated to him that he was responsible for all groundworks operations and for the safe working procedure used by the machine operator and that if he was not responsible he would not have attended the site of the excavation or filled in the permit to disturb ground. With regard to the claim that Mr Wilson had direct responsibility for all sub-contractors, he advised that they were part of a squad with the respondent's employees and the responsibility for supervising that squad fell to the groundworks foreman. He was satisfied that Mr Wilson had delegated responsibility to him for groundworks and to ensure safe working.
60. He advised that he had investigated the allegation that the method statement had been completed after the cable strike by interviewing Mr Kerr and Mr Craig and was satisfied that it was not true. He had checked attendance records to verify Mr Craig's recall that one of the employees signed the method statement on a later date, and stated, "your claim requires that the group of employees and others falsely date the document before the strike occurred. I do not believe that for that group, which included individuals who no longer work for or with the company as a direct consequence of the cable strike, to have colluded in a false signing of such a document to be credible".
61. He was also satisfied that Mr LeMay had followed a fair and reasonable process and that his decision to dismiss was reasonable. He advised that he believed that the bond of trust and confidence had been destroyed by his acts and that it would not be appropriate for him to return to the company. He found no basis on which his dismissal for gross misconduct should be overturned.

62. The machine operator and the engineer were also dismissed for gross misconduct in relation to this incident.

63. The project manager (Craig Wilson) had lesser direct involvement in the matter. In particular, he was not involved in the completion of the permit, and he was not directly responsible for the supervision of the men. He was contrite at the disciplinary hearing and accepted that he had some responsibility for events.

### Relevant law

64. Section 98(1) the Employment Rights Act 1996 (ERA) provides that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and, if more than one, the principal one, and that it is a reason falling within s.98(2) or some other substantial reason of a kind to justify the dismissal. Conduct is one of the potentially fair reasons for dismissal.

65. Section 98(4) provides that where the employer has shown that dismissal was for a potentially fair reason, the question whether the dismissal is fair or unfair 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, to be determined in accordance with equity and the substantial merits of the case.

66. In a dismissal for misconduct, in *British Homes Stores Ltd v Burchell* [1980] ICR 303 the EAT held that the employer must show that: i) he believed the employee was guilty of misconduct; ii) he had in his mind reasonable grounds upon which to sustain that belief, and iii) at the stage at which he formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

67. A lack of consistency may give rise to a finding of unfair dismissal (*Post Office v Fennell* 1981 IRLR 221 CA). *Hadjiioannou v Coral Casinos Ltd* 1981 IRLR 352 EAT established that a complaint of inconsistency of treatment would only be relevant in limited circumstances and that is: i) where employees have

5 been led by an employer to believe that certain conduct will not lead to dismissal; ii) where evidence of other cases being dealt with more leniently supports a complaint that the reason stated for dismissal by the employer was not the real reason, and iii) where decisions made by an employer in truly parallel circumstances indicate that it was not reasonable for the employer to dismiss.

10 68. The Tribunal must be careful not to assume that merely because it would have acted in a different way that the employer therefore has acted unreasonably. One reasonable employer may react in one way whilst another reasonable employer may have a different response. The Tribunal's task is to determine whether the respondent's decision to dismiss, including any procedure adopted leading up to dismissal, falls within that band of reasonable responses.

#### 15 **Deliberations and decision**

69. In this case, as Mr Mitchell indicated, there is little dispute on the key facts. The outcome depends on the application of the legal principles to the facts agreed or found as set out above.

20 70. In a claim for unfair dismissal, as noted above, the first limb of the Burchell test requires the employer to show that they believed that the employee was guilty of misconduct. The claimant himself accepted that he had been guilty of misconduct. That is a potentially fair reason for dismissal.

25 71. Given the claimant accepted that the circumstances of his involvement in this incident did amount to misconduct, the second limb of the Burchell test, that the respondent had in mind reasonable grounds to sustain their belief, is also met.

72. In the circumstances, I concluded that there were reasonable grounds for the belief that the claimant was guilty of the conduct in question and that such conduct was capable of amounting to gross misconduct.

