EMPLOYMENT TRIBUNALS

Claimant: **Mr Pritpall Singh**

Respondent: **Cadent Gas Limited**

Heard at: **Leicester** **On:** **4-7 June 2018**
2 July 2018 (in chambers)

Before: **Employment Judge Moore**
Mr Rose
Mr Bhogaita

Representation
Claimant: Mr Panesar, Counsel
Respondent: Ms Balmer, Counsel

RESERVED JUDGMENT

1. The claimant's claim for unfair dismissal succeeds.

2. The claimant's claim for wrongful dismissal succeeds.

3. The claimant is not a disabled person within the meaning of Section 6 of the Equality Act 2010. The claims for discrimination arising from disability and indirect discrimination on the grounds of disability are dismissed.

4. The claimant's claim for unfair dismissal on the grounds of trade union membership or activities succeeds.

5. The issue of remedy to be determined at a separate remedy hearing.

REASONS

Background

6. This is a claim for unfair dismissal (S98 Employment Rights Act 1996), unfair dismissal on the grounds of trade union activities (S152 Trade Union and Labour Relations (Consolidation) Act 1992 ("TULRCA")), discrimination arising from disability (S15 Equality Act ("EA" 2010)), indirect disability discrimination (S19 EA

2010) and breach of contract (wrongful dismissal for failure to pay notice pay). The ET1 was presented on 20 September 2017. The claim was heard at Leicester Employment Tribunal before a full Tribunal on 4-7 June 2018. The decision was reserved as there was insufficient time to reach Judgment. Parties were ordered to provide written closing submissions which they did so and also submitted replies to each other's submissions. The Tribunal met on 2 July 2018 and reached the unanimous decision set out in the Judgment above. The Tribunal refused an application by the Claimant to adduce evidence from a witness who had not had a statement exchanged in accordance with the directions.

7. There was an agreed bundle of 877 pages in addition a number of documents were disclosed and added to the bundle during the course of the hearing. The Tribunal also heard seven recordings of calls between the claimant and members of the respondent's Dispatch and the claimant's supervisor and a member of the respondent's Dispatch Team. The Tribunal heard witness evidence from the claimant and Mr P Whittaker, for the claimant and a Mr P Wilson and Mr I Dennis for the respondent.

8. The issues before the Tribunal were as follows:-

Unfair Dismissal – S98 Employment Rights Act 1996

a) Has the respondent shown the reason for dismissal?

b) Was that reason a potentially fair reason?

c) Was a fair procedure followed under Section 98(4)? If not what was the percentage change of a fair dismissal?

d) Was the dismissal within the range of reasonable responses?

e) Was there a failure to comply with the ACAS code?

f) Did the claimant contribute to his own dismissal?

9. Dismissal on grounds related to union membership or activities – S152 TULCRA 1992

a) Was the dismissal of the claimant for the reason or principal reason that the claimant was a member of an independent trade union or had taken part or proposed to take part in the activities of an independent trade union at an appropriate time?

b) The claimant relied upon nine activities as set out in his further and better particulars of claim. The respondent accepted he was involved in these activities save it was disputed he was involved in the respondent's pay negotiations (paragraph h) and that he had set up forums for engineers to see communications from the union regarding changes in health and safety legislation and the current pay deal (paragraph i).

10. Disability Discrimination

Section 6

a) The respondent disputed that the claimant was a disabled person within the meaning of Section 6 of the Equality Act 2010.

b) Did the claimant have a physical or mental impairment namely pre diabetes?

c) If so, did / does the impairment have a substantial adverse effect on the claimant's ability to carry out normal day to day activities?

d) If so, is that effect long term? In particular when did it start and;

e) Has the impairment lasted for at least twelve months?

f) Is or was the impairment likely to last at least twelve months?

g) Are there any measures being taken to treat or correct the impairment? But for those measures would the impairment be likely to have a substantial adverse effect on the claimant's ability to carry out normal day to day activities?

11. Discrimination Arising from Disability S15 EA 2010

a) The detriment relied upon by the claimant was his dismissal.

b) Did the respondent lack knowledge of the claimant's disability?

c) Has the respondent treated the claimant unfavourably because of something arising in consequences of his disability? The "something arising in consequence" was the delay in arriving at a gas escape due to the claimant's need to increase his blood sugar levels for his pre diabetes by collecting and eating food.

d) If so can the respondent show that its actions were a proportionate means of achieving a legitimate aim? The legitimate aim relied upon by the respondent were to protect the health and safety of persons and property.

12. Indirect Discrimination on grounds of disability S19 EA 2010

a) Did the respondent apply the following provision, criteria and / or practice ("the PCP") namely, the requirement to attend a gas escape within 60 minutes? The respondent disputed there was a compulsion on any engineer to take the emergency call if there were good reasons for not doing so. Once the call is accepted the respondent accepted the requirement came into force.

b) Did the respondent apply the PCP to the claimant at any relevant time?

c) Did the respondent apply (or would have applied) the PCP to persons with whom the claimant does not share the characteristic e.g. a non-disabled person?

d) Did the PCP put persons with whom the claimant shares the characteristic at one or more particular disadvantages when compared with persons who were not disabled?

e) Did the PCP put the claimant at that / those disadvantage(s) at any relevant time? The PCP was set out in the further and better particulars as the "requirement to attend a gas escape within 60 minutes in circumstances when the engineer in question has not had the rest breaks due under company guidance". The respondent disputed there was such a PCP and that the alleged PCP put or would put people with pre diabetes at a particular disadvantage in comparison with individuals who do not have pre diabetes.

f) If so has the respondent shown the PCP to be a proportionate means of achieving a legitimate aim? This was the same as set out in paragraph 11 (d) above.

13. Wrongful dismissal

a) Was the claimant guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment thereby entitling the Respondent to summarily terminate the contract?

The Relevant Law

14. Unfair Dismissal

The relevant law in relation to the unfair dismissal claim is set out in Section 98 of the Employment Rights Act 1996. The relevant sections provide:

Section 98

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—
(b) relates to the conduct of the employee,
….
(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) 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 for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

15. In a conduct dismissal case **British Home Stores v Burchell [1980] ICR 303**, the Court of Appeal set out the criteria to be applied by Tribunals in cases of dismissal by reason of misconduct. Firstly the Tribunal should decide whether the employer had an honest and genuine belief that the employee was guilty of the dishonesty in question. Secondly the Tribunal has to consider whether the employer had reasonable grounds upon which to sustain that belief. Thirdly at the stage at which the employer formed its belief, whether it has carried out as much as an investigation of the matter as was reasonable in all of the circumstances. Although this was not a case involving dishonesty it is well established that these guidelines apply equally in cases involving misconduct.

16. The relevant authorities in relation to reasonableness under Section 98 (4) were considered by the EAT (Browne-Wilkinson J presiding) in **Iceland Frozen Foods v Jones [1982] IRLR 439.** The test was formulated in the following terms:

(i) "Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the Industrial Tribunal to adopt in answering the question posed by [ERA 1996 s 98(4)] is as follows.

(ii) the starting point should always be the words of [s 98(4)] themselves;

(iii) in applying the section an Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair;

(iv) in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer;

(v) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

(vi) the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair'.

17. In assessing whether the claimant's conduct amounted to gross misconduct that conduct must be deliberate wrong doing or gross negligence. In the case of deliberate wrong doing it must amount for willful repudiation of the expressed or implied term of the contract **(Sandwell and West Birmingham Hospitals NHS Trust v Westwood).**

18. As this is a case where inconsistency is relied upon the similar situations must be truly similar: **Hadjioannou v Coral Casinos Ltd [1981] IRLR 352.** We were further referred to **Securicor Ltd v Smith [1989] IRLR 356; Paul v East Surrey District Health Authority[1995] IRLR 305 and Harrow v London Borough of Cunningham [1996] IRLR 256** for authority that where an employee consciously distinguishes between two cases that decision can only be challenged if there is no rational basis for the distinction. We were referred to **Wilson v Humphreys and Glasgow Ltd [1975] IRLR 211** by the respondent's submissions in reliance of a submission that an employer cannot be considered to have treated other employees differently if he was unaware of their conduct. This follows what is quoted and attributed to this case in Harveys Division D1 para 1041 but having considered the actual judgment in this case it is not authority for the point relied upon. Counsel for the claimant referred us to **Cain v Leeds Western Health Authority [1990] ICR 585** as authority that a dismissal may be held to be unfair on the grounds of inconsistency in that an employer has dealt more leniently with similar misconduct.

19. If the dismissal is procedurally unfair the Tribunal must assess the percentage chance of the claimant being fairly dismissed **(Polkey v AE Dayton Services Ltd [1987] IRLR 503, [1987].**

20. The Tribunal must consider whether, under S207 (2) TULRCA 1992 there is any provision of the ACAS Code of Practice on disciplinary procedure which appears to be relevant.

21. Should the claimant's basic and or compensatory award be reduced under S122 (2) and S123 (6) ERA 1996. The wording of the two provisions are not identical and differing reductions can be made in principle. S122 (2) provides that where the tribunal considers any conduct of the claimant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly. S123 (6) provides that where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

22. In **Steen v ASP Packaging Ltd [2014] ICR 56** (Langstaff P presiding) the EAT stated that the application of those sections to any question of compensation arising from a finding of unfair dismissal requires a Tribunal to address the following: (1) it must identify the conduct which is said to give rise to possible contributory fault; (2) having identified that it must ask whether that conduct is blameworthy—the answer depends on what the employee actually did or failed to do, which is a matter of fact for the Tribunal to establish and which, once established, it is for the Tribunal to evaluate; (3) the Tribunal must ask for the purposes of ERA 1996 s 123(6) if the conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did cause or contribute to the dismissal to any extent then the Tribunal

moves on to the next question; (4) this is to what extent the award should be reduced and to what extent it is just and equitable to reduce it.

23. S152 Unfair Dismissal

Section 152 of TULCRA provides:

152 Dismissal of employee on grounds related to union membership or activities

(1) 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—

(a) was, or proposed to become, a member of an independent trade union, …

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

24. Reason or principal reason

The reason or principal reason test is one of causation. The union grounds must be the sole or predominant reason. The motive or purpose in dismissing is not the issue. It does not have to be shown that the employer was motivated by malice or prejudice **Dundon v GPT LTD** [1995] IRLR 403.

25. Burden of proof

The burden of proof to show the reason for dismissal is on the employer as in an ordinary unfair dismissal claim. If the employee produces evidence that casts doubt upon the employer's reason, raising a prima facie case, then it is for the employer to show the reason for dismissal (**Serco Ltd v Dahou** [2017] IRLR 81) per Laws LJ at paragraph 30:

"If the prima facie case is made out, then it is for the employer to show the purpose of his act or the reason for the dismissal, and therefore to prove what were the factors operating on the mind of the decision-maker. It follows, of course, that in such a case a critical element in the task of the employment tribunal consists in their reasoned assessment of the matters, certainly the central matters, advanced by the employer in proof of those factors."

26. Disability Discrimination – Section 6 EA 2010

6 Disability

(1) A person (P) has a disability if—

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

Part 2 Schedule 1 provides:

Long terms effects

(1) The effect of an impairment is long-term if—
(a) it has lasted for at least 12 months,

(b) it is likely to last for at least 12 months, or

(c) it is likely to last for the rest of the life of the person affected.

(2) If an impairment ceases to have a substantial adverse effect on a person's ability to carry out normal day-to-day activities, it is to be treated as continuing to have that effect if that effect is likely to recur.

