Case number: 2600763/2019

EMPLOYMENT TRIBUNALS

BETWEEN:

Claimant		**Respondent**
	And	
Mr P Cooper		Leicester City Council

AT A FINAL HEARING

Held at: Leicester **On:** 28 and 29 August 2019.

Before: Employment Judge R Clark

REPRESENTATION
For the Claimant: Mr Brady of Counsel
For the Respondent: Miss Hodgetts of Counsel

RESERVED JUDGMENT

1. The judgment of the tribunal is that the claim of unfair dismissal **succeeds**.

2. The Respondent shall pay to the Claimant compensation in the sum of **£577.94.**

REASONS

1. Introduction

1.1 This is a single claim of unfair dismissal arising from the Claimant's summary dismissal, effective on 16 November 2018. The stated reason was gross misconduct. The Claimant was a Gas Service and Heating Engineer. The misconduct relied on concerns his inspection of a gas boiler flue in one of the Respondent's residential properties and the subsequent reporting of its safety status.

2. Issues

2.1 Counsel have reduced the issues in the case to an agreed list which I adopt. There is no dispute that the reason for dismissal was conduct. The issues of reasonableness that arise under section 98(4) of the Employment Rights Act 1996 are put in these terms: -

a) Factors contributing to the Claimant's handling of the matter for which the Respondent ought to take responsibility,

b) Different treatment of other cases,

c) The Claimant's service record.

2.2 It follows that there is no explicit challenge to procedure, the reasonableness of the investigation or reasonableness of the employer's belief, save to the extent that they may be relevant to the above three matters.

3. Preliminary Matters.

3.1 A potential application to amend the claim to include a claim of wrongful dismissal was not pursued.

3.2 The parties were not in agreement about the Respondent's intention to include within the bundle a letter to the Claimant dated 14 October 2016 which records the terms of a final written warning imposed on him and remaining "live" for a period of 12 months. No reference was made to this warning by the employer in its decision to dismiss the Claimant as, by then, it had expired. Indeed, it seems the dismissing manager was not aware of it. The purpose of adducing it was to rebut the Claimant's evidential assertion, in paragraph 3 of his witness statement, that there had never been any complaints about his work as a maintenance technician. The Claimant objected on the ground that it was prejudicial and could be dealt with by amending his statement to remove the assertion.

3.3 I granted the Respondent's application to adduce the document on the basis it went only to the issue of rebutting the Claimant's assertion and his credibility. The facts it conveys are not in dispute and the Claimant can explain his account in his witness statement when giving evidence.

4. Evidence

4.1 I heard only from the Claimant in support of his case. For the Respondent I heard from Mr Kevin Doyle, the Planning and Major Works Manager who dismissed the Claimant, Councillor Diane Cank, the chair of the appeal panel and Mrs Karen Demmer, an HR adviser.

4.2 All witnesses adopted written statements on oath or affirmation and were questioned.

4.3 I was taken to a bundle running to approximately 270 pages and considered those documents I was taken to.

4.4 Both parties made closing submissions.

5. Facts

5.1 It is not the role of the tribunal to resolve each and every last dispute of fact between the parties. My role is to make findings necessary to determine the issues and to put them in their proper context. On that basis, and on the balance of probabilities, I make the following findings of fact.

5.2 The Respondent is the local authority for the City of Leicester. As the housing authority, it has a substantial residential housing stock. It maintains this stock, in part, through a directly employed workforce of maintenance and building trades covering all the trades typically engaged in housing maintenance.

5.3 The Claimant began his employment as an apprentice maintenance technician in 2007. He trained in a wide range of building trades from plastering and joinery to electrics and gas. He became a generic maintenance technician. That role of maintenance technician disappeared in an organisational restructure in 2016 and the Claimant became a Gas Service and Heating Engineer. He reported to Chris Selvedge, the Gas Team Leader within the Council's Housing Division.

5.4 Gas engineers must be qualified and subject to periodic update training to maintain their regulated status. The Claimant's job description included various specific responsibilities relevant to that responsibility, in particular undertaking gas safety checks for the Respondent in its capacity as a residential landlord and full servicing and repair to the current industry and regulatory standards. Similarly, the objectives of the role were to undertake works in accordance with health and safety standards, internal policies and current building and industry regulation; complying with manufacturers' installation and servicing instructions, complying with relevant regulations and codes of practices and ensuring accurate and timely completion of all paperwork including documentation such as the landlord's safety records, warning notices and RIDDOR reports. One such crucial record is the landlord's CP12 gas safety sheet which is produced every time a gas appliance has work carried out on it.

5.5 Mr Cooper had undertaken periodic specialist training in domestic gas installation and servicing. He last completed his periodic competency training, known as CCN, in May 2017. I was told and accept this is a 5-yearly renewal of competencies.

5.6 I need to say something more about the relevant regulations, policies and industry standards that the Claimant was required to comply with. The relevant regulations are the Gas Safety (Installation and Use) Regulations 1998 as amended. So far as is relevant to the facts of this case, it provides at regulation 26(9) that: -

> ***(9) Where a person performs work on a gas appliance he shall immediately thereafter examine—***
>
> ***(a)the effectiveness of any flue;***
>
> ***(b)the supply of combustion air;***

(c)its operating pressure or heat input or, where necessary, both;

(d)its operation so as to ensure its safe functioning,

and forthwith take all reasonable practicable steps to notify any defect to the responsible person and, where different, the owner of the premises in which the appliance is situated or, where neither is reasonably practicable, in the case of an appliance supplied with liquefied petroleum gas, the supplier of gas to the appliance, or, in any other case, the transporter.

5.7 Regulation 27 sets out various requirements as to the installation of flues.

5.8 These regulations are supplemented by an approved code of practice issued by the Health and Safety Executive ("HSE"). In relation to regulation 26(9), paragraphs 239 and 240 of the code state: -

239 After performing work on an installed appliance, engineers should carry out the necessary checks and tests to ensure that the appliance, and any associated flue, is safe for use (see regulation 27(1) for information on flues).

240 Reference should be made to manufacturers' instructions and appropriate standards.

5.9 The HSE have for some time also published periodic safety notices relevant to gas safety. One such notice was issued in December 2010 and updated in May 2013. It relates to flues contained within voids. A void is any space within a building not used for habitation and could be the attic or loft space, between floors or even where a flue is boxed in simply as an aesthetic modification. It makes clear that the construction of flues in such voids must be such that a periodic inspection can still be undertaken to make sure that a future engineer can see: -

a) That the flue is continuous.

b) That is correctly assembled and sealed.

c) That it is adequately supported. In that regard the usual method of support is the application of clips to hold the flue in place.

5.10 I have not been taken to the complete legislative history of the 1998 regulations, but it seems beyond question that the essence of the obligation contained in regulation 26(9) has been in existence in one form or another for at least 8 years before the events relevant to this case. If nothing else, the various versions of CP12 that are before me over the relevant period in question all contain the requirement for the engineer to certify that a visual check of the flue has been undertaken and to pass or fail the flue accordingly.

5.11 The Respondent operates a quality control management system to meet its obligations of compliance with its gas and heating activities. It publishes a written document entitled Gas Quality Control Compliance Procedure. This is a controlled document. The version I have seen shows various review dates since its initial inception in January 2017. It focuses on the systems needed to ensure an internal verification of competency of the engineers employed. It sets out the assessment of levels of competency and periods of assessment. The quality control procedure defines the roles of "gas service heating engineer" and a senior role of "gas quality control engineer". Section 5 of the Quality Control compliance procedure states: -

Where an inspection identified a significant cause for concern and as a consequence it is likely the disciplinary procedure could be invoked, due to the severity of the fail. The case will be reviewed and where deemed necessary the disciplinary procedure will supersede the gas quality control compliance procedure.

5.12 I find the effect of the quality control procedure is that failures in the expected standards of compliance are initially considered by a gas quality control engineer. Many cases will be dealt with within that procedure and may result in identifying retraining or other remedial steps short of a disciplinary sanction. Where the gas quality control engineer has investigated a serious failure, he may refer it to the disciplinary procedure and, in so doing, declares there is a disciplinary case to answer.

