# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Browning

**Respondent:** Automobile Association Developments Ltd

**Heard at:** Southampton **On:** 23 and 24 February 2022

**Before:** Employment Judge Cuthbert

**Representation**

**Claimant:** In person
**Respondent:** Ms G Nicholls (Counsel)

# RESERVED JUDGMENT

1. The claim for unfair dismissal succeeds. The basic and compensatory awards shall be reduced by 50% for contributory fault/conduct.

2. The claim for wrongful dismissal succeeds.

# REASONS

**Introduction**

1. The claimant brought claims for unfair dismissal and wrongful dismissal following the termination of his employment without notice for gross misconduct in January 2021.

2. The claimant appeared in person at the hearing and the respondent was represented by Ms Nicholls of counsel.

3. Judgment on liability was reserved, following the conclusion of the hearing on the second day, as there was insufficient time remaining for deliberation and delivering oral judgment. Whilst many of the primary facts were not in dispute, there was a relatively substantial amount of documentation referred

to in evidence, produced during the course of the respondent's disciplinary process; the documentation was not straightforward including, for example, multiple tables/spreadsheets showing details of overtime booked and worked across multiple dates, multiple shift changes and other similar matters, much of which needed to be cross-referenced in order to be properly understood; and the disputes in the case were primarily about the respondent's interpretation of that evidence and the conclusions it reached about the claimant's conduct as a result of that interpretation. I needed to further consider that evidence carefully before deciding the claims, as I explained to the parties following closing submissions.

**Claims and Issues**

4. At the start of the hearing, the issues were agreed, following on from a draft list of issues supplied by the respondent. I agreed with the parties that I would not hear evidence on remedy, save for issues relating to *Polkey* and contributory fault.

5. The issues to be determined were therefore as follows.

*Issues - unfair dismissal*

6. What was the reason for the claimant's dismissal? Was it a potentially fair reason? The respondent primarily submitted that the claimant was dismissed for misconduct.

7. Was the dismissal fair taking into account section 98(4) ERA 1996 and in particular, did the respondent act reasonably in all the circumstances in treating the claimant's conduct as a sufficient reason for dismissal?

8. Was the dismissal fair? In particular:

    a. Did the respondent hold a genuine belief that the claimant was guilty of the misconduct alleged?
    b. If so, were there reasonable grounds for such a belief?
    c. If so, at the time the respondent formed such a belief had it carried out such investigations as were reasonable in all the circumstances?

9. Was dismissal a sanction within the band of reasonable responses for the alleged misconduct?

10. Alternatively:

    a. Was the dismissal justified by some other substantial reason as defined by section 98(1)(b) ERA 1996, namely on the basis that the respondent submits that there was an irrevocable breakdown in trust and confidence between the claimant and the respondent?

b. If so, did the respondent follow a fair procedure in dismissing the claimant?

11. Was it just and equitable for the claimant to receive compensation if his claim were successful? If yes:

a. If the dismissal was found to have been procedurally unfair, did the lack of a fair procedure make any difference to the outcome and if not, should the compensation be reduced to reflect the likelihood that the claimant would have been dismissed in any event (*Polkey v A E Dayton Services Limited).*

b. Did the claimant cause or contribute to his own dismissal pursuant such that it would be just and equitable to reduce any award?

*Issues - Wrongful Dismissal*

12. Was the claimant's dismissal for gross misconduct so as to entitle the respondent to dismiss the claimant summarily?

**Procedure, documents and evidence**

13. I read witness statements from Mark Sims, Customer Performance Manager (CPM) and Lee Simpson, Head of Roadside Operations, on behalf of the respondent and heard oral evidence from each.

14. The claimant did raise a concern at the outset of the hearing about the length of the respondent's witness statements (6,710 words from Mr Sims and 4,076 words from Mr Simpson) exceeding the initial limit set by the tribunal, in a standard case management order dated 6 September 2021, of 5,000 words. I was informed that an extension to the word limit was requested by the respondent and granted by the tribunal prior to the final hearing. In view of the relative complexity of the facts of the case, I would in any event have been prepared to extend the word limit to accommodate the length of the statements.

15. I also read a witness statement from the claimant and heard oral evidence from him.

16. I was provided with an agreed bundle of documents consisting of 342 pages. The page limit was extended by the tribunal, prior to the final hearing, beyond the initial limit set of 100 pages. The increase, as with the respondent's witness statements, reflected the relative factual complexity of the case.

17. The respondent also provided a helpful chronology, a cast list and a glossary to assist the tribunal.

18. References to page numbers in square brackets below [ ] are to those within the agreed bundle

## Findings of Fact

19. I have set out my findings below on the facts relevant to my decision on the issues above. I have not mentioned matters which I did not consider to be relevant. I have focused in particular upon the main allegation against the claimant which the respondent asserted was *"sufficiently serious on its own to constitute gross misconduct"* (para 20 of the Grounds of Resistance), concerning rosters and overtime. There was a further allegation of breach of trust and confidence and third allegation which was not upheld.

20. There was relatively little factual dispute between the parties and the key aspects of the case which were disputed related essentially to the interpretation of documents and to the claimant's motivation in taking certain steps, particularly in terms of the arrangement of his working hours and in respect of overtime he worked.

### *Employment history*

21. The claimant's employment with the respondent commenced on 14 October 1996. He had no disciplinary issues prior to the allegations giving rise to his dismissal.

22. He worked for the respondent in the roles of Roadside Patrol then Technical Specialist Patrol and was promoted to Performance Leader (PL) in May 2018.

23. A copy of the claimant's contract of employment for the PL role was at pages [50] – [55]. This included entitlement to a basic salary, which at the time of the claimant's dismissal was £40,518.60. The written contract itself contained no specific provisions concerning overtime or the division of claimant's duties as between management and roadside Patrol aspects of the PL role (see below).

24. A copy of a PL job description dated December 2017 was at pages [56] – [58]. The claimant readily accepted in evidence, in keeping with the job description and with the evidence of Mr Sims, that the role of PL came with a significant amount of responsibility. The claimant was expected to manage a team of Patrol employees who reported to him and to have oversight of any issues within the Patrol team for which he was responsible. This included ensuring Patrols were working to expected standards and complying with policies.

### *The claimant's duties – management and Patrol*

25. It was common ground that PLs were expected to undertake Patrol duties as part of their role. The claimant's PL role at the relevant times was split

50/50 between roadside Patrol duties and management duties. This division was reflected in various roster documents which recorded the time in the PL shifts he worked as, primarily, either "MGMT" (management shifts) or "RSS" (roadside service shifts).

26. During RSS shifts, the claimant was required to carry out roadside Patrol duties and to attend the respondent's members' emergency breakdowns at the side of the road, as deployed by the respondent's central deployment system. The claimant would attempt to diagnose and fix an issue by the roadside or, where this was not possible, he would arrange for a recovery truck to collect the vehicle.

27. During MGMT shifts the claimant managed his team of Patrols and any issue that arose within his area. This could include people management functions, claims, complaints, health and safety issues, attending meetings, coaching, training, recruitment, project work and other matters requested by his management team.

28. The main period in dispute in the case concerned October and November 2020.

29. I was taken in evidence (particularly in the respondent's detailed witness statements and during cross examination of the claimant on behalf of the respondent) to a considerable number of documents, referred to in the reasons below. These documents were all before the respondent during the disciplinary process and largely concerned the claimant's working hours during the period in question.

***The claimant's rosters***

30. Pages [68] – [69] set out the claimant's original, unamended roster, as issued by the respondent's central deployment team for the six-month period from the start of October 2020 until the end of March 2021. This document, as issued, contained no distinction as between the claimant's MGMT and RSS duties/hours. It was populated with varied hours based upon a repeating pattern of 7 working days, 3 days off, 2 working days, 2 days off, every two weeks (7-3-2-3).

31. The claimant's shifts on that roster all started at either 0730, 0800 or 0830. The shift length varied. For example, the original roster for October 2020 (page [68]) contained shifts of the following lengths:

    a. Shorter shifts of
        - 6.5 hours on six days
        - 7.25 hours on two days
        - 7.75 hours one day
        - 8.25 hours on one day
    b. Longer shifts of

- 10.75 hours on three days
- 11 hours on six days

It was not in dispute that this document was issued by the respondent to the claimant at some point in early September 2020.

32. I asked Mr Sims during his evidence on what basis the original roster was drawn up and I observed (in view of the issues raised subsequently with the claimant, set out below) that it was issued containing a number of longer shifts in the region of 11 hours. He explained that it was generated based on national demand – the respondent's resourcing system *"spits out"* a roster plan, he said.

33. The claimant, as a PL, was empowered to make changes to the respondent's roster system to change rostered working hours, both for those in his team and also for his own shifts, and also to insert pre-planned overtime (see further below under *"Overtime"*).

34. At page [130] was a document produced by the respondent during the disciplinary investigation into the claimant, headed *"Appendix 4 - Change log for October showing change of management shifts to 11.5 hours and rss to 7.75"*. The document set out a table of shift changes made by the claimant on dates between 5 and 14 October 2020 and indicated when, during that period, the claimant made various changes to his original roster and what changes were made. Page [129] showed an amended version of the *actual* hours worked by the claimant in October 2020 (including overtime, as to which, see further below at paragraph 40).

35. The material changes to the roster made by the claimant, shown on page [130] (not including overtime, which is dealt with further below), I summarise as follows:

| Date of shift | Original shift times (page [68]) | Amended shift times (page [130]) | Date change made | Type of shift and change (if applicable) | Hours changed (+ or -) |
|---|---|---|---|---|---|
| 5.10.20 | 0730 – 1545 (7.75 hours) | 0730 – 1530 (7.5 hours) | 15.9.20 | RSS (no change) | -15mins |
| 6.10.20 | 0730 – 1515 (7.25 hours) | 0730 – 1900 (11.5 hours) | 15.9.20 | RSS to MGMT | +3hrs 45mins |
| 11.10.20 | 0830 – 2000 (11 hours)[1] | 0830 – 1615 (7.25 hours) | 15.9.20 | RSS (no change) | -3hrs 45mins |
| 13.10.20 | 0730 – 1845 | 0730 – 1900 (11.5 hours) | 10.9.20 | RSS to MGMT | +15mins |

[1] This is listed on the original roster on page [68] as an 11-hour shift although the actual time is 11.5 hours.

| | | | | | |
|---|---|---|---|---|---|
| | (10.75 hours)[2] | | | | |
| 14.10.20 | 0730 – 1615 (8.25 hours) | 0730 – 1615 (8.25 hours | 13.10.20 | RSS to mixed RSS, MGMT and meeting | No change |

36. Thus, for example, on 6 October 2020, the claimant changed the roster to create a longer shift for himself, which he assigned for MGMT duties, and correspondingly shortened an RSS shift on 11 October 2020. A longer shift on 13 October 2020 was amended from RSS duties to MGMT duties and slightly increased in duration. The respondent took issue with these changes and the claimant's motivation in making them (see further below).

37. The claimant's rosters of actual hours worked during both October and November 2020 were at pages [129] and [128] respectively. These documents further indicated (in addition to the specific shifts identified by the respondent above) that:

    a. the claimant worked long MGMT shifts (0730 – 1900) on a number of other dates, namely 15, 20, 27 and 29 October (page [129]) and on 3, 6, 10, 11, 17, 24 and 25 November (page [128]). Some of these specific shifts differed in length from those which appeared on corresponding dates on the initial roster at page [68]; it was not clear when those other shifts were changed, although it was presumably done by the claimant and there was no suggestion by either party that anyone other than the claimant had changed his roster; and

    b. the claimant worked a number of relatively short RSS shifts (leaving aside overtime) on the following dates in the same period: 1, 5, 9, 11, 12, 19, 26 and 28 October (page [129]), and on 3, 7, 8, 9, 21, 22, 23, 26 and 30 November (page [128]). Some of these shifts again differed in length to those originally allocated in the initial roster on page [68]. Again, it was not apparent when they were changed but there was no suggestion that they were changed otherwise than by the claimant.

38. In addition, I noted that, overall, the number of longer shifts actually worked by the claimant during October and November 2020 (excluding overtime) remained **almost the same** as had appeared on the original unamended roster issued by the respondent. In particular:

    a. the original October 2020 roster at page [68] contained a total of **nine** longer shifts (listed as being 10.75 hours or 11 hours), and the actual worked roster as amended by the claimant (leaving aside overtime), at page [129], contained long shifts on 6, 10, 13, 15, 20, 24, 25, 27

[2] Again, the actual time (11.25 hours) appears longer than the time listed on page [68].

and 29 October (again, **nine** longer shifts). The three longer shifts worked on 10, 24 and 25 October were RSS shifts and the remaining six were MGMT shifts.

b. the original November 2020 roster at page [68] generated by the respondent contained a total of **six** longer shifts (listed as being 10.5, 10.75 hours or 11 hours), and the actual roster as amended by the claimant (leaving aside overtime), at page [128], contained similarly long shifts on 3, 6 10, 11, 17, 24 and 25 November (**seven** longer shifts, just one more). All of the longer shifts in November 2020 were worked as MGMT.

39. As such, whilst the dates of some of the claimant's longer shifts did change from the original roster, the claimant only created one **additional** longer shift for himself during October and November 2020, as compared to his original roster prepared and issued by the respondent. The longer shifts were predominately worked at MGMT shifts.

***Overtime***

40. The respondent operated various different types of overtime during the relevant period. Overtime was paid in addition to basic salary, as would be expected.

