# EMPLOYMENT TRIBUNALS

**Claimant:** **Mr C Hall**

**Respondent:** **Sodexo Limited**

# PRELIMINARY HEARING

**Heard at:** **Bristol** **On: 1, 2, 3, 4, 5 March 2021 (Hearing) and 8, 9 March 2021 (in chambers)**

**Before:** Employment Judge Midgley
Mrs C Lloyd Jennings
Mr N Knight

**Representation**
Claimant: In person
Respondent: Mrs J Smeaton, Counsel

# RESERVED JUDGMENT

The claims of unfair dismissal contrary to section 111 ERA 1996, automatically unfair dismissal contrary to sections 100 and 103A, detriment contrary to s.44 and 47B, and unlawful deduction of wages are not well founded and are dismissed.

# REASONS

**Claims and Parties**

1. By a claim form presented on 19 July 2019, the claimant brought a claim of unlawful deduction of wages. On 13 October 2019 he presented a further claim for automatically unfair dismissal contrary to sections 100 or 103A ERA 1996, and detriment contrary to sections 44 and 47B ERA 1996.

2. The claimant was employed by the respondent as an Electrician and the respondent is an international company offering a facilities management through a diverse range of services to large businesses and public clients across approximately 100 professions. The events which form the subject to this claim occurred in the context of the respondent's role in overseeing the refurbishment of a client's premises.

**Procedure, Hearing and Evidence**

3. The hearing was conducted remotely by CVP.

4. We were provided with a bundle of agreed documents of 800 pages and the following statements for the parties, respectively:

   4.1. For the claimant – a statement from the claimant himself and a statement from Mr Anthony Richards and Mr Marc Mizzen.

   4.2. For the respondent – statements from the following who were employed by the respondent:

      4.2.1. Ian Preston, a Workplace Manager

      4.2.2. Adrian Clarke, a Hard Services Area Manager

      4.2.3. Matthew Elliston, a Human Resources Manager

      4.2.4. Kathleen Kew, an FM Operations Manager.

5. We heard evidence from all of the witnesses who affirmed, confirmed that the content of their statements was true, and answered questions from the claimant and from Mrs Smeaton respectively and from the Tribunal.

6. In addition, the respondent had prepared a chronology, cast list, list of abbreviations and an opening note.

7. The first day of the hearing was taken as a reading day. Overnight, the Tribunal was provided with further documents from both parties. Save as to one email produced by the claimant which detailed matters related to ACAS Early Conciliation discussions, the inclusion of which the respondent objected to on grounds of privilege, all documents were admitted without objection from either party. A further document was produced by the claimant prior to the second day of the hearing (an extract from the respondent's performance and capability policy) and was also admitted. We read all of the statements and the documents referred to in them during our reading on the first day. We also read the documents we were taken to during cross examination of the witnesses, which took place between days 2 and 4. At the conclusion of the evidence on day 4, we adjourned to enable the claimant to prepare written arguments for midday the following day, day 5. We then received written arguments from the claimant and from Mrs Smeaton, for the respondent, which each expanded verbally.

8. We then adjourned to consider our decision, hoping to give Judgment on the sixth day. Unfortunately, that was not possible, and the parties were advised that we would reserve our decision and use the seventh day as a chamber's day for the production of a reserved Judgment.

**Issues**

9. The issues are those set out in the Case Management Summary of 24 December 2019, save that issues 6.1 to 6.4 had been fallen away given the respondent's concession at the start of the hearing that the claimant had made protected disclosures as detailed at paragraph 6.1.

**Factual Background**

10. We make the following findings of fact on the balance of probabilities in light

of the documents which we read (detailed above) and the evidence that we heard. We have been greatly assisted by the Statement of Agreed Facts, which are incorporated into our findings of fact.

11. The claimant was employed by the respondent as a Lead Electrical Technician at its BAE System site ("the Site") in Christchurch from 8 February 2016 until his summary dismissal for gross misconduct on 17 July 2019.

The respondent's safe system of work

12. The claimant was one of two Appointed Persons ("AP"), the other being Ian Preston, who were responsible for authorising electrical work on Site. An AP is a voluntary position of considerable status and importance within the respondent's Safe Systems of Work ("SSOW") and more generally within the electrical sector. In consequence an electrician appointed to the role of an AP received a significant salary increase.

13. Within the respondent's organisational structures, an AP reports to the Coordinating Authorising Engineer (Electrical) ("AE(E)") who is responsible for the works conducted on the site for which they have responsibility and for the safety of all those conducting works or present on site. The AP has delegated responsibility for all electrical works conducted on the site and is responsible for the practical implementation of the Safety Rules and Procedures on the site to which they are appointed.

14. In particular, an AP is required to authorise the works of Competent Persons ("CP") employed by the respondent and the Authorised Persons and Competent Persons employed by a contractor, who are the only electricians permitted to undertake works on site. When a CP receives a valid 'safety document', they become the 'Person in Charge' of the work and are responsible for the direct supervision and/or performance of the work and for testing any electrical system detailed in the Safety Document.

15. A key role of the AP is to oversee and certify the isolation and, where applicable, earthing of the electrical systems which they have been appointed to oversee. This process is known as "proving or confirming dead" and is undertaken using 'voltage test indicators' in the presence of an accompanying safety person. Once a circuit is isolated a process known as "logoff tag off" is adopted, in order to ensure that any circuit breaker or miniature circuit breaker is not switched back to the live position by someone other than the AP. The process requires a chain or lock and warning tag to be applied to the circuit breaker in question.

16. The respondent's electrical safe system of work permits any individual to switch off or trip any high voltage switch in an emergency, but in other circumstances switches should only be operated by the AP, or a person in charge or a CP who has been duly authorised by an AP or authorising engineer. Where an AP or CP considers that equipment is in a dangerous condition, the safe system of work requires that it should be immediately switched off and isolated (unless that would cause a greater hazard) and the AP should take action to prevent it from being reconnected to the supply of electricity, before reporting the matter as soon as is reasonably practicable to the Authorising Engineer.

17. APs are also responsible for ensuring (as far as is reasonably practical) that all personnel observe and comply with the requirements of the 'electrical safe system of work.' In consequence, they not only have to assess the competence of CPs, but also must also ensure that any relevant risk assessments and safety programs are prepared prior to the work in question being undertaken. Suffice it to say that there is a surfeit of relevant and necessary documentation that has to be reviewed and produced to comply with that obligation.

18. In addition, the respondent has a maxim of 'The Three Checks' for safety (which is sometimes referred to as the "3 Ts"), namely: (1) correct training, (2) the right equipment and (3) a safe environment. This maxim was regularly reinforced in the company's literature and training, appeared in a pop-up box whenever an employee logged in to the respondent's intranet, and was at the foot of the email signatures of a number of employees, including the claimant.

Records

19. In order to ensure that all parties on a site, whether the respondent's employees or contractors, understand the boundaries of their responsibility and the works they were permitted to undertake, the respondent adopts separate management arrangements for each area. These consist, amongst other documents, of 'demarcation agreements' and 'permits to work' which specify the precise works for which each party has responsibility and is permitted to perform. All the relevant safety documents are held in the respondent's Electrical Systems Document Cabinet ("ESDC") and are maintained in the Electrical Distribution Operating Record ("EDOR"). The AP is responsible for ensuring that the ESDC is maintained and is up to date.

The respondent's management structure

20. Mr Ian Preston had been appointed by the respondent as the senior Appointed person with responsibility for leading all electrical work, and the management and mentoring of all APs sites across the respondent's site in the south-west. The claimant was not aware of that additional role and believed that Mr Preston was of equal seniority to him.

The respondent's disciplinary policy and Rules of Conduct

21. The policy provides as follows

> *Health, Safety and Hygiene*
>
> *2. *Employees must not adjust, move or otherwise tamper with any equipment or machinery in a manner outside of the scope of their duties.*
>
> *3. *Employees must not undertake a job unless they have received adequate safety instruction and they are authorised to carry out the-task.*
>
> *10. *Employees must not engage in activities, which cause, or might cause, unacceptable loss damage or injury or which may endanger employee/customer or Client safety.*

22. Each of those matters is identified as gross misconduct.

Events leading to the non-payment of wages

23. On 5 February 2019 the claimant was sent home by Mrs Kew, the Service Delivery Manager and Site Manager for the Site, because the claimant had refused to issue an authorisation to work to a contractor who was to service some electrical doors on site.

