EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4101831/2020

Held via Cloud Video Platform (CVP) on 10, 11, 16 and 17 December 2020

Employment Judge R Gall

Mr H Rae	**Claimant** **Represented by:** **Ms M Gribbon -** **Solicitor**
Network Rail Infrastructure Ltd	**Respondents** **Represented by:** **Mr B Frew** **Barrister** **Instructed by** **Ms A Salt -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claim is unsuccessful.

REASONS

1. This case was heard by way of video conference ("CVP"). The hearing took place on 10, 11, 16 and 17 December 2020. The claimant was represented by Ms Gribbon, solicitor. The respondents were represented by Mr Frew, barrister.

2. The claim is one of unfair dismissal. There is no claim of wrongful dismissal. This hearing was set down to deal with liability alone. A hearing on remedy, including possible application of the ***Polkey*** principles and also any element of contribution, would then be set down if the dismissal was found to have been unfair. A joint file of documents was submitted prior to the hearing. Witness statements were prepared, exchanged and also sent to the Tribunal prior to the hearing.

3. Evidence was heard from the following parties:-

   a. Mark Allan, Rail Management Engineer, who carried out the investigation.

   b. Keiren Sharkey, Infrastructure Maintenance Engineer, who dismissed the claimant. He is referred to in this Judgment as Keiren Sharkey, to distinguish him from Kevin Sharkey, mentioned below.

   c. Stephen Crosbie, Head of Maintenance, who heard the appeal.

   d. The claimant.

   e. Mick Campbell, Team Leader Track Inspections and RMT rep. He was present with the claimant at the investigatory and disciplinary meetings.

   f. Michael Legg Team Leader. He worked with the claimant and was also dismissed.

   g. Andrew Mackay, Team Leader.

   h. Gordon Martin, full time Regional Organiser with RMT union. He was present with the claimant at the appeal meeting.

4. The following parties did not give evidence, however are relevantly mentioned.

   a. Kevin Sharkey, Track Maintenance Engineer (TME) in charge of the Inverness Depot. He is referred to as Kevin Sharky in this Judgment, to distinguish him from Keiren Sharkey, mentioned above.

   b. Brian Shaw, Section Manager.

   c. Ali Fair, Supervisor.

   d. Andrew Muir, Supervisor.

   e. AB, Team Leader.

   f. CD, Infrastructure Technician.

g. Dale Webb, Operative.

h. Jamie McCourt, Operative.

i. Alexander Urquhart, Operative.

5. At the outset of the hearing, both parties sought to lodge additional documents. After discussion and clarification of the reasons for the requests and opposition to those requests, the position in relation to these documents became far clearer. The respondents withdrew their application to have additional documents lodged. For the claimant it was confirmed that the documents sought to be lodged and which related to dismissal of Mr McCowatt and Mr Webb were to be relied upon solely in relation to questioning the credibility of the respondents' witnesses. On that basis the documents relating to Mr McCowatt and Mr Webb were accepted, without opposition, as productions in the case.

6. The claimant confirmed that he maintained that, whilst he remained dismissed after appeal, as did Mr Legg, the respondents had acted inconsistently This was so as the employees AB and CD, dismissed at the same time as him, had been reinstated following their appeals with a first written warning being substituted as sanction. AB and CD were the employees upon whose circumstances he relied to illustrate inconsistency of treatment. There were documents in relation to the disciplinary processes and outcome of those for AB and CD in the file or bundle before the Tribunal.

7. The respondents sought that the two people AB and CD were referred to as such in the Judgment, whilst their names were used during the hearing. There was no opposition to this from the claimant. Those employees did not give evidence. They were not central to the events in relation to the claimant and the basis of disciplinary proceedings being taken in his case. I considered the application during an adjournment. I decided to agree to refer to these two individuals as AB and CD in the Judgment. They were referred to by name in the hearing, as mentioned. No formal Order was sought or made.

8. The claimant maintains that the dismissal was unfair in terms of the Employment Rights Act 1996 ("ERA"). He founds upon what he alleges to have been a flawed investigation, one which lay outwith the band of a reasonable investigation. He argues that the person taking the disciplinary meeting who decided to dismiss the claimant ought not to have been the decision maker and that that the decision to dismiss lay outwith the band of reasonable responses. Further, he maintains that the appeal hearer did not investigate as he ought to have done and that the decision to uphold dismissal was inconsistent with the decisions in the cases of AB and CD. It was also inconsistent with the decision taken to overturn dismissals in the cases of 3 employees in Fife initially dismissed for the same type of "offence", it was said.

Facts

9. The following are the relevant and material facts as admitted or proved.

Background

10. The claimant was employed by the respondents from November 2012 until 6 November 2019. Initially he was an Operative. In June 2015, he was promoted to Infrastructure Technician ("Technician"). From around January 2019, he undertook duties of a Senior Infrastructure Technician ("SIT") on some shifts, having the appropriate training and practical knowledge. SIT is a different term for Team Leader. Whilst SIT, the claimant was not however in charge of a team and did not have employees reporting to him. When he was SIT the claimant undertook extra duties. He received remuneration at an enhanced level for the shift when he was SIT.

11. The claimant worked on a rota of three weeks night shift, one week dayshift. The hours of work when he was on nightshift were 9pm till 6am. The work essentially involved inspecting, checking and working on railway tracks. The claimant was based at Inverness.

12. The Operatives and Technicians report to the Team Leader. The Team Leaders report to the Section Supervisor ("Supervisor"). The Supervisors relevant to the team in which the claimant worked during the period relevant

to this claim were Ali Fair and Andrew Muir. Mr Muir would regularly finish his work at around 4am to 4.30am. The Section Manager was Brian Shaw.

Employment Contract and Policies

13. At pages 38 to 51 of the bundle a copy of the claimant's contract of employment appeared. At pages 52 to 59 a copy of the respondents' disciplinary policy appeared. Paragraph 2.10 of that document is headed "Gross Misconduct". It provides that, where found, gross misconduct will result in dismissal without notice or pay in lieu of notice. It sets out in bullet point form examples of gross misconduct. One of those is "*Theft, fraud and deliberate falsification of records*".

14. Employees are briefed on health and safety matters and in relation to employment matters on a regular basis. This extends to reminders in relation to starting and finishing times and completion of timesheets. That is covered each time there is a safety brief. One such briefing took place on 5 January 2019. It was attended by the claimant. The relevant briefing record and signed attendance sheet appeared at pages 60 and 61 of the file of documents.

15. Employees such as the claimant sometimes carry out work on rail track which is some distance from any bothy or work base. Employees have 30 minutes as a lunch break. If in such a more remote location, rather than returning to base, having their lunch break and then travelling back to their work location, which would be almost certain to take far longer than 30 minutes, employees will continue to work at the location. They will then finish 30 minutes early as a "trade off" for the lunch period not being taken.

16. Employees in the role of the claimant are also able to leave work slightly early by agreement, given upon request at the time, if they have finished their work tasks for the day. Prior consent of management is therefore required for that type of early finish. It is permitted where the jobs in question are completed close to, but in advance of, actual finish time. The team manager will complete the paperwork for the day and liase with management, a supervisor, to inform them of the situation. The supervisor may then say the employees are able to leave, although the end of the shift time has not quite been reached. If that

occurs it is known as "*job and knock*", or "*shoot*". It is possible however that supervisor consent to job and knock would not be given. If that was so, then employees would have to await the correct time for the end of their shift before they could leave.

17. Any departure from work early on the basis that it is part of the job and knock arrangement required, in the claimant's case, consent of a supervisor and required to be in relation to a proposed departure close to scheduled finish time. A departure over 70 minutes before shift end, without authority, could not therefore fall within any job and knock arrangement applicable in the case of the claimant.

Nightshifts commencing on 16 and 17 April 2019

18. The claimant worked nightshift on the nights of 16 April and 17 April. His shifts on those two nights were scheduled to commence at 9pm and to finish at 6am. He worked as SIT on the shift scheduled to commence at 9pm on 16 April.

19. The claimant completed a timesheet in relation to the two shifts in question. A copy of that appeared at page 62 of the bundle. It was completed and signed by the claimant on the basis that his hours of work were 9pm until 6am for those two shifts. Those were the hours he signed as having worked.

20. The claimant did not however appear for work on 16 April until around 10.15pm. On 17 April he appeared for work at around 10pm. He appeared at those times together, on both occasions, with Michael Legg and Ali Urquhart. On the morning of 18 April the claimant, together again with Michael Legg and Ali Urquhart, left their work for the shift prior to 4.50am. Other employees on the team, specifically including the employees AB and CD, were not late on either of the days and did not leave early on the morning of 18 April.

21. Ali Fair, Supervisor, became aware of the claimant's late arrival for work on 16 April. He spoke with the team leader, Mr Legg after his arrival, over an hour and fifteen minutes late. At the start of a shift, work to be done on the shift is clarified and set out. That was not possible that evening due to the late

arrival of the claimant and others. When Mr Fair spoke to Mr Legg later in the shift to query late arrival, he was told by Mr Legg that they were watching football. That was given as the reason for their late arrival for work.

22. Mr Fair prepared an email. He sent that to Mr Shaw and copied it to Mr Muir. He did this at 04.44 on 17 April. A copy of the email is at pages 65 and 66 of the bundle. The email contained the following narrative in relation to a discussion between Mr Fair and Mr Legg:-

"I told him that the communication tonight was a mess and they have lost an hour of the possession time already because of this. I told him I expect communication in regard to what is going on and If they want to watch football, or anything else like this, I expect to be asked and I will decide if I am happy with this or not, they are not to just 'do what they like' in regards to their timekeeping.

I also told him that when I am out on nightshift I want all team leaders to come to the office at 21:00 to run through the shift and sort out communication, organisation etc, I will send on an email about this also to remind them. it is currently 00:35 and they are still organising vans for the re-timber, absolute shambles tonight."

23. The following evening the claimant and the other 2 colleagues mentioned arrived at around 10pm for their shift which was scheduled to start at 9pm. Mr Fair raised this and was told that the claimant had sent a text to Mr Muir, who is a supervisor, seeking consent to arrive late. Mr Fair checked with Mr Muir who confirmed that he had received such a text, but had not replied. Authority to start late had been sought, therefore. No authority had been granted however for a later start to the shift. The claimant, Mr Legg and Mr Urquhart had arrived late notwithstanding that.

24. At 04.50 on 18 April it became apparent to Mr Fair that the claimant and others had left the shift, although scheduled to finish at 6am. Mr Fair states in his email of 18 April to Mr Shaw, copied to Mr Muir, (pages 67 and 68 of the bundle), timed at 05.04, "*Not a word from any of them about it, they once again just left*". AB and CD remained present at work.

25. Mr Shaw was working day shift that week. Mr Muir was on leave for part of the week and on day shift for the remainder of the week,

26. Mr Shaw informed Kevin Sharkey of these events. Kevin Sharkey intended to speak to the men on 19 April.

Evening of 18 April

27. In the evening of 18 April before any steps had been taken to address the events of the evenings of 16 and 17 April and early morning of 18 April, a serious event occurred on site. There was a heated altercation involving Mr Fair and the claimant. Kevin Sharkey was told of this and spoke with both Mr Fair and the claimant. He sent both of them home to enable things to cool down. The claimant was paid for the full shift that evening and completed the timesheet on the basis of a full shift having been worked by him. This was the course confirmed to him by Kevin Sharkey as appropriate. The incident was investigated over the next period. Ultimately no action was taken as Kevin Sharkey concluded he could not determine who had been the aggressor. This was however a very unusual, if not unique, occurrence and a very serious incident.

28. In relation to the matters which led to dismissal of the claimant, the investigation of the claimant and decisions taken at investigation, disciplinary and appeal stage were unaffected by the altercation between the claimant and Mr Fair. The reports of the late arrivals and early departure had been made prior to the altercation.

29. At a time which is unclear, but was soon after 18 April, Mr Shaw counter signed the claimant's timesheet at page 62 showing him as having worked two complete shifts on 16/17 April and 17/18 April, although he had arrived late for both shifts and had left early on the shift commencing on 17 April. Mr Shaw had on previous occasions challenged times entered in timesheets by employees as their working times. The claimant was aware of that.