41. It was not in dispute that, prior to 1 November 2020, the claimant was working under a type of overtime arrangement called Paid Per Job (PPJ). This was said on various occasions in evidence by both parties to be a *"PPJ contract"* although there were no documents in the bundle which set out the basis of this arrangement and it was not mentioned in the claimant's contract of employment noted above. The claimant did mention at the hearing that he believed that there was a document in existence which set out the basis of the PPJ arrangement but it was not before me and in any event the relevant basis of the PPJ arrangement did not seem to be in dispute.

42. The PPJ arrangement operated on the basis that the claimant received a fixed fee for each job which he completed during a period of PPJ overtime. Mr Sims stated that the fee was £46 per job. The PPJ arrangements were such that during busy periods, the number of jobs which could be completed could make this a lucrative type of overtime, compared to standard overtime which was available to those not on the PPJ arrangement and which was simply paid on an hourly-rate basis. Conversely, if there was no work available during a PPJ overtime period, the claimant would not be paid.

43. The respondent's evidence was that the claimant ceased to work overtime on a PPJ basis from 1 November 2020 onwards and was then simply paid on an hourly-rate basis (and it was said all PPJ arrangements across the

respondent were ended on that date). This was not disputed by the claimant.

44. There were in turn apparently two main types of circumstance in which overtime could arise within the respondent over the relevant period, including for those on PPJ arrangements:

    a. **'pre-planned'** overtime was placed into the roster prior to the day when it would be worked and then activated on the day; and

    b. '**stop-on'** overtime was where, if there was work outstanding or a high level of demand in the area in which the roadside Patrol was operating when their shift was due to end, the Patrol could stay on, after their shift would otherwise have ended, to complete stop-on overtime[3].

    In either case, the claimant's PPJ arrangement would give rise to payment for each job done during the period of overtime, as already indicated.

45. On 22 May 2020, shortly after the start of the COVID pandemic, which gave rise to a significant downturn in the respondent's business, an email was sent by the respondent to *"all PPJ patrols"* (including the claimant) which included the following (pages [227] – [228]):

> *The current context means we're having to run to keep up with the changing situation, both in terms of the guidance issued by government, and how the public, including our customers, responds to it. Your patience and dedication are key to serving our customers when they need us.*
>
> *Many of you have asked questions relating to the availability of PPJ work and the future of the scheme.*
>
> *Our approach to meeting the needs of our customers is firstly to use normal time hours then standby and overtime, and then PPJ before looking to overflow work to garages. With where we are right now with workload, we have sufficient capacity by only using normal time, standby and overtime…*
>
> *As a reminder, the PPJ scheme is a non-contractual means of generating flexible hours. When there is sufficient work, all members of the scheme benefit from the opportunity to work hard and earn more money, but when workload is limited it is not possible to offer this opportunity. This is one of the key characteristics of the scheme. If more certainty is the most important thing to you, there are of course other options available.*

[3] This type of overtime was also referred to, interchangeably, as **"standby"** overtime, for example in paragraph 27(a) of Mr Sims' witness statement.

> ***At present, the reduced workload means we are not offering PPJ.***
>
> *…*
>
> *We are committed to ensuring that you have the opportunity and flexibility to work and earn in a way that suits you whilst prioritising customer outcomes. If you would prefer to take advantage of the standby and overtime available to the majority of patrols, you're welcome to leave the PPJ scheme at any time.*

46. On 22 October 2020 at 1400, the claimant's line manager, David Holt, Customer Performance Manager (CPM), forwarded a further instruction from the respondent (specifically from James Hosking on 21 October 2020) on the issue of overtime to the claimant and his team (pages [229] – [232]), which stated (sic):

> *Hi All,*
>
> *I just wanted to re-iterate James messages as below and unfortunately, this also stands for yourselves in regards to RSS OT and your booking for any of your Patrols.*
>
> *STBY and Contractual can be plotted as normal.*
>
> *Regards*
>
> *David Holt*
>
> *,,,,*
>
> > *To all RSS patrols,*
> >
> > *Firstly, I want to thank you all for your support whilst adapting to the changes being introduced across the country and for continuing to provide an excellent service to our customers.*
> >
> > *With the introduction of the tier system in England and new lockdowns coming into place in Northern Ireland, Scotland and Wales we are starting to see a major reduction in RSS workload in many areas, which is also affecting workload distribution across weekdays and weekends. We currently expect this situation to continue as additional areas of the UK introduce further restrictions. However, we have not seen the same impact on recovery workload at this point.*
> >
> > *In order to ensure we have the right amount of patrols available to service our customers,* ***from today (21 October)***

> ***we are going to be switching off the ability to book voluntary overtime for the rest of October and November until further notice, as we will have a surplus of hours in most areas.***
>
> ***To confirm, any voluntary overtime hours that have already been booked in October and November will at this point remain in place.*** *However, we will need to continuously review this situation in the coming days and weeks.*
>
> ***At this stage we are not making any amendments to standby or contractual overtime.***
>
> *I'd like to thank you again for your support during these unprecedented times.*
>
> *If you have any questions or would like to discuss your individual circumstances, please speak to your performance leader in the first instance...*
>
> *James Hosking*
> *Chief Operating Officer - Roadside*

47. As indicated above, as a PL the claimant was able to amend the respondent's rosters and this included the ability to enter pre-planned overtime for himself and for others.

***The claimant's October 2020 overtime***

48. During October 2020, the claimant's roster contained (and he worked) pre-planned PPJ overtime on 5, 9, 12, 14, 16, 19, 21, 23, 26, 28 and 30 October (page [129]).

49. It appeared that much of this pre-planned overtime was entered onto the roster by the claimant on 3 October 2020. Page [130] showed the dates and times of the entries made on 5, 9, 12 and 14 October. The planned overtime entries for 16, 19, 21, 23, 26, 28[4] and 30 October were also created on that date (apparent from pages [169] – [171], which were documents submitted by the claimant to the respondent during the disciplinary hearing).

50. Insofar as further changes made by the claimant to his roster between 13 and 27 October 2020, and which related to changes to pre-planned overtime, the following details were apparent from page [230], a spreadsheet produced by the respondent during the disciplinary hearing, which the claimant explained to me during his cross examination:

[4] This overtime was originally planned for 29 October and moved (see the table below) to 28 October.

| Date of overtime | Date and time of change | Roster changes made by the claimant (page [230]) | Hours worked by the claimant on the date in question and type of shift(s) (page [129]) |
|---|---|---|---|
| 23 Oct 2020 | 22 Oct 2020, 1734 | The claimant firstly removed a regular RSS shift between 0800 – 1500 and also removed an **existing** pre-planned RSS overtime booking between 1500 – 1800[5]. He then immediately inserted a MGMT shift between 0730 – 1500 and **reinserted the same pre-planned RSS overtime at exactly the same time**, between 1500 – 1800. | 0730 – 1500 MGMT<br><br>1500 – 1800 RSS overtime |
| 26 Oct 2020 | 24 Oct 2020, 2235 – 2236 | The claimant firstly removed a regular RSS shift between 0800 – 1500 and also removed an **existing** pre-planned RSS overtime booking between 1500 – 1800. He then inserted an RSS shift between 0700 – 1400, and **reinserted** the pre-planned RSS overtime from 1400 – 1800 (albeit **1 hour longer** than the original booking), and then inserted a MGMT shift between 0700 – 0800. | 0700 – 0800 MGMT<br><br>0800 – 1400 RSS<br><br>1400 – 1800 RSS overtime |
| 28 and 29 Oct 2020 | 27 Oct 2020, 1534 - 1535 | The claimant made a series of changes to the roster for these two days.<br>• Firstly, he removed a MGMT shift between 0800 – 1930 on 28 October. He then inserted an RSS shift between 0730 - 1800 on the same day.<br>• He then removed an RSS shift 0730 – 1430 and an **existing** pre-planned RSS overtime booking between 1430 – 1800 from 29 October and instead | 28 October:<br><br>0730 – 1430 RSS<br><br>1430 – 1800 RSS overtime<br><br>29 October:<br><br>0730 – 1900 MGMT |

[5] The latter was signified by the entry *"RSSx O"*, the *"x"* signifying the removal of a shift from the roster, as explained in Mr Sims' witness statement. The overtime in question had first been created on 3 October – see paragraph 49 above.

| | | | |
|---|---|---|---|
| | | inserted a MGMT shift all day on 29 October from 0730 – 1900<br>• Finally, he removed the RSS shift between 0730 – 1800 on 28 October and inserted instead a shorter RSS shift between 0730 – 1430 and pre-planned RSS overtime between 1430 and 1800.<br><br>In effect, on 27 October he moved the **existing** pre-planned RSS overtime booking from 29 October to 28 October as part of swapping the shifts already booked on the two days around. | |

51. I was taken during the claimant's cross examination to the claimant's payslip for October 2020 (page [304]) and the claimant was asked by the respondent's counsel to confirm that this indicated that he earned £1,927.80 by way of PPJ overtime (on top of his basic salary of £3,376.55), which he did confirm.

*The claimant's November 2020 overtime*

52. By the start of November 2020, two things had occurred.

    a. Firstly, it was common ground that claimant's ability to claim PPJ overtime had ceased with effect from 1 November (page [164]). As such, he would now be paid based up the actual overtime period worked rather than per job completed during that period.

    b. Secondly, James Hosking had indicated on 21 October that the respondent was *"switching off"* the ability to book voluntary (i.e. pre-planned) overtime with effect from that date, for *"the rest of October and November"* (see above, paragraph 46).

53. The direction from Mr Hosking of 21 October did expressly state that existing voluntary overtime hours which had already been booked, during October and November 2020, could remain. It was, however, apparent from the claimant's roster for November 2020 (page [128]), that he did not book or claim any pre-planned overtime during November 2020, as he had done during October 2020.

54. A record of the claimant's *"RSS OT"* (i.e. stop-on) overtime from November 2020 was produced by the respondent on 8 December 2020 (page [132]).

This indicated that the claimant accrued stop-on overtime during November, totalling 27.94 hours, (to be paid on an hourly-rate basis) as follows:

| **Date** | **Overtime (page [132])** | **Prior shift worked (MGMT or RSS) – page [128]** |
|---|---|---|
| 02/11/2020 | 14:30- 17:00 (2.5 hours) | RSS |
| 07/11/2020 | 14:30- 16:01 (1.52 hours) | RSS |
| 08/11/2020 | 16:00 - 16:16 (0.27 hours) | RSS |
| 09/11/2020 | 15:00 - 15:31 (0.53 hours) | RSS |
| 16/11/2020 | 14:30 - 18:13 (3.72 hours) | RSS (0730 – 1230)<br>MGMT (1230 – 1430) |
| 20/11/2020 | 14:00 - 14:21 (0.35 hours)<br>14:49 - 17:43 (2.9 hours) | MGMT (0830 – 1400) |
| 21/11/2020 | 15:00 - 20:04 (5.08 hours) | RSS |
| 22/11/2020 | 15:00 - 15:46 (0.77 hours) | RSS |
| 23/11/2020 | 14:30 - 18:25 (3.92 hours) | RSS |
| 26/11/2020 | 14:00 - 15:40 (1.68 hours) | RSS |
| 30/11/2020 | 13:15 - 14:25 (1.17 hours)<br>14:45 18:16 (3.53 hours) | RSS |

As noted in the right-hand column of the table above, it was apparent from page [129], which was the claimant's roster from November 2020 showing the actual shifts he worked, that most of the overtime worked above followed on after the claimant's rostered shorter RSS shifts in November, but some also followed on from shorter MGMT shifts in November, namely on 16 and 20 November.

55. Finally, on the issue of the overtime worked by the claimant during October and November 2020, there were some references during the respondent's evidence and in the documents before me to an *"overtime ban"* having been in place at the relevant times during October and November 2020. This seems to have been a partial ban only, rather than a complete one, namely in respect of PPJ overtime and, from 21 October, pre-booked overtime, but not a ban on other types of overtime. Page [131] was referred to by Mr Sims and this document, produced by the respondent during the disciplinary investigation, indicated, for example, that on a number of dates during October 2020, normal overtime (as opposed to PPJ) *was* available at certain times of the day, typically from 1700 to midnight, and on at least two occasions from 1200 to midnight. Likewise, the message from Mr Sims above (see paragraph 46) expressly stated that standby and contractual

overtime were not affected by the prohibition on new pre-booked overtime. Therefore, it was clear that there was not a general overtime ban as such.

***Whistleblowing complaint August 2020 and wider investigations into PLs***

56. Prior to the above, on 25 August 2020, the respondent received a whistleblowing complaint (page [70]), which stated as follows (sic):

> *Hi, I would like to raise an issue on [CG] abusing his position to financial his own gains I.e overtime, standby call out and LAS OT when there is no availability for all us work colleagues. He also brags about him doing this to other colleagues. Please could you look into this because I feel I can't go to my PL or CPM because I feel this will be brushed under the carpet because they're all friends*
>
> *Also I would like to remain anonymous. I do not want my name mentioned at all.*

57. "CG", mentioned in the above complaint, was a PL, like the claimant. This complaint resulted in a review by the respondent of the overtime practices of a considerable number of PLs across the business. Amounts of overtime earned by PLs were scrutinised. The concerns are captured in an email from Dan Knowles, Head of Roadside Operations – South, dated 8 October 2020 (page [71]):

> *Keri*
>
> *Could you run a report which shows the actual total earnings of each PL in the country. During a whistle blowing investigation we found a group of PLs who were misappropriating time and manipulating overtime to earn more money - disciplinaries are about to be launched.*
>
> *But before I do that, I'd like to check the problem isn't more widespread. By running an actuals report, we'll see who is standing out from the crowd and then check its not explained by something like PPJ.*
>
> *Dan*

58. Mark Sims, the CPM who conducted the claimant's disciplinary hearing, was asked to investigate various PLs about these matters (but not the claimant). Mr Sims explained in his evidence that the purpose of the investigations was to ascertain whether or not the levels of pay and overtime claimed could be explained legitimately, or whether there was evidence of misconduct. He said that each such investigation took a significant amount of time and that, given the amount of time that went into each investigation,

PLs were *"investigated in batches"*, as the respondent could not investigate all of the PLs at once.