27. Findings of fact

We found the following facts on the balance of probability.

28. The claimant commenced employment in January 1988 as an apprentice. At the time of his summary dismissal on 14 September 2017 he was a Lead First Response Engineer whose role was to deal with public gas leaks. The respondent was formerly National Grid Plc and became Cadent Gas Ltd in May 2017. The respondent is the UK's largest gas distributor and manages the national gas emergency service free phone telephone line on behalf of the gas industry.

29. The claimant was part of a team of Lead First Response Engineers. He was a senior engineer and very experienced. He reported to his supervisor Rob Baxter. Until the incident that led to his summary dismissal the claimant had an unblemished career and disciplinary record.

30. The respondent had a number of formal procedures setting out how engineers were required to respond to Gas Escapes and other emergencies.

31. The National Grid Gas Operational Procedures for Dealing with Gas Escapes and Other Emergencies was issued in September 2013 (the "EM72"). This provided a series of mandatory and non-mandatory requirements with the word "shall" denoting a mandatory requirement and "should" indicating best practice and preferred method. It set out under "Background" that failure to comply with the requirements could result in NGG (National Grid Gas) and / or the individual employee facing criminal charges and individual disciplinary action. 3.1.1 of the Procedure set out different categories of incidents; with a priority escape requiring a response time of 1 hour ("P1 gas escape"). This is the highest level emergency gas escape signifying a potentially uncontrolled gas escape. 4.1 of the Procedure provided as follows:

"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 predictable 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."

32. The Engineering Bulletin 119 dated 24 March 2011 ("EB119") referred to the EM72. This set out clarification of site arrival requirements. The engineer was required to *"confirm receipt of the work order and commence travel to site without delay taking the most appropriate route to arrive on site in the shortest practicable time".*

33. The respondent's disciplinary policy was last updated in September 2016.The claimant's position was that a supplementary policy called the H&S Golden Rules Management Guidance should have been followed to determine if disciplinary action should be taken as his was a case of an alleged breach of health and safety.

34. The disciplinary policy referred to an Employee Code of Conduct dated September 2010. It sets out a non exhaustive list of potential gross misconduct. In the later dismissal letter the respondent referenced the breaches as refusal or failure to comply with a proper instruction and breaches of health and safety rules or regulations resulting in possible or actual damage to property or injury to persons.

35. The disciplinary policy contained a flowchart which provided that following an incident or allegation the line manager would undertake a basic fact find. If there was a case to answer an initial assessment / triage would take place by the Line Manager with guidance / advice from Case Management who were the respondent's HR team. There would then flow a number of different processes depending on what the category of misconduct was.

36. Calls reporting gas leaks and concerns came into a Dispatch Centre ("Dispatch") who would then allocate the call to an engineer. There had been a history of complaints and grievances raised by the claimant that Dispatch were not following the agreed process for allocating calls to engineers. We return to this below under our findings about the claimant's trade union activities.

37. Dispatch used a system called "Gantt" which was an online schedule of each engineer's movements on a particular shift. The engineers were listed by name and then their whereabouts broken down by hours were logged. For example if they had attended a call out between 8am – 9.30 am this would be shown on the chart next to that individual engineer. Other important matters during a shift were also recorded such as if an engineer had taken a break or if they had undertaken a risk assessment.

38. The respondent operated a risk assessment that was to be undertaken when an employee has reached 12 hours work in a day and was required to carry on. This was set out in a flow chart document ("Fatigue Risk Assessment"). This set out a series of questions to follow in assessing fatigue risk including how many successive nights the engineer had worked, if the engineer had had a day off in the proceeding (sic) 7 days or 2 in the proceedings (sic) 14 days. Depending on the answers to those questions at 16 hours the engineer either had to be stood down or a full risk assessment was carried out which prompted further questions to be addressed. There was an important and relevant question at this stage of the risk assessment. If an engineer had had less than 11 hours daily rest the previous day and has worked for more than 12 hours the assessment stated that arrangements must be made to relieve them as soon as possible.

Claimant's trade union activities

39. The claimant was the health and safety representative and shop steward for the GMB trade union and had held these positions since 2012.

40. The respondent recognises three trade unions, one of which is the GMB. The structure of union recognition within the respondent was as follows. The "DOF" was name for the 6 national level representatives. The "AOF" was the regional level with 30 representatives. The "SOF" level was the local level with 100 or so local representatives. The claimant was at AOF level.

41. The claimant had cited nine trade union activities he relied upon in relation to S152 (1) (b) claim in further and better particulars. There was no real issue between the parties that the claimant had been engaged in trade union activities. The respondent accepted in their closing submissions that the claimant was involved in seven of the activities listed although this was at odds with Mr Wilson's evidence who only disputed one activity namely paragraph (h) which set out that the claimant represented the union in pay negotiations and was a key part of the communication sent out on behalf of the union. Mr Wilson's primary position was that prior to the disciplinary process he was not aware of the claimant's involvement in the listed activities or more generally in any detail. Mr Wilson was aware of a workshop that had been set up between the engineers and Dispatch to discuss issues raised about the way engineers were called out but was not involved in the meeting or aware of specific issues. Mr Wilson recalled the claimant raising the stress survey at an AOF meeting he had attended. He did not agree that the activities described at paragraph (h) of the further and better particulars formed part of his role as an AOF representative although he gave no detail as to why or how he would know the extent of the claimant's involvement in internal union communications The more serious challenge to this activity was that pay negotiations were dealt at a higher level (DOF) to the claimant's level.

42. It was not disputed that the claimant had raised a number of grievances prior to the events that led to his dismissal. There was evidence in the bundle regarding these grievances and the outcomes as well as witness evidence from the claimant. The Tribunal heard limited witness evidence from the respondent about their position in relation to the grievances other than Mr Wilson was aware the claimant had raised concerns but his evidence was he had no awareness of the details or any involvement in those grievances.

Grievance regarding unfair allocation of work by Dispatch to claimant

43. The claimant raised a number of grievances against Dispatch that he was receiving more calls than other engineers and he was being discriminated as he was challenging Dispatch in his role as a union representative. The Tribunal was referred to a document drafted by a Janet Jordan of the Respondent which was a record of an investigation into a grievance raised by the Claimant in June 2015 ("the June 2015 grievance record").

44. This records that the claimant had raised a grievance against Dispatch informally in October 2014 after Dispatch had agreed to recognise the local agreement in June 2014 being "first in first out" (referencing the call out system for engineers) then failed to follow it. The grievance cites a number of examples where the claimant maintained he had been unfairly allocated work by Dispatch. The June 2015 grievance record records that in January 2015 the claimant received a letter of apology for the impact of workload on the claimant and his family and an assurance that Dispatchers had been re briefed regarding terms and conditions and wanted to work together as a team.

45. In February 2015 the claimant was invited to visit Dispatch to share knowledge and during the visit a member of Dispatch stated he had no sympathy for an engineer working 16 hours which the claimant found offensive. The June 2015 grievance record states that the claimant felt Dispatch had a negative opinion of him due to him being a union representative. In March 2015 this member of staff was spoken to formally regarding these comments.

46. Following further concerns regarding unfair allocation of work by Dispatch on the May bank holiday weekend in 2015 the claimant raised a formal grievance in June 2015 and requested a transfer. It was not clear what the outcome of this grievance was formally. The June 2015 grievance record referenced that Dispatch had complained how the claimant had spoken to them. It was put to the claimant in cross examination that the issue with Dispatch may have been the way the claimant spoke to them. The evidence in relation to the way the claimant spoke to Dispatch was limited to the reference in the grievance referred to above. The June 2015 grievance record referred to the claimant having apologised to the Dispatch individual at the end of that shift. The claimant explained in answer to this point in cross examination that the Dispatch person concerned had put the phone down on the claimant after he challenged her for treating him unfairly.

47. Following this grievance adjustments were made to management and the claimant describes the situation as easing for a period of time.

48. By November 2015 the claimant was raising further issues regarding Dispatch allegedly not following "First in first out policy" by sending an email copying in his line manager Rob Baxter. He was asked by Andrew Huckerby, Network Manager to raise issues with his supervisor Rob Baxter. It was not clear why Mr Huckerby had responded in this way given that the claimant had already raised it with Mr Baxter.

49. The claimant continued to raise issues with Dispatch including in February 2016, June 2016 and July 2016 regarding Dispatch's alleged failure to carry out risk assessments as well as breach of process and also having to wait 50 minutes for risk assessments. The claimant alleged on a number of occasions he

was being singled out, discriminated against for performing union duties (emails of 7 February 2016, 6 June 2016, 4 July 2016). This was acknowledged by Mr Baxter who advised the claimant he would escalate his concerns as previous assurances had not been met and the Dispatcher in question would be apologising to the claimant. A visit was to be arranged with the claimant and Mr Baxter to meet with the manager of Dispatch. This led to the manager of Dispatch apologising to the claimant as Dispatch had not followed the process for getting relief to an engineer when they had less than 11 hours rest prior to starting their shift.

50. In October 2016 another engineer, Dave Taylor, complained he was being treated unfairly by Dispatch. Mr Taylor was not a trade union representative and did not assert his unfair treatment was for any particular reason. The claimant took this up on his behalf as his union representative and in November 2016 the claimant complained that other engineers no longer trusted some dispatchers. It was put to the claimant in cross examination that this showed that if there was unfair allocation of work it was happening to other engineers and not just the claimant.

51. This one example of another engineer raising a complaint was not sufficient evidence in our view to suggest that there was a similar level of grievances from other engineers as the claimant had raised. We did not have sight of any formal outcomes from the respondent in relation to these various grievances. We find that in light of a number of apologies made by different staff within Dispatch to the claimant that the respondent accepted some culpability that Dispatch were not following agreed procedures and the claimant was being unfairly allocated work. It is clear from the evidence that the claimant repeatedly raised issues regarding unfair allocation of workload to the claimant by the Dispatch team and failure to follow risk assessments. Further the claimant repeatedly suggested that he was being singled out due to his trade union activities.

Grievance regarding Steven Pain

52. In March 2016 the claimant raised a grievance that he had been prevented from carrying out trade union activities by Mr Pain on several occasions and from inspecting some shelving. This was upheld by Rob Baxter and the outcome was that Steven Pain was to be presented with an overview of the trade union role and responsibilities and the claimant was to be granted full access to the area in question in his role as health and safety representative. This did not happen and the claimant continued to be prevented from accessing this particular area which led to an appeal by the claimant.

53. The claimant raised a number of other grievances namely:

a) June 2016 - alleged attempts by HR and management to undermine the claimant in the context of disciplinary investigation packs including allegations regarding the claimant's activities even though he was not the subject of the investigations;

b) December 2016 – grievance regarding sharing of work also expressed as alignment of terms and conditions. This related to complaints that work was not being shared evenly to engineers including the claimant which impacted on his ability to earn overtime. This was appealed to

Andrew Huckerby. The Tribunal did not have any evidence on the outcome.

c) The claimant was a vocal and active union representative and raised a number of other issues we were referred to namely breaches of data privacy, withdrawal of a video in which the claimant did a presentation intended to be shown to new dispatchers, working time and pay over travel time.

d) In October 2016 the claimant had posted a stress survey on OpsNet which was an intranet style platform. The post was removed by the Mr Huckerby. There was an email debate between the claimant and Mr Huckerby as the claimant contended the platform should be available for trade union use as per TUC guidelines and Mr Huckerby disagreed this was the appropriate forum. The claimant's evidence was that this was another example of a source of contention between him and Mr Huckerby.

e) In November 2016 the claimant made complaints over the risk assessment procedure which resulted in ACAS early conciliation in December 2016. Mr Huckerby expressed his disappointment at the escalation by the claimant. There was no evidence about the outcome of this process.