30. As time passed and it became clearer to the respondents what had apparently happened on 16/17 and 17/18 April, an investigation started in relation to Mr

Shaw's actions or inaction those evenings/mornings. As part of that investigation Mr Shaw was asked why he had counter signed the timesheet at page 62. A copy of the minutes of that meeting between Mr Allan and Mr Shaw appeared at pages 85 and 86 of the bundle. The meeting was held on 25 September 2019.

31. When asked the question as to counter signing of the timesheet, Mr Shaw referred to the allegations of threatening behaviour which had been made involving Mr Fair and the claimant. He said that from that, it "*just caused a lapse of concentration*". He went on to confirm that he had previously challenged timesheets and still did that.

32. The claimant was aware that falsification of timesheets constituted gross misconduct and that dismissal was the recognised sanction for that.

2 May 2019

33. On 2 May 2019 there was a visit to the respondents' workplace at Inverness by Adam Garvin, Assistant Track Maintenance Engineer. He established that 7 employees were not present on site an hour and half before their shift was scheduled to finish. Notwithstanding this, they had completed their timesheets on the basis that they had worked the full shift. Mr Allan was asked to investigate the allegation of falsification of time sheets.

34. In course of this investigation, Mr Fair drew to the attention of Mr Allan the emails he had sent in April, as referred to above. Mr Allan was informed him that in addition to those involved in the events of 2 May, other employees appeared also to have been falsifying timesheets. Mr Allan was given a copy of whatsapp messages which suggested that employees had arrived late for a shift on 16 March 2019 because they were watching a football match. A copy of the whatsapp messages appeared at pages 69 to 71 of the bundle. The claimant was in the whatsapp group as were AB, CD and Mr Urquhart. The message relating to the football match came from Mr Legg and read:-

"I'm going to watch the Untied (sic) game tonight boys so won't be in until 10-10.15ish! Pretty sure no1 is out so feel free to do the same".

35. The claimant was not working on 2 May or 16 March. There was no allegation in the disciplinary proceedings ultimately instigated against him that he had falsified timesheets for those dates.

Investigation by Mr Allan

36. The full range of investigation by Mr Allan involved him considering the timesheets for 8 employees. The dates which were relevant varied for the employees. In relation to the claimant the dates were 16,17 and 18 April 2019. Those dates were also the relevant ones for Mr Urquhart. The investigation relating to Mr Webb and Mr McCowatt involved those dates and also 2 May 2019. The relevant date for AB and CD was one day, 2 May 2019.

Investigation of the claimant and his timesheets

37. As part of Mr Allan's investigation into the events of 2 May he had already interviewed Mr Shaw, Mr Muir and Mr Fair. Those interviews had taken place on 21 and 22 May 2019. A copy of the notes appeared at pages 73 to 80 of the bundle. In this meeting Mr Shaw said he had no issues with the staff. Mr Shaw, Mr Muir and Mr Fair were reinterviewed by Mr Allan in relation to the claimant on 19, 27 and 28 June. Copies of the notes appeared at pages 81 to 93 of the bundle.

38. It had been suggested that there was an agreement that employees could arrive late. Mr Muir and Mr Shaw both denied that there was any such agreement. Mr Muir confirmed that the claimant had sent him a text seeking authority to arrive late on 17 April, but that he (Mr Muir) had not replied to that text. Mr Shaw referred to a possible early departure by agreement, where, for example, a dental appointment was required. In instances of late arrival for a shift or early finish to a shift, the position of those interviewed was that authorisation from management was required.

39. Mr Allan interviewed the claimant. It proved difficult to arrange the date for interview of the claimant. It was proposed it occur on 17 July. Due to the claimant's representative being unable to attend and then absence of the claimant on leave, the interview ultimately took place on 14 August 2019. The

claimant was represented at this meeting by Mr Campbell, an experienced trade union representative.

40. The letter inviting the claimant to the investigatory meeting on 14 August appeared at pages 100 and 101 of the bundle. It alerted the claimant to the allegation and to the purpose of the meeting. The relevant passage read:

- "*It is alleged you have falsified your timesheets, which is a breach of section 2.10 of the disciplinary policy.*
- *The dates being investigated are as follows 16/04/2019, 17/04/2019 & 18/04/2019*

The purpose of the investigatory interview is fact finding to establish what happened and based on the information gathered to decide whether or not a disciplinary hearing is appropriate. "

41. The claimant had met Mr Allan on one occasion prior to the interview on 14 August. A colleague of the claimant's, Mr Webb, was interviewed by Mr Allan on 22 May. The claimant accompanied Mr Webb to that meeting. The claimant was of the view that Mr Allan had been somewhat offhand with him. There had been a conversation between Mr Webb and Mr Allan following the meeting between them. It is unclear who said what to who during that conversation. The possibility of there having been bullying by the claimant of Mr Webb in relation to attendance by the claimant at the meeting with Mr Webb was mentioned. It is unclear whether Mr Allan or Mr Webb raised this possibility.

Investigation meeting 14 August.

42. In the investigatory meeting the previous meeting between the claimant and Mr Allan was brought up by the claimant. No objection was however taken to Mr Allan being the investigating officer, either by the claimant or Mr Campbell.

43. Mr Allan conducted both the meeting with the claimant and all other parts of the investigation in a fair and reasonable manner. He sought to obtain the claimant's comments on the relevant points which he had been asked to

investigate. The claimant and Mr Campbell were given appropriate opportunity and freedom to comment as they saw fit. At conclusion of the meeting, the claimant signed the minutes prepared at the time.

44. The hand written minutes signed by the claimant appeared at pages 102 to 106 of the bundle. The typed version appeared at pages 107 to 109 of the bundle. Mr Campbell was sent the typed version of the minutes. Mr Campbell sent them on to the claimant. The claimant then sent an email to Mr Allan which appeared at page 111 of the bundle. That email was dated 6 September. It read:-

"With regards to the minutes I received from yourself, I would like my discontent noted regarding the email you received from Ali Fair in which he falsely accuses me of threatening him. I brought his up at the meeting and I would like this reflected in my minutes. Everything else seems fine. Thanks"

45. The claimant did not ever suggest any further specific discontent with the minutes or their accuracy, although, as referred to below, both he and Mr Campbell said at the disciplinary meeting that they took issue with the minutes. They did not however provide any proposed revisions or explain what it was that they said at that later stage had been added to or omitted from the minutes. Mr Allan sent an email to the claimant, with a copy to Mr Campbell, on 25 October asking for any comments felt to have been missed from the minutes so that the claimant's amended minutes could be added. There was no reply providing any such information.

46. At the investigatory meeting the claimant accepted that he might have come in late on 16 April, although said it was not as late as 10.15. He apologised. He also said he might have started late, saying "*we all watch football. I do my shifts now. I might have started late then*". The "*football thing*", he said, "*has been going on for years*". He confirmed having left work early in the past, whilst highlighting that he had not been in any trouble during his employment.

47. No request was made of Mr Allan that he interview others or explore specific avenues of investigation.

48. The minutes of the investigatory meeting between Mr Allan and the claimant were an accurate reflection of that meeting.

49. An Investigation Report was prepared and submitted by Mr Allan at conclusion of the investigation. A copy of that in its final form appeared at pages 116 to 119. It is dated 22 October 2019.

50. Prior to completing the Investigation Report, Mr Allan had conducted investigation meetings with other employees. Four of those employees, it is understood, including the claimant, had said that an agreement was in place with Mr Shaw that they could leave early and that they could start outwith their contractual hours. The claimant later said to the disciplinary hearing that Mr Shaw had said to him that if he (Mr Shaw) said they could leave then they could.

51. Mr Allan held an investigatory meeting with Mr Shaw on 25 September 2019. A copy of the notes of that appeared at pages 85 and 86 of the bundle. That meeting was in relation to the investigation of Mr Shaw. Mr Allan raised the position of those four employees as to there being such an agreement with him. Mr Shaw repeated his position from the earlier interviews held with him by Mr Allan. He said there was no such agreement. He explained that he dealt with any approach on a case by case basis, as and when unplanned things happened, such as doctors' appointments. He confirmed that there was no agreement as to what happened when works were completed. Mr Shaw commented as detailed above in relation to the timesheets which he had counter signed and the challenge he said he made to other timesheets.

52. In the Investigation Report Mr Allan set out the position of the claimant that the investigation had arisen from a bullying claim made by him. Mr Allan said he "*did not determine a substantive link between bullying application and timesheet fraud*." Mr Allan went on, in a passage which appears at page 117, to say :-

"This investigation arose due to a disclosure by another employee, as such it is the duty of the investigator to make enquiries."

"He" (the claimant) *"has indicated that he had consent to do this by a local agreement with his section manager. I am unable to find any evidence to substantiate this. … (page 118) I have found no evidence of this from 2 supervisors and section manager."*

53. Mr Allan recommended that the allegations proceed "*for further discussion to a Disciplinary Hearing for further review*".

Disciplinary Hearing

54. Keiren Sharkey was appointed to take the disciplinary meeting and to make the decision as to outcome of that meeting. He dealt with disciplinary hearings for all 7 employees based at Inverness who were facing allegations of falsifying timesheets. Those employees included AB and CD.

55. The claimant was invited to the disciplinary hearing by letter of 29 October 2019.He received relevant papers with that letter. A copy of it appeared at pages 121 and 122 of the bundle. The disciplinary hearing for the claimant took place on 6 November 2019. The claimant was accompanied by Mr Campbell. The handwritten version of the minutes appeared at pages 123 to 128 of the bundle. The typed version of the minutes of the meeting, including the statement which the claimant read to that meeting, appeared at pages 129 to 137 of the bundle. Those are accurate minutes of the meeting.

56. The evening before the meeting, Mr Shaw spoke with some of the employees, including the claimant, who were facing disciplinary hearings. The claimant disclosed at the disciplinary hearing that Mr Shaw had said that if he (Mr Shaw) said that employees could go home early, then they could. The claimant's understanding was that consent of the section manager or the supervisor was required for an early finish. The claimant did not comment to the disciplinary hearing on anything else which Mr Shaw said to him. He did not request that Mr Shaw attend the hearing or be asked anything further by Keiren Sharkey.

57. At the outset of the meeting, Mr Campbell raised the position of Keiren Sharkey as decision maker. He said:-

"Keiren, I have concerns that you are the previous IME in Perth until recently, I know you're related to the TME Inverness Kevin Sharkey, ideally we would of liked another IME in another delivery, for me this is not ideal."

58. Mr Campbell did not halt or seek to halt the meeting. He did not press the point in terms other than as set out above. The meeting proceeded. There was no discussion between Keiren Sharkey and Kevin Sharkey in relation to way in which the hearing should be conducted or what the decision at the hearing should be.

59. The claimant read out the statement at pages 135 to 137 of the bundle. In that statement the claimant said the following:-

"I received my minutes from my interview, and immediately I could identify errors. So, after speaking to Mick, I emailed Mark Allan to advise him that I believed it wasn't an accurate reflection of what was said in the meeting. To which Mark only replied "Okay, thanks Harry.""

"I emailed Mark Allan on 24 October telling him I hadn't received an updated copy of my minutes, having previously highlighted the errors from the original copy. Mark responded on 25 October, asking me to add comments I felt were missing and he would add them to my case file. I still haven't received a copy of the minutes and they aren't in my case file".

"The truth is I've never admitted to arriving late or leaving early and there is no proof or factual evidence that I have done so."

"It is my belief that Mark Allan has manipulated my words – at no point in my interview did I give details of coming in late and I certainly did not say I've been doing it for years. If I'd been coming in late for years, I'm sure a line manager would have noticed. Coming in a couple of minutes late or leaving a few minutes early is quite clearly a local agreement, whether its officially documented or not, or why would anyone take the risk?"

"there really isn't anything I've done wrong."