59. A table at pages [72] – [73] showed details of earnings, between 1 October 2019 until 30 September 2020, for nine of the PLs who were investigated. I have replicated the relevant details below and numbered the employees within it, with the claimant appearing at number 3.

| No. | Period 1.10.19 to 30.9.20 | | | Outcome of disciplinary process |
|---|---|---|---|---|
| | Earnings from "OTTIME IT" £ | Earnings from PPJ £ | Total Earnings inc salary etc £ | |
| 1. | 2,402.20 | 31,701.77 | 84,371.05 | Still Employed |
| 2. | 18,999.59 | 0.00 | 70,994.93 | Dismissed |
| **3.** | **705.95** | **22,484.68** | **66,580.15** | **Dismissed** |
| 4. | 17,923.80 | 0.00 | 64,584.24 | Resigned under investigation |
| 5. | 18,134.72 | 0.00 | 63,248.32 | Resigned under investigation |
| 6. | 14,121.85 | 0.00 | 62,128.27 | Improvement Notice |
| 7. | 13,289.82 | 0.00 | 59,049.68 | Dismissed |
| 8. | 7,022.19 | 9,403.57 | 58,297.98 | Improvement Notice |
| 9. | 13,591.55 | 1,460.81 | 58,102.87 | Improvement Notice |

60. I asked Mr Sims to explain the outcomes in the table to me insofar as he was able to, other than the claimant's situation. He explained that he had investigated the PLs numbered 4 and 5 in the table, each of whom had resigned prior to their disciplinary hearings. In each case, he said that the PLs in question had been booking overtime and had been paid for it but had not been working the overtime – he said that they had been *"defrauding"* the respondent. Those situations were different to that of the claimant and involved plainly fraudulent conduct. Neither those two PLs, nor the PLs who were dismissed at numbers 2 and 7, had any earnings from PPJ, as evidenced by the third column above, and so by implication the issues in their cases must have related to the overtime in the second column as opposed to PPJ overtime they had booked.

61. Mr Sims also investigated one of the other PLs in the table, one of the three who had received an improvement notice. I asked him why that case warranted an improvement notice and not dismissal. He said that the issue

did not relate to overtime but was about how the individual concerned was using their time during RSS shifts.

62. Mr Sims said that he did not know why the PL who had earned more PPJ overtime than the claimant (number 1 on the above list) had not been disciplined but said that he believed that this would have been because the PPJ overtime had been earned within the scope of the respondent's policy.

63. On the wider question of the dismissal of other PLs, the claimant asserted as part of his case before the tribunal that the respondent, for cost-saving reasons, had sought to dismiss a number of members of its *"middle management"* and that numbers of PLs had dropped, from 137 in June 2018, to 120 by the time of the tribunal hearing, i.e. those dismissed had not been replaced. The respondent's witnesses disputed that there was such a motive and Mr Sims stated that the respondent was presently recruiting at PL level. There was no evidence before me to support the claimant's assertions that the real reason for the various sets of disciplinary proceedings was cost-saving.

**Relevant emails sent by the claimant in late October 2020**

64. On 22 October 2020 (at 1730), in reply to the email earlier that day (at 1400), referred to above in paragraph 46, containing the message from James Hosking (page [231]), the claimant emailed his line manager, David Holt, as follows:

> *Hi David*
>
> *Unfortunately not all the PLs are playing by the same rules. I have seen over time hours added after the message was sent out.*
>
> *Mark Browning*

65. On 27 October 2020, the claimant emailed Mr Hosking directly (page [75]), as follows (sic):

> *Subject: PL Standby*
>
> *Hi James*
>
> *I left you a voicemail recently but have had no reply, So I thought I would drop you an email.*
>
> *As minimal OT is available High performing PL's like myself have no chance of helping out and earning a bit extra ££ if it gets busy at short notice. So I wondered if some sort of Standby or call out could be made available for PL's to save garaging should work load depict it. Look forward to hearing your thoughts.*

*PS. some PL's are still booking their own overtime.*

*Thanks & Kind regards*
*Mark Browning*

66. The email confirmed that, as at 27 October 2020 (six days after the message from Mr Hosking of 21 October) the claimant understood that overtime for PLs was very limited and that he was seeking an exception to it.

67. Mr Hosking responded on 28 October 2020 (page [77]) to confirm that the opportunity for overtime was presently limited due to reduced workload and that he would look into PLs who were still booking overtime (which he duly did).

68. On 29 October 2020, the claimant replied to Mr Hosking as follows (page [77]):

*Hi James*

*Thanks for the reply*

*[LA] is the PL. I'm not normally one to snitch but his behaviour is very dubious and I believe he is abusing his position. From what I see he is also doing MGMT while on OT which we have all been told should not happen.*

*Please keep me anonymous as I have to maintain a working relationship with him and the other PL's Please get back to me if you need or want more information.*

*Thanks & Kind regards*
*Mark*

69. The PL referred to above, "LA", was subsequently investigated and dismissed by the respondent, at least in part because he had booked pre-planned overtime during November 2020, in contravention of the instruction of 22 October.

**Investigation into the claimant by Audie Russell – early December 2020**

70. Precisely when the claimant's own overtime and roster situation came under scrutiny by the respondent was unclear from the evidence before me. The respondent's Grounds of Resistance asserted at paragraph 8 that the investigation into the claimant commenced following an anonymous *"whistleblowing"* complaint about him, made on 8 December 2020 (see below paragraph 81). Mr Sims explained during his evidence that this

assertion was an error, in view of the fact that an investigation into the claimant was plainly already well underway by that time and the subsequent "whistleblowing" complaint about the claimant had no direct bearing on the matters giving rise to his dismissal.

71. Mr Sims explained in his evidence to the tribunal that, due to the time that his various other PL investigations were taking and, in an attempt to avoid unnecessary delay, an alternative investigation manager, Audie Russell (a CPM like Mr Sims and also the claimant's line manager, David Holt), was appointed to investigate issues relating the claimant's overtime and roster. Mr Russell was not a witness before the tribunal.

72. The claimant was not suspended by the respondent and he continued to work as normal throughout the investigation and subsequent disciplinary proceedings, until he was dismissed. Mr Sims' evidence about this was that the claimant was not suspended because it was not considered that, if he remained in the business pending the outcome, he would impede or hinder the investigation. Additionally, Mr Sims said that it was not considered that he posed a risk to the business while remaining at work and that suspension was only used by the respondent in limited cases.

73. Mr Russell's investigation report and its various appendices (pages [110] – [145]) set out details of the investigation he had carried out. This was conducted in accordance with the respondent's disciplinary procedure (page [60]).

74. The main investigation report produced by Mr Russell was brief, running to three fairly well-spaced pages ([112] – [114]). In summarising the relevant aspects of the investigation below, I have focused primarily upon the core allegations which gave rise to the claimant's dismissal, concerning pre-planned overtime and changes to his roster and mentioned the allegation of breach of trust and confidence.

75. Mr Russell interviewed the claimant's line manager, David Holt, via Teams on 1 December 2020. Some fairly brief notes of that 50-minute interview by Mr Russell were at pages [125] – [127]. During that interview, Mr Holt was noted as saying, insofar as was relevant to the key allegations concerning overtime and roster changes/shifts:

    a. That the claimant's instructions for booking MGMT shifts were *"flexible"*, but that Mr Holt wished be kept informed and he wanted 5-2 shifts (which were explained during evidence as meaning 5 days working, 2 days off), because Mr Holt wanted two PLs *"on the road every weekend"*. (As I have noted above at paragraph 30, the claimant's original roster as issued by the respondent was based on a different pattern, 7-3-2-3).

b. That Mr Holt had looked at the claimant's overtime and he noted that the claimant had done a lot of PPJ overtime but that Mr Holt had not paid attention to the claimant over the summer. Mr Holt added, according to the notes by Mr Russell (sic): *"The overtime has been put in was supposed to be ethical places he might have had a text from Dan asking for overtime".*

c. Mr Holt was asked by Mr Russell: *"when you look at the length of his shifts there is a duty of care?"* and he replied *"I wouldn't pick that up paid very little attention to them as I would be doing loads LAS".*

d. He was asked *"Are you aware of the amount of hours Mark is working?"* and replied *"not aware"*.

76. There were various references in the evidence, including that above, to "LAS" (London Ambulance Service) work being undertaken by the respondent's employees, including the claimant's team. I asked Mr Sims what this entailed. He said that, due to the effects of the pandemic on road traffic levels, the respondent had excess resources, which it used in part to support national infrastructure. He said that the LAS work entailed the respondent supporting LAS in keeping ambulances on the road in South West London; rather than sitting in yellow vans, the respondent's employees would be in a workshop, maintaining the LAS fleet of ambulances. The respondent was paid a fee for this work by LAS.

77. The claimant was interviewed, via Teams, by Mr Russell on 10 December 2020. The interview with the claimant lasted for one hour and 40 minutes. The notes, taken by Mr Russell, were somewhat fuller than his notes of the meeting with Mr Holt (pages [115] – [124]). The passages relevant to the overtime and roster issues which resulted in the claimant's subsequent dismissal were as follows (emphasis added, sic):

a. Question: *What instructions do you have for the booking of management days?* Answer: *when first started it was all over the place what we liked no real instructions since things have tighten up slightly pressurised to book in advance followed the instruction laid down by* [sentence incomplete and the notes do not record whose instruction was mentioned by the claimant].

b. Question: *you have booked overtime during the months of June and November how have you booked this* Answer: *through roster viewer* ***not told not to by CPM****, I could book, if I think its I booked it where I thought it was necessary.*

c. Question: *what methods and knowledge do you use to book it?* Answer: *from my experience I have booked it I don't sit on my arse doing nothing I booked via roster viewer*[6]*.*

d. Question: *There was no availability for overtime during this time how have you booked it?* Answer: *I used my experience to book it.*

e. Question: *have you overridden the system to get OT in?* Answer: *yes.*

f. Question: *do you agree this in unfair to colleague who cannot book overtime?* Answer: *they all have the opportunity for overtime* ***we were asked by David to get OT*** *they had the same option to ask.*

g. Question: *have you booked overtime like this for anyone else?* Answer: *yes, all the time they approach me asking if a have any.*

h. Question: *You say they approach you?* Answer: *yes, I put people on ot, we had 100s patrols in LAS there was plenty of availability I was grateful for them taking it.*

i. Question: *I can see in the roster you have put OT in for other people and overridden the system why is this?* Answer: *yes as I was allowed to do to get feet on the ground we knew how busy it was we could override the standby hours I was filling in the gaps I sold so many batteries, it was unbelievable I emailed James, there is still a lot of work, some of the best player I can't get [them*[7]*] on the pitch.*

j. Question: *do you reduce your RSS shifts down and increase your management to 11.5 hours?* Answer: ***To make the management a valuable day, I was copying they guy who left. I was given the wrong information by him, I now see that is not correct. my boss was happy to move shifts around,*** *since the beginning of this issue, it is by the letter of the law.*

**k. Question:** ***why do you do this?*** **Answer:** ***I asked how he did it, making so much money.***

**l. Question:** ***Is it to enable to do more end of shift OT for RSS days.*** **Answer:** ***It does, I was led by [CG]. I was on PPJ if I wasn't working I wasn't getting paid it wasn't the right thing to do, it won't be happening anymore.***

m. Question: *as a line manager to do you think it right and acceptable to do that?* Answer: *at the time yes, I am not allowed to Monday and*

[6] At page [268] in his appeal submission the claimant corrected this answer in the notes to: *"I used my knowledge of workload to book any extra hours so that I'm not sitting on my arse doing nothing".*
[7] Correction made by claimant during appeal process – page [268].

> *Friday, i can't get management in during the week I am only doing what the right thing to do but also given me my management time, more guidance should be given, if whilst blowing is a thing there are plenty of other to look at.*

78. The meeting also focused on other aspects of concern to Mr Russell, including the claimant's use of his work van, his whereabouts during working hours and time-keeping. I have not referred in detail to these matters, given the eventual findings at the disciplinary hearing, but they are reflected in the conclusions reached by Mr Russell (see paragraph 82 below).

79. At the end of the meeting, the following was noted (sic):

> *I don't think I am guilty miss appropriation wise I will do things better in the future, I don't do what I preach. You have shown by not looking hard I am not doing what I am supposed to do, if I think I am good which I am clearly not then what is everyone else doing. I have let myself down.*
>
> *Discussion around putting overtime in and how it affects planning and utilisation of other patrols not taken into consideration. Confirmed during this conversation he had overridden the system*

80. The claimant did not challenge the notes of the meeting of 10 December after they were sent to him, as part of the investigation report and appendices on 21 December 2020, save to a very limited degree during his subsequent appeal (page [268]), as noted above in the footnotes. During the tribunal hearing, he was critical of the respondent in not sending him the notes immediately following the meeting, but nonetheless did not point to any specific inaccuracies within the notes.