54. It was put to the claimant in cross examination that the respondent and / or any individual manager had no issue with the claimant's trade union activities except he constantly raised issues that should have been dealt with at DOF level. The claimant did not accept this. There was no witness evidence from the respondent to support this. The evidence relied upon to support this was an email exchange between Louise Hamilton (page 666) and the claimant culminating in June 2017 in which Ms Hamilton advising she would not accept the issues as a personal grievance and reiterating that the respondent viewed the claimant's concerns as a collective issue. Mr Whittaker was asked about this in cross examination and agreed that the claimant raised issues that were DOF level from time to time. Mr Whittaker told the Tribunal that a senior HR manager had asked him how they could stop the claimant putting in so many challenges. We find that the claimant did raise issues that should have been dealt with at DOF level and the respondent found this difficult to manage.

<u>The claimant's disability</u>

55. The claimant relied upon the condition of pre diabetes as the physical impairment. The Tribunal had sight of his GP records and the claimant's impact statement. The claimant had been given the opportunity to provide expert medical evidence but had not done so. There was no medical evidence confirming a diagnosis of pre diabetes or diabetes. The claimant accepted in cross examination he had not been diagnosed with either condition. The claimant's evidence was that he had to have regular blood sugar tests but this was not borne out in the medical records and the claimant accepted in cross examination he had only had two tests between 2015 and November 2017.

56. The claimant described the condition of pre diabetes resulting in physical symptoms that have an impact on his day to day activities. It was the

respondent's position that these were exaggerated or not attributable to pre diabetes at all.

57. The claimant gave detailed evidence about his various skin conditions that meant he had to restrict physical activities such as weight training and running in order to keep his skin cool. He has to avoid certain skincare products as they exacerbate his skin condition which can itch and bleed. It was not clear whether the claimant's evidence was he actually had Balanitis or whether he had the potential to develop the condition due to pre diabetes. His skin conditions have affected his sex life. There was no medical evidence to support any diagnosis of a skin condition. We were not taken to any point in GP notes that specify the claimant had sought advice from his GP about these skin conditions or had been prescribed any treatment. The claimant accepted there was no evidence to support his witness evidence in the bundle but explained that he had tried to manage the condition using a cream from America to self-manage the condition.

58. The claimant also relied upon damage to his eyesight and relied upon a cataract operation as being due to his pre diabetes as a result of blood sugar levels. This was not in line with the medical evidence. The letter from the Consultant Ophthalmic Surgeon dated 2 March 2015 made no mention of pre diabetes or blood sugars as being the cause for the cataract. The letter states the cataract was probably traumatic and perhaps relating to the claimant's former boxing. For these reasons we find that the claimant's cataract surgery was not a physical symptoms or impairment arising from pre diabetes.

59. The claimant described experiencing failing eyesight and needing to wear glasses for driving and avoid driving at night as well as no longer being able to watch TV at night or in the dark or go to the cinema. There was no medical evidence that this was a result of blood sugar levels or pre diabetes.

60. The claimant had been prescribed statins but accepted these were in respect of managing cholesterol. He also described needing to eat regularly and planning snacks and meals ahead and being unable to go long periods without eating. The claimant gave evidence that he often woke at night and used the bathroom and this was indicative of high blood sugar levels.

61. There was no evidence about the duration the symptoms had lasted or when they had started.

<u>Events leading to the claimant's dismissal</u>

62. On Friday 16 June 2017 the claimant had finished work at 11pm.

63. Saturday 17 June 2017 was the claimant's 4th consecutive day on 24 hour call out. He should have commenced work later than his 8am start due to the time he finished the night before however he was already aware, and specialist hire equipment had been ordered for him to work on an Industrial and Commercial Job at Pegasus House, Burleys Way in Leicester. This was located in the centre of Leicester in the middle of flats and offices.

64. This job was described as complex and physically demanding by the Investigating Officer and "long and difficult" by Peter Wilson. It involved re-pipe and re-site of an industrial gas meter. It was one of the hottest days of the year.

The claimant was accompanied by an apprentice for the first few hours but only as an observer rather than providing assistance. The job involved cutting by hand a 3 inch mapress stainless steel pipe as the machinery hired was unsuitable. The claimant had to make 26 cuts through the pipe by hand. The claimant was required to wear PPE clothing consisting of dark colour full sleeve length overalls.

65. The claimant's evidence was that once he was on site he could not leave until he had pressed the final join. This was supported by the evidence of Paul Whittaker Senior Trade Union and Safety Representative for the GMB. He explained that if a gas pipe was open for repair an engineer could not leave site even if the gas was turned off as someone could inadvertently turn the gas on which could be very dangerous with an open pipe. Peter Wilson's evidence was that the claimant could have left site between 10am and 2pm when the gas was switched off. Neither the investigating officer Chris Brown nor Mr Wilson had visited the site or interviewed anyone on site that day. Mr Wilson said he had relied upon information provided by Mr Huckerby that the claimant could have left site but this cannot have been correct as Mr Huckerby did not deal with this point in his email to Mr Wilson.

66. We accepted Mr Whittaker and the claimant's evidence as a senior gas engineer that it would not have been safe to leave site until the pipe was fully repaired.

67. The claimant had not brought any food with him to site. This was the subject of much debate and criticism of the claimant both at the subsequent disciplinary hearing and appeal and in cross examination. The claimant knew that he could not leave site once he had arrived. He had the opportunity to send the apprentice for food and could have brought a packed lunch. The onus was on the claimant to have ensured he had adequate food and water for the duration of the job especially given his evidence regarding the need to eat regularly. The claimant's pregnant wife had to bring a tool to site for the claimant and the claimant was criticised for not also asking his wife to bring him food. It was surprising that the respondent's focus of the claimant's wife's visit to site was directed at her not bringing food rather than why she was having to bring equipment to the claimant.

68. The claimant's explanation for not having brought food was that the job proved to be much longer than anyone had anticipated and he did not complete the job until 20.44pm that evening when he left site to travel to the Leicester depot. At this point he had had nothing to eat and no break since 8am that morning. The claimant needed to unload his van of the hire equipment. He spoke to Dispatch at 20.52pm on the way back to the depot. There was some discrepancy about the timing of this call as it was referenced at various points as taking place at 19.52pm. We find it must have been 20.52pm as it took place after the claimant left Pegasus House and Dispatch reference it being almost 9pm during the call itself. The Tribunal heard a recording of this call which took place between Caroline of Dispatch and the claimant. The claimant was asked if he had had a break and he informed Caroline that he had not had a break since 8am that morning. It was agreed the claimant would take a break of 20 minutes at the depot but then claimant said he was still on the job and wanted to carry on until he had unloaded. It was then agreed that Caroline would put non availability down from 21.30-22.00pm so he would not get disturbed. This was not an agreed break but to enable the claimant to unload his van at the depot. Caroline advised she was recording the risk assessment on Gantt as per the standard practice;

she is recorded on the call as saying she would “whack that in now” and “pop that on the Gantt and then they are going to know not to disturb you” or words to that effect.

69. Caroline goes on to check how much rest the claimant had had before 8am and the claimant advised her he had got in at 11pm the night before. In response Caroline states that arrangements must be made to relieve the Claimant as soon as possible. This directly quotes the respondent’s Fatigue Risk Assessment as set out in paragraph 38 above. The claimant explained he could not be relieved as he needed to unload the hire equipment as it was being picked up the following Monday. Caroline asked if he was “ok to continue the call or not” or words to that effect and the claimant advised he would” get everything done get some food and let her know he felt in a bit” or words to that effect. Caroline reiterated her understanding of what the claimant had just said by repeating that the claimant would finish the job, have a break and let Dispatch know.

70. There was a dispute about how the call ended. It was put to Mr Wilson that the claimant had ended the call understanding he would be letting dispatch know how he felt after having some food. Mr Wilson did not accept this. His evidence under cross examination was that it was agreed Caroline would call the claimant at 9.30pm. It was clear from the recordings of the call that this was not what was agreed. It was agreed that the claimant would let Dispatch know how he felt after his break. It was also clear that Caroline had identified that the claimant should have been relieved as soon as possible.

71. For reasons that were never investigated or identified Caroline did not record on the Gantt that the claimant had hit 12 hours with no previous clear 11 hours rest or that arrangements should be made to relieve the Claimant as soon as possible. At this point, according to the Respondent’s risk fatigue assessment it was obligatory to stand the claimant down. The failure to record this on the Gantt had the end result that when Caroline went off shift the other operatives could not have known from Gantt that a 12 hour risk assessment had been done or that Caroline had stated arrangements must be made to relieve the claimant as soon as possible. This should have been obvious from the claimant’s working hours that were recorded on Gantt. The respondent’s own Gantt record states the Claimant’s meal break was between 22.30 and 23.00pm.

72. At 22.06pm the claimant is contacted by James from Dispatch. At this point he is about to leave the depot. The claimant informs James twice he is “so tired” and also says he is “smashed to pieces”. It is agreed the claimant will text on his return home and the meal break will start at that point.

73. At 22.29pm there is a further call between the claimant and James of Dispatch. The claimant has just arrived home and his meal break commences to take him up to 11pm. The claimant informs James he has already done 15 hours and asks to speak to the shift controller. He asks for time to rest and says he is “quite knackered”. James then transfers the claimant to someone called Barry who is the shift controller. He explains again he has already completed 15 hours work and has hardly had any food all day. Barry advises they will do their best to leave him alone but cannot guarantee. Neither James nor Barry record any of these discussions on Gantt. Mr Wilson accepted in cross examination that they both should have recorded these discussions and this was a failing on their part. Neither James, Barry nor Caroline were spoken to informally or formally about

failing to record matters relating to the claimant on Gantt nor why the claimant had not been stood down in accordance with the risk fatigue assessment. Mr Wilson's explanation when asked about this in cross examination was that it the claimant had refused to take a break when instructed and therefore it was his actions that resulted in him not having a break.

74. The claimant then texted his supervisor, Rob Baxter to request that he speak to dispatch to let him have four hours rest. He advises he is "genuinely knackered working with the sun on me". Rob Baxter replies he would have a word with Dispatch and thanked the claimant for his hard work. The claimant replies he is "done in the heat wiped me out".

75. Mr Baxter then telephones Dispatch and speaks to James. He repeats what the claimant has told him about being "knackered" and working in full sun and requests that Dispatch give the claimant a break before being called out again. There follows a discussion about the workload of the other engineers on call that shift. There were three other engineers on shift apart from the claimant; Javed Rahim, David Shead and Peter Holland. In addition to the engineers on call, there was a supervisor that could have been called upon (Rob Baxter) and if all engineers were unavailable a team from a neighbouring area could also be called upon. The other engineers had also had call outs but none of them had worked the same length of time as the claimant without a break. It was left that James would use his common sense and leave the claimant alone for a bit.

76. The claimant was on a designated meal break between 22.30 and 23.00. He chose not to eat at that point and went straight to bed. His explanation (provided later at the disciplinary hearing) for not eating at that point was that he was totally drained and his wife had not left him a sandwich.