24. On 14 February 2019, an informal meeting was held which was attended by the claimant, Mrs Kew, and Mr Ben Harris (the Delivery Manager and Site Manager for the Site). The claimant had requested a meeting because of concerns he had about communication on the site. The respondent proposed to address the concerns it had about the claimant's conduct, including the events of 5 February 2019, at the same meeting. The claimant produced a note of the discussions at the meeting, which he emailed to Mrs Kew and Mr Harris for their approval.

25. On 20 February 2019, Mr Harris replied by email, responding to the claimant's record of the meeting, and requiring him to attend a formal investigation meeting on 25 February in respect of allegations that the claimant had failed to comply with reasonable managerial instructions, both in relation to the incident on 5 February and subsequently in relation to a further incident involving 11 AC units.

26. The claimant was incredibly distressed by that email, firstly because it suggested inaccurately that the meeting had not arisen as a consequence of concerns that the claimant had raised about communication, and secondly because it included an allegation of misconduct which had occurred after the meeting but prior to the email being sent on 20 February 2019, namely that relating to the installation of 11 AC units. In the claimant's mind, therefore, the respondent had fabricated the record of the meeting, and had initiated the disciplinary process following concerns which he had raised about the manager's communication with staff.

27. On 25 February, the claimant left the site without providing any prior notice to Mrs Kew or Mr Harris. That was because the claimant was consulting with his union representative about the proposed disciplinary investigation meeting. The claimant believed that he had been authorised to do so by Mr Richards, but he did not notify Mrs Kew or Mr Harris of that prior to leaving the site. This added to what was already a very tense and difficult relationship between the three individuals.

28. The disciplinary investigation meeting was rescheduled for 27 February 2019 and took place that day. The claimant refused to participate in the meeting until Mrs Kew and Mr Harris agreed to sign a copy of the informal meeting notes of 14 February 2019, which he produced. The claimant was particularly agitated, refusing to sit down or to engage in the meeting, and in consequence was viewed by Mrs Kew as behaving in an aggressive and frightening manner. Mrs Kew and Mr Harris therefore terminated the meeting before sending the claimant home due to their concerns about his behaviour and the state of his mental health.

29. Following the receipt of HR advice from Mr Elliston, the Human Resources Business Partner for the Site, Mrs Kew, and Mr Harris medically suspended the claimant on full pay. He was sent a letter confirming this on the 27

February 2019. The respondent requested permission to obtain a medical report from the claimant's doctor and enclosed a consent form to that effect. The claimant signed and returned the consent form and a request for the medical report was made by letter dated 8 March 2019.

30. Between 4 and 6 March 2019 the claimant submitted grievances against Mr Harris, Mr Elliston, and Mrs Kew (and one other) to the respondent. He then began a period of annual leave from the 6/7 March until 31 March 2019.

31. On 4 April 2019 the respondent wrote to the claimant addressing the letter "grievance and medical suspension". The letter appraised the claimant of the process of his grievances and advised him that his medical suspension would end on 11 April, requiring the claimant to confirm whether he would then be fit to work or, if not, to clarify what medical advice he had received. The claimant was requested to respond by 10 April. The claimant failed to do so and his absence on 11 April was therefore treated as unauthorised. The claimant was informed of that decision by letter dated 12 April.

32. On 17 April the claimant submitted a fit note for one month covering the period 17 April until 16 May 2019. His doctor opined that he would be fit to work if he were permitted to work from home. The respondent could not agree to that adjustment given that the claimant's contractual role was as an on-site electrician and there was no significant work to be conducted from home.

33. On 16 April 2019 the claimant's medical suspension ended. He therefore began a period of sickness absence. He was entitled to full contractual pay for a period of three weeks in accordance with his contract of employment. He therefore began receiving statutory sick pay on or about 7 May 2019.

34. On 23 April 2019 the claimant's GP produced a medical report which indicated that the claimant would be fit for work but for the work-related stress that he was experiencing. On the same day the claimant attended a grievance meeting to discuss the grievances which he had raised. The claimant's grievances were investigated in the period 15 May to the 21 May.

35. On 15 May 2019 the claimant provided a further fit note covering the period 15 May until 23 May 2019.

36. On 21 May the claimant consulted ACAS in relation to an allegation that the respondent had made an unlawful deduction from his wages.

37. On the same day the respondent wrote to the claimant in connection to his ongoing grievances and seeking clarity about his return to work. The claimant was advised that his grievances were nearing a conclusion and an outcome could be expected shortly. Insofar as his welfare and return to work was concerned, he was advised that if he were unable to return to work, he would need to comply with the respondent's sickness absence notification procedure. However, if the claimant were fit to return to work, he was instructed that he would be required to attend an informal welfare meeting to discuss the content of his GP report. The respondent proposed that that meeting should be conducted by Mrs Kew as the claimant had not suggested within his grievance or elsewhere that he was unable to meet with her as a consequence of his grievance. The claimant was encouraged to take advice from his trade union, the respondent's support me team or an employment

lawyer if he remained unhappy about that process.

38. The claimant was incensed by the response because it required him to meet with Mrs Kew, whom he believed had fabricated minutes and generally sought to raise unfounded disciplinary allegations against him.

39. The claimant attended site on 24 May 2019 for the purposes of attending the return-to-work meeting. However, on discovering that the meeting was to be conducted by Mrs Kew, the claimant insisted that a witness should be present and refused to continue without one, repeatedly calling Mrs Kew a liar. The claimant mistakenly believed that he was entitled to a representative at the meeting because he believed his period of absence had exceeded eight weeks (which would entitle him to be represented were the meeting to be conducted under the capability procedure), but in reaching that conclusion the claimant had failed to take account of the period of his medical suspension and annual leave when calculating the eight-week period. As the meeting could not take place, the claimant was instructed to return home. He was paid statutory sick pay for that day.

40. On 26 May Mrs Kew emailed the claimant. She advised him that the meeting had been intended to be a return-to-work meeting only, but in the unique circumstances of the case, and particularly given his conduct towards her, she was prepared to permit him to be accompanied to a rescheduled meeting, however the claimant would have to arrange for his representative to attend. She advised that if the claimant were unable to obtain a representative, the meeting would continue either with a witness or without a witness. She advised that if the claimant did not wish to proceed on that basis his options were either to take annual leave, to accept unpaid leave or to obtain a fit note from his GP excusing his attendance. The return-to-work meeting was therefore rescheduled for the 28 May.

41. The claimant replied that he would arrange for someone to accompany him, but they would not attend on 28 May. He did not however take annual leave, notify the respondent that he was seeking unpaid leave or obtain a medical certificate.

42. The claimant did not attend the meeting on 28 May. The respondent therefore wrote to the claimant on 29 May advising him that his absence from the 28 May would be treated as unauthorised. He was instructed to advise Mrs Kew by Monday 3 June of his intentions regarding his return to work. The claimant did not do so, instead he emailed the respondent's People Centre seeking advice, advising them that he had referred the matter to ACAS.

43. On 3 June 2019 the claimant was notified that the proposed meeting had been a return-to-work interview to discuss his return to work, clarifying that he was not being managed under the capability process, and therefore was not entitled to a representative as of right at such a meeting. Consequently, on 4 June 2019 the respondent wrote to the claimant advising him that his absence would continue to be treated as unauthorised and he was required to attend a disciplinary investigation meeting on 7 June in relation to an allegation that he had been absent without leave.

44. The claimant emailed the respondent's People Centre on 4 June alleging that in failing to pay him the respondent was in breach of contract and maintained

that Mrs Kew's proposed conduct of the return-to-work meeting would jeopardise his wellbeing at work. In consequence, the people centre wrote a letter dated 4 June which was signed by Mrs Kew to the claimant advising him that as the claimant had neither informed the respondent that he was not fit to work, or provided a fit note covering his absence, or attended work, his absence would be treated as unauthorised. He was directed to attend a disciplinary investigation meeting on 7 June 2019 in relation to his unauthorised absence, which was to be conducted by Mrs Kew. However, the respondent also determined that Mrs Kew should no longer conduct the claimant's return to work meeting, and so Mr Simmons would take over the responsibility for that process. Regrettably the claimant was not notified of that decision and Mrs Kew continued, in accordance with the respondent's policies, to be the signatory to letters relating to the process as she was the claimant's line manager. That increased the claimant's confusion and unhappiness with the processes.