81. The day after Mr Russell's interview with the claimant, on 11 December 2020, the respondent received what was termed a *"whistleblowing"* complaint about the claimant (pages [105] to [106]) submitted anonymously to a "Speak Up" email address. The complaint contained some fairly general, unspecific allegations about the claimant bullying and intimidating members of his team and some more specific issues relating to aspects of how he carried out Patrol work, although there appeared to be no overlap or connection with matters already under investigation. Mr Sims said that he understood that the respondent decided to complete the currently ongoing investigation into the claimant before commencing any further investigation (and no investigation was subsequently conducted in view of the claimant's dismissal).

82. Mr Russell completed his investigation after interviewing the claimant. In his conclusions in his report (pages [113] – [114]) he addressed three broad issues, as follows (sic):

a. *"Roster Management / overtime"*

- *Mark Confirmed that he had adjusted his roster to increase management days and decrease RSS days to increase his overtime opportunity, and maximise management days. During these days overtime has been generated, with several examples of being at base in overtime status, to be paid in overtime statement.*
- *Mark confirmed that he had rostered himself and other team members overtime against requirement and process.*

b. *"Patrol behaviours"*

- *Mark confirmed that he understands the rules around breaks and heading and arriving on breakdowns, an area that he actively manages his patrols on, there is evidence to proves he has failed to head at the start of shift on numerous occasions and failed to head after break on numerous occasion.*
- *Mark confirmed that he has driven on break to get back to locations he wanted be in, this is an area he actively prevents his patrols from doing.*
- *Mark confirmed that he would use his van off duty on the way home to pick his wife up from friend's house and has used it to visit his parents, there are also occasions where Mark has used the van on rest days that no explanation was given for except for potentially putting waste in the football club bin.*

c. *"Affiliation with football club"*

- *Mark confirmed that he is manager of the club house and on the board of trustees and Ashtead Football club, he is a key holder and is free to come and go as he pleases.*
- *During October and November Mark visited the club 19 times and management and rest days, he would attend on virtually all management days as he confirmed he uses it as office space and it gives them some additional security.*
- *During interview Mark stated that he couldn't work from home due to distractions and also extended his management shifts to 11.5 hours the duration spent at the club is between 4 and 7 hours and management days.*

Mr Russell included 19 separate numbered appendices with his report, mostly spreadsheets showing aspects of the claimant's duties, vehicle logs, time records and overtime records.

83. Mr Russell concluded in his report (page [114]) (sic):

*Following the investigation, I have found that Mark has fraudulently, over a period of the 2 months reviewed, misled the business by breaching trust and confidence as a performance leader for financial gain. Due to the serious allegations of my findings there is a clear case to answer for the following allegations:*

- *Gross misconduct whereby between the periods of 1st October and 10th December[8] received additional monies paid to you by manipulating the roster manager system*

- *Misappropriation of time between the periods reviewed of October 1st -10th December 2020*

- *Breach of trust and confidence*

**The disciplinary proceedings**

84. Mr Sims in his evidence to the tribunal stated that, on or around the week commencing 7 December 2020, Paul Parker (Employee Relations) contacted him and asked him to conduct a disciplinary hearing in respect of the claimant. He said that this contact from Mr Parker was following the investigation conducted by Mr Russell (although I noted that the investigation report from Mr Russell was not seemingly completed until 15 or 16 December[9] and so this date did not appear to be accurate). Mr Sims said in evidence that he by now had capacity to act as the disciplinary officer for the claimant, having cleared some of the other PL investigations he had been working on.

85. It was clear that Mr Russell sent Mr Sims a copy of the investigation report and appendices by email on 15 December 2020 [107]. Mr Sims indicated in his witness statement that, following the investigation by Mr Russell, it became apparent to him that:

    a. the claimant was manipulating his roster by maximising the majority of his management shifts to 11.5 hours and minimising his RSS shifts to enable him to complete more stop-on overtime on his shorter shifts; and

    b. the claimant was inserting pre-planned overtime into his roster.

86. Mr Sims said that he further considered that the changes made by the claimant to his roster were not ad hoc changes to reflect business need, and so it was apparent that his conduct was to ensure his roster suited his

[8] I note here that both the investigation and disciplinary proceedings focused on the periods of October and November 2020 and it was not apparent why the references to December 2020 were included here and throughout, as there was no evidence apparent about that latter period.
[9] Both dates appear on the report and it was sent to Mr Sims by Mr Russell on 15 December (page [107])

own needs and that he was booking and claiming overtime to which he was not entitled and should not have booked. Mr Sims stated that the respondent could have sourced overtime at a cheaper rate (than the claimant's PPJ rate) by offering the overtime to other individuals, where there was a business need for overtime.

87. Mr Sims stated in his witness evidence to the tribunal that, upon his review of the investigation report, he identified three key areas of focus that he wanted to discuss with the claimant.

88. Firstly, Mr Sims said that he wanted to consider and discuss the allegation that the claimant had manipulated his roster for personal gain. It appeared to Mr Sims, from the investigation, that the claimant had admitted that he had manipulated his roster by overriding the system for his own benefit to increase his overtime. Additionally, it appeared to Mr Sims that the claimant had worked a high level of overtime despite working under a PPJ contract where overtime was not permitted and despite the restrictions which had been placed on overtime due to the outbreak of COVID. Mr Sims said that he identified that:

    a. the claimant's updated rosters (pages [128] and [129]) showed that the claimant manipulated his roster and maximised his MGMT time on some days, especially Tuesdays (when all PLs were rostered to work), to 11.5 hours. Mr Sims indicated that this meant in turn that, on other days when the claimant was working RSS shifts, he was able to reduce the amount of time spent on those, for example to between six to nine hours each. Mr Sims said he observed that this enabled the claimant to start those shifts earlier in the day and finish them by mid-afternoon, which made him available during busier periods for overtime. By rostering his RSS shifts to end during peak times, he said that the claimant also increased the likelihood that standby (aka stop-on) overtime would be offered to him at the end of his shift;

    b. the claimant had pre-booked overtime for himself, which he was not entitled to do under a PPJ contract. Mr Sims gave some examples of this in his witness statement, on 16 and 30 October 2020, where the claimant had rostered in overtime shifts (page [129]) on days which were originally scheduled as rest days (page [68]). He also referred to 28 October 2020, where the claimant was originally rostered (page [68]) to work from 0800 to 1930. The claimant had changed his roster to 0730 to 1430 as an RSS shift and had then pre-booked 1430 to 1800 as an RSS overtime shift (page [129]). Mr Sims said that the claimant would have been paid more for the overtime shift on 28 October (because of his PPJ contract) then he would have been had he kept it as it was originally on his roster. In summary, the claimant had made various changes to his roster to insert pre-planned

overtime (the full detail of these changes and when they were made is set out further above at paragraph 49);

c. the claimant had booked pre-planned overtime on dates when there was no overtime available (according to a table at page [131]) to any of the respondent's staff. (I noted that the three specific dates referred to by Mr Sims were in June 2020 and so were outside the period to which the disciplinary allegations related, a point I return to below); and

d. Ms Sims said that page [132] showed that the claimant was paid for 28 hours of overtime in November 2020, which Mr Sims said was when the claimant *"knew that an overtime ban was in place"*. When reviewing the documents again in the course of preparing this judgment, I was puzzled by this comment, as by November 2020, it was (1) not disputed that the claimant was not on a PPJ contract during November 2020, (2) not disputed that the claimant had not pre-booked any overtime during November 2020, and (3) it was evident that overtime (i.e. stop-on overtime) was often available within the respondent at the times at which the claimant's shifts ended (page [131]). It was also clear that there was no general overtime ban in place (see above, paragraph 55).

89. Secondly, Mr Sims said that he wished to review and discuss the allegation that the claimant had *"misappropriated time"*. As that allegation was not ultimately upheld by Mr Sims, he expressly acknowledged that his witness statement that he need not refer to it in more detail, and so nor have I in these reasons.

90. Finally, Mr Sims said that he wished to discuss with the claimant (i) that the claimant appeared to use his work van for personal use against the respondent's policy and (ii) that the claimant had driven whilst on his break (which Mr Sims said created a health and safety risk and was against the respondent's policy).

**The respondent's disciplinary procedure**

91. The respondent's disciplinary procedure was at pages [59] – [65]. This included the following relevant provisions:

- *In principle no employee will be dismissed for their first failure to meet expected standards of conduct unless it is considered to be gross misconduct.*

- *Whilst the risk of a disciplinary allegation is being investigated, the employee may be suspended where the AA feel it is appropriate to do so, during which time he or she will be paid their normal pay rate. Suspension is not a disciplinary sanction and may be lifted at any stage.*

- *Some acts, termed as gross misconduct, are so serious in themselves or have such serious consequences that the appropriate remedy may be dismissal without notice for a first offence. A fair disciplinary process should always be followed before dismissal for gross misconduct. Example of gross misconduct include (but are not limited to):*
  - *…*
  - *Fraud*
  - *…*
  - *Falsification of records, reports, expense claims, accounts, qualification or other information*
  - *…*
  - *Serious or persistent insubordination or refusal to follow a reasonable management instruction*
  - *…*
  - *Serious breaches of company policies or rules including health and safety rules*

- *Misconduct that the AA believes would require disciplinary action includes (but are not limited to):*
  - *…*
  - *Persistent bad timekeeping*
  - *…*
  - *Failure to follow a reasonable management request or instruction; and/or*
  - *Minor breaches or failures to observe the AA's policies or procedures*

- *If the allegation that has been investigated and heard during a disciplinary meeting comes under the description of gross misconduct, (see section in Standards for examples), then if the allegation(s) are upheld the outcome will be dismissal without notice or payment in lieu of notice.*

**Disciplinary invite and allegations – 21 December 2020**

92. On 21 December 2020, Mr Sims wrote to the claimant and invited him to attend a disciplinary hearing on 5 January 2021 (pages [108 - 109]) to consider the following allegations, making clear that if they were upheld, they could amount to gross misconduct and lead to the claimant's dismissal:

- *Between 1st October and 10th December you have received monies paid to you by manipulating the roster manager system.* **(Allegation 1 - manipulating the roster for financial gain)**

- *Misappropriation of time between the periods reviewed of 1st October and 10th December 2020.* **(Allegation 2 - misappropriation of time)**

- *Breach of trust and confidence.* **(Allegation 3 - breach of trust and confidence)**

He also provided the claimant with a copy of the investigation pack which had been produced by Mr Russell.

93. On 5 January 2021, the claimant sent Mr Sims a statement he had prepared in advance of the disciplinary hearing (pages [160 - 161]). In this document, the claimant stated, in summary:

a. That the claimant was sorry and had let himself, his CMP, other PLs, his team and his family down with his behaviour.
b. He was devastated by *"this allegation"*.
c. He would have worked for the respondent for 25 years by 14 October 2021 and he very much hoped he would get there.
d. He referred to his performance record (which I understand was not disputed as being positive) and various achievements. He also referred to an exemplary attendance record.
e. Had been involved with Patrols which had been disciplined within his team and with his help and guidance, those Patrols had *"turned around their performance and bad behaviours"*. This was what the claimant intended to do, moving forward, given the chance.
f. He worked hard and worked long hours, and had been focused on driving his team forward during the pandemic but had lost focus on his own performance.
g. He referred to the health situation of a very close family member, which may have affected his focus.

94. Immediately following this submission, Mr Sims emailed Paul Parker in the respondent's Employee Relations team and stated (sic): *"Ae you about late morning, I have Marks disciplinary at 11a, and may call you to discuss at adjournment if that's ok? Looks like he is going into defensive mode…."* This email came to light via a subject access request by the claimant.

95. Mr Sims was asked by the claimant about this comment in cross-examination and he responded that he regretted making it and said that the reason he made it was because he considered that a lot of the content of the claimant's statement was not relevant to the allegations faced.

**Disciplinary hearing - 5 and 6 January 2021**

96. On 5 January 2021, the claimant's disciplinary hearing commenced via Microsoft Teams (due to the lockdown caused by the pandemic). Mr Sims was accompanied by Sara Hemstock (Road Operations Delivery Support) as notetaker. The claimant was not accompanied and confirmed that he was happy to proceed on that basis. Notes of the meeting were at pages [146] – [157] and there was no dispute raised before the tribunal about any

specific content or alleged inaccuracy in those notes, which appeared to be full and complete.

97. The meeting commenced at 1122. Mr Sims asked the claimant why he had extended his management shifts to 11.5 hours. The claimant replied that he did so to get the most benefit he could from a management day. The claimant said that he did one management day a week and by increasing the length of his day, it gave him a full day to get everything done.

98. Mr Sims asked him why, then, he typically had two such days a week during October 2020 and the claimant replied that he had taken on more, and that he was not allowed, by his manager David Holt, to have management days at the weekends.

99. Mr Sims then asked the claimant if he made changes to his roster to generate more money and the claimant replied *"absolutely not"* (page [148]). He said that he was not doing anything intentionally, the hours were necessary and it worked out the *"best for both worlds".* The question was put again, as Mr Sims said it appeared to him that the claimant was contradicting himself. The claimant said he could see why it looked that way, but no he was not, he was doing the best to benefit the business.

