EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105583/2023

Held in Glasgow on 15 - 18 April 2024

Employment Judge Murphy

Mr P Gahagan — **Claimant In Person**

Openreach Ltd — **Respondent Represented by Ms R Page - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant was unfairly dismissed. The respondent shall pay to the claimant compensation in the sum of TWO HUNDRED AND NINETY-SIX POUNDS STERLING AND SIXTY-SIX PENCE (**£296.66**)

REASONS

Introduction

1. A final hearing took place (in person) at the Glasgow Tribunal.

2. The respondent led evidence from David Rafferty, the claimant's line manager, Lesley-Anne Keith, the dismissing officer and Marc Monteith, the appeal manager. The claimant gave evidence on his own behalf. Evidence was taken orally from the witnesses. The Tribunal was referred to a joint set of productions running to approximately 249 pages. Not all documents in the file were referred to in evidence.

3. The following abbreviations are used in this judgment for witnesses and others referred to in the evidence and findings in fact.

The claimant	C

The respondent	R
David Rafferty, Patch Manager and C's line manager at time of alleged misconduct on 30 May 2023	DR
John McGown, Patch Manager for the patch in which C was working on 30 May 2023	JM
Lesley-Anne Keith, Senior Area Manager for Glasgow Central and Dismissing Officer	LK
Marc Monteith, Senior Engineering Optimisation and Performance Manager for Scotland and appeal manager	MM
Scott Wallace, Patch Manager and C's former line manager	SW
Simon Ritchie, Patch Lead for DR's patch	SR

Issues to be determined

4. A Preliminary Hearing (PH) on case management had taken place on 27 March 2024 and the issues to be decided at the final hearing were set out in the Note which followed. C complains of unfair dismissal. He advances no other complaints. C was employed by R from 29 March 2021 to 20 July 2023 as a Service Delivery Engineer. The respondent dismissed him, ostensibly for conduct, with effect from 20 July on making a payment in lieu of notice.

5. The issues were identified in the PH note as follows:

1) Liability

a. *The respondent admits dismissing the claimant. What was the reason or principal reason for the claimant's dismissal? The respondent says the reason was conduct.*

b. *If the reason was conduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:*

   a. *there were reasonable grounds for that belief;*

   b. *at the time the belief was formed, the respondent had carried out a reasonable investigation;*

   c. *the respondent otherwise acted in a procedurally fair manner;*

   d. *dismissal was in the range of reasonable responses.*

2) Remedy

e. *If there is a compensatory award, how much should it be? The Tribunal will decide:*

   i. *What financial losses has the dismissal caused the claimant?*

   ii. *The respondent has confirmed that it does not argue that the claimant has failed to take reasonable steps to replace his loss.*

   iii. *For what period of loss should the claimant be compensated?*

   iv. *Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?*

   v. *If so, should the claimant's compensation be reduced? By how much?*

   vi. *Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?*

vii. *Did the respondent or the claimant unreasonably fail to comply with it?*

viii. *If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?*

ix. *If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?*

x. *If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?*

xi. *Does the statutory cap apply?*

f. *What basic award is payable to the claimant, if any?*

g. *Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?*

Findings in fact

6. The following facts, and any further facts set out in the 'Discussion and Decision' section, are found to be proved on the balance of probabilities or have been agreed by the parties. The facts found are those relevant and necessary to my determination of the issues. They are not intended to be a full chronology of events.

Background

7. R is a limited company which is a wholly owned subsidiary of the BT Group. It installs and maintains the copper wires and fibre cables that connect homes and businesses to phone and broadband. C employed R as a Service Delivery Engineer from 29 March 2021 until his dismissal with effect from 20 July 2023.

8. In his relatively brief time with R, C had various managers. C divides up its work to geographical areas called patches. Each patch has a Patch Manager and a Patch Lead. They are in charge of a team of engineers allocated to the patch. C was initially managed by David Dougans who,

when C started, was Patch Manager for Scotstoun. C lived close to that patch. From 18 June 2021, his line manager changed to Patch Manager, Andrew Wilson. From December 2022 to April 2023, C was managed by Patch Manager, Scott Wallace (SW). From April 2023 until his dismissal, C's Patch Manager was David Rafferty (DR).

9. After completing his initial training, C was allocated to a patch on the other side of the city to where he lived. In late 2022, C's mother was seriously ill and C had caring responsibilities for her. He asked his then line manager, A Wilson, to be moved back to work on the Scotstoun patch to be closer to home and to his mother. C had lost his father relatively recently. He was experiencing problems with his mental health at the time in relation to which he had sought medical advice and was prescribed medication. C's Patch Lead at the time, A Haggarty, discussed C's situation with him. Mr Haggarty then asked Marc Monteith (Senior Engineering Optimisation and Performance Manager for Scotland) about a transfer for C. MM agreed to a temporary transfer for C to a more local patch to alleviate the pressures on C. At that time the workforce, including C, had been made aware that a reorganization of the engineer teams and allocated patches was pending.

10. C was concerned that he would be moved away from the Scotstoun patch as a result of the reorganisation. He worked there from around 5 weeks before Christmas 2022 and found the local working helpful. On his return after the Christmas break in early 2023, C was allocated back to a more distant patch in the east of the city as a result of the reorganisation. He spoke again to A Wilson about his concerns. Mr Wilson said he couldn't help, so C contacted his manager's boss, Lesley-Anne Keith (LK) to discuss the matter in or around December 2022. LK told C about the possibility of obtaining a so-called 'Carer's Passport' (CP). This was a physical document which would record adjustments put in place to support employees with caring responsibilities like C.

11. Scott Wallace, who was C's new manager, put this in place. In C's case, the CP recorded that he would be entitled to work at a more local patch; that his commute time would be limited to 15 minutes; that he would be given casual leave for hospital appointments; and that he would be entitled

to decline jobs which came up on the system which were a substantial distance from his home location.

12. Because of the CP adjustments, C's working arrangement and line management arrangements were atypical. SW remained C's Patch Manager, but C did not work in the patch for which SW was responsible or with the team for which SW was responsible. He worked in the Scotstoun patch which was managed John McGown (JM). This caused some practical challenges for C. He had never met JM nor the Patch Lead for Scotstoun. When he required support or supervision, he had to contact both the Patch Lead for Scotstoun and the Patch Lead for the team he was nominally allocated to on the east end. He was not on the group chat for the patch where he actually worked which was the official communication medium by which the team of engineers for that patch shared information about their whereabouts and availability to undertake and support each other as required on jobs.

13. At the end of February 2023, C received training from R on the use of Gas Detector Units (GDUs) when working in R's underground network. The purpose of the GDU is to detect gas and other poisonous fumes when working on cable networks in underground holes. Following the training, C was not ticketed to use the skill until after spending a week buddying a trained engineer. This week was put back so that C became ticketed to apply the GDU training on jobs around the end of March 2023.

14. At the end of February / March 2023, C contacted LK again. He was concerned that David Rafferty (DR) was soon to replace SW as his manager in the east end patch. He was anxious about explaining his situation to a new manager and briefing him on the CP, as he had not found the process smooth to date. He asked LK if he could move permanently to JM's team. LK said he could not. She told C that DR was a good guy who would understand the situation. She reassured C that the adjustments under the CP would continue seamlessly. She told him SW would brief DR on the adjustments during the handover.

15. At the end of March / early April 2023, C's manager changed to DR. C called DR to introduce himself and to explain about the CP adjustments. DR, however, focused the conversation on other matters and the CP

adjustments were not discussed in any depth. DR did not seek a copy of C's CP either from C or from SW or from the HR System at the time or at all until after C's suspension at the end of May.

16. On or about 8 April 2023, C went off on an extended period of paternity leave for four weeks (including some extra leave). During his leave, DR contacted C a number of times to ask why he was not yet back at work. C returned to work on 6 May 2023, as planned.

17. Around 20 May 2023, C met DR in person for the first time. C had just rejected a job which he had been allocated to him on the system on the basis that it was around 27 miles away. This rejection was flagged to DR by the control room and he contacted C and asked to meet him. DR asked C why he had rejected the job and C explained the CP adjustments. DR said words along the lines: "I was going to have to talk to you about that anyway."

18. DR appeared displeased about C working on a different patch. He said that JM was unhappy with the arrangement. He said JM was unhappy with one of his engineers being sent to DR's patch while C worked on his patch. DR told C that the CP adjustments had been initiated without informing JM and that JM was unhappy about this. DR told C that JM did not like him (DR) and said words to the effect that the arrangement had previously been facilitated by the fact that SW, C's previous manager, had a good relationship with JM. DR then told C that the CP adjustments could not continue like this and told C to think about his own future and whether C should really be working in a job like this when he couldn't travel.

19. C pointed out to DR that there was a person in JM's team who lived local to DR's patch and suggested to DR a swap whereby he might move permanently to JM's team and that individual might move permanently to DR's team. DR agreed to raise this suggestion with Marc Monteith (MM). C had no further contact with DR before the events on 30 May. There was no further discussion with any manager about his suggested swap into JM's team.

20. R publishes a document called its Standards of Behaviour. This document gives a non-exhaustive list of examples of acts that constitute misconduct

and includes “not following health and safety standards that apply to your role”. The document also gives a non-exhaustive list of examples of acts which constitute gross misconduct and includes “seriously breaching our health and safety rules…”

21. R publishes a Disciplinary Procedure on its intranet. That document includes the following text, so far as relevant:

“5. What’s misconduct?

An act of misconduct is something which breaks our standards, rules, regulations, policies or procedures which we expect our people to follow. Here are some examples:

- *…*
- *not following health and safety standards that apply to your role.*

…

9. What's Gross Misconduct?

It's a serious offence which leads to a breakdown of the trust which we placed in you as an employee. It's a breach of your contract of employment. It also includes serious misconduct which is likely to have a negative impact on our business, brand or reputation. Acts of gross misconduct may lead to summary dismissal (being dismissed without notice or payment in lieu of notice).

