EMPLOYMENT TRIBUNALS

Claimant: **Mr Paul Lauder**

Respondent: **Queen Mary's University of London**

Heard at: **East London Hearing Centre**

On: **9 and 10 September 2021**

Before: **Employment Judge Russell**

Representation:
For the Claimant: **Mr B Uduje (Counsel)**
For the Respondent: **Ms V Brown (Counsel)**

JUDGMENT having been sent to the parties on 25 October 2021 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

1 The Claimant brought claims of unfair dismissal and race discrimination. The race discrimination claims were dismissed upon withdrawal by Employment Judge Taylor on 30 January 2020. The Claimant subsequently unsuccessfully sought to reinstate the race discrimination claims. As there was no race discrimination claim, I heard the case sitting alone and not with the non-legal members originally listed (Mr Lush and Mr Purewal).

2 I heard evidence from the Claimant on his own behalf and read a written statement submitted by Mr Jaime Figueroa Lora. For the Respondent, it heard from Mr Gary Pritchard (Assistant Director for Estates and Facilities Operations) and also from Professor Mauro Perretti (Professor of Immunopharmacology & Dean for Research and Research Impact). I was provided with an agreed bundle of documents and read those pages which we were taken in the course of evidence.

Findings of Fact

3 The Respondent is a University in the east London. It operates from multiple buildings which are accessed by students, members of staff and members of the public, including those with disabilities and for whom English is not their first language.

4 The Claimant commenced employment as a planned preventative maintenance (PPM) operative on 1 August 2019. He was initially employed by Mitie Group Plc but subsequently TUPE transferred to the Respondent's employment. A copy of his job description appears in the bundle of documents. It is not in dispute that the Claimant was responsible for carrying out safety critical checks on the Respondent's premises and properly to record the results. The Claimant's job also required him to submit written service and log sheets as required in order to comply with statutory requirements. I accept that the Respondent attached great importance to the checks and tests as part of its responsibilities for health and safety and discharge of its statutory obligations to those attending its premises.

5 The Respondent's disciplinary procedure gives examples of misconduct which include breaches of health and safety or hygiene rules, acting in a manner potentially dangerous to others, refusal/repeated failure to follow a reasonable management instruction, failure comply with policies and conduct likely to bring the Respondent into serious disrepute. Depending on the seriousness of the breach, it could amount to misconduct, serious misconduct or gross misconduct.

6 The Claimant worked well and without significant performance concerns until around December 2018. At that time, he was issued with a letter of concern setting out issues about his adherence to his supervisor's instructions and also the speed with which he worked. The Claimant did not accept that the criticisms were well founded and sought a meeting with the director. The agreed outcome of that meeting on 16 January 2019 was that there would be further investigation as to the amount of work allocated to the Claimant and speed of work of others within the team. This further investigation did not take place as it was overtaken by the events set out below.

7 Prior to around November 2018, the Respondent kept hard copy, paper records of statutory checks which were passed to the PPM administrator for appropriate logging and filling. The process changed with the introduction of the new Avanti system. The Respondent provided training on the new Avanti system to the Claimant and others in his team which included a description of the test sheets to be completed when undertaking emergency light testing. A slide in the training presentation expressly told the PPM operatives that test sheets should be kept in the office unless being used on site that day, they should be returned to the office at the end of the working day by the latest and that maintenance operatives should not leave sheets in their locker or in their workshops. The training made clear that if tickets for work needed to be raised, the sheet should be passed to the PPM administrator and not simply put away. The training did not expressly address the date by which the information should be uploaded onto the system.

8 There were problems with the introduction of the new Avanti system which lasted until at least December 2018. At the same time, there were also significant management issues within the team which had given rise to general performance problems. As a result, until December the paper based system continued to apply and the PPM administrator was still providing considerable assistance to the maintenance team with submitting relevant paperwork. The administrator relied on the maintenance operatives to bring the paperwork back for her to process but this was not always done in a timely manner due to the lack of a team supervisor. On balance, I find that the teething problems with the introduction of Avanti applied not only to the Claimant but to the PPM team more generally and that there was a widespread issue with compliance in the early days of Avanti's introduction.