5.13 The workforce making up the gas teams had originated from different parts of the Respondent and was now formed as a single department after various reorganisations. Each engineer would carry a safety folder, or “patch folder”, setting out the regulations, standards and procedures. In 2017 there was a growing sense that the various organisational changes had meant an inconsistency in standards across the workforce had developed.

5.14 As a means of tackling this inconsistency, a day was taken out of the normal work schedule, in October and again in November 2017, to hold a team safety briefing session with all engineers. This provided a new, single and unified “patch folder”. That was done by delivering training on a standardised approach to flue clipping, and to put the qualified workforce through a short written open book exam test to ensure they were meeting the necessary knowledge requirements. The Claimant attended such a session on 23 October 2017. Mr Lambatt, a colleague of the Claimant who was employed in the same role, albeit part time, attended his workshop on 28 November 2017. Both passed the written test demonstrating they knew what was expected of them in respect of flue clipping and the associated installation and inspection standards.

5.15 I accept the Claimant’s account that one major factor in the need for this session was the inconsistency in the standards for clipping flues across the workforce. Some engineers were over clipping to ensure they were not accused of failing to meet the standard. However, I do not accept that was the only purpose of the day. It seems to me obvious that to know whether an existing flue has been correctly installed, supported or clipped, it must be inspected.

5.16 Subsequently, this training has been said to have been used to “draw a line in the sand” in terms of the expectations of what service engineers should be familiar with and the standards they must comply with. I find this training did not alter the underlying disciplinary standards, i.e. that a breach of health and safety standards was always a matter of gross misconduct. That said, I find it was the case that anyone who was subsequently found to be in breach could not rely on a defence related to ignorance or that they were working to an out of date patch folder which from this date included all the current regulatory obligations and standards.

5.17 As part of this training, the Respondent issued a series of Technical Briefing Notes. Note number 002 specifically related to the gas safety regulations and the safety of flue

systems, checks and testing. It set out the same obligations as were contained in the HSE notice. It stressed how it was necessary to check the flue was adequately supported throughout its length. What was adequate or not, may sometimes depend on the type of flue, whether it was straight or contained elbows and also the boiler manufacturer's recommendations. On that particular issue, the training event also included a slideshow entitled "to clip or not to clip" which focused on examples of flues in-situ and prompted consideration of whether they were adequately clipped or not.

5.18 A crucially important document in the work of a gas service engineer is the CP12 gas safety record. It is explicitly referred to in the Claimant's job description as it stands as a safety record of gas works and is a document that is issued to tenants after work has been completed on their gas appliance. It records the visit, its purpose, the work that was done and/or is needed and the results of various tests and inspections. One such inspection is a visual inspection of the flue. The question posed states "Visual Condition of the Flue" and the available options on the form are "pass", "fail" or "N/A". A further question asks whether a warning notice was issued and if so, to insert the unique number of the warning notice. I find therefore, the engineers must also carry a pre-printed pad of warning notices individually numbered. There are a number of these CP12 gas safety records in the bundle before me completed by the Claimant and others.

5.19 The issue in this case concerns a property in Groveberry Walk, Leicester. In 2015 it had a new gas boiler installed. The type of flue was a fanned flue, sometimes called a room sealed flue. It was constructed vertically until it reached the attic where its course meant it was constructed with one or more "elbows" before exiting through a seal in the roof in order to vent to the outside world. It is not in dispute that this flue was not correctly installed from the outset in that it was not at all supported by clips or other form of support, at least within the attic area.

5.20 That property, and its boiler, was subject to a number of visits by the Respondent's gas team during the 3 or so years of that new boiler's life. The CP12 records show them to be as follows: -

a) The records start with the installation of the new boiler by an operative, Lee, on 10 July 2015. He or she completed the CP12 and answered "NA" to the question visual condition of flue pass/fail or NA. Although that engineer installed the flue, as opposed to inspecting an existing one, the answer should still have been "pass", assuming it had been installed correctly, although one can perhaps understand why someone used to inspecting existing flues may think a brand-new installation would be answered with NA. In any event, he or she installed the flue in a way that did not comply with the appropriate gas safety regulations and standards.

b) On 11 August 2015, a month later, a visual inspection was conducted on the boiler by an engineer, Ashton, which appears not to have required a flue inspection as no work was carried out.

c) On 5 April 2016, an engineer, Maisuzia, attended to diagnose some faults. The boiler was turned off. No inspection of the flue was undertaken or required.

d) The next day, on 6 April 2016, an engineer, Thompson, attended to the boiler repairs and reported a visual condition of the flue as a "P", which I take to mean a pass.

e) On 8 June 2016, an engineer, Sewell, attended and did work requiring a visual condition check on the flue. He or she recorded a pass.

f) On 10 April 2017, an engineer, Smith, attended and did work requiring a visual condition inspection of the flue and recorded a pass.

g) On 1 September 2017, an engineer, Maisuzia, attended to the boiler. It is not clear what work was done and no visual condition check was reported on the boiler.

h) On 8 and 27 November 2017, engineers attended to perform minor tasks which did not engage the requirements to inspect the flue.

i) On 19 December 2017, Mr Lambatt attended to replace the pump and filter, a process of work on the boiler which engaged the requirements to perform a visual check of the flue. He reported a pass on the relevant CP12 gas safety record sheet.

j) On 12 March 2018, the Claimant attended and did work requiring a visual check of the flue. He reported a pass on the relevant CP12 gas safety record sheet.

k) On 20 August 2018, an engineer, Spencer, attended to diagnose problems with the boiler which needed resetting. On her arrival, and from the outside of the property, she observed that the flue terminal protruding from the roof was not straight, suggesting it was at an abnormal angle as if it had collapsed or failed in some way. She could not get into the roof space with the ladders she had as the hatch providing access to the attic was above the stairs, as it clearly always had been. She reported that she had sought assistance from a colleague, Gamble, to attend with some long ladders to inspect the flue in the attic. On doing so, she reported that the flue had no supports on it in the roof space. She reported this as "AR", meaning "at risk". She switched off the boiler and issued a warning notice number 24229. Photographs were taken of the unsupported flue which showed a substantial gap between the flue and the roof at the point of exit enough to show daylight and expose the attic to the elements. The flue had failed and partially collapsed under its own weight. It appears from the remedial plan to clip it, that the seals remained intact. Ms Spencer put in place a plan of action to return the next day with the necessary materials to support the flue and replace the roof sealing plate which sealed the flue's exit through the roof materials. That work was completed, the boiler tested and the visual inspection of the flue reported on the CP12 was now, unsurprisingly, one of "pass".

5.21 It follows from this chronology, that prior to Ms Spencer, all but 4 of the 11 visits to this property to undertake regulated work on the boiler engaged regulation 26(9) of the 1998 Regulations and resulted in the respective engineer completing a gas safety record to certify

firstly that they had undertaken a visual check of the condition of the flue and, secondly, that they had been satisfied that the result was a pass. It further follows that one of two states of affairs must have existed at the time each certificate was signed off. Either the engineer viewed the flue and did not notice that in fact it did not comply, when that must have been clear to anyone undertaking a reasonable inspection, or they simply did not perform a visual inspection of the flue in the attic at all, in breach of the statutory requirements.

5.22 The fact that the hatch to the attic was over the stairs and inaccessible by use of the shorter ladders carried on many of the operatives' vehicles suggests the answer was more likely that the visual inspections of the attic space were simply not carried out at all. The majority of properties do have accessible attic or loft hatches but the Respondent does have a system for the occasions when it is not accessible. Where the operative is unable to perform a visual inspection, they are expected to either contact their manager for assistance or, if they know of a colleague working from one of the larger vans with longer ladders, to seek their assistance, just as Ms Spencer had done.

5.23 I find there is no financial incentive in signing off a job prematurely. There is no bonus or other productivity scheme that might encourage cutting corners nor, conversely, do I have evidence of any sanction or detriment being imposed if an operative had to issue a warning and switch off a boiler as being "at risk". It follows that there is nothing significant to gain from signing off a job without a full visual inspection of the flue, other than being able to get a job off the operative's list of work to do.