77. At 12.54am on 18 June 2017 David Shead risk assessed himself off which is the process whereby an engineer can stand himself down. This was marked in the Gantt as "12HR RA DONE -LES (sic) THAN 11 HRS REST – DO NOT CALL – VERY TIRED". Mr Baxter was informed of this by Dispatch. This now meant the team of emergency gas engineers was down to 3.

78. At 12.58am an uncontrolled gas escape was received at Bolton Road in Leicester. This was classed as a Priority escape in accordance with EM72. Dispatch contacted Javed Rahim at 1.05am who then stood himself down with the 12 hour risk assessment procedure. At 1.11am James from Dispatch called the claimant and got his voicemail. He called the claimant again at 1.13am. It was clear from the recording of this call this woke the claimant up and he had been sleeping. James explained Javed had stood himself down. When the claimant queried if Javed was at 16 hours James said he thought it was close but then said he did not know how it worked with "you guys". James clarified Javed had started at 8am but had had a break during the day. The Claimant questioned whether the other engineer Pete had hit his hours and was informed he had done. Therefore as far as the claimant was concerned he was the only engineer left to take the call. The next exchange was, in our view crucial. The claimant stated:

"Well I am tired, but if he doesn't want to do it I will have to do it won't I?"

To which James replied:

"Yeah. Ok that's alright then Paul. So, it's been in a little while. It's probably been in about 20 minutes, but it's not too far."

79. James did not understand the risk assessment procedure or how to properly assess who should have been called out. Mr Holland had not reached 16 hours and whilst he had returned home later than the claimant he had undertaken short duration jobs throughout the day with no work being recorded for between 9am – 12 noon, 1pm – 2.30pm, and 7.30pm and 9pm. There was no explanation as to why the claimant was called out over and above Mr Holland or why his repeated requests for rest were ignored.

80. By this point the claimant had informed three people in Dispatch (one being a supervisor) and his own supervisor that he was extremely tired and had repeatedly asked for rest.

81. Still on the call at 1.13am, the claimant informs James he is 'totally shattered and would need to change and shower' in response James said that was 'no problem'. The claimant asks again about the other engineer Pete Holland and queries if he has reached 16 hours. The claimant informs James he would be doing his risk assessment in an hour when he reaches the 16 hours and if he was tired on site someone would need to drive him home. James responded: "whatever you need to do Paul. Obviously your safety is our main priority so whatever you feel".

82. Mr Wilson conceded under cross examination the following:

- It was a failing by James from Dispatch to not record the conversations he had had with the Claimant at 22.06 and 22.29 when the Claimant reported how tired he was.

- Barry from Dispatch should have recorded on the Gantt that the Claimant had asked twice for sleep

- If Mr Wilson had been in Dispatch that night he would have looked elsewhere to see if anyone else from a different area could have covered

- Mr Wilson did not make enquiries as part of the disciplinary process as to whether a repair tem or supervisor were available to cover on the night in question.

- The claimant should never have been called out.

83. In re-examination Mr Wilson clarified that his evidence was there was no obligation to have relieved the claimant as he had not reached the 16 hour risk assessment. As a finding of fact we reiterate that at the time the claimant spoke to Caroline he should have been stood down in accordance with the respondent's own Fatigue Risk Assessment.

84. At this juncture we should say something about the concessions Mr Wilson made under cross examination as it has been submitted that he was subjected to overly robust cross examination, was pressured to agree points with yes or no

answers and did not perform as well as he might otherwise have done. Objections were raised by Counsel for the respondent on the morning of 7 June 2018 that Mr Wilson had been subject to heavy handed and aggressive cross examination by counsel for the claimant. We did not accept that the cross examination of Mr Wilson was inappropriate. Whilst he may have made some concessions these were made under legitimate albeit robust cross examination based on documents that were available to Mr Wilson at the time he had reached his decision to dismiss the claimant.

85. The claimant left home at 1.25am to travel to the escape. The claimant felt he needed something to eat and drink and travelled one mile in the opposite direction to the escape address to McDonalds which he believed to be the closest food outlet open at that time of night. Upon finding that closed he drove to Kentucky Fried Chicken ("KFC") and after collecting food from the store he ate whilst driving on the way to the escape. The claimant later explained at the disciplinary hearing that he had had a headache and stomach cramps and recognising he could be at the job 3-4 hours decided he really needed food. When he was asked why he had not made food at home he advised he wanted a wholesome hot meal and also that he needed something warm and sugary as he is pre diabetic. The investigation report suggested that the claimant had stopped at KFC for 13 minutes to eat his food. The claimant accepted he was at the fast food restaurant for that amount of time but explained that he had been unable to access the "Drive Through" due to the height of his van so he entered the restaurant to collect his food and this accounted for the 13 minutes.

86. The claimant was also asked why he did not inform Dispatch of his need to stop for food. His explanation was he thought he may have texted Dispatch but it was established the text system did not go back that far. There was no telephone call logged to Dispatch. This was also in breach of EM72 which required Dispatch to be informed of any delay.

87. The claimant accepted that this he did not take the shortest route nor did he update Dispatch about his detour and stop for food and that this breached EM72. He arrived at the escape at 01.59am 1 minute outside the Service level Agreement ("SLA") standard of one hour. The property could not be accessed and the Claimant risk assessed himself down at 2.22am, arriving home at 2.36am.

88. Following the events of 17/18 June 2017 the claimant had an informal debrief with his line manager Rob Baxter and Martin Jones. The claimant's unchallenged evidence was that he was led to believe that nothing further would come of the incident. This was supported by a later statement from Martin Jones. There was no witness evidence as to how the incident then resulted in a disciplinary investigation or how it was triggered. All Mr Wilson could assist with was he was asked by Mr Huckerby and HR to be the manager to hear the disciplinary which was some weeks later. In a case where it was being alleged that Mr Huckerby drove the investigation towards a dismissal it was surprising the respondent did not call any evidence on how the investigation came about and was progressed. What was gleaned from the documents in the bundle and questions put to Mr Dennis was as follows.

89. In Mr Dennis's interview with Mr Huckerby as part of the appeal, Mr Huckerby informed Mr Dennis that he received a daily lost jobs report and would flick through them to find out what had gone on. This was in reference to the SLA targets. He described one with the claimant stopping for food and said this had 'jumped out at him, was not normal' and decided to look further into it.

90. The Tribunal had sight of an extract of the daily lost job report which had been reproduced in an email from Mr Huckerby to Peter Tyrell who was covering line manager in Martin Jones's absence. Mr Huckerby drafted a data protection impact assessment request which was a document required to access personal data about the claimant as part of the investigation. He attached and sent it to Mr Tyrell and advised that Rob (we assumed Baxter) was undertaking a fact find but on the face of it, it looked like a potential breach of policies and procedures. Mr Huckerby sent a further email to HR on 20 June 2017. In this he stated:

"I am writing to inform you of a potential disciplinary action against Paul Singh SOF/AOF Rep for Leicester following a lost gas escape. A fact find is in progress and I will keep you informed."

91. Mr Huckerby told Mr Dennis that he had engaged cases (HR) on 20 June 2017 as the claimant was a TU rep he wanted to get a radar as this could be an issue. We heard no evidence why the claimant's union representative status could be an issue and why Mr Huckerby felt this needed to be highlighted to HR. He also informed Mr Dennis that HR had confirmed the case as gross misconduct.

92. On 7 July 2017 Martin Jones emailed HR, copying in Mr Huckerby setting out his fact find. In this he describes a call that had taken place between the claimant and Dispatch on 18 June 2017. The Tribunal did not hear a recording of this call. The claimant was asked why the escape had been lost (in reference to missing the SLA standard by one minute) and informed Dispatch he had nipped in for food on the way and this was why the escape SLA was lost. In response to this email HR emailed Martin Jones and asked what happened to the lost job. Martin Jones did not reply; instead Mr Huckerby replied and advised the job failed the regulatory standards. He did not mention that there had also been a 20 minute delay by Dispatch in allocating the call to the claimant which must have contributed to the lost job. He follows up that email with a further email advising that when the claimant attended the job he 'No Accessed' but when the job was later revisited by another engineer at 5am, access was gained. This in our view implied that the claimant may have deliberately recorded the job as no access. We find that there was a suspicion on the part of Mr Huckerby that the claimant had not been truthful about the no access as Mr Huckerby subsequently ordered data retrieval from the claimant's Bascam Turner machine which is the gas detection equipment that could be used to verify the no access scenario.

93. HR subsequently replied to Andrew Huckerby, and recommended this was treated as gross misconduct. They requested that a suspension risk assessment be carried out and an independent investigating officer be appointed. Mr Huckerby nominated Chris Brown as the Investigating Officer and had an initial conversation with him. HR then prepared a terms of reference which is emailed to Mr Huckerby and Chris Brown on 12 July 2017. On 14 July 2017 Mr Huckerby emailed HR and Chris Brown advising he had changed the terms of reference

and initial letter. We did not have sight of the initial draft by HR. The amended version set out two issues to be examined;

- Private use of company vehicle, specifically during a gas escape, which the SLA was breached, being a trained health and safety rep
- Breach of policies and procedure covering responsibilities when attending gas escapes including but limited to, (sic) EM72, EM119.

94. There was no explanation or evidence as to why the claimant's position of Health and Safety representative was relevant or included in the terms of reference.

95. Mr Huckerby was also involved in widening the data protection impact assessment request submitted to the respondent's legal team; emails being sent and received between 11 July and 19 July 2017. Mr Huckerby wanted to access the claimant's Masternaught system which was the van tracker and also the Bascam Turner equipment.

96. A disciplinary suspension risk assessment checklist was completed. Counsel for the respondent confirmed this had been completed by Martin Jones. Under a column titled "Consideration" the following question is posed:

"Is there a risk the employee's presence at work will make it difficult to investigate the allegation e.g. employee may seek to destroy evidence or attempt to influence / intimidate witnesses."

97. The question had been marked with an "N" to signify No but in the comments box the following statement had been made *"Potential to try and influence peers as a TU Rep".* No explanation was provided by the respondent's witness when they were asked about this in cross examination. Mr Wilson was asked if the claimant had ever sought to destroy evidence or intimidate witnesses and his reply was he did not know. It was suggested that this demonstrated the trade union animus. We had no explanation as to why the claimant's status as a trade union representative might mean his suspension risk assessment would be assessed in this way.

98. The claimant was not informed he was being investigated until the end of an AOF meeting on 10 July 2017. This had been a difficult meeting, described as heated by the claimant. Mr Huckerby was conducting the meeting on behalf of the respondent. This meeting was referenced in evidence as the "pizza meeting". This was because Mr Huckerby brought the meeting to a premature end after the claimant left the meeting to collect some pizzas that had been delivered for consumption at the meeting. At the end of the meeting Mr Huckerby informed the claimant that a fact finding about the events on 18 June 2017 had concluded and would lead to a gross misconduct case. The claimant's position was that Mr Huckerby deliberately targeted the claimant and drove the investigation as an excuse to dismiss him due to his trade union activities. The claimant relied upon differences in the approach taken by Mr Huckerby in both instigating and driving the investigation which the claimant said was outside of the standard procedures adopted in such cases as well as what had happened in similar incidences. We return to this below.

