

Summary dismissal for health and safety breach was unfair

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An employer's decision to dismiss an employee summarily on grounds of gross misconduct was not a reasonable response to an employee's failure to adhere to a new health and safety procedure. It was therefore outside of the 'range of reasonable responses' open to the employer, and it constituted an unfair dismissal.

Mr Newbound was employed as a penstock co-ordinator by Thames Water. He had been employed for 34 years with a clean disciplinary record. Thames Water introduced a new safe system of work form, the SHE4, which specified that breathing apparatus must be used for sewer inspections. Mr Newbound's line manager ran through the form with Mr Newbound and an independent contractor, Mr King. Mr Newbound and Mr King consulted Mr Andrews, the 'competent person in charge' of the site, as to whether it was safe to proceed into the sewer without breathing apparatus. As the gas monitor indicated that it was safe, Mr Newbound and Mr King entered the sewer wearing dust masks and carrying a gas monitor. Mr Gunn, field services manager, attended the site and noted that the men were not wearing breathing apparatus. As such, Mr Gunn undertook an investigation into potential misconduct.

Mr Gunn found that Mr Newbound had countersigned the SHE4 and used a dust mask, which had been inadequate protection. Mr Gunn decided that whilst Mr Andrews was the competent person in charge, he was relatively inexperienced, whilst Mr Newbound was also senior and had led Mr King into the sewer. As such, gross misconduct proceedings were commenced against Mr Newbound whereas Mr Andrews was given a warning. Mr Newbound appealed following his summary dismissal for a serious breach of a health and safety policy. The appeal was rejected, and Mr Newbound brought a claim for unfair dismissal.

The Court of Appeal held that the dismissal had been unfair. To say that summary dismissal was within Thames Water's range of reasonable responses in these circumstances would be to stretch the test to an infinite width. The employment tribunal made 4 findings with regards to SHE4, all of which were crucial to the finding of unfair dismissal: (i) SHE4 was a relatively new document; (ii) employees had not been trained on SHE4; (iii) Mr Newbound had previously exercised discretion as to whether to use breathing apparatus; and (iv) Thames Water had not previously objected to Mr Newbound relying on

his experience in such matters. Further, the Court of Appeal found that Thames Water's disparate treatment of Mr Andrews, who only received a written warning, was "an obvious case of unjustified disparity".

This case shows that employees' breaches of health and safety will not be treated any differently by tribunals than would be the case with any other cases of misconduct. As such, employers should not expect greater deference in respect of their decisions to dismiss where the misconduct relied on relates to health and safety.

Newbound v Thames Water Utilities Ltd [2015] EWCA Civ 677

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