73. The respondent must have formed that belief having carried out as much investigation into the matter as was reasonable in the circumstances. This is the third limb of the Burchell test. I was satisfied in this case, given the investigation undertaken by Mr Bringan and the reliance on the CCTV evidence, that the extent of investigation was reasonable. Indeed, as I understood it, the claimant in submissions said that he did not have an issue with the investigation which was undertaken prior to his dismissal. There was one issue which the claimant did raise around the scope of the investigation, but that related to the position after he had been dismissed, raised at appeal, discussed further below.
74. I therefore turned to consider whether the sanction of dismissal was reasonable in all the circumstances. Given the claimant's position, as I understood it, this was the focus of this case.
75. I accept that even if an employer concludes that there was gross misconduct this does not automatically mean that dismissal in the circumstances will be fair. Rather the legal test described above must be applied, and consideration given to whether dismissal was reasonable in all the circumstances.
76. The claimant's position was, broadly, that given his unblemished record over 24 years of service for the respondent, the decision to dismiss was too harsh; and that he was treated differently from others involved, specifically Mr Wilson, who was given a final written warning but not dismissed.
77. With regard to his argument that that dismissal in the particular circumstances of this case, in light of mitigating factors, was too harsh, he relied on his unblemished record during around 24 years in the job. During evidence it was accepted that the claimant had been a good foreman.
78. Mr Malcolm's position was that an unblemished record prior to such a serious incident would not provide sufficient mitigation. Given that this was a particularly serious incident, with potential for severe injury or death, and in regard to the most risky of operations undertaken in the construction industry, I accepted that it was more than reasonable for him to take that stance.

79. The claimant's main concern when it comes to reasonableness of sanction was on the respondent's lack of consistency in the way that he had been dealt with relative to others involved in the incident. However we heard that two others involved, Mr Jackson, the machine operator and Mr Brady, the engineer, were also dismissed. We heard that the banksman, Mr Shepherd was a subcontractor, but that he is no longer engaged by the respondent.
80. The claimant's focus was on how the respondent had treated Mr Wilson, who was not dismissed, but who received a final written warning.
81. In submissions, Mr Mitchell referenced the *Hadjioannou* case, which confirmed dismissal would be unfair where the employer, through previous non-dismissal of employees, led employees to believe that specific conduct will be either overlooked or not be disciplined through dismissal; and when previous decisions create the inference that the purported reason for dismissal was not the actual reason for such dismissal. Mr Mitchell argued that neither situation applied in this case, which I accepted because there was no evidence to that effect in this case.
82. Mr Mitchell also relied on the *Hadjioannou* case to support the respondent's denial that the case in question relates to truly parallel circumstances. He argued that when considering what truly parallel circumstances are, the particular circumstances of each case will have to be examined, and that there has been a reluctance in decided cases to find that two situations are close enough in similarity to meet the truly parallel criteria.
83. Mr Mitchell submitted that the approach taken in *Hadjioannou* was later endorsed (by the Court of Appeal) in *Paul v East Surry District Health Authority* 1996 IRLR 305. That case requires that arguments which are based on disparity of treatment should be scrutinised with particular care, and concludes that it is rare for separate incidents of misconduct to be exactly the same. Furthermore, when considering whether incidents were parallel, factors such as the degree and nature of the misconduct, mitigating circumstances, and employee's attitude should be taken into account. That includes whether an employee admits that their conduct has been unacceptable and accepts



advice and help to avoid the repetition of the offending conduct, in which case they may be regarded differently from an employee who refuses to accept responsibility for his actions.

- 5 84. Mr Mitchell urged the Tribunal to take account not only of the differences between the claimant's circumstances and those of Mr Wilson, but also the difference in their reaction. In particular, he pointed out that Mr Wilson was apologetic and fully accepting of his responsibility following the incident, as well as accepting of his own shortcomings which may have contributed. The claimant's approach was very different in comparison.
- 10 85. Mr Mitchell also relied on *MBNA Ltd v Jones* EAT/0120/15 where the EAT made clear that the truly parallel test has a high bar, where circumstances need to be carefully examined.
- 15 86. I therefore considered whether it could be said that the failure to dismiss Mr Wilson amounted to inconsistent treatment such that the decision to dismiss the claimant was unreasonable.
87. The claimant's position was that "a culture of cronyism among the decision-makers...means that I have been scapegoated and those responsible have been allowed to keep their jobs".
- 20 88. This seemed to relate to the claimant's belief that Mr Wilson was a favourite of one of the directors, Mr Andrew Malcolm. However, no evidence to support that belief was led, beyond a reference to the fact that he had done work at his holiday home in Arran. That reference appeared to be to show that Mr Wilson, contrary to what was being suggested, was not too busy dealing with all aspects of the site works, since he could be spared to work directly for Mr Andrew Malcolm.
- 25 89. Further, the claimant relied on the fact that it was Mr Wilson not himself who had overall responsibility for the project and for the supervision of the men. He appeared to suggest that it was Mr Wilson who had in fact instructed the job and that therefore he had overall supervisory responsibility for the squad, including subcontractors.
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90. He pointed out that Mr Wilson was also aware of the HV cable and had not told the operatives to stop. As the CCTV footage shows he had apparently instructed them to continue digging with the machine, to clear the trench so that Scottish Power could see what was going on.
- 5 91. The claimant seems to be aggrieved because he was engaged on that job on a transitory basis, and that it was Mr Wilson's site and he had overall control so that he must have been more culpable. The claimant suggested in evidence he was not sure why he was posted to that site, and the evidence was that he had replaced another foreman and that on the very day of the  
10 incident he was moved again.
92. The claimant was aggrieved because he appears to feel that he was singled out of the foreman/supervisors involved, and was treated more harshly than the other. It seems that he was not in fact making an argument that he had been treated more harshly in the same circumstances, but rather that it was  
15 Mr Wilson who was ultimately responsible, so that he was in a different position from the claimant, and thereby more, not less, culpable.
93. Considering the difference in treatment between the two, I note that the claimant does accept that he did not complete the form properly, and appeared to suggest there was a general laxness around completing forms,  
20 which he said were the same or similar for many jobs. He implied that he was doing nothing different from the norm but had been unfortunate in getting caught out on this occasion. In particular, he suggested that he was entitled to assume that since the squad was experienced that they would know that the hand digging was to be done, assumed that it would be done, and for that  
25 reason he could tick the relevant box.
94. That this is his view is apparent in his allegation, at the appeal, that the method statement and risk assessment had not been completed and were in fact completed after the incident. He says that he did not mention this before the appeal, because he "did not want to land them in it". However he decided to  
30 raise it at the appeal because by then he had lost his job and presumably was aware that Mr Wilson had kept his.