99. The claimant attended an investigatory interview with Chris Brown on 25 July 2017. The claimant gave a full account of the events on 18 June 2017. The claimant informed Mr Brown he had voiced his concerns to the Dispatcher as he had done more hours than anyone else and that in his opinion the Dispatcher lied and manipulated the conversation that he had exhausted all other avenues and that he had not understood the risk assessment process. In our view these were all valid points except we do not find that the Dispatcher lied rather he simply did not understand the process. The claimant accepted he had gone via KFC explaining that he had not eaten, was very tired and aware he could have been at the job for 3 or 4 hours further. He informed Mr Brown he was diabetic. He also informed Mr Brown that at his 12 hour risk assessment with Caroline she had stated he should not work beyond the 12 hours. The claimant also raised that he was aware other engineers involved in similar incidents had not been investigated in the same way and questioned if this was linked to him being a trade union representative and ethnic background.

100. Mr Huckerby was further involved in the investigation. He requested information from Dispatch namely the Gantt charts on 19 July 2017. There was also a discussion between Mr Huckerby and Chris Brown on 19 July 2017 where Mr Huckerby was suggesting to Mr Brown that the claimant had taken a 20 minute break at 21.30 which as we found above was incorrect. He had been marked as unavailable as he was unloading hire equipment at the depot. His break is not recorded on the Gantt until 22.30.

101. The Investigation Report dated 4 August 2017 set out that the claimant confirmed he had not proceeded to the escape site without delay stopping on route for food / drink. This was described as Gross Misconduct in a refusal or failure to comply with a proper instruction. The report set out the mitigation put forward by the claimant in some detail, and also that the claimant felt he was being discriminated against and treated unfairly. The report did not make any recommendation as to whether disciplinary proceedings should ensue. Mr Brown had not requested or listened to the calls between the claimant and Dispatch that had taken place at 22.06 and 22.29pm on 17 June 2017.

102. We did not hear any evidence as to who made the decision following the Investigation Report that the matter should proceed to a disciplinary hearing. Given the extent of mitigation set out by the Investigating Manager and that the Investigation Report did not make any recommendation this was an important gap in the evidence. Mr Wilson gave evidence in cross examination on this point that HR appointed him and Mr Huckerby was the responsible manager. It was suggested to Mr Wilson that Mr Huckerby was the genesis driving the whole process. Mr Wilson simply did not know who had made the decision it should proceed, only that he had been appointed to hear the case. He wrote to the claimant on 9 August 2017 to invite him to attend a disciplinary hearing for an allegation of gross misconduct namely:

"On Sunday 18 June 2017, you failed to adhere to laid down policies and procedures including EB 119 during a gas escape call, and resulted in regulatory standards being missed, whilst attending an uncontrolled gas escape."

103. Following the invite the claimant emailed HR on 16 August 2017 and raised a number of concerns regarding the investigation (specifically naming three comparators and requesting details of sanctions) and requesting witnesses

to be present at the hearing including James and Caroline from Dispatch. The claimant also requested the 12 and 16 hour risk assessment document and details of sanctions to other engineers who had breached EB119. He received a reply that these matters needed to be raised with Mr Wilson at the disciplinary hearing. Mr Whitaker also wrote to HR on 19 August 2017 repeating concerns about the investigation and alleging that the claimant was being targeted as a result of his safety actions. Mr Wilson responded by email advising that he was unable to address the points raised as the disciplinary hearing had not commenced and the opportunity to present the case and call witnesses will be done on the day of the hearing.

104. On 21 August 2017 the claimant raised a detailed 3 page formal grievance with his line manager Rob Baxter and HR that he wished to enter the formal Discrimination Bullying and Harassment process. He specially raised that he felt discriminated against on grounds of his safety representative role and ethnic background. Mr Wilson was not aware of this grievance at the time of the first disciplinary hearing but confirmed in a response to a question from the panel that he was aware at the time of the reconvened hearing on 14 September 2017 as the claimant informed him. Mr Wilson stated in evidence that he first became aware that the claimant was saying his treatment was about trade union activities at the hearing on 14 September 2017. Mr Wilson's evidence was that he was told at the second disciplinary meeting that the claimant had raised a grievance and HR said they would look into whether it could be covered by the disciplinary or needed another meeting. Mr Wilson states on several occasions that the reason he had not widened the investigation to look into potential failings by Dispatch was that it was the claimant's conduct being investigated and that was his focus.

105. The disciplinary hearing took place on 24 August 2017. In attendance was the claimant and his union representative Paul Whittaker and Mr Wilson and Jane Rabey of HR. The Tribunal saw detailed notes of the hearing. It commenced at 10.30am. Initially recordings of the calls between the claimant and Caroline were listened to. The meeting was adjourned around 1pm and during the adjournment Mr Wilson request details of all of the calls between the claimant and Dispatch and Rob Baxter and Dispatch. These were available by the time the meeting reconvened at 1.53pm. Therefore as at the disciplinary hearing these calls had not been listened to until this point and had not been included in the Investigation Report.

106. The claimant and his union representative made representations regarding the lost SLA in that there had been approximately a 20 minute delay by Dispatch in allocating the escape to the claimant after Javed Rahim stood himself down. They were informed by Mr Wilson and Jane Rabey a number of times that the missed escape was not the issue. This was reiterated by Mr Wilson in his witness evidence. Mr Wilson's evidence was he had to repeatedly tell the claimant he was not in the disciplinary process as he had failed to meet the 1 hour target but because he had failed to go directly to the escape. However the reference to a missed escape had been set out in the terms of reference for the investigation, the investigation report and in the allegation of gross misconduct. It was therefore in our view unsurprising that the claimant thought it important to address other factors as to why the escape had been missed including the 20 minute delay by Dispatch in allocating the call. If the SLA had not been missed, according to Mr Huckerby's interview with Mr Dennis, there would have been no record of the incident on the daily report which came to the attention of Mr

Huckerby and the claimant may never have even been investigated then disciplined.

107. The claimant was asked why he had not refused or insisted he should not go out again. The claimant explained it was important to him to do the best for the business and he did not want other engineers off patch being called out on a Saturday night as that would be unfair. The claimant accepted he had breached EM72 / EB 119 but put forward his version of events as mitigation. He also continued to raise that Mr Baxter had not been interviewed as part of the investigation nor had anyone from Dispatch as well as examples of other employees he believed had breached EM72 with lesser sanctions. This was a long meeting with several adjournments and ended at 5.24pm. Mr Wilson wished to adjourn to undertake further enquiries.

108. Mr Wilson subsequently emailed Mr Huckerby on 29 August 2017 with some queries about the job on 17 June 2017. Mr Huckerby did not confirm in this email that in his opinion the claimant could have left site whilst the gas was switched off as had been put to the claimant in cross examination. Mr Wilson did not ask Mr Huckerby about the claimant's allegations regarding trade union discrimination.

109. The respondent's case was that it was entirely appropriate that Mr Huckerby initiated the investigation as he was the Network Manager and an SLA had been missed. Mr Dennis interviewed Mr Huckerby as part of the claimant's appeal on 27 November 2017.

110. A HR advisor made enquiries with Rob Baxter regarding the comparators the Claimant had named as receiving lesser sanctions than him. Mr Baxter emailed details of three cases namely David Shead, David Aldridge and Bryn Statham which were sent onto Peter Wilson on 13 September 2017. The claimant gave evidence that in other similar cases the incident had been dealt with "locally" by the supervisor. This differed significantly to his investigation which he says was driven by Mr Huckerby a far more senior manager. The claimant referred specifically to a case involving David Shead and Bryn Statham.

111. In Mr Shead's case in August 2016 he admitted stopping on the way to a P1 gas escape to take a phone call from a relative, talking for approximately 5 minutes resulting in the SLA being missed by one minute. For this he received a written warning and the matter was dealt with by Martin Jones (Line Manager). Mr Shead wrote a letter for the claimant's appeal confirming this and also that he explained his actions "locally" without the need for an investigating officer.

112. Mr Wilson also asked Martin Jones to comment about his initial discussion with the claimant after the incident as the claimant had stated he was informed it was not an issue. Mr Wilson did not ask Mr Baxter about this. Mr Jones advised he had told the claimant it was not a major failing. He clarified to Mr Wilson that at the time of that conversation he was not aware the claimant had stopped for the amount of time he had or that he had travelled in the opposite direction of the escape and had he done so his discussion would have been different.

113. The disciplinary hearing was reconvened on 14 September 2017. Mr Wilson advised he was discounting the comparators of David Aldridge and Bryn

Statham as they had not been attending a P1 gas escape. It is unclear how Mr Wilson had arrived at this conclusion as the email from Mr Baxter did not specify the type of escape these two individuals had attended. The hearing adjourned at 12.50pm until 4.20pm when Mr Wilson read an outcome script informing the claimant he was dismissed for gross misconduct.

114. The letter confirming his dismissal was dated 21 September 2017. The facts in so far as the claimant had failed to proceed directly to the gas escape, travelled in the opposite direction (by 1 mile) and on finding the McDonalds closed, travelled back towards the escape to KFC and then parked and purchased food were not in dispute.

115. The claimant's defence and mitigation were rejected by Mr Wilson. The claimant's first point that this should have been a health and safety investigation rather than misconduct and the Respondent's "Golden Rules" were applicable. Mr Wilson reasonably rejected this argument. Whilst we agree that there were issues of health and safety relevant (specifically in relation to rest breaks and the respondent's risk assessment procedure) to the incident in question this did not mean the appropriate route of investigation was not the disciplinary procedure.

116. Mr Wilson rejected that the length of time the claimant had been on the job at Pegasus House impacted on the claimant's decision to accept the P1 gas escape at 1.13am the next morning. He concluded the onus was on the claimant to step down if he was too fatigued and having accepted it he should have complied with EM119 and EM72. He also rejected that the claimant's less than 11 hours rest break between 16/17 June could have impacted on the claimant's actions. Mr Wilson found the claimant had four opportunities to take a break during the day and obtain food. We find that the claimant did not have the opportunity to take a break and obtain food during the Pegasus House job as we accepted the claimant's evidence he was not able to leave site. We find Mr Wilson reasonably concluded the claimant could have obtained food after leaving Pegasus House (the claimant did purchase a sandwich but threw it away as he said it was inedible) and on his arrival home. The claimant could also have taken food with him to the job at Pegasus House albeit we accept that the job went on for much longer than the claimant had anticipated.

117. In relation to the comparator cases all were rejected as comparable to the claimant's case except for David Shead. Mr Wilson concluded that as Mr Shead had admitted complete culpability at the earliest possible time, was extremely apologetic all the way through the process, explained to the Company he had understood his behaviour was wrong and very clearly expressed he would not repeat such behaviour again the potential sanction was downgraded and he was given a written warning.

118. We find that the explanation in relation to the different treatment to Mr Shead unsatisfactory. Mr Wilson accepted under cross examination that there was no evidence to suggest Mr Shead was hungry or tired or had completed 15 hours on the day in question. Mr Wilson's evidence was that he could not have been given more than a written warning at the time due to the level of manager who dealt with the case and that had now changed following a new disciplinary procedure agreed in September 2016. Mr Whitaker as a DOF representative was asked if he was aware of a change in the application of the disciplinary policy and he was not. We accepted Mr Whitaker's evidence on this. The respondent's

disciplinary policy was reviewed in September 2016. We did not see the previous policy,

119. None of the mitigating factors Mr Wilson set out in his letter confirming the claimant's dismissal for Mr Shead were contained in the letter to Mr Shead confirming his written warning. Neither did the letter say the potential sanction had been gross misconduct but that it had been been downgraded. Mr Wilson was informed of Mr Shead's mitigation by Jane Rabey of HR who spoke to Martin Jones. There were no notes of a discussion between Jane Rabey and Martin Jones about David Shead.

