EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr R Fryer **v** **Balfour Beatty Group Employment Limited**

Heard at: Watford **On**: 13 and 14 February 2017

Before: Employment Judge Manley
Members: Mr S Bury
Mr A Scott

Representation
For the Claimant: Mr A MacMillan, Counsel
For the Respondent: Mr B Frew, Counsel

RESERVED JUDGMENT

1. The claimant was dismissed by reason of his conduct and that dismissal was not unfair.

2. There was no discrimination because of the claimant's age.

3. The conduct amounted to gross misconduct so that the claimant was not entitled to notice.

REASONS

Introduction and issues

1. This matter had two previous preliminary hearings but, unfortunately, no agreed list of issues had been drawn up. The representatives agreed to do this whilst the tribunal did some preliminary reading and that list of issues reads as follows:

2. Unfair dismissal

   2.1. Are the allegations against Mr Fryer capable of amounting to gross misconduct?

2.2. Was there a reasonable investigation?

2.3. Based on that investigation was there a reasonable belief of guilt?

2.4. Was the sanction within the band of reasonable responses?

3. Contribution

3.1. What, if any, compensation the tribunal should in those circumstances award to the claimant having regard to those factors set out in s.123 Employment Rights Act 1996 (including any reduction to be applied by reason of the contributory fault of the claimant).

4. Age discrimination

4.1. Whether Kevin White is a suitable comparator for the claimant?

4.2. What was the less favourable treatment?

4.3. Whether the less favourable treatment was the claimant not being given a real choice as to whether he worked during the night.

4.4. Whether the less favourable treatment was also the respondent not offering reasonable alternatives to night shifts

4.5. If so, whether this treatment was because of the claimant's age?

5. Also rather unfortunately, the matter had been reduced from a three day hearing, which gave indications of the time to be spent on various parts of the hearing, to a two day hearing. The bundle of documents was 450 pages and there were already some extra documents to be considered at the commencement of the hearing. There were three witnesses for the respondent as follows:

5.1. Ms J Thorburn, Senior HR Business partner;

5.2. Mr Craig Wood, Operations and Maintenance Manager, and

5.3. Mr R O'Keefe, Service Delivery Manager

6. There was also a witness statement for the claimant. These witness statements were relatively detailed.

7. We discussed how matters would be dealt with within the day given that there was a substantial amount of preliminary reading and the representatives and parties cooperated fully in making sure we did complete the evidence and submissions by lunchtime on the second day leaving the afternoon of the second day for deliberations. This meant that judgment had

to be reserved and a date for remedy, should it be necessary, was agreed in the future.

8. As the evidence was given on the first day it appeared that there were some documents not in the bundle that might well be necessary. On the morning of the second day a number of other documents were handed in although it is true to say that we only needed to see some parts of those documents.

The facts

9. The facts can be fairly briefly stated as most of them are not particularly in dispute.

10. The claimant started working for Tarmac in February 1999. There were then a number of transfers of his employment until he began working for the respondent some time around 2008. The respondent, along with some other substantial organizations, were involved in a joint venture ad there were a number of people working under different contracts. The claimant's job title was originally "Road Man" and he was employed primarily on day shifts to work out of the Swanley Depot in Kent, working on the M25, and a number of other major roads. His job involved dealing with excessive vegetation, drainage signage, repairs, traffic management and so on.

11. The claimant worked with a number of other similarly aged Maintenance Operatives; Mr Hutchinson, who was also over 65, and a Mr Sofild. Others were working with them were somewhat younger although not dramatically so.

12. The respondent is a large organisation; the claimant believes it has around 55,000 employees. It also has, as is common with organisations of this size, a number of policies some of which might be relevant to this claim. First they have a Sickness Absence Policy which gives details about the review meetings that might be held and how somebody should notify their employer about absence. (**IM to quote from 1.2 on R1**) They also have a Flexible Working Policy and a Disciplinary Procedure which includes references to gross misconduct. (**IM to quote from page 368**)

13. The respondent was involved with the claimant and his colleagues n something called "Connect Plus Services Consultation Process" which was the joint venture referred to earlier. The respondent was undergoing a review of the structure and consulting with staff on it. This seems to have started towards the end of 2013 and there were a number of workshops which were run with staff in those workshops; the respondent was talking to staff about working environment, levels of productivity and so on. The contract of the M25 was one of along duration of around 30 years. The respondent had a number of employees on different terms and conditions because of the TUPE processes.