100. The claimant was asked (page [148]) about his comment to Mr Russell during his interview (see paragraph 77.k above). The hearing notes indicate (sic):

> *MS In the investigation meeting you stated, How did he make so much money?*
>
> *MB That probably lead you down the wrong path He was earning more money than me. I asked him what he was doing. He told me that he moved the hours and I told him that he shouldn't be doing it. When I was doing it there wasn't the days available.*
>
> *MS It does state in the investigation pack, that you said it was wrong and that you wouldn't be doing it again.*
>
> *MB Thats because I have been given more guidance and guidelines. I have looked around the country and other PLs are doing it. They are moving RSS hours from 1 day to another. There have been no set down law around what we can do. I have been tarred with the same brush as the others but I have not set out to de fraud the company. When I am at work on overtime, I am working RSS not management.*

101. The discussion in the hearing moved on to matters not directly relevant to the subsequent decision to dismiss and then turned to the booking of overtime. The claimant readily accepted that overtime was inserted by him

during October 2020, via changes to the roster, and he said he was unable to access normal overtime as he was on a PPJ arrangement.

102. He was asked by Mr Sims why he had pre-booked 39 hours of overtime during October 2020, when these hours were not available nationally. The claimant replied that he was asked to do so by his line manager, David Holt, during a weekly CPM meeting. The claimant was asked by Mr Sims if he had any evidence of this instruction to book overtime. The claimant said that it was done verbally by Mr Holt, and gave an example of the sort of instruction (*"look at the DP7[10], we need patrols out"*) and he said that the demand for overtime was there. He also said that this instruction was given via WhatsApp but that the claimant did not have the relevant chats any longer *"due to the new iPhones"*. I was told that the respondent had replaced work mobile phones and I noted that this was also evident from some emails on page [214] from the disciplinary process, which referred to phones being changed over during November 2020.

103. Mr Sims then asked the claimant again about changing his roster to create space for overtime (page [149]). The claimant said that this was not intentional. He said that he had done *"loads"* of overtime and it had been *"manic"*.

104. Mr Sims asked the claimant, in view of having mentioned CG during the investigation meeting (see paragraph 77.k above) if the claimant had asked CG what CG was doing. The claimant said that he told CG it was not right and reported CG to David Holt. Mr Sims put to the claimant that what the claimant had done *"was the same as what these other PLs have done. Can't you see this?"* The claimant replied that he was working on a PPJ basis during October and if he was not working, getting jobs, he was not getting paid.

105. My understanding from Mr Sims was that CG, who gave rise to the initial whistleblowing complaint referred to in paragraph 56 above, was dismissed for claiming overtime when he had not worked during the period in question and so this was not on all fours with the claimant's own position.

106. Mr Sims then told the claimant that the reason he was talking to the claimant at the hearing was because the amount of overtime that the claimant had earned on PPJ. The claimant replied that he had done the same the previous year, he worked hard and was proud of working for the respondent. He added that there had been no guidance from the business and that was why people had gotten away with what they were doing.

107. The meeting then moved again into the other areas relating to time management and work location, which related to the "misappropriation of

[10] I understood the "DP7" was, or was part of, the respondent's central resourcing/deployment system.

time" allegation, which was not upheld (see below). The claimant did accept some fault in respect of those areas, that he had fallen short of what was acceptable and he had lost focus.

108. The only discussion specifically about the alleged breach of trust and confidence by the claimant, the third disciplinary allegation, was as follows (at page [152]) (sic):

> *MS Lets talk about trust and confidence as a PL. In summary, the themes I have heard throughout this meeting. Some of the standards have dropped recently with regards to the hygiene factors. There are some double standards.*
>
> *There has been some personal use of the van.*
>
> *MB Yes, if that's want you want to call it then slap me down*
>
> *MS I sense some sarcasm in what you are saying*
>
> *MB If I was to look around my team and other teams, it happens and if it's all black and white then there would be no flexibility.*
>
> *MS We have summarised that there are some double standard, use of the vehicle for private use, maximising of management shifts to allow for Overtime and booking of overtimne when it hasn't been available.*
>
> *I have asked all the questions I need to on this.*

109. The first day of the disciplinary hearing concluded at 1318 on 5 January 2021, with the claimant indicating that he would submit further evidence and Mr Sims saying he would seek some clarification from others (page [153]). It was adjourned until the following day.

110. During the adjournment, Mr Sims spoke with Paul Parker, Employee Relations, about various matters relating to procedure and the claimant's PPJ contract.

111. The claimant submitted a bundle of documents and information to Mr Sims at 1904 on the evening of 5 January 2021 (pages [165] – [225]). In those documents, he (re-)stated the following points (insofar as relevant to the key issues):

    a. That David Holt asked the claimant to plan his roster in advance, which is what he then did. There were no specific guidelines set by Mr Holt or the respondent as regards shift-planning, apart from that he was not to work MGMT overtime, he was to work any weekend shifts as RSS and otherwise he was to *"be flexible"*. The claimant

stated that he did not specifically set out to manipulate his roster for any gain but only to plan his hours (page [168]).

b. That when extra hours were required, he had added these via his roster – he was unable to add overtime via the respondent's flexible booking system, as he was on a PPJ arrangement. He said that extra hours were added by him throughout October 2020 to help cover holiday in the LAS workshops (the claimant's team had been deferring annual leave to complete the LAS work) and on the dates of team meetings (page [168]).

c. He provided extracts from booking systems to show when he had booked some of the planned overtime during October 2020 (pages [169] – [171] – see also paragraph 49 above).

112. Otherwise, the documents provided by the claimant did not appear to be directly relevant to the key allegations which resulted in his dismissal; many related to the other allegations he faced following the investigation by Mr Russell, or to overtime booked for Patrol employees, as opposed to PLs like the claimant, none of whom were on PPJ overtime arrangements, or to demonstrating his broader work ethic.

113. Mr Sims indicated in his witness statement for the tribunal that he considered the further material provided by the claimant and in turn he set out why he did not consider that much of it was very pertinent to the allegations faced.

114. Mr Sims also explained in his witness statement that, during the adjournment, he spoke with David Holt, the claimant's line manager, Matthew Spencer, the respondent's Outdoor Resourcing Business Partner for Roadside Operations, and Katie Klimaytys, a Communications Manager. The evidence which resulted from these communications, as disclosed to the claimant during the disciplinary hearing, was as follows:

a. An email from David Holt to Mr Sims which showed some of the dates of the overtime booked by the claimant during October 2020 and changes made to his shifts (pages [229] - [230] – see above paragraph 48).

b. The same email from Mr Holt also forwarded the message from James Hosking of 21 October 2020 and the claimant's response to that (see above paragraph 64).

c. An email from Matthew Spencer to Mr Sims which indicated that, whilst overtime was available to be booked using the respondent's overtime booking system, pre-booked overtime was not available for those on PPJ arrangements (page [233]). Mr Spencer indicated that

PPJ Patrols could only obtain overtime by stopping on at the end of a shift (i.e. stop-on overtime).

d. Katie Klimaytys forwarded the 22 May 2020 email from Dan Knowles to Mr Sims (pages [227 – 228] – see above paragraph 45).

115. Mr Sims' witness statement indicated that these discussions he had with David Holt, Matthew Spencer and Katie Klimaytys *"were quick calls to help provide clarity to the case"*. Notably, there was no documentary evidence provided to the claimant to indicate that Mr Sims had investigated in any meaningful sense the claimant's responses about the pre-booked October 2020 overtime, which had been to the effect that he had been instructed by David Holt, in weekly meetings and in WhatsApp communications, to book such overtime, including for himself.

116. The disciplinary hearing reconvened at 1402 on 6 January 2021 (page [153]). Mr Sims said to the claimant: *"I would like to cover October overtime. You spoke about David requesting you to put extra hours into plan. There is no evidence that this is the case, no emails and I have spoken to David and we have no proof that this was asked of you".* The claimant replied that this had been a verbal request.

117. Mr Sims then stated: "*It's quite clear that if you look at your roster in October and throughout the months before that there has been an awful lot of overtime throughout this time that you pre-booked".* The claimant replied that workload was through the roof and he had not done anything to de fraud the company; he also re-stated: *"The reason I booked the overtime was because we were told to book it".*

118. There then followed a discussion about the overtime which the claimant had swapped around at the end of October 2020 (pages [154] – [155]) – see above paragraph 50. The claimant explained that (following the communication from James Hosking of 21 October 2020) he had not booked any extra overtime to that which he had originally booked on 3 October and had simply swapped shifts around, save for when he inserted one extra hour on 26 October (inserting four hours instead of the original three hours removed), which he said was a *"genuine mistake"* after he changed the hours around to accommodate an emergency meeting.

119. As the disciplinary hearing drew to a close (page [155]), Mr Sims put to the claimant that, in light of the information provided, the claimant should accept that he was wrong to book overtime in the way he had. The claimant said that he could see that, but he had only booked it as *"workload is through the roof"*. The claimant also said during the disciplinary hearing that he accepted, as was put to him by Mr Sims, that by booking overtime for himself, he would have potentially disadvantaged other patrols. Mr Sims stated: *"ultimately you have circumnavigated the system to your financial benefit".*

120. Mr Sims then adjourned the meeting between 1432 and 1532. He stated that during the adjournment, he considered all of the documentation presented in the investigation pack, the verbal information and the additional documents provided by the claimant and the additional documentation provided to him by David Holt, Matthew Spencer and Katie Klimaytys.

121. In his witness statement to the tribunal, Mr Sims explained his thinking as follows:

    a. In terms of the allegation of breach of trust and confidence, Mr Sims said if that had been the only allegation substantiated, he would have issued the claimant with a final written warning. However, he also concluded that the claimant had manipulated his roster to pre-book overtime during an overtime ban and/or where this was not generally available and this was very serious and in Mr Sims' view amounted to gross misconduct on its own.

    b. He added: *"In fact, I am of the view that even if only the three incidents of claiming overtime when it was not available on 4, 12 and 18 June 2020 were considered, these alone would have amounted to gross misconduct".* The three dates which he specified in June 2020 did not form part of the disciplinary case which had been put the claimant concerning booking of overtime, which was expressly based upon overtime during October and November 2020. Those dates were in addition not raised with the claimant during the disciplinary hearing, yet they were part of Mr Sims' thinking in reaching his decision.

    c. He said that he did not consider in detail and therefore did not uphold the allegations about *"misappropriation of time"*.

    d. In terms of sanction, he said that, whilst he appreciated that the claimant had been with the respondent for a significant period of time and he had no live disciplinary warnings, *"the claimant's manipulation of his roster for his own financial gain was serious enough to amount to gross misconduct and dismissal without notice, irrespective of his prior clean record"*. Mr Sims concluded that, taking into account the position of responsibility the claimant held and the trust afforded to him, there was no alternative sanction suitable in the circumstances.

122. The disciplinary hearing notes record that the claimant was informed of the outcomes of the three allegations, as follows, by Mr Sims (pages [155] – [156]) (sic):

    a. *[Manipulation of roster for personal gain]*

*Between 1st October and 10th December you have received monies paid to you by manipulating the roster manager system.*

*You have admitted that you have maximised your mgmt shifts to 11.5 hours days and therefore shortened your RSS shifts. This has allowed you to be available for stop on OT.*

*You have admitted that you have inserted OT into the month of Oct (Over 40 hours), and previous months by circumnavigating the normal booking system. This has therefore being paid at a PPJ rate for overtime which has not been authorised and goes against the Comms sent out on 22nd May which indicated that PPJ had been withdrawn.*

*I therefore uphold this allegation.*

b. *Misappropriation of time between the periods reviewed of 1st October and 10th December 2020.*

*Having reviewed the evidence, whilst there are some minor anomalies I am comfortable that there is no case to answer and I will not be taking this allegation into consideration.*

c. *Breach of trust and confidence*

*You have admitted that on occasions you have driven whilst on Break, this is a serious breach of process. You admitted that on occasion you have visited family and friends during shift. You admitted that on occasion you have used your service vehicle to collect your wife on your way home and to visit friends after shift, returning home significantly after shift.*

*As has also been demonstrated with the first allegation, you are in a position of trust as a manager, you have manipulated your roster for your own personal gain.*

*I therefore uphold this allegation.*

*In the light of this information and what was discussed, my decision is to summary dismiss you from today.*

123. The claimant responded to Mr Sims as follows: "*I'm devastated. I've been penalised for working hard. There's no warning, no one telling me to think about what I am doing. No one told me that I was doing anything wrong. I need you to have a rethink and think about what has happened. First incident in 25 years…you need to change your decision and give me a slap on the hand. This is my first offence, I'll give the money back, I'll work for free. Demote me".*

124. On 7 January 2021, Mr Sims sent the claimant a letter of dismissal which was materially the same as the verbal outcome set out above (pages [234] – [235]).