5.24 In this case, the efficacy of the warning notice system and associated practice of switching off the electrical supply to the boiler at the fuse spur was challenged by Mr Cooper as not altering any safety risk. The argument was that once switched off, the tenant could, in breach of the warning notice issued simply switch the boiler back on. I find this to be little to the point. The nature of the repair was critical, but is to be distinguished from one where there is an immediate danger, in which case the boiler is not simply switched off but disconnected from the fuel supply. What applied in this case was the system of work imposed expected an at risk, or "AR" status. In those circumstances, if the tenant does then switch the boiler back on, at least the landlord has complied with the standards expected of it.

5.25 I find the state of this flue was a serious problem. One does not need to be a gas qualified engineer to recognise, as a matter of common sense, that if a flue fails noxious gases are potentially not vented to the outside and may, instead, be discharged into confined living areas. I note that Ms Spencer's plan in response suggests the problem was serious enough for the matter to be prioritised to be repaired the next day and, in the meantime, the boiler was switched off and a warning issued. I have no doubt that the tests at the time showed no contra indication of safety, just as will have been the case with the Claimant and others undertaking gas tests, but not doing visual inspections.

5.26 As a result of Ms Spencer's visit to the property and the defects she discovered, the quality control failure came to the attention of Mr Selvidge. His initial investigation showed the Claimant was the last engineer to have worked on the property, on 12 March 2018. Prior to him, the next previous engineer was Mr Lambatt who had worked on it on 19 December

2018. As already stated, both engineers completed and signed a CP12 in respect of the property to say that the flue had passed a visual inspection and that they had not needed to issue a warning notice. In both cases, as with the others who had done likewise, the safety certificate was defective as a visual inspection had either not been completed or had been negligently completed.

5.27 An investigation commenced in respect of both engineers under the Gas Servicing Quality Control Compliance Procedures. An obvious question arising is why it was that Mr Cooper and Lambatt were identified as being subject to the investigation, and not the other five engineers who had purported to have carried out the same gas safety checks to the extent that the flue had “passed”. I am satisfied that the unified briefing sessions of October and November 2017 was viewed as the cut off. To repeat the Respondent’s language, it was the point at which a “line was drawn in the sand” with the effect that previous breaches would not be visited with disciplinary sanction, whereas future ones would. This phrase comes from an email from a Mr Webster who was in correspondence with Mr Doyle during the later disciplinary process when the issue of disparity of treatment was raised by the Claimant. I accept that it should be obvious to all those employed in gas safety critical work that they are performing work which must comply with the relevant legal obligations and standards, that there are serious consequences of not complying and any breach could be met with disciplinary sanction. Indeed, it is worth remembering that in the worst cases, it is not overdramatic to say the documents before me could easily be the substance of coroners’ inquests nor is a criminal case of gross negligence manslaughter a fanciful possibility. There is, therefore, a standard of compliance that one might expect should be obvious to all. It remains the case, however, that the Respondent’s records showed a number of the Respondent’s workforce appeared not to have complied with this obvious obligation.

5.28 On 21 August 2018 Mr Cooper was made subject to a restriction in his duties. He was not suspended but was taken off regulated gas work. That appears to have been a proportionate response to the allegations whilst they were investigated.

5.29 On 23 August 2018 the Respondent sent the Claimant a letter inviting him to an investigation meeting to be held on 10 September 2018. I find at this stage it was being conducted under the auspices of the quality control procedure although I suspect that there was already a sense that the seriousness of this matter could exceed the remit of the quality control procedures and be referred to the disciplinary procedure. The Claimant was given the right to be represented at the investigation meeting. The letter set out two allegations. They were: -

a) Failure to carry out gas work in line with the Gas Safety (Installation and Use) Regulations 1988.

b) Knowingly falsified a Gas Safety Record.

5.30 On the same date, Mr Lambatt, was sent an identical letter.

5.31 On 10 September 2018, the investigation meetings took place for each engineer. The information gathered at these meetings would inform whether the matters progressed under the quality control procedure or were referred to the disciplinary policy.

5.32 The Claimant's meeting was chaired by Chris Selvedge, the gas team leader. Also in attendance were Wendy Webster from HR and Mr Neil Hacket. Mr Cooper attended with his work companion, Mr Filali. The meeting was relatively short. It started with confirming the Claimant's service and that he was qualified and up to date with his CCN. He was asked to state the correct procedure for checks and tests on a boiler with a vertical flue. In response the Claimant correctly set out the procedure. He confirmed there were no circumstances when such a check would not be done. He confirmed and recalled the October 2017 team training and slide show on clips. He was shown photos of the flue at the property and asked what was wrong. He accurately confirmed the deficiencies, there was no clipping and the flue was not supported. The discussion then turned to the actual job in March 2018.

5.33 The Claimant could not specifically recall the job. It was, by then, 6 months later. However, he knew the layout of the properties in that area and the fact that they did not have easy access to the roof space. He volunteered that fact. He confirmed the CP12 gas safety record sheet had been completed by him to show that the flue had been inspected and passed when it had not. He asserted that his only error was not completing the form correctly but that despite that he left the boiler operating safely. He denied he had failed to follow the correct procedure, and insisted that he had only not filled in the form correctly. He said he always checked flues and the council did not provide him with the correct tools to undertake the check. He said this was not his choice but he had no means of safe access. He said he was sure that in all other gas work done by him, where access to the loft was safe, he inspected the flue. It was put to him that he must have chosen not to go into the roof. I find his answer seemed to diminish the safety risk that such inspections were trying to minimise as he replied that he was sure "99% were clipped". He was asked to explain the difference between "in danger" and "at risk" and replied that it was the same danger but in an immediately dangerous situation the boiler would have been disconnected from the gas. He described how "at risk" required him to turn the boiler off at the fuse spur but that it could still have been used if the tenant chose to. He added how the boiler was not dangerous and the tenant could still have used it. He felt that a gas analysis test would have shown any faults with the flue as it was the best test that can be carried out and would have shown faults that could not be seen with a visual inspection. His point was that in the past this test has highlighted many faults such as if the flue was parting at its joints, breaking down or had collapsed.

5.34 It seems to me the investigators were entitled to be concerned about some of these remarks. In particular, the suggestion that his failure arose because the council did not provide the correct tools, that is a long ladder; that the need for inspection was diminished as 99% were clipped, when this one clearly wasn't; that the o2 testing provided a better measure than visual inspection which is clearly only half the story. It might identify faults that a reasonable visual inspection would miss, equally a visual inspection could identify an imminent collapse which the positive o2 testing would not. I find these issues demonstrated to

the investigators that there was something more than a mere omission in this case. Notes were produced and the Claimant had an opportunity to correct the notes which he did.

5.35 The two men considering the matter adjourned to the next day to allow some further investigation. On 11 September 2018. Mr Selvidge informed the Claimant that he felt there was a case to answer for breach of health and safety and that the matter would proceed to a disciplinary hearing.

5.36 The Claimant says he immediately took responsibility for his errors. This is not apparent from the notes of the initial investigation meeting. Nor did the Claimant say at this stage that he performed an external visual inspection. This would still not have been adequate but may have been part of a temporary measure if plans had also been in place to return promptly to the property with the longer ladders. In any event, it is entirely possible that an external inspection of the flue in March could have shown the flue to be strait and I accept Mr Doyle's evidence on this that even if it did not indicate a problem at that time, the fact that the flue evidently did subsequently fail only serves to highlight the reason why it is so important to check it is appropriately supported and clipped internally.