120. In addition to the comparators raised by the claimant Mr Wilson decided on his own volition to look at other comparator cases. He explained this was to fully understand sanctions the company has given in previous circumstances. His investigations revealed a number of other cases which he concluded were closely aligned to the claimant's. These were set out in the dismissal letter. They were not named but a description of their actions and disciplinary sanction were set out. Mr Wilson did not see any documents relating to these other cases he found were comparable. He obtained all of the information about the circumstances of the case verbally from HR. We accept that Mr Wilson genuinely relied upon what he was informed by HR. However much of the detail proved to be incorrect. The documentation came to light later in disclosure. At the time of making his decision Mr Wilson understood the cases to be as follows:

An employee who was on her way to a P1 gas escape had stopped at the shops on the way and was dismissed.

121. This employee was later identified in disclosure as a Ms Cameron. The bundle contained documents disclosed by the Respondent in relation to Ms Cameron which identified she had a Final Written Warning for 12 months on 23 November 2011 for unnecessarily long jobbing and failing to end a job on a system. On the second day of the hearing Counsel for the respondent informed the Tribunal that the incorrect documents had been disclosed and what should have been disclosed was her letter in respect of the "shops" incident. This was produced and included into the bundle. We accept there was no deliberate withholding of the correct disclosure document but nonetheless the respondent had sought to rely upon a comparator of their own volition and then disclosed an incorrect document about an entirely different sanction. The incorrect document was referred to at the interim relief hearing.

122. The letter disclosed on day two of the hearing was dated 29 December 2011. This showed that Ms Cameron was given a final written warning for refusing a P1 gas escape. She had refused the job as it occurred 1 hour before the end of her shift. She had travelled 3.9 miles in the opposite direction then went shopping for 15 minutes during work hours. Another colleague had to be dispatched to the escape. Ms Cameron was already on a live final written warning issued the month previously. The sanction afforded to Ms Cameron was a final written warning however as she was already on a final written warning she was dismissed with notice. Mr Wilson was asked about this in cross examination. He accepted that the sanction actually given to Ms Cameron was a lesser one than he had been informed of by HR when considering what sanction to give the claimant and he had seen Ms Cameron's letters for the first time at the hearing.

Mr Wilson accepted that Ms Cameron's letter listed more wrong doing than the claimants. Mr Wilson said in re-examination if he had seen Ms Cameron's letter it would not have changed his decision about the seriousness of the sanction as a final written warning is as serious as a dismissal.

An employee who refused to accept a P1 gas escape as it was too far away and was dismissed.

123. This employee was identified as Mr Morris. His letter of dismissal did not contain the level of detail of Ms Cameron but the allegation was set out as involvement in failure to close an outside gas escape within reasonable timescales. This was an employee refusing to accept a gas escape and was not in our view the same or similar circumstances to that of the claimant. There was no mention of refusing in the letter. He was dismissed for gross misconduct.

An employee who failed to proceed directly to a P1 gas escape instead had remained at home and had tea and toast and was summarily dismissed.

124. This employee was identified as Mr Jones. The letter of dismissal set out that Mr Jones had deliberately taken his time of more than 35 minutes knowing an escape was close to home.

125. We find that none of these cases could reasonably be described as closely aligned with the claimant. Ms Cameron's conduct was in our view much more serious. Ms Cameron had deliberately ignored a call, travelled in the wrong direction and gone shopping in work time and received a final written warning. She was not summarily dismissed. The claimant did not refuse to accept a job as was said to be the case for Mr Morris. Mr Jones conduct was deliberate and intentional which was not the conduct of the claimant. We accept that Mr Wilson was informed they were and took the word of HR on the circumstances but he should have undertaken a more thorough investigation. Had he done so it would have revealed inconsistences in both the circumstances of the cases and the sanctions applied as is starkly apparent in the case of Ms Cameron.

126. This is particularly important given the weight Mr Wilson attached in deciding if the sanction he had decided upon was consistent with those imposed in the past. Mr Wilson described the cases as "truly parallel" and that it was important that the sanctions which came out of those cases were given appropriate weight. What later transpired with disclosure of the sanction letters is that the circumstances of the cases nor, in the case of the sanction in the case of Ms Cameron, were in fact parallel.

127. Mr Wilson also concluded that the failure to record the claimant's risk assessment on Gantt was irrelevant and that even if it had been recorded the outcome would have been the same. This was not a reasonable conclusion to reach. Had the risk assessment been done in accordance with the respondent's own procedures the claimant would have been obligated to stand down and would never have been called out at 1.13am that next morning.

128. The claimant's allegation that he was being disciplined due to his role as a trade union representative was also addressed in the outcome letter where Mr Wilson reassures the claimant that his status as a trade union representative

had no bearing on his decision making and he would have made the same conclusion with any other employee or words to that effect.

129. Mr Wilson went on to comment that as a H&S Rep, the claimant "above all people" should have been aware of the seriousness of his actions.

130. On 27 September 2017 Jane Rabey of HR responded to the claimant's union representative regarding the claimant's grievance he had lodged on 21 August 2017. HR had confused the claimant's grievance that he was being targeted for disciplinary action on the grounds of his trade union status with another grievance and effectively nothing had been done to progress it. Ms Rabey advised that in any event they considered the matters raised in the grievance to have been dealt with in the disciplinary proceedings and if the union were unsatisfied with this they should appeal.

131. The National Officer for the GMB trade union, Mr Fegan sent a letter of appeal dated 28 September 2017. Mr Ian Dennis, Head of Contract Planning and Assurance was appointed to hear the appeal. The claimant submitted a lengthy supporting appeal document. The appeal hearing was arranged on 13 November 2017. The meeting was adjourned. On 19 November 2017 the claimant emailed Mr Dennis raising a further point of appeal. This arose following a town hall meeting that had taken place in Leicester where a team leader had reportedly informed the claimant that he had been investigated for delaying whilst on route to a gas escape having stopped for food but it had not been taken any further. Another manager, Chris Rison was reported to be aware of this case. Mr Dennis interviewed Mr Huckerby, Mr Wilson and Mr Rison.

132. Mr Dennis reviewed the appeal on four grounds namely alleged failure to consider mitigating factors, dismissal outside of the band of reasonable responses and inconsistent with lack of suspension, type 2 diabetes not taken into account and dismissal linked to health and safety complaints and the claimant's trade union activities. Mr Dennis rejected all of the grounds of appeal. He agreed with Mr Wilson that the claimant had had opportunities to eat and take breaks earlier in the day. He also agreed that Javed Rahim's case was different as he had stood himself down whereas the claimant had not.

133. In relation to the diabetes ground of appeal Mr Dennis rejected this as the claimant confirmed he had not actually been diagnosed with diabetes and could only point to a pre diabetes flag in 2015.

134. In relation to the trade union discrimination Mr Dennis concluded that Mr Wilson had only looked at the facts of the case and assessed the case on its own merits and that the claimant's trade union activities had no bearing whatsoever on his decision. The claimant had alleged that Mr Huckerby and Mr Wilson were friends and had colluded in his dismissal. We accept that there was no evidence to support this allegation and it was rightly rejected by Mr Dennis.

135. In relation to the ground of appeal that Mr Wilson had held the claimant to a higher standard. This was in reference to the comment made by Mr Wilson as set out in paragraph 129 above. Mr Wilson explained to Mr Dennis that the comment was not made as he was holding the claimant to a higher standard rather he made the comment as he had concluded the claimant could not say he did not know the respondent's rules and procedures.

136. The claimant had raised an issue regarding Mr Huckerby's request to access the data on his Bascam Turner. This is equipment that monitors gas. The claimant's position was that no other engineer has had this equipment checked and Mr Huckerby was effectively on a fishing exercise to try and catch out the claimant as the claimant had marked the escape as 'No Access' meaning he had not been able to access the property. Mr Dennis rejected this after discussing with Mr Huckerby. Mr Dennis concluded that as another engineer had been able to access the property later it was reasonable for Mr Huckerby to ask for this to be looked into. Following a review of the data there were no concerns which is why it was not included in the disciplinary pack. This was a reasonable conclusion to reach in our funding.

137. In relation to the comparator David Shead Mr Dennis reached some conclusions that in our view were surprising. Mr Dennis's evidence was that there were differences between Mr Shead's case and the claimant's although he did not set out what they were. He further concluded that at no point had the claimant accepted or demonstrated an understanding his behavior was wrong and that the issue had come about as the claimant was at fault and due to events within his own control. Mr Dennis found that in contrast David Shead had admitted culpability at the earliest opportunity.

138. The ground of appeal relating to the town hall meeting information was rejected as Mr Dennis learned from Mr Rison that the individual was shortly leaving employment and further he was satisfied that there were similar comparator cases. Even if the comparator was leaving this does not explain why there was differential treatment and this was the aspect that in our view should have been investigated further.

139. The interview notes between Mr Huckerby and Mr Dennis were handwritten and not easy to read. Mr Dennis did not at any point put to Mr Huckerby the claimant's allegation that he was motivated due to his trade union activities and therefore Mr Huckerby did not have the opportunity to respond to those allegations. Although it was not recorded in the notes of the interview Mr Dennis gave evidence that Mr Huckerby had stated that conversations with the claimant could be difficult but he was an excellent engineer.

140. Mr Dennis informed the claimant his appeal was not upheld on 1 December 2017, after the interim relief hearing on 3 October 2017.

Conclusions

Witness evidence

141. We found that both the claimant and the respondent's witnesses tried to assist the Tribunal but did not always give evidence in a clear and straightforward way under cross examination. The claimant had to be told on a number of occasions to answer the question that had been put to him rather than trying to make separate unrelated points. Mr Wilson made several concessions under cross examination that in our view were the only credible admissions that could be made in light of the questions and evidence put to him. When the respondent's reliance upon a comparator of Ms Cameron unraveled Mr Wilson

refused to accept that a final written warning was less serious than a summary dismissal.

142. We found Mr Whitaker to be a credible witness who gave clear and concise replies to questions.

143. The respondent decided not to call Mr Huckerby. This was the subject of criticism by counsel for the claimant who submitted it was telling that Mr Huckerby had not been called given that it was a central part of the claimant's case that Mr Huckerby had a role in driving through the investigation and his alleged animus towards the trade union. The respondent's reply to submissions set out a number of reasons why he was not called upon. This was a matter entirely for the respondent but in this particular case we observe that many of the questions posed by the claimant's treatment in particular Mr Huckerby's role in the investigation were not dealt with by the respondent's evidence and that Mr Huckerby could have cast light and given evidence on his actions and conduct and enabled the Tribunal to evaluate the explanations.

144. Counsel for the respondent submitted that Mr Dennis had been a confident clear and compelling witness and invited the Tribunal to prefer his evidence over Mr Wilson where their evidence differed following the concessions made by Mr Wilson. These concessions related to the mitigating circumstances on the night of 17 June 2018. Counsel for the claimant submitted that he was not reliable nor did he conduct the appeal in an impartial manner and maintained the party line. The timing of the appeal outcome was potentially significant as Mr Dennis was aware there were Tribunal proceedings having attended the interim relief hearing.