The list below doesn't include everything, but gives you some examples of what may be seen as gross misconduct:

- *…*
- *Seriously breaching our health and safety rules (including breaches to the Safety and Sustainability policy / Health and Safety policy).*
- *…”*

22. R publishes a document called the One HR Global H&S Handbook. Within that there is a section headed “Safe System of Work – Footway and carriageway joint boxes”. In that section, the following text appears:

Before starting work

Use of 2 or 4 head Gas Detection Unit

Carry out a Gas Detection Unit (GDU) test immediately below the access cover before the cover is removed completely

...

Carry out a GDU test as close as possible to the floor or water level

…

Test with the GDU at floor level and at all the duct entry points

...

General requirements

...

All the time the structure is open, keep monitoring for gas using the GDU (i.e. real time gas monitoring)

23. R had access to an HR department who, among other matters were available to advise and support R’s managers with the operation of staff related policies and procedures including R’s Standards of Behaviour and Disciplinary Policy and Procedure.

24. Before the events of 30 May 2023, C had no disciplinary record.

Events on 30 May 2023

25. On 30 May 2023, C returned to work after taking a few days’ annual leave. His mental health was poor. He had taken the leave to commemorate the second anniversary of his father’s passing. He had arranged a Cognitive Behavioural Therapy session via phone call between 11 and 12 pm on that date. He was allocated to a job on Great Western Road near to a petrol station.

26. At around 10:13 am, he opened a joint box i.e. a covered hole in the ground through which R's engineers access its underground network of wires. He tested for gas using the GDU. He did some testing of the wires and found a problem with a line. He worked in the hole for around an hour. He was unable to fix the problem in that time. He closed the hole then went to take an initial look in a different nearby hole which he opened using his GDU. After some initial testing, he closed the hole and returned to his van.

27. He charged his GDU in his van, leaving it switched on while had had his CBT call with the counsellor in the vehicle. He was emotional during the call. He then reopened the hole. He was relatively inexperienced at carrying out the task he assessed was required. He called the Patch Lead, J McVey, to discuss the job. He put out a request for a second engineer to assist him. He identified that he required certain cable so he closed up the hole and drove to the Exchange to pick it up. At that time, he took his lunch break for 40 minutes, hoping that another engineer would become free in that time to assist him. Outside the exchange, he noticed an individual in another of R's vans. C did not know the individual. It was Patch Manager, JM, who he had never before met.

28. C picked up the cable he needed and returned to the site at around 12pm. No engineer had responded to his request for assistance. He re-opened the hole. He did not use his roller bar to do so. C had been trained in using the roller bar to open holes safely. The roller bar is a tool to open the hole without the risk of scratching the surround and causing sparks which could potentially risk igniting in the event of the presence of gas. He forgot to use it on this occasion.

29. He used the GDU to test for gas before fully opening the hole. He wore his PPE as well as putting guards round the hole. He placed the GDU outside the hole while he was working and at some stage caused it to be moved to a distance from the hole where it could not operate effectively or as effectively as it ought to have been by virtue of its location. C felt under pressure to complete the job in a short time span. He felt anxious about carrying out the job without assistance.

30. He carried on working in the hole. While he did so, JM arrived at the site. He introduced himself and asked C where his roller bar was. JM also

observed that the GDU was not in the hole. He asked about C's health. C told him he wasn't doing the best and that he had requested an assistant engineer. JM asked C to pack the site up which he did. During that process, JM took a picture of C. JM then advised C he was going to call C's Patch Manager, DR, and instructed C to wait in his van. C waited in his van alone. (JM returned to his own van).

31. DR arrived around 45 minutes later. He spoke with JM for a couple of minutes before approaching C. DR asked C about the roller bar and C said words along the lines of "I don't know why I wouldn't use the roller bar". He apologised. He did not claim to have used the roller bar to open the hole. DR took C's GDU and told him it would be sent to the tester to be tested. The GDU records and retains data regarding when it has been switched on and off and whether and when it has alarmed to indicate the presence of gas or other noxious substances.

32. C then drove home with DR following in his own van. DR had a further discussion with C in C's driveway when they arrived. C apologised. DR told him he was going back at that point to discuss the matter with JM. DR said C was suspended and instructed him not to contact anyone in the business or access R's systems or Facebook page. He instructed C not to drive his work van.

Fact-finding meeting on 31 May 2023

33. DR held a fact find meeting with C on 31 May 2023. The meeting took place by Teams using audio only at 11 am. It lasted approximately 1 hour and 10 minutes. Only C and DR were present. At the beginning of the call, C advised DR that he did not feel in good mental health. DR continued with the call.

34. DR asked C to account for all time periods during his working day the previous day. On a number of occasions, C told him he was not in a good mental state to continue the meeting. DR persisted with the meeting. C became a little angry. He told DR he thought this was a stich up. He explained he had seen JM smoking in his van at the Exchange and 10 minutes later JM had turned up where he was working. C reminded DR that DR had told him just 2 weeks previously that JM was not happy with

him working his patch and now he found himself suspended. C implied he believed this was not coincidental. He told DR he thought the hearing was a sham. C also brought up DR's repeated contact with him during his paternity leave, suggesting he should be back at work.

35. DR told C that C shouldn't go down this road. DR asked C to leave out of any future meeting his comments previously in their conversation two weeks previously regarding JM not being happy with C working on his patch and about DR's poor relationship with JM. DR asked C not to bring up his contacts during C's paternity leave. DR said to C words along the lines: "between you and me, if you show remorse when it comes to your meeting with Lesley-Anne Keith, and put mitigating factors to her and, if your GDU was on at the time, then the worst that will be given is a Final Written Warning." At the time of this meeting, DR had not seen the GDU data for the day before. Nor had DR seen a written witness statement from JM which was not forwarded to DR until the next day. DR did not, therefore, provide these documents to C during the fact find meeting.

36. C told DR he had told JM he had forgotten to use his roller bar. With regard to his GDU, he told DR it was "on his tool box" He said it was "pushed to the side". C explained to DR that he had felt in poor mental health the previous day and that he had been suffering with an upset stomach. DR told him he was not interested in these matters as these were not facts that he (DR) needed to take into account. He told C that these were mitigation points which would be "done" later, at a hearing. C raised that this was a first offence and he had only recently been trained.

37. On 5 June, DR prepared a report known as and Accident, Incident or Near Miss Report (AIR Report). This requires the manager to respond to questions about the nature of the incident. DR uploaded the photos taken by JM at the site. He categorised the incident as a 'near miss' in the report and recorded the severity of the incident as 'medium'. Medium is defined in the report template as split into two sub-categories as follows:

Major - Fractures (not fingers or toes) temporary reduction in sight in one or both eyes, injuries that result in hospital admittance for more than 24 hours or last time injuries likely to be more than seven days.

Minor - medical treatment or lost time injuries likely to be 7 days or less.

38. DR prepared a draft report which he sent to C to review by email on 5 June 2023. The text included the following paragraph, so far as relevant:

I was at the site with the JF4 [the hole] lid open and my guards set up and I decided that I needed more guards, as I stepping [sic] out of the work site I was approached by John McGown who introduced himself, John asked where my roll bar was, I admitted I had forgot to use it. He then asked where my GDU was and it was in my toolbox outside the site. I had tested for gas but moved the GDU as I was adjusting the site.

John told me he was concerned the site was not set up properly …

This was at about 13:20.

39. His report contained a summary of the key points as follows:

- *You were witnessed working in a manner deemed to be unsafe by another patch manager.*
- *There appears to be gaps in your day on accounted for*
- *You were observed working in an underground structure without a gas detector*

40. C replied by email on 6 June 2023. He said he was happy with the content but asked to amend a part where he had been recorded as saying he could not recall what he had done for the 3 hours (referring to the period between 9 am and noon on that morning). C gave more detail in his email about his activities that morning. He did not comment on or ask to amend the text which has been reproduced in the two paragraphs above.

41. At some time between 30 May and 14 June 2023, JM prepared a written witness statement which he sent to DR. The statement included the following text, so far as relevant:

Engineer left at approximately 1:10 PM, I checked who engineer was and what task he was working on, as it was in my patch, I then decided to carry out a field visit to introduce myself.

...

I introduced myself to Peter and asked him what job he had and what it entailed

...

I realised that no GDU was present on site and when I asked Peter to explain he said he had forgotten and that it was in his toolbox situated at side of wall off footpath, he quickly opened toolbox and put GDU into work site.

I then asked him why there was no roller bar on site again he told me he had forgotten.

42. On 14 June 2023, DR finalised his report and added his conclusion and recommendation as follows:

Having completed my investigation into this case of alleged misconduct, I've come to the following conclusions. Peter wilfully chose to work in a manner which was unsafe. He risked himself and members of the public by doing so. Despite working at a petrol station where a heightened awareness would be expected Peter chose not to adhere to basic safety standards.

I recommend that this case is progressed as gross misconduct under the company's disciplinary procedure.

43. On 21 June 2023, LK contacted C to arrange a date for the disciplinary hearing. At this stage she emailed what she described as a 'placeholder' only to check the date and time suited. She indicated in her email that she would email C's invite letter and attach the case paperwork. The proposed date was 27 June 2023.

44. On 25 June 2023, LK sent C a further email. It said "Please find attached invite letter and case paperwork. Any questions just call or text me on …". In the event, however, the email did not attach the invite letter. There was attached R's Disciplinary Policy and Procedure, DR's AIR report, DR's fact finding report (sent in two separate files) and a copy of C's email exchange with DR seeking an amendment to the record of their interview. C did not contact LK to ask about the whereabouts of the invite letter. C tried to

access R's disciplinary procedure but found it was not sent to him in a format he could access.

45. The disciplinary hearing invite letter which was prepared but not attached to the email contained errors as to where the meeting would take place. In reality it was to be a Teams video meeting, but the unsent invite letter said it would take place at the Scotstoun Exchange. The letter also wrongly stated it would take place at 11 pm.