60. In relation to the minutes, Keiren Sharkey said that the claimant had been asked to read them carefully and to sign them. Mr Campbell said words had been added and were missing, it wasn't a reflection of what the claimant was saying. He said the minutes were "*inaccurate and twisted*". The claimant said he was not saying that he had come in late. He said that Mr Shaw had said to him that if Mr Shaw said he could go then he could go. Keiren Sharkey referred to the claimant having said at the investigatory meeting, according to the minutes, that he used to leave early and start late. The claimant said:-

"I can't physically remember, as an example, "Harry has admitted coming in late" I said everyone likes football, that's not me admitting to coming in late".

61. When asked whether there was a local agreement in place, the claimant replied:-

"My manager said there wasn't but he said to me and in front of two other members if he said we can go then we can".

62. The claimant and his representative were able to raise any matter which they wished to at the disciplinary hearing. They had that opportunity.

63. Keiren Sharkey adjourned the disciplinary hearing. He considered a document he prepared, being a Consideration Checklist. That appeared at pages 138 to 140 of the bundle.

64. That checklist refers to instances where employees were dismissed for "*similar disciplinary*". Those are referred to as Helmsdale and Inverkeithing. Inverkeithing is also referred to in later discussions as "*Fife*". Helmsdale saw employees being dismissed for falsification of timesheets and also for wrongly stating that work had been completed. Inverkeithing saw employees being dismissed for falsification of timesheets. The "*offence*" was leaving before end of shift, whilst completing timesheets to show the normal end of shift time as when work had ceased. The offence of falsification of timesheets was therefore the same in the cases in Fife and the case involving the claimant. Those employees were dismissed, then reinstated on appeal. That was as it was accepted at appeal that the discrepancy between actual finish time and

timesheet finish time was due to the employees following the job and knock arrangement.

65. It was noted in the checklist that the claimant had 7 years of service and had no record of any disciplinary sanctions. Those were factors kept in mind by Keiren Sharkey in his decision making. The view is expressed by him that on balance of probabilities the allegations of late coming are true. The issue of the alleged errors or omissions in the minutes of the investigatory meeting is mentioned, with Keiren Sharkey's comments upon that.

66. In the final element in the checklist, "*Overall reasonableness of penalty*", Keiren Sharkey sates:-

"Gross misconduct for personal gain. I considered he had knowingly arrived late more than once, without reasonable mitigation and played a significant role in others within the team leaving early and coming in late."

*"Harry suggested there was a local agreement for leaving and starting early – no evidence of this. Harry was briefed by Track Section Manager on 5 January 2019 on rostered start and finish times, dayshift and night shift. There are multiple allegations from section supervisors in real time concerning Harry falsely filling out his timeshifts (*sic*) and not working his rostered hours."*

67. Keiren Sharkey considered the comments from the claimant and Mr Allan during the disciplinary hearing. He was aware of job and knock, on the basis that it applied if a 30 minute lunchbreak was not possible, or where a manger permitted it if work had been completed close to the scheduled end of a shift. He did not regard the instance of the claimant leaving work early by over 70 minutes to have been an example of job and knock.

68. The decision taken by Keiren Sharkey was that the claimant was dismissed. He confirmed that to the claimant when the disciplinary hearing reconvened. He then wrote to the claimant confirming the outcome. That letter was dated 13 November and appeared at pages 141 and 142 of the bundle. There was information before Keiren Sharkey, from the claimant at investigatory and disciplinary stage, together with the other material detailed above, on which

Keiren Sharkey could, and did, form a reasonable belief that the claimant had arrived at work over an hour late on 2 occasions and had left work over an hour late on one occasion, without any agreement or practices permitting him so to do.

69. 7 of the 8 employees who were subject to disciplinary hearings in respect of the allegation of falsification of timesheets were dismissed by Keiren Sharkey. His decision was that those who had falsified timesheets were appropriately dismissed as gross misconduct had occurred. The employee not dismissed had left shift early due to having been involved in a police incident on 2 May, the relevant date insofar as he was concerned. Employees AB and CD were included within those dismissed by Keiren Sharkey.

Appeal

70. By email of 14 November 2019 Mr Campbell intimated an appeal on behalf of the claimant. A copy of that appeared at page143 of the bundle. The grounds of appeal were stated as being:

"Misrepresentation of the facts

Severity of the punishment"

71. The claimant was represented by Gordon Martin, full time trade union official, at the appeal hearing. The appeal hearer was Stephen Crosbie. He also heard the appeals of the other 6 employees who had been dismissed by Keiren Sharkey. The appeal was heard on 12 December 2019. Minutes of the appeal hearing appear at pages 146 to 155 of the bundle.

72. At pages 155A and B a statement submitted to the appeal hearing by Mr Martin appears. That statement dealt with the claimant's case on the basis that what had occurred were instances of job and knock. He said that job and knock was not only condoned by senior management but was actively encouraged. Mr Martin also referred to the Fife cases. He said that dismissed members had been re-engaged in that situation "*following a similar situation with relation to the job and knock culture at this company*". He said that the

person hearing the appeal should disregard pressure being applied from senior management.

73. In course of the appeal, the claimant raised the fact that there had been reference to events of 2 May and to the whatsapp messages referred to above. Mr Crosbie confirmed that the events of 2 May were not part of the "*charges*" against the claimant as he was on annual leave at that time. He also confirmed that the whatsapp messages did not involve the claimant so said he would not go further into that.

74. The claimant said he had not said if he had started late. Mr Crosbie said to the claimant that his initial statement admitted "*late starts for years*". The claimant's response was:-

"I have never said this. Both my union representative, Mick Campbell, and I have challenged this statement numerous times but we have received no answers as to why this false accusation keeps being made. As soon as I got a sniff of being in trouble, my SM, Brian Shaw, sat there the day before going down to Perth and told us to leave early that night and I told Keiren this."

75. The altercation between the claimant and Mr Fair was referred to by him. He made the following comment, the initial element referring to that altercation:-

"Despite having six witnesses, this was not enough evidence to his behaviour and bring that forward. (sic) *All seven years I've worked here, I cannot say I have never been late, five or ten minutes but not to what is being claimed here. I said to Kevin (Sharkey) that I just want to get back to my work, I would accept a punishment."*

76. Mr Crosbie ("SC") asked the claimant ("HR") and the claimant replied :-

SC "Just for my clarification, a job and knock happens, but it's not a few minutes here and there so what is happening?

HR "I can't give specifics about this night but there is no factual evidence".

77. At a later point when asked about Mr Fair having said the claimant started at 10 pm, he said:-

"I have never admitted to that and I have never started at 10 at night ever."

78. The following exchange occurred involving Mr Crosbie, the claimant and Mr Martin ("GM") :-

GM "The culture is, he did falsify a timesheet yes but who hasn't"

SC "So, you know that two supervisors and SM haven't condoned these behaviours."

HR "Yes, I am aware. This is why I wanted Andy McKay (sic) *here as a witness"*

79. Mr Mackay was in Prague at time of the appeal. He had been seconded from October 2018 until beginning of April 2019, returning from secondment to work in a different area of the respondents' business. He was not working with the claimant at time of the events which led to dismissal of the claimant. He was not involved in the investigation, the disciplinary hearing or the appeal.

80. The claimant's text to Mr Muir was subject of a question from Mr Crosbie. The exchange is recorded in the minutes, at page 152 of the bundle, as follows:-

SC "What about the text to Andy Muir?"

HR "We would always ask to come in late. There was a time three or four years ago, Anthony Joshua fight and we had an arrangement to come in earlier I bring up the stripes again"

SC "What I'm reading is that there was no approval on the night to start late or finish early?"

HR "Andy Muir did not text me back that night."

81. Further on in the appeal meeting the following was said:-

SC "Back to the appeal and severity of punishment, there's no evidence it's inconsistent with other cases and we've gone over the severity of punishment point of the appeal."

SC "Is there anything else in the misinterpretation of facts?"

GM "Just the job and knock culture"

82. The claimant raised in the appeal a concern that Keiren Sharkey took the disciplinary meeting when, he said, another Sharkey (a reference to Kevin Sharkey) was involved. He also said that whilst there had been a briefing carried out in relation to working hours, it was done for the benefit of the new employees.

83. Towards the close of the meeting Mr Martin said:-

"I will reiterate what the disciplinary procedure is and this is to change behaviour and these boys have changed their behaviour before being dismissed."

84. Mr Crosbie took time to consider the position and to issue his decision. He spoke with the appeal officer in the Fife cases. In so doing and in considering the other matters before him and reviewing them the investigation carried out at appeal stage by Mr Crosbie was within the band of reasonable investigations.

85. Mr Crosbie decided not to uphold the claimant's appeal and therefore to confirm the dismissal of the claimant. The decision made was that of Mr Crosbie. No pressure was applied by any other party to Mr Crosbie and no-one else sought to be or was involved in the decision making. The letter from Mr Crosbie to the claimant confirming the outcome is at pages 155 and 156 of the bundle.

86. The letter contained the following explanation: -

"I conclude that you did knowingly leave early and arrive late to work without reasonable mitigation. From the beginning of the investigation, you did admit to this and advised it was common practice over the years. However, evidence in the case from real time accounts from the Section Supervisor suggest that this is not deemed acceptable behaviour, supports the fact that it is not common practice and states yourself as not working to your contracted hours. I conclude you did falsify your timesheet on the dates 16, 17 and 18 April 2019 and as Infrastructure Technician, and also as Acting Senior

Infrastructure Technician at times during 16 and 18 as stated on your timesheet, you did not demonstrate or practice the values the company expects."

87. In fact, the claimant had undertaken SIT duties on the shift of 16/17 April and not on that of 17/18 April. He had undertaken SIT duties on the shift commencing on 18 April. That shift however was not one being considered in the disciplinary process. Mr Crosbie was aware of that in reaching his decision and based his decision on the events on shifts beginning 16 and 17 April, and, in part, on the duties undertaken by the claimant in those shifts.

88. The outcome letter was dated and sent on 9 January 2020. The appeal hearing had been on 12 December 2019. Paragraph 2.11.4 of the disciplinary policy of the respondents states that following the appeal the manager will respond in writing with their ruling "*normally within 8 calendar days*". In a telephone conversation with Mr Martin on 24 December when intimating the decision in relation to the 5 employees reinstated (subsequently confirmed to them by letter also of 9 January 2020), Mr Crosbie explained that he was still considering the appeals of the claimant and another employee. He may have mentioned that consideration of grades was an element in that delay.

89. The decision reached by Mr Crosbie was taken after he had considered the points raised by the claimant. In the letter confirming the outcome of the appeal, Mr Crosbie set out his decision in relation to the claimant's case. He did not mention the outcomes in any other appeals. Similarly when he wrote to AB and CD with the outcome in their respective appeals, he dealt in the letter to each of them only with their own case.

90. Mr Crosbie concluded that the claimant had arrived substantially late for his shifts on 16 and 17 April 2019. This was not an agreed late start on either occasion. On 17 April he had approached Mr Muir for consent to start late. He had not received consent. He had acknowledged that consent was required. He arrived late, around 10pm, despite not having received consent so to do. He had completed his timesheet for 16 and 17 April on the basis of starting at the appropriate time, despite having started an hour or more after that time.

He had also left work early on the morning of 18 April, again without consent. This was not an example of job and knock, in that job and knock required consent and also applied in situations where the employee finished the required work close to the scheduled finishing time, or had worked through lunch time due to location of work. In this instance Mr Crosbie proceeded on the basis that the claimant had left work over an hour prior to his scheduled finish time.

91. Although Mr Crosbie concluded that management must have had some awareness of there being late starts and early finishes by employees, he came to the view that management did not condone those behaviours. He based that view on the evidence from management obtained in the disciplinary process and from steps which had been taken to remind employees of the need to adhere to rostered hours. There had been the briefing in January and reference by Mr Shaw to this being something covered in every safety brief.

92. In reaching the view that management had not condoned late starts or early finishes, Mr Crosbie also had regard to the fact that Mr Fair had acted when he became aware of the two instances in April. Mr Fair had spoken with those who had arrived late. He had made it clear that his consent was necessary if they were to arrive late. Mr Fair had referred the issue by emails sent to his manager, Mr Shaw. Mr Shaw had in turn referred it to his manager, Kevin Sharkey. Kevin Sharkey was scheduled to speak to the employees, however the altercation on the evening of 18 April prevented that. That was a major incident. Before anything further was put in place for following up the events of 16, 17 and 18 April, the issue over the early departure of employees on 2 May occurred. That saw a full investigation being launched into the team at the Inverness depot. These matters were all in the mind of Mr Crosbie when he reached his decision on the claimant's appeal.