9 On 10 January 2019, Mr Wheatley, an internal fire officer, emailed the Claimant's line manager (Mr Dow) to raise concern about the emergency lighting and fire door records for the People's Palace, one of the Respondent's properties. Mr Wheatley's specific points were that failed emergency lighting which had been identified in October and November 2018 had not been replaced and there was no process in place whereby a ticket to replace failed emergency lighting would be raised. Mr Wheatley was also concerned that records indicated that fire doors had not been inspected since January 2018 and there was no planned future inspection. As there had recently been a notice of deficiency letter from London Fire Brigade identifying maintenance issues, Mr Wheatley concluded: "**we must ensure that a robust system is in place which demonstrates compliance in these areas and this must be initiated with immediate effect**."

10 Mr Dow established that it was the Claimant who had undertaken the November 2018 check of emergency lighting at the People's Palace and that he had not raised a ticket for the necessary repair work. Mr Dow also discovered that the Claimant had not uploaded some of the documents relating to emergency lighting checks undertaken in December 2018. Although not documented in writing, I accept as inherently plausible that due to this new information, Mr Dow decided that there should be a disciplinary investigation into the Claimant's conduct rather than proceeding with the anticipated discussion about his performance following the letter of concern and the Claimant's meeting with the director.

11 Ms Maria Gallagher was appointed to conduct the disciplinary investigation. By letter dated 1 March 2019, the Claimant was told that the areas of concern were that the Claimant had not been undertaking work which had been specifically assigned to him as defined within his job description, including statutory compliance matters in emergency lighting and fire. The disciplinary allegations were failure to follow EAF policy and procedure in relation to statutory compliance and a failure to complete work assigned appropriately. No specific internal policies were identified. The Claimant was informed that these were serious allegations which if proven would constitute gross misconduct and or serious misconduct.

12 On 15 March 2019 the Claimant was suspended.

13 Ms Gallagher interviewed the Claimant, Mr Dow twice, the PPM administrator and then re-interviewed the Claimant. Following her investigation, she produced a report dated May 2019 which is included in the bundle. In her introductory summary, Ms Gallagher set out a chronology of events broadly as above, identified the information she had considered and the source of that information. Ms Gallagher specifically investigated the training provided to the Claimant and PPM operatives and was satisfied that there was a robust schedule of training through toolbox talks and other methods. She attached as appendices to her report, evidence that the Claimant had attended training on Avanti training 26 September 2018, 10 October 2018, 8 November 2018 and 13 December 2018. Ms Gallagher concluded that appropriate training had been provided to the Claimant. Ms Gallagher set out the concern that the Claimant had either not completed or not uploaded the required paperwork for checks in December 2018 and January 2019 and that the hard copy paperwork could not be located. Ms Gallagher fairly recorded the Claimant's explanation that he had carried out the checks with manual paperwork but there were problems uploading on Avanti which he had raised and had passed the paperwork to the office but that it had subsequently gone missing. Ms Gallagher recorded that the Claimant

had been repeatedly chased for the missing paperwork and was offered assistance by the PPM administrator in uploading the documents onto Avanti.

14 In summary, Ms Gallagher concluded that the Claimant had either not undertaken the checks or not completed the appropriate paperwork for statutory compliance, that he failed to recognise the seriousness of the risk to the Respondent and he sought to blame others rather than accept his responsibility for the submission of paperwork. There was a case to answer of gross misconduct under the disciplinary policy.

15 The evidence relied upon by Ms Gallagher is set out in appendices to her report. At appendix 3, Mr Dow listed the outstanding tasks not completed by the Claimant during the period December 2018 to January 2019 which amounted to almost half of the work allocated. At appendix 8i, on 21 January 2019 the Claimant had explained that the apparently large number of uncompleted tasks may be misleading as it arose from his practice on Avanti uploads. The Tribunal accepts that many of the tasks on the list provided by Mr Dow may not necessarily have been outstanding but equally nor had the outcome of those tasks been uploaded or recorded on the Respondent's system.

16 On 10 June 2019, the Claimant was invited to a disciplinary hearing to answer allegations of failure to follow policies and procedures in relation to statutory compliance and failure to complete work assigned to him appropriately. He was informed that the allegations, if proven, could be gross misconduct and/or serious misconduct. This letter included four additional bullet points: failure to comply with Queen Mary's policies; breaches of health, safety or hygiene rules or acting in a manner potentially dangerous to others; refusal or repeated failure to follow a reasonable managed instruction; and behaviour which was likely to bring Queen Mary's into significant disrepute. Each is an example of misconduct as defined in the disciplinary procedure. On balance, I find that there were not additional allegations of misconduct as they did not add to the substantive case against the Claimant, rather they clarified the specific rules said to have been broken in order to help him better prepare for the disciplinary hearing.

