EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4112322/2019

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Held in Glasgow on 9, 10 and 11 May 2022; 7, 8 and 9 June 2022

Employment Judge B Campbell

10 **Ms F MacDonald** — **Claimant**
Represented by:
Ms M Dalziel -
Solicitor

15 **Openreach Limited** — **Respondent**
Represented by:
Mr G Mitchell -
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:

1. the claimant was unfairly dismissed contrary to section 94 of the Employment
25 Rights Act 1996, and

2. the respondent is ordered to pay the claimant the sum of £9,991.25 as compensation; and

3. The respondent did not breach the claimant's contract of employment by electing not to provide notice or payment in lieu upon dismissing her and that
30 claim is dismissed.

REASONS

General

1. This claim arises out of the claimant's employment by the respondent which began on 2 May 2007 and ended on 19 August 2019 with her dismissal. The
35 claimant asserts that she was unfairly dismissed and that the respondent

separately breached her contract by making no payment in respect of her entitlement to a notice period. The respondent contends that it dismissed her fairly because of her conduct and by following a reasonable procedure, and that by being in breach of contract herself she was not entitled to notice.

2. The parties had helpfully prepared an indexed and paginated joint bundle of documents. Numbers in square brackets below are references to the page numbers of the bundle. A small number of additional items were added as the hearing progressed. The bundle contains documents in relation to losses claimed including a schedule of loss, and also relating to the claimant's position on attempts to mitigate loss.

3. The parties had agreed a list of issues and also a statement of agreed facts.

4. Evidence was heard from Mr Donald MacDonald, Ms Katrina Robertson, Mr Kevin Walker and Mr Greg Fleming for the respondent. The claimant gave evidence herself and Mr Colin McDougall also gave evidence (remotely by video owing to the logistics and cost of travel to the Glasgow hearing centre) in support of her case also. The designations of the witnesses are dealt with below.

5. All of the witnesses were found generally to be credible and reliable. There were conflicts in some areas of the witnesses' evidence and those are dealt with in the main body of the judgment below.

6. At the conclusion of the evidence the parties' representatives provided submissions which were noted and where appropriate they are referred to below. Ms Dalziel delivered her submissions orally and Mr Mitchell provided a written note which he referred to orally to emphasise certain points.

Legal issues

7. The parties had agreed a list of issues. The legal questions before the tribunal were as follows. By way of explanation, the claimant had also raised a common law claim of breach of contract and this has been added to the list of issues to be determined.

Unfair Dismissal

It is accepted that the claimant was dismissed on 20 August 2019. The respondent contends that the dismissal was for misconduct.

5 1. Did the respondent have a genuine belief in the alleged misconduct?

2. If so, did the respondent have reasonable grounds for that belief?

3. If so, had it carried out reasonable investigation in coming to that belief?

4. Was the decision to dismiss within the reasonable band of responses
10 for an employer in all of the circumstances of the case?

5. Was the dismissal otherwise fair in all of the circumstances of the case?

Contributory Conduct and Polkey

6. If it is found that the dismissal was unfair, did the claimant contribute
15 to the dismissal through her conduct? If so, should the tribunal make reductions to the basic and compensatory award for contributory conduct and if so, what reductions?

7. If it is found that the dismissal was procedurally unfair, should the tribunal make any Polkey reductions to the compensatory award
20 reflecting the likelihood that the claimant would have been dismissed in any event?

Remedy

8. It is agreed that (subject to any reductions for contributory conduct) if the claimant's dismissal is found to be unfair, the Basic Award will be
25 £7,087.50.

9. If the claimant's dismissal is found to be unfair, what compensatory award (if any) is it just and equitable to award in all of the

circumstances of the case, taking account of the claimant’s losses and any reductions made. Did the claimant adequately mitigate her losses?

10. It is agreed that the statutory cap on any compensatory award will be £32,131.84.

Breach of contract

11. It being agreed that the claimant was entitled to twelve weeks' notice of termination of her employment, by giving no notice of dismissal or payment in lieu, did the respondent breach the claimant's contract of employment?

12. If yes, what damages should be awarded?

Applicable law

8. By virtue of Part X of ERA, an employee is entitled not to be unfairly dismissed from their employment. The right is subject to certain qualifications based on matters such as length of continuous service and the reason alleged for the dismissal. Unless the reason is one which will render termination automatically unfair, the employer has an onus to show that it fell within at least one permitted category contained in section 98(1) and (2) ERA. Should it be able to do so, a tribunal must consider whether the employer acted reasonably in relying on that reason to dismiss the individual. That must be judged by the requirements set out in section 98(4), taking in the particular circumstances which existed, such as the employer's size and administrative resources, as well as equity and the substantial merits of the case. The onus of proof is neutral in that exercise.

9. Where the reason for dismissal is the employee's conduct, principles established by case law have a bearing on how an employment tribunal should assess the employer's approach. Relevant authorities are considered below under the heading 'Discussion and Conclusions'.

10. An employee will be entitled to notice of termination of their employment based on the terms of their contract or the provisions of section 86 ERA, whichever is the more generous. Unless the employer brings the contract to an immediate end by reason of the employee's material breach, it must make a payment equivalent to the wages it would have paid had the notice period been served. It is settled law that where an employee commits an act of gross misconduct the employer may be able to treat this as a fundamental breach of contract, and by immediately ending the contract in acceptance of that breach, it is released from the obligation to pay notice.

Findings of fact

The following findings of fact were made as they are relevant to the issues in the claim.

Background

11. The claimant was an employee of the respondent from 2 May 2007 until 19 August 2019. The respondent is a provider of telecommunications systems to the general public, including broadband services. It operates throughout the UK. The claimant was a Senior Engineer and was based at the respondent's exchange on the Isle of Benbecula. She gained that title in 2018 and before that had been a B2 Engineer. Her principal duties were to resolve customers' issues with their broadband and telephone services.

12. The circumstances of this case concern the provision of customer support services on the isle. The claimant was part of a team of Engineers on the isle. Being a Senior Engineer she was one of the more experienced, and would provide support and guidance to other engineers as well as performing her own duties. A copy of her job specification was provided [65-70]. This included a descriptions of the claimant's duties and responsibilities, as well as a set of values those in the role were expected to demonstrate. As well as being expected to provide field-based assistance to customers she would be *'recognised by your peers and line manager as the 'go to' person for technical and analytical expertise, your practical application of these skills thorough workmanship standards and your ability to adapt and flex to help and support*

colleagues.' The document also said *'You'll be required to pro-actively support colleagues in all aspects of engineering skill and capability, reinforcing behaviours to deliver great customer service.'*

13. The claimant's team were managed latterly by Mr Donald ('DI') MacDonald, an Operations Manager. He was not based on the isle and managed the claimant's team remotely, as well as other teams on neighbouring islands. He tended to be based at the Stornoway exchange, which was around four hours' travel each way from the Benbecula main exchange.

14. Mr MacDonald replaced a Mr Roddy Henderson as the manager of the claimant's team in November 2018. He was initially appointed on an interim basis which became permanent. At that time the respondent considered that the claimant's team, as well as teams on some of the neighbouring islands, were underperforming in terms of customer responses compared to teams elsewhere in the UK. Some minimum service levels as set by OFCOM were not being met. For example, customer issues should be resolved within 48 hours in 80% of cases, but there was an achievement rate of only 60%. Part of Mr MacDonald's remit as the incoming manager was to bring about improvement.

15. The claimant had had a good working relationship with Mr Henderson. Rarely had he taken issue with any aspect of her work and she had largely been left to manage her own working practices. One exception was when he raised that she had not completed a set of timesheets. Her reason was that she had been undertaking a type of job for which there was not a working code in her phone based app, and so had to finalise the details using a computer rather than her phone. That was more time consuming. She accepted that she had not finalised all of the timesheets on time and rectified the issue.

16. The claimant had had some experience with Mr MacDonald before he became her manager and that had largely been negative. She had challenged him about the way he had treated some newly appointed Engineers within his responsibility. She believed he had acted too harshly towards them. She perceived that he was not well disposed towards her.

17. Customer issues would be channelled to Engineers via an app which they would have installed on their work-issued mobile phones, called 'My Jobs'. Engineers would log on each day to show that they were available, and would be assigned 'jobs' to undertake for customers needing assistance. The Engineer will close the job once completed and will then be assigned their next job if one is waiting. That should normally be done at the location of the job, typically the customer's home, after a test is carried out. This allows the next job to be assigned more quickly and there will be times where it allows an Engineer to go from one job to the next close by, rather than travel back to an exchange before heading back out. If no job is offered to them, they can request one. They may be assigned a job or another activity on which to spend time, such as a training module. They are able to indicate when they are not able to take on a new job, for example when taking a scheduled break.

