EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4105960/2019

Hearing Held at Aberdeen on 10 and 11 July 2019

Employment Judge: Mr A Kemp (sitting alone)

Michael Still	**Claimant** **Represented by** **Mr F Lefevre** **Solicitor**
Safelift Offshore Limited	**Respondent** **Represented by:** **Mr K Jennings** **QHSE Manager**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The claimant was unfairly dismissed by the respondent and he is awarded the sum of Three Thousand, Eight Hundred and Eighty-One Pounds and One Pence (£3,881.01).

2. The Tribunal does not have jurisdiction to consider the claim as to unlawful deduction from wages, and that claim is dismissed.

REASONS

Introduction

1. The claimant claimed unfair dismissal and unlawful deduction from wages. An initial matter arose in that the Response Form responded to the latter claim but not the former. The claimant's solicitor raised that initially and by way of objection to evidence. Mr Jennings who both appeared for the respondent and gave its evidence explained that in the Claim Form the box for unfair dismissal had not been ticked, and he had thought that the only claim was for unlawful deduction. That was a part explanation, and Mr Jennings is not legally qualified nor does he have substantial HR experience, this being his first appearance at an Employment Tribunal. The paper apart to the claim for however specified that the claimant's dismissal was alleged to be both procedurally and substantively unfair. It was clear from that that the claim was one of unfair dismissal. That should therefore have been responded to in the Response Form. Mr Jennings confirmed that the reason for dismissal was capability, related to performance, and that the letter of dismissal set out the position. I decided to hear the evidence subject to hearing submissions later as to whether or not it should be considered. In the event there was no submission that any prejudice had been caused nor that it would not be appropriate to consider the evidence led.

2. Before matters commenced I explained to Mr Jennings how the proceedings were to take place, and about the questioning of witnesses. I was informed that Mr Peter Innes who accompanied him was present as an observer. During the course of Mr Jennings' evidence unfortunately Mr Innes sought to make interventions on a number of occasions, and despite clear warnings not to repeat that he did so, and in due course I required him not to attend the remainder of the evidence of Mr Jennings. After the evidence of Mr Jennings

was completed he returned. There was a brief adjournment allowed to facilitate a discussion between Mr Jennings and Mr Innes as to whether the latter was to give evidence, after which it was confirmed that he was not to do so, and Mr Innes was present for the evidence of the claimant that was then heard and assisted Mr Jennings in his cross-examination, and in making his submission.

3. On the second day Mr Lefevre produced an amended Schedule of Loss, which had a higher figure for the claim for unlawful deduction from wages and was in the gross amount that had been deducted. Mr Jennings opposed that. I considered that it was in accordance with the overriding objective to allow it to be received, and noted that evidence had been heard with regard to the total sum that the respondent had sought to recover. The sum had also been referred to in paragraph 3 of the paper apart to the Claim Form.

The issues

4. As discussed with the parties at the commencement of the hearing, the following issues arose:

   (i) What was the reason for the Claimant's dismissal?
   (ii) If the reason was potentially fair, had the Claimant been unfairly dismissed under section 98(4) of the Employment Rights Act 1996?
   (iii) If so, had he contributed to that dismissal in any way?
   (iv) What losses had the Claimant sustained?
   (v) Had there been an unlawful deduction from wages and if so in what amount?

The evidence

5. The Tribunal heard from Mr Keith Jennings and from the Claimant himself. A bundle of documents had been prepared for the hearing, most but not all of which was spoken to by the witnesses. The respondent did not agree with the

index that the claimant had produced, and produced its own index. I have however considered the documents rather than the index of them.

The facts

6. The Tribunal found the following facts to have been established:

7. The claimant is Mr Michael Still.

8. He was employed by the respondent as a Test and Inspection Workshop Foreman from 5 December 2016.

9. The respondent is Safelift Offshore Limited. As its name implies it supplies, services and maintains lifting equipment, primarily to the oil and gas industry. It has about 45 employees. It does not have an HR department. The HR function is undertaken by Mr Keith Jennings who is the QUSE Manager.

10. The claimant was employed under a letter with an offer of employment dated 1 December 2016 and a written statement of particulars of employment both of which stated that overtime was paid £17.50 per hour, which was the same as the standard rate of pay specified in both documents. The claimant was aware of those provisions when his employment started.

11. The respondent operates a disciplinary policy and a grievance policy.

12. The terms of the disciplinary policy include the following:

> "Minor faults will be dealt with informally through counselling and training. However in cases where informal action has not led to improvement or where the matter is considered too serious then the following formal procedure will be used…..If conduct or performance is unsatisfactory, the employee will be

given a verbal or written warning or a performance note…….If the offence is serious, or if there is further misconduct or failure to improve performance during the prior warning, a final written warning may be given to the employee…..If the conduct or performance has failed to improve, the employee may suffer demotion, disciplinary transfer, loss of seniority (as allowed in the contract) or dismissal."