**The claimant's appeal**

125. On 11 January 2021, the claimant appealed to the respondent against the decision to dismiss him (pages [236] – [238]). There were 14 grounds of appeal. These included (sic):

> *7. All additional hours were added after a verbal request and guidance from my Senior Manager, David Holt, to cover shortfall namely LAS and October team meetings. I requested that David Holt was consulted about this and there was no record of this conversation had taken place between David Holt and Mark Sims.*
>
> *…*
>
> *9. After the email from James Hosking, dated the 21st October stating "no more overtime would be available for October and November" I notified my CPM that other PL's had added overtime into their rosters. I also rang and left a voicemail to James Hosking naming [LA] as one of them. I received an email 18th November from Dan Knowles headed whistleblowing and that he had dealt with it where necessary. If this is the case: the manipulation of his roster has seen treated differently to me.*
>
> *10. I have worked very hard for the AA, consistently earning £60k for at least the last 6 years which was described at the onset of the investigation by Mark Sims as a whistle blowing allegation? This lead on to the statement that "you are being investigated because you are a high earner, in fact the highest" (this was not recorded in the minutes of the meeting), yet I have never been targeted or investigated over my consistent unblemished 24 years' service?*
>
> *11. In the summary from Mark Sims, the allegation was changed to state "a breach of trust and confidence as a Performance Leader". I am aware of other PL's being investigated for similar reasons, and they were treated differently resulting in them being offered different outcomes, which makes me feel that I have been unfairly incriminated and the loss of my job being a penalty far too harsh.*
>
> *12. I have seen that manipulation of rosters is commonplace across the Country, specifically Bristol, Bournemouth & Somerset, PL's [LC] & [DH] have manipulated their rosters to add in overtime. PL [AS] drove on his break and while off duty on the 2nd of October 2020 and this is common behaviour throughout the patrol force across the country.*

126. The claimant submitted various further documents in support of his appeal, setting out his case on appeal. These included the following point, at page [295], that:

> *I would also raise the fact that they dropped allegation 2 against me ("Misappropriation of time") as data to the contrary was provided previously, but also which was about me using the van, and yet they level the same evidence against me in allegation 3 (in relation to using the Van (driving on break) to see my wife and check her health and welfare because she has not been well). I believe it is inconsistent of them to disregard evidence for one allegation but then to use it in another.*

127. The appeal was heard by Lee Simpson, the respondent's Head of Roadside Operations (after the claimant requested that the initial manager assigned to the appeal be changed, to which the respondent had agreed).

128. The appeal hearing was scheduled for 12 February 2021, via Teams.

129. On 10 February 2021, the claimant submitted additional documentation (pages [263] – [277]), which Mr Simpson reviewed before the hearing.

130. Insofar as the claimant had referred in his appeal to other individuals being treated differently to him, Mr Simpson's evidence to the tribunal (and there was no evidence to contradict him) was that, of the other PLs mentioned by the claimant:

    a. DW, DH and PH, were investigated for manipulating their rosters. It was determined that there was no fraudulent activity or intent to maximise their earnings, and instead they had simply failed to manage their diaries correctly, which resulted in them being issued with an improvement notice following disciplinary proceedings.

    b. LA was investigated for manipulating his roster and for misappropriation of time and was dismissed for gross misconduct.

    c. AS was looked into but it was found that there was no case to be investigated.

    d. LC was also looked into for manipulation of his roster, but it was determined that there was no case to answer.

131. At the appeal hearing on 12 February, Mr Simpson was accompanied by Jade Myers as notetaker. The claimant was unaccompanied. The notes of the appeal hearing were are at pages [281] – [291]. The hearing lasted from 1200 until 1245 and then reconvened from 1305 until 1334. There was no dispute raised about the notes.

132. The hearing was in two stages. In the first part, Mr Simpson went through the fourteen points in the claimant's appeal letter, read these out and clarified certain aspects of them with the claimant. In the second part, he went through the additional documentation and submissions provided by the claimant and again read some these out and clarified some aspects with the claimant.

133. At the end of the appeal hearing, the claimant stated, according to the notes (sic):

> *I just can't understand how I've manged to get myself in to this much trouble, and I'm sorry I can't say anymore, I can't blame anyone apart from myself and I just think I've said all I can say. I don't believe it was gross misconduct. I was just following instructions and for whatever reason I have been picked out and treated really harshly. All ever done is try my hardest and work really hard. I love being a PL. I tried being an area manager, manged to get the PL role, my teams improving I am doing everything to move them in the right direction this has rocked my world for the last 5/6 weeks. When I've tried to sleep I've thought about nothing else…*

134. Mr Simpson ended the hearing indicating that he would consider matters further and write to the claimant with his decision.

135. The outcome of the appeal was notified to the claimant in a letter dated 15 February 2021 (pages [292 - 294]) from Mr Simpson. The letter went through the 14 grounds points raised by the claimant in his letter of appeal, setting them out again, and dismissed all of them. For example (sic):

    a. On point 7, he responded as below:

    > ***7. All additional hours were added after a verbal request and guidance from my Senior Manager, David Holt, to cover shortfall namely LAS and October team meetings. I requested that David Holt was consulted about this and there was no record of this conversation had taken place between David Holt and Mark Sims.***
    >
    > *a. It was clearly communicated that PPJ was not available and should you have had queried this with your CPM when he requested you would had been informed. As a PL you are in a position of trust and as such should ensure clarity when communicating with the wider team. The message that PPJ was not available that was sent out by Dan Knowles on the 22nd May 2020 and was reiterated on an e mail directly to you and other PL's in David Holts team on the 22nd Oct 2020. Therefore, this point is not upheld.*

    b. On ground 10, he responded as below:

> ***10. I have worked very hard for the AA, consistently earning £60k for at least the last 6 years which was described at the onset of the investigation by Mark Sims as a whistle blowing allegation? This lead on to the statement that "you are being investigated because you are a high earner, in fact the highest" (this was not recorded in the minutes of the meeting), yet I have never been targeted or investigated over my consistent unblemished 24 years' service?***
>
> *a. I can confirm that the investigation was instigated as part of the whistle blowing claim and as a business we have a duty to follow up and investigation such allegations, which resulted in you being disciplined as the whistle blowing allegations were founded. Therefore, this point is not upheld.*

136. Mr Simpson upheld the earlier finding of gross misconduct and the claimant's dismissal.

137. In his witness evidence before the tribunal, Mr Simpson explained that he found that the most important factor, in his view, justifying the summary dismissal of the claimant was *"dishonesty"*. Mr Simpson said he concluded that the claimant's actions, in changing his roster and pre-booking overtime, where this was not permitted either due to his particular PPJ contract and/or because a general overtime ban was in place, were deliberate and done knowing that it was not permitted. Mr Simpson said he considered that the claimant's emails demonstrated he was aware it was not allowed (see paragraph 64 above). He further stated that, given the level of autonomy PLs have and the level of access they have to the respondent's systems, it was critical that the business could trust them to act with honesty and integrity. Mr Simpson also told the claimant during the appeal meeting that *"a breakdown of trust is regarded as gross misconduct"* (page [290]).

138. I did ask Mr Simpson specifically about point 7 of the claimant's appeal (see paragraph 135.a above) and the point raised about the respondent not having investigated whether David Holt had requested that the claimant pre-book additional overtime hours for himself during October 2020, as the claimant had repeatedly suggested had been the case. Mr Simpson indicated that he did not look further into this. He said that Mr Holt was still working for the respondent at the time of the appeal (although he subsequently left).

139. Following the outcome of the appeal, the claimant commenced Acas Early Conciliation on 17 March 2021 and the relevant certificate was issued on 23 March 2021. The claim was presented to the tribunal on 2 April 2021.

**Relevant law**

140. Section 94 of the Employment Rights Act 1996 (ERA 1996) confers on employees the right not to be unfairly dismissed.

141. Section 98 ERA 1996 Act deals with the fairness of dismissals. There are two stages within section 98:

(1) Firstly, the employer must show that it had a potentially fair reason for the dismissal within section 98(2).

(2) Secondly, if the employer shows that it had a potentially fair reason for the dismissal, the tribunal must consider, without there being any burden of proof on either party, whether the employer acted fairly or unfairly in dismissing for that reason under section 98(4).

142. A 'reason for dismissal' has been described as *'a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee' — Abernethy v Mott, Hay and Anderson* [1974] ICR 323, CA. (Mis)conduct is a potentially fair reason for dismissal under section 98(2).

143. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case.

144. In misconduct dismissals, there is well-established guidance for tribunals on fairness within section 98(4) in the decisions in *BHS v Burchell* [1978] IRLR 379 and *Post Office v Foley* [2000] IRLR 827.

145. The tribunal must decide:

(1) whether the employer had a genuine belief in the employee's guilt;

(2) if so, whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation; and

(3) if so, whether the decision to dismiss was reasonable.

146. In terms of the standard of investigation required in misconduct cases, in *A v B* [2003] IRLR 405, it was stated that the employer's investigation should be particularly rigorous when the charges are particularly serious or the effect on the employee is far-reaching. It is unrealistic and quite inappropriate, however, to require the safeguards of a criminal trial. Careful and conscientious investigation of the facts is necessary.

147. The reasonableness or otherwise of the employer's approach, with

reference to the above guidance in *Burchell* and *Foley*, is assessed with reference to the *"range"* or *"band"* of reasonable responses test. In *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17, EAT, Mr Justice Browne-Wilkinson summarised the law concisely as follows:

> *We consider that the authorities establish that in law the correct approach for the… tribunal to adopt in answering the question posed by [section 98(4)] is as follows:*
>
> *(1) the starting point should always be the words of [S.98(4)] themselves;*
>
> *(2) in applying the section [a] tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the… tribunal) consider the dismissal to be fair;*
>
> *(3) in judging the reasonableness of the employer's conduct [a] tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;*
>
> *(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;*
>
> *(5) the function of the… tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.*

148. The tribunal must not therefore substitute its own view for that of a reasonable employer (see also *Sainsbury's Supermarkets Ltd v Hitt* (2003)IRLR 23 and *London Ambulance Service NHS Trust v Small* [2009] IRLR 563).

149. As part of a fair procedure, an employee accused of misconduct must be informed of the charges against them so that they have the opportunity to put their case:

> *It is a fundamental part of a fair disciplinary procedure that an employee know the case against him. Fairness requires that someone accused should know the case to be met; should hear or be told the important parts of the evidence in support of that case; should have an opportunity to criticise or dispute that evidence and to adduce his own evidence and argue his case." (Spink v Express Foods Ltd* [1990] IRLR 320*).*

150. The same point is also reflected in the Acas Code which states, in respect of the notification to be given to an employee of a disciplinary hearing: *This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting.*

151. In a conduct dismissal involving more than one allegation, the question for a tribunal is whether the conduct in its totality amounted to a sufficient reason for dismissal, not whether the individual acts of misconduct individually, or cumulatively, amounted to gross misconduct (*Governing Body of Beardwood Humanities College v Ham* UKEAT/0379/13).

152. *Taylor v OCS Group Ltd* [2006] IRLR 613(CA) established that if there are procedural flaws in the process followed by the employer, they should be considered alongside the reason for dismissal, when the tribunal comes to assess whether in all of the circumstances, the employer acted reasonably in treating the reason as a sufficient one for dismissal.

*Polkey*

153. In *Polkey v AE Dayton Services Ltd* [1987] IRLR 503, the House of Lords held that a compensatory award may be reduced or limited to reflect the chance that the claimant would have been dismissed in any event and that the employer's procedural errors accordingly made no difference to the outcome. A tribunal should make a realistic assessment of loss according to what might have occurred in the future. The chances of the actual employer, not a hypothetical reasonable employer, dismissing the employee have to be assessed.

154. In *Software 2000 Ltd v Andrews and others* UKEAT/0533/06 the suggested approach to *Polkey* was as follows:

> *The question is not whether the Tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice.*

*Contributory conduct*

155. A tribunal may reduce the basic award if it finds that the employee's conduct before dismissal was such that it would be just and equitable to reduce it (section 122(2), ERA 1996).

156. Furthermore, where a 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"* (section 123(6), ERA 1996).

157. In *Nelson v BBC (No.2)* [1979] IRLR 346 (CA), the Court of Appeal set out three factors that must be present for the compensatory award to be reduced for contributory fault:

a. The employee's conduct must be culpable or blameworthy.
b. It must have actually caused or contributed to the dismissal.
c. The reduction must be just and equitable.

158. In *Steen v ASP Packaging Ltd* UKEAT/23/13, the EAT held that an employment tribunal must consider the following four questions:

a. What was the conduct which was said to give rise to possible contributory fault?
b. Was that conduct blameworthy, irrespective of the employer's view on the matter?
c. For the purposes of section 123(6), did the blameworthy conduct cause or contribute to the dismissal?
d. If so, to what extent should the award be reduced and to what extent would it be just and equitable to reduce it?

*Wrongful dismissal*

159. In *British Heart Foundation v Roy* UKEAT/0049/15/RN, the distinction between a claim of unfair dismissal and wrongful dismissal was set out:

> *Whereas the focus in unfair dismissal is on the employer's reasons for that dismissal and it does not matter what the Employment Tribunal thinks objectively probably occurred, or whether, in fact, the misconduct actually happened, it is different when one turns to the question either of contributory fault for the purposes of compensation for unfair dismissal or for wrongful dismissal. There the question is, indeed, whether the misconduct actually occurred.*
>
> *In a claim for wrongful dismissal the legal question is whether the employer dismissed the Claimant in breach of contract. Dismissal without notice will be such a breach unless the employer is entitled to dismiss summarily. An employer will only be in that position if the employee is herself in breach of contract and that breach is repudiatory…*

160. The relevant questions for the tribunal are whether the employee has committed an act of gross misconduct and whether he was dismissed as a result by the employer. The burden of proof is on the employer to prove on the balance of probabilities that the employee was guilty of gross misconduct.

**The parties' submissions**

161. I heard oral submissions on behalf of the respondent and also from the claimant. Ms Nicholls was content to make her submission first, as the claimant was unrepresented, and I did explain the claimant that I would obviously not expect him to make an equivalent submission, but I

considered it would beneficial for him to make his submission last. This was agreed by both parties. I also offered him a break following the respondent's submissions, but he declined this and said that he had prepared a written document which he wished to read, and did so.