18. At the end of each day an Engineer will submit a daily timesheet by importing the information for that day from the app. It is uploaded to the respondent's system via a Virtual Private Network (VPN). The information must be checked for accuracy. Time spent on customer jobs, including travelling, is described as 'task' time and other time such as work time spent on non-customer related duties, or breaks, is called 'non-task' time. Engineers would be permitted some time to deal with 'personal admin' such as reading and writing emails or booking training courses. Each time an engineer submits a timesheet they receive an email summarising the information they have provided. If they realise they have made an error they can ask their manager to change it or amend it themselves using a PC-based system rather than the app.

19. When working away from an exchange, an Engineer is reliant on there being a strong enough mobile signal to operate work-related apps. At the time of the relevant events some parts of Benbecula did not have a strong enough signal and some had very little or no signal at all. This meant that sometimes Engineers could not operate the app fully in certain locations and would need to wait until they moved to somewhere with a better signal, or may have believed they had input information into an app which was not fully received.

The Benbecula exchange had a strong wi-fi signal within the building and so apps functioned properly there.

20. Each Engineer will use a company vehicle to attend customers. They can either be a 'Yard Parker', where they leave their vehicle on company premises when not working, or a 'Home Parker', in which case they are allowed to drive their vehicle to and from work. A Yard Parker is permitted 15 minutes at the beginning of each day to carry out checks on their vehicle before they are expected to start on their first job. Yard Parkers are not permitted to take their vehicles home, and doing so can attract a disciplinary sanction. There are insurance consequences for doing so, meaning essentially that an engineer who is a Yard Parker and who is driving their vehicle outside of their working time may not be insured. They require specific advance permission from a manager in order to drive their vehicle outside of work, and if the permission is obtained they will be covered by insurance. The claimant was a Yard Parker.

21. The claimant's working hours were 8.30am to 4.22pm Monday to Friday, with 40 minutes permitted for lunch. The lunch break was expected to be taken so that at least part of it fell between 12 noon and 2pm under normal circumstances. The respondent allows its engineers to build up time worked in excess of their normal hours, to a limit of six hours. They will be expected to use some of that time up when there is a lull in their task or non-task working activities. If an Engineer with a reserve of six hours works additional time beyond that they will be paid overtime in 15-minute blocks. Only one minute of each block requires to be worked in order to qualify for the full 15 minutes' worth of pay. Overtime was intended to cover matters such as jobs which overran their expected completion time at the end of a working day. Non-task time was not to be logged outside of normal working hours and it was therefore not to be used to gain overtime pay. The claimant regularly carried additional time at the six-hour limit and so was automatically paid overtime for time she recorded outside of her normal working hours. Timesheets are finalised once per week and overtime pay is calculated based on their contents. Engineers are paid monthly.

22. The Benbecula exchange is both an office and a 'technical hub'. It has a kitchen, toilet and basic recreational facilities including seats and a television. It is around a mile away from the claimant's home. It has a distribution frame for the isle's network, allowing various connections to be checked and managed. It is possible to diagnose and rectify some customer faults by manipulating the frame, although it tends to be an inexact and time consuming method of identifying issues, and the respondent prefers Engineers to visit the customers' homes and begin diagnosing any problems from there.

Early management by Mr MacDonald

23. Mr MacDonald visited the Benbecula exchange on 30 November 2018, shortly after his appointment, to meet with each of the Engineers based on the isle. These meetings were his first with many of the Engineers and were not part of any formal process. He spoke about his expectations for the team in the coming months and the improvements he sought. When he met with the claimant he highlighted three particular areas where he wished improvements to be made, which were:

    23.1. The claimant starting her first job of the day earlier, namely at 8.45am after her 15-minute vehicle check;

    23.2. The need for her to spend less time generally in the Benbecula exchange; and

    23.3. That she should close off her completed jobs on the app at their location rather than back at the exchange, freeing her up sooner to take on new jobs.

24. In raising those matters Mr MacDonald was relying on a report dated 28 November 2018 [252] which contained numerical measurements of various performance criteria. On the whole the claimant did not take issue with the areas identified for improvement. She did say in response to the first and second points that she was regularly required to stay at the exchange beyond her allocated 15-minute vehicle inspection period to help contractors temporarily based at the exchange or other less experienced Engineers. Mr

MacDonald has no precise recollection of what she said, but held the view that a small amount of time spent in those ways was acceptable, but not the amount shown in the reports. He also accepted that the claimant had said she spent some time testing lines, but believed this was an outdated practice and not the best use of an Engineer's time, and that the priority was field-based work. The claimant also said she had difficulty in syncing her devices at the end of her day, although the issue appeared to do with signal strength and was usually removed by carrying out the process inside the Benbecula exchange. No other Engineers reported the same issue. The process usually takes two or three minutes.

25. Mr MacDonald summarised the conversation in an email he sent the claimant the same day [105]. The email was appropriately worded in that it pointed out areas where the claimant could realistically be expected to improve, and offered help if it were needed. At this time he identified areas of improvement for some other Engineers also, not just the claimant.

26. Having discussed what he required of the Engineers he had been given to manage, Mr MacDonald waited to see if there was an improvement in their performance figures. He reviewed the Engineers' performance statistics for the period 27 December 2018 to 30 January 2019. Some of the Engineers who previously had problematic figures had improved. He was disappointed with some aspects of the claimant's figures. He believed there had been no material improvement since his conversation with her on 30 November 2018. In particular, he noted that the claimant had spent 43% of her working time in the exchange and on 57% of occasions her lunch break had not been booked appropriately. She was late in moving to her first job of the day by an average of 33 minutes.

27. Mr MacDonald raised with the respondent's HR function that he had not seen adequate improvement in the claimant's way of working. They asked him to conduct a fact-finding exercise. He was directed to a template used by the respondent entitled 'Misconduct Investigation Report' which he was to use. In the course of the exercise he completed the template [130-138]. Implicit in the

discussion was that the claimant was now being investigated for potential misconduct.

28. In early 2019 the claimant attended a training course and incurred some expenses which she claimed back. Owing to his workload at the time Mr MacDonald did not approve the repayment of the expenses for two weeks. This was not a deliberate detrimental act towards the claimant, although she may have perceived it as such.

29. As part of his fact-finding remit Mr MacDonald arranged to interview the claimant. He met with her at the Benbecula exchange on 27 February 2019 at 8.30am, as she arrived for work. His note records that the meeting lasted for 45 minutes. The meeting was challenging for both individuals and at times it became heated. Each later accused the other of becoming unduly aggressive. It is found that each raised their voice towards the other at certain times. Mr MacDonald had matters he had to raise with the claimant and she found it uncomfortable and unfamiliar to be questioned on her working practices. She asked him to clarify one particular aspect of the information he was referring to, which was to do with whether the excess time she had spent in the exchange at the start of certain days included or excluded her allocated 15-minute vehicle checking period. He became exasperated when the claimant asked him repeatedly to clarify that, as he was unsure of the answer at the time. A note of the exchanges was incorporated into the draft investigation template Mr MacDonald was preparing [134-135]. It does not capture everything that was said. For example, the claimant raised that she had issues with synchronising her tester device and her phone, which at times resulted in her timesheets not being accurate.

30. After the meeting Mr MacDonald contacted HR again. Based on the claimant's answers to his questions he believed that further investigation was warranted. He wished to look more closely into the claimant's physical movements by examining tracker data gathered from her vehicle. The respondent operates a system named Intelligent Location Manager ('ILM') which tracks its vehicles using GPS, primarily for safety and security reasons. Access to that

information is only gained through HR who refer the request to a more senior manager to evaluate whether there is sufficient need.

31. Approval was given for Mr MacDonald to view the claimant's ILM data for the period of time he had been reviewing. A series of reports were produced [228-249] showing all of the claimant's movements in her vehicle day by day, cross-referenced to various jobs and other activities she had undertaken, and containing location details. Those covered 18 working days, from 6 February to 1 March 2019 inclusive.

32. Some of the information in the ILM reports caused concern to Mr MacDonald. They showed the claimant's vehicle being at her home on a number of occasions, including shortly after her working day had begun and in the afternoon, going beyond her normal finishing time. They showed the claimant being at the exchange for around 49% of her working time within the 18-day period, and spending just over 9 hours at her home in the same period. Even taking into account the claimant's right to spend her lunch break at home (less any travel time each way), this was considered excessive. The reports also stated that the claimant's vehicle was parked at or adjacent to her home on the evenings of 13 and 14 February 2019. As a Yard parker this would have been a potential breach of her terms of employment if the information was correct.

33. Mr MacDonald wished to meet with the claimant again to listen to any explanation she had for the matters of apparent concern in the ILM reports. He proposed to meet her on 5 April 2019 and travelled to the Benbecula exchange on that day. As with the previous meeting, he did not give the claimant notice of the meeting or even his intention to be at the exchange. When he approached the claimant she was speaking to another Engineer. Mr MacDonald asked to speak to the claimant alone. He mentioned that he wished to discuss ILM data with her. She would not meet with him without being accompanied and said that this was because he had raised his voice at her at the previous meeting. The respondent's disciplinary policy does not give an employee the right to be accompanied at an investigatory meeting. Mr MacDonald wished to take advice from HR as to whether to proceed with

the meeting, and if so whether and how to make arrangements for the claimant to be accompanied. He ultimately accepted that the meeting would not be taking place that day and left the exchange without having the discussion he had planned.