13. There was a provision for gross misconduct, where "the normal consequence will be dismissal without payment or payment in lieu of notice."

14. There was a provision entitling an appeal.

15. From May 2018 the claimant undertook overtime. It was not compulsory. By mistake made by the respondent he was paid at a rate of 1.5 times the standard rate.

16. The claimant was aware of that rate being applied was higher than that required by his contract of employment but did not make any enquiry about it with the respondent. The same rate of 1.5 times the standard rate was paid for the overtime he worked up to November 2018.

17. The claimant is married with three children and spent the sums of overtime when received.

18. On 3 October 2018 the claimant had an annual appraisal with his line manager Brendan Murison. He received a good appraisal. There were no comments that were critical of his performance.

19. From time to time during his employment with the respondent the claimant and Mr Murison had discussions where Mr Murison would make remarks highlighting areas that the claimant could improve on in an informal manner, outwith the disciplinary procedure.

20. At no stage did the claimant receive any formal warning in relation to his performance whether in writing or orally under the disciplinary procedure.

21. On 22 October 2018 after undertaking a review of overtime payments Mr Jennings noted that the claimant had been paid overtime at a rate higher than that in his particulars of employment. He met the claimant to discuss it, and then wrote to the claimant on that date stating that the overpayment had been made, referring to the statement of terms, and noting the total for 187 hours as £1,636.25. He proposed a repayment schedule of four equal monthly payments.

22. The claimant replied on 24 October 2018 to state that he was unable to repay the sum over a four month period and suggested twelve months.

23. On 29 October 2018 Mr Jennings replied to suggest a compromise of six monthly payments, each fo £272.70.

24. On 30 October 2018 the claimant replied stating that a twelve month period was a more realistic timeline for him and his family.

25. On 20 November 2018 Mr Jennings met the claimant to discuss the claimant's position that he would not work overtime at the standard hourly rate. A note of that of that date is a reasonably accurate record of the meeting. The claimant accepted that he had been aware of the error in the overtime pay. In light of that Mr Jennings decided that it was fair to proceed with six monthly repayments as he had earlier proposed. At the meeting

26. The first such repayment was made by deducting the sum of £272.70 from the claimant's gross wages on or around 30 November 2018. The same deduction was made at the end of each of December 2018 January 2019 and February 2019. None of those deductions were made with the consent of the claimant.

27. A number of concerns as to the claimant's performance came to the attention of the respondent. Mr Jennings conducted an investigation on 4 February 2019, and compiled an investigation report on that date. The report referred to examples of poor performance in the role, and that it "may result in significant business risk." It had under the heading "Provision of statements" two statements from the claimant, one from Mr Jennings and one from Mr Murison. Under the heading "other documentary evidence" were nine bullet points, that included the following allegations:

(i) issues related to Technip which had arisen in October 2017 and resulted in the customer not wishing the claimant to return,

(ii) deliveries not being adequately receipted on arrival on or around 14 November 2018 for a period of approximately a week,

(iii) a pallet truck sent out in a new condition but which had had poor painting with the colour of paint not matching such that it stood out as having been "touched up", on or around 19 November 2018,

(iv) a complaint from a customer Total in relation to a pallet truck being repaired which was returned to them with three seized wheels, and two other pallet trucks where the pumping mechanism was not properly working, which the claimant had inspected before dispatch, raised by Total on 13 December 2018;

(v) Shell raising a query on not receiving a quotation for an item left with the workshop of which the claimant was the foreman for about two months, the query raised on 10 January 2019;

(vi) on 29 January 2019 Mr Murison had instructed the claimant not to use sand to grit an area outside reception at the respondent's premises, but salt, which the claimant had not done; and

(vii) on 2 February 2019 a forklift truck being left outside with its door open and keys in the ignition, amongst other matters.

28. By letter of that date Mr Jennings wrote to the claimant requiring him to attend a disciplinary hearing on 7 February 2019. It set out a format that included

explanation of allegations and format of meeting, the claimant putting forward his side of events, and his both being asked and asking questions. Also sent with the letter was the investigatory report, but not any of the attachments referred to in it. The claimant was informed that depending on the outcome of the discussions disciplinary action up to and including summary dismissal may be taken against him.

29. On 5 February 2019 the claimant replied by email to Mr Jennings seeking information and documentation on the allegations, and copies of all documents listed in the section of the report headed “other documentary evidence”.

