EMPLOYMENT TRIBUNALS

Claimant: Imtiyaz Seth

Respondent: Network Plus Services Limited

Heard at: CVP at Manchester Employment Tribunal

On: 13th June 2023

Before: Employment Judge Thompson (sitting alone)

REPRESENTATION:

Claimant: Mr Culshaw, Solicitor
Respondent: Mr Malik, Consultant

RESERVED JUDGMENT

1. The complaint of unfair dismissal pursuant to section 94 of the Employment Rights Act 1996 is well-founded. The Claimant was unfairly dismissed.

2. The complaint of breach of contract in relation to notice pay is well-founded.

3. The compensation owed to the Claimant for unfair dismissal shall be subject to a 15% uplift on the compensatory award pursuant to section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 because the Respondent unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

4. There shall be a reduction on the amount of the basic award and the compensatory award of 40% on the grounds of contributory fault.

5. There shall be no **Polkey** reduction on the amount of the compensatory award.

REASONS

Claims and Issues

1. On 5th October 2022 the Claimant was dismissed by the Respondent on the grounds of gross misconduct. In this claim, the Claimant claims that he was unfairly dismissed. In addition, the Claimant brings a claim for breach of contract relating to his notice pay.

2. This has been a remote hearing which has been consented to by the parties. The Claimant has been represented by Mr Culshaw. The Respondent has been represented by Mr Malik. I am grateful for the helpful manner in which they have both presented their respective cases.

3. I have had the benefit of a bundle running to 219 pages that was agreed between the parties. I have been taken to the important documents in the course of evidence and submissions. References to page numbers in this judgment relate to the said bundle.

4. I have heard evidence from the following witnesses:

   (a) The Claimant.
   (b) Mr Kenny Saving ("KS").
   (c) Mr Trevor Lister ("TL").
   (d) Mr Robert McComb ("RM").

5. The issues for me to determine are as follows:

   (a) What was the principal reason for the dismissal and was it a potentially fair reason in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")?
   (b) Was the dismissal fair in accordance with s.98(4) ERA? That involves a consideration of these questions:
      (i) Did the Respondent genuinely believed that the Claimant was guilty of misconduct?
      (ii) If so, was that belief based on reasonable grounds?
      (iii) Had the Respondent carried out such investigation into the matter as was reasonable?
      (iv) Did the Respondent follow a reasonably fair procedure?
      (v) If all the above requirements are met, was it within the band of reasonable responses to dismiss the Claimant?
   (c) Should any compensation awarded to the Claimant be reduced on the grounds that it would be just and equitable to do so under sections 122(2) and/or 123(6) of the Employment Rights Act 1996, and if so by what percentage?
   (d) Should any compensation awarded to the Claimant be subject to an uplift pursuant to the ACAS Code, and if so by what percentage?

(e) Should any compensatory award be reduced to reflect that the Claimant may have still been dismissed had the Respondent acted fairly?

(f) Did the Respondent breach the Claimant's contract of employment by dismissing him without notice?

Findings of Fact

6. The Respondent undertakes gas mains replacement across the North West. This involves replacing the gas mains from metallic piping to plastic piping. It employs over 5,000 people nationally over 80 sites.

7. The Claimant was initially employed by Balfour Beatty from 24 April 2017. His employed transferred to the Respondent at some point in April 2021. He was based at the Respondent's Worsley office. He worked as what is commonly known as a gas engineer, but his actual job title was '*purge and relight engineer*'.

8. The Respondent operated 3 shifts for their gas engineers: 8am - 4.30pm, 11am - 7.30pm and 1pm - 9.30pm, including a half hour unpaid break. It was a matter for the employees to decide when they would take their lunch break. There was no written rule that prohibited them taking their lunch break at the end of their shift, though in practice that was not the norm.

9. The Claimant worked shifts in rotation. The Respondent's policy was to start and finish the shift from home no matter what locations its engineers were working at that day. Time travelling from home and returning home was included in the shift.