17 The disciplinary hearing was conducted by Mr Pritchard on 28 June 2019. Ms Gallagher provided a summary of the management case based upon her investigation report in which she made it clear that the conduct issue was the paperwork missing for the period December 2018 to February 2019. Ms Gallagher also summarised the Claimant's explanation about the problems with Avanti. Mr Pritchard clarified that the issue was not about whether the work had been done, rather that there was no evidence to show that it had completed. Ms Gallagher conformed that this correct and as a result, the Respondent was in breach of statutory requirements putting it in a vulnerable position. During the disciplinary hearing, the Claimant accepted that he had had all relevant training, apologised and assured Mr Pritchard that it would not happen again.

18 Consistent with the contemporaneous note of the disciplinary hearing and Mr Pritchard's oral evidence, I find that the principal issue was the missing paperwork for the emergency lighting checks in December 2018 with particular focus on the fact that the Claimant said that he had taken it home, whether he had taken sufficient steps to safeguard the documentation when brought back to work and whether or not the paperwork had been provided to the PPM administrator. In the notes of her investigatory interview, which were before Mr Pritchard, the PPM administrator denied that the Claimant had given her the paperwork, saying that the Claimant had provided his February returns the previous day, that January's paperwork from the Claimant was still "hit and miss" and

there had been earlier problems. The PPM administrator had told Ms Gallagher that the Claimant and one other maintenance operative had been leaving it until the end of the month or into the next month to submit paperwork to her. This had caused paperwork to be lost when the other maintenance operative had been hospitalised. When asked whether there was a time frame, she said that it was by the end of the month although most of the time people would send paperwork to her as they finished.

19 During the disciplinary hearing, the Claimant explained the problems caused by the introduction of the Avanti system at a time when the team was busy. The Claimant was asked a series of appropriate questions with regard to the missing paperwork but there was also an in-depth analysis of the broader allegation of work left outstanding by the Claimant. Mr Pritchard's initial position when giving evidence was that his focus at the disciplinary hearing was the failure to upload documents, in particular those documents that the Claimant had taken home and had failed to safeguard. During cross-examination, however, he repeatedly referred to appendix 3 of the investigation as showing that there were 97 jobs allocated to the Claimant which he had not undertaken in the preceding 12-month period. Indeed, Mr Pritchard made clear that part of his reason for deciding that the Claimant should be summarily dismissed for gross misconduct was the history of non-compliance over a 12 month period; this was not a "one off" limited to the absence of paperwork for the emergency lighting checks in December 2018. The other reason for finding this gross misconduct was because it was a breach of the health and safety policy.

20 During the course of his evidence explaining why he had decided to dismiss the Claimant, Mr Pritchard also referred to and relied upon what he described as a "zero-tolerance" policy in respect of compliance with statutory obligations. In his witness statement, Mr Pritchard said that the Respondent had made clear to staff that they would be adopting a zero-tolerance approach to failures which related to the University's compliance with its health and safety obligations. However, in cross-examination, Mr Pritchard accepted that this was not a policy as such but a drive from the Principal and one of his key objectives when he joined in March 2019. There is no evidence before that this zero-tolerance approach was adopted as a policy or, more importantly, that employees had been made aware that henceforth a zero-tolerance approach would be adopted. The introduction of a zero-tolerance approach from March 2019 is consistent with Mr Wheatley's email in January 2019 which stated that robust procedures needed to be put in place with immediate effect. This, however, all post-dated the conduct for which the Claimant was ultimately dismissed.

21 By letter dated 5 July 2019, the Claimant was informed that he had been summarily dismissed for gross misconduct as he had failed to follow policy and procedure in relation to statutory compliance and failed to complete work assigned to him appropriately. The letter stated that summary dismissal was the appropriate sanction due to the gravity of the failures, the serious potential consequences of the Claimant's inaction, the risk to the reputation of the Respondent and his wilful non-compliance with statutory health and safety requirements. Whilst the Claimant accepted that there was documentation missing, Mr Pritchard rejected the Claimant's explanations that this was due to problems with Avanti, operational problems or that he had given the paperwork to the PPM administrator. Instead Mr Pritchard concluded that the Claimant had the appropriate skills, there was no reason why the Claimant could not have completed the paperwork, he had been given relevant training and a dedicated workstation to do his paperwork. The Claimant had failed to accept responsibility for his own inaction and this, along with a failure to adhere to repeated management instructions, had resulted in an irretrievable breakdown in trust and

confidence which made summary dismissal the appropriate sanction despite the Claimant's mitigation.