5.37 In Mr Lambatt's case, he also attended an investigatory meeting on 10 September with the same people present save that he was represented by his Trade Union representative, Mr Denton. The format followed broadly the same format as that for Mr Cooper. Mr Lambatt confirmed his training and qualification, his CCN was in date, he successfully explained the process of checks and tests needed and explained the process where the flue passed through the roof space and that area was inaccessible. In terms, he would issue a warning and turn off the boiler then raise a further work request and record it on the CP12. He recalled the training in 2017 and confirmed the requirement for clipping. He was then shown photographs of the property and asked what was wrong. He also successfully answered that the flue was not clipped or supported in the roof space. The questions then turned to his attendance at the property in December 2017. Like Mr Cooper, he too could not remember the visit. He accepted the CP12 was his paperwork. He also confirmed at that time he was carrying long ladders so could not understand why he would not have checked the flue. He maintained he checked all the flues. He was able to articulate the correct system to invoke if he was not able to check the flue at a job.

5.38 On 15 October 2018 the Respondent sent a letter to the Claimant requiring him to attend a disciplinary hearing. The same allegations as previously stated were repeated. This letter enclosed a management statement of disciplinary allegations, that is submissions and evidence. Although I have not seen it I find, on the balance of probabilities, that Mr Lambatt was sent the same form of letter as both his investigation meeting and the subsequent disciplinary hearing were on the same dates as those of the Claimant. It follows, that Mr Selvidge, the Gas Team Leader who conducted both investigation meetings, formed the view that neither was suitable to be dealt with under the quality control procedures and both were sufficiently serious failings to warrant referring to the disciplinary process.

5.39 At the same time, the department undertook a quality control review of other work undertaken by both men. In both cases, the review of recent work showed no further

breaches. Indeed, there was evidence corroborating the past use of ladders to access the roof spaces to inspect flues.

5.40 Mr Cooper prepared a written account for presentation at the disciplinary hearing. He referred to the immense pressure of work the department was under due to a spell of cold weather. He indicated he would have undertaken an external visual inspection of the flue on arrival. He referred to the inaccessible loft hatch and described, in passive terms, his approach in the past and how he could easily have raised a two-person job but assumed there was no one to assist. He referred to passing jobs over the phone in the past.

5.41 The Claimant then set out some suggestions for the council to change its systems to prevent this happening in the future. Principally, that involved designating this address as a two-person job and that: -

> ***the correct procedures should be put in place so that the responsibility does not fall on the operatives to find a second operative.***

5.42 He set out how he had done all the other checks and asserted that the boiler was operating safely. Samples of his work had shown no other failings. That he accepted his mistake on the paperwork by wrongly filling out the visual condition of the flue as passed and that this had not triggered him to issue a warning notice. In respect of his failure to issue a warning notice, he had no explanation for it. He accepted the boiler should have been subject to a notice and switched off but if it had been switched off, he again minimised the effectiveness of this measure because he said the tenant could have switched it back on in any event.

5.43 He finished by referring to “past cases where engineers have made mistakes on their jobs but the same disciplinary action has not been taken”. He gave two specific examples relating to a Mr Pindar, in or around July 2017, who was taken off gas work due to failing to check a boxed in flue and did not complete a warning notice which resulted in no further action and a Mr Patel who, in or around July 2018, was taken off gas work due to failing to test a fire with a fan on, but who faced no further action.

5.44 Both men attended their respective disciplinary hearing on 14 November 2018.

5.45 The hearings were chaired by Kevin Doyle. He was not the Claimant’s line manager and although he had held a responsibility for gas safety some years previously, in his current role he did not have any line management responsibility for the department the Claimant worked in. Also present at the meeting were a note taker, Mrs Grant, and Ms Daley from HR, advising Mr Doyle. Mr Selvedge presented the management case. The Claimant attended with his companion, Mr Filali. At the time Mr Filali attended in the capacity of a colleague but I understand that he is now an accredited local trade union official.

5.46 The Claimant’s submissions during the hearing built further on the account given to the investigation but there was some development. I find Mr Doyle was concerned that this was not a genuine recollection of what did happen on the day, but that Mr Cooper was simply

seeking to reconstruct what might have happened. His use of the passive "I would have" as opposed to "I did" changes over the times the account is repeated.

5.47 I accept that the Claimant raising system challenges to systems is not in itself a rejection of responsibility, but it was reasonable for Mr Doyle to consider the Claimant's position in the round. I find a number of issues combined to lead him to a conclusion that the Claimant was minimising the risk of his omission and deflecting responsibility onto others. His admission that he had made an error "but only in respect of the paperwork" was such an example. The telephone process for an operative getting support only aggravated Mr Cooper's culpability further. If he did call the schedulers for support, the account of which was incomplete but something Mr Doyle seems to have accepted at face value, it showed he knew the system and knew he had not inspected the flue in the loft. The only purpose of calling was to get assistance to carry out the correct process or raise a job for two others to do it on another occasion. The fact that the Claimant was advancing this case, only served to reinforce Mr Doyle's concern that he must then have chosen to falsely complete the forms. The manner in which the paperwork was completed was therefore not an oversight, but a deliberate, positive choice.

5.48 In response to Mr Cooper's examples of different treatment of other workers, Mr Doyle adjourned the hearing to make further enquiries. Mr Doyle sent an email to Mr Rob Webster, the Respondent's Gas and Heating Services Manager, asking him to provide details of the other disciplinary matters referred to by Mr Cooper. He asked for a summary of the outcome. I find he set out identifying facts and asked: -

> ***Can I have the management rationale for the respective outcomes of the cases involved please, and can you provide the copies of any investigation notes you have.***

5.49 He set a short deadline of noon the following day in view of the fact the disciplinary hearing had been adjourned until Friday 16 November.

5.50 Mr Webster responded. He provided both a narrative response to each of the two matters, the rationale for the decision taken by the quality control engineer along with the associated notes of the investigation meeting undertaken with each of the engineers.

5.51 In respect of Mr Pindar, Mr Webster explained how in July 2017 he had been subject to a reprimand under the quality control procedure for failing to identify what should have been an "at risk" situation where a boiler flue was boxed in. Such boxing in was required to be constructed in a way that provided hatches or otherwise allowed for visual inspection of the flue. He did not do so, stating the screws to the boxing had been painted over. The operative was aware that he should have checked the flue and, in the situation he then found himself in, he should have issued a warning on the boiler. In explaining the rationale for the sanction, Mr Webster explained the significance of the date of this incident occurring before the Gas Team briefing days in October and November 2017.

5.52 In respect of Mr Patel, he was issued with a reprimand under the Gas Quality Control procedure on 8 June 2018. This is after the flue training had taken place. He had tested a gas fire flue without the nearby kitchen extractor fan being switched on. It is a requirement for

a test to be valid under the regulations to have any room fans switched on at the time of the test. Clearly, the purpose of the fan is to draw air out of the rooms in the property and they could adversely affect the efficacy of the flue. Mr Patel had performed the necessary test of the flue otherwise correctly and had signed it off otherwise correctly, but he had forgotten to do it with the fan switched on. The rationale of the gas team leader's decision was that this was a genuine error, not a deliberate decision not to perform the test in accordance with the required standards. His reprimand included Mr Patel being made subject to additional checks on his work by a quality control engineer.

5.53 I accept these are all potentially serious matters, as is always the case with gas safety, and whether the question is considered within the quality control process or the disciplinary process, the manager or Team Leader in question is being asked to make a judgment on the facts before him to assess the future risks posed by the engineer's failure in question. To put stress this, at the end of the investigation meeting with Mr Patel, the Gas Team Leader said: -

> ***Bear in mind the potential consequences this could have had. It could have been the HSE or coroner you were talking to.***

5.54 On Friday 16 November 2018 Mr Cooper's disciplinary hearing was reconvened. At this hearing he was summarily dismissed. The notes of the hearing set out the conclusions Mr Doyle reached over five numbered paragraphs. They were that:-

a) [You] knowingly failed to carry out a visual check of the flue in the roof space.

b) This was a deliberate act to which you gave no reasonable mitigation.

c) You were fully aware of the process to follow and by your own admission you then knowingly and incorrectly completed the CP12 documentation.

d) As a result, you were in contravention of the GS Regs, LCC procedures and Health and Safety but

e) This action left the tenant at significant risk due to the condition of the flue which had the potential to result in a serious incident, bringing significant reputational damage and potential litigation.