95. While I have decided on a balance of probabilities that the method statement and risk assessment were in fact completed prior to the commencement of the trench digging job, even if I am wrong about that, then it would make no difference to the outcome. This is because it is not for this Tribunal to substitute its view on whether dismissal in the circumstances is fair or not. Dismissal will be fair where an employer has acted within the range of reasonable responses open to them.
96. In this case, Mr Malcolm did investigate the claimant's allegation when he raised it at the appeal. He interviewed the two men involved and checked the signatures on the method statement. I could not say that having investigated the allegation, the conclusion that he reached, given the information he had, was unreasonable. His investigations also confirmed that the claimant was in a position of responsibility in relation to supervision of the men, and groundworks generally.
97. The claimant's complacency over the importance of completing forms and his failure to take responsibility very much went against him at the disciplinary hearing. Even at this hearing, he stressed that there was a collective responsibility, and that it was not his individual responsibility, such that he should not have been dismissed.
98. Mr LeMay's evidence was that Mr Wilson understood that he had a responsibility for the incident, apologised for his lack of judgment, and was contrite. For these reasons, he said that he was able to maintain trust and confidence in him going forward.
99. In contrast, the claimant during the disciplinary hearing, but also during the appeal hearing, and indeed even while giving evidence in this hearing, did not appear to accept responsibility, suggesting that others were to blame.
100. Mr LeMay was concerned about the claimant's failure in correctly completing the permit, but he also took account of the fact that the claimant's version differed from his statement to his interview and subsequently. Specifically the claimant appeared to suggest that he had spoken to the men about hand digging, but then when the CCTV emerged and when other men could not

recall that, he had to accept that it had not been done and indeed that it had not been discussed. He attempted to deflect from the failure to ensure that there had been hand digging, by suggesting even at this hearing, that it could not have been hand dug because of the terrain, but was no answer to question why he had not used a vacuum which he accepted would have been the correct procedure. Similarly, again at this hearing, he attempted to deflect from his failures by insisting that the permit could be completed by the site manager who would also be responsible, which also seeks to ignore the fact that it was he who had completed it on this occasion. Mr Malcolm's evidence was that the way he responded to the disciplinary process meant he could no longer trust him, in contrast with his conclusions about Mr Wilson.

101. I appreciate that the claimant feels aggrieved about the outcome of this case when he had an unblemished record over 24 years with the respondent. I appreciate that he believes that it was not appropriate for him to have taken the brunt of the responsibility (among supervisors) when this project was not his overall responsibility, when he was attending as foreman on a transitory basis, and when the project manager was at fault too.

102. However I accept that the claimant and his comparator were not in truly parallel circumstances, but also that the difference in their circumstances including their reaction to the charges was such that it could not be said that the respondent had acted unreasonably in giving one a final written warning and in dismissing the other.

### **Conclusion**

103. I therefore conclude, in all the circumstances, that dismissal for gross misconduct was within range of reasonable responses open to the respondent, and therefore that the dismissal was not unfair. The claim is therefore dismissed.

<b>Employment Judge:</b>	<b>M Robison</b>
<b>Date of Judgment:</b>	<b>01 August 2024</b>
<b>Entered in register:</b>	<b>06 August 2024</b>
<b>and copied to parties</b>	