45. Mrs King, an HR employee within the respondent's People Centre, replied to the claimant's email in an email on 4 June. She set out the rationale for the claimant's classification as absent without leave, informed him that the return-to-work process and his grievance were two separate processes, and advised him that if he felt unable to attend work because of his grievance he should obtain medical advice that confirmed that as there was no suggestion in his grievance, emails, or medical notes that the claimant could not attend work as a consequence of his grievance. The claimant was given a deadline of 930am on 7 June to confirm his position in relation to his return to work or provide an updated medical certificate, failing which the claimant's absence would progress to a formal disciplinary hearing. In consequence, although it was not clearly communicated to the claimant, the meeting on 7 June 2019 was vacated pending the claimant's clarification of his stance.

46. On 5 June the claimant was notified of the outcomes of his grievances; which were dismissed.

47. The claimant emailed Mrs Kew in the morning of 5 June 2019 stating that he could return to work on 6 June, rather than the 7 June as had been proposed, and in consequence Mr Harris conducted a return-to-work meeting with the claimant on 6 June 2019. The claimant attended in his own clothes, given his habit was to cycle to work and to change into his uniform and PPE on site. His uniform was held in a locker on the site.

48. There is a dispute as to what happened on the day, although each party accepts the claimant was not in his uniform when he attended. The claimant insisted that Mr Harris sent him home and instructed him to leave the site because he was not wearing his uniform. The respondent avers that the claimant stated he had no intention of working that day and had left the site. We resolve that dispute in our conclusions below.

49. Mrs Kew subsequently wrote to the claimant confirming the discussion at the meeting and advising him that his absence continued to be classed as unauthorised and he was therefore required to attend a disciplinary meeting on 11 June 2019.

50. Mrs Delaney emailed the claimant within 3 hours of the meeting on 6 June. In her email she wrote:

> "Before Ben got into the content and details of both the return to work meeting and discussion over your medical report, it was noted visibly you had not attended work in uniform.
>
> Therefore, Ben clarified at the outset if it was your intention to attend work after the meeting was concluded, which you stated you were not aware of being the case and were not appropriately dressed to do so.
>
> In reply you stated no and I was given short notice to attend the meeting. It is also noted you provided no explanation for your absence or information to support your absence from work since 28 May 2619."

51. She advised the claimant that his continued absence will be treated as unauthorized.

52. Both parties agree that the claimant was not paid for the period between the 7 and 10 June 2019 (when the claimant eventually returned to work).

53. The claimant returned to work on 10 June. Neither Mrs Kew nor Mr Harris were present on that day and, in consequence, given the detailed history of the claimant's absence from work and the return-to-work process, the claimant was requested to leave site and return the following day. He was paid for 10 June.

54. On 11 June the claimant attended a combined disciplinary meeting and welfare return to work meeting, which was chaired by Mr Simmons, the respondent's South West Regional Manager. Mrs Kew attended as the notetaker, and the claimant was accompanied by Mr Laker. During the meeting the claimant persisted in his allegation that Mrs Kew, Mr Harris, and Charlotte Dennings lacked integrity, had fabricated the minutes of the 14 February meeting, and generally lied, but indicated that he would be prepared, albeit reluctantly, to return to work.

55. Mr Simmons produced a case outcome and rationale for his decision which concluded that the claimant should be given a final written warning for his conduct. It appears that the document was sent to the People Centre, although it is unclear when, and subsequently the outcome letter was not drafted and sent to the claimant until 17 July. The claimant says that is a matter from which we should draw an inference that Mr Elliston sought to influence the decision of Mr Clarke, the dismissing manager, by advising him of the final written warning. Mr Clarke denies that he was made aware of that warning. Again, we address that dispute in our conclusions below.

<u>The incident of 25 June</u>

56. The claimant and Mr Preston had a good relationship, and, prior to the 25 June 2019, the claimant would willingly discuss issues of his work with Mr Preston by email or telephone.

57. In June 2019 an electrical refit was being conducted by the respondent and its favoured contractor, T2K, on the Site at premises known as 'the Signal House' prior to the site being sublet to CEGA Ltd. The ground floor of the site was known as 'C-Block'.

58. Given the claimant's absences between March and June 2019, Mr Preston

had had primary responsibility for the preparation and approval of the necessary demarcation documents, permits and risk assessments for the work.

59. Between the 6 and 19 June 2019, Mr Preston exchanged a series of emails in relation to the work to be conducted at C-Block with Jamie Crocker who led the works for T2K. It was agreed that T2K would conduct local electrical isolation for the proposed refit, and that the respondent would provide access to the plantroom where the sub main and main distribution board (which contained the miniature circuit breakers ("MCBs") were located. Mr Preston proposed that he would attend the Site on 26 June 2019 to isolate the distribution board so work could be conducted on it by T2K. Part of the reason for that decision was that the distribution board was dual fed, meaning that two lines supplied it and if either were live, the board itself would be live.

60. Mr Preston copied the email chain, which contained a full explanation of those discussions and agreements, to the claimant on 19 June 2019. The claimant accepted in cross examination that he received the email chain (although he initially suggested that he had not as detailed below) but averred that he had not received the attachments to the email. He did not raise that concern with Mr Preston at the time, and the documents were in any event available in the EDOR and ESDR which the claimant was able to access and inspect prior to attending the site on 25 June 2019.

61. The claimant's role on 25 June 2019 was intended to be limited to giving T2K's contractors access to the plant room so that they could access the distribution board. Mr Harris had informed the claimant of that responsibility prior to his arrival on site.

62. When the claimant attended site on 25 June 2019 he was in a state of high anxiety as a consequence of his ongoing sense that there was poor communication with his Site Managers, Mrs Kew and Mr Harris, his unchangeable view that that they were conspiring to persecute him and drive him out of his employment and that they were willing to produce false minutes of meetings and lie about events to that end. In addition, he had not reviewed the EDOR prior to his arrival to understand the precise demarcations, permits and safe systems of work that were in place on site. That added to his anxiety and lack of clarity as to what precisely his role and responsibilities were that day.

63. On his arrival at the site, the claimant observed T2K contractors removing kitchen units which the claimant perceived contained live wiring. The claimant therefore immediately stopped the works and locked off the individual circuits with the equipment that he had available to him at the time. The claimant's accounts as to whether he had sufficient LOTO equipment to lock off all of the MCBs which were affected were inconsistent (as detailed below).

64. Later that day the contractors requested the claimant to assist them with a further isolation prior to the dismantling of a partition wall. The claimant therefore decided that it was necessary to ensure that the entire distribution board was made safe (in the sense that no other individual could access the distribution board without his knowledge and approval). To that end he accepts that he undertook the following actions:-

64.1. First, he removed a plastic cap on the bottom of the distribution board that permitted him to look up into the distribution board itself.

64.2. Secondly, he looked up through the uncapped hole to see whether there was any wiring in sight, and

64.3. Then he drilled into the bottom of the distribution board's metal housing before securing a chain, hasp and padlock which secured the distribution board's door close and applied a warning tag to the chain.

65. The claimant then left the site.

66. On 26 June Mr Preston attended site and on entering the plant room noticed the unorthodox LOTO on the distribution board. He was informed by one of the contractors that the claimant had applied the lock and chain. Mr Preston emailed his superiors that evening with a report describing what he had seen and his discussion with the claimant. We find that report to be an accurate record of the discussion.

67. In essence the claimant told Mr Preston that he could not get a LOTO device fitted to each MCB and shut the door, that he had applied the hasp, chain and padlock and warning sign, and that he had done so because he wanted secure the door to prevent anyone (by which he meant the contractors) from accessing the MCBs. He was specifically asked "did you drill the hole through the door, DB whilst the board was live?" He did not respond directly to the question to deny that the board was live or suggest that it was dead, but rather he complained that he had made a request for LOTO kits previously which had been refused.

68. Mr Preston took photographs of the distribution board before leaving the site.

The protected disclosures

69. On 27 June 2019, the claimant emailed Mrs Kew, Mr Simmons, and others with a 'Near Miss Report' in relation to the events of 25 June. The respondent accepts that this was a protected disclosure ("PD1"). In a second email that day, the claimant notified that respondent that in the circumstances of what he described as a 'communications break down' which had created a safety risk he was resigning as the AP. Again, the respondent admits that in the circumstances this amounted to a protected disclosure ("PD2").

