EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4113341/2018

Held in Glasgow on 12, 13 and 14 December 2018

Employment Judge: Mary Kearns (sitting alone)

Mr J R Brown	**Claimant** **Represented by:** **Mr M O'Carroll - Advocate**
British Gas Services Limited	**Respondent** **Represented by:** **Mr R Bradley - Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal was to dismiss the claims.

REASONS

1. The claimant who is aged 39 years was employed by the respondent as a Technical Engineer until his dismissal on 8 March 2018. On 15 August 2018, having complied with the early conciliation requirements he presented an application to the Employment Tribunal in which he claimed that his dismissal was unfair.

Issues

2. The respondent admitted dismissal. The issues for the Tribunal were:-

   (i) Whether or not the respondent's dismissal of the claimant was fair;

   (ii) If it was unfair, the appropriate remedy.

   (iii) Whether the claimant is entitled to notice pay.

Evidence

3. The parties lodged a joint bundle of documents ("J") and referred them by page number. The respondent called the following witnesses: Mr James Martin, Service Manager and Mr Graham Weller, Head of Smart Delivery for Centrica plc who chaired the claimant's Appeal Hearings. The claimant gave evidence on his own behalf and called Mr Steven McCue, trade union representative.

Findings in Fact

4. The following facts were admitted or found to be proved:-

5. The respondent is a company engaged in the servicing, repair and sale of boilers, heating systems and gas appliances. The company employs around 6,500 engineers in Great Britain. The claimant was employed by the respondent as field based technical engineer from 7 December 2003 until 8 May 2018, when he was dismissed for gross misconduct. The role of a technical engineer involves going to customers' properties and repairing, servicing or upgrading central heating systems, gas boilers, radiators and appliances in customers' homes. Field engineers work autonomously from home and are sent into customers' homes so that mutual trust and confidence is important.

6. The respondent's engineers are required to comply with their Rules of Conduct (J58). These require employees to attend work at agreed hours, take agreed meal breaks and not to leave work without permission. They also require employees not to falsify records. "*Theft, fraud, deliberate falsification of records*" features on a list of examples of offences that will normally be regarded as gross misconduct rendering employees liable to dismissal. Section 3.3.5 of the Rules defines theft and fraud and provides that in particular, employees shall not knowingly falsify time and other work sheets and returns; and shall not misuse forms for recording attendance at work.

7. The respondent has a Disciplinary Procedure (J63). The Introduction to the Procedure contains the following paragraphs:

"1.1.2 The stage of the procedure at which action is initiated will depend upon the nature and severity of the alleged breach…"

1.1.5 The procedure is concerned solely with cases where an employee merits formal disciplinary action. It is not intended to replace the normal interchange between the Line Manager and employee in the day-to-day running of the business which amounts to normal advice, guidance and counselling. This advice, guidance and counselling may be part of the process preceding any formal disciplinary action in respect of inadequate performance. Informal counselling does not form part of the formal disciplinary process and therefore no formal warnings can be given arising from it.

1.1.6 It is implicit in this procedure that if a Line Manager notices a particular employee failing to achieve the minimum standard of performance or behaviour in any aspect of their work, then the perceived shortfall in the employee's work performance or behaviour should be discussed with them at the earliest opportunity. It must be explained to the employee where their work is falling short of the required standard, what requires to be done to achieve the required standard and the timescale by which the standard must be achieved….

4.1.9 …. Dismissal without notice will only occur when British Gas Services is satisfied that gross misconduct has occurred. For the purposes of this procedure gross misconduct is behaviour of such a nature that British Gas Services is unable to tolerate the continued employment of the individual concerned."

8. Part of the technical engineer's role is to provide safety and efficiency advice after each job and to promote the respondent's products, such as new boilers, heating systems, smart meters and HIVEs and to generate sales leads. A smart meter is an energy efficiency device which replaces the existing gas meter so the customer can see how much gas they are using, and which appliances are using most energy. A HIVE is a smart time clock which can be controlled from the customer's phone through an app. The respondent's engineers record the time taken to discuss leads for central heating upgrades and HIVE installations with a customer as "quote jobs".

9. In or about October 2017 the respondent held a briefing session for its engineers entitled 'Call to Action'. It was stated during the presentation that there had been a 17% reduction in annual engineer productive hours since 2012. A power-point slide

(J87) stated that the respondent employs an engineer for 1,924 hours [annually] alongside a graph showing that in 2012 productive hours per FTE were 1,364; that in 2017 they were 1,137; and that in 2014 they were 1,213. Taking account of holiday, sickness and downtime the 2017 figure was expressed as 59% productive time. The slide stated: "*For comparison we only pay contractors for in house productive time."* The next slide (J88) said: *"We spend **£14M** per year on contractors because direct labour is less productive than 2014/15. Our aim is to strike the right balance between being efficient in the home and minimising time lost between jobs. It is through balancing these metrics that we will achieve our goal of serving more customers each week."* Engineers were advised that the respondent's target was to increase efficiency back to 2014/15 levels, which would require an engineer to complete two more jobs per week. It was observed that time was being lost at the beginning and end of the day. In addition, engineers were told they would be expected to increase sales leads generated through safety and efficiency advice ("SEA"). During the session the respondent announced an interim change to its engineer bonus scheme. Under this, the way in which the respondent measured the performance of each technical engineer would change for quarter 4 of 2017. In that quarter the main qualitative measure would be the average weekly completion rate from the time of entry into the customer's property to completion of the job (fixing or servicing a central heating boiler or system). Under the new scheme engineers would not receive a bonus if they spent less than 73% of their working time in customers' homes and would only get 50% bonus if they generated SEA sales leads in fewer than 6% of their jobs. If they generated sales leads in 6.1% to 20% of jobs they would receive 100% bonus and if they exceeded 20% they would receive 150% bonus. This scheme only applied in Q4 and was experimental.

10. It was also highlighted at the 'Call to Action' session (J90) that customer delivery audits had shown some anomalies in engineer conduct including quote jobs being raised inappropriately and visit times not matching van movements. The importance of correct conduct was emphasized and the engineers were informed that the respondent's managers would be undertaking random audits to look at such behaviour.

11. The respondent allows an average of 75 minutes to quality complete an interim breakdown and 47 minutes for an annual service visit. These figures were arrived at using historic data. Engineers record their time using a laptop. When they set off for a customer property, they press a button to say they are en route. When they arrive they press another button. Once they have completed a job they input the job data and press another button to say the job is complete. The 'time on the job' average data impacts on an engineer's pay. In the final quarter of 2017 under the respondent's bonus system the following measures were used to calculate whether a bonus would be paid: (i) *average completion time* - if an engineer's average interim breakdown completion time was 75 minutes or less; and/or their average annual service visit time was 47 minutes or less; (ii) *first time fix rate* – the proportion of repair jobs they fixed first time.

12. In early 2018 the respondent undertook an audit on the quoting activities of its engineers in quarter 4 of 2017. The audit was known as the "Quote Audit". Following the Quote Audit, the respondent decided to undertake further investigations into the data of certain engineers which was deemed to be of concern. The concern was that the data appeared to show that certain engineers were using 'quote jobs' to reduce their average breakdown and service visit times to below the 75 or 47 minutes necessary to attract a bonus. If the engineer spent 90 minutes in a customer's property and claimed 60 minutes for fixing the boiler and 30 minutes for a quote, this would reduce the average time to quality complete the repair, but it would amount to falsification of records if no quote was in fact done. If a quote had been raised, it would be on the system and sent out to the customer. Time for central heating boiler leads and smart meter leads is already built into the 75 or 47 minute allowance as these do not take long to discuss with a customer and extra time for them is not required. Engineers are aware that quote jobs should only be raised for central heating upgrades and HIVE installation as these require extra time to prepare. The 'Quote Audit' investigation revealed serious concerns in relation to the quoting activities of around 200 of the 6,500 engineers across Britain.