22 The Claimant appealed against dismissal by email dated 16 July 2019. He said that the sanction was too severe, relying on the case of another maintenance operative who had also failed to comply with documentary requirements in carrying out safety critical repairs, in that case asbestos, potentially bringing the employer in disrepute, but who had only received a final warning. The Claimant also asserted that there had been a procedural failure as there had not been an informal stage and/or the earlier meeting with the Director had not properly been followed up and suggested that there was additional evidence which had now come to light.

23 The appeal was heard by Professor Perretti on 4 September 2019. Mr Pritchard presented the management case and in doing so again relied upon on what he said was the Respondent's zero-tolerance approach. Professor Perretti conducted the appeal fairly and appropriately within the limited scope permitted by the process: it was not a full re-hearing but rather a review of fairness that was limited to the specific grounds put before him. Moreover, the appeal hearing did not hear or consider evidence as to consistency of sanction because as the HR representative for the Respondent had said that such evidence was not relevant and could not be considered. Although Professor Perretti rejected the conclusion that there had been wilfulness in the Claimant's conduct, dismissal was nevertheless upheld.

Law

24 The employer must show a potentially fair reason for dismissal within section 98 of the Employment Rights Act 1996. Conduct and/or capability are potentially fair reasons.

25 The legal issues in a conduct unfair dismissal case are well established in the case of **BHS –v- Burchell** [1978] IRLR 379, namely:

> (1) did the employer genuinely believe that the employee had committed the act of misconduct?
> (2) was such a belief held on reasonable grounds? And
> (3) at the stage at which it formed the belief on those grounds, had the employer carried as much investigation as was reasonable in all the circumstances of the case?

26 Section 98(4) of the Employment Rights Act 1996 requires the Tribunal to determine whether the Respondent acted reasonably or unreasonably in treating any such misconduct as sufficient reason for dismissal in accordance with the equity and substantial merits of the case. This will include consideration of whether or not a fair procedure has been adopted as well as questions of sanction.

27 In an unfair dismissal case it is not for the tribunal to decide whether or not the claimant is guilty or innocent of the alleged misconduct. Even if another employer, or indeed the tribunal, may well have concluded that there had been no misconduct or that it would have imposed a different sanction, the dismissal will be fair as long as the **Burchell** test is satisfied, a fair procedure is followed and dismissal falls within the range of reasonable responses (although these should not be regarded as 'hurdles' to be passed or failed).

28 The range of reasonable responses test or, to put it another way, the need to apply the objective standards of a reasonable employer, applies as much to the adequacy of an investigation as it does to other procedural and substantive aspects of the decision to dismiss, see **Sainsbury's Supermarkets Limited v Hitt** [2002] IRLR 23, CA. The more serious the implications for the Claimant and the more challenge there is to the facts of the case then perhaps the greater the investigation required. An investigation is not limited to issues of guilty or innocence, it may also require further investigation to put misconduct into proper context including investigating points raised in mitigation but it is not necessary for the employer to investigate every point made by the employee in his defence.

29 The test for the range of reasonable responses is not one of perversity but is to be assessed by the objective standards of the reasonable employer rather than by reference to the tribunal's own subjective views, **Post Office –v- Foley, HSBC Bank Plc –v- Madden** [2000] IRLR 827, CA. There is often a range of disciplinary sanctions available to a reasonable employer. As long as dismissal falls within this range, the Tribunal must not substitute its own views for that of the employer, **London Ambulance Service NHS Trust v Small** [2009] IRLR 563. However, the band of reasonable responses is not infinitely wide and it is important not to overlook s.98(4)(b) the provisions of which indicate that Parliament did not intend the Tribunal's consideration of a conduct case to be a matter of procedural box ticking and it is entitled to find that dismissal was outside of the band of reasonable responses without being accused of placing itself in the position of the employer, **Newbound –v- Thames Water Utilities Ltd** [2015] IRLR 734, CA.