30. Mr Jennings did not reply to that email.

31. On the morning of 6 February 2019 Mr Peter Innes the managing director of the respondent said to the claimant that he needed to speak to him. He said that it was not looking good for the claimant, and it was in the best interests of the company and the claimant if the claimant handed in his notice, and if he did he would give him three months’ work.

32. The meeting on 7 February 2019 took place with Mr Innes, Mr Jennings and the claimant present. Mr Innes asked the claimant if he had anything for him. By that was meant a resignation. The claimant stated that he did not. Mr Innes repeated the question. The claimant repeated his answer. The claimant was then informed that the meeting was to be an investigatory meeting not a disciplinary hearing. The claimant was provided with the supporting documentation for the investigatory report at that meeting and asked to comment. The respondent did not keep any formal minute or note of the meeting. The meeting took about an hour.

33. On 9 February 2019 the claimant wrote to Mr Jennings with a formal letter of grievance, detailing a series of concerns and his position in respect of allegations made.

34. Mr Jennings did not reply to that letter. The grievance was not considered by the respondent in any way.

35. On 12 February 2019 a disciplinary hearing took place involving Mr Innes, Mr Jennings and the claimant. The respondent did not keep any formal minute or note of the meeting. The claimant was asked about the allegations and denied that he was responsible, or that issues had been raised with him at the time. The meeting took about an hour.

36. After the meeting Mr Jennings and Mr Innes discussed the meeting and what the decision on it should be. Mr Jennings was involved in the decision-making process. Mr Jennings made a note of their discussions on that date. It referred to the claimant blaming everything or everyone else and refusing to take responsibility for the failings that had occurred. Mr Innes and Mr Jennings agreed that the business was put at risk, they considered alternative employment but said that the only option would be painter and that was hugely derogatory, and that performance was poor, with the claimant not displaying leadership and supervisor qualities. There was also a failure to follow instructions from line management. The decided to dismiss him.

37. The claimant was informed of the dismissal by letter of 12 February 20189 written by Mr Jennings. It stated “The reason for this is as discussed in the aforementioned meetings you have given unsatisfactory performance in the roe of Test & Inspection Workshop Foreman, there has been client complaints leading to possible loss of further work. Loss of confidence in ability to carry out quite basic tasks. Failure to carry out instructions for direct Management.” It referred to a right of appeal, and that one month’s notice would be paid.

38. On 14 February 2019 a further letter was sent to state that the claimant's last day of employment with the respondent would be 1 March 2019. Six days of holiday had been booked before that and one day was to be taken before the termination date. In relation to overtime £272. 70 was deducted from March pay and £545.40 from April pay, both in 2019.

39. The claimant appealed his dismissal by letter dated 15 February 2019.

40. That was acknowledged by letter of 25 February 2019 and an appeal hearing arranged for 28 February 2019. The appeal was heard by Mr Ritchie Barron a director of the respondent. Mr Barron reports to Mr Innes. Mr Jennings attended at the appeal hearing. No written minute or note of the hearing was prepared by the respondent.

41. Mr Barron wrote to reject the appeal by letter dated 28 February 2019. In that he dismissed the claimant's allegations, and stated that no new information or evidence was raised at the meeting, only that the disciplinary procedure was not followed. It was asserted that the procedure had been followed, and the conclusion was that he concurred with the original decision such that he was to remain on leave for the rest of the notice period.

42. The claimant was 54 years of age at dismissal. His gross annual earnings were £35,000 per annum. His net weekly pay, including pension provision, was £554.92.

43. The claimant obtained new employment after termination. He sought that by searching the internet. In the period to 28 June 2019 he had net earnings of £5,599.36. Had he been employed by the respondent to that date he would have earned £8,640.00. The differential in his current earnings against his net earnings with the respondent is £143.97 per week.

44. The claimant did not claim benefits.

45. The claimant had failed in his duties to the respondent in the following respects:

(i) he had failed to secure the correct paint was used for work on a pallet truck being sent to a major client with the colour of paint not matching the original, such that it stood out as having been "touched up", on or around 19 November 2018,

(iv) he had tested pallet trucks being repaired for another major client which were returned to the respondent after delivery, one with three seized wheels, and two others where the pumping mechanism was not properly working, raised as an issue by the customer on 13 December 2018;

(v) he had not arranged for a quotation for an item left with the workshop of which the claimant was the foreman for about two months, and a query was raised by the customer about that on 10 January 2019;

(vi) on 29 January 2019 Mr Murison instructed the claimant not to use sand to grit an area of ice and snow outside reception at the respondent's premises, but salt, which the claimant did not do.