93. In addition Mr Crosbie had in mind that the claimant had himself sought consent to late arrival rather than relying on any agreement or practice said to have been in place.

94. Mr Crosbie was aware when making the decision that there had been an investigation into Mr Shaw and his actions or omissions. He was aware that this investigation had been closed.

95. The claimant and other employees referred to there being a local agreement as to late starts and early finishes. Mr Muir, Mr Shaw and Mr Fair denied that there was any such agreement. CD said that he did not know if Mr Muir was aware of any early departures as he finished around 4/4.30am.

96. In relation to Kevin Sharkey and his possible involvement in the process given that Keiren Sharkey was his cousin, Mr Crosbie found no evidence of there being any such involvement. There was no involvement or attempted involvement by Kevin Sharkey in the decision making of Mr Crosbie. In dealing with the appeal Mr Crosbie was not contacted or put under pressure by senior management. He made the decision without involvement or influence from senior management.

97. Whilst Mr Crosbie understood the issue between Mr Fair and the claimant, he was conscious that the report made by Mr Fair had been sent by him prior to the altercation between the claimant and Mr Fair. The issue with claimant and falsification of timesheets had come to light as a result of the investigation into a different incident.

98. Although the claimant had alleged that Mr Allan had been biased, Mr Crosbie found no evidence to support that. He regarded the minutes of the investigatory meeting as being accurate.

99. The conclusion of Mr Crosbie was that the claimant had not demonstrated the values expected of him in his role where he would carry out SIT or team leader duties, and indeed the values expected of him as an employee of the respondents. Mr Crosbie's view was that the claimant fell short in the expected values of integrity, honesty and teamwork. He took account of the fact of the claimant's responsibilities in that he was SIT with relevant duties from time to time and on the shift of 16/17 April. The fact that there had been two starts significantly beyond scheduled start time and one finish well ahead

of scheduled finish time was also something which informed Mr Crosbie's decision to refuse the claimant's appeal.

100. There were grounds on which Mr Crosbie could reasonably reach the conclusion he did. That was so given the claimant's position at investigatory, disciplinary and appeal meetings, information from other parties and documentation before Mr Crosbie.

Other employees.

101. 5 of the other employees had their dismissals overturned by Mr Crosbie on appeal.

102. When he reached his decision on the claimant's appeal Mr Crosbie was aware of the decision to reinstate at the appeal stage in the Fife cases. He was also aware that the dismissals in Fife and the decisions to reinstate centred around allegations of falsification of timesheets and the operation of the job and knock arrangement That arrangement was in relation to employees finishing work for the day close to but ahead of their scheduled time for finish, on the basis that they had completed their allocated tasks for the day. That was different to the situation of the claimant who had arrived for work an hour or more late on 2 occasions and who had left work over 70 minutes before his shift finished. In those situations the claimant had completed his timesheets to show a full shift as having been worked by him. No consent or agreement existed for the claimant to arrive or depart at the times he did. Mr Crosbie spoke with the appeal hearer in the Fife cases to gain an understanding of the facts and applicable reasoning in those cases.

103. It was therefore Mr Crosbie's view that the claimant's case was different to those of the Fife employees.

104. The clear position of the respondents was that if falsification of timesheets was involved, dismissal would result. The Fife case demonstrated a situation where the job and knock arrangement was applicable. In the circumstances of the early departures there, dismissals were overturned. That was regarded by Mr Crosbie as a different set of circumstances to those of the claimant.

105. The appeals of AB and CD were successful. They were reinstated and issued with a first written warning. As mentioned Mr Crosbie heard these appeals.

106. AB was a team leader. That is a grade higher than the claimant, although equivalent to the grade sometimes applicable in the claimant's case, SIT. CD was the same grade as the claimant's principal role, Infrastructure Technician.

107. AB and CD had, with others, left shift early on 2 May. There was one transgression. That weighed with Mr Crosbie. A reason was given for early departure, namely that the employees' clothes were soaked as a result of bad weather. AB and CD were also accepted by Mr Crosbie as being remorseful. Although the claimant had initially used words of apology, he had subsequently adopted contrary positions. He had admitted to late arrival having occurred on several occasions. He then maintained that he had not made any such admission. He argued that custom and practice meant he could arrive late and leave early, in effect having that ability without requiring specific consent. He accepted, however that he had sought consent. No such consent had been given. The claimant had arrived at work late despite that absence of consent. The claimant said there was a local agreement. Mr Crosbie found no evidence of that. The claimant referred to the job and knock principle as being applicable to his early departure over an hour prior to the end of his shift. Mr Crosbie concluded that any job and knock arrangement was not what had happened in the claimant's case, as job and knock would involve a finish far closer to scheduled finish time. Whilst prior to his late arrival on 17 April the claimant had sought and had not obtained consent to that late arrival, he had not sought consent in relation to early departure on 18 April. AB and CD similarly had not sought and did not have consent to leave when they did on the morning of their transgression, 2 May.

108. The conclusion reached by Mr Crosbie was that the cases of AB and CD were different to and distinguishable from that of the claimant. Whilst AB and CD were properly reinstated in his view, he concluded that the distinction in the circumstances between AB and CD on the one hand and the claimant on the other meant that a different outcome was appropriate. As team leader, the

written warning imposed on AB was to last for 12 months. In the case of CD, that written warning was to last 6 months.

109. Whilst Mr Urquhart was said to have been dismissed for falsification of timesheets, there was no information before the Tribunal as to the circumstances which were before the disciplinary hearing and appeal. The Tribunal had no information before it as to any mitigating factors which might have been advanced and why it was that the decision that he be dismissed was overturned by Mr Crosbie.

The issues

110. The issue for the Tribunal was:-

111. Was the dismissal of the claimant by the respondents fair or unfair? That would turn upon the view taken by the Tribunal on the matters detailed below. The starting point was that it was accepted that there was belief on the part of the respondents that the claimant was guilty of misconduct.

112. The questions were:-

(1) Whether the respondents had reasonable grounds on which to sustain that belief.

(2) Whether the respondents had, at the time they formed that belief, carried out a reasonable investigation, as much investigation as was reasonable in all the circumstances; and

(3) Whether dismissal lay within the band of reasonable responses of a reasonable employer.

Applicable Law.

113. Section 98 of ERA sets out the requirements for a dismissal to be fair. An employer must show the reason for dismissal, which must be a potentially fair reason. Here the potentially fair reason was conduct of the employee.

114. Section 98 (4) of ERA states:-

Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer): -

a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

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

115. The well-known case of ***British Home Stores v Burchell 1978 IRLR 379 ("Burchell")*** confirms that for there to have been a fair dismissal, an employer must have a genuine belief that the employee had committed the misconduct in question, must have had reasonable grounds in mind on which to form that belief, must have carried out as much investigation as was reasonable in the circumstances and, in deciding to dismiss, that decision must be one which lies within the band of reasonable responses of a reasonable employer.

116. The investigation carried out does not require to be a forensic one such as might be carried out in a police investigation situation. It requires to be of the standard of a reasonable investigation lying within the bounds of an investigation which would be carried out by a reasonable employer. In assessing whether an investigation lay within the band, account may be taken of admissions by an employee. If an innocent explanation is offered, the investigation should include evidence which might potentially be viewed as exculpatory or as consistent with the innocent explanation that is offered. ***Stuart v London City Airport 2013 EWCA Civ 973 ("Stuart")***.

117. It is an important element of fairness that there is consistency of treatment by an employer of transgressions which occur. The outcome and punishment should be the same if the offence is the same.

118. There must however be truly similar or sufficiently similar circumstances for one outcome to be properly compared to another. The cases ***of Post Office***

v Fennel 1981 IRLR 221 ("Fennel"), ***Hadjioannou v Coral Casinos Ltd 1981 IRLR 352 ("Coral Casinos")***, ***Doy v Clays Ltd EAT 0034/18 ("Doy")***, ***Securicor Ltd v Smith 1989 IRLR 356 ("Securicor")***, ***Paul v East Surrey District Health Authority 1995 IRLR 305 ("Paul")***, ***Kier Islington v Pelzman EAT 0266/10 ("Pelzman")***, ***Protor v British Gypsum 1992 IRLR 7 ("Proctor")***, ***Cain v Leeds Western Health Authority 1990 IRLR 168 ("Cain")***, ***Newbound v Thames Water Utilities Ltd 2015 IRLR 734 ("Newbound")*** and ***Wilko Retail Ltd v Gaskell EAT 0191/18 ("Wilko")*** are all of relevance.

119. From those cases the following principles can be drawn:-

1. The Tribunal must decide whether, on the facts, there is sufficient evidence of inconsistent treatment.. It is almost always the position that a Tribunal will have less specific information about cases alleged to have been similar to that which it is considering than it will have about the case then before it.

2. While consistency is important, there is quite a degree of latitude given to an employer as to how it deals with specific cases. An employer is able to be flexible in how it deals with matters.

3. The argument of an employer being unreasonable is relevant in limited circumstances – (a) those where employees have been led by an employer to believe that certain conduct will not lead to dismissal, (b) where evidence of other cases being dealt with more leniently supports a complaint that the stated reason for dismissal was not in fact the reason for dismissal and (c) where decisions made by an employer in truly similar or sufficiently similar cases indicate it was not reasonable for the employer to dismiss.

4. If there is a clear and rational basis for distinguishing between cases, then the employer's decision should not be overturned by an Employment Tribunal. In circumstances where 2 employees have been dismissed for the same incident, where an appeal conducted sees an employer adhere to the decision to dismiss one employee but

overturn the decision to dismiss the other, the question for the Tribunal is whether the decision in that appeal is so irrational that no employer could reasonably accept it.

5. A Tribunal must be careful not to substitute its own view for that of the employer The Tribunal must consider whether the decision taken involved reasoning which was irrational. Consistency is therefore subject to the range of reasonable responses test. It matters not that a Tribunal would have seen things differently, coming to a different decision.

120. The reaction of an employee to the conduct involved is something which can be considered by an employer in its decision making. An employee who accepts that conduct was unacceptable and who co-operates in avoiding repetition may therefore be treated differently from an employee who refuses to accept responsibility for his actions.

121. An unfair dismissal may result where procedures have not properly been followed.

122. The case of ***Chandhok v Tirkey 2015 ICR 527 ("Chandhok")*** underlines the need for each party to set out their position in form ET1 or ET3 as those may be added to during the case, so that by the time the case proceeds to a hearing, each party has fair notice of what in essence the other is saying.

Submissions

Submissions for the Respondents

123. Mr Frew lodged written submissions. A copy of those is attached at Appendix 1. He spoke to those written submissions and also responded to the submissions made by Ms Gribbon.

124. The following is a summary of the submissions for the respondents.

125. Mr Frew said that the claimant's position was as an Infrastructure Technician who acted on occasion as a Senior Infrastructure Technician. That latter post

was accepted by the claimant as being another name for the post as team leader.

126. The conduct of the claimant appeared to be accepted as constituting extremely serious acts of gross misconduct. He had, on one of the occasions, sought permission to come in late. He did not receive consent so to do. He had nevertheless come in late.

127. Conduct was the reason for dismissal and the dismissal was fair.

128. The investigation was reasonable. It was "*within the band*". The claimant had admitted the conduct in question, albeit not accepting the precise timing put to him.

129. Mr Fair had become aware of the late arrivals and early departure. He had sent an email highlighting that. Later on the day of the early departure, a serious incident, accepted as such by the claimant in evidence, had occurred. That had disrupted plans to investigate. It led to investigation. Ten working days later the same type of incident of falsification of timesheets had occurred and an investigation was commenced. That led to information emerging about the events of 16, 17 and 18 April, and investigation into those.

130. It appeared, said Mr Frew, that the claimant argued that summary dismissal was too harsh. He accepted at Tribunal and at appeal that he should be punished.