30 A finding of gross misconduct does not inevitably mean that dismissal will fall within the range of reasonable responses, consideration must be given to mitigating factors which may be such that dismissal is not reasonable, **Brito-Babapulle v Ealing Hospitals NHS Trust** [2013] IRLR 854. The Tribunal must not abdicate or short its tasks in applying section 98(4) to the facts of this particular case.

31 Relevant factors in the overall assessment of reasonableness under s.98(4) include, amongst other matters going to the equity of the case overall:

31.1 the conduct of an employee in the course of a disciplinary process, including whether they admit wrongdoing and are contrite or whether they deny everything and go on the offensive.

31.2 disparity which may arise (i) where an employer has led an employee to believe that certain categories of conduct will either be overlooked or at least not be dealt with by the sanction of dismissal; (ii) where evidence about decisions made in relation to other cases supports an inference that the purported reason for dismissal is not the real or genuine reason; and/or (iii) decisions made by an employer in truly parallel circumstances may be sufficient to support an argument in a particular case that it was not reasonable to adopt the penalty of dismissal that some lesser penalty would have been appropriate in the circumstances, **Hadjioanou v Coral Casinos Ltd** [1981] IRLR 352.

31.3 mitigating factors, including length of service, disciplinary record and whether the employee believed or had reason to believe that what they did was permitted and, therefore, whether they were doing something wrong.

32 In deciding whether the dismissal was fair or unfair, the tribunal must consider the whole of the disciplinary process. If it finds that an early stage of the process was defective, the tribunal should consider the appeal and whether the overall procedure adopted was fair, see **Taylor –v- OCS Group Limited** [2006] IRLR 613, CA.

33 The Tribunal must have regard to the ACAS Code of Practice which sets out basic principles of fairness to be adopted in disciplinary situations, promoting fairness and transparency for example in use of clear rules and procedures.

34 If a dismissal is unfair due to procedural failings but the appropriate steps, if taken, would not have affected the outcome, this may be reflected in the compensatory award, **Polkey v A E Dayton Services Ltd** [1987] IRLR 503, HL. This may be done either by limiting the period for which a compensatory award is made or by applying a percentage reduction to reflect the possibility of a fair dismissal in any event.

35 Section 122(2) of the Employment Rights Act provides for reduction of the basic award where the Tribunal considered that any conduct of the complainant before the dismissal was such that it would be just and equitable to reduce it. Section 123(6) provides that if 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.

36 The correct approach to reductions was given in **Steen v ASP Packaging Ltd** [2014] ICR 56. For there to be any reduction, the Tribunal must identify the relevant conduct and find whether or not it is blameworthy. This does not depend upon the Respondent's view of the conduct, but that of the Tribunal.

37 For section 123(6), the Tribunal must find that the conduct caused or contributed to dismissal to some extent. For both sections, it must consider to what extent it is just and equitable to reduce the award. Although not necessarily required, the reduction to each award will typically be the same unless there is a good reason to do otherwise, **Charles Robertson (Developments) Ltd v White** [1995] ICR 349.

38 The Tribunal may adjust an award by up to 25% in respect of an unreasonable failure to comply with the requirements of a relevant ACAS Code (here on disciplinary and grievance procedures).

39 The appropriate order for deductions is as follows:-

(i) Calculate the total loss suffered;
(ii) Deduct amounts received in mitigation and payments made by the formal employer other than excess redundancy payments;
(iii) Make any **Polkey** deductions;
(iv) Make any adjustment for failure to follow statutory procedures;
(v) Make any deduction for contributory fault;
(vi) Apply the statutory maximum.

Conclusions

40 Having regard to my findings of fact as set out above, I conclude that Mr Pritchard genuinely believed that the Claimant was guilty of an act of misconduct rather than this

being a capability issue. Whilst it is possible that another employer may have treated it as a part of the ongoing capability investigation, the reason for dismissal is the knowledge and belief of the person who decided on dismissal. The dismissal letter and his oral evidence make clear that Mr Pritchard actually and genuinely believed that the Claimant had the skill set, the training and the operational ability to undertake and properly report the safety critical checks required for statutory compliance. Mr Pritchard concluded that the Claimant had wilfully failed to do so. This is a classic conduct case.