46. The unsent invite letter set out the allegations. It set out information about C's entitlement to bring a companion. It set out information about arrangements for recording the meeting. It set out the documents which ought to have been attached. The list included all the documents C received. It did not include a printout of the GDU data which had, by then, been obtained for 30 May from the testing team. This was not sent to C with the other attachments. It was not mentioned in the unsent invite letter's inventory of enclosures. However, it was made available to LK who reviewed it before the hearing.

47. The unsent invite letter referred to possible outcomes and explained that "… *this could amount to gross misconduct which if confirmed could mean that you'll be summarily dismissed from the company*…" It continued:

However, if I don't believe that the allegations amount to gross misconduct I can give any of the following sanctions: no action, a written warning or a final written warning.

I may also look at the following:

- *…*
- *Changing your role or your location.*
- *Demoting you.*
- *Recovery of loss.*

48. The unsent invite letter did not refer to it, but both DR and LK had, by the time of LK's email to C, been provided with a written witness statement from JM. This was not attached to LK's email to C in advance of the disciplinary hearing nor was it sent to C at all throughout the process.

49. C attended the disciplinary hearing without having had sight of the invite letter, the GDU data printout or JM's written witness statement. He did not know the latter two documents existed and ought to have been attached before the hearing as they were not referred to in the body of LK's email to him.

Disciplinary hearing on 27 June 2023

50. The meeting took place via Teams by video conferencing on 27 June 2023. Only LK and C attended. The meeting lasted between half an hour and an hour.

51. LK began the meeting by reading out information about C's right to be accompanied. C confirmed he was willing to continue without a companion. LK then read out to C the allegations which were contained in the invite letter which C had not received. These were as follows:

Serious breach of our Standards of Behaviour policy and Health and Safety rules in that you failed to take appropriate checks by 1. Failing to check for gas by using your GDU 2. Failing to use your roller on 30/05/23 at job WS2PGU57, Munro Place which had the potential to cause risk to your self [sic] *and the public. This was exacerbated by the fact you were working in a JF4* [a hole] *which was located directly behind the premises of a petrol station.*

52. LK then noticed she had not attached C's disciplinary invite letter to the email with the case documentation. She offered C the choice of postponing the meeting to send the letter or that she would send the letter 'retrospectively', meaning that she would send it on to C after the hearing had concluded. C was anxious to conclude the meeting, having been by suspended for 4 weeks by this point. He believed, based on DR's comments, that if he showed due remorse he would be allowed to return to work with a warning and was eager to do so. He asked for the hearing to continue. LK carried on without pausing to send C a copy of the invite. In the event, she did not send it to C after the meeting either.

53. LK also referred to the fact that C had not seen the GDU data, but she did not offer to send this over to him. C did not ask for a copy of the data as he was confident it would show the GDU was switched on at the material

times. LK did not notice that C had not been sent the witness statement by JM so did not raise this with C during the meeting.

54. C explained to LK that the incident took place the day after the two-year anniversary of his father's passing and that, with a newborn in the house, he was sleep deprived. He explained to her about having had a CBT telephone appointment at 11 am on the date in question. He explained he'd requested another engineer to assist on the job. C also referred to the CP he held and his mother's serious illnesses.

55. C told LK that he took the GDU from the side of the van and tested for gas then viewed his set up and thought he could make it bigger (meaning move the safety guards around the hole to give himself more working space fenced off to the public). He told her he picked up the GDU and put it to the side in a safe location. He told her that JM then approached him and asked him where his roller bar and GDU were. He told LK that he had told JM that he did use his GDU but had just moved it subconsciously for some reason. He told her he did not use the roller bar which he had forgotten to use and that it was still in the van.

56. During the meeting C tried to be apologetic. LK pointed to one of the pictures taken by JM in the meeting and put to C that there was no GDU in it. In fact, the photo did show a GDU present, partly concealed by JM's hand in the shot. The photo was not taken of the site as it appeared when JM arrived but at a later point when C was clearing up and closing the hole. By the time of the picture, C had moved the GDU from its original position back closer to the hole. C did not correct LK to point out that the GDU was, in fact, in the photo. He felt confident that the GDU was switched on at the material time and believed that, based on DR's comments, if he showed due remorse, he would not be sacked. He felt that he didn't want to correct LK, a senior manager, about there being no GDU in the photo in circumstances where he believed he would not be dismissed but receive a warning in any case.

57. During the meeting, LK did not refer to the existence of a written witness statement by JM but at times she referred to JM's account of things. C formed the impression from this that LK had spoken to JM about the incident. He did not know a written statement had been prepared.

58. During the hearing, LK focused heavily on the timeline. She repeatedly asked C what he was doing at 12.20pm. At the time, C found this odd as he was on his lunch at this time. He told LK this. He couldn't understand why LK was concerned with this time of day as the incident took place later, after 1pm. Unknown to C, it was because LK had seen the GDU data for the 30 May which recorded that C's GDU had been switched on between 09:13 and 12:22. As it turned out, there was an error in the timings in the printout, but LK was unaware of this error when she considered the evidence and reached her decision.

59. Following the hearing, both LK and C were away for a period of annual leave. On 10 July, LK sent C a text message asking for a personal email address to which to send the meeting notes. C provided this on 11 July at 08:34. Around 15 minutes earlier on 11 July, DR had a call with C to arrange a visit to C's home to uplift C's work van, phone and laptop. C was concerned about the implications of this request for his hearing outcome.

60. LK sent C the notes on 12 July 2023. C replied on 13 July. He asked for an amendment regarding the GDU. He asked for it to be recorded that he advised LK that he did use it but had moved it. In his email he also said "I did not use my roller bar. I had forgotten to use it and it was still in my van".

Dismissal

61. On 19 July 2023, LK called C and told him she'd decided to dismiss him. She told him he would be paid one month in lieu of notice. She gave a couple of aspects of her reasoning during the call. C was very upset. He argued that he didn't accept her findings and maintained he had used the GDU. On that date, LK followed up by sending C a dismissal letter. It said his last day of employment would be 20 July 2023. The letter said the reason for the dismissal was gross misconduct. It explained that C had a right of appeal and asked C to put his grounds in writing within 7 calendar days. The letter referred to a separate 'rationale' document which set out LK's reasons for the decision. That document included the following text:

- *The incident that occurred on May 30th raised serious concerns regarding your failure to adhere to safety protocols by not using your roller bar and gas detection unit (GDU) in a high-risk area near*

a petrol station. While you did provide several personal reasons and external circumstances that may have influenced your actions, it is crucial to emphasise the significance of safety and the potential consequences of breaching safety protocols. You were able to explain why we mandate the roller bar being used to remove the lid from the JF4 [the hole] *"it's to stop dragging the lid" and when I prompted you, you advised it is to prevent sparks. However you weren't able to articulate why the roller bar was not used, only to say, "I cannot think why I didn't use it"*

- *In terms of the GDU not being deployed, you were able to articulate why we mandate the use of the GDUs as gas can build up in the chamber and dragging the lids can ignite, however when asked why it wasn't used in the afternoon when John had approached you (having previously been in the same JF4 that morning), you advised that you had used it earlier that day but had subconsciously moved it out of the way as it had been lost before. I do not accept that as mitigation, using the GDU in the morning does not mean that the chamber will be in the same condition as it is a dynamic work area, as such the GDU must be used every time you enter or re-enter the UG structure.*

62. The document went on to refer to the importance of safety as a top priority. LK acknowledged C's previously positive safety record. LK said she did consider a lesser sanction but said: "*However, the culmination of not using the roller bar and gdu reinforced the significance of consistent adherence to safety protocols*".

63. LK went on to acknowledge C's personal circumstances at the time including his stomach upset, his sleep deprivation, his role as a care giver and his distress over the recent anniversary of his father's passing. She concluded, however that, "Considering the severity of the incident and the potential risks involved, a sanction of dismissal is warranted." She stated she found the charges upheld.

64. Because C no longer had access to R's systems and his work email, on or about 20 July, C requested that LK send the documents she had sent before the disciplinary hearing. LK forwarded the same chain on that date

with the same attachments (which did not include the disciplinary invite letter, the GDU data or JM's witness statement).

65. On 24 July 2023, C sent an email to LK saying he would like to invoke his right to appeal the decision. He did not give any written grounds for his appeal but said he would provide reasons in person at the hearing.

66. In early August, Marc Monteith, the appeal manager, called C to introduce himself. He agreed to hold C's appeal meeting face to face. C asked him for a copy of the GDU data and MM sent him a copy on 13 August 2023. During the call, C said he was worried about "throwing people under the bus". MM reassured him that the appeal hearing would be confidential and that he could say whatever he wished about anyone.

67. When C reviewed the GDU data, he quickly identified that there was an inaccuracy with the times recorded for the GDU being switched on. He gathered this must be because the GDU had not recalibrated after the clocks went forward at the end of March. Therefore, where the print out suggested the GDU had been switched on between 09:13 and 12:22, it ought to have shown it was on between 10:13 and 13:22.

68. On 14 August, MM sent C an appeal hearing invite which advised him of the date, time and place of the hearing as well as informing him of his right to bring a companion. MM also attached a copy of R's disciplinary policy and procedure.

Appeal hearing on 17 August 2023

69. On 17 August 2023, C attended the appeal hearing with MM. The hearing was recorded. It took place in person at Alexander Bain House. Only C and MM were present. It lasted just over two hours.

70. C explained he returned to the site after lunch a little before 1pm. With regard to the roller bar, C said to MM, "I've apologised when I say I can't say for sure the roller bar I honestly don't know why I didn't use the roller bar. I'm aware that's what I say."

71. With respect to the GDU, C asked MM "Are we saying that I didn't use my gas unit or that my gas unit wasn't where it was supposed to be?" MM replied: "Wasn't used". C then disputed this. He pointed out that the GDU,

in fact, could be seen under his hand in the photograph where LK had suggested it was absent. MM then explained that his information was that C had used the GDU when he was at the hole in the morning but at the time when C was in the hole just after 1pm, the GDU may have been present but wasn't on. C disputed this. He queried whether the GDU clock updated automatically with GPS. He pointed out that if it did not, then the times recorded would be out by an hour and that, when this was factored in, the times would tally with his account that the GDU was switched on until 13:20.