131. At the disciplinary hearing whilst a comment had been made about Keiren Sharkey being the decision maker, no objection had been taken. Mr Campbell was very experienced. He had simply said Keiren Sharkey was *not ideal* "".

132. The claimant had then, at the disciplinary hearing changed his position from the investigatory meeting. It was a "*sea change*" said Mr Frew. He denied saying what was attributed to him at the investigatory meeting. He did however say at the disciplinary hearing that if Mr Shaw said he could go then he could go. That confirmed he accepted that consent to leave was required. Mr Shaw may have said more in that exchange, according now to the claimant and some other witnesses. Any such comments or remarks were not however

before the respondents at the time they made the decisions, both that to dismiss and that on appeal.

133. The claimant had been informed of the matters being investigated and had been accompanied at that meeting. There was no recorded objection to Mr Allan, and no indication by Mr Campbell or the claimant of any issue with the minutes in this regard when the minutes were commented upon.

134. The claimant had, in reality, changed his position from admission to blanket denial and then to an explanation that what he had done was an example of job and knock, and was therefore approved by the respondents.

135. Every opportunity was given to the claimant and his representatives to respond to the allegations and to say what they wished. It now seemed that disparity of treatment was the main point taken by the claimant.

136. In fact, until appeal, all employees who had falsified timesheets were dismissed. There was no basis on which the respondents could be said to have encouraged a view that conduct comprising falsification of timesheets would not lead to dismissal.

137. The other cases in which decisions had been taken by the respondents were not truly similar or sufficiently similar to that of the claimant. Mr Frew referred to ***Coral Casinos, Doy, Fennel, Paul, Securicor, Wilko*** and ***Pelzman.***

138. The Helmsdale cases were not similar in that they involved employees stating to their employer that elements of work had been done when that was not the case. In addition, timesheet falsification had taken place. The Fife/Inverkeithing cases involved falsification of timesheets and dismissal. When, at appeal, it had been established that what had happened was an instance of job and knock, the dismissals were overturned. The claimant however had not been involved in job and knock, even on the morning when he left early.

139. There was no true similarity between the claimant's case and those of the employees in Fife. The claimant was also not able to point to a relevant disparity in treatment between himself and the two employees AB and CD.

This was as the respondents had, at appeal, taken a decision as to a different punishment being applicable and had explained the reason for that outcome. The explanation given was rational. It was within the range of reasonable responses. That was the test in terms of ***Securicor*** and ***Wilko***.

140. Mr Crosbie had given his reasons in evidence. He had referred to the claimant being a team leader some of the time. The claimant had admitted his behaviour. The claimant had referred to the behaviour going on for some time. AB and CD had been involved in one incident. The claimant had been of the view that he did nothing wrong, whereas AB and CD had been apologetic. The claimant's position had changed. He latterly referred to what had happened as being examples of job and knock. Mr Crosbie had legitimately concluded that the claimant had not demonstrated the values expected of a team leader or an employee of the respondents, such as honesty, integrity and teamwork.

141. Mr Frew gave specific instances from the disciplinary process with AB and CD of what had happened in their cases, contrasting that with the position adopted by the claimant. The claimant had accepted falsifying timesheets over many years and seeking permission to arrive late, not getting it and arriving late despite that. Mr Crosbie had taken an entirely rational approach, Mr Frew said. The claimant had shown himself to be completely unreliable due to his changes of position.

142. The respondents were in a position to take the view that there was no local agreement as the claimant maintained. Three managers had said that there was no agreement. The claimant himself had said permission was necessary, referring to seeking that for his late arrival, although he had then arrived late despite not getting the permission he had sought.

143. Mr Crosbie had, Mr Frew recognised, said in evidence that he had come to the view that management must have had some awareness of the late starts/early finishes happening. The important point was that Mr Crosbie was clear that management had not condoned this behaviour. Mr Fair's emails and his actions confirmed that. There had been delay in moving forward with the

investigation. That however did not amount to condoning the behaviour. There had been an altercation. Then 10 working days later an inspection had led to a team wide investigation. That had, in turn, led to the investigation of the instances involving the claimant.

144. The respondents had a reasonable belief that the behaviour had not been condoned. Mr Shaw may or may not have said things to the claimant and others. The claimant had not passed the full detail of those on at his disciplinary and appeal hearings. That may have been as he wished to protect Mr Shaw. The point was, however, these were not matters revealed in full by the claimant until the Tribunal proceedings. Even however had the respondents been informed by the claimant that Mr Shaw had wished him luck at his appeal, that did not take the claimant any further forward, said Mr Frew.

145. In looking at possible disparity of treatment, the claimant's behaviour had to be kept in mind. His changes of position in the process were of significance. Mr Crosbie had referred to his values falling short of those of a team leader or employee of the respondents.

146. There had been little cross examination of Keiren Sharkey. That was appropriate, Mr Frew submitted. There had been consistency by Keiren Sharkey. Those who had falsified their timesheets had all been dismissed.

Submissions for the claimant

147. Ms Gribbon lodged written submissions. A copy of those appears at Appendix 2. What follows Is a summary of the submissions made by Ms Gribbon.

148. Ms Gribbon set out the law she submitted applied. She detailed Section 98 of ERA. She referred to ***Burchell***. The investigation stage required to include evidence which was potentially exculpatory or consistent with innocent explanation (***Stuart***).

149. Cases on inconsistency of treatment were highlighted by Ms Gribbon. She specifically mentioned ***Fennel, Coral Casinos, Proctor, Cain, Paul*** and ***Newbound***.

150. Proposed findings in fact were set out, which Ms Gribbon urged the Tribunal to adopt.

151. Turning to analysis of the case, Ms Gribbon firstly set out her position that there had been an inadequate investigation, with procedural failings having occurred.

152. Mr Allan had information from 4 employees that senior management knew of late starts and early finishes. They said it had been going on for years. Those employees had no previous disciplinary "*offences*" and no history of dishonesty.

153. In addition, Mr Allan had the Whatsapp messages. Those showed Mr Legg, a team leader, confirming that he would be late as he was to be watching football. He had given permission to others to do the same.

154. Mr Allan knew Mr Shaw had not acted on the emails from Mr Fair. Mr Shaw had not informed Mr Allan of those emails when they had met in May. It was difficult to think he had forgotten about them. Mr Shaw had counter signed the timesheets for the nights in question, something he later described as a lapse of concentration.

155. Although Mr Shaw said to Mr Crosbie that he had discussed Mr Fair's email with Kevin Sharkey, the fact was Mr Shaw, Mr Muir and also Kevin Sharkey had not acted. Ms Gribbon referred to comments Mr Shaw was said to have made to the claimant about Mr Fair, albeit that information was not before the respondents when they made their decisions.

156. The investigator had therefore not questioned Mr Shaw about the failure initially to address the situation or to mention those matters to him when they had first spoken. It was not a valid suggestion, Ms Gribbon submitted, for the respondents to say that the department had been overwhelmed by the investigation into the events of 2 May.

157. It was not a rational or reasonable conclusion for Mr Allan to decide that there was no evidence to support the employees' position that management knew of and condoned late starts and early finishes. The conclusion he had reached

defied logic and common sense. There could be no reasonable belief on the part of the respondents that misconduct had occurred.

158. The investigation was not reasonable in light of ***Stuart***. Evidence which was exculpatory was discounted entirely. That evidence was consistent with the position of the employees. There were no reasonable grounds to sustain the belief that the claimant was guilty of misconduct

159. There was, said Ms Gribbon, a failure to ask Mr Shaw why he had not acted on Mr Fair's emails, why the emails had not been mentioned in the May meeting between Mr Allan and Mr Shaw and why he had commented in the May meeting that there was no issue with the staff. Mr Shaw had not acted at all on the emails, Ms Gribbon submitted. Kevin Sharkey also knew of the position. Mr Allan had not interviewed Kevin Sharkey.

160. Further, Ms Gribbon submitted, there was no evidence that Mr Crosbie considered any mitigating evidence, including this information which suggested management knew about the late starts and early finishes.

161. The ***Burchell*** test had not been met as the investigation was not a fair one. The dismissal was unfair for that reason, said Ms Gribbon.

162. If the Tribunal was not with her on that element, Ms Gribbon submitted that the Tribunal should find the dismissal unfair as the decision to dismiss was outwith the band of reasonable responses.

163. The inconsistency with the Fife cases was the primary reason for the dismissal being unfair due to inconsistency, Ms Gribbon said.

164. Mr Crosbie said he had spoken with the Appeals Officer in the Fife cases. Dismissal in those cases was for falsification of timesheets. That was also the position in this case. It was accepted by Keiren Sharkey and Mr Crosbie that the Fife cases were similar. Mr Martin gave unchallenged evidence to the same effect. There was no reason advanced for differing treatment. Dismissals had been overturned in Fife. Helmsdale involved false claims that work had been done, in addition to falsification of timesheets.

165. If therefore the respondents pointed to the Fife cases as being consistent with the claimant's case, as they did, then the significance was that in the Fife cases dismissals had been overturned on appeal. If there were differences in treatment or reasons for that, it was for the respondents to justify that, Ms Gribbon argued. They had failed to do that.

166. Ms Gribbon said that the differences the respondents pled in their amended ET3, in paragraph 19 were:-

i) The number of occasions on which there was a failure to work the contractual hours.

ii) The Claimant's attitude to not working full shifts.

iii) The circumstances in which this had happened.

iv) The Claimant's admission he had been late/finished early; and

v) AB and CD having left their shift early "due to weather conditions".

167. In his witness statement Mr Crosbie had, Ms Gribbon submitted, justified the difference in his decision as between the claimant on the one hand and AB and CD on the other as being due to:

i) Grade.

ii) Number of occasions on which there was a failure to work full shifts.

iii) AB's and CD's "*wet weather*" issue as valid justification for them both leaving their shift one hour twenty minutes early on the 2nd May 2019.

iv) It being an alleged "*a one-off incident*" for AB and CD.

v) The Claimant's attitude being completely different – it being alleged that he did not feel that he had done anything wrong and maintained that he was allowed to start his shifts late/leave early without authorisation when he pleased; and

vi) The Claimant being a Team Leader and events not being compatible with honesty/integrity/teamwork on his part.

168. However, said Ms Gribbon, if grade was a factor in the decision not to reinstate the claimant, that was not credible in that CD was the same grade as the claimant and AB was a grade higher, being team leader. They were both reinstated.

169. In relation to the number of shifts mentioned, Ms Gribbon highlighted to the Tribunal the fact that all three of the respondents' witnesses had said in the statements, their evidence in chief, that the other employees had been investigated and dismissed in relation to the events of 2 May alone. Whilst that was true so as far as AB and CD were concerned, other employees had falsified timesheets for more one shift. Ms Gribbon referred to the dismissal letters of Mr McCowatt and Mr Webb. They had been reinstated. She also referred in submission to Mr Urquhart, although no specific evidence had been led in relation to his circumstances. Similarly, there was no reference to Mr McCowatt and Mr Webb and their circumstances in evidence, Ms Gribbon having been clear before commencement of evidence in the hearing that the reference to them and the dates of their "*offences*" was being made in order to call into question the credibility of the respondents' witnesses.

170. This erroneous and untruthful reference by all three of the respondents' witnesses that only one date was involved in the case of Mr McCowatt and Mr Webb was, Ms Gribbon submitted "*a rather menacing attempt on the part of the respondents to co-ordinate false evidence designed to suggest to the ET that there was a material difference justifying the difference in treatment between the claimant and those reinstated*." Had the claimant not produced the respondents' dismissal letters to Mr McCowatt and Mr Webb, the evidence given by the respondents' witnesses would, more likely than not, have been false in an area which they knew had a critical bearing on their defence. Ms Gribbon appreciated that she was making a serious accusation, however believed there was a proper basis for it.

171. Although AB and CD admitted to falsification of timesheets, so did the claimant. AB had referred to being bullied and pressurised. Keiren Sharkey had found no evidence to support this allegation. He had not indulged this. Mr Crosbie had however referred to this after JB had mentioned it in his appeal.