13. The claimant was one of those audited whose figures gave rise to concern. The investigation showed that he had a pattern of claiming 60 minutes for central heating repairs and that a very high percentage of the jobs he had done had been

input at exactly 60 minutes, which meant he was in a positive position to get a bonus. Indeed, 37 of the claimant's 49 IBs during the period were exactly 60 minutes and of 38 ASVs 32 were exactly 45 minutes. This was demonstrated by the claimant's '302 report' which is held for each engineer and shows the work report and information (including times) the engineer input into his laptop in respect of every job carried out. In addition, the '302 report' showed that the claimant claimed 30 minutes in a high percentage of quote jobs. On average a quote job takes around 15 minutes. However, the claimant was claiming exactly 30 minutes for most of them. The high number of cases where exactly 60 or 30 minutes had been claimed gave rise to concern, since it is statistically unlikely that so many calls would take exactly those times and it was felt there was likely to have been some rounding. The concern was that if the claimant was in a customer's property for 90 minutes fixing the boiler, he would not be eligible for a bonus, but if he claimed 60 minutes for the repair and 30 minutes for a quote then that would attract a bonus if it averaged out.

14. Thus, the claimant, and a number of other engineers whose figures had given rise to concern were further investigated. The investigation involved reconciling their 302 reports with their vehicle tracking data and the physical quotes they had submitted to the respondent. The investigation suggested that there was a mismatch between the quote jobs for which time had been claimed and the actual number of quotes in the system. Between 21 September and 31 December 2017 the claimant had input time for 32 HIVE quotes but there were only 8 in the system and a further quote which had expired (J149). According to the records, the other 23 had never been raised, which meant that the customer had never received the quote which had allegedly been discussed with them and had never had the opportunity to purchase that product.

15. On 6 March 2018 the claimant was sent a letter (J70) inviting him to an investigatory meeting under the respondent's disciplinary procedure. The letter advised him that the allegations to be considered were based upon

- "*Your quoting activity during Q4 of 2017;*
- *Daily patterns of movement;*

- *Out of hours use of your van."*

16. On 7 March 2018 the GMB Union (of which the claimant was a member) raised a national grievance (J46) with the respondent regarding the "*approach and handling of engineers following compliance audits in several areas*". The grievance stated that the GMB had consistently challenged the business approach of directly invoking the disciplinary procedure immediately following audits. It was suggested by the Union that the morally acceptable way of dealing with behavioural shortfalls would be to deal with an error swiftly by counselling, education and training. The grievance stated: "*Rather than widespread allegations of theft and fraud, the business should regularly confirm engineer's knowledge and understanding, especially prior to an audit. Alternatively, following an Audit, any issue should be brought to the attention of the engineer to correct the behaviour (monitoring where appropriate) and not evoking* [sic] *the disciplinary procedure at this point."* The GMB requested the cessation of all disciplinary proceedings against engineers in the Quote and other Audits until the national grievance was concluded. Following the respondent's receipt of the national grievance a number of meetings took place between David Young, the respondent's Director of Service and Repair and Aubrey Thompson, the GMB Chairman.

17. The claimant attended an investigatory meeting with Scott Pirie, investigating officer on 13 March 2018. Mr Pirie asked the claimant about anomalies from his 302 reports and other records. The claimant's trade union representative Martin Rooney was present. Con McGinley took a note (J71). After going through the detailed records with him the claimant stated: "*It looks as if I am stealing time, I have been doing this job 15 years and developed bad habits. I have not had a PDR with new manager. It's not my intention to steal anything, foolish on my part, not been told doing anything wrong. Doing it the last 15 years until today not been told, new metrics changed recently."* Mr Pirie summarised the claimant's quoting activity in quarter 4. "*You have claimed 32 HIVE quotes with only 9 in the system and all for faulty controls and the time taken is 870 mins (14.5 hrs). You have 880 mins against quotes you've linked to IBs, 300 mins against quotes linked to ASVs and 10 verbal quotes given which totalled 235 mins. If the business was to remove the time you had put against quotes claimed you wouldn't have made bonus in Q4."*

The reference to faulty controls related to the price at which the hive quotes were given. The respondent's standard price is £249. However, if the customer's control is faulty, the hive can be installed as a replacement for a reduced price of £149. Following his investigation Mr Pirie concluded that there was sufficient evidence to suggest a breach of the respondent's rules of conduct and the responsible manager David Mitchell put the case forward to a disciplinary hearing (J56). Mr Pirie prepared an investigation report (J49 – 318).

18. On or about 28 March 2018 John Law, Service Manager sent the claimant an invitation to a disciplinary interview on 5 April at the Erskine Bridge Hotel (J319) along with a copy of the investigation report. The letter stated that the interview had been arranged to consider allegations of gross misconduct and listed the following: "*time-keeping/compliance; unauthorised use of company vehicle; your quoting activities during Q4 of 2017; daily patterns of your movements".* The claimant received this letter which gave Mr Law's mobile number and stated that if, for any reason the claimant was unable to attend he should telephone Mr Law. It warned that if he did not attend and did not have a valid reason the interview might be held in his absence. The claimant discussed the letter and pack enclosed with Mr Steven McCue, his trade union representative. However, Mr McCue told him that the meeting would not be going ahead. The claimant did not call Mr Law on the number provided to check or to inform him that he would not be attending.

19. Following the respondent's receipt of the national grievance the respondent met with the GMB three times to discuss and agree its response. The response (J327) was issued as part of a joint communication (from David Young for the respondent and Aubrey Thompson for the GMB) at 15:10 on 29 March 2018 (J325). The response explained the agreed approach to disciplinary issues arising out of the audit: *"For the small number who may be identified as falling short of good working practices, the line manager would initially have an informal conversation about the errant behaviour as described in the disciplinary process.// For many this could just mean a diarised informal conversation and education via section 1.1.6 of the procedure. For others where certain behaviours indicate potentially serious issues, the line manager would decide if formal stages of the disciplinary procedure should be invoked but only through investigating and speaking to engineers will we be able*

to determine the appropriate outcome. It is acknowledged that there are occasions when certain undesirable behaviours are identified from a small number of individuals. If this degree of behaviour is identified either inside or outside any audit, these are potentially serious issues which would merit formal disciplinary action."

20. At 14:25 on 29 March 2018 (just ahead of the joint communication) Aubrey Thomson, GMB Chairman had forwarded the business response by email (J321) to the GMB officials within the respondent, asking for it to be forwarded to "*our 21 colleagues"*. This was a reference to the 21 engineers (who included the claimant) whose conduct, following investigation was assessed as falling into the category of "*potentially serious issues which would merit formal disciplinary action*". Steven McCue, the claimant's GMB representative was one of those officials to whom the email was sent. The email stated under the heading ***"For the attention of the 21 to forward to all Shop Stewards only.*** *(Not for circulation):*

"All,

As you know we recently submitted a Grievance on behalf of our colleagues involved in the Quote Audit investigations. Attached is a copy of the Company's response. Later this afternoon the joint note below will go to all our colleagues with the outcome attached.

Dear XXXXXXXX

We want to update you on the progress we have made on the recent Quote Audit Grievance.

Over three meetings, we have worked on a response to confirm the business approach for control audit reviews which is attached to this message. Colleagues who have already been spoken to about this will now be contacted again and next steps in line with the outcome put in place.

Regards David and Aubrey

As part of the discussions we also agreed the following and would ask that you contact individuals in line with the guidance given:

The GMB Leadership Group have an agreed outcome from the business on the National Quote Audit Grievance.

Following a number of meetings with David Young and Shelley Leatherbarrow the business has supplied a written response (see attached).

This note is an attempt to share what this will mean for GMB members involved, we wanted to relay what you are likely to see, and may be taking part in over coming days.

The business reply to the National Grievance quotes section 1.1.6 of the Disciplinary Procedure and this paragraph states: 'The procedure is concerned solely with cases where an employee merits formal disciplinary action. It is not intended to replace the normal interchange between the Line Manager and employee in the day-to-day running of the business which amounts to normal advice, guidance and counselling. This advice, guidance and counselling may be part of the process preceding any formal disciplinary action in respect of inadequate performance. Informal counselling does not form part of the formal disciplinary process and therefore no formal warnings can be given arising from it.'

It is important to relay the spirit of this paragraph which informally encourages the right conduct and behaviours. When a potential issue is picked up by a manager, and they think about invoking the disciplinary procedure, it advocates that a conversation with the individual might be appropriate. Where necessary this could be diarised to record the conversation and period of review set to change behaviour.

Following our early engagement with the business, a number of your colleagues will have received a message stating that there is no case to answer. A further number will now be invited to attend a Disciplinary Interview and it will be helpful in these cases if you contact your colleague and explain that the outcome can only be either no sanction, verbal warning or written warning.