72. C also pointed out to MM that the scratches to the side of the hole that could be seen in the photo had been made on the opposite side to the side where he opened the hole. Scratches can be caused to the adjacent pavement surface when a roller bar is not used to open a hole with the risk of sparks. C maintained, therefore, that the scratches hadn't been caused by him. At that point, MM asked C again if he had used his roller bar to open the hole and C said he could not remember.

73. C raised that he had never seen JM's statement. MM did not at that stage pause the hearing to provide C a copy of JM's statement or to let C read his copy. C gave his account of what happened when JM arrived.

74. MM said, "*I think the statement from JM states that the GDU wasn't present on site when he spoke to you about it. He said that you forgot it and it was in your toolbox which was situated at the side wall of the footpath. You opened up the toolbox and put it in the box*." (JM's statement said C opened up the toolbox and put the GDU into the work site").

75. C disputed this and said that JM hadn't mentioned the GDU. He explained his experience of obtaining the CP and his interactions with DR in relation to the CP. He told MM about DR's conversation with him when DR said that JM was not happy that he was working on JM's patch. He told MM that DR said that he, DR, and JM didn't get on. C said DR had told him JM was 'raging' with him and that 'this can't go on' with reference to C working on his patch and his engineers covering work elsewhere. C told MM that DR said JM drove past him by chance on the date in question and queried whether it was a chance sighting.

76. MM said that, in JM's statement, JM said he was at Scotstoun Exchange, he was on a conference call and saw C there. MM said JM's statement was that he had noticed an engineer parked in the Exchange, whilst in conference calls. He further paraphrased part of JM's statement for C as follows: "The engineer left at approximately 1:10. I had a look to see who the engineer was who was working on my patch and decided to carry out a field visit."

77. C raised with MM that, during the fact-finding meeting, DR had said to him that he thought that if C brought up all his mitigating points in a hearing then it was most likely he was going to get a final written warning but that was not guaranteed. He raised that he did not receive a written invite letter to the disciplinary hearing. He said LK said she would send it retrospectively but that she had not. C also raised a concern that shortly before he was told he was dismissed, DR had contacted him to ask for the company van, phone and laptop to be returned. C raised concerns about the length of the suspension and the lack of support or contact from R during that period when his mental health was poor.

78. After the appeal meeting, MM spoke to various people about C's case before reaching his decision. He spoke with DR and SW about C's allegation that DR had told him JM was unhappy about having him on his patch and that JM was targeting him. He also spoke to JM. What was said by DR, SW and JM was not shared with C beyond the limited information recorded and conveyed subsequently in MM's appeal outcome rationale document.

79. After the appeal hearing, MM also spoke to Mark Callaghan, R's coaching manager for Scotland to refresh his understanding on how the GDU and roller bar should be used. Mr Callaghan said the GDU should be at the side of the hole and that the roller bar should have been used to avoid the risk of sparks. MM additionally spoke to R's Health & Safety Manager, Andrew Bailey. Mr Bailey told MM that his thought processes about C's case were in line with other cases he'd been involved with. MM spoke, in addition, to SR regarding whether C had been trained on the type of work he was doing and whether he had received proper supervision. SR told MM that he had. MM did not communicate the content of any of these

conversations to C either before issuing his decision or in his appeal outcome rationale document.

80. After the appeal hearing, MM spoke to the Mobile Tester who had downloaded the GDU data printout. The tester told MM that the times shown on the data print out would be lagging by one hour. MM referred to his consultation with the mobile tester in his appeal outcome rationale. He accepted C's account that the timings were out by one hour.

81. On 28 August 2023, MM emailed C. He apologised for the delay in getting back to C. He told him he had had to hold some other meetings regarding some of the points raised and had been waiting for information coming back from the GDU on the time issue. He said he now had all the information needed and was in the process of writing up the outcome.

82. On 8 September 2023, MM telephoned C and told him his appeal had been unsuccessful. He also sent a letter by email that day confirming the outcome. His letter said:

"*My reasons for this decision are shown in the attached rationale.*

I'm comfortable that at your original meeting the decision made was fair, reasonable and appropriate and as such your appeal has been unsuccessful".

83. With respect to the use of the GDU, though MM accepted the GDU data was lagging by one hour, he observed that its effectiveness hinged upon its correct positioning to detect gas. He accepted JM's account in JM's statement that it was not stationed near the hole but was in C's toolbox, where, MM found, it could not detect gas. MM identified corroboration for this in C's admission in the fact find meeting notes. With respect to the roller bar, MM advised that he found on the balance of probabilities, based on JM's statement and C's statement to DR and LK, that C had failed to use the roller bar.

84. In his rationale document, MM also discussed the point that C implied that JM was motivated to catch C out. He rejected this based on his post appeal discussions with SW, DR and JM. He found "there is no substantial evidence to substantiate a claim of discriminatory action against you by

John McGown". His document included the following text, so far as relevant:

You also expressed concerns of discrimination, hinting that John McGown was targeting you. This belief stems from 2 conversations: one with Scott Wallace before the incident, where you were informed of John's displeasure about you furthering a job in his patch, and another with your new manager, David Rafferty, who mentioned John's unhappiness regarding another job you furthered due to it being 17 miles away from your location, which was also in his patch. You sensed inconsistencies in John's statement which, according to you, implies a motive to catch you out …

I have spoken with David Rafferty and Scott Wallace regarding the conversations they had with you. Both confirmed that the discussions concerning job furthers where standard managerial conversations focused on performance, development, and coaching. Although both conversations involved John McGown, both managers assure me that it is standard practice to share potential coaching opportunities in this manner.

John McGown also assured me that he harboured no preconceived negative opinions about you that might give rise to discriminatory actions relating to a protected characteristic. He explained that visiting you on site was a customary gesture, particularly since you were working in his area…

John mentioned that he does not recall specific details of previous conversations regarding issues he had highlighted to your manager. He added that he undertakes several hundred jobs weekly in his patch, many of which necessitate feedback and coaching sessions with engineers on his team as well as others.

…

Taking the above factors into account, there is no substantial evidence to substantiate a claim of discriminatory action against you by John McGown.

85. With regard to other mitigating factors concerning C's personal circumstances, MM concluded: "*While I empathise with these circumstances, they do not excuse your decision to work unsafely*."

C's post-termination losses

86. At the time of his dismissal, C had 2 complete years' service with R. Throughout his service, he was over the age of 22 and under the age of 41. He was contracted to work 38.5 hours per week and his basic gross weekly pay was £675.56. His net weekly pay was £545.45 per week. While employed by R, C was also in receipt of an employer's pension contribution into a defined contribution scheme of £265.93 per month.

87. R informed C he would be paid one month in lieu of notice. In fact, instead of paying C up to 19 August 2023, R paid C in full up to 31 August 2023.

88. C began new employment on 16 October 2023. His income in his new employment was equal to his income when employed by R. There was a lag in his new employer starting to make employer pension contributions.

89. C incurred expenditure in the course of his endeavours to secure new employment. In total, C drove around 150 miles to attend interviews and incurred milage costs of approximately £67.50.

Observations on the evidence

90. There were some material factual conflicts in this case between C's evidence and that of DR and LK. Ms Page invited me, in her submission, to find that the evidence of all of R's witnesses to be honest and credible.

Conflicts between the evidence of C and DR

91. The first concerns the content of a conversation between C and DR approximately two weeks before 30 May 2023, when C first met DR in person. C's evidence was that DR knew little about C's CP adjustments and told C that JM was unhappy with the arrangement and that JM didn't like him (DR). C said DR told him that the CP adjustments could not continue like this and to think about his future.

92. DR initially said he didn't remember telling C that JM was unhappy C was working on his patch. It is fair to observe that both DR and LK often

responded that they did not remember when questioned during their evidence. When C put to DR that DR had told him he and JM didn't get along, DR said he didn't remember the conversation, but conceded that and JM were "very different managers" and said he accepted they might have had a conversation like that. However, was then more firm that he did not accept he told C that JM was not happy sending engineers over to cover him. DR also said he had no recollection of the conversation that C was trying to get moved. He denied telling C that his situation with his carer's passport was not viable. He said he'd no recollection of C asking to get moved permanently.

93. With respect to his knowledge of C's CP adjustments, DR gave evidence that after the meeting with C, he went to C's previous manager (SW) to ask for C's CP.

94. I preferred C's evidence about the content of the conversation two weeks before 30 May. On the issue of DR's knowledge of the CP adjustments, the written documentation confirms DR did not seek this from SW at that time as he gave the Tribunal to believe, but that this was done after C's suspension and fact-finding meeting. I concluded DR's recollection and grasp of the chronology was weak. When answering questions about it, he referred to it being a long time ago and at other times to not recalling things or not recalling them word for word. I had concerns about the reliability of his account. C, on the other hand, referred to this conversation consistently in his account to MM at the appeal hearing, as well as in his ET1 and his evidence to the Tribunal. He gave compelling detail of the discussion which was of considerable concern to him at the time.

95. Another conflict related to an alleged discussion on 31 May 2023 during the fact find call. C's evidence was that he told DR he thought this was a stitch up; he had seen JM smoking in his van shortly before JM attended. His evidence was that he then referred to the conversation he'd had with DR about JM a couple of weeks beforehand. C's said DR discouraged him from raising these issues and told him "between you and me" that the likely outcome for C of the conduct process was a warning.

96. When I asked him about C's allegation in the ET1 that this would be the outcome as long as he left out the parts about DR and JM at the hearing and DR's response was "*I don't remember discussing anything about that*".

97. Notes were produced of the hearing which were prepared by DR and which don't record the conversation which C alleges. However, those notes are brief given that meeting lasted over an hour, and plainly offer only a partial record of the discussion. Although C asked for the notes to be amended, he did raise this conversation or ask for it to be included.