10. If there were no more jobs for an engineer to do on a particular day, permission to finish early needed to be requested from the duty manager. Often this was several hours early. Engineers were still paid to the end of their shift. Engineers were supposed to enter on their timesheet their designated end shift time. This was because these were basic hours for which they were paid whether there was work to do on the shift or not.

11. If an engineer was required to work hours in excess of his/her normal shift, this would have to be authorised first by someone in the office. The engineer was not required to work overtime and would have to agree to this in advance.

12. The Claimant was provided with a company van. The company van is tracked by a software tracking device known as "*Track King*". The chronology set out below is based upon a combination of the data available from Track King and the Respondent's phone records which demonstrate the times of relevant phone calls.

13. On 30 August 2022, the Claimant was working an 11am to 7.30pm shift pattern. That day he had a number of jobs. Several of the jobs the Claimant was dispatched to were cancelled and he was asked at 3.26pm to attend Ludlow Avenue in Whitefield, Manchester, along with another engineer, Andy Lonsdale ("AL"). The Respondent had also sent a third engineer, Calvin Gurr ("CG"), to

the same site.

14. The Track King records that the Claimant arrived at Ludlow Avenue ("the site") at 4.15pm. After reviewing the job, AL rang the office and spoke to Sophie Cluksy ("SC"), the duty manager, to inform her that the job required a joiner and that no work could be done until the following day. AL was told by SC that there were no other jobs for the 3 engineers and so the 3 of them could go home. This message was conveyed to the Claimant.

15. The Claimant saw on google maps that the journey time to his home was expected to be 1 hour 13 minutes. This was longer than the usual travel time because of road works.

16. After being informed that there was no more work and they could go home, AL asked the Claimant to go to his home in order to look at a solar panel. The Claimant agreed to this at it was on his way home.

17. At 5.10pm KS became aware from an email that the job at the site had been rescheduled for the following day. He then had a telephone conversation with SC and was told that the engineers had been sent home as they had informed her that they could not do the job. KS was not happy with this. He says there was an agreement in place with the customer that the Respondent would undertake some work (what has been referred to as a dry run) on 30 August so that the work on the following day would be easier. However, that information had not been properly communicated to the 3 engineers. KS had finished his shift and was on his way home at the time that he received the information about this job. He waited until he was at home before making calls to the 3 engineers.

18. KS rang the Claimant at 5.41pm. The Claimant was driving at the time and on his way to AL's house. They spoke briefly before the Claimant ended the call to take another call from AL. The Claimant rang KS back at 5.49pm. He was also driving at the time of this second call.

19. There is a dispute between the Claimant and KS as to what happened in these two calls. KS says that he asked all 3 engineers to return to site. He says in his witness statement that "*All three engineers agreed to return to site and complete the work (a pipe alteration)*".

20. The Claimant says that in these 2 calls with KS, there was a discussion about the reason the engineers had left the site. The Claimant says that he was not asked to return to the site and did not agree to return to the site.

21. The Claimant was at AL's house for 5 minutes or so in total between 5.52pm and 5.57pm. He did not go and look at the solar panel because when he arrived at AL's house, AL was having an argument with his wife. He did not want to intrude and left within minutes. During this time, the Claimant became aware that AL was returning to the site. AL suggested to him that the 3 engineers should return to site. AL used words along the lines of "*let's go back, we have to go back*". However, AL was not the Claimant's manager and it is not

suggested by the Respondent that this was a failure to follow a management instruction.

22. It was only AL and CG who returned to site. The Claimant did not return to site. Whereas the Claimant was due to finish his shift at 7.30pm, AL and CG were both working different shift patterns and were not due to finish until 9.30pm. The Claimant believed that if he had returned to the site it would have taken him about 30 minutes, so he would arrive at about 6.15pm. He had earlier checked on google maps the time to travel from the site to his home which was estimated at 1 hour 13 minutes. He believed that if he had returned to the site then he would then have had to immediately turn around in order to get home by the end time of his shift. He had also not taken his 30 minute lunch break that day.