5.55 There was a suggestion by the Claimant that the typeface of these notes indicated they were amended at a later date. I am satisfied these were the reasons for Mr Doyle's decision and the formatting is more likely explained by the settings on the software used to set out these reasons in numbered paragraphs. They are not repeated word for word in the dismissal letter that followed but I am satisfied that the essence of them is.

5.56 The outcome is recorded in a letter dated 19 November 2018. I will return to that.

5.57 By this date, Mr Lambatt's own disciplinary hearing had concluded. During his disciplinary hearing he had recognised his error and the importance of doing something about it, two factors which Mr Doyle considered. Mr Lambatt's representative summed it up in this way: -

> ***important fact [Mr Lambatt] recognised his error, he had apologised, he realises that he cannot demonstrate that he looked in the roof space but, he does look in all lofts. Important to point out, flue still did passed checks, tenant was not at risk. SL has looked at putting measures in place and by taking steps will ensure this doesn't happen again***

5.58 I find Mr Doyle did consciously distinguish between Mr Cooper and Mr Lambatt. There were some minor background differences. Mr Cooper was longer qualified and worked full time. Mr Lambatt was new to the department and part time. Although he had attended the training in November 2017, Mr Lambatt was given some leeway to allow time for the training to be put into practice. He himself had referred to trying to get in line with how the other engineers worked.

5.59 Mr Doyle decided that Mr Lambatt's circumstances and explanation permitted him to step back from dismissal and impose a final written warning, principally on the basis that this wasn't a deliberate omission. At the conclusion of the hearing, the notes record him saying: -

> ***I am comfortable that when you visited in December the Flue wasn't clipped the onus is on you to take further advice or rectify.***
>
> ***In [your representative's] summing up, he says that all tests were satisfactory, however, this is not the case as there were no clips, regardless of passing other checks. It's a risk, unless you take immediate action. I am not convinced the flue was in the same state that it was found in in August 2018 when you visited in December 2017 but that still doesn't change the fact that that it wasn't clipped. If you fail to carry out a visual check then it was clearly inadequate as it failed to identify an unclipped flue. The next day it could have collapsed and we shouldn't minimise the seriousness of that fact.***
>
> ***Under normal circumstances if I thought that the omission to carry out the required checks was a deliberate omission I would dismiss. However, I have concerns over your level of expertise at [the] time, the fact that you were not as experienced as other Gas Engineers, I take on board previous concerns were raised and that you maintain that whilst you cannot remember the job in question, you always carry out visual inspection in the roof space.***

5.60 The Claimant seeks to compare his dismissal letter to the outcome letter received by Mr Lambatt. It is obvious why as they are very nearly identical. But that should come as no surprise as both were charged with identical disciplinary offences committed in similar circumstances differing only in their respective explanations and the ultimate outcome.

5.61 The Claimant appealed against the decision to dismiss by letter dated 10 December 2018. Two points were raised. One was unequal treatment, the other an unfair investigation. The main ground of appeal was the former. That occupied all but one paragraph of the two-page letter of appeal. He relied again on Mr Patel and Mr Pindar and now also Mr Lambatt. The allegation of an unfair investigation related to the fact that the person who inspected the failing flue was not a gas service engineer. It seemed to me that was not a particularly strong point and, indeed, it was all but abandoned in the appeal hearing itself and has not been argued before this tribunal.

5.62 Mr Doyle set out his rationale in a detailed written report to the appeal panel. The Claimant also prepared a detailed response to Mr Doyle's submissions which I find was read out and, although some extracts were read out verbatim, others were paraphrased. The

written document was not handed in to the panel. I find the information before the panel was that captured in the notes of the hearing.

5.63 The appeal hearing took place on 25 February 2019. The appeal was heard by a panel of three councillors, chaired by Councillor Cank. Also present was the Director of Housing and Mrs Demmer to provide HR advice to the panel.

5.64 I find the panel considered the seriousness of the allegations and the Claimant's explanation and concluded that the allegations were made out and the sanction of summary dismissal appropriate. However, I find the panel simply ignored what was the only substantive point raised in the appeal, namely the disparity of treatment. The reason for this was a decision which was, at best, a fundamentally confused position in respect of data protection and, at worst, a disingenuous excuse for refusing to consider a legitimate ground of appeal.

5.65 Everyone understood the focus of the appeal was disparity of treatment. Mr Cooper spelled out the three people with whom he sought to compare his treatment. Mr Doyle dealt with these in his written submission. He simply said: -

> ***the information could not be shared or discussed due to the potentially sensitive nature of the information involving other employees.***

5.66 The appeal panel accepted this submission. I find this ground of appeal was ultimately dismissed by panel on the basis that: -

> ***"we have respect for data protection".***

5.67 I was told that the Respondent's internal expert on data protection advised that individual consent had to be obtained from the employees concerned. However, there was no attempt made to obtain consent from any of the three individuals concerned. Despite the significance of data protection as the reason for rejecting any enquiry into the appeal point, I was surprised not receive any evidence relating to any data use policies or contractual terms which might set out agreement to the way an individual employee's data will be used by the council as a data handler.

5.68 Despite what was effectively a complete refusal to engage in the disparity argument on the grounds of data protection, I find Mrs Cank otherwise took her role of chair of the appeal panel seriously. I find she would look carefully at the justice of the decision to dismiss and I am satisfied she would have been prepared to make her mind up for herself, including ultimately overturning a decision, or at least arguing that point with the other two panel members. I find on this issue she was concerned about the safety issue affecting the council's tenants and was concerned about the potential serious consequences of gas safety failings. At the time of giving evidence to the tribunal, she still had no knowledge of the circumstances of the other three cases.

5.69 The Appeal decision was announced at the end of the appeal hearing and later confirmed in writing. The written outcome repeated the sentiment that the disparity of treatment argument was outside the scope of the appeal. It reads: -

"The committee listened to your representations of unequal treatment in comparison with other cases, however, they could not comment on decisions made in other cases as they were not party to the full facts of those cases."

6. The Relevant Law

6.1 The law of unfair dismissal is well settled. Nevertheless, in a disparity case such as this, the process of comparing and contrasting allegations of truly comparable cases poses a risk that a tribunal may, unwittingly, lead itself towards substitution. For that reason, it is worth setting out the law rather more fully than is usually necessary if for no other reason than as a reminder that the question is always and only that posed by section 98(4) of the Employment Rights Act 1996. It states:

> ***"(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer)—***
>
> ***(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and***
>
> ***(b) shall be determined in accordance with equity and the substantial merits of the case."***

6.2 I have regard to the guidance in **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439** and **Post Office v Foley [2000] IRLR 827** on the correct approach to section 98(4) including that:

> ***a tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair;***
>
> ***in judging the reasonableness of the employer's conduct a tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;***
>
> ***in many 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 tribunal's function 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 far; if the dismissal falls outside the band it is unfair."***
>
> ***that process must always be conducted by reference to the objective standards of the hypothetical reasonable employer … and not by reference to their own subjective views of what they would in fact have done as an employer in the same circumstances.***

6.3 The hypothetical reasonable employer must be engaged in broadly the same field as the employer (see **Siraj-Eldin v Campbell, Middleton Burness and Dickson [1989] IRLR 208**.)

6.4 The approach to be adopted where a dismissal is on the ground of misconduct was explained by the EAT in **British Home Stores Ltd v Burchell [1978] IRLR 314** which poses two further questions under s.98(4). They are whether the employer's belief was based on reasonable grounds and whether that was based on a reasonable investigation.

6.5 The Court of appeal in **Sainsbury's Supermarkets Ltd v Mr P J Hitt [2002] EWCA Civ 1588** made clear that it is necessary to apply the objective standards of the reasonable employer to all aspects of the question whether the employee had been fairly and reasonably dismissed. That is in respect of both the decisions reached and the steps taken to reach those decisions.