98. Nevertheless, having considered all the evidence on the issue, I preferred C's account. C's failure to raise the omission of the discussion when he reviewed the notes is explicable by DR's suggestion that he "should not go down [the] road" of bringing up the discussions about JM at the hearing and also his implication that C's best approach would be to raise his mitigation points and show remorse. C would inevitably be mindful that DR was his manager, and that JM was also in a position of authority such that, if he were to continue working for R, he would require to have a continuing working relationship with these individuals. There was consistency between C's ET1 and his account to the Tribunal. C also described this conversation with DR to MM at the appeal hearing. On the other hand, DR's account was characterised by vagueness and a lack of recollection.

Conflicts between evidence of C and LK

99. C said LK had a call with him in late 2022/ early 2023 when she advised him of the CP system and referred him to take it forward with his manager. LK said she had no recollection of this but pointed out she had responsibility for 200 engineers and had multiple conversations every day. She said, "If you say it happened it may well have". I accepted that C had this conversation. C described it in some detail and the circumstances which led to it. I accept LK genuinely did not recall the conversation, owing to the number of interactions with engineers she experiences in her role.

100. C said LK had a further telephone conversation with him in February / March 2023. He said this call followed his attempts to contact LK by email text and WhatsApp to discuss concerns about DR replacing SW as his manager and the need to explain his CP situation to a new manager. His

evidence was that he eventually had a call with LK who reassured him that DR was a good guy who would understand and that the CP adjustments would continue. He said that during the call, he requested a permanent move to the team that covered the local patch but that this was refused. LK's evidence was she didn't recall either C's call or his attempts to contact her by email, text or WhatsApp or the subsequent call.

101. The question of the written communications was, on the face of it, of peripheral relevance in that, if available, they might have supported C's account of the subsequent call with LK. C did not have access to his work phone or laptop so had no access to these since before his dismissal. Although, the written communications were, on the face of it, of secondary importance, the evidence I heard in relation to the matter was troubling for reasons now explained.

102. There was a procedural background. A Case Management Order was made on 27 March 2024 at a preliminary hearing, among other things, requiring R to send to C hard copies of messages sent by C to LK between 1 February and 8 April 2024 in which C raised concerns about being allocated a new line manager. During the preliminary discussion at the final hearing on 15 April, the Order was raised by C who advised no documents had been provided by R in response to this or the other calls. I asked Ms Page during the preliminaries if R had conducted a search and made appropriate enquiries of all relevant actors. Ms Page confirmed this had been done.

103. LK was not present during these preliminary discussions. When she later gave her evidence, C asked her about his messages to her expressing concern about getting a new manager. C pointed out these had been requested from LK and he had been told these couldn't be found. To this, LK replied, "*So it's your word against mine*".

104. I asked LK at that point if she had conducted a search of her text messages and emails to identify whether she had any messages from C raising concerns about the allocation of his new manager and LK's evidence was that she had not conducted any such search. She said words to the effect that she didn't know that she had to. Ms Page then repeated her assurance that the terms of the Tribunal Order had indeed been raised with LK. The

following morning, Ms Page, of her own volition, produced an email from her colleague in R's legal department to LK dated 27 March 2024. The email had been sent with high importance and requested the documents within the terms of the call in the Order.

105. I found LK's evidence on this issue concerning. The email from her legal team had been sent to her less than 3 weeks before the hearing, yet she denied any knowledge of the requirement to disclose communications indicated in the Order. On the face of her evidence, she had failed to take the necessary steps to ensure R's compliance with an Order of the Tribunal. At best, she had overlooked this correspondence sent to her with high importance. Alternatively, she had either forgotten its existence in as little as 3 weeks, or she had misled the Tribunal that she was unaware of the requirement to search for and provide the documents.

106. I come to no conclusion on the explanation for this anomaly since the email of 27 March was not put to LK for comment, her evidence having concluded the day before Ms Page produced it. Nevertheless, it was a disquieting feature of the case, and all possible explanations have implications for LK's reliability. I had regard also to her striking propensity to answer that she did not recall when asked about virtually anything that was not specifically recorded in the contemporaneous notes. Overall, I assessed LK's reliability to be extremely weak.

107. I accepted that C had sought to correspond with LK at the material time regarding his change in manager by text, email and WhatsApp on the balance of probabilities. I also accept his account of the subsequent call with LK in early 2023. I make no finding that LK was deliberately dishonest with the Tribunal but am persuaded that her recollection of work interactions, both historic and recent, is particularly poor. This may be attributable to the volume of these undertaken in her role.

108. C said LK didn't sent him a disciplinary invite letter, though her email of 25 June 2023 purported to do so. LK's evidence was that she didn't recall and that it must have been an oversight. I accepted that LK did not send the disciplinary invite. C's account of this was supported by the list of attachments to the relevant email chain which was produced in the bundle. I further accepted C's evidence that LK acknowledged during the

disciplinary hearing that the invite letter had not been sent and undertook to do so retrospectively but that she did not, in the event, forward the document. The disciplinary invite letter produced to the Tribunal gave incorrect information about the arrangements for the meeting. This tends to support C's account that it was never sent to him because, if it had been, it would almost certainly have generated further communications between the parties to clarify the arrangements and dispel the confusion its issue would have caused. There was no evidence of any such clarificatory communications.

109. C said LK had the GDU data available to her at their meeting and acknowledged C had not been sent it**.** LK said she didn't recall saying this and that it would have been captured in her notes. C said she repeatedly asked him about what he was doing at 12.20pm on the date in question. I accepted C's account that LK indeed had that information available to her at the hearing, and indeed that she considered it though she did not share it with C.

110. DR took the GDU from C for the data to be analysed on 30 May 2023 and the disciplinary hearing took place on 27 June. The date the data printout does not appear on the face of the printout but there was ample time for it to have been downloaded before the disciplinary hearing. MM's evidence was that he understood the GDU data to have been available to LK. He said the data was included in the documents sent to him at the appeal stage and he could only assume that it was considered by LK.

111. LK said she didn't recall considering the data but her recollection on most points was weak. She maintained her reference to the data would have been captured in her notes of the disciplinary hearing, but I did not find this suggestion compelling. The notes were brief considering the meeting length. They made no reference to the other documentation which LK accepts she did have available such as the AIR, so it is unclear why she would have expected to have recorded her consideration of the GDU data printout specifically.

112. LK's comment in her dismissal rationale that "*using the GDU in the morning does not mean that the chamber will be in the same condition*" also tends to support C's position that the data was considered by LK. That

data printout on the face of it would (wrongly) suggest that C had used the GDU in his morning session before his lunch break but not after. That accords with LK's finding.

113. I heard some evidence from C and from R's witnesses about other disciplinary cases involving health and safety issues where employees were said to have been dismissed or not dismissed. None of the instances referred to was useful. There was a lack of detail of the facts and circumstances of the other cases but such limited facts as were identified made clear they were neither truly similar nor sufficiently similar to C's case as to provide a meaningful comparison for a consistency (or an inconsistency) argument. I have, therefore, made no findings about the circumstances or outcomes of other cases because they do not assist.

114. I was referred by both C and R during submissions to another ET case involving R heard in the Dundee ET (Craig v R 800020/2023). I am not bound by other ET decisions but agreed I would review the case. I did so. The facts found by that Tribunal were not analogous to, nor sufficiently similar to, the facts in the present claim so as to be meaningfully compared.

Relevant Law

Unfair Dismissal

115. Section 94 of the Employment Rights Act 1996 (ERA) provides that an employee has the right not to be unfairly dismissed. It is in the following terms so far as relevant:

> ***98 General***
>
> *(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and*
>
> *(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*

(2) A reason falls within this subsection if it—

(a) …

(b) relates to the conduct of the employee,

…

(3) …

(4) Where *the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—*

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

116. A reason that relates to the conduct of the employee is, therefore, one of the 'potentially fair reasons' listed (s.98(2)(b) ERA). Where, as here, the employer relies upon a reason related to conduct, it does not have to prove at this stage of the analysis that the conduct actually did justify the dismissal; the Tribunal will later assess the question of reasonableness for the purposes of section 98(4).

117. At this stage, the burden on the respondent is not a heavy one. A "reason for dismissal" has been described as a "*set of facts known to the employer or it may be of beliefs held by him which cause him to dismiss the employee*." (**Abernethy v Mott Hay and Anderson** [1974] ICR 323).

118. Once a potentially fair reason for dismissal is shown, the Tribunal must be satisfied that in all the circumstances the employer acted fairly in dismissing for that reason (Section 98(4) of ERA). There is no burden of proof on either party when it comes to the application of section 98(4).

119. The Tribunal must not substitute its own decision for that of the employer in this respect. Rather, I must decide whether the respondent's response

fell within the range of reasonable responses open to a reasonable employer in the circumstances of the case (**Iceland Frozen Foods Limited v Jones** [1982] IRLR 439). In a given set of circumstances one employer may reasonably decide to dismiss, while another in the same circumstances may reasonably decide to impose a less severe sanction. Both decisions may fall within the band of reasonable responses. The test of reasonableness is an objective one.

120. In a case concerned with conduct, regard should be had to the test set out by the EAT in **British Home Stores v Burchell** [1978] IRLR 379 in considering section 98(4) of ERA:

"*What the Tribunal have to decide …. whether the employer … entertained a reasonable suspicion amounting to a belief in guilt of the employee of that misconduct at that time … First of all there must be established by the employer the fact of that belief, that the employers did believe it. Secondly that the employer had in his mind reasonable grounds upon which to sustain that belief. Thirdly, we think that the employer at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."*

121. This well-established guidance was endorsed and summarized by Mummery LJ in **London Ambulance Service NHS Trust v Small** [2009] IRLR 536 where he said the essential enquiry for Employment Tribunals in such cases is whether, in all the circumstances, the employer carried out a reasonable investigation and at the time of dismissal genuinely believed on reasonable grounds that employee is guilty of misconduct. If satisfied in those respects, the Tribunal then must decide whether dismissal lay in the range of reasonable responses.