It was unclear what basis he had to deviate from the view of Keiren Sharkey. CD made no allegations of bullying. Both AB and CD had been in the whatsapp group. They were not however questioned about that. CD had said, referring to coming in late, that everybody did it and everybody knew. It was not credible, Ms Gribbon said, that it appeared to be acceptable to leave a shift early because of wet clothing. Proper assessment of the position of AB and CD revealed their explanation as being implausible, with each undermining the other.

172. The Tribunal should keep in mind that the claimant had apologised twice at the disciplinary hearing. He had said he wished his job back and that he would accept a punishment. He had no disciplinary record, had a young family and had been fighting for his livelihood. His position was to say, "*yes, I did it. Everybody knows. Senior management know. It has been going on for years.*" Mr Crosbie had said the claimant's attitude was completely different to that of AB and CD. That position of Mr Crosbie did not stand up to scrutiny, however.

173. It was also possible for the claimant to refer to the position of Mr Urquhart, Mr Gribbon said. His offences occurred on the same dates as those of the claimant and in the same circumstances. He had however been reinstated. His situation was truly parallel to that of the claimant. I raised with Ms Gribbon the fact that AB and CD were said at the outset to be the people referred to by the claimant in relation to alleged disparity of treatment. I had not heard evidence from the claimant or indeed anything by way of evidence in chief or cross as to Mr Urquhart's position and why it was that he was reinstated. I had not anticipated reference to Mr Urquhart in the case, other than to him being one of the employees who had been reinstated. Ms Gribbon said that disparity of treatment had always part of the claimant's case and he was entitled to point to staff in a similar position. There was enough material before the Tribunal to enable it to make findings in fact in relation to the dates on which Mr Urquhart was found to have falsified timesheets and that he had been dismissed, subsequently being reinstated.

174. The basic proposition advanced was that all employees had failed to work their contractual hours. Senior management knew of this. Having all been

dismissed, the claimant and Mr Legg remained dismissed after appeal, whereas the others had been reinstated with a first written warning. The dismissal of the claimant was unfair.

175. It was not credible to suggest that AB and CD were honest and had exhibited integrity whereas the claimant had not, Ms Gribbon submitted.

176. Ms Gribbon said she accepted that the claimant's position throughout the disciplinary process was contradictory. The respondents were however aware of his "*predominant response*" to the allegations. The respondents had not, it was submitted, alleged that the disparity in treatment was due to alleged conflicting accounts given by the claimant during the disciplinary process.

177. The respondents had referred to the claimant as a technician. At the Tribunal hearing, however, they were emphasising his role as being SIT. He had not been acting team leader, as they had claimed.

178. There had been a delay of just under a month between the appeal hearing and intimation of the decision. Mr Crosbie had referred in the outcome letter to the claimant having been SIT at times including on 16 and 18 April. 18 April was a date referred to in the allegations of falsification of timesheets. The issue related to early departure on the morning of 18 April, however, whereas the claimant had been SIT for the shift commencing in the evening of 18 April. This showed a lack of attention to detail, Ms Gribbon submitted.

179. Evidence from Mr Shaw and Kevin Sharkey would have been important Ms Gribbon said. The Tribunal did not however have the benefit of that.

180. Ms Gribbon urged that the Tribunal find the respondents' witness not to be credible in relation to the key elements in the defence. Management knowledge of the actings was a prime example of this. Mr Crosbie said he concluded that management was aware, yet maintained it had not turned a blind eye to the practices, despite the absence of action from management. It was said there was no evidence to support the position put forward by the claimant and other employees when that was not so.

181. Evidence from Mr Campbell, Mr Legg and Mr Mackay was of relevance for the Tribunal notwithstanding a submission to the contrary from the respondents. Those witnesses spoke to the working practices and culture. Ms Gribbon said that the "*undisputed evidence*" was that "*if an employee leaves a shift early, they do so with the permission of the Team Leaders and Supervisors present on that shift*." Further, she submitted, " *the overwhelming evidence is that employees arriving late for shifts and leaving early had a legitimate expectation based on the conduct of management that this was not something which would result in any form of disciplinary sanctions let alone dismissal*".

182. Mr Shaw had been a form of double agent, it was submitted, in that he had said one thing to the employees but another thing to management investigating the incidents.

183. The claim should be successful with the case being set down for a remedy hearing.

Brief reply from the respondents

184. Mr Frew said it was important for the Tribunal to recall Mr Crosbie's evidence in relation to knowledge. He had concluded that management must have known something about the practices, however had also concluded, for reasons he gave, that the practices had not been condoned by management.

185. Mr Legg was not a comparator. He was in the same position as was the claimant in that he had been dismissed.

186. As to Mr Urquhart, Mr Frew said that if he was to be referred to as a comparator, amendment would be required. Any such application would be opposed. If permitted, further evidence would be necessary from Mr Crosbie as to why it was that he had concluded that Mr Urquhart should be reinstated. It was not possible to guess what those reasons were and whether they were valid or not.

187. It was not apparent until submission stage, Mr Frew said, that Fife was the primary instance founded upon as illustrating disparity of treatment. Looking

at Fife, however it was clear that the cases there centred upon the job and knock arrangement. Mr Frew referred to Mr Martin's position before Mr Crosbie as explained in the document at pages 155A and 155B, the statement he handed over at appeal. Fife was not therefore the same as the situation with the claimant. All witnesses, including those for the claimant, save for Mr Campbell, accepted that the claimant leaving his shift more than an hour and 10 minutes early was not an instance of job and knock. Mr Campbell had not answered the question. He had been obtuse.

188. The claimant had argued that the relevant cases for comparison were those of AB and CD. What the Tribunal had to do was to determine whether the decision making process and reasoning of Mr Crosbie was rational. What the Tribunal might think about what it would have done was not what mattered.

189. There was a key ingredient missing when the claimant arrived late or left early, that of authority from management. If Mr Muir had given authority for late arrival when the claimant asked for that, it would be unlikely that the case was before the Tribunal, Mr Frew submitted. The claimant did not get that authority, however. He did not show for work until an hour after his start time despite not receiving authority.

190. The claimant had changed his story. He had put himself in a position where he was wholly incredible and could not be trusted. There was an initial level of integrity when he had held his hands up and said he did it. Then, however, he had changed his story. He had not been honest and had zero integrity, Mr Frew said. The decision of Mr Crosbie should not be viewed as constituting an unfair dismissal. He had acted in a rational way. That was the matter the Tribunal had to consider.

191. Credibility of the witnesses was a matter for the Tribunal. An explanation had been given by the witnesses as to the error in the dates. They had been taken to the letters of dismissal for Mr McCowatt and Mr Webb and had clarified the statement they had given.

192. Mr Shaw had referred in an interview with Mr Allan to counter signing the timesheets in what he had said was a lapse of concentration. There had been

a substantial incident involving an altercation around the time the timesheets were countersigned. Mr Shaw had been investigated himself by the respondents.

193. Although no steps had been taken by management prior to 2 May when the next issue arose, there had been a lot happening and that continued to be the position as the whole team then were under investigation.

Submissions after conclusion of the hearing

194. By email of 17 December Ms Gribbon expanded upon her submission that Mr Urquhart's situation was of relevance and supported the claimant's position that there had been disparity of treatment.

195. Ms Gribbon referred to Mr Fair's emails in April which contained allegations that Mr Urquhart had not worked full shifts on the same days as the claimant. Keiren Sharkey had said that the claimant and Mr Urquhart were investigated for falsifying timesheets on the same dates. Keiren Sharkey had also said that all employees were dismissed by him for gross misconduct, comprising falsifying their timesheets. Mr Martin had confirmed that all the employees were dismissed for the same offence and that he had represented them at the various appeals. Mr Campbell had also confirmed all employees had been dismissed for the same offence, falsification of timesheets

196. The Tribunal could therefore find that Mr Urquhart had been dismissed for falsification of timesheets and that he had been reinstated on appeal. The shifts involved were the same ones as had been the basis of disciplinary action relating to the claimant. The Tribunal could therefore take account of those facts in "*analysing the veracity of the reasons advanced by the Respondent for upholding the Claimant's dismissal and reinstating another employee dismissed in identical, failing which, similar circumstances*."

197. The respondents objected to these additional submissions for the claimant. They said in an email also of 17 December "*The Claimant has never raised the disparity between the Claimant and Mr Urquhart in his pleadings. Save for*

her final pleadings, the Claimant's representative also failed to pursue this argument in the course of the tribunal proceedings.

If the disparity between the Claimant and Mr Urquhart is to be considered by the tribunal, the Respondent respectfully requests that Mr Stephen Crosbie is called back to give evidence in this regard as an appeal officer who made a decision to uphold the Claimant's dismissal and to reinstate Mr Urquhart."

Discussion and decision

198. As set out above, the claimant had arrived late on 16 and 17 April and left early on 18 April. He had been undertaking SIT duties on the shift starting 16 April finishing 17 April. He did not dispute that he had falsified his timesheets on 16, 17 and 18 April 2019. He It was accepted by him that this constituted gross misconduct and that dismissal was the penalty for gross misconduct.

Management Agreement/turning of a blind eye.

199. The claimant argued that the respondents through senior management in Inverness were aware of and condoned, or certainly turned a blind eye to the practices of late arrival and early departure. He also maintained that job and knock meant he could leave as he did on the morning of 18 April.

200. I considered this argument carefully. I kept in mind that it was not for me to regard the Tribunal hearing as being one to determine whether managers actually did or did not condone departure from set hours or turned a blind eye to it. The role of the Employment Tribunal in this scenario is to consider the information which the respondents gathered and the conclusion which they reached.

201. I could understand why Mr Crosbie concluded that there must be some awareness by managers of the practice. I could also understand however the distinction he drew between "*some awareness*" and the practice being approved of or condoned.

202. It seemed to me to be difficult to say that it could be concluded by the decision makers in the disciplinary process that employees were authorised by

management to arrive over an hour late for shift if a football match was going on. There was no evidence of there being any agreement in place. The highpoint was the whatsapp message from team leader Mr Legg saying that he was going to be late as he watching football and that others could take the same path. The claimant's own actions however supported the view that there was no "*right*" to be able to do this. He sought consent of Mr Muir to arrive late. He would not do that if management was aware of the practice and condoned it or even turned a blind eye to it. That consent was not given. The claimant arrived late despite absence of consent. Further, when the matter was raised by Mr Fair with the claimant, he did not immediately refer to the practice being something known to management and approved by them. He also did not query why a blind eye was not being turned on this occasion, referring to that being the practice. The fact that the claimant did not follow either of these courses meant that the respondents did not have that reaction to assess as part of their decision making.

203. Whilst Mr Allan, and indeed Keiren Sharkey and Mr Crosbie, had the claimant and others saying to them that consent existed either expressly or by implication because of unobjected-to practice, no such written consent could be produced, nor was there any example given where management had, even by implication, agreed to late arrival for shift. There was contrary evidence in fact. There had been briefings, including one in January, reminding everyone of shift times and the need to stick to them. The claimant had attended that January briefing. Mr Shaw referred to giving permission to arrive late or leave early potentially if a request was made. He mentioned appointments with doctors or dentists as examples of that scenario. He denied there being any express or implicit consent to late arrival. Crucially the claimant had sought consent from Mr Muir. That was entirely inconsistent with there being some form of standing consent or accepted practice.

204. It is true that Mr Shaw did nothing obvious to the claimant on receiving the emails from Mr Fair in April. The information from him gathered in the investigation phase was that he had spoken with Kevin Sharkey and that Kevin Sharkey planned to speak with the claimant on 19 April. The altercation

then took place in the evening of 18 April. The claimant and Mr Fair had both been sent home on the evening of the altercation. The reason that Kevin Sharkey did not speak with the claimant and others regarding their late arrivals and early departure was that the altercation had occurred. That was a significant event. There was a basis for it having thrown matters off course.

205. Whist the events of 16, 17 and 18 April could then have been taken forward, that had not happened by the time the visit to site of Mr Galvin on 2 May (10 working days later) happened. That then saw an investigation being launched into the situation with the whole team at Inverness. There was an investigation into Mr Shaw in addition. During the course of the investigation into the events of 2 May, the matter of the 16, 17and 18 April goings on was raised and the investigation was then extended to encompass those. This was one of the reasons for delay.