70. On 28 June 2019, the claimant was suspended by Mr Harris. In an email of that that date sent to Mr Simmons, Mr Harris noted

> "*Since Christian has now resigned his appointment as an Authorised Person, he can no longer undertake any electrical works at site. In order to undertake any electrical works, an individual must be appointed as at least a Competent Person. A decision needs to be made as to if this is appropriate at this point. But as of Monday morning Christian must be made aware that he cannot undertake any electrical works.*
>
> *This process is already in place for Vince Laker and Marc Scammell so there can be no accusation of singling any person out. Kane Pang advises that these appointments remain valid even though Christian is no longer*

*an AP."*

71. The claimant alleges that that Mr Harris was thereby suggesting that he was incompetent and that that comment and the decision to prevent him working on electrical installations were detriments made on the grounds of his protected disclosures.

72. Within the email Mr Harris also provided a view of events, following his discussion with Mr Preston. He noted that Mr Preston believed that the claimant had proved the circuits dead, in the presence of two contractors (one of who appears to have been Mr Jamie Crocker of Broadsword Ltd), but recommended speaking to those contractors to confirm what steps had been taken. He observed that if the claimant lacked the necessary LOTO as he argued to lock off the individual circuit breakers, then he had failed to comply with the respondent's 3 checks, because he did not have the right equipment and so should not have undertaken the work.

The disciplinary investigation meeting

73. The claimant attended a disciplinary investigation meeting on 2 July 2019 with Mr Simmons. The claimant was accompanied by Mr Goodchild. The meeting was recorded by the claimant, but the recording appears to have malfunctioned so that a transcript could not be produced (this is only relevant in so far as there is a dispute as to what was said and the unlikelihood that the respondent would have fabricated the minutes of the meeting, knowing that the claimant was recording it. Consequently, on balance we find the minutes are an accurate but not verbatim record of the discussion).

74. During the interview the claimant was asked whether he performed the 3 safety checks prior to undertaking the isolation of the DB. He professed not to be familiar with them. Mr Goodchild accepted that Mr Simmons had reminded the team, including the claimant, at a meeting the previous week of the 3 Safety Checks. The claimant accepted that they had been raised at the meeting but said that he subconsciously made the necessary checks in any event.

75. The claimant accepted that he had applied the chain, hasp and padlock and maintained that in the circumstances he believed that he had acted safely and appropriately in so doing. He stated that he had drilled into the distribution board because he did not have the necessary LOTO kits [to lock off the MCBs] and there were no live parts visible. He stated that he had proved the distribution board was dead by using the testers provided by T2K and that that was observed by the contractors.

76. He maintained that there was confusion as to whether the respondent or T2K were in control of the plant room because there was no demarcation record confirming the position, stating that he had not received the email chain from Mr Preston, or all of it, if he had received part of it. The minutes record the claimant stating that he had not reviewed the EDOR register because his mind was on other things.

77. He insisted he was right to apply the LOTO in the way he did, rather than switching off the submains or the main circuit breaker to the distribution board because that latter action would have prevented any further work being

undertaken on the site. He argued that he had previously applied a lock to a cabinet door in the same manner and suggested that he would do it again if he had the right equipment and it was necessary to make the area safe as he did not regard it as creating any hazard

78. There is a dispute between the parties as to whether during the investigation meeting the claimant (a) agree that he had drilled into the circuit board when it was live and (b) identified three individuals who were present at the time that he applied the LOTO to the distribution board and asked that they should be interviewed. The claimant accepts that the minutes reflect (a) and that in relation to (b) there is no record of that discussion in the minutes that were produced by the respondent but argues that the minutes are inaccurate and fabricated. For the reason given above, we rejected that argument.

79. Mr Simmons concluded that the matter should progress to a disciplinary hearing on the grounds that the claimant had not complied with the respondent's safe system of work by drilling into the distribution board and by failing to apply LOTO correctly. Mr Simmon's view was that the distribution board was live when the claimant drilled into it.

80. On the same day Jamie Crocker, of Broadsword (a contractor), provided an account of the events of 25 June in email form. He reported that the claimant had been asked by him to isolate circuits to the kitchen area, that the two of them had located the distribution board in the plant room and that the claimant had conducted the necessary isolations and tested them with T2K's socket and handheld testers. He observed, however, that no further works were conducted by Broadsword on 25 June because it required confirmation from T2K that it was safe for them to continue by removing redundant cabling and sockets.

81. On 4 July the claimant was informed that the meeting notes would be sent to him with the disciplinary hearing documents as they were being typed up.

82. On 12 July the claimant was sent a letter notifying him of the disciplinary allegations that he had failed to isolate circuits safely, failed to apply LOTO, had drilled into the door of a live distribution board and thereby failed to observe the respondent's safe system of work. He was warned that one outcome could be summary dismissal and notified of his right to be represented. The letter contained amongst other documents the minutes of the investigation meeting, the investigation report, the emails of Mr Preston, Mr Harris, and Mr Jamie Crocker.

83. The letter contained the common warning about entering the respondent's or its client's premises and/or contacting employee's without permission from his line manager.

The disciplinary hearing

84. The disciplinary hearing took place on 12 July and was conducted by Mr Clarke, a Hard Services Manager employed by the respondent. He had no prior knowledge of the claimant but had previously worked in the Armed Forces for 23 years and had extensive experience and knowledge of electrical engineering due to the roles he had undertaken. He had previously worked in the role of AP and co-ordinating Authorised Person. His role for the

respondent required him to manage 36 engineers and subcontractors to deliver integrated facilities management, including electrical maintenance for Leonardo Helicopters, a client of the respondents. We are satisfied that he was independent and appropriately qualified to chair a disciplinary where the allegations centred upon the manner in which the claimant had isolated a dual fed distribution board.

85. The claimant wanted to call witnesses; Mr Clark told him that (if the individuals in question were employed by the respondent) he should have arranged their attendance through the People Centre.

86. The claimant provided a further account of events. In particular, he accepted that Mr Crocker had asked him to isolate the circuits relating to the kitchen on which Mr Crocker's staff were working but stated that on his arrival he saw that the circuits and leads were live, so he instructed them to stop, switched off the circuits and then tested that they were dead. However, because there was no demarcation agreement (which he alluded to as no control) and he 'found there was an issue' he applied the lock and chain. The claimant described removing the plug from under the distribution board in the presence of Vincent so he could look up into the board and then drilled the hole. He maintained that he could not LOTO the individually effected MCBs as he did not have sufficient LOTO kits and that he had performed the same operation some weeks previously and the AE had not raised any concern when he saw it. He denied that the 3 Ts were in place at the Site.

87. Mr Clarke suggested that if the claimant did not have enough LOTO kits to make the distribution board safe, he should return to the plant room to act as a human barrier preventing access to the distribution board before ringing Mr Preston and escalating the matter to him.

88. The claimant's trade union representative accepted, in the circumstances, that the claimant's actions amounted to gross misconduct but argued that the claimant should receive a final written warning as he acted through a desire to protect others and the job had been given to him at the last minute. The claimant informed us that that stance had not been agreed with him prior to the hearing but was discussed during it (as is reflected in the minutes on page 7), and whilst he was uncomfortable in accepting that he had committed gross misconduct, he was willing to do so in order to get back to work.

89. Mr Clarke adjourned for 15 minutes to consider the matter and then informed the claimant that the respondent had a zero tolerance of breaches of health and safety and claimant was therefore dismissed. He noted that the claimant had already received a final written warning for non-attendance.

90. Mr Clarke completed a proforma document to record the rational for his decision. The key factors that led him to dismiss which are recorded within it were first that his actions were gross misconduct because they were made in haste and failed to comply with the respondent's procedures by failing to obtain approval from the AE or his line manager. Secondly, that the claimant's statement that he had performed the same operation before and (during the investigation meeting) that he would do so again demonstrated that he did still not accept that he had followed an incorrect procedure and therefore posed a future risk of harm.

91. The document also indicates that Mr Clarke found that:

91.1. the claimant was aware of the proposed works on 25 June and 26 June because he had received the emails from Mr Preston on 18 and 19 June.

91.2. Drilling into the board was 'deliberate negligence' [sic] in respect of any safe system of work - the claimant was unable to explain how acting in that manner applied the safe system of work.

91.3. The claimant had suggested that the 3 Ts had not been introduced on the Site but had accepted during the investigation that there had been a briefing only days before the incident.

91.4. Despite accepting that his conduct amounted to gross misconduct the claimant did not demonstrate any insight or remorse into his action, but rather found the claimant had obfuscated as to what he knew, what equipment he had, and had sought to divert attentions from his actions by blaming others when explaining why he acted as he did.