Disability Discrimination claim

145. The issue over whether the claimant was a disabled person within the meaning of S6 EA 2010 was in dispute.

146. The burden of proof lies with the claimant to show he falls within the definition of S6. There does not have to be a medical diagnosis of an impairment in order for a person to fall within the definition. The claimant had no formal medical diagnosis of pre diabetes. He also had no medical evidence supporting his skin condition complaint or that he had ever consulted his GP about this or the other issues he described namely the need to eat regularly and needing to use the toilet in the night.

147. The presence of physical symptoms in the absence of a formal medical diagnosis can in certain cases amount to an impairment. We found the claimant's evidence about his skin conditions persuasive and on the balance of probabilities accept that he did experience the symptoms he described. We therefore considered whether or not these symptoms had a substantial and long-term adverse effect on his ability to carry out day to day activities.

148. The day to day activities relied upon by the claimant affected by his skin condition was weight training and running and generally high levels of physical activity that would result in sweating. The claimant said he was no longer able to undertake such activities. Counsel for the respondent submitted that weight training was not a normal day to day activity. We consider the

described impact to be wider than that and are prepared to accept that exercise to a level of exertion that would cause sweating could be a normal day to day activity.

149. Turning to whether the skin condition had a substantial impact on his ability to exercise. The claimant was no longer able to undertake physical exercise that would cause sweating so the impact was substantial; he could no longer carry out that activity. The effect of that symptom was more than minor or trivial.

150. The claimant's evidence about Balanitis was vague and there was no diagnosis. The claimant described what could happen if someone had Balanitis but gave no other evidence as to whether he had actually suffered with these symptoms, the severity and for how long.

151. The claimant's eye cataract surgery was not caused by pre diabetes. It was described as traumatic injury by the medical expert. There was no medical record of a deterioration in his eyesight. This could have been caused from any number of reasons namely normal deterioration or eyesight requiring correction by spectacles or contact lenses. Apart from the surgery the claimant pointed to having to wear glasses for night time driving, not being able to go to the cinema or watch TV in the dark. The claimant's evidence was that he was no longer able to go shooting due to his eyes deteriorating. Shooting and watching TV in the dark are not in our view a normal day to day activity. We accept that night time driving and going to the cinema would be a normal day to day activity however there was no evidence that claimant's inability to undertake any of these activities due to eyesight issues was caused by pre diabetes, the impairment relied upon or for how long they had lasted or might last.

152. The description of symptoms of needing to eat regularly did not in our view amount to a physical symptom of an impairment or show an impact on day to day activities. Neither was there any evidence of how this had a substantial impact on his ability to carry out normal day to day activities.

153. Toileting is clearly a normal day to day activity. In respect of the claimant's reliance on needing to visit the toilet in the night and urinate more frequently there was no evidence as to whether this was a substantial impact.

154. In relation to the duration of the impairment and the symptoms that emanated from the impairment. The skin condition was the only symptom that could potentially have amounted to an impairment but this in isolation was not sufficient to lead us to conclude he satisfied the definition in Section 6 of the EQA 2010. There was no evidence to support that the skin condition had lasted or was like to last 12 months or when the impairment had even started or of the duration of any of the symptoms relied upon by the claimant.

155. Taking all the above into account we have concluded that the claimant has failed to show that he falls within the definition of a disabled person. For this reason we are not required to go on to consider the S15 and S19 claims.

<u>Dismissal on grounds related to union membership or activities</u>

<u>Reason for dismissal - Discussion and conclusions</u>

156. The respondent relies upon conduct as the reason for dismissal. The Tribunal must determine if this is the genuine reason or, as the claimant submits a sham reason to disguise the real reason for dismissal that is trade union activities.

157. We start by recognising that there was potential misconduct by the claimant that required investigation by the respondent. In the early hours of 18 June 2017 the claimant stopped at a KFC on the way to an emergency gas escape. Had there been an explosion at that gas escape and the claimant was in a KFC the potential consequences to life and property as well as the respondent's reputation, statutory obligations and the claimant himself are obvious. We fully accept that the respondent was entitled to undertake an investigation and further that this was potentially a very serious matter with which the respondent was entitled to have concern.

158. The claimant and Mr Whittaker accepted from the outset that he had breached EM72 but there was a raft of mitigating circumstances that were not taken into account by the respondent.

159. The claimant relied upon a number of contentions to support his claim that the reason or principle reason for his dismissal was his trade union activities. These contentions were set out in the ET1 and in the claimant's evidence. Having regard to the guidance in **Serco** we have considered these and the respondent's explanations as follows.

Claimant was held to a higher standard when assessing the misconduct due to his trade union status

160. The terms of reference of the investigation that set out the allegations against the claimant did in our view demonstrate that there were grounds to suggest the claimant was being held to a higher as they specifically referenced he was a trained health and safety representative.

161. The respondent's evidence as to why Mr Huckerby referenced the claimant's status as a health and safety representative in the terms of reference of the investigation came from Mr Dennis's interview of Mr Huckerby. He had explained that he wanted this on the radar.

162. Further, in the conclusions reached by Mr Wilson in the dismissal letter he referred to the claimant as being a health and safety representative and then stating "you above all people should have been aware of the seriousness of your actions". The reference to "you above all people" clearly denotes the claimant was being placed at a higher standard. We did not find Mr Wilson's explanation for this statement to be satisfactory (see paragraph 129) as the Claimant had not claimed to be unaware of the rules and procedures and had accepted he had breached EM72. We find that the claimant was held to a higher account due to his status of health and safety representative. This was referenced on a number of occasions and there has not been a satisfactory explanation as to why.

Inconsistency of treatment

163. It was a central plank of the claimant's case that he had been treated more harshly than other engineers who had committed similar or even worse transgressions. The inconsistent treatment was alleged to be twofold. Firstly the manner of investigation had been driven by Andrew Huckerby due to a trade union animosity by Mr Huckerby. Secondly that the inconsistent treatment in respect of his sanction was evidence that he was treated differently due to his trade union status.

164. The claimant raised the issue of inconsistent treatment at the investigation interview with Chris Brown. He had pointed to several engineers who had been involved in similar incidents and had not been investigated in the same way and questioned if it was of his union representative status and ethnic background. Mr Brown did not investigate this or follow it up in his investigation report. The claimant named three specific cases in an email to HR prior to the disciplinary hearing. These cases were investigated by Mr Wilson who asked the claimant's supervisor Rob Baxter about the cases. Mr Wilson rejected the comparison in all three cases. He focused on the conduct of the individuals and the sanctions that had been given or as in the case of David Aldridge and Bryn Statham no sanction. Mr Wilson did not question or investigate why the claimant's investigation procedure had differed to the other cases cited by the claimant.

165. The respondent's disciplinary procedure flow chart provided that the basic fact find would be conducted by the line manager. The claimant's line manager was Martin Jones. Following the basic fact find, if there was an initial case to answer there would be an assessment / triage by the line manager with guidance from HR. This is what happened in the case of David Shead. Martin Jones dealt with Mr Shead's investigation and confirmed a written warning. There was no involvement of anyone more senior. Mr Huckerby, Network Manager and Martin Jones' manager was not involved in this investigation.

166. This was in contrast to the level of involvement Mr Huckerby had with the claimant's investigation. Mr Huckerby initiated the investigation. We accept that there were valid grounds to commence such an investigation having regard to Mr Huckerby seeing a report about a lost SLA with an explanation that the claimant had stopped for food. Martin Jones may have drafted the initial fact find but Mr Huckerby then went much further than initiation and took on a leading role on the investigation. He highlighted that the claimant was a trade union representative to the HR team. He did not merely instigate the investigation he drove the investigation. He amended the terms of reference that had been drafted by HR and drafted the privacy impact assessment and later widened the request and then obtained data from the claimant's vehicle tracker and gas monitoring device. He emailed a reply to HR in response to an email they had sent to Martin Jones, advising that SLA targets had been lost but omitted to mention that 20 minutes had been lost by Dispatch in failing to allocate the call quickly. This was not a balanced response to HR setting out all the relevant factors as to why the SLA was missed. In failing to mention this fact, it seemed that the claimant was wholly to blame for missing the SLA. This led directly to HR advising the case was one of gross misconduct. Mr Huckerby was also having discussions with Chris Brown and Dispatch management and was active in gathering documentation for the investigation.

167. Having compared the approach the respondent took in the David Shead case we concluded that the claimant has raised a prima facie case. We therefore considered the respondent's explanation. We did not hear from Mr Huckerby as a witness. The respondent dealt with this in evidence from both Mr Wilson and Mr Dennis who both told the Tribunal it was entirely appropriate that as the Network Manager Mr Huckerby would instigate the investigation as he was responsible for missing SLA's. Whilst this may have explained the instigation of the investigation it did not explain the extent of Mr Huckerby's involvement in the investigation itself as has been outlined above. The respondent submitted that the initial fact find looked into actions of others including Javed Rahim. The respondent pointed to Javed Rahim's different conduct in that he had stood himself down and therefore his conduct differed from the claimant who accepted the job. This did not take into account that by the time the claimant was presented with the job he knew there was no other engineer that could have taken the job having being advised that Javed Rahim had stood himself down as had David Shead. We also found that rather than the claimant being requested and having a choice to accept the job he had no choice but to take the job. We reject the contention that James answered a rhetorical question by the claimant (see paragraph 78).

168. It was suggested by the respondent that there had been a change in the disciplinary triage process since Mr Shead's case which could explain the difference in approach to the claimant's investigation. There was no evidence to support this. The respondent's disciplinary flowchart set out the process which was departed from to the extent that we concluded the line manager's role was assumed by a more senior manager. We saw no previous different procedure. Mr Whittaker, was unaware of any change in process.

169. Mr Shead, who was not a trade union representative, had failed to proceed directly to a P1 gas escape. He was given a written warning. Ms Cameron, who was also not a trade union representative committed far more serious transgression than the claimant and was given a final written warning despite already being on a final written warning. She was dismissed on notice for an accumulation of warnings. The claimant also admitted to failing to proceed directly to a P1 gas escape and was summarily dismissed for gross misconduct. These are facts from which we conclude are capable of establishing the dismissal was on prohibited grounds as the difference in treatment was stark. We rejected Mr Wilson's explanation that a final written warning was as serious as being dismissed for gross misconduct. A summary dismissal is the most serious of sanctions open to an employer. The difference on the effect on an individual between receiving a final written warning and summary dismissal is retaining a job and salary and having no job and salary, not even notice pay.

170. The respondent submitted that the claimant's case was not inconsistent with other dismissals within the respondent. This was not, in light of both the evidence available in the bundle and the evidence that unfolded at the hearing a sustainable position. In relation to Mr Jones he had deliberately stayed at home to make tea and toast delaying 35 minutes. We reject that this can be described as analogous to the events involving the claimant on 17/18 June 2017.

171. The respondent's case in respect of Mr Shead was that it differed from that of the claimant in that he had expressed remorse and was apologetic and acknowledged it would never happen again. Mr Wilson's evidence was that he

was informed of this by HR. If we accept that Mr Wilson believed this information from HR to be correct can it be said that as he genuinely yet mistakenly believed the cases to be different he cannot have been motivated by the claimant's trade union status. In our view this is more relevant to the band of reasonable responses but there are a number of inconsistences with this. The claimant apologised for missing the SLA on the night of 18 June and openly advised he stopped for food but this was overlooked by Mr Wilson and not taken into account.