6.6 Turning to the question of disparity of treatment as a species of unfairness, the seminal exposition of the relevance of disparity comes from **Hadjioannou v Coral Casinos [1981] IRLR 352**. There it was stated how disparity may be relevant in 3 situations. The first is where it may suggest the true reason for dismissal is different to that advanced. The second is where the employer has previously condoned a disciplinary act so as to lead the employee to believe he will not be dealt with as harshly as he subsequently was. The third is where two employees are treated differently in respect of the same matter. All but the first are said to be engaged in this case. The requirement for the comparator cases to be truly parallel was restated in **Paul v East Surrey DHA [1995] IRLR305 CA,** in which employment tribunals were encouraged to scrutinise disparity cases with particular care.

6.7 The case of **Securicor v Smith [1989] IRLR 356 CA** provides authority for my starting point, namely that the question for the tribunal remains whether the Respondent's decision fell within band of reasonableness or not.

6.8 I was also referred to **Post Office v Fennel [1981] IRLR 221**, on the application of equity and substantial merits test and to **Cain v Leeds Western Teaching Hospitals [1990] IRLR 168**, for the proposition that it will be no answer to a disparity argument to say different agents of the employer had dealt with the different disciplinary decisions.

6.9 I was also referred to **General Mills (Berwick) Ltd v Glowacki UKEAT/0139/11** and **SPS Technologies Ltd v Chughtai UKEAT/0204/12**, both of which appear to me to be cases applying those principles of law to their own particular facts.

6.10 Directing myself on those authorities, the issue is not whether I think there was a material similarity amounting to truly parallel circumstances but, in the context of s.98(4) whether the employer acted within the range of reasonable responses in drawing the distinction *it* drew between the Claimant and his comparable cases.

7. Discussion and Conclusions

7.1 The first of the issues going to reasonableness identified by the parties is that there were factors contributing to the Claimant's handling of the matter for which the Respondent ought to take responsibility. In essence, this amounts to the fact that Mr Cooper did not have long ladders on his van and that he may have telephoned the office to request assistance which was not provided. I do not see anything in this which helps the Claimant demonstrate that the Respondent's actions fell outside the range of reasonable responses. Firstly, I have found that there was an established system for calling on colleagues to assist in such situations, whether that was done directly, by contacting a colleague known to be working nearby, or indirectly by telephoning the office. There is nothing in the provision of a smaller trade van capable of carrying only the shorter ladders than can be said to have caused the

Claimant to choose to sign off the CP12 as having passed a visual inspection that he must have known at the time he had not completed. Secondly, the employer was entitled to be doubtful about whether the Claimant did in fact follow that established process of making a telephone call to the office. His account did evolve between the various hearings and submissions and his recollection of phone calls seemed to grow in certainty, although it was still expressed in some passive terms. The fact that his explanation of what was said in any such phone call remained vague at best added to this. Thirdly, it seems to me the Respondent's assessment that this aggravated, rather than mitigated, the Claimant's conduct was a reasonable conclusion that any reasonable employer was entitled to come to. If there had been a phone call to the planning office, which Mr Doyle was prepared to accept at face value, it served to highlight the facts that not only was the Claimant aware of the correct process to follow, but his actions were not an oversight on the day. There is no explanation given by him of why, when no help was forthcoming from this phone call, the Claimant did not either warn the job as being "at risk" and request a new job to be raised or to simply chase up the support. Instead, he chose to complete the CP12 to indicate both that he had conducted a full visual inspection and that it had passed. It follows that if he did make a call to the planner, there can be no challenge to the employer's conclusion that his completion of the CP12 was not a case of an omission by inadvertent oversight or some other distraction etc but was a deliberate choice not to undertake the inspection and to close off the job.

7.2 The reasonableness of this conclusion was reinforced by other aspects of the Claimant's account. His view that the boiler was left in a safe state minimised the risk and purpose of the visual inspection. His view that 99% of flues are clipped only added to the basis on which the Respondent concern this was a deliberate act, based on a calculated risk that it will all be ok.

7.3 I jump to the third issue going to fairness, that the Respondent did not take into account the Claimant's service record. I am not satisfied that there is anything within this challenge that takes the decision outside the range of reasonable responses. Firstly, the Claimant's service was considered in the sense that an audit of recent relevant gas work had shown that the Claimant did usually conduct a visual inspection. That is a factor which a reasonable employer would take into account and this employer did. In view of the conclusions that Mr Doyle came to, and which were reasonable for him to come to, a conclusion that this evidence did not weigh sufficiently to displace the other concerns that this was a deliberate choice was one that fell within the range of decisions that a reasonable employer could have come to. Beyond that, two further factors arise. The first is that the decision maker was aware of Mr Cooper's length of service and history within the organisation in broad terms. Nothing in those basic facts could reasonably displace his conclusions on the disciplinary charge. Length of service is very often of little weight to a reasonable employer in genuine cases of gross misconduct. The second factor is that if Mr Doyle had made further enquiries into Mr Cooper's service record, he would have discovered the final written warning issued within recent years which was either irrelevant or, if past record was to be taken into account as the Claimant suggests, could only really add to the employer's concern. Consequently, it is difficult to see how this particular challenge to

fairness could result in Mr Doyle's decision falling outside the range of reasonable responses so as to render the dismissal unfair.

7.4 Before considering the last issue raised of disparity, I have considered whether or not the test in section 98 was met in the underlying circumstances of the dismissal viewed in isolation to the disparity point. There is no dispute that the Respondent held a genuine belief in the misconduct. It follows that it discharged its duty under s.98(1) to establish the reason for dismissal and that that reason was a potentially fair reason. Turning to the test in section 98(4), I am satisfied that the investigation undertaken by the employer was sufficient to fall within the range of reasonable responses and, in turn, formed the basis on which it was reasonable for the employer to hold the belief in the misconduct. The question then is whether dismissal was a sanction that fell within the range of reasonable responses. In this case, the misconduct was categorised as gross misconduct, there were factors which would entitle a reasonable employer to conclude this was a deliberate act, as opposed to an oversight, and that Mr Cooper's own view of his conduct was that it did not pose a risk to safety and was, in part, the Respondent's fault. It was reasonably open to a reasonable employer to interpret Mr Cooper's account in this way and that was likely to undermine the confidence a reasonable employer would be able to hold in retaining the employee. The process was otherwise one which satisfied the minimum requirements of the ACAS code of practice and I therefore conclude that the decision to dismiss would fall within the range of reasonable responses of a reasonable employer and therefore satisfy section 98(4).

7.5 I return to the question of disparity of treatment. In reality, this is the core of the Claimant's case. Three comparator cases are relied on. They are Mr Patel, Mr Pindar and Mr Lambatt. A fourth category was not explicitly relied on but has been lurking in the background to the Claimant's case, that is the other engineers who between March 2015 and December 2017 also visited the address in question, failed to inspect or recognise the incorrectly fitted flue, signed off their CP12 form with a "pass" and yet were not made subject to disciplinary action. I can see why the tenants living in the Respondent's properties may well expect the Respondent to deal with the apparent failures of those other employees one way or another. I have found that the reason for them not being subject to disciplinary action was that there was a decision taken to limit the "look back" exercise so as to go back only to the time of the training in October/November 2017. The question for me is whether that decision was a decision that was reasonably open to a reasonable employer. This demonstrates a classic application of the reasonableness test in that I can easily imagine a hypothetical employer in these circumstances which would have gone back further and that it would clearly have been reasonable to do so. However, that does not necessarily mean this employer acted unreasonably. In this case I am satisfied the Respondent had a rational and logical basis for the cut off being applied as it was. That related solely to the so-called line in the sand drawn by the unified standards imposed in the October/November training days. Had it not put the work into that training and the revised safety patch folders, there is would be nothing to meaningfully distinguish between Mr Cooper and the others. But the Respondent did engage in that substantial restatement of the safety expectations of its engineered in late autumn 2017. I have found nothing capricious or arbitrary about the cut off. I have found no ulterior motive for it. I am satisfied, therefore, that whilst another employer

might have taken action against those other engineers, the Respondent's decision was one which was within the range of responses of a reasonable employer.

7.6 The focus then turns to the basis on which the Respondent treated Mr Copper more harshly than it appears to have treated the other three individuals. By reference to the categories of relevance of similar cases identified in **Hadjioanou**, Mr Pindar and Mr Patel are in the second category of past cases. Mr Lambatt is in the third category of being disciplined for the essentially the same matter.