92. On 26 July Mr Clarke wrote to the claimant confirming his decision to dismiss although unhelpfully it did not provide the fuller explanation which was contained within the rational, only summary reasons namely the claimant accepted that his actions were gross misconduct and, given that the claimant had failed to follow procedures and a safe system of work when drilling into a distribution board with live parts, the appropriate sanction was summary dismissal. The claimant was informed of his right of appeal.

<u>The appeal</u>

93. The claimant appealed on 2 August 2019. He complained that he had not been able to obtain the evidence necessary to make his defence. He listed a series of documents in the appeal letter which he said were necessary for his defence, however, the claimant was not able to explain to us how any of those documents (which were in the bundle) were relevant to the issue to be decided given that the claimant admitted that he had drilled into the distribution board and that in acting in that way he had committed gross misconduct. Rather the documents relating to the claimant's arguments as to the lack of clarity as to his responsibilities on the day.

94. On 5 August the claimant was sent a letter notifying him of the grounds of appeal that had been accepted and that the appeal would be heard on 13 August 2019. The claimant requested an alternative date for the hearing, and it was rescheduled to the 20 September 2019. In the interim period the respondent sought to collate the documents that the claimant had requested.

95. On 11 September the respondent wrote to the claimant proposing that the scheduled appeal hearing should be used for the purpose of hearing the claimant's appeals against his dismissal, against his final written warning for non-attendance between 7 and 10 June 2020, and against the rejection of his grievances against Mr Harris, Mrs Kew, and Mr Elliston. The claimant was informed that if he failed to attend a decision might be taken in his absence.

96. On 16 September the claimant informed the respondent that he could not attend the hearing on 20 September because he had yet to contact a union

representative and he had been unable to secure time off from his new employment. On 19 September 2019, the claimant was instructed to inform the respondent by the 27 September 2019 of a date between 30 September and 11 October 2019 when he and his union representative could attend; or to confirm that he would provide written submissions in support of his appeal by 11 October 2019. He was advised that the hearing could be conducted by telephone if necessary but was warned in clear terms that:

> *"In the event we do not hear from you either way regards the above proposals by 5pm on Friday 27 September 2019, we shall have no alternative than to accept you have withdrawn your three individual appeals and we shall communicate this to you accordingly in writing. "*

97. The claimant did not respond to propose a date or adopt any of the proposed formats of the appeal and 30 September the respondent wrote to confirm that it had accepted the withdrawal of the claimant's appeals.

**The Relevant Law**

Protected disclosures - Detriment

98. In order to bring a claim under section 47B, the worker must have suffered a detriment. It is now well established that the concept of detriment is very broad and must be judged from the viewpoint of the worker. There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment. The concept is well established in discrimination law and it has the same meaning in whistle-blowing cases. In Derbyshire v St. Helens MBC [2007] UKHL 16; [2007] ICR 841 paras. 67-68 Lord Neuberger described the position thus:

> "67. … In that connection, Brightman LJ said in Ministry of Defence v Jeremiah [1980] ICR 13 at 31A that "a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment".
>
> 68. That observation was cited with apparent approval by Lord Hoffmann in Khan [2001] ICR 1065, para 53. More recently it has been cited with approved in your Lordships' House in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337. At para 35, my noble and learned friend, Lord Hope of Craighead, after referring to the observation and describing the test as being one of "materiality", also said that an "unjustified sense of grievance cannot amount to 'detriment'". In the same case, at para 105, Lord Scott of Foscote, after quoting Brightman LJ's observation, added: "If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice"."

99. Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the claimant genuinely does so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective.

"On the ground that"

100. There must be a link between the protected disclosure or disclosures and the act, or failure to act, which results in the detriment. Section 47B requires that the act should be "on the ground that" the worker has made the protected disclosure. The leading authority is the decision of the Court of Appeal in Manchester NHS Trust v Fecitt [2011] EWCA 1190; [2012] ICR 372 where the meaning of this phrase was considered by Elias LJ (atpara.45):

> "In my judgment, the better view is that section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower."

101. As Lord Nicholls pointed out in Chief Constable of West Yorkshire v Khan [2001] UKHL 48; [2001] ICR 1065 para.28, in the similar context of discrimination on racial grounds, this is not strictly a causation test within the usual meaning of that term; it can more aptly be described as a "reason why" test:

> "Contrary to views sometimes stated, the third ingredient ('by reason that') does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the 'operative' cause, or the 'effective' cause. Sometimes it may apply a 'but for' approach. For the reasons I sought to explain in Nagarajan v London Regional Transport [2001] 1 AC 502, 510-512, a causation exercise of this type is not required … The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."

102. Liability is not, therefore, established by the claimant showing that but for the protected disclosure, the employer would not have committed the relevant act which gives rise to a detriment. If the employer can show that the reason he took the action which caused the detriment had nothing to do with the making of the protected disclosures, or that this was only a trivial factor in his reasoning, he will not be liable under section 47B.

S.103A automatically unfair dismissal

103. Section 103A provides:

> “An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.”

104. “This creates an anomaly with the situation in unfair dismissal where the protected disclosure must be the sole or principal reason before the dismissal is deemed to be automatically unfair. However, it seems to me that it is simply the result of placing dismissal for this particular reason into the general run of unfair dismissal law” see Kuzel v Roche Products Ltd [2008] ICR 799 per Elias J at para 44.

105. for the claims under s.103A ERA and/or s.100 1996, the Tribunal must ask:

105.1. whether the claimant has shown that there is a real issue that the reason advanced by the respondent is not the real reason for dismissal;

105.2. If so, whether the claimant has proved his reason for dismissal;

105.3. If not, whether the employer has disproved the s.103A/s.100 reason advanced by the claimant.

106. If it has not, the dismissal will be for the s.103A/s.100 reason (Kuzel v Roche [2008] IRLR 530).

107. The principal reason for the dismissal is "a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee" (see Abernethy v Mott, Hay and Anderson [1974] ICR 323).

108. The focus must be on the knowledge, or state of mind, of the person who actually took the decision to dismiss, as, "by S.103A, Parliament clearly intended to provide that, where the real reason for dismissal was whistleblowing, the automatic consequence should be a finding of unfair dismissal. In searching for the reason for a dismissal, courts need generally look no further than at the reasons given by the appointed decision-maker. …[however] If a person in the hierarchy of responsibility above the employee determines that, for reason A, the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts, it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination." Royal Mail Group Ltd v Jhuti 2019 UKSC 55, SC.

Unfair dismissal s.98(4) ERA 1996

109. The reason for the dismissal relied upon was conduct which is a potentially fair reason for dismissal under section 98(2) (b) of the Employment Rights Act 1996 ("the Act").

110. The principal reason for the dismissal is "a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee" (see Abernethy v Mott, Hay and Anderson [1974] ICR 323).

111. We have considered section 98(4) of the Act which provides:

"…. 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".

112. We have considered the cases of Post Office v Foley, HSBC Bank Plc (formerly Midland Bank plc) v Madden [2000] IRLR 827 CA; British Home Stores Limited v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT; Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR; Nelson v BBC (No 2) [1980] ICR 110 CA and Polkey v A E Dayton Services Ltd [1988] ICR 142 HL. The Tribunal directs itself in the light of these cases as follows.

113. The starting point should always be the words of section 98(4) themselves. In applying the section, the Tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair.

114. In judging the reasonableness of the dismissal, the Tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the Tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

115. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion. A helpful approach in most cases of conduct dismissal is to ask three questions (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral):

(i) whether the employer believed the employee to have been guilty of misconduct;

(ii) whether the employer had in mind reasonable grounds on which to sustain that belief; and

(iii) that the employer, at the stage (or any rate the final stage) at which it formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case.

116. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.

117. When considering the fairness of a dismissal, the Tribunal must consider the process as a whole Taylor v OCS Group Ltd.

Contributory conduct

118. Compensation for unfair dismissal is dealt with in sections 118 to 126 inclusive of the Act. Potential reductions to the basic award are dealt with in section 122. Section 122(2) provides:

"Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice

was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce the amount accordingly."

119. The compensatory award is dealt with in section 123. Under section 123(1)

> "the amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

120. Potential reductions to the compensatory award are dealt with in section 123. Section 123(6) provides:

> "where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

121. A similar power is contained in relation to the basic award in s.122(2) ERA (as quoted above) in relation to any conduct which occurred before the dismissal, however, that provision does not contain the same causative requirement which exists in s.123(6); the Tribunal therefore has a broader discretion to reduce the basic award where it considers that it would be just and equitable (see Optikinetics Ltd v Whooley [1999] ICR 984, EAT).