23. It must be stressed that the Claimant does not say that he was asked to return to the site, but it is my finding that he nevertheless gave some consideration at the time as to whether he could feasibly return to the site once he became aware that AL was returning. He decided that it was not practical for him to return with AL given his shift finish time.

24. The Claimant rang SC at 5.58pm when he was in the Bolton area to ask if there was any work. He was on his way home at this time. He says she told him there was no work and he could go home. He says that this corroborates his account that there was no instruction to return to site, as it would not make sense for him to ask if there was other work if he had been instructed to return to a job. SC was not interviewed as part of the later investigatory, disciplinary or appeal processes. Both KS and TL took the view that this phone call did not take place. However, phone records obtained as part of these proceedings show that the Claimant did call SC at 5.58pm.

25. The Claimant arrived home at 6.40pm. This was some 50 minutes before the end of his shift time but he says he had been given permission to finish early by SC as there were no other jobs. He nevertheless put in his time sheet that he finished at 7.30pm as per the usual procedure.

26. At 8.30pm, KS called CG to check whether the engineers had returned and the work was being carried out. He was informed that the Claimant did not return. KS had access to the Claimant's tracker data. He reviewed the Claimant's day. He says in his witness statement that he thought the Claimant had wasted company time by being on site and not doing work. Then he wasted time by driving to AL's house for his own private gain. KS claims that he had not done a number of other jobs that day. The Claimant says that there was no work for them to do and he was not wasting time on this day.

27. KS spoke to TL on that evening to inform him of the situation. TL told KS that the events would need to be investigated the next day. The investigation was to be carried out by KS.

28. KS held a meeting with the Claimant on 31st August 2022. The tone of that meeting was accusatory. KS said the Claimant was doing a "foreigner" - undertaking private working during his working hours – when he went to AL's house. It was repeatedly said to the Claimant by KS that he had instructed him

to return to site. This was repeatedly denied by the Claimant.

29. The Claimant received a letter dated 6 September 2022 (issued by email) inviting him to attend a disciplinary hearing to be chaired by TL. The letter records the charges as:
(a) Deliberate recording of incorrect working hours.
(b) Failure to follow a reasonable management instruction.
(c) Unofficial work in work time for personal gain.

30. The basis of the failure to follow a reasonable management instruction is clear. KS was saying that he had instructed the Claimant to return to the site and instead he went home. I asked both KS and TL what their understanding was in relation to what is later referred to as the "*falsification of timesheets"* allegation (which started out as the "*deliberate recording of incorrect working hours*" allegation). They both said that there would have been nothing wrong with the Claimant recording the end of his shift as 7.30pm even if he finished at 6.40pm, if he had been told that there was no further work that day. This was, in effect, just another way of characterising the failure to follow a reasonable management instruction allegation.

31. A disciplinary meeting place took place on 16 September 2022, the notes of which appear at **[101]-[109].** The Claimant attended with his union representative, Billy Goulding ("BG").

32. The Claimant did not accept in that meeting that KS instructed him to go back to site. TL says in his statement that he did not believe the Claimant on this point. He says it did not make sense for KS to instruct 2 out of the 3 engineers to return.

33. The Claimant also said in this meeting that he had called SC at 5.58pm to see if there were any other jobs. TL says that he said he did not think it made any sense that the C would call SC at 5.58pm.

34. The Claimant also explained at this meeting that if he did have to return to the site, he would then have to go home almost straight away. TL says he did not accept the Claimant's story about it taking 1 hour and 13 minutes to go back home. He says it was a 40-minute journey home. He says that he looked at google maps during the hearing. The Claimant said it would have taken him 30 minutes to return from AL's house to the site. TL returned at 6.13pm, which is about 16 minutes from the time the Claimant departed from Mr Lonsdale's house. TL was of the view that the Claimant could have worked at the site for at least 30-40 minutes.