41 In deciding whether Mr Pritchard's belief was reasonable based upon a reasonable investigation, I took into account the points raised by Mr Uduje on behalf of the Claimant that the Claimant's failure properly to record the paperwork from the checks was not his fault and that there should have been broader investigation into the underlying capability issues. These are not compelling points in a case where Mr Pritchard had considered and rejected the same arguments, finding it to be a conduct and not a capability dismissal. Moreover, I conclude that the investigation by Ms Gallagher was comprehensive and fair. The appropriate witnesses were interviewed to investigate whether the checks had been completed, the proper process for recording the outcome of safety critical checks and that the Claimant's explanations were properly recorded and investigated, not least the Avanti process and training. Section 98 does not require the investigation to be a work of exhaustive perfection, simply to fall within the range of reasonable investigations open to an employer. I conclude that this investigation fell comfortably within that range and that it was reasonably relied upon by Mr Pritchard when he reached his belief that this was an act of misconduct.

42 I must then consider section 98(4) and, in particular, whether the Respondent acted reasonably or unreasonably in treating the Claimant's misconduct as sufficient reason for dismissal in accordance with the equity and substantial merits of the case. The Respondent's disciplinary procedure recognises that not all breaches of health and safety policy will amount to gross misconduct, similarly that not all behaviour likely to bring the Respondent into significant disrepute is necessarily gross misconduct. This to some extent is a matter of common sense: there is a range of culpability and it is for the Tribunal to conclude whether or not this particular conduct was sufficient for the Respondent reasonably to respond by treating it as sufficient reason for dismissal.

43 In reaching his decision to dismiss, Mr Pritchard properly considered but rejected the Claimant's arguments by way of mitigation about performance and Avanti. Whether or not this Tribunal would have reached the same decision is not the correct question. I conclude that it was within the range of reasonable responses for Mr Pritchard to reach the conclusion which he did.

44 However, I conclude that there are two fundamental issues relevant to the equity and substantial merits of the case which take this dismissal outside of the range of reasonable responses on the facts as I have found them. Firstly, Mr Pritchard applied a zero-tolerance policy when considering the Claimant's conduct. There can be no doubt that Mr Pritchard genuinely and passionately believes in upholding the highest possible standards to compliance with statutory health and safety obligations. This may be commendable but it reflected a different approach to that which had applied prior to his appointment and, most importantly, at the date of the Claimant's misconduct. The zero-tolerance drive from the Principal was not communicated to employees and seems to have been applied from the appointment of Mr Pritchard in March 2019. The email from Mr Wheatley in January 2019 raised concerns about safety checks going beyond the

emergency lights for which the Claimant was ultimately dismissed, for example the failure to check fire doors and the London Fire Brigade notice of deficiency. This way why Mr Wheatley concluded that a robust system to demonstrate compliance must be initiated with immediate effect. That is not consistent with a zero-tolerance or robust system already being applied. The Claimant could not reasonably have been expected to know that a zero-tolerance approach would be applied to him in all of the circumstances of the case.

45 The application of the new zero-tolerance approach on its own may not have been sufficient to take the dismissal outside of the range of reasonable responses but it was also coupled with Mr Pritchard's belief that the Claimant had not completed 97 jobs in the preceding 12-month period. This was clearly a substantial factor in his decision making, tipping the Claimant's conduct from serious to gross due to the belief that there was a historic failure over a lengthy period and not simply a problem in December 2018. In fact, Mr Pritchard's belief was not supported by the evidence before him. The appendix to the investigation report showed a number of jobs outstanding for the Claimant on the system from December 2018, but not necessarily the period for which they had been outstanding. There was equally evidence before him from the Claimant that this was linked with the problems with the Avanti system and his practice of uploading paperwork at the end of the month. The PPM administrator's interview during the investigation gave month end as the timeframe for providing paperwork and made clear that the Claimant was not the only operative who delayed providing paperwork and where paperwork had been lost.

46 It was foolish of the Claimant to fail to use the Avanti system despite the training provided and to persist in maintaining paper records and it was negligent of him to fail to safeguard the paper record of the December 2018 emergency lighting checks. However, by applying a zero-tolerance policy which did not exist at the time of the conduct and in relying upon a historic failure which was not supported by the evidence, Mr Pritchard's decision to dismiss the Claimant fell outside of the range of reasonable responses open to an employer in all of the circumstances of this case. I accept Mr Uduje's submission that Mr Pritchard went straight from finding that there had been non-compliance in relation to statutory obligations and health and safety to a conclusion that this was gross misconduct warranting summary dismissal without properly considering all of the circumstances of the case and, critically, the practice at the time of the misconduct.