5 **Appointment of Katrina Robertson**

34. Mr MacDonald again contacted HR who agreed to appoint another manager to carry on the investigation. The process was effectively taken out of his hands. Ms Katrina Robertson was requested to carry on the investigation into the claimant. She was an Operations Manager and was of the same seniority
10 as Mr MacDonald. She had previously interacted with the claimant as a duty manager when the claimant worked on Saturdays, with no issues. She was also offered as a point of contact if the claimant wished to discuss any aspect of her working rather than go to Mr MacDonald, who remained her manager operationally. The claimant and Mr MacDonald both accepted that there was
15 a clear breakdown in their working relationship by this point.

35. Two other things happened around this time. First, and also on 5 April 2019, the claimant raised a grievance against Mr MacDonald in relation to his interaction with her. She did so by completing the respondent's template grievance form. She complained about Mr MacDonald's conduct towards her
20 in the meeting of 27 February and the proposed meeting on 5 April. She described it as bullying and intimidating and said it had left her feeling stressed and anxious about coming to work. She asked that Mr MacDonald be made to undergo management, diversity and equality training and be made to appreciate that he should look after his staff rather than bully and intimidate
25 them. Mr MacDonald was not made aware of the grievance.

36. Secondly, the claimant began a period of absence from work due to illness, from 7 April to 1 May 2019. She had been feeling stressed since Mr MacDonald's attempt to meet her two days before. Her sleep had been disrupted and she felt unable to carry out her duties adequately.

30 37. Ms Robertson was nominated as the claimant's point of contact in relation to her absence and arranged a meeting between the two on or around 16 April

2019. The claimant was content to meet her. The discussion was confined to the nature of the claimant's illness and any measures which could be offered to assist her. The claimant discussed that she was suffering from stress and also that an existing skin condition, psoriasis, had been aggravated which caused her loss of skin and required her to apply cream. The claimant made it clear that to Ms Robertson the cause of her stress was the way Mr MacDonald interacted with her. That was largely true, although in her personal life there were other events which also caused her stress but she did not mention them to Ms Robertson. She generally found it difficult to talk about her mental health as it ended up causing her to feel more upset. She wanted simply to get back to work, but was unsure how she and Mr MacDonald would find a way to get on. Ms Robertson suggested mediation as a step in that direction and the claimant reluctantly agreed to consider it. She was not especially optimistic about it succeeding. A note was made of the discussion [120-124]. Ms Robertson passed on the matter of mediation to HR to progress.

38. As a consequence of proceeding with mediation, the claimant's grievance was closed. The claimant did not realise this would happen, and expected it would simply be paused pending the outcome of the mediation process. This caused her a degree of upset when she later found out, although there would have been nothing to stop her asking the respondent to reopen her grievance, or raising a fresh one, if mediation had been completed and she was not content with the otucome.

Further investigation by Ms Robertson

39. Ms Robertson arranged to meet with the claimant on 14 May 2019 in order to resume Mr MacDonald's investigation into her working methods. She arranged the meeting with the claimant in advance and explained that she wished to discuss ILM data relating to the claimant's movements at work within a given date range. The two met alone at the Benbecula exchange.

40. Ms Robertson wished to discuss three particular matters arising out of the ILM reports, namely delays in the claimant attending her first job of the day, the

amount of time overall she spent at the exchange, and apparent visits to her home without authorisation by her manager. The last matter comprised stops at her home during working time and also on one occasion having her vehicle parked outside her home overnight on two successive days. The ILM reports were not given to the claimant in advance, but in the meeting Ms Robertson showed the claimant the aspects she wanted to discuss on her laptop screen.

41. A note was made of the meeting by Ms Robertson as the discussion progressed [139-148]. She had prepared her questions in advance. She paused at various points to ensure that the claimant agreed with how she had recorded the things said. At the end of the meeting she printed a copy and gave the claimant around 20 minutes to read it before agreeing it as a record. Both parties signed it. The note is accepted to be a sufficiently compete and accurate record of the discussion. The claimant commented at the time that it 'didn't make very good reading'. The claimant's evidence to the tribunal was that she had been given closer to 10 minutes to read the meeting notes, and found that time insufficient to read everything whilst thinking about the issues raised. She also made the point that the notes went along with other information such as the ILM data, and so it was only realistic up to a point to take her comments at that stage as essentially her full and final position. Ms Robertson said in her evidence that she had allocated plenty of time for the meeting and so could have given the claimant more time if she required it, whereas the claimant said that Ms Roberson would not give her more time as she wanted to catch up with someone else at the exchange before catching her flight. There was therefore some conflict in the evidence. Aspects of each individual's evidence are considered to be the most likely on the balance of probability. That is to say that Ms Robertson believed she had captured accurately the claimant's responses as she progressed through the meeting, and had done, but equally there was only so much the claimant could say at that point without time to reflect, cast her mind back to the dates and events in question, and check other records not available in the meeting. On one matter her memory was jogged by the comments of a colleague about something that had happened on a particular day under review. This illustrates the point. Therefore, although the claimant was given 20 minutes

to review the notes Ms Robertson took, the fact remained that despite the accuracy of those notes as a record of what was said, they would not realistically contain everything the claimant could say in answer. That is not to say of course that the respondent treated them as such.

42. In the meeting the claimant was asked about her vehicle returning repeatedly to her home during her working day. She replied that she did so to use her own toilet rather than those at the exchange, or to make a coffee to take with her in her thermal cup. Although not noted, the claimant mentioned that male contractors often used the women's toilets and did not leave them in a clean enough state for her to feel comfortable using them. She said that the water at her home was not as good as at the exchange, and her home was en route to some of her jobs. She also said that at times she would be taking her lunch at home, but admitted that she had not booked her lunch. On one occasion she was recorded as being at home for 61 minutes. She responded that part of the time was when she was working on a job at a water plant near to her house.

43. Ms Robertson asked the claimant about an occasion when she did not respond to her first jobs until 9.00am. The jobs related to a payphone and the claimant had put them back into the system to be picked up by someone else. The claimant recalled that she was not trained or experienced in repairing payphones, and had wanted to speak to Control first. Control in this sense was the person who allocated jobs to the Engineers. She had done that and been told that the jobs had been pinned to her on the instruction of Mr MacDonald. He had not told her in advance that this would happen. The time taken clarifying the situation with Control was said to be the reason for the delay in her moving from the exchange.

44. The claimant was asked about a number of occasions when she had returned to the Benbecula exchange at a certain time in the afternoon before her normal finish time, but had claimed end-of-day travel until a later time when she signed off. She said that was an error due to her occasionally not being able to connect with the respondent's VPN in order to finalise her time, meaning that she only spotted and corrected the error later on when at home.

She acknowledged that she was 'not good at doing timesheets' and needed to ensure they were completed accurately each day. She accepted that by going into the exchange rather than trying to sync her devices or sign off she would be likely to connect properly.

45. On another occasion the claimant's vehicle had been moved to her home at 8.20am, then moved back to the exchange at 8.45am for 31 minutes. The claimant's response was that she had asked a colleague to bring the vehicle to her home as her car was being repaired, and her first job was near her home. This seemed inconsistent with her then going to the exchange. On the same day she closed her only task of the day at 15.44. but signed off at 17.13, gaining an hour of overtime pay. She had recorded the additional time as 'ordering stores' which is non-task time. She believed that she had finished at her scheduled time of 16.22 and that the later sign-off time was again caused by her having VPN connection issues. She said she did not actively claim overtime, as it would have been automatically applied owing to her carrying 6 hours of flex time.

46. Ms Robertson asked the claimant about the evening of that day, 13 February 2019, when the ILM report suggested her vehicle had been parked next to her home overnight (and on the following evening). She could not explain how that could have happened.

47. The claimant was asked about two other occasions when she had completed her last job before her finish time but signed off after it, again accruing overtime. On one of those days she had recorded the extra time as 'personal development', which is also non-task time. She believed this was due to a recurring issue of her not competing timesheets promptly, causing her difficulty in remembering what she had been doing.

48. In response to it being put to her how long her vehicle had spent at her home during working time, she repeated that the time was a combination of lunch, albeit not properly booked as such, or stopping for coffee. The overall amount of working time spent at the Benbecula exchange was highlighted, and the claimant responded to say that a lot of her jobs were close by, and that she

was sometimes delayed by giving advice to other Engineers. She was asked to comment on the amount of time she had spent at other exchanges on the isle. She explained that at times there were jobs which took a long time, but also on other occasions she might be shown as being there for a particular period of time in error due to the remoteness of their location.

49. She was asked about 'furthering' a job, which is the act of an Engineer putting it back into the system after it has been allocated to them. She explained that she had been allocated it at 16.16, six minutes before her finish time. She had been unable to work that evening and allocated the job to herself to take up the following morning. She accepted she should normally let her manager know she was doing that but did not have sufficient information to tell whether she had done that.