35. The Claimant also raised other issues at the disciplinary hearing, not relevant to what had happened on 30th August 2022. He said that another manager, Andrew Parkinson ("AP"), did not want the Claimant to be on site on some other occasion. As a result, TL agreed to take a statement from AP. The Claimant also raised an issue about KS instructing him to do other (electrical work).

36. The disciplinary hearing also discussed the "*private work"* the Claimant was said to have done for AL. The Claimant did not accept it was private work. The Claimant also accused TL of having asked him during work hours to do a private job for him. TL does accept that he once asked the Claimant for a quote for the installation of an electric car charger. Nothing further came of it and TL says the circumstances were totally different.

37. After the first disciplinary hearing, TL arranged for a statement to taken from AP (at **[110]**). AP says in that statement that he did not say to KS that the Claimant should not be on any sites. AP also asserts in that statement that the Claimant avoids doing work.

38. On 30 September 2022 **[114]**, the Claimant was invited to attend a reconvened disciplinary hearing. He was told that the Respondent had removed the allegation of unofficial work in work time for personal gain **[111]**. TL says this was because the Claimant probably attended AL's house to give him a quotation for work. In the end, he was there for around 5 minutes and could not have undertaken any work.

39. The reconvened disciplinary hearing took place on 5 October 2022. The notes appear at **[119]-[120]**. In this hearing, TL expressed that he found it hard to believe that KS instructed 2 out of the 3 engineers to return to site. TL also set out that he disagreed with what the Claimant said about the timings.

40. There was also some discussion at this hearing about the lunch break issue. The Claimant was saying that he had not taken his lunch break on the day in question, and that he would have been entitled to add it onto the last 30 minutes of his working day. The Respondent did not accept this, noting that there were plenty of periods during the day when the Claimant could have taken his lunch break as he was "*doing nothing*".

41. Once it was clear that TL was not accepting what the Claimant had to say, BG asked the Claimant whether he was sure he had not "*misheard*" KS's instructions. The Claimant said he was sure he did not mishear. There was then a short adjournment. The Claimant consulted with BG in private during this adjournment. It would have been obvious to BG at this point that TL was not accepting the Claimant's account. BG encouraged the Claimant to state that he could have misheard KS. He advised the Claimant that if he admitted to the possibility of it being a miscommunication, his job would be saved. On the basis of this advice, the Claimant came back and said this (as recorded in the minutes at **117**): "*I probably misheard Kenny when he said to go back to the site, I should have gone back to the job. I'm sorry and apologise if I have missed it"*.

42. Immediately after the Claimant made this comment, TL told the Claimant that he was dismissed. He said this: "*Right, unfortunately we are at a position of falsification of timesheet, we will terminate your employment*".TL took no time to consider his decision whatsoever.

43. TL says that at the start of the disciplinary process, he was not convinced on

the sanction of dismissal (despite having taken the view that the Claimant had done what was alleged). He says this in his witness statement:

"*It appeared to me that, as the Claimant was disputing Mr Saving's instruction of going back to site, there was some disagreement, and I did not feel such a sanction to be appropriate. However, when the Claimant changed his story on 5 October 2022, it was plain to me that he was being dishonest and at the last ditch he wants to come clean. My decision of dismissal was communicated instantly, I was clear that the Claimant could have come clean earlier, and I would have continued to work with him. However, he kept changing his story, including the irrelevant points about Mr Parkinson and Mr Saving asking him to do extra work, which had no relevance."*

44. In his evidence to me, TL confirmed that this would have been a written warning had it not been for the Claimant's "*dishonesty*". He confirmed that the only matter that he considered the Claimant was being dishonest about was that he was now accepting that he probably misheard KS. He also referred to the Claimant's demeanour as evidence of dishonesty. I found his evidence in regard to the alleged dishonest "*demeanour*" to be unconvincing and vague. I find that the reference to the Claimant having a dishonest demeanour has been made with a view to bolster his conclusion that the Claimant was dishonest.