Submissions for respondent

46. Mr Jennings argued that there had been no unlawful deduction from wages. The respondent believed that it had acted lawfully. They had acted fairly. The claimant knew that the amount was incorrect and had not highlighted it to the company. They had offered him overtime to make up the deficit, which he had refused.

47. He argued that the reason for dismissal was nothing to do with the overtime issue, but was unsatisfactory performance. There had been several complaints from customers. The company reputation had been damaged. All business was critical. There was a loss of confidence in the claimant's ability to complete basic tasks or follow instructions from line management.

48. He argued that the dismissal was fair. The respondent honestly believed that it did the best it could as a small company. It had been a difficult time in the industry. ACAS guidance and their own procedures had been followed. Errors which had been highlighted they had tried to correct. The claimant had taken away the documentation but at the meetings had not put forward significant mitigation. He did not give an explanation. He had not taken responsibility for anything. They had been justified in taking the action that they did.

Claimant's Submissions

49. Mr Lefevre accepted that the respondent was a small company and that it can be given a certain degree of latitude. He argued that the overpayment could not be recovered in law. The suggestion put forward that the claimant had been dishonest was totally unfounded. The claimant's evidence should be accepted. He had spent the money. Mr Lefevre referred to the ***Avon,*** which is referred to below.

50. He argued that there had been a lack of addressing any performance issues formally until that was commenced on 2 February 2019 (the date of the investigation report being 4 February 2019). The respondent had delayed doing anything until the first few deductions from wages had taken place. Nothing was done in respect of matters in November, December or January.

51. The letter calling him to the disciplinary hearing came out of the blue. No real information was given. The claimant produced a formal letter of grievance. It was quite improper not to address it. The disciplinary procedure had not commenced. The hearing on 7 February 2019 became an investigation, and that may not necessarily lead to disciplinary processes being engaged. Mr Innes had made it clear that the best thing to do was resign, and had addressed that at the meeting on 7 February 2019 twice.

52. Mr Jennings had been involved in the decision after the meeting on 12 February 2019. The note of the discussions afterwards referred to alternative employment. The respondent did not dream of giving a written warning. They paid him notice. The procedure was breached.

53. It was very difficult to judge the seriousness of what the claimant had done given the way in which the evidence had been led. The result was that the claimant should never have been dismissed. There should have been a performance improvement programme. There could be no other finding than one of unfair dismissal.

54. If that was the conclusion it was difficult to say that there was any contribution. It was not possible to say what had been done and what was the degree involved. If there was a finding of contribution that should be up to 10%.

The Law

(a) Unfair dismissal

55. It is for the Respondents to prove the reason for dismissal under section 98 of the Employment Rights Act 1996 ("the Act"). Capability is a potentially fair reason in sub-section (2).

56. In ***Alidair Ltd v Taylor 1[978] ICR 445*** Lord Denning in the Court of Appeal stated that "it is sufficient that the employer honestly believes on reasonable grounds that the man is incapable or incompetent" to establish that as the reason for dismissal.

57. If the reason for dismissal is potentially fair under section 98(2) of the Act, the issue of whether it is fair or not is determined under section 98(4) and

> "depends on whether in the circumstances…..the employer acted reasonably or unreasonably in treating [that reason] as a sufficient reason

> for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case."

58. The role of a tribunal in assessing that section was explained by ***Iceland Frozen Foods Ltd v Jones [1982] ICR 432*** which included the following summary:

> "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;
> 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;
> 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."

59. The band of reasonable responses has also been held in ***Sainsburys plc v Hitt [2003] IRLR 223*** to apply to all aspects of the disciplinary procedure.

60. Although there is an onus on the employer to prove the reason for dismissal, there is no onus on either party to prove fairness or unfairness. There earlier had been such an onus, and earlier cases where that was the law required to be considered in that new light.

61. The basic principles in a case of capability were set out by Lord Bridge in the House of Lords case of ***Polkey v AE Dayton Services Ltd [1978] IRLR 503***, one of those earlier cases, as follows:

> "Employers contesting a claim of unfair dismissal will commonly advance as their reason for dismissal one of the reasons specifically recognised as valid by [what is now section 98 quoted above]. These, put shortly, are: (a) that the employee could not do his job properly……. But an employer having prima facie grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as 'procedural', which are necessary in the

> circumstances of the case to justify that course of action. Thus, in the case of incapacity, the employer will normally not act reasonably unless he gives the employee fair warning and an opportunity to mend his ways and show that he can do the job;"