*The respondent's submissions*

162. These were as follows. Ms Nicholls dealt briefly with the relevant law, which was uncontroversial and well-settled. She referenced *Buchell, Hitt, Foley* and *Madden* and, in terms of what amounts to gross misconduct, *Wilson v Racher* [1974] ICR 428, which is authority for the proposition that, in cases of deliberate wrongdoing, gross misconduct must amount to wilful repudiation of the express or implied terms of the contract.

163. She submitted:

a. that the claimant's actions fell within the remit of gross misconduct and included falsification, serious insubordination, refusal to follow instructions and breaches of the respondent's rule;

b. that the claimant's manipulation of his roster as a supervisor, compared to Patrols, fell within the definition of gross misconduct;

c. that the actions of the claimant were far more serious than something like unauthorised absence and went to the heart of the relationship;

d. the length of the claimant's employment of 24 years was a significant time but that cut both ways; the claimant had been promoted to PL and so was responsible for setting an example to others; he manipulated his roster and took away the opportunity for others to earn overtime and received pay at an inflated rate than other patrols going out (standby rates were lower);

e. that it was only in 2020 that this was uncovered and others were also investigated;

f. that it was quite obvious from the documents that the claimant was manipulating the system for his own gain;

g. that the fact that the respondent did not uphold Allegation 2 was evidence that it took a fair and balanced approach;

h. there were two parts to the claimant manipulating the roster:

- he maximised his management hours and made shorter RRS shifts to allow him to work stop-on overtime; and

- he inserted overtime during October 2020 and at the PPJ rate was paid nearly £2,000 for this. Pre-booking overtime

went against the communications in May and October 2020; and

i. that the claimant produced no evidence that he was instructed to book overtime by his line manager and that the respondent had spoken to the line manager who had provided emails at pages [229] – [231] (see above, paragraph 114). She suggested that the claimant was now claiming that he had been so instructed by his line manager to get out of a sticky situation.

164. Ms Nicholls submitted that the respondent alternatively contended that the claimant's dismissal was fair on the basis of *"some other substantial reason",* namely an irretrievable breakdown of trust and confidence. She said that the claimant had accepted the vast majority of the points put to him and he was responsible for setting an example; he needed to be *"whiter than white"* and had not been. He had access to amending the roster.

165. She submitted that, although Mr Sims was not questioned by the claimant at length before the tribunal, it was clear that he reasonably believed the claimant to be guilty of gross misconduct. He considered a lesser sanction and the claimant's disciplinary record but determined that dismissal was the appropriate sanction.

166. In terms of the procedure followed by the respondent, the claimant could not point to any breaches of the respondent's disciplinary policy. He had ample time to prepare for the disciplinary hearing and could clearly state his case – the process had not been *"a tick box exercise"*; there had been a lot of discussion about the issues in the disciplinary hearing; the claimant had been allowed to go away and produce more evidence. The claimant did not suggest that anyone else should have been spoken to during the investigation. The respondent denied the point raised by the claimant about his line manager, David Holt. There were clear communications in May and October 2020. The fact that others may have manipulated rosters was not relevant; others were dismissed or resigned and some received improvement notices. The claimant was not treated less favourably and the respondent took appropriate action.

167. The disciplinary invite letter set out the potential consequences and the claimant's right to be accompanied. The disciplinary hearing was detailed and the outcome was not pre-determined. Mr Sims had no prior dealings with the claimant. The claimant presented 60 pages of evidence and Mr Sims made his own enquiries. The reason the claimant and others were investigated was because of the August whistleblowing complaint and the subsequent review of PL pay/earnings.

168. The dismissal letter was clear, as was the appeal letter; it was clear that the claimant had not been singled out.

169. The claimant did not obtain any email from David Holt concerning PPJ overtime; Mr Sims spoke to Mr Holt during the adjournment in the disciplinary hearing and I was invited to find that David Holt's subsequent email to Mr Sims was decisive.

170. Vast swathes of the process were not put to Mr Sims or Mr Simpson by the claimant concerning alleged flaws and neither took their responsibility lightly. Their only option was dismissal.

171. If I were to find flaws in the process, I was invited to find that the claimant would have been dismissed in any event and to make a 100% Polkey or contributory conduct reduction, due to the claimant's manipulation of his roster.

172. The claimant had also driven during his break periods and whether others had also been doing so did not resolve the issue. Mr Sims and Mr Simpson said that if that had been the only issue, they would not have dismissed the claimant.

173. On the wrongful dismissal claim, the respondent's case was that the claimant's actions for his own gain permitted the respondent to terminate the contract on the basis of a fundamental breach.

174. I was invited to dismiss both of the claimant's claims.

*The claimant's submissions*

175. The claimant's submissions were much briefer, as would be expected, and were as follows.

176. In effect, he summarised his witness evidence and points from his evidence during the disciplinary proceedings. He referred to his employment history, his good record and how he had *"loved"* working for the respondent and its customers. He had seen that he had a job for life and why would he risk that *"for a few extra hours"*?

177. He submitted that he had been very busy over the relevant time as a result of his team supporting LAS. They had been very short-handed and his manager had asked him to *"get guys on the road"*; he had worked very hard for every penny he had earned.

178. The respondent had looked at the period from October to December 2020. He had not added in any pre-planned overtime in November or December.

179. During October, he had inserted overtime in advance as that was best practice; he had need to change his roster to add in MGMT time and meetings. He had added it as *"it had to come from somewhere"*.

180. The overtime he had pre-booked during October was mostly done in September or early October. There had been no guidance from his managers about this and he had been learning on the job.

181. He submitted that the investigation report was poor, with inaccuracies. He had apologised for his own double standards but the respondent had failed with its own processes.

182. He said that he could not vouch for the accuracy of the meeting notes.

183. He had been dismissed after 24 years and submitted that other PLs had acted with impunity for similar behaviour. He had not been replaced. There had been 137 PLs in June 2018 and now there were only 120. It was a form of forced redundancy.

184. Towards the end of his submission, he referred to matters concerning David Holt's departure from the business, on which I had not heard any evidence and so I did not take those matters into account.

185. He strongly objected to being labelled as dishonest, when he had done what had been requested of him by the respondent and worked to the best of his ability for the respondent's customers.

186. He had found the whole experience very traumatic (and he referred to consequences for him and his family, which were not directly relevant to my decision).

187. I was invited to find in his favour so that he could close this chapter of his life and move on.

## Conclusions

Unfair Dismissal

188. This was a case in which there were relatively few factual disputes and the main issue between the parties was around the interpretation and characterisation of those facts, which were relatively complex.

*Reason for dismissal*

189. On the first question, namely whether there was a potentially fair reason for dismissal, I am satisfied that the respondent dismissed the claimant because it considered that the claimant had committed misconduct. There was no evidence to support the claimant's contention that the respondent had an ulterior motive of cost saving. As such, there was a potentially fair reason for dismissal within the meaning of section 98(2).

190. I now address whether the dismissal was fair for the purposes of section 98(4).

*Did the respondent carry out a reasonable investigation?*

191. I have firstly considered the fairness of the investigation. I have focused on here on the two main allegations which were upheld, Allegation 1, manipulating the roster for financial gain and Allegation 3, breach of trust and confidence.

192. Allegation 1 in effect had two components:

a. the claimant pre-booking overtime during October 2020 contrary to the respondent's instructions;

b. the claimant arranging his roster to maximise the length of MGMT shifts and reduce the length of RSS shifts, so as to maximise his opportunity to undertake stop-on overtime.

193. There was no dispute that the claimant had pre-booked overtime during October 2020. He said, during the disciplinary proceedings that he did so not to maximise his own earnings, but because he and his team were busy and in particular he was expressly instructed to book the overtime by his line manager David Holt. The respondent did not investigate the claimant's contentions concerning David Holt in any detail, in particular:

a. Mr Russell did not revisit Mr Holt during the disciplinary investigation following his interview with the claimant, during which the claimant had raised this point.

b. Mr Sims spoke briefly to Mr Holt by telephone during the adjournment in the disciplinary hearing itself. The claimant was not told what Mr Sims had been specifically asked of Mr Holt by Mr Sims or what Mr Holt's responses were, save that the claimant was merely told by Mr Sims that there was no evidence to support his position. The emails referred to at pages [229] – [231] from Mr Holt to Mr Sims shed no light on this point.

c. The claimant had also told the respondent that the instructions from Mr Sims had been given verbally in a CPM meeting and also via WhatsApp on work mobile phones. There was no evidence that either of these lines of potential inquiry had been explored.

d. The claimant raised this same point during his appeal, including that had not previously been properly investigated by Mr Sims, but Mr Simpson did not look into it any further at the appeal stage.

194. This was an important aspect of the overtime allegation since, if it transpired that the claimant had been following the express instructions of his line manager in booking overtime, it would be very likely to have changed the characterisation of his actions by the respondent. It is clear (see *A v B*) that where an employee faces serious allegations of misconduct, in this case in effect an allegation of dishonesty against a long serving employee, a particularly rigorous investigation is required.

195. The investigation of this allegation was not rigorous. Rather, it appeared that the respondent's management had closed its mind to the possibility that the claimant may not have committed the misconduct alleged, in terms of the pre-booked overtime. I find that no reasonable employer, particularly a large employer with the resources of this respondent, would have omitted

to fully investigate an important aspect of the overtime allegation and to provide the results of the further investigation to the employee before the conclusion of the disciplinary proceedings.

196. There was also some indication in the evidence of Mr Sims (see above, paragraph 121.b) that he took into account in his decision-making a period of overtime in June 2020 which had not been put as part of the disciplinary case against the claimant (which related to a later defined period in 2020), and which had not been discussed during the disciplinary hearing.

197. As such the respondent's investigation in this regard was outside the range of reasonable responses.

198. The investigation of the second aspect of Allegation 1 by the respondent, concerning changes by the claimant to his (non-overtime) hours within his rosters, was within the range of reasonable responses. The allegation was sufficiently clearly defined. Relevant evidence was collated during the initial investigation and subsequently; it was put before the claimant during the disciplinary hearing; and the claimant was able to adduce some evidence of his own about the same issue.

199. The investigation of the third allegation, of a *"breach of trust and confidence"*, was, however, another problematic area for the respondent.

200. The main difficulty with this allegation for the respondent was that it is not self-evident from the phrase itself what a *"breach of trust and confidence"* entails. The respondent did not make the case which the clamant faced on this point clear. In all cases where employers and employees rely upon a breach of this implied term, particulars of what conduct is said to give rise to the breach are inevitably required, whether that is a one-off incident or a series of incidents. The allegation in the present case was put variously as follows by the respondent:

    a. In the investigation report of Mr Russell, he concluded that the claimant: "*fraudulently, over a period of the 2 months reviewed, misled the business by breaching trust and confidence as a performance leader for financial gain"* (see paragraph 83 above). Thus, Mr Russell framed the breach of trust and confidence **only** as an aspect of Allegation 1, in effect the consequence of the claimant's alleged actions under Allegation 1. There was no indication that it was a free-standing issue or that it related to other aspects of the claimant's alleged conduct, for example matters which fell under the separate "misappropriation of time" allegation.

    b. The disciplinary invitation to the claimant from Mr Sims gave no specific or additional particulars and merely stated that one of the three allegations was *"breach of trust and confidence"* (see paragraph 92 above). A copy of the investigation report was provided

to the claimant, including the point I have mentioned in the previous paragraph.

c. During the course of the disciplinary hearing itself, Mr Sims mentioned trust and confidence to the claimant only very briefly and, for the first time, raised the issue of the claimant's use of his company van for personal use in this context (see paragraph 108 above). He did not mention to the claimant that an allegation that he had driven whilst on a break also formed part of the breach of trust and confidence allegation.

d. Mr Sims then found as follows against the claimant in respect of the allegation of breach of trust and confidence: "*You have admitted that on occasions you have driven whilst on Break, this is a serious breach of process. You admitted that on occasion you have visited family and friends during shift. You admitted that on occasion you have used your service vehicle to collect your wife on your way home and to visit friends after shift, returning home significantly after shift. As has also been demonstrated with the first allegation, you are in a position of trust as a manager, you have manipulated your roster for your own personal gain"* (see paragraph 122.c above). Thus, the finding of breach of trust and confidence in the mind of Mr Sims was based upon a combination of:

    - A finding that the claimant had driven whilst on a break (which formed part of the separate "misappropriation of time" allegation)
    - A finding that the claimant had on occasion visited family and friends during shift (also part of the "misappropriation of time" allegation)
    - A finding that the claimant had on occasion used his van to collect his wife and visit friends after his shift (also part of the "misappropriation of time" allegation)
    - The findings on the manipulation of the roster for personal gain (Allegation 1)

e. On the separate *"misappropriation of time"* allegation which the clamant faced, Mr Sims had concluded (my emphasis): *"Having reviewed the evidence, whilst there are* ***some minor anomalies*** *I am comfortable that there is* ***no case to answer*** *and* ***I will not be taking this allegation into consideration****".* There is a clear inconsistency here, in Mr Sims finding on the one hand that there was no case to answer on the allegation of misappropriation of time and saying he will not be taking such matters into consideration, but on the other hand then (as is apparent from the preceding paragraph) expressly incorporating several aspects of the same allegation into his finding on the allegation of breach of trust and confidence. The claimant raised this issue in the course of his appeal to Mr Simpson (see

above, paragraph 126). Mr Simpson did not, however, address this point in the appeal.