206. There had been late arrival on two occasions. The second occasion was the evening after the first one. On the evening of the second occasion, the claimant had sought and not obtained consent to late arrival.

207. The claimant also left over 70 minutes early on the morning of 18 April.

208. The claimant tried to argue that he was able to take this course, on all three occasions it appeared, due to application of job and knock. He accepted at Tribunal, as did his colleagues, that departure 70 minutes before shift end was not a job and knock situation. Mr Campbell's responses to questioning on this point did address that question. The claimant also said in evidence that the procedure was for the team manager to report that the job had been finished and for authority then to be given by the supervisor to employees departing. That had not happened here. At the disciplinary hearing the claimant said to Keiren Sharkey that Mr Shaw had said to him that if he (Mr Shaw) said the claimant could go, then he could go. It was never suggested that Mr Shaw had said to the claimant on 18 April that he could go. That information to Keiren Sharkey was an underlining from the claimant himself of there being no standing practice/authority for employees to leave well

before their shift ended. Authority was required for early departure in terms of the job and knock arrangement.

209. The comments of CD in relation to early departure made in his appeal at page 189 of the bundle that "*Everybody knows does it and everybody knows"* were known to Mr Crosbie. He queried with CD, in a passage appearing on the same page of the bundle, whether CD thought Mr Muir knew about this. CD replied "*Honestly, I don't know."* Mr Crosbie, legitimately in my view, concluded that this exchange did not confirm that management condoned early departure in general terms and without prior approval.

210. I also did not see that there was a basis on which it could be successfully argued that it was unreasonable of the respondents to conclude, on the information before them, that job and knock could not be extended to cover late arrival for a shift.

211. It was also the claimant's position that the investigation in his case was not a reasonable one. Employees in a management role had not been asked important questions, it was said. Mr Shaw had not been asked why he did nothing after receiving the emails from Mr Fair in April. Kevin Sharkey had not been interviewed at all, despite Mr Shaw saying at one point that he had informed Kevin Sharkey of the emails from Mr Fair. Mr Allan ought not to have been the investigator, it was said, given what was said to be his interaction with the claimant when the claimant had accompanied a colleague to a similar investigatory meeting. The claimant felt he was being picked upon due to his altercation with Mr Fair, that altercation being in the evening of 18 April after the falsification of timesheets had taken place, but not being related to that matter. It was also said to have been significant that when asked (in the investigation into his own situation) about having counter signed the timesheets, Mr Shaw had referred to that being due to a lapse of concentration on his part. That had not been challenged. Counter signing of the timesheets after the emails had been received from Mr Fair ought to have been viewed as evidence that Mr Shaw did not object to or indeed approved the practice of late arrival and early departure.

212. I accepted that, as often is the case, there were questions which might have been asked during the investigation, but which were not asked. There were different conclusions which might have been reached. Judging the investigation against the standard accepted by both Ms Gribbon and Mr Frew as being applicable however, that of a reasonable investigation, the investigation lay within that band I concluded.

213. The claimant had been given information about the matter which was subject of the investigation. He had been accompanied by an experienced trade union representative. He had had every chance to say what he wished and indeed to raise with the investigating officer any matters he might have wished to be explored by him. Importantly, he had admitted the transgressions.

214. No objection was taken to Mr Allan being the investigatory officer. I did not see that there was a basis for the view that Mr Allan was inappropriate as investigatory officer such that the investigation was tainted rendering the dismissal unfair. I was not given a basis on which I could conclude that it was likely on the balance of probabilities that Kevin Sharkey had been in any way involved in the investigation or had influenced its outcome. The report was full. It took some time, complicated no doubt by the investigation following the events of 2 May, as well as the altercation between Mr Fair and the claimant on 18 April. In the latter regard, the reports from Mr Fair had been submitted before the altercation. I did therefore see that it could be maintained successfully that the claimant had been picked upon as a result of the altercation. That is underlined by the fact that all those who had falsified timesheets were taken to disciplinary hearings and were dismissed.

215. In my view Mr Allan was entitled to reach the view he did that a disciplinary hearing was warranted given the competing information he had and what had actually happened, particularly as the claimant had arrived over an hour late after seeking and not getting consent to arrive late. He had been an hour late on 2 occasions. He had left over 70 minutes early. In neither instance did he give information to Mr Allan which demonstrated management agreement to these events or indeed management awareness of them, with tacit approval being given or no objection being taken. What the claimant had said to Mr

Allan, by way in particular of admission, taken with the information Mr Allan had obtained in the investigation, provided Mr Allan, at investigation stage, with grounds for having a reasonable belief that the claimant had arrived over an hour late on 2 occasions and departed more than an hour early on one occasion, without consent, express or implied on any of those occasions. He was in a position to recommend that disciplinary proceedings followed.

216. As mentioned, there were areas which might have seen further questions being asked or deeper probing take place. I did not regard there as being relevant exculpatory evidence of reasonable importance with Mr Allan which he did not then include in his report. There were no relevant matters which he was requested to pursue but did not.

217. It was said at the disciplinary hearing that the investigation meeting notes were wrong. The claimant said then that he had made no admissions as described. The record was inaccurate and twisted, Mr Campbell said. Words were said both to be added and to be missing. However, the claimant was accompanied by Mr Campbell. The claimant had signed the minutes at the end of the disciplinary hearing. The minutes had been sent to Mr Campbell. He had sent them to the claimant without taking objection to them. The claimant had then sent the email referring to his discontent regarding Mr Fair having, he said, falsely accused him of threatening him (page 111 of the bundle) He went on to say "*Everything else seems fine*". That email was copied to Mr Campbell who did not take any issue with its terms. Having seen both the claimant and Mr Campbell give evidence, it does not seem to me at all likely that either of them would have hesitated to raise any issues they might have had either at the time or certainly in commenting on the minutes given to them when returning those. I am satisfied therefore, on the balance of probabilities, that the claimant said what he is recorded as saying in the minutes of the investigatory meeting.

Alleged deliberate attempt to mislead the Tribunal.

218. It may be appropriate to deal with this point at this stage as it affects my assessment of the evidence of Mr Allan, Keiren Sharkey and Mr Crosbie.

219. It is the case that all 3 witnesses say in their witness statement that some employees who were actually involved in falsification of timesheets on dates including 2 May but also including other dates, were investigated in relation to 2 May (Mr Allan and Keiren Sharkey) or were dismissed in relation to the incident on 2 May only (Mr Crosbie). That was not correct. The witnesses readily accepted that when challenged.

220. I accepted that this was an error in their respective statements. I accepted that their respective decisions at the time were not based on an understanding that the employees being referred to were involved solely in an event on 2 May. The dismissal letters issued by Keiren Sharkey to Mr McCowatt and Mr Webb set out the other dates in respect of which falsified timesheets had been submitted. That was the material before Mr Crosbie. The decisions had been taken on correct information. It was the material in the witness statement which was incorrect.

221. I understood Ms Gribbon's concern about this situation. It is certainly odd that each of the witnesses refers in his statement to 2 May being the only relevant date for some employees when that was not the case. Ms Gribbon's submission on this matter contained a very serious allegation. She said that the witnesses had included this information in their respective statements deliberately, knowing it to be false, in order to mislead the Tribunal. This position adopted by them would potentially be used to support the view that the claimant was different to those other employees in that he had "*multiple offences*". whereas I might have taken it, if no challenge was made, that those other employees had only offended on one occasion. That would then be a distinguishing element justifying their reinstatement and the claimant's dismissal. It was however an incorrect statement in the evidence in chief of all three respondents' witnesses.

222. Put coldly, the inclusion of the reference to 2 May alone was, in my view, either as Ms Gribbon saw it, or it was an error.

223. I concluded that it was an error. It is not easy to discern exactly what happens in preparation of witness statements. I did not regard it as credible that such

an easily detectable "*deliberate lie*", if that was what it was, was likely to have been set out in statements from the witnesses submitted to the other party prior to a hearing. The statements were in conflict with the position of those witnesses as to their thought process at time of decision making, as given in evidence and as that thought process was reflected in the source material from the time. It is certainly very unfortunate that the statements were framed as they were. I appreciate that Ms Gribbon did not regard the ready acceptance of error as being genuine. I took a different view on careful assessment of the reaction from witnesses. While the situation led me to analyse this passage of evidence and to keep it in mind in assessing credibility and reliability of the respondents' witnesses, I was satisfied that all three and in particular Mr Crosbie, were reliable and credible despite this error appearing in their statements.

Disciplinary Hearing

224. There was little challenge to the evidence from Keiren Sharkey. That was understandable given that the decision he took was to dismiss all those who had falsified timesheets. There was no inconstancy.

225. It was said that Keiren Sharkey ought not to have been the decision maker. I did not regard objection as having been intimated by Mr Campbell or the claimant to him so acting however. There was a degree of reservation mentioned and reference to his involvement not being ideal. Mr Campbell and the claimant did not, as mentioned above, strike me anything other than well able to express themselves and to "*stand firm*" if they believed their position to be justified. The gentle querying of Keiren Sharkey being the disciplinary officer was not an objection being taken to his involvement.

226. I considered whether, even absent an objection being intimated, there was a valid reason why Keiren Sharkey ought not to have dealt with the disciplinary hearing, such that it tainted the outcome and made it unfair. I also did not see that there was any such reason. There was no indication of involvement in that process by Kevin Sharkey or interference in the conduct of the hearing or decision making by Kevin Sharkey.

227. Keiren Sharkey was faced with the claimant changing his position from that adopted by him at the investigatory meeting. As set out above, the minutes of the investigatory meeting were challenged despite being signed at the time and only one comment being made when they were sent for approval. The claimant denied any wrong doing when he appeared at the disciplinary hearing. He said that there was "*quite clearly a local agreement*". That was a distinct switch in position rather than a clarification or minor variation.

228. The claimant had the opportunity to put forward any points he wished to at the disciplinary hearing. Mr Campbell also had that opportunity.

229. Keiren Sharkey had regard to the investigation report, the material gathered by Mr Allan for that and the claimant's own comments and admissions at the investigation meeting. He considered all of the information before him, including what was said at the disciplinary hearing itself. I was satisfied that his evidence as to the elements considered by him in his decision making was credible and reliable.

230. In my view the decision to dismiss met the requirements of ***Burchell.*** The claimant had accepted that he was "*guilty*" of misconduct. The minutes of the investigatory meeting were present before Keiren Sharkey and were assessed by him, together with the claimant's position as set out at the disciplinary hearing. Keiren Sharkey was able to explain how it was he had come to the view that the claimant was "*guilty*" of gross misconduct. He had had regard to the claimant's assertion that there was an agreement in place with management and the evidence around that. He was able to explain why he had rejected that proposition.

231. As detailed above, the investigation was within the band a reasonable investigation in my assessment.

232. Keiren Sharkey also weighed in his decision making the fact that the claimant had 7 years' service and a clean disciplinary record.

233. The respondents' policy placed falsification of timesheets in the category of gross misconduct with dismissal being the consequence. That was the step

taken by the respondents in the Fife/Inverkeithing case at the disciplinary stage. The offence there was the same – falsification of timesheets. Dismissal was the decision taken by Keiren Sharkey in all the disciplinary hearings undertaken by him, including the cases relating to AB and CD. Although Helmsdale had involved falsification of timesheets an additional offence was also involved, that of claiming work had been done when it had not. Dismissal had resulted.

234. The respondents had not given any indication to the claimant that the behaviour in which he was involved would be tolerated or that dismissal would not result. It was only when Mr Martin represented the claimant at appeal that the Fife case was advanced as one where dismissals had been overturned on appeal.

235. Keiren Sharkey referred to the whatsapp messages in the dismissal letter. He said they supported the claimant's confession to late coming having occurred in situations where football matches were taking place.