A number will be invited to attend a disciplinary hearing where the letter will explain the allegation of 'Misconduct'. This means that on this occasion their job is not at risk and again we ask that you contact these colleagues and explain this to them.

This leaves a smaller number of colleagues, who, because of the seriousness of the allegations will be invited to a disciplinary hearing for "Gross Misconduct". The Company have been clear with us that this does not automatically mean dismissal, although this could be a potential outcome. However, due to the serious nature of the allegation, it will be the hearing panel who decide on the outcome.

The business has confirmed it is reviewing all cases in the light of the grievance outcome. Therefore, any who have already been given sanctions or who may have recently received letters containing allegations of 'Gross Misconduct' will have their case reviewed to see if this is in line with the confirmed approach (sanctions cannot be increased).

Many regards and on behalf of the GMB Leadership Group

Aubrey"

21. On 5 April 2018 Mr Law and Mr Pirie attended the Erskine Bridge Hotel for the claimant's Disciplinary Interview. The claimant did not turn up, nor did he contact Mr Law on the number provided to say he would not be coming, notwithstanding the warning in the letter that the meeting might be held in his absence.

22. On or about 24 April 2018 Jim Martin, service manager sent the claimant an invitation (J331) to a further disciplinary hearing to take place at the Garfield Hotel, Glasgow on 8 May 2018. The letter advised the claimant that the hearing would consider the following allegations of gross misconduct against him:

- "*Your quoting activity during Q4 of 2017*
- *Daily patterns of movement*
- *Out of hours use of your van"*

23. The letter informed the claimant that the allegations gave rise to potential breaches of the respondent's Rules of Conduct relating to attendance at work, relationships with other employees and "*Theft and Fraud".* The relevant extracts from the rules were quoted. The claimant was advised of his right to be accompanied and that a potential outcome could be the termination of his employment without notice. The respondent had two addresses for the claimant and copies of the letter were sent

to both. Enclosed with the letters were copies of the 267 page Investigating Officer's Report dated 13 March 2018 with appendices (J49 – 318). The Report contained the notes of the investigation interview with the claimant. The appendices to the report were:

- "*British Gas Services Rules of Conduct*
- *British Gas Services Disciplinary Procedures*
- *Call to Action Brief – October 2017*
- *302 extract from 25/9/2017 to 21/2/18*
- *Trimble data from 1/2/17 to 21/2/18*
- *IQ activity from 25/9/17 to 21/2/18*
- *Button Presses for meal break from 1/1/18 to 21/2/18"*

24. Around the end of April 2018, a further disagreement arose between the GMB and the respondent. This related to a practice referred to as 'case building'. On 30 April 2018 the GMB wrote the respondent a letter (J335) informing them of their 'suspension of engagement'. The letter suggested that the period of suspension be used *"to deal with all outstanding matters including the current Quote Audit Investigation"* through a Service Joint Council Meeting. Matters to be discussed were to include any members who had been dismissed (pending appeal). The letter went on: *"We firmly believe there is substantial evidence of 'case building' by management in these cases; placing many Engineers under intolerable stress and anxiety, which is, of course, counter to the Centrica values and something which the GMB can't and won't 'walk by'.* The precise definition of 'case building' was not agreed but it involved further building a case against an employee identified under an audit as having possibly committed misconduct, by adding reference to other potential misdemeanours. Mr Martin, (who had been asked to chair the claimant's disciplinary hearing on 8 May) was of the view that the reference to the claimant's out of hours use of his van and daily patterns of movement did not amount to 'case building' because the discrepancies were thrown up by the Trimble data and 302 reports, which were all part of the same investigation.

25. On 8 May 2018, the Tuesday after the bank holiday weekend, Mr Martin turned up at the Garfield Hotel in Glasgow ready to conduct the claimant's disciplinary

hearing. Craig Allen, the claimant's trade union representative also attended. He had not previously met with the claimant and had not seen the pack. The claimant did not appear. He had sent an email to his line manager Alan Bruce at 7.58 am that day saying: "*I will not be attending today. I have been to my GP and he says I am not fit to attend.*" Mr Martin thought that if the claimant was sending an email at 7.58 on the Tuesday after the bank holiday weekend then he must have been at his doctor the previous week. He took advice from HR and considered the occupational health ("OH") reports in the hearing pack. OH had stated in a report dated 26 March 2018 (J317) that the claimant was fit to attend the hearing. In addition, in an email from OH to Alan Bruce dated 20 April 2018 (J329) OH had stated that the claimant was fit to attend meetings and that the sooner they went ahead the better for his mental health. At 10.10 am Mr Martin decided to go ahead with the hearing in the absence of the claimant. Those in attendance were: Mr Martin and David Willison as the hearing panel; Graeme McCann as notetaker; Craig Allan as the claimant's trade union representative and Scott Pirie, Investigating Officer. The hearing was adjourned to enable Mr Allan to read the pack. The hearing reconvened 35 minutes later and Scott Pirie read out the investigation report, then withdrew. Mr Martin and Mr Willison discussed the evidence. Mr Allan remained present, and a note (J337) was taken by Mr McCann. Mr Allan was not in a position to answer any questions and he adopted a listening role. At 11:57 the meeting was adjourned and reconvened at 13:40. During the adjournment Mr Martin and Mr Willison formed the belief that the claimant was using quotation jobs to make his average IB time under 75 minutes and/or his ASV time under 47 minutes and that this amounted to falsification of records. They concluded that the claimant had also been late and taken excessive meal breaks without explanation and had used his company vehicle without authorisation. However, they considered that the main issue was the falsification of records. They rejected the allegation of failure to follow reasonable instructions. When the meeting resumed Mr Martin announced the conclusion he and Mr Willison had reached on the evidence, namely that the claimant was dismissed without notice. Mr Allan said that he was not happy, and he was informed of the appeal process.

26. The decision to dismiss the claimant was confirmed to him in a letter from Mr Martin dated 8 May 2018 (J343). The letter stated that the hearing was the second occasion on which the claimant had been invited to attend the disciplinary hearing, (the first occasion being 5 April 2018). The reasons for dismissal were said to be: (i) lateness to work and excessive meal breaks without reasonable explanation; (ii) "*a very high percentage of IB* [interim breakdown] *and ASV* [annual service visit] *job durations were exactly the same time which raised concerns that these times were not a true reflection of the times actually spent on each job. Subsequently this time was offset by quote jobs and other jobs which don't form part of your personal reward."* The 'other jobs' referred to were the installation of carbon monoxide detectors for which 30 minutes had been claimed. (iii) Use of the claimant's company vehicle for private and unauthorised use. A further allegation of failure to follow reasonable instructions was said to be unsubstantiated. The claimant was informed that his breaches of the Rules of Conduct amounted to gross misconduct and an irretrievable breach of trust. The letter informed him that he was dismissed with immediate effect. He was advised of his right of appeal. Had the claimant not been dismissed for gross misconduct he would have been entitled to twelve weeks' contractual notice (J38). Mr Martin would have made the same decision to dismiss the claimant for gross misconduct even had elements of the claimant's case subsequently found to be 'case-building' not been before him.

27. The claimant appealed against the decision to dismiss him for gross misconduct by email, which was passed from his representative Mr McCue to Mr Martin on 11 May 2018 (J347).