14. The respondent was carrying out this work on behalf of Highways England which organisation has intended to introduce smart motorways and "all

lanes running". In essence, this would involve considerably more night-work than having previously carried out. Staff were written to in January 2014 as a response to the workshops and there was then a nomination of employee representatives for further discussions.

15. There were then a number of collective consultation meetings and the tribunal had before it a number of slides which were shown during that process and as part of the consultation. The claimant himself was not involved in those collective consultations.

16. One of the key proposals was to create something called and Emergency Response Team (ERT). People working on this team would work four night shifts followed by four day shifts. Those who remained on the Maintenance Operatives would be working more night shifts, originally this was 1 in 5 but was 1 in 4 after later consultations. Some of the proposals were altered during the consultation process.

17. The claimant had not been involved in these collective consultations. He told the tribunal that he had previously been a trade union representative for many years but appeared not to be directly involved in this. Furthermore, towards the end of 2014, the claimant had a period of sick leave and had been referred to Occupational Health with respect to that. An Occupational Health Report of 19 November (page 305) set out the background to the claimant's period of sick leave from 9 July. He had been signed off with depression and had been going through alcohol detox. That report stated that he had anxiety but that it "does not affect his function significantly from his perspective" and that his "predominant anxiety generally manageable".

18. With respect to the possibility of working night shifts the Occupational Health Report says this:

> "He reports that he does not want to work night shifts all the time, due to the affect it will have on his body clock, work-life balance, social interaction, as well as the maintenance of his medical conditions and he reports he has already request to be considered for an ISU role if possible which would mean a 50/50 day and night work due to his separate medical condition it would also be recommended that he avoids high risk lifting". (page 307)

19. It seems that this is probably a mistake as the ISU role was not 50/50 day and night work but might well be a reference to ERT as set out above. Although the claimant was not fit to attend work at that point in November, we understand that he returned to the workplace in early 2015. The claimant, along with his colleagues received the details of the ongoing consultation by letter and copies of the outcome of those meetings.

20. On 5 February the claimant ad a welfare meeting with Mr Wood where the reasons for his absence were noted and discussed and the medication that he was taking. The reference to going on to permanent night shifts was raised and the claimant made it clear that he would not want to go on to night shifts. Mr Wood reported "You advised us in this meeting that this is

purely personal as you would not see your wife and not medically related." (page 311).

21. The respondents also began individual consultation meetings with respect to the changes to the shift pattern. The claimant agreed that he attended these meetings which totalled six consultation meetings. The tribunal have seen notes from those meetings and the claimant says that he did not get copies of those notes at the time. In large part he accepts that he went to those meetings and mostly accepts what he is recorded to have answered to the standard questions asked there. At the first consultation meeting in November 2014 the claimant is recorded as saying that he had a personal preference with respect to day work and the comment "perm days" is made. It is also recorded that the claimant was interested in ISU, maintenance and "ERT" all at Swanley. It was also recorded that he would be willing to sign a new contract.

22. The second consultation meeting took place, again with Mr Wood, on 18 February. Again he is appeared to be standard questions as the respondent were seeing a fairly large number of people. With respect to those matters most of interest to the tribunal there was the discussion about the maintenance shift pattern, this showed that the shift had reduced originally from 12 hours to 10 and then in that note to 9 hours with adjusted start times. It goes on to say "We are still proposing a 1 in 4 shift pattern to ensure we can meet the needs of the contract". Later the claimant seems to have referred "permanent days" and there is a reference to "no facilities at night". This appears to be a fairly lengthy meeting where various things are gone through and there were some questions with respect to the gritting.

23. A further letter was sent to the claimant on 30 March which outlined the changes and for him to attend the third consultation meeting which took place on 7 April, again with Mr Wood. In this document it is suggested that there would be copies of the new contract and some other policies such as discipline and grievance, accident and life cover etc.