122. Three factors must be satisfied if the Tribunal is to find contributory conduct (see Nelson v BBC (No.2) 1980 ICR 110, CA):

122.1. the conduct must be culpable or blameworthy

122.2. the conduct must have caused or contributed to the dismissal, and

122.3. it must be just and equitable to reduce the award by the proportion specified

123. Provided these three factors are satisfied, the fact that the dismissal was automatically, as opposed to ordinarily, unfair is of no relevance (Audere Medical Services Ltd v Sanderson EAT 0409/12).

124. In determining whether conduct is culpable or blameworthy, the Tribunal must focus on what the employee did or failed to do, not on the employer's assessment of how wrongful the employee's conduct was (Steen v ASP Packaging Ltd [2014] ICR56, EAT).

Unlawful deductions from wages

125. Section 13 ERA prohibits the unlawful deduction of wages that are 'properly payable'. In order for a payment to fall within the definition of wages 'properly payable,' there must be some legal entitlement to the sum (New Century Cleaning Co Ltd v Church [2000] IRLR 27, CA).

126. Section 27(1) ERA defines 'wages' as 'any sums payable to the worker in connection with his employment', which includes 'any fee, bonus,

commission, holiday pay or other emolument referable to the employment' (S.27(1)(a)).

127. Where a claimant argues that he was ready and willing to work the Tribunal must ask whether he was prevented from working by factors beyond his control (see North West Anglia NHS Foundation Trust v Gregg [2019] EWCA Civ 387, [2019] IRLR 570 at paragraph 52), in particular it must consider whether:

127.1. If an employee does not work, he or she has shown that they were ready, willing, and able to perform that work if they wish to avoid a deduction to their pay (Petrie v McFisheries Limited [1940] 1 KB 258]

127.2. If he or she was ready and willing to work, and the inability to work was the result of a third-party decision or external constraint, any deduction of pay may be unlawful. It will depend on the circumstances.

127.3. An inability to work due to a lawful suspension imposed by way of sanction will permit the lawful deduction of pay (Wallwork v Fielding [1922] 2 KB 66).

127.4. By contrast, an inability to work due to an "unavoidable impediment" (Lord Brightman in Miles v Wakefield [1987] ICR 368, HL) or which was "involuntary" (Lord Oliver in Miles v Wakefield) may render the deduction of pay unlawful.

127.5. Where the employee is accused of criminal offences, the issue cannot be determined by reference to the employee's ultimate guilt or innocence (Harris (Ipswich) Ltd v Harrison [1978] ICR 1256, Burns v Santander UK Plc [2011] IRLR 639), nor simply by reference to whether he or she was granted bail or not.

**Discussion and Conclusions**

128. The following conclusions represent the unanimous decision of the Tribunal, which we have made on the balance of probabilities in light of the evidence that we have heard and read.

Unfair dismissal s.100, 103A and 111

The reason for the dismissal.

129. We are satisfied that the set of beliefs or facts which led Mr Clark to dismiss were the claimant's actions in drilling into the distribution board in the manner in which he did on 25 June 2019. Those actions took place prior to the subsequent protected disclosures. The respondent's reaction to that incident is only consistent with the respondent regarding claimant's conduct as misconduct. In particular Mr Preston produced a report within an email raising his concerns on 26 June 2019, having spoken to the claimant about the incident (during specifically asked whether the distribution board was live, a question which was left unanswered); further information was sought from those who had direct knowledge the incident or of the surrounding events (namely Mr Harris and Mr Crocker), and the claimant was subsequently invited to a disciplinary investigation meeting.

130. At the disciplinary investigation meeting the claimant accepted that he had drilled into the distribution board. That admission and his explanation of the surrounding events was, we are satisfied, the reason why the matter progressed to a disciplinary hearing. Similarly, we are satisfied that the reason that Mr Clarke dismissed the claimant was because he genuinely believed that the claimant had drilled into the distribution board in the circumstances where the board was potentially still live, that the claimant had failed to follow a safe system of work and comply with the 3 Ts safety check in so doing, and that he had shown no insight into the risk that exposed him to all remorse for his actions, but rather suggested that he would take the same action if the situation were to present itself again.

131. Whilst Mr Clarke knew of the protected disclosures, we are satisfied that they played no part whatsoever in his decision to dismiss and, similarly, the fact that the claimant had carried out activities as the AP (for the purposes of section 100 (1) (a)) or that he had taken appropriate steps to protect himself or other persons from danger which he reasonably believed to be serious and imminent (for the purposes of section 100 (1)(e)) was not a cause or principle cause of the decision to dismiss, none of those factors played any part at all in the decision to dismiss. (Hereinafter we refer to the section 100 and 44 matters as 'health and safety concerns' for ease of reference). That is because Mr Clarke's rationale was recorded contemporaneously in the decision document which we found to be a genuine record of his deliberations and thought processes, and we accepted his evidence to us to that effect.

132. The claimant argues that we can infer that the respondent had predetermined his dismissal and did so because he had made protected disclosures and raised health and safety concerns because the respondent did not have legible copies of the minutes of the disciplinary hearing until he provided them during the Tribunal process. Thus, he argues, it was quite prepared to conduct an appeal in circumstances when the appeal officer had no idea what was said during the disciplinary. We reject that argument. Mr Elliston described (and the claimant accepted) that the respondent's practice is for minutes to be taken in triplicate, one copy being given to the employer, another being held by the manager, and the third being sent to the people centre. The latter copy is scanned by the HR team and is retained as an electronic record. Here, the copy sent to the people centre had been poorly scanned. The respondent argued that the very purpose of that system was to ensure that if a copy were lost or destroyed a further copy could be obtained either from the manager or employee, and that is what would have happened in this case had the case progressed to an appeal. Critically, this relates to the appeal, and does not catch on Mr Clarke's decision to dismiss.

133. Secondly, the claimant argues that the respondent raised no prior concerns regarding his conduct or performance as an AP until the appointment of Mrs Kew and Mr Ben Harris as site managers. We understand that he therefore argues that we should draw the inference that the reason why he was suspended and disciplinary proceedings issues on three occasions after their appointment (in relation to overtime claims, unauthorised absence, and the events of 25 June 2019) is because he had made protected disclosures and/or raised health and safety concerns. That argument is logically flawed as the first two suspensions and investigations predated the protected disclosures / health and safety concerns and the third was triggered by Mr Preston's discovery on 26 June 2019 of the claimant's

manner of LOTO on the distribution board.

134. The claimant has not therefore shown that there is a real issue as to the reason for his dismissal and, as we have accepted the respondent's reason which was not the protected disclosure or the raising of any health and safety concern, the complaint that the claimant was automatically unfairly dismissed contrary to section 100 or 103A is therefore not well founded and is dismissed.

Unfair dismissal (s.98(4) ERA 1996

135. We turn then to the questions identified in British Home Stores Ltd v Burchell. First, did the respondent hold a genuine belief in misconduct? We find that it did, the genuine belief arose from the fact that the claimant had drilled into the distribution board, that the distribution board was dual fed, that the claimant admitted that he had drilled into the board without switching off the main circuit breaker or sub main, and the claimant had done so because he did not have the necessary equipment to lock off and tag off the MCB's. Critically, he and his union representative accepted that those actions amounted to gross misconduct during the disciplinary hearing and that admission was consistent with the respondent's disciplinary policy identifying the act of 'engaging in activities which cause, or might cause, unacceptable loss, damage or injury or which may endanger employee/customer or Client safety' as gross misconduct. Clearly, drilling into a distribution board that might be live could reasonably be regarded as endangering the claimant's safety, and no doubt this was the basis on which the trade union representative argued the admission of gross misconduct should be made.

136. Secondly, did the respondent have reasonable grounds for that belief? Again, we find that it did. The basis of those reasonable grounds was the claimant's admission that he knew of the 3 safety checks, having had a briefing in respect of them a few days prior to the incident on 25 June, knew that in order to ensure that the distribution board was not live it was necessary to switch it off at the main circuit breaker and/or at the sub main, but had chosen not to do so because he did not want to stop the works on site, and, despite knowing that, had drilled into the board itself. Critically, again, the claimant had admitted that he had committed gross misconduct in circumstances where that admission was consistent with the contents of the disciplinary policy. In addition, the claimant demonstrated a lack of insight into the respondent's concerns about his failure to follow the safe system of work and/or to escalate the matter to Mr Preston, but rather suggested that he would act in the same manner again on another occasion.