50. Ms Robertson put to the claimant that she had spent a total of 8 hours and 41 minutes at other exchanges. She was asked whether she had an explanation for this. She replied that she did have jobs at other exchanges, which sometimes took a long time. She also suggested that as some of them were in remote areas, she may have been working somewhere else near to an exchange instead. She said she only went to an exchange if she had work to do there.

51. Ms Robertson summarised the claimant's main points and the claimant confirmed they were accurate. Those were in essence that:

51.1. She was guilty of not completing timesheets properly, which was partly related to a poor connection to the VPN. She acknowledged that she should have rectified this by entering the Benbecula exchange at the end of each day and checking thoroughly that she had a proper connection;

51.2. She accepted the time shown in exchanges was high, but maintained she was still working such as by faulting cables, and was not doing anything non-work related;

51.3. She recognised that the amount of time spent at her home 'doesn't look good on paper' but didn't realise the cumulative effect of her stops for coffee or to use her toilet, or as caused by not booking and adhering to her permitted lunch break. She said those practices had to stop and she had to pay more attention to her booking practices.

52. When given the opportunity to make Ms Robertson aware of anything else, she said that there were issues which needed to be addressed and now that she was aware of them she would rectify them.

53. Ms Robertson prepared a summary of her investigation and a recommendation, as required within the template document she was using. She did so over the course of six pages [161-166].

54. Ms Robertson considered that the claimant was aware of the ways of working she was supposed to use, but that her responses indicated that she did not accept responsibility for her decisions or their impact on the respondent's business. She had given an explanation for some matters put to her but did not do so in detail, for example by saying who she was helping while at the exchange or about what.

55. Ms Robertson gave comments in response to each of the claimant's main statements as noted above in paragraph [61]. Again, in brief:

55.1. Ms Robertson accepted that the claimant had experienced issues connecting to the VPN, but as an employee with 12 years of service should have appreciated the importance of checking she had a proper connection, moving inside the Benbecula exchange before going home if required. Ms Robertson had checked herself that the wi-fi signal there was adequate;

55.2. There was not a lot of work to be done in exchanges, and the quantity of time attributed to the claimant could not be reconciled with her workload. Ms Robertson accepted in cross-examination that as a Senior Engineer, the claimant would be expected to support and assist less experienced colleagues, but said that the claimant had the option

to ask the Engineer to have a specific 'assist' task generated which could then be added to her timesheet. This was an approach used in her area although the claimant had not been told about it, and felt that it would take even longer as there would be a waiting time for the assist to be approved before any help could be given;

55.3. Proper booking of lunch was a basic requirement that the claimant was not fulfilling, and the claimant appeared to have been complacent about it for some time;

55.4. There was a noted improvement in the claimant's moving time at the beginning of the day, but there were still 5 dates on which she had not moved at or around 8.45 am. The times of her leaving the exchange varied from 8.51am to 9.27am. Ms Robertson had only raised one of those dates with the claimant in the meeting – 8 February. One of the other occasions was the day she had met with Mr MacDonald – 27 February – and so there was an explanation for that which was not apparently appreciated by Ms Robertson, who said that 5 instances of late moving suggested the claimant had not taken on board the advice she had been given;

55.5. Ms Robertson was of the opinion that the claimant spent excessive time at home during working hours knowing it was unacceptable to do so. It was accepted that on occasion an Engineer could stop off at home, but would tell their manager;

55.6. The claimant was an experienced Engineer and there was no good reason why she would sign off later than her normal finishing time on 5 occasions as the data showed. For the claimant to say that she did not always complete her timesheets on a daily basis was not acceptable;

55.7. No reasonable explanation had been given for the apparently large amount of time spent at other exchanges.

56. Ms Robertson reached the view that the case should be passed to her manager for consideration under the respondent's disciplinary procedure as gross misconduct. She signed off her investigation on 20 May 2019.

57. The day after the meeting, the claimant had further thoughts in response to Ms Robertson's questions. On that day she contacted Ms Robertson by instant messenger to ask if the notes of the meeting could be revised. Ms Robertson checked with HR and was told that the claimant would have a further say if the process advanced to the next stage, and that Ms Robertson was just to make her decision. She therefore told the claimant that she could not add to the notes of the meeting.

Disciplinary hearing with Kevin Walker and dismissal

58. The process was passed to Mr Kevin Walker, Senior Engineering Area Manager, to take forward Ms Robertson's recommendations. He was the line manager of both Mr MacDonald and Ms Robertson. He had no relevant previous interaction with the claimant.

59. The claimant was sent a pack of materials intended for use at the disciplinary hearing. She was invited by letter to attend a disciplinary hearing in June 2019. By this point she had requested assistance from Mr Colin MacDougall of the CWU trade union. Both attended the meeting but it became clear shortly after it commenced that not all of the papers had been provided, and Mr Walker decided to reschedule to allow the claimant to have all of the materials. She was sent a letter dated 21 June 2019 asking her to attend on 1 August, which in the event was moved to 2 August. The hearing took place at the respondent's premises in Inverness where both Mr Walker and Mr MacDougall were based.

60. The claimant had only had the opportunity to meet with Mr MacDougall for around two hours before the first hearing, due to her travelling time. However, by the time of the rescheduled hearing both had had the majority of the documents for some weeks.

61. The claimant attended the disciplinary hearing along with Mr MacDougall on 2 August 2019. It lasted just under an hour. Throughout the hearing she became upset and Mr MacDougall had to make submissions on her behalf.

62. The allegations to be considered were set out in the letter of 21 June 2019 [170-173]. They comprised:

62.1. Unauthorised use of/journeys in a company vehicle, and unauthorised parking of a company vehicle between 13 and 14 February 2019;

62.2. Wasting company time between 6 February and 1 March 2019 by spending unnecessary and excessive time in telephone exchanges, estimated at 8 hours, 41 minutes and at her home location on non-work activity, estimated at 8 hours, 11 minutes;

62.3. Failure to follow correct company procedures or working practices between 6 February and 1 March 2019 by failing to leave her parking location at the required time to begin her start of day procedures; and

62.4. Inaccurate recording of time on 7, 8, 13, 15 and 18 February 2019 by failing to record her end of day finish times correctly, resulting in inaccurate overtime claims.

63. The letter stated that summary dismissal was a possible outcome, as were lesser sanctions such as a change of role or location, or demotion.

64. It is the respondent's practice not to have notes taken of disciplinary (or appeal) meetings, but rather for the meeting to be recorded. A copy of the recording was sent to the claimant afterwards. There was no written record or transcript of the meeting available to the tribunal. Evidence of what happened at the meeting came from the oral recollections of those who were there and supported by a document created by Mr Walker after the meeting giving the rationale for his decision [179-186].

65. Mr Walker recorded the claimant's response to the allegation as falling into seven sections. When he came to write his rationale he added his response to each of those.

66. The first part of the claimant's case was that she was very emotional and had found the previous six to eight months dreadful and mentally draining. She was suffering from depression and Mr MacDonald had shouted at her on numerous occasions, was unapproachable and had no respect for her as an Engineer or as a person. She had also been suffering from her skin condition since January. Mr Walker's response was that there were resources for colleagues to use, such as the Employee Assistance Programme and Mr Walker himself. The claimant did not come to him at any time. She also had to earn her manager's trust, and he was entitled to speak to her about inefficient practices. He went on to say that the claimant could have asked Mr MacDonald for additional support, but instead she continued to make poor decisions. He believed that a lot of the work-related stress she had experienced was self-inflicted, caused by poor decision making.

67. Point 2 was that because of her stress and depression, at the end of her working day she simply wished to return home as soon as she could. This was particularly said in response to her failing to close her timesheets timeously or accurately. She also frequently returned home to apply skin cream or use her own toilet as the facilities were not suitable at the Benbecula Exchange. Mr Walker accepted what she said was genuine, but had issues with some of her explanations for her movements. He considered it acceptable for the claimant to stop briefly at home for medical reasons or to use her toilet, but only if she was genuinely passing on the way to or from a customer job. Extensive detours, or time spent at home was not acceptable and she should have sought permission from Mr MacDonald first. He concluded that her actions failed to recognise her duty to customers and were a breach of trust.

68. Point 3 was made by Mr MacDougall who questioned the notes made by Ms Robertson of the meeting on 5 April 2019. He took issue with her recording that the claimant could not give detailed responses to account for her time spent at exchanges or reasons for stopping at her home. Now that she had further time to reflect, the claimant had more detailed explanations for the issues raised. He also said that Mr MacDonald was different in his style to

previous managers and had caused upset with the claimant's team on his arrival. Mr Walker's response to this was that the claimant had signed the notes and that the fact that she could not provide full explanations at the time did not detract from what had been presented. He did not accept a lot of the mitigation she put forward. He did not consider any difference in management style shown by Mr MacDonald as compared with previous managers explained the claimant's own poor decision making.