28. In order to address the GMB's suspension of engagement and the issues they had raised regarding 'case building', meetings were held between the respondent and the GMB to review 21 cases, including that of the claimant. The process and key principles to be applied to the decision making were summarised in a document dated 22 and 23 May 2018 (J349) created by the review team. The review process involved the respondent summarising the case allegations and how the investigation had progressed in each of the cases and the GMB representatives highlighting where they believed case building was evident. Thereafter, two

independent leaders were appointed to listen, question and apply a definition of case building which had now been agreed at the SJC (Services Joint Council – management/union negotiating body). It was agreed that:

- "*Following a business audit, any remedial actions based on that audit, will only reference the audit subject and any directly associated data.*
- *If there is a potential for the disciplinary procedure to be evoked, any further proceedings will only contain information taken from that audit and any directly associated data.*
- *Should the business identify any other areas of concern (outside of extreme gross misconduct), these should be brought to the attention of the individual informally to ensure consistent understanding and then set a reasonable period of monitoring."*

29. Aly Bathews, Head of Customer Communications and Tim Doran, Head of Resourcing were jointly appointed as the independent leaders. The respondent and the union agreed that they would have objective decision-making rights to determine whether or not case building was present with the following potential outcomes:

- *"No case building – progress within our procedures, as appropriate (unfounded)*
- *Case building is evident - take out those elements and progress within our procedures, as appropriate (founded)*
- *Case building is evident – take out those elements and no case to answer".*

30. The independent leaders addressed each of the cases, listening to the information provided by all parties and looking at the relevant documentation (including investigation content, hearing outcomes and communications to individuals) and they reached a decision in each case. Any parts of the disciplinary proceedings against GMB members defined as 'case building' were then stripped out. In the claimant's case the decision was "*Case building is evident – take out those*

elements and progress within our procedures as appropriate (founded)". The outcome was:

- *"IB and 30 mins for quotes (non-case building)*
- *Time-keeping on days (non-case building)*
- *Late starts (non-case building)*
- *Van use after hours (case building)*
- *Additional jobs with excessive time (case building)".*

31. David Young, the respondent's Director of Service and Repair met with the GMB once the reviews were complete to discuss what the next steps should be. By email dated 1 June 2018 he confirmed to his team that he had agreed with GMB to remove the pause on proceedings. He therefore instructed his team to re-engage with the process. He summarised the way forward he had agreed as follows:

- "*We have now completed all the 21 case reviews with you.*
- *Of the 21 cases, 9 were identified as have elements of case building; where the individual was impacted.*
- *Where case building has been identified we continue with the process but exclude the case building elements*
- *The case building elements are to be discussed with the individual outside of the formal process and documented accordingly*
- *Where there are case building examples that we have determined are extreme gross misconduct nature then those cases continue including the case building elements. (I will pick up with a few of you on Monday in terms of who these relate to)*
- *Where the engineer has already been dismissed and is awaiting appeal, the process continues. However I will be sourcing some external (to FO) support to help with the process. Leigh Ann and I will be in touch early next week.*

- *We are not revisiting those engineers who have decided to resign from the business."*

Bullets 1, 2, 3 and 6 applied to the claimant.

32. Of the respondent's 6,500 engineers, around 200 had been affected by the Quote Audit. Of these, 21 were subject to formal disciplinary proceedings and had their cases reviewed for possible 'case-building' by the independent leaders. 9 of the 21 cases were found to have contained elements of case-building. The claimant was one of the 9 affected.

33. On or around 8 June 2018 Graham Weller, Head of Smart Delivery for Centrica plc (and therefore external to Service and Repair) was appointed to hear the claimant's appeal. He was also asked to hear four other appeals. Mr Weller was sent by Leigh Anne Byrne of HR the entire documentation including the 267-page investigation report (J367). Ms Byrne confirmed to Mr Weller which elements of the original case had been determined as case building and which had not and instructed him not to consider "*van use after hours*" and "*Additional jobs with excessive time*", both of which had been identified as case-building and removed from the scope of the disciplinary procedure. Thus, Mr Weller was to consider the appeal in relation to "*IB and 30 mins for quotes; Time-keeping on days; and Late starts*" only. A hearing was arranged before Mr Weller on Monday 11 June 2018. The claimant attended along with Steven McCue, his GMB representative. Liam McGregor was present to take a note (J357). Two problems arose at the hearing on 11 June. Firstly, the claimant said that he had made a good case regarding late starts at the investigation hearing because he had had his diary with him. However, he said that he did not have his diary at the appeal because it had been left in his van which he had returned to the respondent. Secondly, Mr McCue, the claimant's TU Representative stated that all the charges apart from quoting activity had been stripped out as case building which was different to the information Mr Weller had been given. The hearing was accordingly adjourned for half an hour while Mr Weller checked and confirmed the correct position with HR.

34. The note (J359) states that when the hearing reconvened parties: "*Agreed to cover quotes and other areas including similarity in job times and late starts"*. The claimant was asked about the quotes he had claimed time for. He said that he had raised jobs for them but that the quotes were only raised on the job screen. He stated that he had a new laptop in January and it may not have been communicating back to the office. He said he had a receipt for a new laptop dated 15 February. He showed the receipt to Mr Weller. He said he had called IS (the respondent's IT support) on many occasions but did not always record the reference number and that his laptop had had problems. Mr Weller asked the claimant: "*Talking about quotes John. You stated you would talk to the customer but not always log them. Are these all actual quotes?"* The claimant said "*Yes. Only explanation would have been the laptop. We were told at a meeting point to raise a quote to justify our time."* Mr Weller asked the claimant why so may of his IB jobs were 60 minutes. The claimant replied that he rounded up and down. With regard to the first meeting Mr McCue (incorrectly) stated that the claimant had received the papers but that no date or venue had been given for the meeting. At the end of the meeting Mr McCue said that he believed that the claimant was attending the hearing for misconduct and not gross misconduct and that it seemed he had been misled. Mr Weller said he would speak to other individuals about what they had said.

35. After the hearing Mr Weller set about following up the claimant's points and seeking substantiation for them. Mr McCue had suggested during the meeting that all those cases that had had an element identified as case-building and removed should now be treated as misconduct and not gross misconduct and that it was still his understanding that that applied to the claimant's case. He reiterated the point at the end of the meeting. Mr Weller therefore followed this up first. He telephoned a number of people to try and resolve whether the case was misconduct as Mr McCue had said, or gross misconduct as he had understood. He also wanted to confirm exactly what was in scope for the disciplinary in view of Mr McCue's statements about which parts considered formerly had been stripped out as case-building. Mr Weller spoke to Aubrey Thompson of GMB, and Shelley Leatherbarrow, Lisa Metcalfe and Leigh Ann Byrne of HR (J369). He also spoke to Scott Pirie, the Investigating Officer. Mr Weller also obtained the complete record of how many

times the claimant had contacted the IT helpdesk ("IS") and the nature of the calls. This showed contacts on 31 August and 20 December 2017, neither of which had involved any problem with the quoting tool. There had been an issue with the laptop pen, but no issue reported regarding communicating quotes back to the office. The Helpdesk records contradicted the claimant's statement that he had contacted them on many occasions.

36. Mr Weller also contacted the claimant's line manager Alan Bruce and asked him where the claimant's van was. He explained that the claimant believed there was information in his diary which may help his case. Mr Bruce said the claimant's van was parked outside his house and was sealed and untouched because he was half expecting there might be a reason to check it. At Mr Weller's request Mr Bruce searched the van but did not find the claimant's diary. Mr Weller also asked Mr Bruce what instructions the claimant had been given about logging quotes. The claimant had said at the appeal hearing (J360) that he had been instructed by his manager Alan Bruce at a meeting to raise a quote to justify his time that if a customer did not accept a quote you would not log it on the laptop. Mr McCue stated that Mr Bruce himself could back this up. Mr Weller checked the point with Mr Bruce, who said that he had given the direct opposite instruction and that Mr McCue had been present at the time. He said that the other engineers in his team could confirm that his instruction was the opposite of what the claimant and Mr McCue were now suggesting. Mr Weller spoke to Mr Law about the first disciplinary meeting. He asked him whether the invitation had been delivered. Mr Law said that it had been hand delivered to the claimant's mother's house and that he had confirmed receiving it. Mr Law said that he had gone to the venue for the hearing and had had an indication from the GMB that the claimant was not coming.

37. After the hearing on 11 June 2018 Mr McCue reported back to his GMB colleagues that he had not felt he had been able to represent the claimant's interests properly at the appeal hearing because he had understood the charge against the claimant had been reduced to 'misconduct' rather than 'gross misconduct'. This was taken up in a discussion on 19 June between Aubrey Thompson and David Young about the five appeals considered by Mr Weller and his recommended outcomes. During

the course of this discussion it was agreed that the claimant's appeal meeting would be reconvened. The agreement on this point was recorded in an email on 20 June from David Young to Aubrey Thompson: *"John Brown We will reconvene the appeal meeting and ensure alignment to the company Disciplinary and Grievance Policy. I have agreed to this approach as you felt that there was some confusion around a previous discussion where it was felt that the Gross Misconduct was reduced to a misconduct. As such Stevie felt that he did not represent John in his best interest. I want you to feel that Stevie and John have been treated fairly, we will set up session asap. For clarity, John will be invited to the follow up session with an invite letter that states potential Gross Misconduct."* Mr Thompson replied to say that he had shared the summary and that Mr McCue would contact Ms Leatherbarrow to request the pack and discuss a date for the reconvened appeal.