45. AG asked if TL would consider a lesser sanction and following a short adjournment, TL confirmed that would not be the case and directed them both to the appeals process. Following the disciplinary hearing, the outcome letter was sent to the Claimant (at **[119]**).

46. The Claimant appealed against the decision to dismiss him on 7 October 2022. The main basis of his appeal was that he had no previous disciplinary record. He also alleged that KS had asked him to undertake work that is not within the scope of his contract of employment **[121]**.

47. The appeal hearing took place on 24 October 2022. It was chaired by SM. The notes are at **[126]-[134]**. It was suggested that TL should have given the Claimant a final written warning or a two-week suspension. The appeal was not upheld. This was communicated at the hearing and followed up in writing on 28 October 2022 (**[135]-[137]**).

48. SM was a wholly unimpressive witness. He said that the appeal was a review rather than a re-hearing but in the very next question conceded that he did not know the difference between a review and a rehearing. It is entirely unclear to me what information he had before him when he considered the appeal. It is not set out in writing anywhere and he did not know when asked. It was also unclear to me on what basis he upheld the appeal. He said that it was because of dishonesty. When he was asked what the dishonesty was, he said it was that the Claimant had changed his story and admitted to having received the instruction to return to site. When it was suggested to him that the Claimant did not admit to this, but rather that he may have misheard KS, he then changed his evidence to fit with the disciplinary notes, even though it remains unclear whether he ever saw these notes.

49. SM also said that even with this "*change of story*", the allegation of failure to follow a reasonable management instruction was not, in his view, a gross misconduct offence that ought to lead to dismissal. He said that he upheld the appeal because of the falsification of time sheets allegation, which he did think was a gross misconduct offence. I found this evidence confusing as it was, according to the other 2 witnesses from the Respondent, the same allegation phrased a different way. In the end, I was left completely unsure about what evidence SM had considered and what the basis was of his decision to uphold the appeal. I was left with the impression that the appeal was nothing more than a rubber stamping of the disciplinary decision.

Applicable Law

50. The test for unfair dismissal is set out at section 98 of the ERA. Under section 98(1) it is for the employee to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is a reason falling within section 98(2), i.e conduct, capability, redundancy or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position in question.

51. Once the employer has established a potentially fair reason for the dismissal under section 98(1) of the ERA, the tribunal must then decide if the employer acted reasonably in dismissing the employee for that reason. Section 98(4) of the ERA provides:

> **"(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question of whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-**
> **(a) Depends on whether in circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and**
> **(b) Shall be determined in accordance with equity and the substantial merits of the case."**

52. The test as to whether an employee acted reasonably is an objective one. The tribunal has to decide whether the employer's decision to dismiss the employee fell within the range of reasonable responses that a reasonable employer in those circumstances and in that business might have adopted: see **Iceland Frozen Foods v Jones [1982] IRLR 439**. The tribunal must not substitute its view for that of the employer: see **Midland Bank plc v Madden [2000] IRLR 82**.

53. The correct approach to fairness is based on **British Home Stores v Burchell [1980] ICR 303**. The questions for the Tribunal are these:

(a) Did the respondent genuinely believe that the claimant was guilty of misconduct?

(b) If so, was that belief based on reasonable grounds? This involves a consideration of the information available at the time of the dismissal and the appeal decisions.
(c) Had the employer carried out such investigation into the matter as was reasonable? Relevant are the nature of the allegations, the position of the claimant and the size and resources of the employer.
(d) Did the employer follow a reasonably fair procedure?
(e) If all those requirements are met, was it within the band of reasonable responses to dismiss the Claimant rather than impose some other disciplinary sanction such as a warning?

54. Under section 122(2) of the Employment Rights Act 1996, where the tribunal considers that any conduct of the employee before the dismissal was such that it would be just and equitable to reduce the amount of the basic award, the Tribunal shall reduce that amount accordingly.

55. Under section 123(6) of the Employment Rights Act 1996, where the tribunal considers that the dismissal was to any extent caused or contributed to by any act of the employee, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable.

56. The case law tells me that I must concentrate on the employee's acts and I must only deduct if I can identify culpable or blameworthy conduct. The leading case is **Steen v ASP Packaging Limited UKEAT/0023/13/ LA** where the EAT identified that the Tribunal must:

(a) Identify the conduct which is said to give rise to the potential contributory fault.
(b) Decide if the conduct is blameworthy or culpable.
(c) Decide whether it is just and equitable to reduce the amount of the award.

57. The Trade Union and Labour Relations (Consolidation) Act 1992 makes provision for ACAS to issue Codes of Practice, and section 207(A) provides for unfair dismissal awards to be adjusted if either side has failed to comply with a relevant Code of Practice. Section 124A of the ERA provides that the increase is applied only to the compensatory award and is applied before any reduction for contributory fault. Where there has been an unreasonable failure, the adjustment can be up to 25%.

58. If the Tribunal finds that a dismissal was unfair, it is open to it to reduce any compensatory award to reflect that the employee may have still been dismissed had the employer acted fairly: see **Polkey v AE Dayton Services Limited [1988] ICR 142**. The tribunal needs to consider both whether the employer could have dismissed fairly and whether it would have done so.

59. When applying **Polkey**, the Tribunal should consider whether the employer could have fairly dismissed and, if so, what were the chances that the employer would have done so? A **Polkey** deduction may take the form of a percentage reduction, or it may take the form of a Tribunal making a finding that the

employee would have been fairly dismissed after a further period of employment. Alternatively, a combination of the two approaches could be used but not in the same period of loss.

60. The tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done: see **Hill v Governing Body Great Tey Primary School [2013] IRLR 274**.

61. The Tribunal should have regard to any material and reliable evidence that might assist in assessing just and equitable compensation, even if there are limits to the extent it can be confident about the world as it might have been; a degree of uncertainty is inevitable and the mere fact that an element of speculation is involved is not a reason for refusing to have regard to the available evidence: **Software 2000 Ltd v Andrews and others [2007] ICR 825**.

62. The Employment Tribunals Extension of Jurisdiction Order 1994 provides that proceedings for breach of contract may be brought before a Tribunal in respect of a claim for damages or any other sum (other than a claim for personal injuries and other excluded claims) where the claim arises or is outstanding on the termination of the employee's employment.

63. A claim for notice pay is a claim for breach of contract: see **Delaney v Staples 1992 ICR 483 HL**.

64. In **Neary v Dean of Westminster [1999] IRLR 288**, it was held that conduct amounting to gross misconduct justifying summary dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment. The tribunal is not concerned with the reasonableness of the employer's decision to dismiss but with whether the employee is guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract: see **Enable Care and Home Support Ltd v Perason EAT 0366/09**).

Application of law to the facts

65. I now apply the law to the facts that I have found. I will deal with each of the issues that I identified at the outset.

What was the principal reason for the dismissal and was it a potentially fair reason in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")?

66. I accept the Respondent's assertions that the reason for the dismissal was conduct, and that this is a potentially fair reason. There was no real challenge to this is cross examination. In general terms, the conduct can be described as

the Claimant failing to follow KS's instruction to return to site, which could amount to either a failure to follow a reasonable management instruction or the falsification of time sheets (if an early finish had not been authorised).

Did the Respondent genuinely believed that the Claimant was guilty of misconduct?

67. I accept that the dismissing officer, TL, genuinely believed that KS had given the instruction to the Claimant to return to site and that the Claimant was aware of this instruction. Again, there was no real challenge to this in cross examination.

If so, was that belief based on reasonable grounds?

68. This involves a consideration of the information available at the time of the dismissal and the appeal decisions. I accept that TL had reasonable grounds for accepting the evidence of KS in relation to the key issue of whether the instruction had been given and heard by the Claimant. KS was clear from the outset that he had given the instruction and that the Claimant agreed to return to the site. TL was entitled to believe him, in particular as the 2 other engineers had returned to site.

69. Mr Culshaw invites me to find that the belief that this was a reasonable management instruction was not based upon reasonable grounds. He invites me to make this finding because it would never have been feasible for the Claimant to return to the site given the travel times involved and/or the fact that he had not taken a lunch break. I do not accept this. TL was entitled to find that the Claimant could have worked for 30-40 minutes based upon the information he had, namely the fact that it had taken AL 16 minutes to return to site and not 30 minutes (the Claimant would also have been coming from AL's house). Further, his own google maps research of the Claimant's journey home from the site showed it was 40 minutes and not 1 hour 13 minutes. Further, it was not the norm to take a lunch break at the end of the working day as confirmed by the Claimant's own trade union representative.

Had the Respondent carried out such investigation into the matter as was reasonable?

70. Although Mr Culshaw raised a number of issues in relation to the investigation in opening, including checking traffic times, traffic problems and break times of colleagues, I do not find any of these matters were central to the key allegation. The Respondent could have looked further into these issues but that would amount to a standard of perfection.

71. However, I do find that it was unreasonable for the Respondent not to interview SC as part of the investigatory, disciplinary or appeal processes. SC could have corroborated the Claimant's account because of the phone call she had with him at 5.58pm. Both KS and TL have said in their statements that they do not accept that the phone call took place. However it is now apparent from phone records that it did. I have no account before me from SC as to what the content of that conversation was.

72. TL provided no explanation as to why SC was not interviewed. I consider that this would have been an obvious line of enquiry and I can not see why, given that the Respondent is a company that employs over 5,000 people and has an HR department, that SC was not spoken to at any stage in this process. It was unreasonable not to interview her.

Did the Respondent follow a reasonably fair procedure?

73. I find that the procedure was unfair. KS should not have continued to act as the investigating officer once it became clear that the Claimant was disputing KS's account of an instruction having been given to return to site. KS would not have gone looking for evidence that would have demonstrated that he was wrong, which explains why SC was not interviewed as part of the investigatory process. Moreover, this meant that KS's version of events was never subject to any real scrutiny as he was not interviewed by a third party given that he was the investigating officer.

If all the above requirements are met, was it within the band of reasonable responses to dismiss the Claimant?

74. The crux of this issue is whether it fell within the reasonable band of responses to dismiss the Claimant for the misconduct, as opposed to some other sanction. By TL and SM's own admissions, this was not something that they would have ordinarily have dismissed an employee for. There was considerable mitigation: the Claimant was an employee of over 5 years service with no previous disciplinary offences for this type of conduct or anything else. There were not any serious consequences to the Claimant not returning to site as on anyone's case as to timings, he only had a very short period left in his shift when he could have been on site in any event. His position was different from the other 2 engineers as his shift was due to shortly finish.

75. The Respondent says that what pushed this into the category of gross misconduct was dishonesty. The dishonesty alleged against the Claimant is the "*change in story"*. It is my judgment that it was irrational for TL to categorise this as dishonesty. The Claimant was not admitting to an allegation that he had previously denied. Instead, he was accepting the compromise position to appease his employer, that there may have been a miscommunication, that KS may have told him to go back to site, but that he may not have understood that. This was not the Claimant "*coming clean*" only when faced with incriminating evidence, as TL suggests.

76. The possibility of this being a miscommunication ought to have been obvious to TL. The Claimant was talking over the phone while driving when these conversations happened. They were on any account brief conversations. There was no suggestion that the Claimant was the type of person to just ignore his manager. However, the option of this being a miscommunication was never even considered by TL.

77. Moreover, I am concerned as to the circumstances in which the Claimant made the concession that he may have misheard KS. Both of the disciplinary hearings as well as the investigatory hearing were highly accusatory in nature. I can understand why the Claimant may have felt, after consultation with his trade union representative, that the hearing was going one way and that it would help him avoid dismissal if he accepted that maybe there was a third option, ie a misunderstanding. It was put to the Claimant in cross examination that he would not have been asking for a written warning if he did nothing wrong and this was a clear indication that he knew he had lied. I do not accept this. It is my view that the Claimant's concession was entirely the right one to make and ought to have confirmed TL's initial view that dismissal was not the right sanction given the differing accounts.