Motivation

172. We do not conclude that Mr Wilson or Mr Dennis were motivated by prejudice against the claimant for his trade union activities or that Mr Wilson was in conspiracy with Mr Huckerby to dismiss the claimant for a falsehood but motivation is not necessary **(Gundton v GPT).** We also reject the claimant's contention that he was dismissed as the respondent was about to enter into pay talks and his influence was one of the respondent's motivating factors. There was no evidence to support this.

173. Nonetheless, Mr Wilson presided over a wholly inadequate investigation. Other members of staff had culpability. Three Dispatch team members failed to mark the Gantt with crucial information. No action was taken against anyone other than the claimant. The respondent's explanation that once the claimant had accepted the job he was obliged to proceed without delay, ignored everything else that had happened to that point and this was not a reasonable position to have taken.

Trade union animus

174. The claimant's evidence established sufficient grounds to show that there was a history of conflict between him and Mr Huckerby. We reached this conclusion taking into account the history of grievances, the disagreement regarding the stress survey and the ACAS early conciliation.

175. We have already concluded that the respondent has not provided an adequate explanation as to why Mr Huckerby was so involved in the investigation into the claimant's conduct. Although Mr Huckerby did not make the decision to dismiss the claimant the active role he took in driving the investigation, which differed to the approach taken for Mr Shead, had the end result that the claimant faced a charge of gross misconduct whereas Mr Shead was dealt with locally and received a written warning.

176. The respondent disputed there was any evidence to show that Mr Huckerby had a particular issue with the claimant. Mr Huckerby was not called as a witness to refute any of this evidence. The respondent pointed an email the claimant sent to Mr Huckerby thanking him for professionalism in dealing with an appeal in 2016 and also that the claimant had selected Mr Huckerby to hear an appeal against a grievance. We are not persuaded that this one email was sufficient to counter the claimant's evidence regarding the history between him and Mr Huckerby. Also, the reference to Mr Huckerby hearing an appeal was not a personal selection by the claimant. The email refers to him being the 'go to' appeal manager in line with the grievance procedure.

177. In addition, the respondent's explanations for the unfavourable treatment of the claimant in comparison to Mr Shead and Ms Cameron is unsatisfactory and does not explain why other members of staff in Dispatch faced no sanctions or any investigation despite one member of staff being heard on the recording as saying he did not understand the call out procedures.

178. We accept that the pizza meeting could not have been the cause of Mr Huckerby starting the investigation into the claimant as this took place after the investigation was instigated on 20 June 2017.

179. It was not only the animus between the claimant and Mr Huckerby that we found raised a prima facie case. What was also persuasive that the reason for the dismissal was trade union activities was the chain of events involving Dispatch on night of 18 June 2017. We have found and Mr Wilson conceded that the claimant should never have been called out to the job in question. The history of animosity and disputes between the claimant and Dispatch was never even considered to be of relevance by Mr Wilson or Mr Dennis. No-one from Dispatch was ever interviewed or held to account for the failings that night.

180. We found that the correlation made by Mr Jones on the disciplinary suspicion checklist to be concerning (see paragraph 97 above). In response to a question as to whether there was a risk the employee's presence at work will make it difficult to investigate the allegation e.g. employee may seek to destroy evidence or attempt to influence / intimidate witnesses a correlation was made with the claimant's status as a union representative. Mr Jones commented "Potential to try and influence peers as a TU Rep". This was a telling observation and in the absence of an explanation it is reasonable to infer that there was a prejudicial view of the claimant due to his trade union status / activities.

Conflicting reasons put forward for dismissal

181. We have considered the submission that the claimant did not know himself the reason for his dismissal having cited race, socialist views or trade union beliefs at various states of the investigation and disciplinary. The claimant did express views that his treatment may have been connected to his race on a number of occasions. We have balanced this with the claimant's position taken at the investigation, where he immediately raised his trade union activities as being the reason for his difference in treatment, his emails to HR prior to the disciplinary hearing, his formal grievance (which was never dealt with) and focus of his challenges at the disciplinary hearing and appeal and his claim to the employment tribunal. Taking all of this into account we conclude that the claimant was consistent in his reliance on the prohibited reason of his trade union activities. The claimant's defence of his actions throughout have been based on his belief he was being treated differently due to his trade union activities and status as a union representative.

182. Lastly we turn to the respondent's submission that the trade union were less than full throttle in their assertion the dismissal was due to trade union activities where the correspondence from the union stated that it "conceivably may have had an influence". We agree that an influence would not be sufficient to show the reason or principle reason for dismissal and could be taken as a watered down expression of support. It is the function of the Tribunal to arrive at

a judgment based on the evidence before us and other opinions, even from the supporting trade union are not of relevance when reaching that judgment.

183. It follows that taking all of the above into account, on balance we find the principle reason for the claimant's dismissal was his trade union activities and shall be regarded as unfair.

Unfair Dismissal – S98 claim

184. Having found the reason for dismissal to be the claimant's trade union activities this is not a fair reason under S98 (2) ERA 1996. Nonetheless there are a number of other conclusions we have reached and consider worth setting out in respect of the reasonableness of the decision generally under S98 (4) ERA 1996 and the band of reasonable responses which we set out below.

185. Having regard to the requirement for a reasonable investigation following **Burchell,** we have concluded it was not a reasonable investigation for the following reasons:

186. The HR team were not availed of the full circumstances when they were informed by Mr Huckerby that the result of the lost escape was the job failed regulatory standards. It was accepted that the claimant was one minute late for the escape but HR were not informed that there had been an initial 20 minute delay by Dispatch in allocating the call to the claimant. HR then deemed the offence gross misconduct.

187. Mr Brown failed to follow up on the claimant's assertions made at the first investigation meeting that other engineers had been treated less harshly and not been subjected to an investigation in the same manner due to trade union activities. These assertions were ignored. It is the role of an investigating officer to investigate all the relevant factors.

188. Mr Brown failed to investigate or follow up on the claimant's assertions at the investigation meeting that Dispatch had lied and manipulated him into thinking he was the only engineer that could take the emergency call. Mr Brown did not interview anyone from Dispatch to investigate the claimant's explanations as to why he had stopped for food that night or speak to anyone who had been present at Pegasus House or Mr Baxter. He did not obtain transcripts of the calls between the claimant and Dispatch and Mr Baxter and Dispatch despite calls being available as it was clear Mr Jones had listened to the call between the claimant and Dispatch when the claimant explained he had stopped for food after the missed escape.

189. The respondent's submissions accepts that the risk assessment carried out by Caroline was not recorded on Gantt and it should have been. The respondent submitted that this did not matter as if it had been recorded all it would have said was that the claimant was tired and Dispatch should try to avoid calling him. We do not find this to have been the case. Counsel for the respondent submitted that the Gantt recording showed that the claimant had a break from 21.30 to 22.00. This is not what was recorded on the Gantt system chart the Tribunal had sight of.

190. Mr Wilson and Mr Dennis failed to investigate the claimant's assertions that he was being treated differently and effectively victimised due to his union status. Neither asked Mr Huckerby about this so Mr Huckerby never got the opportunity to comment or rebut those allegations.

191. Mr Wilson's investigation into the comparator cases was wholly inadequate. In relation to Mr Shead Mr Wilson distinguished his case from the claimant as Mr Shead was reported to be very remorseful and sorry but there was no evidence of this anywhere in the outcome letter to Mr Shead. Further, Mr Wilson failed to take into account the evidence that the claimant had apologised and volunteered that he had stopped for food and no account was taken of this. Mr Wilson then went further and sought out his own comparators to establish that the claimant was not being treated inconsistently. It transpired that the extent of investigation into these comparators whom Mr Wilson specifically relied upon to justify the claimant's sanction was flawed. Mr Wilson simply accepted a verbal account of events from HR about the other cases. We do not accept that it was reasonable for Mr Wilson to rely on verbal account from HR. If an employer is going to point to cases in support of a decision to dismiss an employee they should be certain of the facts. In respect of Ms Cameron who committed a far more serious transgression than the claimant the respondent's case unraveled during the hearing when it transpired that Ms Cameron had not been summarily dismissal at all.

Range of reasonable responses

192. We find that the dismissal was not within the band of reasonable responses. There was no recognition by the respondent at any stage of these proceedings until the admission of Mr Wilson that the claimant should never have been in the position of being called out. We do not believe that a reasonable employer would dismiss in circumstances taking into account the claimant's work hours over the preceding days and the day in question, work conditions, lack of rest breaks and daily rest, repeated requests for rest to Dispatch and his supervisor which were ignored.

193. The respondent maintained the claimant could have rejected the call, he could have been more forceful. We do not accept these contentions having found the claimant had no choice but to take the call. Even if we had found the claimant had a choice the respondent had a part to play as a responsible employer for enforcing rest breaks especially in the circumstances of that particular day.

194. Mr Dennis found that the situation had come about due to the claimant being at fault and the situation was within his control. We find that this was not a reasonable conclusion to have reached based on the evidence that was before Mr Dennis at the time of the appeal hearing. In relation to Mr Shead, we assume that Mr Dennis relied upon Mr Wilson's dismissal letter which set out that Mr Shead had admitted culpability at the earliest opportunity. However Martin Jones's fact find had set out that the claimant had informed Dispatch on the night in question that he stopped for food and had apologised for missing the SLA. The claimant had also stated that he had informed his supervisor Rob Baxter and the line manager Martin Jones shortly after the event. Further Mr Dennis holds the claimant fully responsible for the whole chain of events with no acknowledgement of the failings of the Dispatch team or the position the claimant was in at Pegasus

House. Mr Wilson had stated in his outcome script that the claimant had been let down by his supervisor. The Claimant was blameworthy to the extent that he did not eat food when he had an opportunity to do so and should have insisted on being stood down but this should have been seen in the context of all of the circumstances of that day.

195. The most forceful reason for our finding that the decision to dismiss was outside the band of reasonable responses is the respondent's previous decisions in other cases. The most analogous case was that of David Shead and he received a written warning. The respondent acted with far more lenience towards Ms Cameron who committed worse transgressions yet she received a final written warning, and was dismissed owing to the fact that she was already on a final written warning. The respondent's own band of reasonable responses was clear from these cases and they stepped outside of it when deciding to summarily dismiss the claimant.

Polkey

196. We were invited by the respondent to consider a 100% reduction for Polkey on basis if there were any shortcomings to the procedure there was a 100% chance the claimant would still have taken place. For reasons set out above we conclude that it would not be possible to cure the defects we have set out at paragraphs 186 to 191. We decline to make a reduction for Polkey.

Contributory fault

197. We are however persuaded that a reduction for contributory fault is appropriate in this case. The reason we have reached this conclusion is that the claimant admitted breaching an important and serious procedure in failing to proceed directly to the gas escape the consequences of which could have been serious. The claimant did have very limited opportunity to have food either by taking food with him to Pegasus House or having food when he eventually arrived home at 10.30pm that night before going to bed. More importantly the claimant could have informed Dispatch that he needed to eat before proceeding to the call or even en route. He was well versed in the rules and requirements to keep Dispatch informed although we take case to balance this against our findings of the lack of rest the claimant had been able to take and that he had been woken to take the call after only a few hours sleep. The level of contribution is in our view relatively low having regard to the failings we have attributed to the respondent. The action in stopping for food did contribute to the dismissal. We find it just and equitable to reduce the award by 20%.

Wrongful dismissal

198. The claimant was not guilty of conduct so serious it warranted summary dismissal. Accordingly this claim succeeds.

Employment Judge Moore

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Date 15 October 2018

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS