EMPLOYMENT TRIBUNALS

Claimant: Stewart Neil

Respondent: Vinci Construction UK Ltd

Heard at: Watford **On:** 1, 2, 3 September 2021

Before: Employment Judge Shastri-Hurst

Representation
Claimant: In person
Respondent: Mr M Sellwood (counsel)

JUDGMENT having been sent to the parties on 25 September 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. By claim form dated 13 April 2020, the Claimant brings a claim of ordinary unfair dismissal under s98 of the Employment Rights Act 1996 ("ERA"). He had previously followed the ACAS early conciliation process, initially approaching ACAS on 23 February 2020 and receiving the ACAS certificate on 23 March 2020.

2. The claim is defended by the Respondent, who put in a response claiming that the dismissal was for the potentially fair reason of conduct and that the dismissal was, in all the circumstances fair.

3. In determining this claim, I had sight of an agreed bundle of 449 pages (paginated up to page 407). My thanks to the Respondent's solicitors who ensured that the pdf page numbers matched the paginated numbers. I also received witness statements from the following individuals:

3.1. The Claimant, who also adopted the document at pp401-406 as part of his statement, and affirmed the truth of that document;

3.2. Mr Douglas Wakeling, Mechanical Engineer and colleague of the Claimant between 2014 and 2018;

3.3. Mr Stephen Gathergood, investigating officer and Senior Engineering Manager;

3.4. Mr Mark Smith, disciplinary officer and Senior Project Manager (now Project Director);

3.5. Mr Ian Bancroft, appeal officer and Senior Account Lead.

4. I also received an email from the Claimant entitled "Skeleton" that I read prior to the commencement of the hearing.

5. All witnesses other than Mr Wakeling attended to be cross-examined. I give Mr Wakeling's statement as much weight as I feel appropriate, given he has not attended to be cross-examined and therefore his evidence could not be challenged by the Respondent.

6. Mr Sellwood of counsel represented the Respondent, and the Claimant represented himself. I am grateful to them both for their assistance and the professional and courteous way in which they conducted themselves throughout the hearing.

7. I established at the beginning of the hearing that I would deal with liability first; in other words, whether the Claimant had been fairly or unfairly dismissed, as well as two issues that relate to remedy (set out below). Any issues regarding the amount of money the Claimant would receive if I found he was unfairly dismissed would be dealt with at a second stage.

8. I set out the issues for me to consider at the commencement of the hearing: they are helpfully summarised in Employment Judge Bedeau's order at pp27c-d. I explained to the Claimant that I did not expect him to be in a position to address me on the law, but that I would just go through and explain what issues I thought I needed to consider.

ISSUES

9. The issues that are relevant to my decision making were agreed to be as follows:

9.1. Can the Respondent prove that the reason for dismissal was the Claimant's conduct, namely the four matters for which the Claimant was disciplined as set out at paragraph 5 on p337;

9.1.1. This requires me to consider the test in the case of British Home Stores v Burchell [1978] IRLR 379, which I set out here:

9.1.1.1. Did the Respondent have a genuine belief that the Claimant was guilty of the misconduct he was charged with;

9.1.1.2. If so, was that belief based on reasonable grounds; and,

9.1.1.3. Did the Respondent undertake an investigation that was reasonable in all the circumstances?

9.1.2. Did the sanction of dismissal fall within the band of reasonable responses open to a reasonable employer?

9.1.3. Was the procedure followed by the Respondent fair?

9.2. The specific points that the Claimant relies on as demonstrating unfairness are recorded within the Record of Preliminary Hearing of 9 December 2020 at paragraphs 5.13.1 – 5.13.12, at pp27c-d.

9.3. In terms of the two remedy points that I indicated I would consider at this stage of the case, they are as follows:

9.3.1. If there was any procedural unfairness, what was that chance of the Claimant being dismissed, even if the procedure had been fair – Polkey v AE Dayton Services Ltd (1988) ICR 142; and,

9.3.2. Did the Claimant cause or contribute to his dismissal by his conduct and/or was he guilty of any conduct that would make it just and equitable to reduce any award – s122(2)/s123(6) ERA.

LEGAL FRAMEWORK

10. The relevant legislation is found at s98(1), (2) and (4) ERA, which provides as follows:

> "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it –
>
> (a) ...
> (b) relates to the conduct of the employee,
> (c) ...
> (d) ...

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regarding 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."

Reason for dismissal

11. It is for the employer to show the reason for dismissal and that it is a potentially fair one, such as conduct. This is not a high threshold for the Respondent. In Gilham and others v Kent County Council (No2) [1985] ICR 233, the Court of Appeal found as follows:

> "The hurdle over which the employer has to jump at this stage of an inquiry into an unfair dismissal complaint is designed to deter employers from dismissing employees for some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the inquiry moves on to [s98(4) ERA] and the question of reasonableness."

Fairness

Substantive fairness

12. Regarding conduct cases, the case of British Home Stores Ltd V Burchell [1978] IRLR 379 encompasses the relevant test for fairness as I have set out already.

13. In all aspects of a conduct case, in deciding whether an employer has acted reasonably or unreasonably within s98(4) ERA, the tribunal must decide whether the employer acted within the band of reasonable responses open to a reasonable employer in the circumstances. Whether the tribunal would have dealt with the matter in the same way or otherwise is irrelevant, and the tribunal must not substitute its view for that of a reasonable employer – Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, London Ambulance Service NHS Trust v Small [2009] IRLR 563.

14. In this case, there is the involvement of a previous final written warning that was still live at the point of the Claimant's dismissal. I therefore address the legal situation regarding existing final written warnings:

    14.1. It is an error of law to find that pre-existing warnings for different issues are irrelevant or that an employer is prohibited from taking previous live warnings into account simply because they cover different issues. It is however fair to say that the significance to be attached to

preexisting live warnings will differ depending on the similarity of the subject matter they involve – Auguste Noel Ltd v Curtis [1990] IRLR 326, Stein v Associated Dairies Ltd [1982] IRLR 447.

14.2. The Employment Appeal Tribunal ("EAT") in Wincanton Group plc v Stone [2013] IRLR 178 applied this logic, highlighting that there is nothing in the ACAS Code that requires similarity as a matter of law.

14.3. Again from Wincanton Group plc v Stone [2013] IRLR 178, the tribunal may only look behind a final written warning if that warning was manifestly inappropriate. At paragraph 37 the EAT stated:

> "...if a tribunal is not satisfied that the first warning was issued for an oblique motive or was manifestly inappropriate, or, put another way, was not issued in good faith nor with prima facie grounds for making it, then the earlier warning will be valid..."

Limited remedy issues

"Polkey" reduction

15. The decision in Polkey v AE Dayton Services Ltd [1987] UKHL 8 permits the reduction of compensation when, even if a fair procedure had been followed, the Claimant would have been dismissed in any event.

16. Compensation can be reduced as a percentage, if a tribunal considers that there was a percentage chance of the employee being dismissed in any event.

17. The tribunal has to consider what difference a fair procedure would have made, if any. It is for the Respondent to provide evidence on this point. It is always the case that a degree of uncertainty is inevitable, unless the process was so unreliable it would be unsafe to reconstruct events. However, the tribunal should not be reluctant to undertake the exercise just because it requires speculation – Software 2000 Ltd v Andrews [2007] ICR 825.

Contribution

18. Under s122(2) ERA, the relevant test is whether it is just and equitable to reduce compensation in light of conduct of the Claimant prior to the dismissal. The conduct need not contribute to the dismissal. The EAT has confirmed that the same test of whether the Claimant's conduct was "culpable or blameworthy" applies to the s122(2) reduction question as it does to s123(6) ERA – Langston v Department for Business, Enterprise and Regulatory Reform UKEAT/0534/09, Nelson v BBC (No.2) [1980] ICR 110, CA.

19. In considering whether behaviour is culpable or blameworthy, the tribunal needs to look at what the Claimant in fact did, as opposed to simply looking at what the Respondent's view of the Claimant's culpability was – Steen v ASP Packaging Ltd [2014] ICR 56.

20. The EAT in Steen summarised the approach to be taken under s122(2) and s123(6) ERA at paragraphs 8-14:

    20.1. Identify the conduct which is said to give rise to possible contributory fault;

    20.2. Ask whether that conduct was blameworthy, irrespective of the Respondent's view on the matter;

    20.3. Ask, for the purposes of s123(6) ERA, whether the conduct which is considered blameworthy caused or contributed to the dismissal; and, if so,

    20.4. Ask to what extent the award should be reduced and to what extent it was just and equitable to reduce it.

ACAS Codes of Practice

21. A note on the ACAS Code of Practice on Disciplinary and Grievance Procedures, given that the Code is something that has been raised by the Claimant.

22. Here, as the Claimant was disciplined under the Respondent's disciplinary policy, the applicable Code is the one on disciplinary processes. Under that Code, disciplinary matters can cover both misconduct and poor performance. Here, the matter for which the Claimant was disciplined related to, and was framed as, misconduct, as opposed to performance. The Code provides that employees have a right to be accompanied to any formal disciplinary or grievance meeting: this does not include investigation meetings (although accompaniment may be permitted by an employer). In misconduct cases, different people should carry out the investigation and the disciplinary hearing itself. Where suspension is necessary, this should be kept as brief as possible.

23. An employee should be informed in writing of the allegations he faces, in order that he can prepare to answer those allegations at a disciplinary hearing. This does not necessarily mean that allegations are set out in writing before the investigation stage.

24. Regarding written warnings, the following is said at paragraphs 19-21 of the Code:

> "Where misconduct is confirmed or the employee is found to be performing unsatisfactorily it is usual to give the employee a written warning. A further act of misconduct or failure to improve performance within a set period would normally result in a final written warning.
>
> If an employee's first misconduct or unsatisfactory performance is sufficiently serious, it may be appropriate to move directly to a final written warning. This might occur where the employee's actions have had, or are liable to have, a serious or harmful impact on the organisation.

> A first or final written warning should set out the nature of the misconduct or poor performance and the change in behaviour or improvement in performance required (with timescale). The employee should be told how long the warning will remain current. The employee should be informed of the consequences of further misconduct, or failure to improve performance, within the set period following a final warning. For instance that it may result in dismissal or some other contractual penalty such as demotion or loss of seniority."

FINDINGS OF FACT

25. I only made findings of fact so far as they are relevant to the issues I have set out above. Where I have not covered certain facts, it is because they are not relevant to those issues.

26. The Respondent is a concessions and constructions services provider. Its facilities division (Vinci Facilities) is a facilities management and building maintenance provider and delivers a range of integrated facilities, energy and property services.

27. The Claimant commenced employment with the Respondent on 20 August 1973 as a maintenance technician; he was also a qualified electrician. He had held the title and position of Authorised Person ("AP") for low voltage and medical gases for 18 years by the time of his dismissal. He mainly worked at Amersham Hospital, although he also covered two other hospitals on oncall duties.

28. Under his employment, the Claimant was subject to the disciplinary procedure – pp39-42. I highlight the part regarding investigations at p40:

> "...an investigation will be carried out to determine the facts relating to the allegations before deciding whether to proceed with a disciplinary hearing. If appropriate, the employee will be informed as soon as practical that an investigation is being undertaken. ...
>
> The company reserve the right to conduct investigatory interviews without providing notice."

29. Taking into account the extract I have quoted from the ACAS Code, in tandem with this part of the Respondent's policy, there is nothing in relation to investigation meetings in the Policy that is inconsistent with the requirements of the ACAS Code.

30. I have also seen the Line Manager Briefing document at p51. Again, there appears to be nothing in this Briefing paper that is inconsistent with the ACAS Code. I note that the Briefing at p72 states that an investigating officer should not "*offer your own opinion, be judgmental or speculate on the outcome of the investigation*" – I will return to this point later.

31. In 2011, the Claimant signed a Hot Works Permit to allow a third party to undertake works, with a commencement date of 29 September 2011 – p112. The permit was completed and signed by the Claimant, including the

completion of the Risk Assessment Document Number, and the Method Statement Document Number (together known as the "RAMS"). This document bears the Claimant's signature at various places, including in order to grant permission to the third party, and in due course to cancel the permit. The Claimant therefore understood, and knew how to fill in, a Hot Works Permit as at 2011.

32. Whilst the Claimant was with the Respondent, he underwent a good amount of training, as can be seen by his training records and certificates at pp113-128, and the Claimant's individual profile at p306.

33. On 3 July 2017, the Claimant was reappointed to the position of AP by Paul Raynor, the Authorising Engineer ("AE"); the appointment was valid from 30 June 2017 to 31 January 2018 – p129. Although it therefore appears on the paperwork that the Claimant's appointment lapsed in January 2018, the Claimant was in fact able to undertake the necessary training to renew his appointment, but failed to communicate this to the AE – see the note in the investigation report at p295. Therefore, throughout the relevant period, the Claimant was an appointed AP.

34. The Claimant had been AP for a total of 18 years by the time of his dismissal. During that period, he had undertaken AP training as required, every 3 years. He last undertook the training on 13 October 2017 – p306.

35. The AE had attended Amersham Hospital to undertake an audit in July 2018. The Claimant was not present on that occasion, and so the AE was unable to discuss matters with him. However, the AE had attended previously, in May 2018, at which point he had met with the Claimant to discuss the Claimant's AP duties – p299.

The final written warning

36. On 27 November 2018, the Claimant partially filled in a Hot Works Permit for a third party contractor, granting permission as the AP. I say partially as, on this form, the RAMS details were not completed, and were left blank. In other words, there was no record that a risk assessment or method statement had been completed in advance of the permit being granted. The Claimant was also the AP that signed the document later on 27 November 2018 to cancel that permit – p181.

37. Although the Claimant was the issuing AP for this permit, he was not the individual who actually let the contractor on to the site.

38. On 27 November 2018, a fire alarm was activated due to the hot works that were being carried out under the permit I have just mentioned. This led to an area of the Amersham Hospital being evacuated.

39. The Claimant attended a meeting with Tracey James-Mackenzie (Facilities Manager) on 29 November 2018, at which he accepted that he had been the issuing AP, and had not completed the RAMS section as he did not ask for

the risk assessment, and assumed it had already been done. Notes of that meeting, signed by the Claimant, are at p182.

40. Following this investigation, a report was produced and, on 25 January 2019, the Claimant attended a disciplinary meeting with Vishnu Patel. In this meeting, the Claimant stated that he had had no training on hot works. The meeting appears to have been fairly lengthy, the notes spanning 5 pages at pp202-206.

41. Mr Patel's decision is set out in an internal email at p208. I note Mr Patel's comments at p208:

> "...whilst the fire activation incident which occurred did not cause any major disruption on this occasion, it has highlighted the potential ramification and the severity of what could have happened that could potentially impact our client operation; that being the care of the patient at the hospital and to the company. This is the consequence of knowingly putting a person at work, given the risk level involved under fire safety requirements and therefore not fulfilling his responsibilities to the standards expected by the company and a breach of health and safety company procedure."

42. As a result of this disciplinary action, the Claimant received a final written warning, communicated by letter of 11 February 2019 at p211. In that letter, Mr Patel evidently took the Claimant's mitigating circumstances into account, highlighting the "*lack of consistent and appropriate safety briefings to the team...*". He however found that "*this does not negate the fact that you knowingly put the contractor to work without the necessary safe systems in place and the warning issued is based upon the potential ramifications of these failures...*" – p212.

43. The Claimant appealed this final written warning. An appeal meeting was held on 12 March 2019, however the warning was upheld. The outcome letter appears at p225.

Chronology leading to disciplinary proceedings

44. Throughout 2019, there appears to have been outstanding remedial work required to be done to emergency lighting in the Hospital: see the Emergency Light Defect Log at pp262-270, and the plan to remedy this situation as set out in an email on p271 on 11 June 2019 from Tracey James-Mackenzie to the Claimant and others.

45. On 12 June 2019, the Claimant was seen to be using a ladder in an unsafe manner. He was given a management instruction to dismount and reposition his ladder, but he refused to do so: see incident report at p272. Following this, on 13 June 2019, the Claimant was suspended in order to allow for an investigation to take place – p274.

46. In June 2019, Adrian Collyer had joined the Respondent as Project Manager. In his new position, he determined to commission an audit, or electrical review, into the sites under his remit. He invited Stephen Gathergood to undertake the audit, along with Mr Maddock. Amersham Hospital was

audited and a report produced on 18 June 2019 – p275. The scope of the audit is set out at p276a:

> "The scope of the review and report, was principally to undertake a contract compliance review with a specific focus on the electrical systems, planned and reactive maintenance. The review was not intended to be a "deep dive" but more a shallow but broad review of the service delivery."

47. In other words, Mr Collyer wanted to ensure that the sites under his management were compliant, and that the reality reflected the paperwork he had seen.

48. In the audit, emergency lighting is dealt with at p276d, and it was found that there were defects that had been logged to the tune of 56 faults with the system – p276e. It was recorded that:

> "An annual emergency lighting certificate has been issued for the contract by the site AP Stewart Neil 22 January 2019. This certificate was inconsistent with that defined within Vinci operational procedure OP-06-02-03."

49. The audit records a "*lack of resilience within the management and operating model of the contract"* and other criticisms of management – p276f.

50. On 21 June 2019, the Claimant attended a meeting with Louise Jackson at which he was informed that the investigation regarding the ladder incident would lead to no further action. However, due to the unearthing of the emergency lighting certificate via the audit, the Claimant was to be resuspended on full pay pending investigation into that new matter. Confirmation of his suspension was sent by letter of 24 June 2019 – p279.

51. The Claimant was first informed of the precise allegations by letter of 1 July 2019, those allegations being (p280a):

    51.1. Falsification of records; specifically recording emergency lights 100% accurate on a legal document for statutory compliance when knowingly there are failures;

    51.2. Serious breach of the Health & Safety at Work Act 1974 by recording emergency lights are 100% accurate when knowingly there are failures;

    51.3. Serious breach of company procedures (AP procedures, Permit to Work procedures);

    51.4. Serious breach of trust and confidence.

52. In effect, these are four different labels for the same factual allegation, that the Claimant signed off a form stating that all lights were in working order when he in fact knew this was not the case. The form in question is at p141, and is known as the EPM4 form, titled as the Emergency Lighting Periodic Inspection and Testing Certificate. This certificate covered Amersham

Hospital as the client. The certificate records that the contractor responsible for carrying out the inspection was the Respondent, and the declaration is signed by the Claimant. The declaration states:

> "I hereby certify that the emergency lighting system installation at the above premises has been inspected and tested by me in accordance with the Results Schedule of items inspected and tested and to the best of my knowledge and belief, the installation complies at the time of my inspection and testing with the recommendations given by British Standard 5266-1: 2011..."

53. The Claimant accepted to me in this tribunal that it was a mistake for him to have signed this certificate, and that he regrets doing so.

54. The Claimant was invited to an investigation meeting conducted by Mr Gathergood on 15 July 2019 – p284. Mr Gathergood also produced an investigation report at p292. The report summarises Mr Gathergood's findings of fact, and concludes by recommending progression to a disciplinary hearing. I note at this point that, although Mr Gathergood gives his opinion as to sanction in his witness statement for this tribunal, in his report he keeps his powder dry on sanction, and simply recommends that a disciplinary hearing be conducted. This recommendation falls within his remit as investigating officer as set out in the Briefing paper mentioned above.

55. The Claimant was invited to a disciplinary hearing by letter of 5 August 2019 – p308c. The following day, the Claimant entered a grievance at p309, regarding his final written warning, the investigation into the ladder incident, and the current, live disciplinary process regarding the electrical paperwork. The Claimant was concerned that, having had a clean record for 45 years, he had faced three disciplinary matters in six months, and felt he was being managed out. This is a point he maintained before me.

56. On receipt of the Claimant's grievance, the Respondent took the decision to postpone the disciplinary until the grievance had concluded – p310.

57. A full grievance process, including a grievance appeal, was undertaken. The end result was that the grievance was not upheld. On 31 October 2019 a letter was sent by the Respondent to the Claimant, communicating this final outcome to him – p332. The Claimant received this letter on 4 November 2019 – p335. The following day, the Respondent sent a letter re-instating the disciplinary matter that had been postponed – p337.

Disciplinary process

58. A disciplinary hearing was held with Mark Smith as the chair, on 28 November 2019: the notes are at pp349-360. The Claimant accepted in crossexamination that he had the opportunity to tell Mr Smith his views on the allegations he faced at that meeting. At the end of that meeting, Mr Smith asked "*I think we have talked enough, do you agree, and anything else you wish to add?*" to which the Claimant answered "*No*".

59. Mr Smith sent his outcome letter dated 8 January 2020, in which he upheld the allegations and communicated the decision to dismiss the Claimant with his notice pay. The letter is just over four pages long, and goes through each allegation in turn, as well as addressing each of the Claimant's points that he raised in his defence and/or as mitigation – p365.

60. The Claimant exercised his right to appeal that decision by email of 14 January 2020 – p370. Ian Bancroft heard the appeal on 14 February 2020. Again, this was a fairly lengthy meeting, in which the Claimant was given the opportunity to go through each of his appeal points in turn. At the end of the meeting, Mr Bancroft asked whether there was anything else the Claimant wished to add, to which he replied "*No*".

61. Mr Bancroft confirmed his decision to uphold the dismissal by letter of just over five pages dated 20 February 2020 – p391. This letter addresses each point raised by the Claimant, and gives him Mr Bancroft's reasoning for the appeal's lack of success on each point.

62. The Claimant commenced ACAS early conciliation on 23 February 2020, following which he duly entered his claim form on 13 April 2020.

CONCLUSIONS Reason for dismissal

63. As I have mentioned, it is for the Respondent to prove its case, that misconduct was the reason for dismissal.

64. The Claimant challenged the Respondent's position that the reason for his dismissal was misconduct: he was of the view that he was managed out deliberately and that the alleged conduct issues were really just a sham. The Claimant however accepted that none of the decision makers involved in any of the formal meetings I have discussed in my findings would have any reason to take against him and/or to want him dismissed. His view was that they were taking instructions from someone higher up the chain in the organisation. I gave the Claimant the opportunity to put a name to that unknown person, but he was unable to do so. I have no corroborative evidence before me of a conspiracy to manage out the Claimant, and no reason for which anyone would wish to do so, given his 46+ years of good work for the Respondent.

65. Returning then to the burden of proof borne by the Respondent, the threshold to prove misconduct as the reason is a fairly low one. The Respondent has provided evidence of the Claimant's conduct regarding the emergency lighting certificate that led it to investigate and subsequently discipline him. I have also seen no evidence to suggest that the reason for the Claimant's dismissal was for any other reason.

66. I am therefore satisfied that the reason for the Claimant's dismissal was the potentially fair one under s98(1)/(2) ERA of conduct.

Genuine belief

67. Having heard evidence from Mr Smith and Mr Bancroft, the decision makers, and having seen their detailed outcome letters, I am satisfied that they both held a genuine belief that the Claimant was guilty of the conduct with which he had been charged.

68. Further, regarding the four allegations for which the Claimant was eventually dismissed, there can be no escaping that the Claimant signed a document confirming that emergency lighting was in compliance with the relevant British Standards, when in fact he was aware that this was not the case.

69. It is fair to say that the Claimant put forward issues of mitigation during the disciplinary process, but those matters are more relevant to sanction, as opposed to the Respondent's genuine belief.

Reasonable grounds following a reasonable investigation

70. Mr Smith and Mr Bancroft had before them an audit report from Mr Gathergood regarding the site for which the Claimant was responsible. That report detailed that there were defects within the emergency lighting system in Amersham Hospital, contrary to the EPM4 document that had been signed by the Claimant, declaring that all was as it should be and in compliance.

71. Pausing there, one of the Claimant's specific grounds of unfairness (at point 5.13.7 of the Record of Preliminary Hearing) is that the audit unfairly singled him out with the intention of managing him out. I have dealt with the general allegation of the Claimant being managed out already (which also deals with point 5.13.9), but in terms of the suggestion that this audit was targeted at the Claimant, I am not satisfied that this is demonstrated on the evidence. The audit report, supported by Mr Gathergood's evidence, is clear, that (p276a):

> "...the brief was to identify any gaps in relation to the delivery of the contracted services on site and whether this was able to be evidenced from the paper or electronic records management systems in place."

72. I accept Mr Sellwood's point that, if the Claimant's paperwork had all been in order, the audit would have shown as much, and therefore no issue regarding the Claimant and his conduct would have resulted. I therefore find that the audit was not targeted at the Claimant in order to force him out of the Respondent's employment.

73. Mr Gathergood undertook an investigation meeting, and followed this with the production of a report. I note the Claimant's allegation on p406 that the report was biased and inaccurate. No further specifics have been raised other than this general allegation. I can see nothing on the evidence in front of me, and specifically the audit report or investigation report, that would lead me to be able to make a finding that the audit was biased and/or inaccurate.

74. The Claimant raised issues around a lack of training and lack of oversight by his AE during the internal process. These matters were considered and explored by the Respondent; the AE was invited to provide details of his audits and dealings with the Claimant during the disciplinary process – p299. Further, the Claimant's training was a matter of record, stored by the Respondent.

75. On the balance of probabilities, I therefore find that the Respondent had reasonable grounds for holding the genuine belief that the Claimant was guilty of the conduct with which he was charged, and that those grounds followed a reasonable investigation.

Sanction – the Claimant's specific points

76. I will deal first with the Claimant's specific points as recorded within the Record of Preliminary Hearing of 9 December 2020. These points generally are ones that the Claimant raises in mitigation as to why dismissal was not an appropriate sanction.

Issues regarding the live final written warning

77. First, at point 5.13.2, the Claimant raised that he had not been trained in hot works prior to the final written warning being issued.

78. It was known by the Respondent that the Claimant had previously successfully completed a Hot Works Permit in 2011, complete with the RAMS information. The conclusion that the Claimant did not need training in order to complete such a permit was therefore a reasonable one.

79. Second, at point 5.13.3, the Claimant argued that being issued with a final written warning was too severe.

80. In line with the case law I have set out above, I cannot go behind a preexisting final written warning unless it was "*issued for an oblique motive or was manifestly inappropriate*". There is no evidence before me to enable me to find that this was the case here. I also note the ramifications, or potential ramifications, of the incorrect/incomplete filing of a Hot Works Permit, as set out by Mr Patel and quoted above already. Given the environment within which the Claimant worked, I am not satisfied that it was manifestly inappropriate to issue a final written warning.

81. Thirdly, at point 5.13.5, the Claimant alleged that recommendations made by Mr Patel to the Respondent following the final written warning being issued were not included within his outcome letter to the Claimant. I am not satisfied that, even if I were to find that it was unfair to exclude recommendations from the Claimant's final written warning letter, that this could affect the fairness of the Claimant's ultimate dismissal.

82. For the purposes of completeness however, I find that there was nothing so unfair as to be outside the band of reasonable responses in relation to

recommendations not being specifically included within the Claimant's final written warning letter. Within the letter to the Claimant, he was informed that the "*lack of consistent and appropriate safety briefings*" had been taken into account, effectively as mitigation, and that "*recommendations have been made for the site lead to put in place which will be communicated via the Operations Director*". Although the recommendations could have been specifically set out to the Claimant, it was not outside the band of reasonable responses available to a reasonable employer to simply refer to them as the Respondent did here.

83. Fourthly, at point 5.13.10, the Claimant raised that the disciplinary notes from the meeting that led to the final written warning were not made available to him prior to him drafting his grounds of appeal against that warning.

84. Again, I am not satisfied that, even if I were to find that this allegation were correct, it could impact the fairness of the ultimate dismissal for a separate act of misconduct. However, for completeness, I will deal with this point.

85. At the appeal regarding the final written warning, the Claimant had every opportunity to raise any matter he wanted. The Claimant told me in his evidence that he felt he was confined to his grounds of appeal. However, on the evidence I have seen and heard, it seems that was an impression he formed, rather than the Respondent doing or saying anything to indicate that he was so confined. I note that the appeal officer, at the end of that meeting, stated "*I think I am more or less there unless [you have] got anything else to add*" to which the Claimant answered "*No, unless Kojo [his representative] has*". Kojo then made an additional comment, recorded at p223. I therefore find that the Claimant had the opportunity to raise any issue at the appeal, having by that time seen the notes of the disciplinary hearing. Therefore, on balance, he was not disadvantaged by receiving the disciplinary minutes after entering his grounds of appeal, and there was no unfairness as alleged in that process.

<u>Issues regarding the electrical paperwork allegation</u>

86. Firstly, at point 5.13.1, the Claimant raised that he was not given training to reach an acceptable performance level of a Maintenance Technician and/or AP.

87. The Respondent was aware that the Claimant had completed his AP training every three years, the most recent time being in October 2017. It therefore knew that he was up to date on his AP training.

88. In terms of his training in his position of Maintenance Technician, the Claimant stated that he did not have training on how to fill in the EPM4 and had never come across one in 18 years.

89. The wording on the EPM4 is clear, to the extent that the declaration confirms the signatory's understanding that the emergency lighting at Amersham Hospital complied with the requisite British Standards. The Claimant had

many years' experience, and therefore was able to determine whether or not he deemed the emergency lighting to be in compliance. Had he any questions over the completion of the EPM4 form, I find it to have been reasonable of the Respondent to conclude that he was sufficiently experienced to be able to refuse to sign the form and therefore could have avoided signing the EPM4 form if he had any concerns whatsoever with that form.

90. I conclude that it was reasonable for the Respondent to conclude that no specific training was needed in order for the Claimant to either understand the EPM4, or to refuse to sign it if he did not understand it.

91. Secondly, at points 5.13.4 and 5.13.6, the Claimant complained of his long suspension and re-suspension.

92. It was not unreasonable for the Claimant to be suspended on full pay regarding the ladder incident whilst the matter was explored further. This is not contrary to any of the Respondent's policies, or indeed the ACAS Code regarding disciplinary processes.

93. In light of the timing of the coming to light of the electrical paperwork incident, and the conclusions within the 2019 audit, it was also not unreasonable for the Claimant to be re-suspended pending investigation into that paperwork. I again record that it is a fact that this paperwork was not accurate, and note the importance of accurate paperwork given the specific environment in which the Claimant worked.