122. Single breaches of a company rule may found a fair dismissal (e.g., **The Post Office t/a Royal Mail v Gallagher** EAT/21/99). Exactly what type of behaviour amounts to gross misconduct will depend on the facts of the individual case. However, it is generally accepted that it must be an act which fundamentally undermines the contract of employment (i.e., it must be repudiatory conduct by the employee going to the root of the contract –

Wilson v Racher 1974 ICR 428, CA). Moreover, the conduct must be a deliberate and willful contradiction of the contractual terms or amount to gross negligence (**Sandwell and West Birmingham Hospitals NHS Trust v Westwood** EAT 0032/009). Even if an employee has admitted to committing the acts of which he is accused, it may not always be the case that he acted willfully or in a way that was grossly negligent (e.g., **Burdett v Aviva Employment Services Ltd** EAT 0439/13).

123. If an employer acts inconsistently, it may render a dismissal unfair. However, the allegedly similar situations must be truly comparable (**Hadjioannou v Coral Casinos Ltd** [1981] IRLR 352 followed in **Procter v British Gypsum Ltd** [1992] IRLR 7). Waterhouse J said in **Hadjioannou** "It is only in the limited circumstances that we have indicated that the argument [of disparity] is likely to be relevant, and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate basis for the argument."

124. ACAS publishes a Code of Practice (COP) on Disciplinary and Grievance procedures. It is designed to help employers and employees deal with disciplinary and grievance situations in the workplace. A failure to follow the COP will not, of itself, make an individual or organisation liable to proceedings, however Tribunals will take the COP into account when considering relevant cases.

125. Paragraph 4 of the COP provides that 'Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.' This is one of the basic elements of fairness within the ACAS Code. The COP further provides that:

If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.

126. In para 12 of the COP, it is stated that:

> *12 … At the meeting, the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been raised. The employee should also be given a reasonable opportunity to ask questions, present evidence, and call relevant witnesses. They should also be given an opportunity to raise questions about any information provided by witnesses.*

127. There is similarly support in caselaw for the importance of letting the accused know of the case against them and the evidence in support of it to allow the employee to contest it. The EAT in **Spink v Express Foods Group Ltd** [1990] IRLR 320 opined:

> *… fairness surely requires in general terms that someone accused should know the case to be met; should hear or be told the important parts of the evidence in support of that case; should have an opportunity to criticise or dispute that evidence, and to adduce his own evidence and argue his case…*

128. If an appeal is held, but the procedure is unfair, it can render an otherwise fair dismissal procedure unfair (**West Midlands Co-operative Society v Tipton** [1986] AC 536). Employers must act fairly in relation to the whole of the dismissal procedure. On the other hand, procedural defects in a disciplinary hearing may be remedied on appeal provided that in all the circumstances the later stages of a procedure are sufficient to cure any earlier unfairness. The ET is bound to consider the process overall (**Taylor v OCS Group Ltd** [2006] EWCA Civ 702), applied, for example, in **Adeshina v. St George's University Hospitals NHS Foundation Trust** 2015 IRLR 704).

Compensation

129. An award of compensation for unfair dismissal consists of a basic award and /or a compensatory award.

130. The formula for calculating the basic award is prescribed by legislation. Where the Tribunal considers that any conduct of the claimant 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 (s.122(2) of ERA). In contrast to the compensatory award, a basic award may be reduced for conduct which was not causative of the dismissal.

131. The compensatory award is such amount as the Tribunal considers just and equitable in all the circumstances, having regard to the loss sustained by the employee as a result of dismissal insofar as attributable to actions of the employer. The compensatory award is to be assessed so as to compensate the employee, not penalise the employer and should not result in a windfall to either party (**Whelan v Richardson** [1998] IRLR 114).

132. Where a Tribunal concludes a dismissal was unfair, it may find that the employee would have been dismissed fairly in any event, had the employer acted fairly, either at the time of the dismissal or at some later date. The Tribunal must assess the chance that the employee would have been dismissed fairly in any event then the reduce the losses accordingly. Such reduction may range from 0% to 100% (**Polkey v AE Dayton Services Ltd** 1988 ICR 142, HL).

133. If the Tribunal finds that the employee has, by any action, caused or contributed to his dismissal, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding (s.123(6) ERA). If the Tribunal determines that there is culpable or blameworthy conduct of the kind outlined, then it is bound to make a reduction by such amount as it considers just and equitable (which might range from 0 to 100%).

Submissions

134. Ms Page spoke to a written submission. She summarised this, as opposed to expanding upon it. The claimant gave an oral submission. The entire content of both submissions has been carefully considered and taken into account in making the decisions in this judgment. Failure to mention any part of these submissions in this judgment does not reflect their lack of

consideration. The submissions are addressed in the 'Discussion and Decision' section below, which sets out where the submissions were accepted, where they are not, and the reasons for this.

Discussion and Decision

Was the dismissal of C by R for the potentially fair reason of conduct?

135. Ms Page said R had established conduct as the reason for the dismissal. She pointed out Mr Gahagan noted on the first day of the hearing that he did not advance a substitute argument as to why he was dismissed and that although he had previously suggested the reason was linked to his carer's passport, he conceded that was not the case. LK has given evidence that the reason she dismissed C was due to his conduct. C made no submission on this, though, from previous discussions during the hearing, I understood his position to be that he put R to proof of the reason and made no concessions. With respect to the history with JM and his CP adjustments, C's position was not that LK dismissed him for this reason but that this background was relevant to why JM had visited C's site on 30 May 2023.

136. I accept that R dismissed C for a reason relating to his conduct for the purposes of s.98(2)(b) of ERA. Though C made no concession in this regard, there was no meaningful challenge to the reason for dismissal and no other reason put forward by C. LK concluded C was guilty of a failure to check for gas by using his GDU and a failure to use his roller bar on 30 May 2023. On the balance of probabilities, I accept she dismissed C because she made these findings.

Were there reasonable grounds for LK's belief?

137. Ms Page argued there were reasonable grounds. She said C had admitted throughout the process that he had failed to use his roller bar, and that his GDU was out of the work site, even temporarily, which meant he had failed to use it. She said these acts were not denied by him. C did not make any submission specifically about this question.

138. I accept there were reasonable grounds for LK's belief in C's guilt on the evidence before her at the disciplinary hearing. During both the disciplinary

hearing with LK and the earlier fact find meeting with DR, C had admitted to not having used the roller bar to open the hole. With respect to the GDU, she had before her the notes of the fact find which recorded C as having said that when JM arrived, his GDU was in the tool box outside the site. At the disciplinary hearing, C had told LK that he used his GDU but had subconsciously moved it for some reason.

139. LK had before her a GDU data printout which appeared to show that the GDU was switched off at 12.20pm on the date in question when she formed her belief about the matter. She also had JM's statement that he travelled to the job at some time after 1.10pm and saw that no GDU was present on the site. His statement also maintained that C had told him he had forgotten that it was in his tool box and that had retrieved it from there. It said C admitted to him to having forgotten to use his roller bar.

140. Although there was a photograph before LK which showed the GDU near the hole, it was not easy to spot as it was partly obscured by C's hand. When she and C discussed the picture during the disciplinary hearing, C had accepted (wrongly) that the GDU was not in the picture but was about a foot behind.

141. Having regard to all of the evidence before LK when she took her decision, I am satisfied there were reasonable grounds for her to find (1) that C had failed to use his roller bar and (2) that he had failed to check for gas by using his GDU, in each case in breach of R's Health and Safety rules.

Had R conducted a reasonable investigation at the time LK formed her belief?

142. Ms Page said R's investigation was thorough and reasonable. She observed that throughout the process, C admitted that he had not used the roller bar, or at least at the point of appeal he said he couldn't be sure. He had admitted throughout that the GDU was out of the work site, said Ms Page. Therefore, it was not for the Respondent to extensively investigate every line of defence in order to conduct a sufficient investigation (**Shrestha v Genesis Housing Association Ltd** [2015] EWCA Civ 94**),** particularly when the investigation would not have changed the course of the case (**ILEA v Gravett** 1988 IRLR 497). She pointed out that where an employee admits gross misconduct and the facts are not in dispute, it may

not be necessary to carry out a full-blown investigation, citing **Boys and Girls Welfare Society v Macdonald** 1997 ICR 693.

143. C did not speak directly to this question in his oral submission.

144. I remind myself that it is necessary to consider whether the approach to the investigation was in the range of reasonable responses and that it is not for the Tribunal to substitute the approach it would have taken.

145. During the fact find meeting, C reminded DR that DR had told him just two weeks previously that JM was not happy with him working his patch and that this was not viable. C suggested his subsequent suspension was not coincidental and told DR that he thought the hearing was a sham. DR did not record and represent this information C put before him during the fact-find discussion in his report. He didn't investigate it with JM. Instead, DR's response was to discourage C from 'going down this road' and saying words along the lines: "between you and me, if you show remorse … and put mitigating factors .. and, if your GDU was on at the time, then the worst that will be given is a Final Written Warning."

146. I consider whether the failure to record, investigate and place before the decision-maker C's concerns about JM's bad faith was reasonable.

147. C relied upon a conversation which DR held with him about JM's view and also upon alleged comments imputed to DR about the viability of C's future and CP adjustments. DR's own part in C's factual allegations placed in doubt DR's ability to conduct the investigation in an impartial manner.

148. Significantly, in order to keep allegations which might cause him personal embarrassment out of the case, DR gave C to believe that he would escape dismissal if he approached the matter with remorse so long as his GDU was found to be switched on at the material time. C's evidence was that DR's remarks in that respect effectively coloured his own approach and response during the meetings with both DR and with LK. In effect, they influenced him towards a *laissez faire* approach when it came to contesting evidence and when it came to reviewing and commenting on the notes of the meetings.

149. I am satisfied that it is foreseeable that wrongly advising an employee that dismissal is unlikely if they take a certain approach would not only encourage them to follow that approach, but critically may affect the extent to which the employee will ensure he examines and, where appropriate, contests, the evidence. DR's approach to the investigation was not, in this respect, an objectively reasonable one to take.

