EMPLOYMENT TRIBUNALS

Claimant: Mr D Egan

Respondent: British Gas Trading Limited

HELD AT: Leeds **ON:** 19 July 2018

BEFORE: Employment Judge Rogerson

REPRESENTATION:

Claimant: Mr Paul Grindley, Solicitor
Respondent: Mr Rob Childe, Solicitor

JUDGMENT

The complaint of unfair dismissal fails and is dismissed.

REASONS

1. **Issues**

The issues were identified at the beginning of the case where the claimant clarified that the issue in this case was whether the decision to dismiss was a reasonable decision that a reasonable employer could have taken in the circumstances of this case. I explained at the outset that it is not for this Tribunal to step into the shoes of the employer and substitute the Tribunal's view for what the employer has done but the job is to judge the employer's actions in the particular circumstances of the case and having regard to the band of reasonable responses test. The findings of fact that I have made are based on the evidence that I heard for the respondent from Mr R Jackson, the dismissing officer, Mr I McKenzie, the appeals officer, Mr S Bacon, the line manager, Mr C Wilson who is the line manager of Mr Bacon. For the claimant I heard evidence from the claimant and I saw documents from an agreed bundle

of documents. From the evidence I saw and heard I made the following findings of fact.

1. The claimant was employed by the respondent from 17 January 2011. From 18 April 2016 until his dismissal on 17 October 2017 he was employed as a smart energy expert fitting smart metres for the respondent's customers.

2. Driving is an essential part of the claimant's role and the respondent has specific policies addressing driving which were introduced in 2010 and updated regularly thereafter. The primary purpose of these policies was protecting the safety of the respondent's employees, its customers and other road users. To that end a set of training materials were produced and provided to all employees which the claimant attended. The respondent set out its view as having a zero tolerance policy going forward to ensure that there was a change in behaviour and that view was supported by the unions. The policy defines driving as "being at the control of a motor vehicle whilst the engine is running (even if the vehicle is stationery) whether on public or private land". Specifically to this case paragraph 6.3.12 to 15 apply which prohibit the use of a mobile phone to make calls or send messages or for any other purpose whilst driving. Paragraph 6.3.15 specifically provides that breach of these provisions can be treated as gross misconduct and the respondent's disciplinary policy explains that gross misconduct is an offence which is so serious it removes the company's trust and confidence in the employee. In October 2016 the claimant had taken a snap chat video whilst driving and was verbally warned about this. This was an informal warning that he was given but when the claimant refers to the circumstances of this in his witness statement he says "I had foolishly taken a snap chat video whilst driving a vehicle slowly on a country road". That previous warning and those circumstances are part of the background context the respondent considered for the dismissal.

3. On 23 August 2017 the claimant sent via a WhatsApp message a photo while stopped on the motorway slip road in his van showing the flooded road ahead of him and stating "FFS what I do lol". The respondent on discovering this suspended the claimant and an investigation was conducted by Ryan Ackroyd.

4. An investigation report was produced which is at pages 103 to 122 in the bundle which was provided to the claimant.

5. A disciplinary hearing took place on 12 October 2017 which was chaired by Mr Jackson. The claimant gave his account of events of 23 August which is recorded in the minutes and Mr Jackson questioned the claimant to understand what his position was on the use of the phone. Mr Jackson then adjourned the hearing to consider his decision and the hearing was reconvened on 17 October 2017 for the purpose of Mr Jackson communicating his decision to the claimant.

6. A criticism that was put to Mr Jackson which he accepts is that at the reconvened hearing further information was sought to be provided by the claimant which was about advice in a flood situation which was not considered by Mr Jackson. He accepted he didn't look at this information, he had already his mind up and had made the decision and in any event