24. There appears to be detailed discussion about the new contract which was gone through with the claimant and gain reference to the maintenance shift pattern which was not changed since the previous one. The claimant is recorded as having no question about that pattern. It is then recorded (page 324) that the people who could not work the shift pattern could "submit a Flexible Working Request on or before 5 May". It is suggested there that a flexible working policy and form would be given to people. Mr Wood's evidence was that it was although the claimant either did not receive one or does not recall that he received one. Further details of the contract were discussed.

25. At page 326 it says this:

> "If you chose not to sign your contract of employment and you have not submitted a Flexible Working Request, we will arrange for a further individual

> consultation meeting with you again to discuss your reasons. If we are unable to resolve the issues then we may have to give you notice to terminate your existing contract".

26. There was then a reference to the ERT and a suggestion that the claimant did not express an interest in it although it is likely that is incorrect because the claimant almost certainly did express such an interest. It says this: "Applications for Emergency Response Team will only be accepted when you have returned your signed contract on or before 5 May 2015". The claimant then received a follow up letter to that. He had not signed the new contract. Neither had he filled out any Flexible Working Request nor, the respondents say, made an application for ERT.

27. At the fourth individual consultation meeting on 18 May with a different interviewer it is recorded that the claimant "does not wish to work nights. Happy to apply for ERT". A further letter was sent on 26 May which sets out the background including his clear wish not to work night shifts and the respondent's reasons for needing people to work that night shift. It states:

> "Although we appreciate your personal wish to not to work night shifts the requirement for our Maintenance Operatives is to work the rotating shift pattern to enable us to deliver the service required by our client".

It goes on

> "Although it is not a particular reason for you not returning your contract at the fourth meeting you expressed an interest in the Emergency Response Team positions. I can confirm that the application form for this position has been posted out to all staff on Tuesday 18 May and if you wish to apply you should complete the application form and return it to Tracy Morris, Resourcing Partner, at South Mimms by 5pm on Monday 8 June".

28. The claimant was told that if he did not sign the contract there would be a sixth meeting at which his employment would be terminated.

29. [The claimant's evidence is that at some point he did get an ERT application form. One was handed in to the tribunal but he believed the one that he completed was different in that it had specific reference to him not being able to apply for ERT until he had signed the contract. He had not signed the contract at this point. The claimant was unclear about when he had made the application and what had happened to it. When he was asked this a number of times he could not recollect who he had given his application form to. In his witness statement he said that he had completed it with several colleagues. He believed that it was Dave Hutchinson, a colleague of his who took them all and put them in pigeon holes. He relieved no response to that. It is the respondent's position that they never received such an application form. It would appear that is probably correct as they say a number of times in the consultation meetings that they have not received such an application form.

30. The claimant was invited to a meeting on 26 May where it is recorded "Will sign because wants to apply for ERT". Although he also makes it clear that he is not happy with the position. A further letter was sent to him on 11 June which sets out the individual consultations and invites him to a final meeting. That final meeting took place on 23 June with Mr Wood. In that document (page 344) t records "Wants to apply ERT but thinks it's morally ethically and unlawful for us to ask him to sign the contract". He also records that he wants them to consider ERT and "Ask can he still apply for ERT if he signs his contract" (page 345). At document (page 345.1) Mr Wood sent an email to Ms Lush (**IM to include this**).

31. By letter of 26 June (**IM also to quote from 17 June where the claimant almost certainly did get that letter**)

32. Back to 23 June – He received a notice of termination of employment. This told him that he was being dismissed for some other substantial reason and that his notice would expire on 11 September. He was still asked to sign a new contract. By letter of 30 June the claimant advised that he would sign the contract and he id so on 1 July. The claimant accepted, when he was cross examined that that meant he was agreeing to the terms contained therein which included working the night shifts as previously agreed. The document he signed had some other documents attached but did not have the Sickness Absence Procedure. The change in shifts was to come in to effect on 21 September and the claimant worked until that day. In the meantime he asked for a grievance but when he was asked for details of that (page 374) he did not appear to take it further.