150. Ms Page has made a submission that if there was a procedural defect during the original disciplinary, this was cured during the internal appeal. I am bound to consider the process overall (**Taylor**). It is right to acknowledge that C raised the issue of his conversation two weeks before the incident with DR about JM being unhappy about C's CP arrangement during the appeal with MM. He told MM that DR said to him 'this can't go on' with reference to C's CP adjustments which allowed him to work on JM's patch.

151. In his appeal outcome, MM characterised C's point as a belief that JM was targeting him, stemming from conversations with SW and DR about JM's unhappiness regarding C doing jobs in his patch. Albeit MM did some follow up by speaking to JM, SW and DR, it is not clear what specifically was put to them. On the evidence before me, it is not clear whether MM put the specifics of C's allegations beyond references to JM's 'unhappiness'. For instance, it is not clear whether MM asked DR about C's allegation that DR told him, "this can't go on" with respect to his CP adjustments.

152. MM made no written notes of investigatory meetings with JM and DR nor did he obtain any written statements from them. C was not provided with any information about MM's post-hearing conversations with these witnesses or given the opportunity to comment upon their content before MM took his decision. I am not persuaded on the facts found that the process followed on appeal with respect to this aspect of C's complaint was sufficiently robust as to 'cure' the earlier flaws in DR's investigation of matters.

153. I turn to Ms Page's argument that the extent of investigation required is more restricted where there is an admission of the conduct or where the investigation would not change the course of the case (**Shrestha**, **ILEA**).

It is right that C had made certain admissions in this case. He had admitted not to using the roller bar. He had said he had tested for gas but had moved the GDU. I considered whether, in those circumstances, little or no investigation was warranted into C's allegations that JM may be driven by an agenda to end C's working arrangement on JM's patch.

154. I was not persuaded by that argument in the particular circumstances of this case. There were admissions by C in relation to both the roller bar and the GDU. However, in relation to the GDU, there was inconsistency between the respective accounts of C and JM with respect to the extent of C's use of and failings with respect to the GDU. JM said that C had told him he had forgotten to use his GDU which was still in the toolbox. C did not accept that he hadn't tested for gas at all. C didn't have sight of JM's statement in full throughout the process but his evidence to the ET was that he did not tell JM he'd forgotten to use it and that it was not in his toolbox.

155. It is objectively reasonable that the investigation into alleged health and safety breaches would seek to ascertain the factual position regarding the nature and extent of the breach. In such a case, these might range from a prolonged flagrant disregard for a rule to a momentary accidental slip. In circumstances where the extent of the conduct is disputed, I do not find that it is a reasonable response to decline to investigate allegations which may bear on the motive and agenda of a key witness whose evidence about the extent and nature of the breach is to be relied upon by the employer. JM's statement was considered and accepted by both LK and MM.

156. I conclude that the failure to investigate C's allegations about JM and DR was not objectively reasonable and nor was it remedied by subsequent process, despite MM's apparent efforts to make some follow up enquiries. Nor am I persuaded that the investigating officer's advice to C that dismissal would be avoided if remorse was shown and mitigating factors put forward was reasonable. Objectively viewed, advice of this sort coming from an authority figure with responsibility for the investigation risked encouraging C to take an imprudent approach to the process, and he did.

157. Another feature of the investigation process was that neither DR nor LK gave C JM's statement or the GDU data to allow him the opportunity to comment on this evidence. This evidence was available to and was considered by LK, the decision-maker.

158. With respect to JM's statement, Ms Page asserted that C alleged only at the point of the Tribunal hearing that he did not have JM's statement during the process, and argued this was not pleaded by him. She cited **Chandhok v Tirkey [2015] ICR 527** as authority that the case should be found in the pleadings alone and argued that, based on a lack of pleading, no finding be made on the issue. In his ET1, C says, "*the company used and withheld evidence from the original hearing that was later at appeal found to be inaccurate and false when challenged*". My understanding is that Ms Page maintains this referred to the GDU data only. I am satisfied that, construing the claim form fairly, this sentence in the ET1 is sufficiently wide to refer also to JM's witness statement. R was aware from the appeal that C had complained about not having JM's statement. When MM read parts of it to C at the appeal hearing, C disputed aspects of it so that C's assertion in pleadings that evidence was found to be inaccurate and false at the appeal stage could fairly be understood to be a complaint about JM's statement.

159. It is enshrined in the ACAS COP that an employee should normally be provided with copies of written evidence with the notification of a disciplinary hearing. It is objectively reasonable that an accused employee should hear or be told the important parts of the evidence in support of the case against him and have an opportunity to criticise or dispute that evidence. Ms Page cited **Hussain v Elonex plc [1999] IRLR 420,** where she noted it had been held that failure to disclose witness statements to an employee will not be fatal, so long as the employee knows the substance of the case against them. However, DR did not set out JM's account of the matter to him as he didn't receive JM's witness statement until after his fact find with C. LK had not noticed that C had not been sent JM's statement, so she did not set out the specifics of what JM said to C.

160. I am not persuaded that, standing the admissions C had made about his conduct at the fact find and disciplinary hearing, it was rendered irrelevant or unnecessary to put to him in full the evidence against him which was

considered by LK in taking her decision. As discussed above, it is reasonable that an employer should be concerned to ascertain the nature and the extent of an employee's failings.

161. I consider whether MM's actions at the appeal stage the earlier omissions. At the appeal, C did raise with MM that he had not received JM's witness statement and, through MM did not pause the hearing to provide a copy, he did read or paraphrase parts of the statement to C at different points during the hearing. C then disputed JM's account. MM told C that JM's statement said the GDU wasn't present on site when he spoke to C and that his statement said that C had told him he forgot it, and it was in his tool box.

162. MM's disclosure of these key excerpts went some way to mitigating the previous omissions of DR and LK to provide the statement. However, considering the process as a whole, I am not satisfied that his actions were sufficient to remedy the failure to provide this document in full at earlier stages or indeed at the point of the appeal. On the particular facts of this case, the failure to provide C with a copy of the full statement to review was objectively unreasonable. All managers involved in R's process, including MM, were aware that C was struggling with mental health difficulties at the material times. When, during the appeal, JM's evidence was relayed to him piecemeal, C was expected to respond spontaneously without the opportunity to digest the written version as a whole. Importantly, he was not given the opportunity to review and, where applicable, contest the contents at a point closer in time to when the statement was taken and to the events of 30 May, when they were still fresh in C's memory. The appeal hearing took place some two and a half months later.

163. Had the late and piecemeal disclosure of written JM's statement to C for comment been the only flaw in the investigation process, it may not have rendered the overall process unfair. However, in combination with the other defects in the investigation discussed above, it formed part of an approach that fell outwith the band of reasonable responses.

164. In relation to the GDU data, on the other hand, I accept that MM's actions at the appeal stage substantially remedied the defect of the earlier failure to provide this data to C by LK. MM sent this to C before the hearing and

C had the opportunity to make representations about the timings shown and his (correct) hypothesis that the time stamps were an hour out. MM ultimately (following further enquiries of the ESI Tester) made a finding that C the timings shown were indeed out by one hour. This, in and of itself, did not, however, cure the investigation process as a whole so as to place it in the band of reasonable responses.

165. In assessing the reasonableness of the investigation, I had regard to the all of the circumstances, including the size and administrative resources of R. Throughout the process, DR, LK and MM had access to HR specialists with whom they had the opportunity to and did discuss and review the case. R was not a small or unsophisticated employer with little or no HR resource. Nor was there a lack of impartial managers available to conduct the initial fact find. Having regard to all the facts and circumstances, I conclude R did not carry out a reasonable or sufficient investigation.

Did R otherwise act in a procedurally fair manner?

166. C has complained that he was never formally invited in writing to the disciplinary hearing, and I have found as a fact that LK did not send him the invite.

167. Ms Page invited me to find that the letter was indeed emailed to C. In any event, she submitted that C knew he could take a colleague or union representative and that he had seen the allegations in the investigation report which also read to him at the outset out the hearing. She said that C was aware that everyone who has failed to use a GDU has been dismissed. She cited ***Buzolli v Food Partners Ltd EAT 0317/12*** which found that failure to invite the Claimant formally in writing and advise of the consequences did not render this dismissal unfair. C had already been advised of the seriousness of the allegations within the investigation, said Ms Page. The report had concluded that it should be referred as a gross misconduct and the disciplinary policy was attached setting out the possible consequences of gross misconduct being dismissal. There could be no doubt, in her submission.

I accept LK read out the charges at the outset of the hearing and that this substantially remedied the failure to set these out in advance of the hearing

in the circumstances. The charges were relatively simply put. However, C received no warning either before or during the hearing that the hearing could result in his dismissal. This would have been communicated in the invite letter, had it been sent.

168. I am not persuaded by Ms Page's argument that he knew in any case that others has been dismissed for failing to use the GDU. The suggestion appears to be that this rendered it unnecessary to set this out to C. It was not C's evidence that he believed any failing with respect to a GDU would result in dismissal. C said he knew that others had been dismissed but it was clear from his evidence that he believed that their cases differed from his own in terms of the seriousness of the breaches.

169. DR had given C to believe that in relation to his own case, so long as his GDU was on, he could expect a warning. Although the disciplinary procedure states that acts of gross misconduct may lead to summary dismissal, I accepted C's evidence that this was not sent to him in a format he was able to access. While DR's finalised investigation report recommended that the matter be progressed as gross misconduct, his remarks during the fact find that C would likely receive a warning significantly undermined the clarity of his messaging in relation to the potential consequences for C.

170. It was particularly important against this background that it was put to C unequivocally that his disciplinary hearing may result in dismissal. It was not objectively reasonable that this was not done. The circumstances were that LK was alerted to the failure to send the invite letter and had the opportunity to remedy the issue at the outset of the meeting but did not do so. It was not objectively reasonable to rely on C's judgment in relation to the point. LK knew he was finding the process stressful and that he was unaware of the content of the letter he was agreeing not to see. **Buzolli** is distinguishable on its facts. In that case, the employee was already subject to a final written warning for previous poor conduct which stated that further breaches could result in dismissal.