137. Finally, in our view the respondent had carried out a reasonable investigation as was warranted in the circumstances in the case. The conduct which was the subject of the disciplinary charges was the claimant's action in failing to log off and tag off the MCB's in a safe manner an instead in drilling into a dual fed distribution board in circumstances where the board was potentially live. The claimant admitted that he had drilled into the distribution board and that he did not have sufficient equipment to log off and tag off each of the MCBs.

138. In those circumstances only a limited investigation was necessary. The claimant had suggested that there was uncertainty as to his specific tasks on

the day due to the lack of demarcation documents and appropriate permits to work. However, the respondent's concern with the claimant's conduct was not focussed upon why he acted as he did (the respondent took no issue with the fact that the claimant perceived that there was a risk to health on the day and chose to act to reduce that risk), rather it was concerned with the manner in which he acted to reduce that risk by drilling into the distribution board.

139. The claimant argues that the respondent's investigation was unreasonable because the respondent did not interview three individuals that he named during the disciplinary investigation meeting. We address that allegation. First, the claimant maintains that he identified the individuals by name during the meeting. On balance we have concluded that the minute of the meeting is accurate - because the respondent had permitted the claimant to record the meeting, we found it unlikely that it would have deliberately omitted important details such as witnesses' names. There is a section in the minutes in which the claimant describes borrowing the contractors' testing kit and testing the circuits in their presence to ensure that they were dead. If that was claimant's reference to the contractors, we find that the claimant did not either (a) name them or (b) suggest that it was necessary for them to be interviewed. However, even had the claimant named the individuals, it was not in our view outside a band of reasonable responses for the respondent not to have interviewed them for the following reasons:

139.1. There was no dispute that the claimant did not have the appropriate LOTO for each of the MCBs; the witnesses would not have added anything to that issue;

139.2. There was no dispute that the claimant had drilled into the distribution board. The claimant admitted that but insisted that it was safe and appropriate for him to do so. Mr Clarke and Mr Preston were concerned that that action failed to comply with a safe system of work because the board was dual fed and in switching off the main circuit breaker prior to drilling into the board the claimant had only prevented current from leaving the board, not from entering it. In order to prevent current entering the board the claimant accepted that he would have had to switch of the sub main. His argument was that he did not wish to do so as (a) that would have prevented any further work on site at all, and (b) it would require a permit. It mattered not, in Mr Clarke's and Mr Preston's views, whether the claimant had looked up through the aperture revealed by removing the cap at the bottom of the board to see whether he was about to drill into live wires, because there always remained the possibility that the entire circuit board might become live if the mains feed became loose and touched any part of the distribution board. The witnesses could say that that claimant had removed the cap and looked up into the board and/or that he had tested the circuits he had isolated to prove dead, but that would not have added any evidence of relevance to the issue which was the central to the disciplinary allegations.

140. In any event, we note that the claimant did not seek to call evidence from those contractors at the disciplinary hearing, nor did he suggest that it was necessary for them to be spoken to prior to the decision to dismiss being made.

141. We next consider whether the respondent followed a fair procedure. The

claimant identifies three challenges to the process adopted to dismiss. First, he argues that he was not permitted to collect evidence. He argues that once he was suspended, he could not attend site to obtain copies of permits etc nor could he speak to his colleagues. He is right that the letter of suspension imposed a prohibition on his speaking to colleagues, but it made clear that he should not do so without permission from his line manager. It necessarily follows that if he wanted to speak to his colleagues to encourage them to give evidence on his behalf, he should have sought his line manager's permission. Similarly, it seems to us, he could have requested documents or asked for permission to visit site to obtain them. Given that the claimant did not make any such request, it was not outside the band of reasonable responses for the respondent to have conducted the disciplinary meeting with the information it had collected through its investigation.

142. In any event, the claimant sent a list of the documents he wanted to refer to in his defence to the respondent in his letter of appeal. The documents were obtained and included within those that were to be considered at the appeal. However, for reasons set out above, that appeal did not take place and they were not considered. Nevertheless, the claimant was unable during the course of his evidence to explain to the Tribunal how those documents were relevant to the respondent's concerns and we were not persuaded that they would have made any difference to the respondent's decision as to the issue of misconduct or sanction, not least because the claimant had admitted his actions were gross misconduct and yet had suggested he would repeat them.

143. The second allegation of procedural unfairness is that the respondent failed to interview witnesses. We have addressed that above.

144. The final allegation is that the respondent closed the appeal without considering the claimant's appeal (as contained in his grounds of appeal) in his absence. That allegation is factually inaccurate. On 19 September 2019 the claimant was told in simple and categoric terms that if he did not make any proposal within the deadline specified as to how he wished his appeal to progress, it would be treated as withdrawn. At that point the respondent had proposed 3 appeal dates and offered sensible proposals of alternatives to an in-person appeal, such as a telephone hearing and/or a decision on the basis of written representations. It was certainly within the band of reasonable responses for the respondent to conclude that the claimant was withdrawing his appeal in those circumstances, having given him ample warning of the outcome, and taken more than reasonable steps to enable the appeal to take place in some form.

145. Even if we are wrong that that decision was within the band of reasonable responses, we are satisfied that had an appeal been held and the claimant's documents considered as part of each, that it was inevitable (i.e. a certainty) that the claimant would still have been dismissed. He admitted gross misconduct, failed to demonstrate insight or remorse, stated that he would repeat the conduct if faced with the same situation and the documents he had requested had been obtained and had no bearing on the issue of whether his conduct was gross misconduct or on the appropriate sanction given that state of affairs.

146. Finally, we have to consider whether dismissal for gross misconduct on

the circumstances of the case was within a band of reasonable responses open to a reasonable employer. That means that if a reasonable employer could have opted to dismiss, whereas another equally reasonable employer could have opted to give a final written warning, the dismissal will remain a fair one. The claimant identified various challenges to the substantive fairness of the decision at paragraphs 5.2.1 to 5.2.8 of the list of issues prepared by EJ Bax. Those at 5.2.1 and 5.2.2 are really challenges to the process followed. 5.2.3 to 5.2.6 are no more than factual matters which the claimant relies upon, they might perhaps be regarded as mitigation, which relate to the claimant's argument at 5.2.8 that the decision to dismiss was outside the band of reasonable responses. Only 5.2.7 is a stand-alone argument and we therefore address that below.

147. The claimant was given a first sanction for unauthorised absence by Mr Simmons. Although the decision was made much earlier, the letter recording the final written warning was not produced by the respondent's people centre until the day of the disciplinary hearing on 12 July. We accept Mr Clarke's evidence first that he was not aware of it until he asked for the claimant's record to be checked, and critically and secondly, it played no part in his decision to dismiss as the reason that the Mr Clarke dismissed was because he concluded that the conduct was gross misconduct and that the claimant lacked insight and remorse and he had therefore lost trust in the claimant in his role. We accept that evidence, finding Mr Clarke to be a credible and honest witness who was supported by the document recording his rational for dismissal, and therefore reject the claimant's argument on this point. It is regrettable that that rationale was not recorded in the dismissal letter, because it may have avoided many of the arguments in the case.

148. Although it is not recorded in the issues, the claimant sought to argue before us that Mr Elliston had orchestrated his dismissal in conjunction with Mr Harris and Mrs Kew. Mr Elliston, he argued, was the thread that joined all the incidents together. It is right that Mr Elliston, in his role as HR Business Partner for the region, oversaw the process of grievances and disciplinaries, save where they related to him. However, Mr Elliston did not make the decision to dismiss, Mr Clarke did, and we accept his evidence that whilst he took advice as to the process, it was his decision and his decision alone. Again, that account is corroborated in the rationale document.

149. We find therefore the summary dismissal for gross misconduct was within the band of reasonable responses open to a reasonable employer. It was a genuine and reasonable concern that the claimant may repeat his conduct, given his stance that he would, notwithstanding his admission of gross misconduct, and it is well within the band of reasonable responses for an employer to take the view that adopting that stance when working as an electrician destroyed the employer's trust in the claimant's performance of his role, such that a final written warning was not appropriate.

150. Lastly, for the sake of completeness, we consider whether the claimant committed blameworthy or culpable conduct that contributed to his dismissal. We find that he did. His conduct which we have detailed in relation to the gross misconduct (see in particular paragraphs 135, 136 and 139.2 and 145 above) is culpable and blameworthy. It was the direct cause of his dismissal no other cause has been established. Consequently, in the circumstances it would have been just and equitable to make a reduction both to the basic and

compensatory awards pursuant to s.122(2) and 123(6) ERA and a 100% percent reduction would be appropriate in the circumstances as there was no other cause.