236. The decision to dismiss was one which lay within the band of reasonable responses of a reasonable employer, I concluded. The claimant had arrived on shift over an hour late on two occasions. On one of those occasions he had sought consent but had not obtained it. He proceeded to arrive over an hour late despite not having consent. He had left his shift some 70 minutes before the shift was scheduled to finish. He had no authority so to do. He had not sought authority. There was, in the reasonable view of the investigator and the Keiren Sharkey as dismissing officer, no agreement either of a general nature or by way of job and knock covering this situation enabling the claimant to arrive late and leave early as he did. It was therefore a fair dismissal, applying ***Burchell***.

The Appeal

237. A lot of the case at Tribunal centred around the fact that other employees, specifically AB and CD, had been reinstated and given a first written warning on appeal, whereas the claimant had seen his appeal refused. AB and CD

were confirmed by the claimant at the outset of the case as being the employees to whom he pointed, saying that there was disparity of treatment.

238. Paperwork relative to the disciplinary process involving AB and CD was part of the bundle. The respondents' witnesses gave evidence in chief regarding those employees, their situations and the disciplinary decisions taken in relation to them. Those witnesses were then cross examined about those matters. It had been confirmed at the outset that the cases of Mr McCowatt and Mr Webb were being referred to only in relation to credibility of the respondents' witnesses. This was on the basis that the witnesses had stated in their statements that those employees had only falsified timesheets in relation to 2 May, whereas the reality, as confirmed by the relevant dismissal letters, was that there had been 4 occasions when falsification had happened.

Mr Urquhart

239. The claim form made no reference to disparity of treatment being said exist due to treatment of Mr Urquhart. The request for documents submitted on behalf of the claimant included a request for documents relating to AB and CD. The request made on behalf of the claimant for answers to questions related to Mr McCowatt and Mr Webb. In neither instance was there mention of Mr Urquhart.

240. It is true that Mr Urquhart's name appears in that he was one of the employees involved on the same dates as the claimant. There was no basis, in my view, however on which it could be said that fair notice had been given by the claimant that Mr Urquhart was being relied upon by the claimant as supporting his position that there had been disparity of treatment such that his dismissal was unfair. The case of ***Chandhok*** underlines the importance of fair notice being given.

241. There was no application to amend the claim to provide that fair notice. On occasion what unfolds at a hearing can lead to an application to amend as evidence has made a particular ground of claim apparent or clearer. That was not the situation in this case, however. There was no such application to amend. There had been no cross examination of any of the respondents

witnesses seeking an explanation of what Mr Urquhart had said when interviewed at investigation, what (if any) explanation he had provided, what (again if anything) had been said by him in mitigation and why it was that Mr Crosbie had decided that Mr Urquhart was to be reinstated on appeal. Such questioning would, I anticipate, have led to objection and a decision having to be made upon permitting or refusing to permit this line of questioning. That did not occur.

242. It was no surprise to me that these were not matters covered during the hearing. Mr Urquhart's name had not been mentioned as being someone relevant to the claimant's position that disparity of treatment had occurred.

243. I had only very limited information in relation to Mr Urquhart. He had arrived late on the same occasions as the claimant. He had left early on same morning as had the claimant. He was an Infrastructure Technician. He may well have been one of the employees who had said to the respondents that there was some form of agreement as to these practices being acceptable to management. That latter point was not entirely clear.

244. I had no information as to the exchanges involving Mr Urquhart at investigation, disciplinary hearing and appeal hearing stages. The claimant said in re-examination that Mr Urquhart had not "*to my knowledge*", had express authority to come in late. Mr Crosbie had not been asked about this. It would have speculation on my part, therefore given the lack of evidence I had, to consider whether there was a rational basis on the part of Mr Crosbie for distinguishing between Mr Urquhart and the claimant in in relation to sanction.

245. Having said that as to absence of evidence, the more fundamental point is that there was, in my view, no valid basis for the submission made that I could properly have regard to Mr Urquhart when considering disparity of treatment. This was so given that there was no fair notice of that being any part of the claimant's case.

246. In relation to disparity of treatment I therefore had regard to the decision taken by Mr Crosbie in relation to the claimant, that taken by him with regard to AB

and CD and also to the decision of the respondents on appeal in the cases in Inverkeithing/Fife.

Disparity of treatment – AB and CD and the cases in Fife

247. It was not argued as I understood it, that the claimant had been led to believe by the respondents that falsification of timesheets would not lead to dismissal. If that was a point taken, I did not regard there as being a basis for it. The disciplinary policy of the respondents categorised that behaviour as gross misconduct. The claimant accepted dismissal without notice or pay in lieu of notice was specified as resulting if gross misconduct was found. He accepted that falsification of time sheets was gross misconduct and was what he had done. Briefing meetings reminding employees of start and finish times took place. The claimant did not say he was aware of other cases where employees had not been dismissed for falsification of timesheets and, as a result, viewed it as being something tolerated by the respondents. He became aware of the situation in the Fife case when Mr Martin highlighted that at the claimant's appeal.

248. The claimant argued that decisions made by the respondents in cases he regarded as being truly or sufficiently similar, those of AB and CD, and those in Fife, meant that his dismissal was unfair.

249. In considering this matter, I had regard to the cases to which Ms Gribbon and Mr Frew referred me. I found ***Securicor, Fennel, Coral Casinos, Doy, Pelzman*** and ***Wilko*** to be very helpful. I regarded the principles to be applied as being those set out above where the applicable law is detailed. Of specific importance, I kept in mind that the question I had to ask myself was whether the decision by Mr Crosbie on appeal was so irrational that no employer could reasonably have accepted it. I also reminded myself that if a reasonable employer could have made the assessment of similarities and differences between the different cases as had occurred, then the decision taken stands. It is not for me to make that assessment or to decide the case by applying my own view as to equivalence or otherwise of the different instances and penalties imposed.

250. I considered Mr Crosbie's explanations as to why, in his view, the Fife cases and those of AB and CD were not truly or sufficiently similar, leading to the decision that different outcomes legitimately were reached.

251. At surface level there was indeed a similarity. All employees, including those in Fife, had falsified timesheets. They had all initially been dismissed. The employees AB and CD had been reinstated on appeal, as had the employees in Fife. The claimant remained dismissed.

252. I was satisfied that Mr Crosbie had considered the cases in Fife. He had spoken with the person who heard and decided the Fife appeals. The information he had before him from Mr Martin confirmed that the Fife cases related to job and knock. That principle is applicable when an employee finishes allocated work close to, but prior to, the time when his shift is due to conclude. In that situation, it may be possible for the employee to regard his work shift as being over and to leave. It is noteworthy however that the claimant in re-examination said that even in that situation the team leader would seek authority from the supervisor and would confirm to employees that they could leave if that authority was given. If authority was not given, the claimant confirmed, employees were not able to leave. The claimant's position at the disciplinary hearing did not focus on job and knock. What he did say however was that Mr Shaw had confirmed that if Mr Shaw said employees could leave, then the employees could leave. That confirmed that consent was necessary before the claimant could depart work.

253. The claimant did not ever say that he had consent to leave early. He had left work at least 70 minutes before his shift was due to end. Consent apart, that was not a timeline which permitted the application of the job and knock arrangement.

254. The cases in Fife had been accepted at appeal as involving early departure in terms of the job and knock arrangement with dismissals being overturned on appeal.

255. There was a clear and rational basis on which Mr Crosbie distinguished between the Fife cases and that of the claimant. The claimant had confirmed

that permission was required in his case for early departure and that he did not have that permission. The claimant had also arrived to start work over an hour late on two occasions. On one of those occasions he had sought permission to commence work late. He did not get that permission, however did as he wished to do and arrived over an hour late notwithstanding the absence of consent in response to his request.

256. Further, the claimant had altered his position from one largely of acceptance at the investigatory meeting. He had attended that meeting with prior warning of what was to be explored. He also was accompanied at the meeting by his union representative. He did not, in fairness, say he had answered as he did due to any unpreparedness. That would not have been credible. The claimant then altered his position to a very significant extent at the disciplinary hearing. He disputed having made any concessions or admissions on key points. He said the minutes were inaccurate, despite having signed them and approved them in an email in all respects save one, that one point not being relevant to this hearing. He denied coming in late as had been alleged and leaving early as had been alleged. He made no reference to having departed early as part of any job and knock arrangement. At appeal, however, the claimant relied heavily on his timekeeping not being an issue due to it being something covered by the job and knock arrangement. He said he could not remember specifics of the night in question. He referred to asking each time he wished to arrive late (page 152 of the bundle). That was what he had done in texting Mr Muir. He had then, in the absence of consent, arrived late in any event.

257. There was no information given by Mr Martin to Mr Crosbie and no information before the Tribunal as to the posts held by those dismissed and then reinstated in Fife. There was no information as to the approach or attitude of those involved in the Fife cases.

258. I considered the evidence before me, in particular that from Mr Crosbie as decision maker. I concluded relatively readily that his conclusion that the cases in Fife were different to that of the claimant, not being truly similar or sufficiently similar to use the language of ***Securicor***, was not so irrational that

no reasonable employer could accept it. It did not lie outwith the range of reasonable responses.

259. I understood why Ms Gribbon made the careful and well-constructed submission she did in relation to disparity of treatment as between AB and CD on the one hand and the claimant on the other. She analysed their respective positions and the factors Mr Crosbie said led him to reach different conclusions in their cases. There were some individual elements which, viewed in isolation, did raise questions as to the rationale applied.

260. The claimant was a technician. He undertook duties from time to time as an SIT, a post otherwise known as a team leader. When he did that he was paid at that rate. That "*standing*" was a matter which Mr Crosbie took into account. AB was a team leader. CD was a technician. Both were reinstated whereas the claimant remained dismissed.

261. AB and CD were contrite. The claimant, Ms Gribbon said, had also apologised. That was something, however, which occurred at the early stages when the claimant accepted wrongdoing as described. He then departed from that acknowledgment and apologetic approach. He claimed no admission had been made despite that being recorded in minutes which he had signed and approved, save for with regard to an unrelated point. He further altered his position at the appeal hearing, arguing that although he had left early and arrived late, job and knock applied rendering it permissible.

262. I considered Mr Crosbie's evidence, as tested in cross examination, very carefully. In my view, he advanced cogent reasons as to why, looking at the situation of AB and CD in relation to that of the claimant, he had concluded that AB and CD should be successful in their appeals, but that the claimant should not be. He gave his evidence in a calm and considered way. It seemed to me that he had examined the position in the round and had had regard to all the various factors he mentioned.

263. There was only one offence involving AB and CD. There were three in the claimant's case. I appreciate that Ms Gribbon maintained that this may have been the only offence for which AB and CD had been caught. Nevertheless,

there was only one offence on their part "*live*" before the Mr Crosbie (and of course by the same token only three "*live"* offences on the part of the claimant before him).. He had considered the honesty and integrity of the claimant, reflecting on the changes of position by the claimant in the investigatory and disciplinary procedure. The issue was not just the position of the claimant as an SIT from time to time, but also his position as an employee given those contradictory positions. Mr Crosbie had taken account of the claimant's absence of earlier disciplinary issues and of his service with the respondents.

264. In short, while there were points which were properly explored at this hearing, I did not have any evidence which led me to the conclusion that Mr Crosbie's decision to treat the claimant's case as warranting a different outcome to those of AB and CD amounted to disparity of treatment in sufficiently similar truly similar cases, leading to the dismissal being unfair.

265. The respondents had a genuine belief as to the claimant having committed the misconduct in question. That genuine belief was based on reasonable grounds. The investigation had been reasonable. The decision to dismiss was not outwith the band of reasonable responses of a reasonable employer. Disparity of treatment did not apply so as to render the dismissal unfair.

266. I also appreciate that Ms Gribbon referred to the outcome of the appeal being intimated by Mr Crosbie to the claimant on 9 January after the hearing had been on 12 December. This is despite the reference in the policy to a decision being intimated normally within 8 calendar days. Christmas intervened, however. I recognise that the decision for the other employees was made known to Mr Martin on 24 December. I did not regard the failure to adhere to what was expressed as the norm for decisions to be made known rendered the dismissal unfair.

267. For the above reasons the claim is unsuccessful.

Employment Judge: Robert Gall
Date of Judgment: 5th January 2021
Entered in register: 21st January 2021
Copied to parties