7.7 The first issue is whether they are truly comparable cases. I am not satisfied Mr Patel's case is truly comparable. He was found to have made a genuine error in the testing process but in all other respects had carried out the test correctly. He had signed it off honestly, albeit against that erroneous test. The team leader's decision that this was a genuine error was a decision that was reasonably open to him. Those two factors suggest this comparator, though superficially similar, was not truly comparable. In any event, I am satisfied Mr Doyle's distinction between that case and Mr Cooper's was reasonably open to him to make. Mr Pindar's failure has a closer similarity to Mr Cooper's and, on a broad assessment is one which I would accept was sufficient to be categorised as truly comparable. There are two matters however, on which I have concluded that Mr Doyle's distinction was one that was reasonably open to him. The first, explicitly relied on by Mr Doyle, is that the failure occurs before the time of the training in late 2017. As with the other engineers who were not disciplined for the failings at Groveberry Walk, drawing the distinction between those failures occurring before and after that "line in the sand" was in itself a reasonable decision a reasonable employer was entitled to come to. Secondly, it seems to me that the essence of the unfairness in the second **Hadjioanou** category of comparable cases is that, by its prior treatment, the employer has led the Claimant to believe he will not be visited with the sanction of dismissal. There is nothing in the facts of this case which supports the idea that Mr Cooper did what he did thinking he would not at risk of facing a gross misconduct disciplinary hearing at which he could be dismissed. The disciplinary policy had not changed. In any event, even in those other cases where employees had come to believe a certain type of misconduct would not be met with a certain level of sanction, it always remains open to an employer to restate the rules for future reference. The rules have always included this type of failure as potentially amounting to gross misconduct and the October 2017 training served to reinforce that.

7.8 The comparison with Mr Lambatt is more accurately reflected in the third of the Hadjioanou categories as they both attended the same house and, on the face of it, commit the same failure. The distinction drawn between the Claimant and Mr Lambatt was in the explanation for that failure. It was succinctly and powerfully put by Mr Doyle in his closing remarks to Mr Lambatt's disciplinary hearing when he said how "*under normal circumstances if I thought that the omission to carry out the required checks was a deliberate omission I would dismiss*". He was entitled on the evidence before him to conclude that Mr Lambatt had been guilty of an oversight whereas Mr Cooper had deliberately chosen not to undertake the checks. The result of that distinction was, in some respects, limited as it changed the outcome by only one step on the ladder of disciplinary sanctions. Mr Lambatt was still made

subject to a final written warning. That distinction is, of course, a distinction of the utmost significance as one remained in employment and the other lost it.

7.9 I am satisfied that Mr Doyle's distinction was a decision which was reasoned and based on the evidence before him and that he was reasonably entitled to find. His decision to treat the two differently is a distinction that fell within the range of reasonable responses of a reasonable employer. To that extent, therefore, the challenge based on disparity with the other cases does not lead to any unfairness under section 98(4) of the 1996 Act so far as Mr Doyle's analysis is concerned.

7.10 However, the issue of disparity within the wider context of fairness did not end with Mr Doyle. It was, effectively, the only point raised on appeal by the Claimant to be considered, he hoped, by the panel of Councillors. There is no challenge to the procedure in the usual sense save to the extent that the handling of the disparity issues goes to fairness.

7.11 In this respect only, I am satisfied that the Respondent's handling of the central ground of appeal was not one which fell within the range of reasonable responses of a reasonable employer. I am not satisfied that any reasonable employer would have dismissed the disparity argument in the way that the Respondent did, apparently hiding behind the general data protection regulations as a means of dismissing any enquiry or scrutiny of the point being raised. I am not entirely satisfied that there was a data protection issue but, to the extent that there was, the refusal to engage with the issue and consider how to deal with it, such as by seeking the consent or by redaction of confidential aspects of the facts of the comparator cases, was itself a decision which was outside the range of reasonable responses. The effect of this procedural decision was that the appeal that took place had no real purpose and was as good as not having an appeal at all.

7.12 I did not find the Respondent's attempt at explaining this approach convincing. I originally had some doubts that there was an internal expert on data protection advising that individual consent had to be obtained but came to accept there must have been something to cause Mr Doyle to put his written submissions in the way he did. The fact that there was no attempt to obtain any individual consents from the employees concerned undermined any serious concern about data protection. Similarly, the fact that the Respondent would have been handling the data in order to comply with its other legal obligations under the Employment Rights Act did not seem to engage consideration of any other lawful reason for legitimate use of the data. All that arises in the context of what appeared to be sufficiently wide public knowledge of the circumstances of these other three employees for Mr Cooper to be able to raise them as comparators in the first place. I then ask myself what was it that governed the appeal process that did not govern Mr Doyle's hearing? There was no convincing explanation given as to how the data of those same three employees was freely shared between Mr Doyle and Mr Webster and used by Mr Doyle when coming to the decision at the disciplinary hearing. Nobody suggested there was consent for him to use it at that hearing, but not for the appeal. He must have used it to reach his decision in exactly the same way as Mr Cooper was asking the appeal panel to use it in its decision. Mrs Demmer offered a spontaneous explanation for the distinction being that, in the disciplinary hearing, the data was not shared with the employee. I am not sure the distinction that one employee

did not see what another was processing would satisfy the Information Commissioner and, in any event it did not provide an explanation for the approach by the appeal panel. Firstly, it was Mr Cooper who was at all times identifying the issue of disparity with these three other engineers and bringing it to the employer's attention. He knew they had been subject to some investigation and had not been dismissed. To the extent that he did not know why, or any of the finer details, it did not explain why the appeal panel could not have embarked on exactly the same closed examination of the factors in each of the cases as Mr Doyle had apparently done. In summary, nobody appears to have considered how the Respondent held that data, why it held it, what use it has for it and what legitimate reasons it may have had for processing it in the case of dismissing another employee in compliance with the Employment Rights Act 1996. In short, I find the data protection explanation was used as a device to avoid having to meaningfully engage with the Claimant's appeal.

7.13 I accept the allegation itself was serious, but I noted Mrs Cank's concern that these were serious failures with potentially catastrophic consequences and I suspect she would have been at one with Mr Tovey's observation to Mr Patel that "next time you might be speaking to the coroner or HSE"

7.14 All that is necessary at this stage of consideration is that this was a legitimate ground of appeal, it is not necessary to show the merits of it or the likely effect of a reasonable consideration of it by the appeal panel. That is a question of remedy to which I return shortly. For present purposes, I am satisfied that the appeal is part and parcel of the process of a fair dismissal, that this approach to the handling of the appeal was outside the range or reasonable responses and, on that specific point only, rendered the decision to dismiss unfair.

8. Remedy

8.1 The Claimant seeks financial compensation only.

8.2 I find the following additional facts relevant to remedy, again on the balance of probabilities.

8.3 Prior to his dismissal, the Claimant earned £30,000 per annum. I find his net weekly pay based on the three months prior to his dismissal was £427.90.

8.4 Immediately following his dismissal on 16 November 2018, the Claimant secured alternative employment of a similar nature with a company operated by an acquaintance of his. The two had previously spoken about the Claimant working for him and he was able to take up that offer and started work the following Monday 19th November. He was employed at a salary of £20,000 resulting in a net weekly pay of £313.43.

8.5 It follows that there is a net weekly loss of £114.47.

8.6 However, the Claimant only maintained that employment for around two months before voluntarily resigning. He described this in his claim as being because "the Council had left him unable to continue with the career of his choice". He described this as being because he

found himself constantly questioning his decisions and not being able to switch off from a day's work. I accept that this was part of his thinking when he resigned from that employment although there has been extremely limited disclosure and evidence on the point. It seems to me, however, that two issues arise that prevent me from including any losses beyond that resignation as losses for which the Respondent should continue to be liable for. The first was that the underlying issue about his overbearing sense of responsibility for gas safety would have remained had a lesser sanction such as a final written warning had been imposed instead. Had that been the case, and if the Claimant's contention is genuine, it follows the same concerns about the weight of responsibility he was carrying would still have been praying on his mind with the result that, on the balance of probabilities, he would on balance have resigned from the Respondent voluntarily around the same time. Secondly, I am not satisfied that the cause of the loss of confidence can in any event be said to be due to the Respondent's process and decision and any unfairness. It arises from the underlying failure of the Claimant to undertake the checks required of his regulated role of a gas heating engineer that this disciplinary process brought to light. I have therefore concluded that the subsequent resignation from his new employment does not arise in circumstances where it can be said the Respondent should remain responsible for any continuing financial loss.