38. By letter dated 22 June 2018 (J375) Mr Weller invited the claimant to the reconvened appeal hearing on 27 June 2018. The claimant attended the hearing on that date accompanied by Mr McCue. Liam McGregor also attended and took a note (J377). On this occasion Mr Weller was joined by Mr John Dalrymple, Head of Operations in Smart Metering. Mr Dalrymple was there as a second independent manager. Together he and Mr Weller formed an appeal panel. The claimant brought some fresh evidence to the reconvened appeal. In particular, he had found his diary and during the meeting he used it to refer to a number of the alleged late starts. Mr Weller and Mr Dalrymple listened to the claimant and Mr McCue. After adjourning they concluded that the core of the case was the quoting activity. They felt that the pattern of quoting activity evidence from the records looked unusual and could not reasonably have an innocent explanation but could only be a deliberate falsification of the times being reported which would feed directly into the claimant's bonus. They considered that this would also have increased the workload on other engineers. Having reached this conclusion on the facts they considered whether dismissal was the right sanction in all the circumstances. They telephoned the Employee Relations team, discussed with them the nature of the activity and checked whether this was gross misconduct. Mr Weller and Mr Dalrymple decided that the sanction of dismissal awarded was fair in the circumstances. During the course of the appeal the claimant had admitted (J381)

that he had always recorded quotes as 30 minutes. The panel had been struck by this. Mr Weller considered that a reasonable time for raising a quote would be 10 to 15 minutes and it would only be 30 minutes if, for example a customer wanted three new radiators. He thought that 30 minutes for all quotes was excessive and, if claimed every time was inaccurate. As Mr Weller was not part of Service and Repair he contacted 25 engineers, service managers and area managers and asked them what would be a normal quote time. He was told that talking to a customer was a normal part of the job and that 10 to 15 minutes was all you would normally need for a quote. Mr Weller noted that during the investigation the claimant had been asked how long he would spend on a quote and he had himself said 15 to 20 minutes, yet he had claimed 30 minutes in 6 out of the 9 quotes he had put through.

39. The appeal panel also concluded that the claimant had not raised many of the quotes he had booked time to. The claimant admitted (J382) that he had processed 32 quotes. However, there were only 9 on the quote tool. The claimant's explanation for this was that he had had a problem with his laptop which had prevented the quotes from being communicated to the office and had contacted the helpdesk on numerous occasions. Mr Weller had attempted to substantiate this. However, the claimant's helpdesk contact record only contained two contacts from himself to the helpdesk in the relevant period. The panel also considered the claimant's explanation that if the customer does not accept the quote you would not log it on the laptop, but that was not the system, nor had the claimant been instructed to do this as a check with his line manager Mr Bruce had established. The panel reasoned that the quote is raised whether the customer accepts it or not and if you are not raising a quote then what exactly are you spending the time doing? Having discussed the various points made by the claimant and his representative and considered the evidence Mr Weller and Mr Dalrymple decided to uphold the claimant's dismissal for gross misconduct. They recorded their decision and the reasons for it in an outcome letter dated 4 July 2018 (J385). In relation to the late starts, the panel concluded that there was insufficient evidence to sustain this and they upheld the appeal on that point. However, with regard to the quoting activity the outcome letter stated:

"*The panel believes that there was substantial evidence that your job durations were not a true reflection of the true time that you had spent on each job, and that this time has been offset by time booked against quote jobs. There is evidence that you deliberately falsified the time recorded in order to benefit yourself. The panel does not believe that the mitigating evidence you provided gives adequate explanation for your actions.// The allegations of falsification of company records are classed as Gross Misconduct. By falsely claiming time and not being available to take jobs not only are you letting your customers down, you are putting pressure on other colleagues to work harder."*

40. Of the five appeals heard by Mr Weller, two ended in the dismissal being upheld (the claimant's and one other); in the other three appeals, the employees were reinstated with other sanctions.

Applicable Law

41. Section 98 of the Employment Rights Act 1996 sets out how a tribunal should approach the question of whether a dismissal is fair. There are two stages. The first stage is for the employer to show the reason for the dismissal and that it is a potentially fair reason. A reason relating to the conduct of the employee is a potentially fair reason under Section 98(2).

42. To establish that a dismissal was on the grounds of conduct, the employer must show that the person who made the decision to dismiss the claimant believed that he was guilty of misconduct. Thereafter the Employment Tribunal must be satisfied that there were reasonable grounds for that belief and that at the point when the dismissing officer reached that belief on those grounds the respondent had conducted an investigation that was within the range of reasonable investigations a reasonable employer might have conducted in the circumstances.

43. If the employer is successful in establishing the reason, the tribunal must then move on to the second stage and apply Section 98(4) of the Act and decide whether the dismissal was reasonable in all the circumstances. In applying that section, the Tribunal must consider whether the procedure used by the respondent in coming

to its decision was within the range of reasonable procedures a reasonable employer might have used.

44. Finally, the Tribunal must consider whether dismissal as a sanction was within the band of reasonable responses a reasonable employer might have adopted to the conduct in question. The Employment Tribunal is not permitted to substitute its view on any of these issues for that of the employer. Instead it must consider whether the process and decisions of the respondent fell within the range of a reasonable employer.

Discussion and Decision

Unfair Dismissal claim

45. Both Mr O'Carroll and Mr Bradley reminded me of the test in British Home Stores v Burchell [1980] ICR 303. The respondent requires to show that the decision makers genuinely believed the claimant was guilty of misconduct; that they had reasonable grounds for the belief; and that at the time they formed that belief on those grounds they had carried out as much investigation as was reasonable in the circumstances. Finally, dismissal as a sanction must be within the band of reasonable responses a reasonable employer might have adopted.

46. With regard to whether the respondent's decision makers had a genuine belief in the claimant's misconduct, the thrust of Mr O'Carroll's first submission on behalf of the claimant was that the stated reason for dismissal was not the real reason. He argued that the real reason was a desire on the part of the respondent to reduce head count among its direct labour force which included the claimant. Mr O'Carroll submitted that the company-wide Quote Audit in Q4 of 2017 was used as a pretext to achieve headcount reduction by instigating disciplinary procedures. He referred to the evidence of Mr McCue about reduction in direct labour and increased use of contractors. Mr McCue's evidence in chief on this was: *"My personal point of view is that the respondent is moving towards a contractor-based workforce. If you ask a senior manager, they'll say it's not the case. We've lost 1,650 engineers over the last two years and they have not been replaced – a combination of guys being dismissed or left".* The specific figure of a reduction in direct labour of 1,650

engineers who were not replaced was not put to the respondent's witnesses and I did not feel able to make a finding on it. Mr O'Carroll put to Mr Martin in general terms that there was a strategy to reduce direct labour and increase the number of contractors. Mr Martin responded that direct employees were not doing the same jobs as contractors; direct employees were doing repairs and servicing whereas contractors only do services. He went on to say that in his experience the contractors used by the respondent did not have the technical expertise to do the job of a technical engineer. Mr Weller's evidence in cross examination was that the respondent receives higher customer satisfaction ratings from direct labour engineers in blue uniforms than from contractors and that they had they had deliberately recruited employed engineers for smart metering for this reason. The evidence before me on this issue of whether there was a strategy of replacing employees with contractors was not consistent. I concluded that there was insufficient evidence to reach any conclusion on whether Mr McCue's personal point of view was correct. It would presumably have been possible for the union to have produced statistical evidence and to have put that to the respondent's witnesses. In the absence of that I felt unable to make any finding on the matter.