the information provided would not have changed his view. It was not disputed that the weather was extreme on the day in question. The same point arises in relation to the questions put to Mr Jackson about now obtaining meteorological report for the day in question. There was no dispute the weather was extreme. Mr Jackson didn't agree with the claimant's assertion that he was not driving when the photo was sent because of the start/stop technology within the van which temporarily turns the engine off. He accepted there was some ambiguity about the definition of engine running within the policy. However and importantly in his view the van engine was running in the sense that it was switched on when the claimant had taken the photo with his mobile phone. His witness statement at paragraph 25, 33 and 32 sets out the rationale for his decision to dismiss. An important factor for him was the loss of trust and confidence because he felt he couldn't trust that the claimant would not do this again. He believed it was possible and potentially likely that the claimant would use his mobile phone whilst driving in the future. Mr Jackson's belief was based on a real safety concern that he had regarding the claimant's use of the mobile phone. His belief was genuinely held by Mr Jackson. The claimant does not agree with the interpretation of driving in the policy. However the interpretation of the policy has to be considered in the context of the purpose of the policy which is safety. The respondent is entitled to interpret the policy widely in light of the particular circumstances of the case. I agree with Mr Childe's submission that the respondent was entitled to interpret in a way that gave effect to it and does so by the fact that driving can also mean driving while somebody is parked or stationery. The claimant did not accept that he was responsible for any failure in his actions and relied upon his narrow interpretation of driving. Mr Jackson describes the claimant's actions as gross negligence rather than deliberate which runs with it the risk of recurrence if you do not recognise any fault on your part. The claimant unfortunately lives or dies by the sword when he maintains a position of no fault. Mr Jackson set out his reasons in the dismissal letter. An important factor for him was the claimant's credibility. He did not accept that the claimant's motivation for sending the photo and message was a cry for help because of the language that was used in the message. It was put to the claimant that the responses that he received from his colleagues to his cry for help was silly demonstrating that the purpose of the message was a joke. Mr Jackson was entitled to conclude on the evidence before him that it was not sent as a cry for help and as a consequence of that to doubt the claimant's credibility. He was also entitled to conclude that the claimant had by his actions left him with no confidence that this would not happen again especially when he had previously used his phone while driving to send a snap chat video. The claimant at this hearing relies on a comparator Mr K Phillips. The important point is that neither Mr Jackson or Mr McKenzie were aware of Mr Phillips' actions. That is significant because an employer cannot be treating two individuals inconsistently if it does not know the circumstances of the other employee and how they have been dealt with. Furthermore I accepted Mr Childe's submissions that there were other material differences that prevent the inconsistency argument from succeeding. I accepted the respondent's evidence having heard both the dismissing officer and appeals officer that as the senior

managers that would have been a decision makers it is likely that Mr Phillips would have been treated in the same way as the claimant had they known about circumstances. I was satisfied that the level of investigation fell within the band of reasonable responses. Mr Jackson's belief was therefore based upon a reasonable investigation and reasonable grounds to support the belief he held. In relation to the appeal process Mr McKenzie considered all the 11 points of appeal that the claimant raised and addressed them in the outcome letter. He did not agree with the claimant's interpretation of the policy and was satisfied that Mr Jackson had applied the policy correctly. He did consider the extract about flooded roads that Mr Jackson had not considered at the disciplinary hearing but concluded that that did not affect the outcome. In answer to questions about whether the claimant had a genuine belief that he was not driving because the engine was not running Mr McKenzie said he did not believe that the claimant had that genuine belief. He said that at the time the photograph was taken the claimant had not made a conscious decision that taking the photo was ok because the engine was not running. That sums up the gross negligence point Mr Jackson makes. There was no conscious thought process followed by the claimant in which he actually considered whether his phone usage on the motorway slip road at the time he took the photo was appropriate. This is retrospective from the claimant. Mr McKenzie also had concerns about the credibility of the claimant's account of the purpose of the photo as a cry for help and the assertion that the claimant was at the time the photo was taken carrying out a dynamic risk assessment. He didn't know about Mr Phillips and there was no inconsistency of treatment argument provided to him on the appeal even though the claimant was represented by the union at the time. I accepted his evidence that he didn't know about the inconsistency argument until these proceedings. His letter setting out his reasons for dismissing the appeal are at pages 147 to 151 and he goes through each of the 11 points and addresses each of them before upholding the decision to dismiss. In relation to the WhatsApp message he states "I'm in agreement with the hearing manager that the tone and timing of the WhatsApp message did not demonstrate that your intention was a plea for help as you suggested. You did not wait for a response and continued to drive on through the flood stretch of road". He also considers the mitigation presented. I agree you had breached the policy by using your mobile phone whilst in your vehicle on the slip road to a motorway despite your mitigation of the unusually bad weather conditions and start/stop technology stopping the engine from running. The appeal process I found was thorough and fair. Mr McKenzie genuinely believed based on reasonable grounds and after a reasonable investigation which included the further points that had not previously been considered that the claimant was guilty of gross misconduct. I have not set out the law which was accurately set up by Mr Childe in his closing submission. I conclude by going back to the point that I started with that this is not the function of the Tribunal to say what I would do in these circumstances. It is to look at the decision that this employer has made and whether dismissal was a reasonable sanction open them in the circumstances. I agree with Mr Childe that a narrow interpretation of the policy which is what the claimant advances would circumvent the purpose of the policy which is to protect safety. The respondent is entitled as a

reasonable employer to have regard to all of the circumstances when it interprets a safety policy in a way that serves the purpose of that policy. It is clear the respondent wanted to change behaviour and an approach to mobile phone use to make it clear that there was a zero tolerance policy going forward. Unfortunately for the claimant that has resulted in his dismissal.

2.

Employment Judge Rogerson

Date: 19 September 2018

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