47 The appeal by Professor Perretti did not remedy the unfairness. Professor Perretti candidly accepted in cross-examination that it had been wrong to apply the zero-tolerance policy in circumstances where it was new, yet he upheld the dismissal. The appeal did not consider at all the Claimant's disparity argument which was clearly relevant to sanction and may have been consistent with the conclusion that prior to 2019 there was a more relaxed approach to record keeping even in health and safety matters.

48 For those reasons therefore, the claim of unfair dismissal succeeds.

Remedy

49 The Claimant was dismissed in July 2019 and with the exception of some very limited work as an Amazon delivery driver between September and October 2020, he has not worked at all.

50 There is no evidence of any applications for employment. The Claimant accepted in evidence that he had not applied for any work within his professional skill set as he believed that the finding of summary dismissal for failure to comply with statutory obligations would render him unemployable. The Claimant may or may not be correct in his belief but, without even applying for such work, it is hard to know. The Claimant was a skilled and experienced engineer and it is entirely possible that he would still have been able to secure some employment if he had tried. If he had made a number of applications and had been rejected, then he would at least have had evidence of attempting to mitigate his losses. I bear in mind that the burden is on the Respondent to show that the Claimant had failed to mitigate his losses. Although the Respondent has not put forward jobs which it says that the Claimant could have applied for, I accept that the Claimant's admitted deliberate decision not to apply for any work for which he is suitably qualified work (or indeed any other work), is an unreasonable failure to mitigate his losses.

51 I considered for what if any period the Claimant should be compensated, in other words, if he had reasonably mitigated his losses how long it would have taken him to secure alternative employment. The Claimant would have been adversely affected to some extent by the finding of gross misconduct but, set against that, he had particularly valuable and attractive skills and would have been looking for work in summer 2019, a time before the effect of the Covid-19 pandemic. I take judicial knowledge of the significant amount of construction work on which an electrical engineer could be required in the East London area and around, as well as the work which can exist for skilled maintenance operatives in buildings and facilities management more generally.

52 On balance, and doing the best I can on very limited evidence, I conclude that if he had reasonably mitigated his losses, he would have been able to find a job within the period of 6 months following his dismissal.

53 The Claimant was signed off work due to stress between 29 January 2019 and 5 February 2019. He returned to work until his suspension on 15 March 2019. He was certified as unfit for work due to stress-related illness from 6 to 20 February 2020 and from 11 December 2020 until 14 March 2021. There is no other medical evidence before me today. The Claimant said in his oral evidence that he had been so unwell that he had been unfit from work from January 2019 to this day. This is clearly not correct. The Claimant was fit for and in fact attended work between 5 February 2019 and 15 March 2019. I have limited losses to six months from dismissal, namely 5 July 2019 until 5 January 2020. There was no sick note covering the dates within that period and there is no reliable evidence upon which I could conclude that if he had not been dismissed the Claimant would have been unfit for work due to ill-health and in receipt of sick pay. In all of the circumstances, I am satisfied that the Claimant is entitled to compensation based upon full pay for that six month period.

54 Based upon my findings of fact and conclusions, I do not consider that a **Polkey** reduction is appropriate in this case. The dismissal was not unfair due to procedural failings. A fair procedure was followed but the dismissal itself was substantively unfair.

55 I turn finally to the contributory fault. I have concluded that it was foolish of the Claimant to fail to use the Avanti system despite the training provided and to persist in maintaining paper records and it was negligent of him to fail to safeguard the paper record of the December 2018 emergency lighting checks. The Claimant's conduct was a clear and significant contributory cause of Mr Pritchard's decision to dismiss. It is appropriate

that there be a deduction for contributory fault. Doing the best I can and bearing in mind the significant effect of the Claimant's foolish and negligent conduct but weighing the disproportionate reliance of Mr Pritchard on a zero-tolerance policy which did not apply, I find that a 60% deduction is appropriate in all of the circumstances of the case.

56 I do not accept Mr Uduje's submission that the different nature of the basic award renders it just to make no reduction. Considering justice and equity and in the absence of any good reason to the contrary, I find that it is appropriate to apply the same deduction to both the basic award and compensatory award.

57 Having given Judgment and reasons orally at the hearing in the terms set out above, the parties were able to agree the amount of the remedy due to the Claimant.

Employment Judge Russell
Dated: 1 March 2022