151. The claimant's complaint of unfair dismissal, therefore, is not well founded and is dismissed.

Detriment on the grounds of having made protected disclosures or health and safety concerns

*Investigating the claimant for misconduct*

152. As stated above, the investigation of the claimant predated the protected disclosures and the raising of any health and safety concerns. The investigation began 25 June 2019 when Mr Preston discovered the nature of the LOTO which the claimant had applied to the distribution board. The claimant's first protected disclosure was made the following day, the second the day after. We are entirely satisfied, for the reasons that we have set out above, that the protected disclosures had no material influence whatsoever (and were not even a trivial influence) upon the decision to instigate the investigation for misconduct or to continue it.

*Informing the claimant that he was competent [as an electrician] and would not be permitted to work on electrical installations.*

153. The email in question was that sent on 28 June 2019, following the claimant's suspension by Mr Harris. Mr Harris wrote

> "*Since Christian has now resigned his appointment as an Authorised Person, he can no longer undertake any electrical works at site. In order to undertake any electrical works, an individual must be appointed as at least a Competent Person. A decision needs to be made as to if this is appropriate at this point. But as of Monday morning Christian must be made aware that he cannot undertake any electrical works.*
>
> *This process is already in place for Vince Laker and Marc Scammell so there can be no accusation of singling any person out. Kane Pang advises that these appointments remain valid even though Christian is no longer an AP."*

154. Within the email itself there is a clear explanation unrelated to the protected disclosures or health and safety concerns for the respondent's decision to prevent the claimant from working on electrical installations. The email is contemporaneous, and we find accurately records Mr Harris's thought processes. The explanation is logical both in the context of the safe system of work, the appointment of CPs following verification by APs, and more generally in the context of the claimant's suspension for gross misconduct in relation to the manner in which he had fulfilled his duties as an AP. We are therefore satisfied that neither the protected disclosures nor the raising of health concerns had any influence on the decision, rather it was taken firstly as a consequence of the claimant's resignation from his role as an AP and secondly as a consequence of the disciplinary investigations relating to his performance on 25 June 2013.

*Rejecting the claimant's appeal*

155. The claimant's appeal was not rejected, it was treated as withdrawn. Insofar as the allegation is really that the respondent treated it as being withdrawn, for the reasons set out in paragraph 144 above, we are satisfied that the reason that the claimant's appeal was treated as withdrawn was his failure to respond to the respondent's letter requiring him to indicate how he wished it to be resolved within the specified timeframe. Accordingly, neither the protected disclosure nor the act of raising health and safety concerns had even a trivial influence upon the decision to treat the claimant's appeal as withdrawn.

156. It follows that the claimant's complaints of detriment on the grounds either of having made protected disclosures of having raised health and safety concerns are not well founded and dismissed.

Unlawful deduction of wages

157. The claimant's allegation is that he was ready and willing to work in the period 28 May until 7 June 2019 but he was not paid. There is no dispute between the parties that in that period the claimant was not signed off as unfit for work. The areas of dispute are threefold: -

157.1. First, was any part of that period of absence authorised?

157.2. Secondly, was the claimant ready and willing to perform the work?

157.3. If the claimant were ready and willing to perform the work, was the claimant's inability to work due to (a) the decision of his employers not to permit him to work or (b) a lawful sanction by the employer?

158. It is sensible to consider the differing periods of time. On 26 May the claimant had been informed that he needed to attend a return-to-work meeting on 28 May, but if he did not wish to attend that meeting because he could not obtain a representative and was unwilling for the meeting to be conducted with a witness, he should either take annual leave, accept unpaid leave, or obtain a fit note. He did none of those things and did not attend the meeting on 28 May 2019. We are satisfied that the claimant's absence was unauthorised on that day and the non-payment of wages was therefore lawful as the claimant was not ready and willing to perform work on that day. The claimant was told to inform the respondent by 3 June whether he was ready and willing to return to work.

159. Between 28 May and 6 June, the claimant did not attend work and remained at home in circumstances where he had been informed that his absence was treated as unauthorised. Again, we are satisfied that the non payment of wages for that period was a lawful deduction from the claimant's wages as the claimant was not ready and willing to attend work and further there was no third-party impediment preventing him from doing so.

160. The claimant emailed Mrs Kew in the morning of 5 June 2019 stating that he could return to work on 6 June, rather than the 7 June as had been proposed, and in consequence Mr Harris conducted the return-to-work meeting with the claimant on 6 June 2019. As we recorded in our fact find, the claimant attended in his own clothes, given his habit was to cycle to work and to change into his uniform and PPE on site. His uniform was held in a locker on the site.

161. The issue between the parties is whether the claimant was ready and willing to perform work on the 6 June or whether he was prevented from doing so by Mr Harris, who sent him home. The claimant insists that Mr Harris sent him home; the respondent argues that the claimant stated he had no intention of working that day and left the site.

162. We have found this a very finely balanced point. We have considerable sympathy with the claimant's confusion as to which procedure the meeting was being held under, in particular whether it was a return to work meeting to discuss his GP report, whether it was a sickness absence meeting under the capability procedure because the claimant's period of absence was 8 weeks (although as indicated above not all of it was sickness absence, as it included periods of annual leave and medical suspension), or whether it was a disciplinary investigation meeting in relation to his prior unauthorised absences. The precise nature of the meeting determined the claimant's right to be accompanied as a matter of policy (although Mrs Kew had permitted him to be accompanied through the exercise of a discretion). In addition, there was further uncertainty as to whether Mrs Kew, against who he had raised a grievance, would chair the meeting, or would merely attend as a note taker.

163. However, the issue before us is not determined by that confusion but only by what happened at the meeting on the 6 June – either the claimant refused to return to work or he was sent home by Mr Harris. That is a binary factual dichotomy. Here, on balance we prefer the respondent's account for the following reasons:

163.1. The minutes of the meeting, which the claimant disputes, record the claimant was asked by Mr Harris whether he was intending to return to work that day as he was not in uniform, and the claimant replied "no, as not in uniform." Mrs Kew's letter of 6 June records "regrettably you turned up with no intention of returning to work, or being in readiness to attend work i.e., in uniform wearing the correct PPE. As a consequence, you were sent home from site due to your unwillingness and decision to return to work today." We recognise that those are two documents produced by the respondent and may therefore have been written through the prism of the respondent's experience of the day, however, there is no record of the claimant seeking to challenge the accuracy of that record either in the minutes of the subsequent disciplinary hearing or in an email or other contemporaneous document. Similarly, there is no record of the claimant advancing the explanation regarding his work clothes being locked in his locker which he provided to the Tribunal during cross-examination.

163.2. Secondly, Mrs Delaney emailed the claimant within 3 hours of the meeting on 6 June. In her email she wrote:

> "Before Ben got into the content and details of both the return-to-work meeting and discussion over your medical report, it was noted visibly you had not attended work in uniform.
>
> Therefore, Ben clarified at the outset if it was your intention to attend work after the meeting was concluded, which you stated you were not aware of being the case and were not appropriately dressed to do so [sic].

> In reply you stated no and I was given short notice to attend the meeting. It is also noted you provided no explanation for your absence or information to support your absence from work since 28 May 2619. [sic]"

164. Whilst that note is not entirely clear given the typographical and grammatical errors within it, it does create a picture of the claimant refusing to return to work because he had not had sufficient notice that he was required to return to work immediately after the meeting. We can easily envisage that scenario arising because of the claimant's very understandable confusion as to exactly what would be discussed at the meeting, with whom and critically what would happen next. However, we can equally easily envisage that the claimant's rather truculent, and at times sarcastic and obstructive nature, got the better of him and we find that he made the comment that he would not be returning to work because of lack of notice in a moment of pique and frustration with the respondent, and Mrs Delaney's note reflects that. No matter how much sympathy the Tribunal have with the claimant's frustration due to the somewhat labyrinthine manner in which the various procedures had been merged and approached, the necessary and unavoidable consequence was the claimant was not ready and willing to perform work after the meeting.

165. In consequence, the claim for unlawful deduction of wages is not well founded and is dismissed.

**Employment Judge Midgley**
**Date: 29 March 2021**

Judgment and Reasons sent to the Parties: 14 April 2021

FOR THE TRIBUNAL OFFICE