8.7 After leaving this employment the Claimant took a number of months to begin searching for new employment. He waited until his return from a holiday around May 2019. A Claimant acts reasonably in mitigating his loss if he takes steps that a reasonable person in his position ought reasonably be expected to take, unaffected by the prospect of compensation. It is for the Respondent to satisfy me that the steps actually taken were unreasonable by that standard. I am satisfied on the evidence before me that it was unreasonable for the Claimant not to take any meaningful steps to search for alternative employment for a further 3 or 4 months. I am satisfied therefore that there was a failure to mitigate during that period.

8.8 The losses for which the Respondent is prima facie responsible for stop at 31 January 2019 with the Claimant's resignation from his new employment and his subsequent failure to mitigate any ongoing losses. That is a period of 10.5 weeks amounting to a net loss of £1201.94 (10.5 x £114.47).

8.9 At the date his employment with the Respondent terminated the Claimant was aged 30 and had completed 13 full years of continuous service. He is entitled to a basic award calculated on the basis of 10.5 weeks' pay subject to the statutory cap (3 x 0.5 x £508) + (8 x 1 x £508) which results in a figure of £5334.00.

8.10 He is entitled to a notional award in respect of the loss of statutory rights which I assess in the sum of £500.

8.11 I am satisfied that those are the losses that flow from the employer's decision to dismiss the Claimant. Before applying those figures to arrive at a final award, I must have regard to the two possible adjustments contended for by the Respondent.

8.12 The first is the effect any prior culpable conduct of the Claimant has on the calculation of a basic and compensatory award under sections 123(6) and 122(2) of the Employment Rights Act 1996 and the principals set out in ***Nelson v BBC (No 2) [1979] IRLR 346 CA*** so far as they apply to the compensatory award. There is a subtle difference between the two tests. The foundation of either reduction is that the tribunal is able to make a finding of fact of some culpable conduct on the part of the Claimant in respect of which it is just to make the reduction and, in the case of the compensatory award, contributed to the dismissal. Such a finding is a primary finding for the tribunal to make. Unlike the liability decision, I am not assessing the Respondent's assessment of the evidence but making my own assessment of it. In this case I am entirely satisfied that the evidence does show that the Claimant did what he was alleged to have done and, based on what is before me, I come to the same conclusion that the Respondent reached, namely that this was a conscious decision on the part of Mr Cooper. The conduct clearly contributed to the dismissal. I then have to assess the effect of that conclusion. I am satisfied in this case it should result in a high percentage figure to reflect both the underlying culpability and the manner in which the Claimant's account reasonably gives the impression of minimising the seriousness. I assess this at 90% under both statutory provisions.

8.13 The second reduction contended for is that I make a reduction under s.123(1) of the 1996 Act on the basis it is just and equitable to do so. In that regard I have regard to s.123(6) Employment Rights Act 1996 and the guidance contained in **Polkey v AE Dayton Services Ltd [1987] UKHL 8**. Such a reduction may arise where there is a chance that the defects found to make the dismissal unfair would, had they been conducted fairly, have resulted in the same outcome. Similarly, it may be just and equitable to reduce compensation where the evidence shows the employment would have come to an end fairly at some point in the future in any event.

8.14 In respect of the latter application of the test, I am satisfied that but for the dismissal, the Claimant's employment with the Respondent would have continued at least until late January 2019 when I have otherwise found the Respondent's liability for his loss ceases. That much of the just and equitable analysis does not result in any reduction or limitation of the period of loss. In respect of the former, however, I have concluded there should be a reduction.

8.15 I approach this on the basis that I must do what I can with the evidence before me, however difficult it may be, to attempt to reconstruct what might have been but for the matter which amounts to the unfairness. In this case, that translates to me considering the prospects that, had the appeal panel given consideration to the three comparator cases, they would have overturned the decision to dismiss. The evidence on that is scant, but not so much so that it can be ignored. It consists of the evidence of the similarities and differences between Mr Cooper and the comparators, the distinctions between them that were in fact drawn by Mr Doyle when deciding Mr Cooper's sanction, which I must conclude would have been maintained by him at the appeal had it been properly considered, and Mrs Cank's independent decision making and concern about the seriousness of the failures. I do not have evidence from her that she has considered the comparators since the appeal and would have

still dismissed the appeal. She had not considered the facts of the comparators so my task is one step further into the abstract.

8.16 I can say with a degree of certainty, that the evidence does not paint a picture where, had the comparators been considered the decision would definitely have been overturned and the Claimant retain his employment. The extreme of a 0% reduction can be ruled out. It seems to me that the evidence I do have points very strongly towards the likelihood that the outcome might well have been the same but I am not prepared to say that evidence points to the other extreme of a 100% reduction. Whilst I suspect I would have treated with caution any evidence from Mrs Cank that she would still have dismissed the Claimant, I do not even have that but the fact I found she was prepared to reach an independent decision means she might have changed the outcome. I found she was struck by the seriousness which points both ways. That might support the likelihood of the same outcome but, it is also possible that seeing the same level of seriousness of consequence expressed by the team leader when dealing with Mr Patel's failure (i.e. that he could have been talking to the HSE or a Coroner) might have caused her and her colleagues to reflect on Mr Cooper's situation differently and in recognition that he was being treated more favourably. I should stress here, that the task I am performing is not applying the same test of fairness that I have when concluding the distinction was fair, but reconstructing the chance of a different outcome on appeal. In doing that I do not impose on the appeal panel the same legal tests.

8.17 Though not impossible, the likelihood of a different outcome was slim. Having ruled out the 100%, the conclusion I have come to is at all but the same level. I will allow 10% such that the compensation flowing is reduced by 90%

8.18 Accordingly, I calculate the Claimant is entitled to the following awards.

8.19 A basic award of £5334.00 to which I make a reduction of 90% resulting in a figure of £533.40.

8.20 A compensatory award, the calculation of which starts at £1701.94. That is made up of the total financial net loss from dismissal to when losses cease of £1201.94 plus the notional award of £500. There are no payments by the Respondent to credit.

8.21 I reduce that by 90% under s.123(1) resulting in a figure of £170.19.

8.22 I reduce that further by 90% under s.123(6) resulting in a figure of £17.02.

8.23 In this case, there are no further adjustments or deductions to be made for contributory fault, accelerated receipt or grossing up. The only potential adjustment remaining would be under s.207A of the Trade Union and Labour Relations (Consolidation) Act 1992. The only basis for any such adjustment would be in respect of the appeal. Whilst there was an appeal process in fact, I have concluded there was no appeal in substance. Ordinarily, the failure to deal with an appeal, as important as it is, is but one of a number of minimum procedural safeguards in the ACAS code. The Respondent complied with all other requirements and any adjustment would be at the lower end of the available range, in the order of 5%. I have considered whether notwithstanding that conclusion, there is anything in the circumstances of

the case as a whole that renders it not just and equitable to make that adjustments. In particular the high level of reduction I have made in two other respects. I have concluded that it remains just and equitable to make the adjustment, albeit it has minimal practical effect either way, and I increase compensation by 5% accordingly.

8.24 The total award is therefore £577.94 (£533.40 + £17.02) x 5%. The recoupment provisions do not apply.

EMPLOYMENT JUDGE R Clark

DATE 8 November 2019

JUDGMENT SENT TO THE PARTIES ON

AND ENTERED IN THE REGISTER

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FOR SECRETARY OF THE TRIBUNALS