171. I conclude that R unfairly dismissed C. At the time the belief in C's guilt was formed, R had not carried out a reasonable investigation. R also otherwise failed to act in a procedurally fair manner by omitting to send the

disciplinary invite to C which would have explained he could be dismissed, following DR's misguided indications about the likely outcome. Standing these conclusions, it is not necessary at this stage in the analysis to assess whether dismissal fell within the range of reasonable responses. However, the question of whether C might have been fairly dismissed had a reasonable procedure been followed is considered below in the context of the principle in the **Polkey** case.

Remedy

Basic Award

172. The claimant's basic award is calculated as 2 years x 1.5 weeks' gross pay. That is 3 x £675.56 = £2,026.68.

173. I require to apply s.122(2) of ERA and decide whether any conduct of C before the dismissal was such that it would be just and equitable to reduce the amount of the basic award.

174. In Ms Page's submission, C's acts were blameworthy and placed him and the public at risk of death or serious injury as well as putting R at risk of financial loss and the impact of negative views. C did not address me specifically on the issue of culpable conduct and its impact on any award.

175. I have found as a fact that C did not use his roller bar when he knew he ought to have done so. He forgot to do so. I have further found that, with regard to the GDU, though he had it turned on and in the vicinity, he didn't take the necessary care to ensure it remained properly positioned to be effective. C knew the purpose of using the roller bar and the GDU when he failed to take those steps. I have made findings about C's poor mental state on the date in question and the degree of pressure he felt to swiftly and successfully carry out the task. At the time, C was relatively inexperienced in the task he was allocated and had made unsuccessful attempts to secure the assistance of a fellow engineer.

176. Notwithstanding these various mitigating factors, I am satisfied that C's conduct in failing to properly carry out the required safety measures was culpable. Although I have not found that he deliberately set out to breach health and safety rules, I find that he demonstrated carelessness or even

recklessness in his failure to ensure that the processes he had been trained on were meticulously followed at the outset of, and throughout, every occasion when he accessed the hole. That lack of care and attention was blameworthy in circumstances where it risked his personal safety and potentially that of others.

177. Taking all of these aspects into account, I assess that it would be just and equitable to reduce the basic award by 90% in recognition of C's pre-dismissal conduct. C's basic award is thereby reduced to **£202.67**.

Compensatory Award

178. C's employment terminated on 19 July 2023. He was, however, paid by R in the usual way up to 31 August 2023. His loss of earnings and benefits ended on 16 October 2023, when C obtained a new job on an equivalent salary. C therefore experienced a loss of earnings for 6.6 weeks. His net loss of salary was, therefore 6.6 x £545.45 = £3,599.97.

179. In addition, C claims a loss of pension contributions. He did not initially benefit from employer pension contributions at the beginning of his new employment. He claims two months' pension contributions from R on that basis. This equates to 2 x £265.93 = £531.86.

180. C also incurred expenditure which arose from his dismissal in connection with his efforts to obtain alternative employment. He drove in total approximately 150 miles in his own vehicle to attend various interviews with prospective employers. His losses in this respect are assessed as 150 x £0.45 = £67.50. (The HMRC mileage rate at the material time was 45p per mile).

181. C also experienced a loss of statutory rights, and it will take him 2 years from the date of commencement to accrue statutory rights in his new employment such as the right not to be unfairly dismissed or the right to a statutory redundancy payment in the event of redundancy. I have allocated £500 for loss of statutory rights.

182. I therefore calculate C's financial losses caused by the dismissal to be £4,699.33.

183. R makes no argument in this case that C unreasonably failed to mitigate his loss.

Polkey

184. I now turn to the question of whether there is a chance that C would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason.

185. Ms Page submits that any award should be reduced by 100% as he would have been dismissed in any event under **Polkey** principles**.** When applying this test, she pointed out the Tribunal must consider what the actual employer would have done, not a hypothetical employer and cited **Software 2000 Ltd v Andrews and others 2007 ICR 825** which offered guidance that the Tribunal should make an assessment about what is likely to have happened using its common sense, experience and sense of justice. C did not address me on the question of whether he would have been dismissed in any event following a fair procedure.

186. I accept that, had a fair procedure been followed, R would have been entitled reasonably to conclude that C had seriously breached its health and safety rules on 30 May 2023 and that, in doing so, he had breached R's Standards of Behaviour. LK would have been entitled reasonably to conclude that C had not used his roller bar. With respect to the specific circumstances of his GDU failings, LK after a reasonable investigation would likely have been aware before coming to a decision of the GDU data time stamp error and would have known the GDU was switched on at the material time. She would likely also have known that the GDU did indeed feature in the photo taken by JM. After a sufficient investigation, she would have known that this photo had limited evidential value because it does not show the site as it appeared at the time of JM's arrival, but after the GDU's location had been moved.

187. I find it is probable that, following a fair procedure, LK would have before her different accounts to consider with respect to the extent of C's failure as far as the GDU is concerned. On the one hand, she would have JM's evidence that C admitted forgetting to use it and that it was in C's toolbox on his arrival. On the other, following a reasonable investigation, I find it is

likely she would have C's alternative account that he did use the GDU when opening the hole on the last occasion but that during the work he had inadvertently moved it to a distance from the hole that it was not effective. Following a reasonable investigation, she would also have C's evidence about the attitude of JM to his employment arrangements working on his patch as well as the evidence of both JM and DR on that issue. With all the evidence gathered, LK would have required to decide whose account of 30 May she preferred.

188. Whether LK had accepted JM's more grave account of the GDU omissions or C's lesser one, I accept that a decision to dismiss C for gross misconduct would have fallen within the band of reasonable responses available to an employer of R's size and type. On either view of the facts, LK could reasonably have concluded serious health and safety breaches which would bring C's case within the gross misconduct category for the purposes of R's Disciplinary Procedure. No facts have been established to show that this outcome would not have been available to LK following a fair procedure owing to inconsistency with how R dealt with other similar cases. Furthermore, it is possible to assess with confidence that, if LK had chosen to dismiss after a reasonable procedure, it is virtually certain that MM would have upheld her decision, having regard to the view MM took of various matters raised at the appeal stage.

189. What I am concerned with assessing is the chance that LK would or would not have decided to dismiss. I assess that there is a reasonable chance that LK would have accepted C's account of the events had a reasonable investigation elicited this. The GDU data would, to some extent, have supported his account or at least would not have been inconsistent with it, as LK can only have believed it was at the actual hearing. However, even if LK did accept C's account as true, I assess that there is a high chance that she would have dismissed (fairly) in any event. I do not conclude there is a 100% chance as Ms Page entreated me to hold, but I am persuaded the prospects of a lesser sanction than dismissal were relatively low.

190. I find support for my assessment that LK was not constrained by a blanket company policy or by a personal practice of dismissing for each and every case involving a GDU omission from the following features of the case.

191. Firstly, in the unsent invite letter, though summary dismissal was indicated as a potential outcome for the allegations, it was not framed as the only potential outcome. The letter said, "gross misconduct if confirmed *could* mean that you'll be summarily dismissed" (my emphasis added). It also referred to the possibility of other lesser sanctions.

192. Secondly, R's Disciplinary Procedure, as you might expect, anticipates a nuanced approach regarding health and safety issues. It lists 'not following health and safety standards" as an example of misconduct while separately providing that "seriously breaching out health and safety rules" as an example of gross misconduct. LK would be expected to and, I assess, she would have made a determination of the seriousness of C's failings to decide the sanction.

193. Thirdly, I am encouraged in my assessment that dismissal was not automatic or inevitable in the circumstances of C's case having regard to DR's comments to C during the fact-find. DR indicated a written warning was the likely outcome so long as the GDU was switched on. It was an objectively unreasonable comment for him to have made in his position as investigating officer, but I accept DR said it with some belief in the veracity of his statement.

194. I, therefore, assess there is some chance that, when regard was given to to C's mitigating factors and clean record, LK would have decided on a lesser sanction. However, having regard to LK's evidence to the Tribunal regarding the seriousness with which she viewed C's omissions, I conclude that the prospect of C avoiding dismissal was relatively slim. Taking everything into account, I assess that there is an 80% chance that LK would have fairly dismissed C for gross misconduct in any event following a fair procedure. The compensatory award is thereby reduced to **£939.87** (0.2 x £4,699.33).

ACAS Uplift?

195. Neither party addressed me specifically on whether there had been an unreasonable failure to follow the ACAS COP and whether an uplift should be applied. In these circumstances I do not require to consider making an

adjustment to the award and decline to do so (**Pipecoil Technology Ltd v Heathcote** UKEAT/0432/11).

Contributory fault?

196. I require to apply the provisions of section 123(6) of ERA. This is a case in which I have found, as set out at paragraphs **176** and **177** above, that C was guilty of culpable conduct before his dismissal. That conduct was his failure to use his roller bar and his failure to take the necessary care to ensure his GDU remained properly positioned to be effective when working in the hole.

197. I am satisfied that that conduct to a significant extent caused or contributed to C's dismissal. It was clear from LK's evidence and written dismissal rationale that this was so. Taking into account the blameworthiness of that conduct as discussed above, I find that it is just and equitable to reduce the amount of C's compensatory award by 90%. C's compensatory award is thereby reduced further from £939.87 to **£93.99**.

198. Given the resulting figure for the compensatory award, there is no reduction by operation of the statutory cap and the final compensatory award is £93.99.

Conclusion

199. R dismissed C for a potentially fair reason relating to his conduct. Applying section 98(4), in all the circumstances of the case, it did not act reasonably in treating that conduct as a sufficient reason to dismiss C. C was unfairly dismissed. R is ordered to pay a (reduced) basic award of **£202.67** and a (reduced) compensatory award of **£93.99**. The total award incorporating both elements is, therefore, **£296.66**.

Employment Judge: **L Murphy**
Date of Judgment: **13 May 2024**
Entered in register: **16 May 2024**
and copied to parties