33. The claimant did not attend work after 21 September. He sent text messages to Line Managers saying that he would not be attending and he rang Mr Wood and asked to meet with him to discuss his absence. That meeting took place on 8 October with Mr Wood and someone from HR. There was some discussion about the claimant not being able to work nights but he confirmed that he had not seen the doctor and he did not have a certificate signing him off work. When he was asked about night work he said that he did not want to do the night work and it is recorded that he said "stress, heart attack, divorce, its just not on". He was asked about whether he had made a Flexible Working Request, so he said the option was not given to him.

34. Mr Wood then sent a detailed letter to the claimant of 22 October following that meeting. (Page 377). This says:

> "We asked you the reason why you are not attending work and the reason you stated was that you do want to work nights. You believed that working nights would negatively impact your continued recovery from your alcohol problem".

35. Various references were made to the consultation process but it also states this: "However, you also sated in this meeting you would be interested in applying for a role in the ERT Team. We did not receive any application from you fro this post". Anther day shift position was offered to the claimant

on the Area 4 contract but the claimant decided that that would involve a great deal of ravelling and he did not accept it. It was recorded the claimant's employment was terminated but that eh then signed the contract. He was then instructed to return to work on 29 October for two days shifts and then he would revert to night shifts and it would continue with the 1 in 3 cycle.

36. The claimant responded by sending a text message to Mr Wood which reads: "Thank you for your recent letter suggests that you proceed with the disciplinary hearing."

37. Mr Wood therefore decided to carry out an investigation and he prepared a fairly detailed investigation report which set out the background, the investigation, further detail about the claimant's recovery from his alcohol problem and his difficulty with working nights. He summarised that the claimant had failed to attend work and therefore failed to fulfil his obligations under the contract but that he had signed it on 1 July 2015. Mr Wood believed there was no mitigation and in his conclusions said that the claimant had failed to attend work "without a medical reason or substantive justification" and that he had "failed to follow the Absence Reporting Procedure". He recommended that the claimant was invited to a disciplinary hearing and that followed (page 387) **any quotes**?

38. The disciplinary hearing took place on 17 November. Mr Smith was the officer who undertook that and he has not been able to give evidence as he no longer works for the respondent. The notes of the meeting are relatively short but there was discussion about why the claimant could not work nights. He was asked why he had not applied for ERT and the claimant said that he had but he could not remember who he had given his form to. The claimant said that he had told various people at consultation that he did want to join ERT. There was then some discussion about the Area 4 job and why the claimant had not applied for flexible leave. At page 391 rather oddly Mr Smith asks the claimant whether he was still interested in ERT and the claimant said he was and he also hoped there was another job. For some reason this does not seem to have been taken forward either by the respondent or by the claimant. The person from HR criticised the claimant for not putting in the request.

39. By letter of 26 November the claimant was dismissed (page 392) (IM to do any quotes)

40. The claimant put in an appeal and that was dealt with by Mr O'Keefe. We have seen a transcript of the hearing as well as notes of the hearing. Considerable time was taken up with the question of why the claimant chose to text and whether tat was within the sickness absence procedures but they were no with Mr O'Keefe at the time he had the discussion at the disciplinary hearing. Mr O'Keefe was a relatively new employee but appears to have looked at all the relevant documents before he undertook the appeal. (**IM to put anything in from the appeal**).

The law and submissions

41. (**IM to add age discrimination law and unfair dismissal law**)

42. We also received written submissions from the representatives. These were detailed and very helpful in assisting the tribunal in reaching its XXX.

43. There is really no dispute between the parties as to the legal tests which should be applied in unfair dismissal and in age discrimination. There was a dispute between them as to the importance of a case Robinson v Tescom Corporation UK EAT 0567/07. Mr Frew says that it binds the tribunal and is XXX with the factual matrix in this case. Mr MacMillan says that it is not and there are some significant differences. The question in that case is whether the claimant had affirmed the new terms of his contract which had been varied by the respondent because the claimant had, in that case, had continued to work and had not resigned.

44. It seems to the tribunal that this is a slightly different case but it matters not because we have come to our judgment based on the tests as set out above rather than necessarily needing any guidance or being bound by anything said in the Robinson case.