78. In summary, I find that the decision to dismiss was not within the reasonable band of responses because the possibility of this being a miscommunication was not acknowledged by TL and it was irrational to find that the Claimant accepting this possibility was dishonesty on his part.

Should any compensation awarded to the Claimant be reduced on the grounds that it would be just and equitable to do so under sections 122(2) and/or 123(6) of the Employment Rights Act 1996, and if so by what percentage?

79. The Respondent has identified the following contributory conduct :
    (a) the Claimant not doing the job at the site and waiting for the out of hours team;
    (b) the Claimant travelling to AL's house;
    (c) the Claimant admitting late in the day that he probably misheard KS and then apologising;
    (d) the Claimant muddying the waters by mud-slinging on unrelated matters at the disciplinary and appeal hearings; and
    (e) the Claimant's conduct as set out in the statement of AP.

80. I accept that there was a miscommunication between the Claimant and KS. The Claimant did know that the other engineers were returning to site and he ought to have clarified matters with KS. This miscommunication led to the disciplinary allegation that the Claimant was eventually dismissed for. This does amount to conduct that is blameworthy or culpable. Further, it is my view that it is just and equitable to reduce the amount of the award by 40% to reflect this.

81. I do not accept that the remainder of the allegations listed above amount to blameworthy or culpable conduct or that that it would be just and equitable to reduce the award. I make this finding because the Claimant was not subject to any disciplinary allegations in respect of these matters. That suggests to me that the Respondent did not have sufficient evidence to back these matters up or that they did not view them as sufficiently serious to warrant any investigation.

82. In relation to allegation (d), I accept that it did not help the Claimant's case at the disciplinary hearing to make these points and he ought to have been steered by his trade union representative to stick to the relevant issues.

However, in my judgment this does not amount to blameworthy or culpable conduct and I do not consider it to be fair and just to reduce the amount of the award on these grounds.

Should any compensation awarded to the Claimant be subject to an uplift pursuant to the ACAS Code, and if so by what percentage?

83. There has been a failure to follow the Code insofar as I have found that necessary investigations were not carried out, contrary to paragraphs 4 and 5 of the Code. In particular, SC ought to have been interviewed. I consider that, in light of the size and resources of the Respondent and the fact that this was a significant oversight, an uplift of 15% is appropriate.

Should any compensatory award be reduced to reflect that the Claimant may have still been dismissed had the employer acted fairly?

84. I have to consider whether the Respondent could have fairly dismissed and, if so, what were the chances that the employer would have done so. The Respondent may still have dismissed the Claimant even if SC had been interviewed and even if she corroborated the Claimant's account. However, it is my view that dismissing the Claimant would have been unfair in any event, given my finding that it was not within the band of reasonable responses to dismiss the Claimant, as this was not a case where the employer could rationally find that the Claimant was dishonest. This is not a case where the Claimant's dismissal was unfair solely on the basis of a procedural defect: it was also substantively unfair and in those circumstances I decline to make any **Polkey** reduction.

Did the Respondent breach the Claimant's contract of employment by dismissing him without notice?

85. I find that on a balance of probabilities there was a miscommunication between the Claimant and KS about whether the Claimant was required to return to the site. I make this finding because the Claimant had never disobeyed a management instruction on any previous occasion that I have been made aware of and because the conversations were brief and over the phone whilst the Claimant was driving. I do not accept that this miscommunication was conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract.

Other Matters

86. The matters will now be listed for a remedy hearing to consider the appropriate level of compensation payable to the Claimant. The parties shall write to the Tribunal with their proposed dates.

Employment Judge Thompson

Date 3rd July 2023

JUDGMENT AND REASONS SENT TO
THE PARTIES ON

12 July 2023

FOR THE TRIBUNAL OFFICE

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