94. The Claimant was suspended for a relatively long time, and the ACAS Code suggests that periods of suspension should be as short as practicable. However, it was reasonable for the Respondent to postpone the disciplinary process whilst dealing with the Claimant's grievance. Once that grievance process was completed, there was no delay in recommencing the disciplinary process. I also note that the few minor delays following that recommencement were at the Claimant's request.

95. Therefore, although unfortunate, it was not unfair for the Claimant to be suspended for the duration of his suspension period.

96. Thirdly, at point 5.13.8 the Claimant stated that not enough consideration was given to the role of an AP in terms of responsibilities and training required. This appears to be a repetition of 5.13.1 regarding the weight given to training, or lack thereof. I therefore repeat my conclusion that, firstly, the Claimant was up to date with his AP training, and, secondly, it was not outside the band of reasonable responses for the Respondent to conclude that no specific training was needed to avoid the Claimant's error in the signing of the EPM4.

97. Fourthly, at point 5.13.11 the Claimant asserted that the appeal hearing and outcome failed to give due weight to the matters raised in his grounds of appeal.

98. As I have already mentioned, the appeal outcome letter from Mr Bancroft is reasonably detailed, and goes through each of the Claimant's points of appeal, dealing with them in turn. The Claimant accepted this in crossexamination.

99. Although the Claimant may disagree with the findings that Mr Bancroft made, I am satisfied that Mr Bancroft's appeal hearing and outcome did not fail to give due weight to matters raised in the Claimant's appeal.

100. Fifthly, at point 5.13.12, the Claimant disputes that the sanction imposed was reasonable. I deal with this point below, in "Sanction- overview".

Sanction – overview

101. The relevant question is not whether a lesser sanction was available, but whether dismissal was outside the band of reasonable responses available to a reasonable employer. In other words, I must ask myself whether no reasonable employer would have dismissed the Claimant in the circumstances. I am not permitted to substitute my view for that of the Respondent.

102. I bear in mind that the Claimant had a live final written warning on his file. Although the warning was near expiry at the time of the electrical paperwork allegations, it was still a live final written warning at the date of the decision to dismiss the Claimant.

103. I also bear in mind the environment within which the Claimant worked, and within which the Respondent operates. I accept that health and safety is critical in a hospital environment, not only for the safety of staff, but for patients and visitors too. The Claimant accepted in cross-examination, and during the internal investigation, that all employees are responsible for health and safety, and that this constituted an important part of his role.

104. The Claimant's length of service was taken into account by the Respondent's decision makers. It did not fall out of the band of reasonable responses for them to consider that someone with the Claimant's experience should have known better than to complete the EPM4 as he did, and that this is a scenario in which actually length of service (and therefore experience) stands against an employee.

105. Further, the Claimant's disciplinary record was considered along with his length of service. However, the Respondent was entitled to take account of the final written warning that was still live at the time the decision to dismiss was taken.

106. Although the Claimant accepted fault for his actions in signing the EPM4 during this hearing, and accepted that he had made a mistake and regretted signing it, this was not something that he did during the course of the internal process with the Respondent. It was reasonable for Mr Smith and Mr

Bancroft to take the Claimant's lack of contrition into account in concluding that he was a future risk, in light of his final written warning and the lack of insight he demonstrated during that internal process.

107. I therefore conclude that dismissal was not outside the band of reasonable responses available to a reasonable employer.

Procedural fairness

108. The Claimant has made a point that the Respondent's processes fell outside the scope of the ACAS Code, and outside the Respondent's own policies. I have highlighted the relevant parts of both those policies already.

109. The Respondent's policy does not give the Claimant the right to have notice of an investigation meeting, nor does the ACAS Code. Further, the Respondent's policy does not give the right to be accompanied to an investigation meeting, and neither does the ACAS Code. These were two specific points raised by the Claimant.

110. The Claimant also argued that he should have been given a chance to improve as prescribed under the ACAS Code. This part of the Code relates to capability/poor performance issues, whereas this case dealt with a conduct issue. The point raised by the Claimant here is therefore not relevant to the facts of this case.

111. I therefore find that the process undertaken by the Respondent was fair and reasonable in all the circumstances.

112. In light of those findings, I conclude that the Claimant's dismissal was fair both substantively and procedurally. Therefore, the Claimant's claim is dismissed. There is therefore no need for me to consider the limited points of remedy within the above list of issues.

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Employment Judge Shastri-Hurst

Date 14th October 2021

REASONS SENT TO THE PARTIES ON
28th October 2021

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THY

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FOR THE TRIBUNAL OFFICE