69. Mr MacDougall went on to say as the fourth point noted that the claimant's high exchange parking time related to her being a Senior Engineer and that she was either showing contractors around the Benbecula exchange or assisting colleagues on the telephone. The claimant offered explanations for the two longest periods recorded at an exchange. For one, she was working on a private wire fault with a BT TSO Engineer named David MacInnes and for the other she was waiting while a colleague, Lye Campbell, worked on a hot site job on another island. She had hot site authorisation and although Mr Campbell did too, the system would not recognise that on this occasion and so he could not close the job himself. Mr Walker considered that no real explanation had been provided for the high exchange time. He acknowledged that the claimant tried to account for each instance referred to. He said that he had to trust the claimant that her explanation for the largest single occasion was genuine. He believed that in relation to the second longest period, Mr Campbell had not been hot site trained and so should not have been doing the job. He said that safety was the respondent's number one priority, and staff should not undertake jobs without the necessary training. He also queried why the claimant would not pick up another job on Benbecula while waiting for him. However, the claimant said that Control had asked her to stay on that job as there were no others waiting at the time. He referred to a further 18 cases of her spending more than an hour in exchanges, and an additional six times when she had spent more than half an hour in one. He said that was completely out of step with how Engineers should work. He considered that the claimant had not given him sufficient details of which contractors or Engineers she believed she had been assisting from an exchange.

70. As his point 5 Mr Walker recorded that the claimant had said 18 occasions of her spending more than an hour in an exchange involved her testing pairs from the frame. She would routinely go to the exchange when a broadband fault had been reported and test the line there, then call the customer. Mr Walker considered that there was no need for the claimant to go into the Benbecula exchange before heading out on every job. The low number and nature of faults experienced on the isle did not justify it. He asked the claimant to embrace new technologies such as ARTISAN and AFM (the terms were not explained in evidence) to allocate resource more intelligently for customers' benefit. The claimant had not been trained on those systems or applications. Mr MacDonald had agreed that the claimant would be allocated an hour a week to become competent using ARTISAN when he met with her in November 2018, but that had not been followed up and the claimant knew little about it. Mr Walker considered that by spending unnecessary time in exchanges the claimant was not attending to customers quickly enough. To his recollection the claimant did not provide much detail in relation to what she had been doing in exchanges or who in particular she may have been assisting.

71. Point 6 was noted to be that Mr MacDougall accepted the claimant had taken her eye off the ball in relation to completion of daily timesheets. He stated that this was down to the stress and anxiety she was under. He went on to provide reasons why there were so many inaccuracies or wrong bookings of lunch breaks (although those reasons were not captured in the rationale document). Those errors resulted in her flex hours total remaining at the maximum of six, in turn leading to payment of overtime for any further time recorded outside of her normal start and finish times. Mr Walker recognised that the claimant knew she could connect to the VPN from within the Benbecula exchange and believed that it was not unreasonable to expect her to do so at the end of each day so that her finishing time was properly recorded and her timesheet was finalised accurately. He noted that the claimant had been picked up on her timesheet practice by Mr Henderson. It was unacceptable that the claimant had been paid overtime for an extended period because she had not followed good practices as pointed out by two successive managers.

72. The seventh and final point was that the claimant clearly blamed Mr MacDonald for all of the issues she then had (taken to mean the disciplinary matters now under review), although Mr Henderson before him had raised timesheet compliance as an issue for the claimant to address. Mr Walker noted that the claimant had agreed with Mr MacDonald in November 2018 to address issues with her working practices and to complete her timesheets promptly and accurately.

73. Mr Walker added a conclusion to his document. He said that the claimant was reluctant to change and was not embracing new technologies and ways of working, and not putting the customer at the centre of her decision making. He saw that her decisions had a negative impact.

74. He had asked her at the end of the meeting whether she had improved on the deficiencies highlighted in the process, and whether he would see that if he checked. She had said he would. He checked on her performance metrics and stated that they showed she was still submitting timesheets late, conducting testing in a non-compliant way and not booking her time appropriately. He believed that as a Senior Engineer she should have led by example and been a role model for the rest of her team, but had not done so. He concluded that his trust in her had been irretrievably broken and his decision was to dismiss her.

75. In evidence Mr Walker said that for having her vehicle in an unauthorised place overnight he would have issued a warning, were it the only disciplinary matter raised. He believed that wasting company time could amount to gross misconduct in itself, if extensive enough. He believed that falsifying a timesheet and gaining overtime irregularly was a clear case of gross misconduct.

76. The disciplinary hearing itself came to an end without an outcome being decided. Mr Walker undertook to confirm his decision at a later date in writing. Around 30 minutes after the hearing ended the claimant had left the building and Mr Walker approached Mr MacDougall to raise the question of whether the claimant was prepared to work towards improving her working habits and

rebuilding her relationship with Mr MacDonald. The evidence of each individual about the specifics of the discussion differed in a critical way. Mr Walker's evidence was that he merely wished to know the claimant's position in the event he decided not to dismiss her, a decision he had not yet taken. Mr MacDougall's recollection was that Mr Walker undertook to 'take dismissal off the table' if the claimant agreed to engage in mediation with Mr MacDonald and also undertake some form of behavioural training. Mr MacDougall recalled being surprised but pleased at the offer, as he felt the hearing had not been going well for the claimant. He went outside to try to catch the claimant so he could tell her, but she had already left. He said he spoke to her over the weekend which immediately followed, and she agreed to the terms. Although not explicitly stated by Mr Walker, Mr MacDougall understood that a warning or similar sanction would also be imposed, which the claimant was also prepared to accept if it meant remaining in employment. Both Mr MacDougall and Mr Walker agreed that the former called the latter at the beginning of the following week to say that the claimant would be prepared to mediate. Mr MacDougall said he also confirmed that the claimant would also undertake any necessary training. He then said that he later found out about the decision to dismiss the claimant when he was attending a disciplinary hearing in support of another employee. His reaction was one of surprise and disappointment.

77. Clearly the evidence of the two parties to this important discussion is at odds. The evidence of Mr MacDougall is preferred and considered to be the more accurate account of the exchange. It is credible that the conversation would be memorable to him as it was not one he was expecting. It is also unlikely that he would have gone to find the claimant to tell her about the conversation had he merely been asked to sound her out on whether in principle she would mediate, as that request did not carry the same importance or urgency. He was clear in saying that Mr Walker had offered to 'take dismissal off the table'. That was an unequivocal thing for someone to say. Finally on this point, the claimant had received emails about two behavioural training courses just before she received intimation that she was being dismissed. She took those emails to be further confirmation of her job being safe.

78. Mr Walker wrote to the claimant on 20 August 2019 to confirm his decision to dismiss her for gross misconduct. He enclosed a copy of his rationale document and said that it contained his reasons for doing so. He believed that all of the allegations raised against her had been proven. Her last day of employment was to be 21 August 2019. She was therefore not given notice of her dismissal and the letter confirmed she would not receive any payment in lieu. The letter confirmed that she had the right to appeal against her dismissal by contacting a named individual by 27 August 2019.

Appeal with Gavin Fleming

79. On 21 August 2019 the claimant emailed HR to indicate she wished to appeal against Mr Walker's decision to dismiss her. She asked for her email to be acknowledged and for the next steps to be confirmed. She did not provide any grounds for her appeal as she did not know whether that was required, and was looking to be guided by HR.

80. An invitation was sent out around the end of August for an appeal hearing on 11 September 2019. The hearing took place in Glasgow and lasted a little under two hours. Again the claimant was accompanied by Mr MacDougall. The hearing was audio recorded rather than formal notes being taken. Again no transcript of the discussion was produced. Mr Fleming prepared a rationale for his decision [220-224].

81. Mr Fleming broke the claimant's case down into six points which he replied to.

82. The first point noted was that Mr MacDougall had asked whether Mr Fleming had a signed copy of the investigation report of Ms Roberson. This was because there was some doubt over whether Mr Walker had the correct version, as his copy was unsigned.

83. The second point was that the claimant had challenged the finding of unauthorised use of her vehicle on 13 and 14 February 2019, as she was stating it had been at a local garage overnight rather than being parked at her

home as the GPS data in the ILM reports suggested. The garage is 200 metres from the claimant's home.

84. The claimant also challenged the finding of wasting company time by being at exchanges for excessive time periods or at home. She stated that her time at exchanges in each instance was justifiable as she was working to resolve customers' issues or helping other Engineers or contractors. Time spent at home was on the way to her first job.

85. Point four as noted was in relation to findings about inaccurate time recording. The claimant said they were a combination of time inaccurately recorded by her but also on occasion when she was working beyond her finish time to complete a customer job and once when she needed to wait at the Benbecula exchange for a colleague to help her remove some heavy equipment from the back of her vehicle.

86. The fifth point was in relation to Mr MacDougall's assertion that Mr Walker had agreed to remove dismissal as a sanction only (as he saw it) to go back on his word.

87. The sixth and final point was in relation to the grievance the claimant raised. Mr Walker was aware by reference to this that the claimant had reported difficulties with Mr MacDonald. Also, there had been discussion about using mediation but this had not taken place.