62. A single act of gross negligence can lead to a fair dismissal, particularly if the potential consequences are calamitous such as in ***Alidair***, where the claimant was a pilot flying a commercial aircraft with passengers. A number of smaller incidents may collectively amount to a sufficient reason for dismissal, as occurred in ***Miller v Executors of John C Graham [1978] IRLR 309,*** but in that case there had been a warning given. The extent to which an employer's internal procedures have or have not been followed is a further factor – ***Welsh National Opera v Johnston [2012] ewca Civ 1046.***

63. The Tribunal is required to take into account the terms of the ACAS Code of Practice on Disciplinary and Grievance Procedures. It includes the following provisions:

> "6. In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.
>
> 20. If an employees….unsatisfactory performance is sufficiently serious, it may be appropriate to move directly to a final written warning. This might occur where the employee's actions have had, or are liable to have, a serious or harmful impact on the organization.
>
> 46. Where an employee raises a grievance during a disciplinary process the disciplinary process may be temporarily suspended in order to deal with the grievance. Where the grievance and disciplinary cases are related it may be appropriate to deal with both issues concurrently"

(b) Unlawful deduction from wages

64. The provisions as to unlawful deductions from wages are found in Part II of the Act. The right not to suffer unauthorised deductions is provided for in section 13. There are exceptions to that found in section 14 that include

"overpayment of wages". Where the section 13 right is breached, the remedy lies to the Tribunal under section 23.

65. On the face of those provisions therefore an employer may deduct from wages where there was an overpayment without that being a breach of section 13. The position however is not straightforward. EAT authority initially under the predecessor provisions of the Wages Act 1986 was to the effect that the deduction must be permissible under the general law and if it is not the employee may be able to maintain a claim for unlawful deduction from wages under the predecessor to section 13: ***Home Office v Ayres [1992] IRLR 59. Ayers*** was not followed in ***Sunderland Polytechnic v Evans [1993] IRLR 196***, where the EAT held that the subsection should be applied as it stands such that the Tribunal did not have jurisdiction to consider an issue of the extent of a deduction made in relation to industrial action, which fell within the exclusion. ***Evans*** was applied by the EAT in ***SIP (Industrial Products) Ltd v Swinn [1994] IRLR 323*** which was a case concerning overpayment of expenses, which held that the tribunal did not have jurisdiction as overpayment was excluded and more generally in ***Gill v Ford Motor Co Ltd [2004] IRLR 840*** which was a case under the 1996 Act, involving industrial action where there was a question as to whether the claimants had or had not taken part in that action. The EAT held that it was necessary to determine that factual issue to decide if the section 14 exclusion as to industrial action was engaged, but not that if the claimants were so engaged the Tribunal would not have jurisdiction for a claim of unlawful deduction from wages.

66. The case on which Mr Lefevre founded, ***Avon County Council v Howlett [1983] IRLR 171,*** was not an unlawful deduction from earnings claim but an action in court for damages for breach of contract, and in any event the reasoning behind this decision was later queried to an extent in the House of Lords in ***Lipkin Gorman v Karpnale Ltd [1991] 2 AC 548***. It was held that where the overpayment is due to mistake by the employer, it will be recoverable by the employer unless the employee has in good faith acted to

change his position such as by spending the money, and the overpayment was not caused primarily by the fault of the employee, in the House of Lords case of ***Kleinwort Bension Ltd v Lincoln City Council [1998] 3 WLR 1095***. In ***Webber v Department for Education [2015] ICR 544*** the High Court held that if the person appreciates that the payments may be an overpayment and could make a simple enquiry to check whether this is the case but chooses not to do so, it is inequitable to allow him to rely on the defence of change of position. It is notable however that these were actions in court as damages claims, not in Tribunal for unlawful deduction from wages.

Observations on the evidence

67. Mr Jennings gave honest and candid evidence. He set out his understanding of matters, and the outcome of his own investigations. He was trying to do his best in handling matters. There were some matters that required comment however. Firstly, he was not the decision-maker, which was – it was said – Mr Innes either alone or jointly with Mr Jennings. Mr Innes did not give evidence. Secondly there was an accusation that Mr Innes had said, before the disciplinary meeting that became an investigatory meeting on 7 February 2019, that it would be best if the claimant resigned. Mr Jennings spoke about his understanding of what happened, but Mr Innes was not a witness, nor therefore was he cross examined on that point. Thirdly, Mr Jennings sought to criticise some of the documentation that the respondent had prepared, particularly the appraisal which he suggested should not have been as it was. Fourthly he was not able to point to any part of the disciplinary procedure that permitted dismissal in such circumstances, where he accepted that gross misconduct was not engaged and notice had been given, but argued that it was a matter of “common sense”. Fifthly he was the investigator but attended the disciplinary hearing, discussing the decision itself, and the appeal hearing. Sixthly, no written minute or note of the meetings was kept. Finally, although there was reference to the position of Mr Murison, who was the claimant’s line manager, he too did not give evidence.