47. As the second prong of his attack on the genuineness of the respondent's reason for dismissal Mr O'Carroll submitted that the respondent's 'strategy of case-building' was further evidence that the real reason for dismissal was reduction in headcount and not misconduct. As referred to in the findings in fact, on 30 April 2018 the GMB suspended engagement with the respondent citing 'case building' by the respondent in the disciplinary proceedings arising from the Quote Audit. Meetings were held between the respondent and the GMB to review 21 cases, including the claimant's and the issue of whether 'case-building' had occurred in each case was determined by independent leaders as agreed. Any parts of the disciplinary proceedings against GMB members defined as 'case building' were then stripped out. In the claimant's case the issues of '*van use after hours*' and '*additional jobs with excessive time*' were found on 23 May to be 'case-building' and removed from his case on appeal. However, the following allegations were held not to have been case-building:

- *"IB and 30 mins for quotes (non-case building)*

- *Time-keeping on days (non-case building)*
- *Late starts (non-case building)"*

48. Mr O'Carroll submitted that the case review at J349 – 352 and the email of David Young, Director of Service and Repair at J353 clearly demonstrated acceptance on the part of the respondent that the "strategy" of case building had indeed taken place and had been employed by it in relation to nine cases including that of the claimant. He argued that case building was a deliberate strategy aimed at increasing the number of allegations faced by employees subject to disciplinary proceedings following the audit. Mr O'Carroll stated orally that this "strategy" was directed towards reducing headcount. He said this fitted with Mr McCue's evidence (discussed above) about the respondent's reduction of direct labour and increased use of contractors. It appeared to me with respect that on the evidence before me this was rather a curious submission. The respondent has around 6,500 engineers. Although around 200 engineers may have been affected by the Quote Audit, only 21 were subject to formal disciplinary proceedings. 9 of the 21 cases were found to have had elements of case building. Of the five appeals heard by Mr Weller only two ended in the dismissal being upheld. (The other three were reinstated). In the nine cases where case-building was identified, it was not established that the additional elements added by way of case building were added disingenuously or dishonestly by the respondent, only that they were added and that the union successfully objected to this. If the respondent's true intention was to reduce headcount, then it would seem to be a peculiarly ineffective and time-consuming way to go about it. Whilst the respondent's senior managers were frank in acknowledging that case building had taken place in 9 cases, those 9 did not all end in dismissal. Even if there had been a strategy of reduction of direct labour and increased use of contractors, (and I have not been able to determine that on the evidence before me) it would be quite a leap to correlate that with case building in 9 cases and a still greater leap to claim in the absence of supporting evidence that they were cause and effect.

49. It is necessary to quote Mr O'Carroll's final submission about genuine belief here in case I have not understood it: *"If the above submission* [that the respondent's

disciplinary process was fundamentally and irredeemably poisoned from the start by case-building – discussed under 'procedure' below] *is accepted, it could be argued that genuine belief was not present as the outcome of the Audit and the effects of case building were being allowed to play themselves out in the disciplinary procedure without any need for a genuine belief in wrong doing on the part of the respondent."* I found the easiest way to address this submission was to remind myself that it is trite law that the reason for dismissal in any case is the set of facts known to the employer or beliefs held by him, which cause him to dismiss the employee. (See Abernethy v Mott, Hay and Anderson 1974 ICR 323 CA). In this case I accepted Mr Martin's evidence that it was his opinion that the claimant was using quotation jobs to make his average IB time under 75 minutes and ASV time under 47 minutes and that this amounted to falsification of records. It was also clear from the evidence that Mr Weller's appeal panel (consisting of himself and Mr John Dalrymple) believed that the claimant was guilty of gross misconduct by falsifying company records all as set out in the appeal outcome letter (J385). I concluded that their belief was genuine. I also accepted Mr Weller's evidence that he and Mr Dalrymple concluded that the core of the case was the quoting activity. I did not find Mr O'Carroll's argument persuasive on the evidence before me. At best, there may have been correlation, but firstly case building had not caused the claimant's dismissal. The appeal panel effectively restricted its belief in misconduct to the issue of the falsification of company records as demonstrated in Mr Weller's outcome letter at J386. I found Mr Weller to be a sincere and truthful witness who made appropriate concessions and gave his evidence carefully. Furthermore, there is no getting away from the fact that there *was* genuine misconduct in this case and that the claimant had partly admitted it to the investigating officer and at the appeal. There was also a genuine attempt by Mr Weller to investigate the explanations the claimant gave for his actual quotes not matching the number he had claimed time for. There was genuine deliberation by Mr Weller and Mr Dalrymple on the facts of the case and Mr Weller testified as to their decision and the reasons for it. By the time the appeal panel came to consider the case, the case building elements had been stripped out. Indeed, Mr Weller was so concerned to ensure that this had been correctly done that he adjourned the first hearing to check Mr McCue's representations about it. For all these reasons I accepted Mr Weller's evidence that

he and Mr Dalrymple genuinely believed the claimant was guilty of gross misconduct in falsifying company records. It follows that the respondent has established a genuine belief in the claimant's misconduct.

50. The grounds upon which the respondent reached their belief in the claimant's misconduct were as follows: The claimant had conceded to Scott Pirie, investigating officer on 13 March 2018, having gone through the detailed records with him that it looked as if he had been "*stealing time"* and that he had "*developed bad habits".* Mr Pirie summarised the claimant's quoting activity in quarter 4 as demonstrated by the records they had just gone through in the following way: "*You have claimed 32 HIVE quotes with only 9 in the system and all for faulty controls and the time taken is 870 mins (14.5 hrs). You have 880 mins against quotes you've linked to IBs, 300 mins against quotes linked to ASVs and 10 verbal quotes given which totalled 235 mins. If the business was to remove the time you had put against quotes claimed you wouldn't have made bonus in Q4."* Those were essentially the grounds for the ultimate belief of both Mr Martin and the appeal panel in the claimant's misconduct. The panel had concluded that the core of the case was the quoting activity. The investigation showed that he had a pattern of claiming 60 minutes for central heating repairs and that 37 of his 49 IBs during the period were exactly 60 minutes. It had also established that of 38 ASVs 32 were exactly 45 minutes. In addition, the '302 report' showed that the claimant claimed exactly 30 minutes in a high percentage of quote jobs. They felt that the pattern of quoting activity evident from the records looked unusual and could not reasonably have an innocent explanation but could only be a deliberate falsification of the times being reported which would feed directly into the claimant's bonus. Furthermore, during the course of the appeal the claimant had admitted (J381) that he had always recorded quotes as 30 minutes. Mr Weller had been struck by this. He considered that a reasonable time for raising a quote would be 10 to 15 minutes and it would only be 30 minutes if, for example a customer wanted three new radiators. 30 minutes for all quotes was excessive and, if claimed every time was inaccurate. As Mr Weller was not part of Service and Repair, he had contacted 25 engineers, service managers and area managers and asked them what a normal quote time would be. He had been told that talking to a customer was a normal part of the job

and that 10 to 15 minutes was all you would normally need for a quote. Mr Weller had also noted that during the investigation the claimant had been asked how long he would spend on a quote and he had himself said 15 to 20 minutes, yet he had claimed 30 minutes in 6 out of the 9 quotes he had put through. The appeal panel also concluded that the claimant had not raised many of the quotes he had booked time to. Out of 32 quotes he had booked time to, only 9 had been raised.

51. Mr Weller had attempted to substantiate the claimant's explanation that he had had a problem with his laptop which had prevented the quotes from being communicated to the office and that he had contacted the helpdesk on numerous occasions. However, this had been refuted by his helpdesk contact record. The panel also considered the claimant's explanation that if the customer does not accept the quote you would not raise it on the laptop, but Mr Bruce had confirmed that that was not the system. Mr Weller and Mr Dalrymple reasoned that the quote is raised whether the customer accepts it or not and if you are not raising a quote then what exactly are you spending the time doing? I therefore considered that the foregoing were reasonable grounds to support the belief of Mr Martin, Mr Willison, Mr Weller and Mr Dalrymple in the claimant's gross misconduct. Mr O'Carroll's submission to the contrary rested upon saying that the claimant's explanations ought to have been accepted by the respondent. However, I concluded that the decision to reject the claimant's explanations was evidence based and was within the band of reasonable decisions a reasonable employer might have taken on the evidence before the respondent.

52. In relation to whether sufficient investigation had been carried out, I concluded that the investigation done by the respondent was thorough and well within the range of reasonable investigations a reasonable employer might have conducted in the circumstances. The investigation report extended to some 267 pages and included the claimant's 302 reports, vehicle tracking data and quote records. In addition, Mr Weller was diligent in following up and seeking substantiation for the claimant's and Mr McCue's explanations. He went to some lengths to find the claimant's diary and find out how long a quote would normally take. Mr O'Carroll challenged this saying that we cannot know, and the claimant did not know what the other 25 engineers had said. Mr Weller's evidence on this (which I accepted) was that it was his

understanding that if an allowance for conversation with the customer was included in job time then raising a quote should normally take no more than 10 to 15 minutes and that 30 minutes would be exceptional, for example where the customer wanted a quote for a number of new radiators. The claimant had, in fact been asked by Mr Pirie at the investigation stage how long he would spend on a quote and he answered 15/20 minutes. Accordingly, even on the claimant's own evidence 30 minutes was not the norm. I did not consider that Mr Weller checking the normal time a quote would take with 25 engineers took the investigation outside the band of reasonable investigations in the circumstances. He was effectively conducting a 'sense check' instead of relying on his own assumptions and the result was not all that different from the claimant's own estimate.