201. I find that a reasonable employer, particularly one of the size of the respondent and with its resources, who considered that an employee had breached trust and confidence would have provided an employee with clear particulars as to what behaviours and actions were said to amount to a breach of trust and confidence. The unclear and nebulous way in which this respondent investigated and determined this allegation was outside the range of reasonable responses.

*Was the respondent's belief that the claimant had committed misconduct reasonably held?*

202. I reminded myself that, in considering this question, the issue for me is **not** whether I would have believed the claimant to be guilty based on the material before the respondent, but whether the respondent has acted reasonably in forming its belief. The question of whether the respondent acted reasonably and had reasonable grounds for its belief is to be judged objectively.

203. On the issue of the first aspect of Allegation 1, namely the claimant booking pre-planned overtime during October 2020, I find as follows:

a. For the period from 1 to 22 October 2020, the respondent's belief that the claimant had committed misconduct in so doing was not reasonably held. Whilst there had been a general instruction issued in May 2020 concerning the issue of booking PPJ overtime, the respondent's decision here cannot be considered as reasonably held in view of its failure to adequately investigate the claimant's repeated defence, namely that he had subsequently been expressly instructed to book such overtime by David Holt because he and his team were very busy. The respondent therefore formed a view based only upon a partial picture, which was unreasonable.

b. During the period from 22 to 31 October 2020, the respondent had re-stated its position on overtime in the message from James Hosking (see paragraph 46 above). That message expressly stated that no additional pre-booked overtime should be created during the rest of October and November 2020, although such hours already booked could remain in place. It was clearly apparent from the evidence before the respondent during the disciplinary process, most of which was generated by the respondent itself, and the claimant also explained his position clearly at the disciplinary hearing, that the claimant did **not** create any new overtime bookings after that date, during October and November 2020. Rather, he merely moved around three existing overtime bookings which had been made before 22 October (see paragraphs 50 and 118 above), save that he

said that he accidentally inserted one additional hour when he moved one of those bookings. He did not pre-book any overtime during November 2020. Viewed objectively, the respondent's belief that the claimant's actions, after the instruction by Mr Hosking of 22 October 2020, amounted to misconduct, was not a reasonable one in view of the evidence which was before it.

204. The second aspect of Allegation 1 was the allegation that the claimant had increased the length of his MGMT shifts and reduced the length of his RRS shifts in order to maximise his opportunity to earn overtime.

205. On the one hand:

a. During his first meeting with Mr Russell in December 2020 (see paragraph 77.j above) the claimant told Mr Russell that he maximised the length of his MGMT shifts to make the day a valuable one but also, when asked why he did it, said that he had asked his predecessor how he *"made so much money"*. He accepted that this arrangement enabled him to do more stop-on overtime at the end of the RSS shifts. He also acknowledged that he now understood that it was not the right thing to do.

b. The claimant was asked by Mr Sims about his comments above to Mr Russell during the disciplinary hearing about making money (see paragraph 104 above). He said that this probably led the respondent "*down the wrong path"* (this point was not queried or explained further during the disciplinary hearing), that his predecessor had been earning more money than the claimant, the claimant had asked him what he was doing, and when he responded that he had moved hours, the claimant said that he should not be doing it.

c. The claimant also admitted on several other occasions during the disciplinary process (in fairly unspecific terms) that he had been at fault and wished to be given a chance to improve going forwards.

206. On the other hand:

a. The evidence produced by the respondent during the disciplinary process showed that the automatically generated rosters for the claimant were created with almost the **identical** number of longer and shorter shifts that the claimant worked during October and November 2020 (see above, at paragraphs 31 and 38). As such the claimant did not create more longer shifts than had already been generated for him by the respondent. He merely determined whether the longer shifts were to be worked by him as MGMT or RSS.

b. There was clear evidence from the claimant and that was supported in the interview with Mr Holt that the claimant needed to change his

shifts from those which were automatically generated by the respondent, and which did not distinguish between RSS and MGMT time.

c. The claimant explained to the respondent on several occasions during the disciplinary process that longer management shifts made for the best/most valuable use of his MGMT time.

d. There was no evidence of any procedures or guidance from the respondent in place for PLs when it came to arranging their shifts as between MGMT and RSS duties as to what could or should be done.

207. On balance, I find that the respondent's conclusions that this issue amounted to misconduct on the part of the claimant, viewed objectively, *were* reasonable. The claimant's admissions during the investigatory process, which were not satisfactorily explained to the respondent, were telling. He did have some discretion, as a PL, when it came to arranging his shifts. Whilst there was a logical basis for having longer management shifts as he explained, in that this was a valuable use of his time, and he also needed to make changes to the initial shifts generated automatically for him, there did appear to be some element of financial motive in making these arrangements, as he admitted to Mr Russell. I remind myself that the test here is not what I would have found in the shoes of the respondent and I cannot substitute my own decision. I find that, on the evidence before the respondent and in particular the admissions during the investigatory interview, its conclusion on the roster arrangement issue, that it amounted to misconduct, was a reasonable one.

*Reasonableness of sanction*

208. I then considered the severity of the sanction imposed upon the claimant.

209. I noted that the respondent's disciplinary policy (see above paragraph 91) included:

a. the following as example of gross misconduct: fraud; falsification of records, expense claims or other information; serious or persistent insubordination or refusal to follow a reasonable management instruction; and serious breaches of company policies or rules including health and safety rules.

b. the following as examples of misconduct: persistent bad timekeeping, failure to follow a reasonable management request or instruction; and minor breaches or failures to observe the respondent's policies or procedures.

210. Of the main allegations against the clamant, the only substantial one which effectively survived the respondent's flawed disciplinary process, as I have

found it to be above, was that which concerned the claimant's arrangement of the MGMT and RSS shift on his roster, amounting to misconduct. The investigation of the allegations concerning pre-booked overtime and breach of trust and confidence were materially flawed and the conclusions reached on those allegations by the respondent were unreasonable.

211. The surviving allegation did not readily fit within the examples of gross misconduct within the respondent's disciplinary policy above, although these were not exhaustive.

212. I remind myself again that I must not substitute my decision in this regard for that of the respondent. The test is not what I would have done in the respondent's shoes but rather, whether, in all of the circumstances, the respondent's decision to dismiss the claimant was one which no reasonable employer could have reached and so fell outside the range of reasonable responses.

213. I find that the decision to dismiss, based upon the allegations which survived the respondent's flawed disciplinary process, did fall outside the range of reasonable responses. In reaching that view, I considered the following factors, in combination:

    a. The claimant was a very long-serving employee with no previous disciplinary findings against him.

    b. The respondent's own booking system automatically generated virtually the same number of longer shifts (during the period being considered) as those which the claimant was subsequently found to have created for himself. As such the claimant's actions essentially boiled down to allocating/arranging his shifts as between RSS or MGMT duties, rather than creating an increased number of longer shifts for himself. There was clear evidence from the claimant, and this was supported by the interview with his manager during the disciplinary process, that he needed to change his shifts from those automatically allocated to him. The respondent also did not dispute the claimant's assertions during the disciplinary process that longer management days were the most valuable use of his management time.

    c. There was no evidence of the respondent having provided any guidance or procedure concerning the booking or allocation of shifts by PLs as between MGMT and RSS duties, as the claimant repeatedly stated during the disciplinary process.

    d. The character of the claimant's conduct differed from that, described by Mr Sims, of the other PLs who had been dismissed, who had been fraudulently booking or claiming overtime which they had not in fact worked or the PL who had, amongst other things, pre-booked

overtime in November 2020 despite the express instruction from Mr Hosking not to do so. Other than some minor time-keeping issues, which formed part of the "misappropriation of time" allegation against the claimant which was not upheld, there was no finding by the respondent that the claimant had fraudulently not been working at the relevant times. This particular point, concerning the treatment of other PLS, would not be determinative in itself on this issue, but is part of the overall surrounding circumstances which I have considered.

e. The only other material findings by the respondent against the claimant, insofar as they could be discerned from the respondent's muddled disciplinary process, concerned driving whilst on a break, minor timekeeping issues, and the claimant using his van for personal use, which were not upheld at the disciplinary hearing ("misappropriation of time"). Those findings would not have brought the dismissal within the range of reasonable responses, either on their own or in conjunction with the MGMT/RSS roster issue.

f. Whilst the claimant was in a position of responsibility and trust, I balanced this against the nature of the misconduct in question, his long service and noted the fact that the respondent had been content for the claimant to remain at work throughout the disciplinary process, during which time he continued to have access to the roster and had the ability to work further overtime.

*Some other substantial reason*

214. I deal briefly with the respondent's alternative contention that the dismissal was alternatively a fair one, for some other substantial reason, based upon a fundamental breach of the duty of trust and confidence. This point was not pleaded in the Grounds of Resistance in a case which was clearly a dismissal on grounds of conduct. The primary case against the claimant for a breach of trust and confidence has been addressed above in the context of the conduct case, and I have found that the respondent's actions in respect of it were unreasonable (in the *Iceland Frozen Foods v Jones* sense). Furthermore, Mr Sims expressly stated in his evidence that, if the allegation of breach of trust and confidence had been the only allegation substantiated against the claimant, he would have issued the claimant with a final written warning, as opposed to dismissing him i.e. it fell short of warranting dismissal. I therefore do not uphold that point.

*Conclusion on unfair dismissal*

215. I conclude that the respondent dismissed the claimant for misconduct, a potentially fair reason for dismissal. By virtue, however, of (i) the serious procedural failings identified above, (ii) the lack of a reasonably-held belief on the part of the respondent in respect of some of the allegations it upheld,

and (iii) the decision to dismiss the claimant, based upon the allegations which remained intact, falling outside the range of reasonable responses, the claimant's dismissal was unfair.

*Polkey and contributory fault*

216. I do not consider that the facts of the case give rise to any basis for reducing any award to the claimant based on *Polkey.* Had the respondent followed a fair procedure, on the information available to me and mindful that I do not know what the outcome would have been of the full enquiries into Mr Holt's instructions concerning overtime including checking WhatsApp messages, I do not find that the claimant, on the balance of probabilities, would likely have been dismissed in any event. I do not consider that the matters set out in the anonymous complaint against the claimant dated 11 December 2020, which was not investigated, would have been likely to have resulted in a fair dismissal by this respondent.

217. I do, however, consider that there should be a reduction of the basic and compensatory award payable to the claimant to reflect the extent to which the claimant's own culpable conduct contributed to his dismissal. The claimant admitted on a number of occasions during the disciplinary process that he had fallen short of what was expected of him and the particular culpable conduct in question which was evident before me was:

    a. The claimant did take his own financial benefit into account when arranging his shifts, in terms of the opportunity to earn stop-on overtime. This was not the sole basis of the shift arrangements he made. He already had longer shifts allocated automatically by the respondent, which he needed to allocate to RSS or MGMT time. Whilst I accept, for the purposes of considering this issue, his evidence that it made sense for his MGMT shifts to be longer, to make the most valuable use of the time, he should not have allowed his own financial benefit to affect the allocation at all, as he admitted he had done during the investigatory interview.

    b. The claimant did also accept fault in other areas which gave rise to the disciplinary proceedings, including driving whilst on a break, around the use of his company van, and on some minor timekeeping issues.

218. I find that the appropriate reduction, which would be just and equitable, is a 50% reduction in the basic award and the compensatory award to reflect the extent to which the claimant contributed to his dismissal.

<u>Wrongful dismissal</u>

219. The claimant was dismissed without notice. He brings a wrongful dismissal claim in respect of his entitlement to 12 weeks' notice.

220. The respondent says that it was entitled to dismiss him without notice for gross misconduct.

221. I must decide if the claimant committed an act of gross misconduct entitling it to dismiss the claimant without notice. In distinction to the claimant's claim of unfair dismissal, where the focus was on the reasonableness of the respondent's management's decisions, and it is immaterial what decision I would myself have made about the claimant's conduct, I must now decide for myself whether the claimant was guilty of conduct serious enough to entitle the respondent to terminate the employment without notice.

222. The onus fell on the respondent to convince the tribunal, on the balance of probabilities, that the claimant had committed gross misconduct.

223. I find that the respondent has not proved that the claimant committed gross misconduct. I have set out in detail the evidence which was before the respondent during the disciplinary process (and before me) concerning the claimant's overtime and booking of RSS/MGMT shifts.

224. On the overtime issue, there was no evidence from Mr Holt to contradict the claimant's case that he had been expressly authorised to pre-book the overtime in question. He did not book any new pre-booked overtime (bar one hour in error) after the instruction of 21 October from James Hosking. There was no gross misconduct evident here.

225. On the roster booking issue, the claimant of necessity needed to change his shifts from those originally allocated automatically to him. It made sense for his MGMT days to be longer than his RSS to make the most valuable use of his management time. However, he admitted during the initial investigation that there was a financial element to his decision making. I find that this amounted to misconduct on his part, but in the absence of any guidance or procedures in place on the part of the respondent concerning these arrangements, I do not find that it amounted to gross misconduct.

226. None of the other matters of potential misconduct which were apparent from the evidence (driving whilst on break, minor timekeeping issues, personal use of the claimant's van) came close to amounting to gross misconduct individually or cumulatively.

227. The claim for wrongful dismissal succeeds.

Employment Judge
Dated: 15 March 2022

Reserved Judgment & reasons sent to parties: 30 March 2022

FOR THE TRIBUNAL OFFICE