68. The claimant gave evidence relatively briefly, and denied that he was responsible for the issues that arose. I accepted his evidence as to the conversation with Mr Innes in advance of the first hearing, at which the issue of his resignation had been raised by Mr Innes. His responses to some of the allegations however were not I considered always reliable. He accepted that he had checked the trucks that were sent out, but they were found on receipt to have seized wheels, and failed pumping mechanisms. He could not give an explanation for that. The inference from the evidence was that he had not carried out the checks adequately. He said that he had used the paint that was available to touch up chipped paint on what was a new truck, but had not checked the RAL number, which is used to identify its precise colour, shade and similar characteristics to enable a precise match to be made, or sought the correct paint. The inference was that he had not taken adequate care. He was the foreman of the Test & Inspection Workshop. A client complained at the absence of a quotation for an item sent two months previously, the complaint being in January 2019. As foreman he would be expected to be aware of what was within the workshop. The inference was that he had not taken sufficient care over that item, and was at least partly at fault for the absence of a quotation. He said that he had been told to use salt by Mr Murison on an area near reception, but there was very little of it available he said, and he used sand in another area which he said he thought would work. He did not act on the instruction he had been given by his line manager, and had not he accepted raised the reasons for his doing as he did at any meeting.

Discussion

(i) Reason

69. I considered that the Respondents had proved that dismissal was for the reason of capability which is potentially a fair reason under section 98(2) of the Act. I do not accept the allegations that it was a reaction to the issue of overtime. Firstly the issue had been on the face of it resolved, as deductions were in the course ofbeing made. Secondly, there were complaints by customers, and it was legitimate to have concerns as to the performance of

the claimant in light of them. Thirdly, he had not acted on an instruction from his line manager.

70. I consider that the Respondents have established that the sole reason for the decision was the capability of the Claimant.

Fairness

71. Capability is a potentially fair reason for dismissal under section 98(2). Whether the dismissal was fair or not is then determined by section 98(4). That generally raises two issues, the procedures that were followed, and the substantive decision

(ii) Procedural issues

72. Overall it appeared to me that the procedure was not a fair one. There are a number of reasons for that:

(i) The first that the claimant knew of matters was the letter calling him to a disciplinary hearing on 7 February 2019, three working days after the letter itself, under threat of summary dismissal. Until then there had been no formal disciplinary procedure, and his last appraisal on 3 October 2018 had been a good one.

(ii) That meeting was preceded by Mr Innes suggesting to the claimant that it was not looking good for him and that it would be best for him and the company if he handed in his notice. That was wholly inappropriate. It was prejudging the issue. By itself that renders the process an unfair one.

(iii) The claimant raised a grievance. It was effectively ignored. Its issues were not addressed. That was a failure by the respondent to have regard to the terms of the ACAS Code of Practice. The issue should have at the least formed part of the disciplinary meeting, and consideration been given to who was to conduct that given that Mr Innes had allegedly made comments that indicated that his mind was made up. Nothing however was done.

(iv) When the meeting did take place, the claimant was presented with the bundle of supporting evidence. It included events from as far back as 2017. That had not been raised in a disciplinary context at the time, and was prejudicial to include in the mater at that stage. It was indicative of a mindset against the claimant seeking to secure his dismissal.

(v) The meeting was not minuted in any way. The foreword to the ACAS Code of Practice referred to above includes the comment "Employers would be well advised to keep a written record of any disciplinary or grievance cases they deal with." The minute records both what is said, and not said. The absence of any minute means that it was not possible to be clear what had happened at the meetings. It was not clear therefore what had been put to the claimant for each of the matters alleged and what his response to that was. Nor was it clear to what extent if at all replies had been considered.

(vi) In his grievance letter the claimant had outlined his position. There was no evidence of that being investigated in any way. The respondent appears just to have assumed that the claimant was wrong, or that he was responsible as he was a foreman. Simply being a foreman however is not sufficient to lead to the finding that he was at fault for what happened, and therefore was not himself competent in his role.

(vii) Mr Jennings was the investigator. He was however involved in the decision to the extent that he minuted the discussion he held with Mr Innes, and then Mr Jennings wrote the letter of dismissal. The separation between investigation and decision referred to in the Code was not observed. The issue has been considered in ***Ramphal v Department of Transport [2015] IRLR 985*** in which the role of HR in influencing the decision was criticised, and rendered the dismissal unfair. Given that Mr Jennings was both investigator and providing HR support, I consider that the same general principles as in that case apply in the present case.