53. Mr O'Carroll also submitted that individual customers ought to have been questioned about their interactions with the claimant. This would be quite an unusual step for an employer to take and I was unclear what it was submitted that they ought to have been asked. In any event, I did not conclude that the omission took the investigation outside the band of reasonable investigations a reasonable employer might have conducted in the circumstances. Indeed, I concluded that the investigation carried out by the respondent was well within the band of reasonable investigations in the circumstances.

54. I am therefore satisfied that the respondent has shown that the claimant was dismissed for a reason relating to his conduct. That is a potentially fair reason for the purposes of Section 98(2) of the Employment Rights Act 1996 (ERA).

Procedure

55. I considered the application of Section 98(4) to the facts of this case. Both Counsel referred me to Taylor v OCS Group Ltd [2006] ICR 1602 in paragraph 47 of which the Court said this about how the Employment Tribunal should apply the statutory test: *"they should consider the fairness of the whole disciplinary process. If they find that an early stage of the process was defective and unfair in some way, they will want to examine any subsequent proceeding with particular care. But their purpose in so doing will not be to determine whether it amounted to a rehearing or a review but to determine whether, due to the fairness or unfairness of the*

procedures adopted, the thoroughness or lack of it of the process and the open-mindedness (or not) of the decision-maker, the overall process was fair, notwithstanding any deficiencies at the early stage."

56. With regard to the procedure adopted by the respondent Mr O'Carroll argued that the respondent ought to have handled the claimant's misconduct under the 'advice, guidance and counselling' route in paragraph 1.1.6 of its disciplinary procedure instead of or prior to using the formal process. The informal route is available to a line manager who notices an employee failing to achieve the minimum standard of performance or behaviour in any aspect of their work. However, as the Disciplinary Procedure (paragraph 1.1.2) says: "*The stage of the procedure at which action is initiated will depend upon the nature and severity of the alleged breach…"* Furthermore, the approach the respondent adopted was exactly the approach agreed with the GMB in relation to the most serious cases. The agreed response to the union's grievance, jointly issued on 29 March 2018 (J325) was that, whilst for many there might just be "*a diarised informal conversation and education via section 1.1.6 of the procedure";* for others whose behaviours were more serious, there would be formal disciplinary action. The respondent's witnesses to whom this argument was put by Mr O'Carroll in cross examination were clear that the claimant's alleged conduct was of sufficient gravity to warrant invoking the formal procedure. It was also clear that it was identified as falling into the most serious ('gross misconduct') category in Mr Thompsons' email of 29 March 2018 (J323). This was agreed to be the case by the union at a senior level as Mr Thompson's subsequent email of 20 June in response to Mr Young's of the same date (J372) makes clear. Thus, standing that the claimant's case involved a serious alleged breach, it did not appear to me that the invocation by the respondent of the formal rather than informal disciplinary procedure was outside the band of reasonable responses that a reasonable employer might have adopted in all the circumstances.

57. Mr O'Carroll also argued that the procedure was fundamentally flawed from the outset and that anything flowing from it was therefore tainted by procedural irregularity, rendering the dismissal unfair. Mr O'Carroll pointed to the 'Call to Action' ("CtA") and invited me to draw the inference from it that the respondent was not satisfied with the performance of its service and technical engineers and was

seeking an increase in additional sales of its products to boost revenue. I concluded from the evidence I accepted that the CtA was essentially about productivity and sales. It was demonstrated during the CtA presentation that there had been a 17% reduction in annual engineer productive hours per FTE since 2012. Whilst the relevant CtA presentation slide stated: "*For comparison we only pay contractors for in house productive time",* the next slide (J88) informed engineers that the respondent was spending £14M a year on contractors *because* (my emphasis) direct labour was less productive than in 2014/15. The respondent's stated target was to increase efficiency back to 2014/15 levels, which required an engineer to complete two more jobs per week. Engineers were also expected to increase SEA sales leads. Thus, it appeared to me that the CtA was exactly that. In essence, a call to work more efficiently and sell more and to that end, the interim change to the engineer bonus scheme was announced. However, it was also highlighted at the CtA session that audits had shown some anomalies in engineer conduct including quote jobs being raised inappropriately and visit times not matching van movements. The importance of correct conduct was emphasized, and the engineers were told that the respondent's managers would be undertaking random audits to look at such behaviour.

58. Mr O'Carroll submitted that allied to the Quote Audit the respondent was operating a case-building strategy to bolster the case for dismissal against employees identified by the Audit. He said that that meant that the disciplinary process was tainted from the outset. This submission was made both in relation to the genuineness of the reason for dismissal and in relation to procedural fairness. I have discussed the first of these in the relevant section above. With regard to procedural fairness I considered the evidence carefully. The facts about the CtA, the Quote Audit and the discussions between the respondent and the GMB about case-building were fairly well documented. The respondent was frank and transparent about the fact that case building had occurred, that the union had objected to it and that the respondent had ultimately agreed to strip out any allegations found to amount to case building. I did not accept Mr O'Carroll's submission that viewed as a whole the disciplinary process was effectively and irredeemably poisoned from the start so that the only proper and logical course of

conduct would have been to call off the whole process and offer the claimant his job back. His argument was that because the original case that led to the claimant's dismissal included the additional case building elements, even though these were stripped out by agreement before the appeal and even though Mr Weller held two appeal hearings, the defect was so fundamental that it could not be redressed. The dismissal was, he said, 'fruit of the poisoned tree'. It appeared to me that it was entirely open to the union to argue that disciplinary proceedings arising from the Quote Audit should be restricted to matters directly arising. They were entitled to make those representations and they were listened to. The union's intervention and the subsequent negotiated agreement resulted in the allegations against the claimant at appeal being reduced. That is the way industrial relations are supposed to work and the handling of the claimant's case proceeded thereafter in the manner agreed with the union. Mr Weller was careful to establish exactly which allegations were before him and which had been stripped out. Indeed, he adjourned (then reconvened) the first hearing because of concerns about this raised by Mr McCue and made a number of investigations after that hearing. The decision ultimately taken respected the agreement reached with the union and the determination made by the independent leaders about case building. The appeal panel did not consider the case-building elements, and indeed, as Mr Bradley submitted, they focused on the key issue; the time booked to quote jobs and to IB/ASV jobs. I did not conclude that because the union were successful in reducing the original charges against the claimant that meant that the procedure was irredeemably poisoned. As mentioned above, it was agreed that case-building elements should be stripped out, but I did not conclude on the evidence before me that those elements had been dishonestly or disingenuously raised.

59. Mr O'Carroll also argued that the first disciplinary hearing ought not to have counted and that the respondent ought to have held a further hearing at that stage. In total, four hearings were attempted in this case. In relation to the first hearing, John Law, Service Manager sent the claimant an invitation on 28 March 2018. The hearing was on 5 April (J319). The letter gave Mr Law's mobile number and stated that if, for any reason the claimant was unable to attend he should telephone Mr Law. It warned that if he did not attend and did not have a valid reason the interview might

be held in his absence. The claimant did not attend the hearing. He admitted that he had received the invitation letter and enclosed pack and that he had not contacted Mr Law to say he would not be coming. The reason for his non-attendance was that Mr McCue told him the hearing would not be going ahead. Whilst it is true that the GMB had lodged its national grievance on 7 March, and that meetings had been held to resolve it, an agreed response was issued by Mr Young and Mr Thompson on 29 March, well before the hearing on 5 April. In addition, Mr Thompson had sent an email at 14:25 on 29 March to all shop stewards in which he had given instructions about the effect of the agreed response on cases. This was clearly relevant to the claimant's case. The claimant's disciplinary interview invite letter referred to the allegations against him as "gross misconduct". The response (J327) explained the agreed approach to disciplinary issues arising out of the audit and in it the respondent reserved the right to use formal disciplinary action where the degree of behaviour merited it. Mr Thompson's email (J321) to GMB officials (including Mr McCue) requested them to contact individuals in line with the grievance outcome and relay to them what they were likely to see and may be taking part in over coming days. Various scenarios were set out. The only two relevant for present purposes are:

"A number will be invited to attend a disciplinary hearing where the letter will explain the allegation of 'Misconduct'. This means that on this occasion their job is not at risk and again we ask that you contact these colleagues and explain this to them.