88. Mr Fleming wished to understand Mr Walker's position in relation to Mr MacDougall's assertion about dismissal potentially being taken off the table. He emailed Mr Walker on 3 October 2019 and Mr Walker responded later that day [216-217]. Mr Walker agreed that he had had a brief conversation with Mr MacDougall later in the day of the disciplinary hearing (2 August 2019) but that he had only asked Mr MacDougall to sound out the claimant on whether she would be prepared to take any steps to rebuild her relationship with her manager, and said that he would take her position on that into consideration. Mr Walker said that he had emphasised to Mr MacDougall that the allegations against the claimant were very serious. He did shake hands with Mr MacDougall but just as a more general act of politeness, not to signify

agreement on anything as Mr MacDougall had understood. He did not recall any suggestion about the claimant undergoing behavioural training, but agreed that it had been confirmed that the claimant would participate in mediation. He then went away to make his decision.

5 89. Mr Fleming had completed his rationale by 4 October 2019 when he signed it off. He enclosed it with a letter to the claimant on 8 October 2019 which confirmed that his decision was final and therefore brought the respondent's disciplinary process to an end.

Post-termination activity, mitigation and losses

10 90. The claimant found it difficult to find other work on the isle as there were few roles available. She had some savings to rely on in the early weeks but felt she had to find another job. She applied to a GP surgery for a receptionist post and to local salmon farms.

91. The claimant received Employment Support Allowance for 25 weeks and
15 Universal Credit in June and July 2020, as detailed in the schedule of loss [53-54].

92. She was able to secure a role as a cleaner at premises operated by Highlands and Islands Enterprise, starting in November 2019. She worked only 16 hours per month as that was all the work that was required.

20 93. She joined another fish farming company, Salar, in March 2020 but very soon after was sent home as the Covid-19 imposed lockdown began. She went back to work in July 2020 and continued until 27 March 2021. During that period of employment she also worked some weekends with another Salmon farming company. The last position she gained, her current role, is with Tagsa
25 Uibhist working in community transport, organising and carrying out pick ups of elderly people.

94. The losses which the claimant was seeking were contained in her schedule of loss. Details of her earnings with each employer were contained in the bundle. She was not claiming any losses beyond the end of December 2021.

95. It is found that the claimant took adequate steps to mitigate her loss. She was queried by Mr Mitchell in relation to a number of aspects but it is found that her efforts were sufficient in the circumstances. She had few opportunities to go for and was prepared to lower her expectations in order to get back to work. She was unlucky to be a victim of the Covid-19 pandemic by having work withdrawn and by not being eligible for pay under the Coronavirus Job Retention Scheme due to her short service.

Discussion and conclusions

The reason for dismissal – section 98(1) and (2) of ERA

96. The respondent asserted that the claimant was dismissed for the potentially fair reason of her conduct. The claimant accepts that this was the reason for her dismissal. The onus is on the respondent in this issue. There is adequate evidence to support its contention. The oral evidence and supporting documents are consistent on this point. A standard disciplinary process, involving investigation, a disciplinary hearing and an appeal were followed. The respondent believed that the issues created were down to conscious decisions and behaviours on the claimant's part. Mr Walker, the decision taker, said that he didn't think the claimant's capability was in question, but her decision making was.

General reasonableness of the respondent's process – section 98(4) of ERA

97. The parties disagreed over whether all of the requirements of section 98(4) of ERA had been satisfied.

98. In assessing the overall reasonableness of an employer's actions in cases of dismissal for conduct, the principles in ***British Home Stores Ltd v Burchell [1978] IRLR 379*** will be relevant According to that authority three things must be established for a conduct related dismissal to be fair. First, the employer must genuinely believe the employee is guilty of misconduct. Secondly, there must be reasonable grounds for holding that belief. Third, the employer must have carried out as much investigation as was reasonable in the circumstances before reaching that belief.

Burchell part 1

99. The respondent maintained that it genuinely believed the claimant was guilty of misconduct. It was argued that both Mr Walker and Mr Fleming, the disciplinary and appeal hearer respectively, reached that view. The onus does not fall on either party to prove its side of the issue. The claimant accepted the respondent's case on this point in any event. Again, the oral evidence of the relevant witnesses and the documents generated in the course of the process consistently point to a genuine belief in misconduct having occurred.

Burchell part 2

100. The respondent argued that it had reasonable grounds on which to form its belief in the claimant's misconduct. The claimant also accepted this was the case, in that the documents and the claimant's own admissions recognised she had not followed correct procedures despite it being within her knowledge and power to do so. So for example she accepted that she had not complied with time recording practices and that this had been raised by her manager before Mr MacDonald, and she had at times not followed the rules for booking her lunch break.

Burchell part 3

101. The third limb of ***Burchell*** requires consideration of whether the employer carried out as much investigation as was reasonable in the circumstances in order to reach its genuine belief in the employee's misconduct. That does not require an employer to uncover every stone, but no obviously relevant line of enquiry should be omitted.

102. The legal test, as emphasised in ***Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23*** is whether the investigation fell within a band of reasonable approaches, regardless of whether or not the tribunal might have approached any particular aspect differently.

103. The respondent submitted that a sufficiently adequate investigation had been undertaken. On this issue the claimant disagreed. Ms Dalziel put forward a

number of ways in which she asserted the respondent was deficient, summarised as follows:

103.1. When Ms Robertson held her investigatory meeting with the claimant on 14 May 2019, she did not cover all of the five occasions she later put forward as evidence of the claimant being unduly late in starting her daily jobs. She only put one of those to the claimant, when the claimant left the exchange 17 minutes later than her target time on 8 February 2019. Yet she concluded that there was no valid reason for the late starts on each date, including 27 February despite that being accounted for by the fact that Mr MacDonald had asked to meet the claimant. Accordingly at least some of Ms Robertson's conclusions were unsupported or untested;

103.2. In the same meeting Ms Robertson did not go into sufficient detail regarding the occasions where the claimant was said to have spent too long in exchanges. The claimant was asked general questions and it was unsurprising that she gave general answers in response. There were no meaningful details or documents to refer to and it was unrealistic to expect the claimant to give precise and detailed answers to a level that Ms Roberson might have found satisfactory;

103.3. Allied to the above point, it was unreasonable for Ms Robertson, even if guided by HR, to refuse the claimant the opportunity to add to the note of the meeting when she requested to do so the next day;

103.4. When the claimant opened up about her mental health issues to Mr Walker at the disciplinary hearing on 3 August 2019, he did not consider obtaining any further information on the impact of her mental health on her actions at work. The opportunity to understand whether any of her conduct was mitigated to any extent by her poor mental health was not taken. All he said in his rationale was effectively that the claimant's stress was self-inflicted and that she should have asked her manager for support, which was to ignore that he was the person she had accused of bullying her;

103.5. Mr Fleming took a similarly flawed approach at the appeal stage. He did not see fit to seek further clarity on the issue and did not see why Mr Walker should have done so either. The case of ***Chamberlain Vinyl Products v Patel – 1996 EAT – ICR 113*** was referred to on the basis that in that scenario an employer was criticised for failing to look into the possible impact of an employee's mental health condition on their actions at work. The EAT confirmed that the first instance tribunal was entitled to do so. Ms Dalziel accepted that the claimant had been more guarded about her mental health issues during the investigation as it was stressful for her to discuss it, but she was sufficiently candid by the time of the disciplinary hearing to prompt the respondent, if it were acting reasonably, to investigate her health issues and their possible effects before making a decision on any sanction;

103.6. The claimant put forward an explanation to Mr Fleming for her vehicle being away from the yard overnight on 13 and 14 February 2019. She had said it was at a garage close to her home as she had taken it there to have a fault with its wheels assessed. It was her evidence that in the past Engineers had done this rather than have the respondent's own fleet mechanics review the issue, as it could be quicker to get a diagnosis or even a fix. In the event the garage was too busy to examine the vehicle and she took it back. She offered to provide Mr Fleming with the contact details of the garage so that he could call him to verify her account, but he declined and did not get in touch with them;

103.7. Similarly, by the time of the appeal the claimant had put forward as an explanation for a proportion of her time at exchanges that she was assisting or working with other individuals, and that she would be supported in this account by people including David McInnes, the TSO from BT and also Paul Scally and Barry Watson, two individuals who had held the position of Control and as such oversaw the allocation of her jobs. It was suggested that they would have helped reinforce her position that she was not wasting time in exchanges when there were

customer jobs waiting. None of the individuals suggested were contacted.

104. The standard that a respondent requires to meet is that of a reasonable investigation and not a perfect or unlimited one. The process must fall into the middle ground of what a reasonable employer would do. Therefore, whilst Ms Robertson could have spent more time discussing specific instances of potential failure to follow proper procedures, or provided more detailed information, or more time to review the interview notes, she was acting in the capacity of investigator and not final decision maker. Her power extended to recommending whether a disciplinary hearing should be convened or not, and any allegations deemed serious enough would be fully understood and answered at that point. Whilst it is undoubtedly true that she put a selective and at times general set of allegations to the claimant, those were refined and set out in more detail by the time of the disciplinary hearing. By then also the claimant had received copies of all the documents supporting the allegations. Whilst those were only provided in their entirety a matter of days before the initial disciplinary hearing, that was postponed for over a month and the claimant had adequate time to review them and prepare a response by the day of the reconvened hearing. It was not fatal to the respondent's case that Ms Robertson put only a sample of allegations to the claimant before deciding whether to move the process forward to the next stage.

105. Similarly, although the claimant raised in both the disciplinary and appeal hearings that her mental health had been badly affected by her experience of Mr MacDonald's treatment of her in their meetings, she did not put that forward forcefully or persuasively enough as a reason for her transgressions. The EAT decision in ***Chamberlain*** predated ***Sainsbury's*** and nowadays the issue would be dealt with under the principles discussed in the latter case. A similar issue arose in the post-***Sainsbury's*** case of ***Tesco Stores Limited v S UKEATS/0040/19*** at which the following was said at paragraph 42 of the EAT judgment:

"In considering whether a particular line of enquiry into mitigation was so important that failure to undertake it would take the investigation out of the

Sainsbury's band, Tribunals require to consider inter alia the degree of relevance of the inquiry to the issue of sanction, whether or not the employee advanced any evidential basis which merited further inquiry, and the extent to which resultant further investigation could have revealed information favourable to the employee."

Either Mr Walker or Mr Fleming may have decided to order an occupational health assessment or even a psychiatric report, say, to assist in understanding the claimant's state of mind and functioning at certain times but there was not enough to make that a requirement, something any reasonable employer would do. Mr Walker considered that the most serious allegations were spending inordinately large amounts of time on non-task work and creating, as he saw it, false timesheets. The claimant gave an explanation for the first of those which was not linked to her mental health. In relation to the second, she admittedly said that the need she felt to go home at the end of the day as soon as she dropped her vehicle off at the Benbecula exchange caused her not to go into the building where she could have gained a more secure connection to the VPN and thus downloaded her activities more promptly and accurately. However, Mr Walker was entitled to evaluate that without the need for further medical evidence, particularly given that the claimant would not have encountered Mr MacDonald by entering the building for the two or three minutes required to complete the task. It is recognised here that the claimant's mental health for at least part of the time when her work was under review – i.e. December 2018 to February 2019 – was impacted by matters in her personal life, but she did not divulge that to either Mr Walker or Mr Fleming. Her disclosures were related to the effect caused by Mr MacDonald and as such they were entitled to view those concerns, even if legitimate, in the context of his limited interactions with her and as not sufficient to explain the issues in her working practices.

106. There is however more force in the argument that either Mr Walker or Mr Fleming (or even Ms Robertson) ought to have interviewed at least some of the individuals the claimant said she had been assisting from an exchange when she ought otherwise to have been on the way to a customer job. The

respondent interviewed no-one other than the claimant. It may have proved difficult or impossible to track down external contractors, but Mr MacInnes, who was based at the Benbecula exchange despite being employed by a sister company, could have been interviewed, as could the individuals who worked as Control. Likewise the Benbecula based Engineers, or a sample of them including for example Lye Campbell, could have been asked questions about their working practices for context. This would have allowed a better appreciation of whether what the claimant was saying about various matters was justified or not. For example, they could have been asked about routes they took to certain parts of the island (relevant to whether the claimant was stopping at home on the way to a job or not), the way that certain tasks were approached and whether the claimant would be out of step with others, and how credible were the claimant's accounts of various challenges with gaining a mobile signal or VPN access. They could also have been specifically questioned on their interactions with the claimant in relation to support. It was a reasonable step to interview at least some of them, particularly as she suggested they should. By not doing so there was a lack of appreciation for some particular aspects of working on the isle which may not have applied elsewhere, even for people ostensibly in the same role. Given that it was clear before the tribunal that Mr Walker and Mr Fleming were sceptical about, or in some instances misinterpreted, the claimant's explanations, this was a reasonable thing to do. With reference to both ***Sainsbury's*** and ***Tesco*** the respondent fell on the wrong side of the dividing line between reasonable and unreasonable.

107. Similarly, the decision taken by Mr Fleming not to contact the local garage to verify whether the claimant was being truthful when she said she had taken her vehicle there was unsustainable. It had been found by Mr Walker that the claimant had breached the terms applying to Yard Parkers and unless Mr Fleming was prepared to accept at face value what she said, and there is no record that he did, then he should have taken this straightforward step. Any reasonable employer would have done. It would have informed him properly about that particular matter and may have affected his overall assessment of her honesty and credibility.

108. Therefore, based on a combination of these last two related matters, it is found that the respondent did not undertake a reasonable investigation and that the third requirement of ***Burchell*** was not fulfilled. As a result the claimant's dismissal was unfair. That is not to say that all parts of the respondent's process and final reasoning are unsustainable, and this is dealt with below.

The band of reasonable responses

109. In addition to the ***Burchell*** test, a tribunal must be satisfied that dismissal fell within the band of reasonable responses to the conduct in question which is open to an employer in that situation. The concept has been developed through a line of authorities including ***British Leyland UK Ltd v Swift [1981] IRLR 91*** and ***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439***.

110. The principle recognises that in a given disciplinary scenario there may not be a single fair approach, and that provided the employer chooses one of a potentially larger number of fair outcomes that will be lawful even if another employer in similar circumstances would have chosen another fair option which may have had different consequences for the employee. In some cases, a reasonable employer could decide to dismiss while another equally reasonably employer would only issue a final warning, or vice versa.

111. It is also important that it is the assessment of the employer which must be evaluated. As Mr Mitchell raised in his submissions, whether an employment tribunal would have decided on a different outcome is irrelevant to the question of fairness if the employer's own decision falls within the reasonableness range and the requirements of section 98(4) ERA generally. A tribunal must not substitute its own view for the employer's, but rather judge the employer against the above standard.

112. Ms Dalziel argued that some of the features of this case meant that the sanction of dismissal fell outside the band of reasonable responses. It was, she said, too harsh in the circumstances. She made reference to the following in particular:

112.1. The above mentioned alleged shortcomings in investigating the claimant were more than merely procedural matters and affected the substantive fairness of the decision to dismiss. Again, failure to consider and investigate her medical position was a critical flaw;

112.2. The claimant in many ways was not acting with deliberate intent. She was not for example falsifying timesheets or trying to defraud the respondent by claiming overtime she knew was not justified;

112.3. Similarly, there were multiple references to the claimant using outdated working practices. That signalled a training need rather than a disciplinary sanction. The claimant was given no opportunity to rectify her ways;

112.4. Both Mr Walker and Mr Fleming unreasonably rejected her explanation for spending so much time in exchanges. They recognised that as a Senior Engineer she was someone who colleagues would go to for assistance, and her job description specifically recognised this as something she should embrace. It was unreasonable to then refuse to accept that this was why she was spending time in exchanges. They had no other explanation and reached no conclusion on what she was doing in that time if not what she said;

112.5. The claimant was given a false sense of security by Mr Walker offering to remove dismissal as a potential sanction, only to go back on that. In his doing so the respondent was also in breach of paragraph 4 of the ACAS Code of Practice on Disciplinary and Grievance Procedures, which required among other things that 'Employers…should act consistently'. No reasonable employer would have acted in that way;

112.6. There was no mention of the claimant's clean disciplinary record and long service in either rationale document, suggesting they had not been taken into account;

113. Not all of Ms Dalziel's criticisms of the respondent go towards taking the decision to dismiss outside of the band of reasonable responses. For

example, it was open to the respondent to find that serious breaches of time recording policy leading to the payment of overtime, or repeatedly poor or inefficient working practices fell within the scope of conduct rather than something else such as capability. The claimant was experienced, senior and had been reminded by Mr MacDonald on 30 November 2018 what was expected of her. Similarly, even though there was not an explicit reference to her length of service or disciplinary record, that does not prove that they were not considered. Given that the claimant's experience and seniority were considered – and ultimately counted against her – it cannot be said that the respondent fell outside the band of reasonable responses by failing to document those points expressly.

114. However, some of Ms Dalziel's arguments are valid. The deficiencies in investigation, addressed above, also filtered through to the question of whether dismissal was within the range of what is reasonable. That is to say that there is every likelihood that evidence gathered by a reasonable investigation would have shown the claimant in a better light. It would not have exonerated her completely, since for example her timesheet practice was always a matter for her alone, but it may have yielded explanation or mitigation in relation to matters such as the apparently excessive time spent in exchanges, delays in closing jobs, the claimant's journey routes or whether there was a less culpable reason for her vehicle being outside of the yard for two evenings. The cumulative effect of that evidence may have been a lesser sanction.

115. Similarly, whilst it may have been within the band of reasonable responses for the respondent to dismiss the claimant had a proper investigation been undertaken, it was would no longer have been reasonable to do so after offering her the assurance that she would not be dismissed.

116. Therefore, mindful of the above approach which a tribunal must take in dealing with the question of reasonableness, it is found that dismissal of the claimant was not within the band of reasonable responses open to the respondent in these circumstances.