(viii) The appeal was similarly not minuted. It did not remedy the defects that have been referred to above. Mr Jennings appeared at it, and again was able to influence it.

73. All of the circumstances must be considered. This is a small employer with limited resources, operating in a competitive market. I conclude however that as the failures were serious both individually and collectively the dismissal was procedurally unfair.

Substantive fairness

74. I have again taken into account that the respondent is a small organisation. Mr Jennings is the QHSE and Training Manager, and although he undertakes the HR function that is not his area of primary expertise. I have concluded that no real regard was had to the terms of the respondent's own disciplinary policy. Had it been, it would have been apparent that in a serious case of incapability, as distinct from gross misconduct, the appropriate step to take was a final written warning. Mr Jennings argued that although what the company did was not in the policy it was a matter of common sense, but I do not consider that the decision can be said to be that. Not following the disciplinary policy is not determinative of the issue of fairness, but is a significant factor to consider, as was commented on in ***Johnston***.

75. The respondent accepted that this was not a case of gross misconduct. They were right to do so. There were a number of issues that had arisen, but they were at the highest ones that might lead to a final written warning. If that warning is given, and performance continues to be unsatisfactory, there may then be a dismissal which may be fair, as was the position in ***Miller***, but to do as the respondent did was not a step that a reasonable employer could have taken.

76. The ACAS Code makes clear that dismissal on the ground of capability in the absence of prior warning will be permissible only in the event of gross

misconduct, in the sense of gross negligence in this context. The respondent did not argue that there had been and separately that was not what the evidence bore out. The respondent dismissed the claimant with notice, which was also consistent with this not being a case of gross misconduct.

77. Thirdly, case law makes clear the importance in all but exceptional cases of there being a waring in cases of capability. This case was not one that engages the exception. There was no evidence of actual loss of clients. The incidents founded on were not in themselves matters that could be regarded by reasonable employer as serious ones. There was a concern that there may be a loss of business, but that is a matter itself referred to in the Code with its reference at paragraph 20 to harmful consequences, and that in the context of giving a final written warning. Whilst the issue of safety was mentioned by Mr Jennings in submission it had not been put to the claimant in cross examination, nor was it part of the investigation report. There was a failure to follow Mr Murison's instruction as to using salt instead of sand, but that was a minor issue, and the claimant had at least been doing something to try and improve the position of the area generally, stating that there had been only a small amount of salt.

78. Against that background, I consider that no reasonable employer would have dismissed the claimant. It was outside the band of reasonable responses to do so. The decision was substantively unfair.

79. The dismissal was therefore unfair under section 98(4) of the Act.

Remedy

80. In the event of a finding of unfair dismissal, a basic and compensatory award may be made under sections 119 and 122 of the Employment Rights Act 1996. The amount of the basic award is a function of earnings, which are capped, age (one and a half weeks of pay for service over the age of 41`) and number of continuous years of service.

81. The amount of the compensatory award is determined under section 123 and is "such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

82. The Tribunal may reduce the basic and compensatory awards under sections 122(2) and 123(6) of the Act respectively in the event of contributory conduct by the claimant.

83. In ***Nelson v BBC (No. 2) [1979] IRLR 346*** it was held that in order for there to be contribution the conduct required to be culpable or blameworthy and included "perverse, foolish or if I may use a colloquialism, bloody minded as well as some, but not all, sorts of unreasonable conduct." Guidance on the assessment of contribution was given by the Court of Appeal in ***Hollier v Plysu Ltd [1983] IRLR 260***, which referred to taking a broad, common sense view of the situation, in deciding what part the claimant's conduct played in the dismissal. It is the conduct of the claimant that is considered in this context, not that of the respondent.

84. I consider that the respondents have established that the claimant did contribute to his dismissal under the statutory provisions referred to. Mr Lefevre was right to refer to the limited evidence on that, and it was not easy to decern from the investigation report and various documents, which did not include any minutes or notes of the meetings held under the disciplinary process, exactly what had happened and when, but there was evidence spoken to by Mr Jennings and supported by emails and photographs to establish on the balance of probability that the claimant had contributed to his dismissal. I take no account of the more historic issues, such as that related to Technip in 2017 on which no formal action was taken by the respondent at the time. I also take no account of any discussions or issues before the annual appraisal on 3 October 2018, which was a good one and indicated nothing of material concern. That included for example an allegation of a grinder being

left in the yard all weekend with its key in the ignition in late March 2018, and generalised allegations of his not exercising authority over subordinates referred to in the statement from Mr Murison. Although there was a handwritten note on the appraisal document said to be from Mr Innes, referring to the claimant acting as forman, Mr Jennings did not know if the claimant had seen it. Anything before the appraisal was, if dealt with at all, was addressed by the informal process such that it must have been considered to be minor under the disciplinary policy. That was consistent with the terms of the appraisal which had no indication of anything "below expectations". All ratings were either the highest at "exceptional", or second highest at "above expectations" save for one which was "satisfactory".