This leaves a smaller number of colleagues, who, because of the seriousness of the allegations will be invited to a disciplinary hearing for "Gross Misconduct". The Company have been clear with us that this does not automatically mean dismissal, although this could be a potential outcome. However, due to the serious nature of the allegation, it will be the hearing panel who decide on the outcome." It was clear from the claimant's invite letter that he fell into the category invited to a hearing for 'gross misconduct'.

60. In fairness to Mr McCue, Mr Thompson's email did also state: "*The business has confirmed it is reviewing all cases in the light of the grievance outcome. Therefore, any who have already been given sanctions or who may have recently received*

letters containing allegations of 'Gross Misconduct' will have their case reviewed to see if this is in line with the confirmed approach (sanctions cannot be increased)." However, given the short period between the issue of the claimant's disciplinary invite letter and the issue of the agreed grievance response, it would have been prudent for Mr McCue to have checked the position before advising the claimant not to turn up. At the very least either the claimant or Mr McCue should have telephoned John Law to confirm whether the hearing was going ahead in light of the review. I therefore did not accept the argument that this hearing 'did not count' and that when the claimant failed to turn up on 8 May as well, another disciplinary hearing should have been arranged. It seemed to me that the respondent's arrangement of two disciplinary hearings, neither of which the claimant attended was within the band of reasonable processes a reasonable employer might have adopted in the circumstances and that the failure to hold a third disciplinary hearing did not take that process outside the band, even when considered cumulatively alongside any other flaws in the process.

61. Mr O'Carroll submitted that the notice of allegations faced by the claimant were 'something of a moving feast'. On 24 April 2018 Jim Martin, service manager sent the claimant an invitation (J331) to a rearranged disciplinary hearing on 8 May 2018. The letter again advised the claimant that the hearing would consider allegations of gross misconduct against him. These were said to be: "*Your quoting activity during Q4 of 2017; Daily patterns of movement; Out of hours use of your van"*. The claimant was advised that a potential outcome could be the termination of his employment without notice. The claimant again failed to attend. His reason was that he was not feeling up to it. Mr O'Carroll noted that the allegations the claimant faced were not exactly the same as in the first invite letter. He submitted that "late starts" had been excluded as 'case-building' but in fact, late starts were determined to be 'non case-building' by the independent leaders on 23 May (which obviously post-dated the disciplinary hearing on 8 May). However, 'out of hours use of the van' was found to be 'case-building' so perhaps that was what he meant. As Mr O'Carroll points out, the van allegation was ultimately stripped out by the time of the appeal.

62. The invite letters to both disciplinary hearings stipulated that the case was one of alleged gross misconduct. However, in his evidence Mr McCue testified in support of his understanding that it had been agreed between the respondent and the union that the claimant's case would be treated as misconduct rather than gross misconduct, and that a meeting had taken place between the respondent and the union on an unspecified date at which the whiteboard had shown that the claimant was to be reinstated and charged with misconduct. Mr McCue produced a photograph he had taken on his phone of the whiteboard (J387) and said this was the basis for his understanding. Although the whiteboard photograph was put to Mr Weller in cross examination and it was suggested it had been taken at a meeting on 31 May 2018, he stated he had never seen it before the production of the bundle. I did not find the photograph to be of much evidential value. It was not clear to me from Mr McCue's testimony what the status of the whiteboard was, who had written what and when. (Mr McCue did not remember the date of the meeting himself.) In any event, it was inconsistent with Mr Thompson's email exchange with Mr Young on 20 June, both in relation to the claimant, but also in relation to another employee DP in respect of whom the email confirmed "*Dismissal stands"*, whereas the whiteboard suggested reinstatement. Thus, even if there had been a discussion at some stage, the status was unclear and it appeared to have been superseded.

63. When, after the hearing on 11 June 2018 Mr McCue reported back to his GMB colleagues that he had not felt he had been able to represent the claimant's interests properly at the appeal hearing because he had understood the charge against the claimant had been reduced to 'misconduct' rather than 'gross misconduct', this was taken up in a discussion on 19 June between Aubrey Thompson and David Young and it was agreed that the claimant's appeal meeting would be reconvened as confirmed in the email of 20 June from David Young to Aubrey Thompson: *"John Brown We will reconvene the appeal meeting and ensure alignment to the company Disciplinary and Grievance Policy. I have agreed to this approach as you felt that there was some confusion around a previous discussion where it was felt that the Gross Misconduct was reduced to a misconduct. As such Stevie felt that he did not represent John in his best interest. I want you to feel that Stevie and John have been treated fairly, we will set up session asap. For clarity,*

John will be invited to the follow up session with an invite letter that states potential Gross Misconduct." Mr Thompson replied to say that he had shared the summary and that Mr McCue would contact Ms Leatherbarrow to request the pack and discuss a date for the reconvened appeal.

64. At the second appeal hearing on 27 June 2018 Mr Weller was joined by Mr John Dalrymple, Head of Operations in Smart Metering as a second independent manager. The claimant brought some fresh evidence to the reconvened appeal. In particular, he had found his diary and during the meeting he used it to refer to a number of the alleged late starts. Mr Weller and Mr Dalrymple listened to the claimant and Mr McCue. After adjourning they concluded that the core of the case was the quoting activity as discussed above.

65. On balance, I concluded that the claimant had a proper opportunity to prepare and present his case, taking the procedure in the round. The process was perhaps not perfect, but it complied with the ACAS Code and was, in my view, within the band of reasonable procedures a reasonable employer might have adopted in the circumstances, notwithstanding the reduction in the allegations the claimant faced at the appeal stage resulting from collective negotiations. The effect of the collective negotiations on the individual procedure in this case is relevant in considering whether the overall process was fair, notwithstanding any deficiencies at the early stage. Looking at that overall process, its fairness and thoroughness and the open-mindedness of the decision-makers, I have concluded that notwithstanding any deficiencies, the overall process was fair.

66. With regard to whether dismissal as a sanction was within the band of reasonable responses, the appeal panel had concluded in essence that the job durations the claimant had entered in his records were not a true reflection of the time he had spent on each job and that he had booked time against quote jobs that he had not submitted. Their conclusion was that he had deliberately falsified the time recorded in order to receive a bonus. They concluded that this was gross misconduct and that summary dismissal was the appropriate sanction. It appears to me that summary dismissal as a sanction for deliberate falsification of company records is within the band of reasonable responses a reasonable employer might have

adopted in the circumstances of this case notwithstanding the claimant's record and length of service. It follows that the dismissal was fair and the unfair dismissal claim is dismissed.

Breach of Contract/ Wrongful Dismissal claim

67. In this case, the claimant also claims damages for breach of contract. It is his position that his summary dismissal was in breach of his contract of employment. The measure of his loss is twelve weeks' pay, being the notice to which he was entitled under the contract. However, the respondent states that the claimant was guilty of gross misconduct and that he was therefore in repudiatory breach of the contract entitling the respondent to dismiss him with immediate effect.

68. I have to decide on a balance of probabilities who is correct as a matter of fact. The following facts of this case lead me to decide that on the balance of probabilities the claimant was in repudiatory breach of contract. He is not, therefore entitled to notice pay: (i) the claimant's concession to Scott Pirie, investigating officer on 13 March 2018, as set out above; (ii) the claims for 32 HIVE quotes when there were only 9 in the system; (iii) Mr Pirie's calculations, put to the claimant in the investigation and not disputed by him (J74) that if the business were to remove the time the claimant had put against quotes claimed he would not have made bonus in Q4; and (iv) the pattern of claiming 60 minutes for central heating repairs (37 of his 49 IBs during the period were exactly 60 minutes and of 38 ASVs 32 were exactly 45 minutes). It follows that the claim of wrongful dismissal does not succeed and is dismissed.

69. I am grateful to both counsel for their able conduct of their respective cases.

Employment Judge **M Kearns**

Date of Judgment **25 March 2019**

Entered in register and copied to parties **26 March 2019**