***Polkey* consideration**

117. Mr Mitchell submitted that if there was any procedural unfairness in the respondent's process, it should be considered whether the claimant would nevertheless have been dismissed had a fair procedure been followed. In doing so her referred to the well-known decision of the House of Lords in ***Polkey v A E Dayton Services Limited [1987] ICR 142***. The court confirmed that a tribunal may reduce compensation to reflect the likelihood that the respondent's procedural errors made no difference to the outcome. Mr Mitchell argued that the likelihood of the claimant being dismissed under a fair procedure was high, if not certain. He referred to the weight of evidence of blameworthy conduct, at least some of which the claimant accepted.

118. The ***Polkey*** principle requires the tribunal to consider what would have happened had this particular employer followed a procedure that met the test of fairness. That outcome may be something which is certain, although such cases are rare. The tribunal must therefore assess the percentage probability of a fair dismissal if it can.

119. The respondent's shortcomings were essentially twofold – failure to conduct a sufficiently thorough investigation and then offering to remove dismissal as a sanction only to go back on that decision.

120. In relation to the first of those, it is in the nature of the issue that without anyone undertaking the additional investigatory steps it is difficult to tell what difference they would have made. As discussed above, they may have supported the claimant but equally they may ultimately have given her no assistance. It is considered that there was a two-thirds or 67% chance that the claimant would still have been dismissed, based on (i) the evidence available in relation to the issues which the additional investigation would have dealt with and (ii) the seriousness of the matters which would not have required further investigation in order to be within the range of reasonable responses, principally in relation to time recording.

121. In relation to the second issue, the position appears clearer. Had Mr Walker not made the offer to take dismissal off the table, he would have been free to

choose that outcome and in all realistic likelihood would have done, particularly as his own evidence was that he had not offered to restrict himself at all. The likelihood of the claimant's dismissal had he not made and then withdrawn the offer is close to certainty. That dismissal would have been fair but for the issues described in the paragraph immediately above.

122. Therefore the net effect of the application of the ***Polkey*** principle is that any compensatory award should be reduced by 67%.

The ACAS Code

123. Ms Dalziel submitted that the respondent had breached the ACAS Code in the way referred to above, i.e. by offering and then withdrawing a lesser sanction than dismissal in return for the claimant agreeing remedial steps including mediation. This was said to be a breach of the requirement to act consistently under paragraph 4 of the Code. She said a 25% uplift was justifiable.

124. Paragraph 4 speaks of the importance of both employers and employees acting consistently. That suggests that, on an employer's part, the requirement applies not only to consistency across different cases – i.e. comparing one employee with another in similar circumstances – but also acting consistently throughout a given process involving a single employee. Otherwise it is difficult to see how employees could be expected to act consistently themselves.

125. That being so it is found that the respondent acted inconsistently towards the claimant by first offering to remove the threat of dismissal and then imposing that outcome. It understandably added additional stress and upset to an already difficult situation.

126. The maximum permitted uplift in compensation which can be awarded is 25%. The respondent's breach in this case is not of the most egregious kind. There was no evidence for example of Mr Walker cynically making the offer or meaning to cause additional upset, even if that was the effect. Up until the point she was dismissed the claimant was receiving communications about

both mediation and behavioural training. The effect of the decision to dismiss was compounded unnecessarily. Therefore an uplift of 20% in the compensatory award is considered appropriate.

Contributory conduct

5 127. It is necessary next to consider whether any award of compensation should be reduced to reflect the degree to which the claimant's own conduct contributed to her dismissal. This duty falls on a tribunal whenever findings are made suggestive of contributory conduct, and in any event both parties raised the issue in in their submissions. Mr Mitchell argued for a high reduction
10 and Ms Dalziel suggested that a reduction of around 25% would be more appropriate, to reflect matter such as that the claimant accepted she should not have stopped at her home so frequently and that she should have been more diligent in completing her timesheets at the end of her day.

128. A tribunal may reduce both a basic and compensatory award to reflect
15 contributory conduct. There are slightly different considerations for each, but the broad approach is the same, namely what is a just and equitable approach to take. According to the Court of Appeal in ***Nelson v BBC (No.2) [1979] IRLR 346*** in order for a reduction to the compensatory award to be appropriate, the conduct in question must be culpable or blameworthy, it must
20 have caused or contributed to the dismissal and the reduction must be just and equitable.

129. That approach is effectively distilled into four separate questions (as per ***Steen v ASP Packaging Ltd UKEAT/23/11***) which are dealt with as follows:

129.1. **What is the conduct said to give rise to contributory fault?** In this
25 case, it is the claimant's admitted conduct, including poor working practices;

129.2. **Was that conduct blameworthy?** The claimant herself admitted that it was;

129.3. **Did the blameworthy conduct cause or contribute to the dismissal?** Clearly the answer is yes and this was not a disputed issue;

129.4. **If so, to what extent should the award be reduced, consistent with what is just and equitable?** This question requires analysis of the specific facts and circumstances of the case. The claimant's contributory conduct played a large part in the decision to dismiss her but it was not the whole reason. The contributory element of her conduct may have justified her being dismissed fairly were it not for the respondent's procedural breaches and the consequences of them. A significant reduction is appropriate and it is decided that this should be 50%.

130. Although the same detailed analysis is not required in relation to a basic award, and a broader approach can be taken, it is generally unusual for a different reduction to be applied. There is no reason in this case to view the relevant background differently and accordingly the basic award should also be reduced by 50%.

Breach of contract claim/wrongful dismissal

131. The additional claim of wrongful dismissal must be considered separately. This has to be evaluated on a different common law basis to the approach taken in the unfair dismissal claim. Not all of the relevant principles and considerations are common to both.

132. It is determined that the respondent was not in breach of the claimant's contract by dismissing her summarily and without notice pay. The claimant fundamentally breached her contract with the respondent by way of her failure to comply with time recording requirements alone. This led to the payment of overtime which was not justified. She materially breached the express term that she would account for her working time accurately and on time, and in a way which would not result in her unjustly receiving extra pay. She also breached the underlying obligation of mutual trust and confidence. Given the remoteness of her location from her managers, a large degree of trust was

implicit in her working relationship with her employer. That conduct was admitted by the claimant and there was no dispute over whether it occurred. The respondent brought the contract to an end because of it. It was therefore released from the obligation to give notice or payment in lieu.

5 133. Although the claimant's dismissal was found to be unfair in the statutory sense, that is not inconsistent with this finding. The issues in relation to adequacy of investigation and withdrawal of the offer not to dismiss in her statutory claim are not a determining factor in the common law analysis required to determine her wrongful dismissal claim.

10 **Calculation of award**

134. The parties had helpfully confirmed that some of the key values set out in the claimant's most recent schedule of loss were agreed.

135. It was agreed that the claimant's basic award entitlement would be £7,087.50. As a 50% deduction needs to be made for her contributory conduct, the award 15 granted is **£3,543.75**.

136. The claimant's net loss of earnings between her dismissal date and 17 December 2021 (beyond which she did not seek compensation for any losses) was £30,037.84. This took into account loss of employer pension contributions and gave credit for income received since dismissal.

20 137. She also sought **£500** in respect of the loss of her employment rights. This figure is within a normal and appropriate range, especially given that she had acquired 12 years of service with the respondent, and with that corresponding notice and redundancy rights.

138. On the basis that a compensatory award is appropriate, it is necessary to 25 calculate a reasonable period of loss. That should recognise the degree to which the respondent has deprived the claimant of paid work, but up to a sensible point. The claimant has been out of work for well over a year now, which is not necessarily through any fault of her own in the current climate. Equally, a respondent is entitled to argue that at some point it should cease 30 to be effectively paying for its mistake.

139. Considering the above and all of the circumstances of this claim, the claimant is awarded compensation from her dismissal date until 17 December 2021 as she has requested. Whilst Mr Mitchell was entitled to argue that the claimant's reduced income caused by the Covid-19 pandemic was not directly of the respondent's making, it is an inherent risk of dismissing an employee unfairly that they may experience difficulty in seeking or retaining new work in a variety of ways, whether because the remoteness of the location translates to a limited number of vacancies to apply for or the Covid pandemic further depresses the market. In particular, the claimant lost out on furlough pay via the Coronavirus Job Retention Scheme because she hadn't built up sufficient service to qualify. That was related to her dismissal, which in the process removed the rights she had built up over an extended period of employment.

140. Starting therefore with the net loss figure of £30,037.84, the percentage adjustments outlined above must be applied. Therefore, it should be reduced by 67%, then increased by 20%, then reduced by 50%. Doing so produces a figure of **£5,947.50.**

141. Adding this figure to the adjusted basic award and the award for loss of employment rights results in a final total award of **£9,991.25.** This is the amount the respondent is ordered to pay.

Employment Judge: **Brian Campbell**
Date of Judgement: **28 June 2022**
Entered in register: **29 June 2022**
And copied to parties

Date sent to parties _29 June 2022