85. The issues that arose after 3 October 2018 however are I consider ones to have regard to. There was an issue of not following an instruction to use salt on ice on 29 January 2019. That is however an issue at the low end of the scale. There was another issue about not providing a quotation. That the item was in the workshop for two months indicated to me that the claimant ought to have been aware of it, and taken some step to address the matter. That again was I considered an issue at the low end of the scale.

86. The issues that are more significant are the sending of three trucks to Total, a major client, in a condition they found to be defective, for which no explanation was provided by the clamant, although he said that he had tested them, and where the inference I draw is that he was at fault, and the sending to Shell another major client of what was a new truck with obviously different paintwork, which on the evidence was caused by the claimant failing to take sufficient care to ensure that the job was done properly.

87. The remaining matters alleged may possibly have been a matter for his responsibility but they were not investigated accurately enough to be able to say that that was proved, there was no minute or note of any of the meetings, and no evidence therefore that was clear as to why the claimant had actually a responsibility going beyond the fact that he was a foreman. Such a fact does not of itself lead to contribution for these purposes.

88. Taking the broad approach referred to in authority I conclude that the claimant contributed to his dismissal for the matters where I consider that he was at fault to the extent of 25%.

89. There is no issue of mitigation of loss taken. The claimant's basic award is £1,524, which I reduce by 25%, the sum of £381 leading to a net award of £1,143.

90. The compensatory award I calculate for the period to 28 June 2018 at £3,040.74. There is a further loss of £309.94 for two weeks differential in earnings to the time of the hearing. No loss is sought beyond that. The claim for loss of statutory rights I consider to be overstated at £500. I award £300 under that head. The total is the sum of £3,650.68 from which I deduct 25% being the sum of £912.67 leading to a compensatory award of £2,738.01.

91. The total of both awards is £3,881.01.

92. The claimant did not receive benefits, and the recoupment provisions are not engaged.

Unlawful deduction from wages

93. There is a divergence in the EAT authorities on whether or not a claim for unlawful deduction from wages can be pursued in the context of what is an overpayment of wages. It is clear that this is a case of overpayment of wages, with the respondent making an error in its calculation of the claimant's overtime. It was paid at the higher 1.5 rate, not at standard rate. That much was not contested. Nor did the claimant contest that he should repay it, the issue was only whether that was over 6 or 12 months.

94. I consider that the line of authority from ***Evans*** is to be preferred. It was decided after the House of Lords decision in Pepper v Hart, reference to which is made in it, in which it became possible to consider remarks made in

Hansard. That happened in that case, and it became clear from doing so what the Parliamentary intention had been. The conclusion was that in that case concerning deductions after strike action, the Tribunal did not have jurisdiction to consider the claim.

95. The circumstances in the case of ***Swinn*** are more closely related to those in the present case, concerning overpayment of expenses although in that case there was an issue of dishonesty. In the present case the claimant did not seriously challenge the suggestion that he had been paid at a higher rate for overtime than the contractual terms required. He proposed to repay the sum over 12 not 6 months. That can be contrasted with the most recent of the three cases, ***Gill,*** in which there was a dispute as to whether or not the facts of the exclusion were engaged, in that case concerning participation in industrial action. There is no such dispute in this case.

96. I conclude that in the present case the exception in section 14 as to overpayment applies, such that there was no unlawful deduction from the claimant's wages under Part II of the Act, and the Tribunal does not have jurisdiction to consider the claim.

97. For the avoidance of doubt that is not to say that the claimant may not have another remedy. Like the claimant in ***Avon*** he has the option of pursing his claim as damages for breach of contract in court. The claim was not pursued before me as one for damages for breach of contract, but only as one for unlawful deduction from wages. I must dismiss the claim made in this regard before me as I consider that it does not fall within the statutory provisions.

Conclusion

98. The dismissal was unfair under the terms of section 98(4) of the Act. I award the sums set out above. There was no unlawful deduction from wages and that claim is dismissed.

99. In so far as the decision is taken under reference to authority not canvassed in submission, should either side consider that they wish to make submissions in relation to those authorities that can be attended to by application for reconsideration under Rules 70 and 71 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.

Employment Judge: **Alexander Kemp**
Date of Judgment: **17 July 2019**
Date sent to Parties: **19 July 2019**