Conclusions

45. We answer the questions, with some slight amendments, set out in the list of issues.

46. The first is the question of whether the XXX with respect to the claimant were capable of amounting to gross misconduct. We considered this with some care. The tribunal does have some sympathy for the claimant who had many years working for the respondent without any difficulties working days for them. We ca understand that he would have considerable hesitation about changing to a significant amount of night working. However, the difficulty is that the claimant did understand when he signed the contract that contained the requirement to work nights and he accepted, under cross examination, that that meant he was agreeing to those terms when he signed it. In the absence of any supporting evidence as to why he should not work nights. It seems to the tribunal that his refusal to attend work must amount to a breach of his contract of employment. There are fewer significant breaches when simply not attending work. That is the basic minimum required of an employee. Whilst we understand that the claimant may well have been confused by the process. We also cannot see why he did not make greater attempts to secure the ERT work when the respondents had made it clear that they had no0t received an application from him. This employee had, as he told us, some years experience as a trade union representative so it is not that he did not understand what he was agreeing to. He had resisted signing the contract for a number of months, with some justification because of the hesitation he had about working nights and the impact it would have on himself and his home life.

However, the respondent s had provided reasonable business reasons for the requirement and carried out extensive consultation on it. We have come to the view that his failure to attend work must amount to gross misconduct.

47. We put here that we first then have to decide whether the respondent can show a reason for dismissal. Of course this follows what we have just said. The respondents have shown that their reason for dismissal was the claimant's conduct, namely him refusing to attend work.

48. We next have to answer the question as to whether there was a reasonable investigation. The claimant himself accepts that Mr Woods's report was concise and accurate. Again, the tribunal have some sympathy because as some parts of the process that the respondent decided to carry out was a little unclear in that they appeared to suggest flexible working which then, on the evidence before us, meant no one was accepted under that procedure. Of course it is not clear whether the claimant would or would not have been accepted but the indications are that he would not. We are also not entirely sure why no one in one of the many meetings held with the claimant did not actually have the ERT form there and ask him to fill it in there and then. However, it is not for us to run the respondent's procedure. The claimant appeared to understand that he needed to apply and, although he said that he did, his very vague answers with respect to how he applied and whether he applied correctly having been set out clearly in writing what he should do with the application form meant that even if he did apply the respondent s did not receive it. His investigation really centred on the claimant's refusal to attend work; there was no doubt that the claimant was refusing to attend work as he felt unable to work nights. The investigation is well within the range of reasonable responses.

49. Turning to the question of whether the respondent had a reasonable belief of the claimant's guilt it almost goes without saying that must be a reasonable belief as it is clear, on the facts of the case that the claimant was not attending work. We think there is less to be said about his failure otherwise to explain his absence whether that was within or without the Sickness Absence Policy.

50. We then have to consider whether the sanction of dismissal was within the band of reasonable responses. Of course we remind ourselves that we must not substitute our view. Although, as stated earlier, the tribunal had considerable sympathy for the claimant and the decision might seem to some people to be a hard one where the employee is a long serving employee with obvious difficulties about working nights, we can not say that it stands outside the range of reasonable responses given the extensive consultation and possibilities there were for the claimant to apply for ERT or perhaps to get some medical evidence (his hint about the psychiatrist).

51. This means that we have decided that eh dismissal was not unfair. We therefore do not need to answer any questions about contribution.

52. Turning then to age discrimination we should say first of all that the claimant has not succeeded in this claim. It is almost certainly not necessary to go through the issues as drafted. The claimant has not identified any less favourable treatment because of age. He readily accepted when cross examined that this was just something that he surmised. On the evidence before us, all employees were treated the same in that they all had similar consultation meetings, all had the opportunity to apply for flexible working and/or to apply for the ERT. Some were successful in getting places in the ERT and some of them might well have been lucky enough to secure day work. The claimant has no been able to show that they are suitable comparators. (**IM to say anything else and look at page 61 for the respondent's explanation of that which the claimant has not challenged**).

53. Given that the claimant has not succeeded in either of his claims, there is no need for the remedy hearing which was listed for 3 May to proceed and that day is therefore vacated.

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Employment Judge Manley

Date: 22 March 2017

Sent to the parties on: 6 April 2017

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For the Tribunal Office