EMPLOYMENT TRIBUNALS

Claimant: **Mr C Lamb**

Respondent: **Teva UK Limited**

Heard: BY CVP **On: 22 to 25 May 2023**

Before:

Employment Judge JM Wade

Ms H Brown

Mr G Corbett

Representation:

Claimant: **In person**

Respondent: **Mr M Humphries, counsel**

Note: A summary of these reasons was provided orally in an extempore Judgment delivered on 25 May 2023, which was sent to the parties on 12 June 2023. The Employment Appeal Tribunal ordered the provision of these reasons on 10 July 2024 and they are provided below, corrected for error and elegance of expression. Rule 62(5) provides: In the case of a judgment the reasons shall: identify the issues which the Tribunal has determined, state the findings of fact made in relation to those issues, concisely identify the relevant law, and state how the law has been applied to those findings in order to decide the issues. For convenience the Judgment given on 25 May 2023 is also repeated below:

JUDGMENT

The unanimous decisions of the Tribunal are as follows:

1 The claimant's Equality Act complaint is dismissed.

2 The claimant's unfair dismissal complaint is not well founded and is dismissed.

JM Wade

Employment Judge JM Wade
25 May 2023
Judgment sent to the parties on:
12 June 2023

REASONS

Introduction

1. The claimant was employed by the respondent, a global supplier of generic and other drugs, from 2011, latterly as a senior technician. The respondent operates warehouses as part of its operations. In broad terms the claimant's team of technicians kept the site running, and safe, and oversaw outsourced security and cleaning. After an incident in which a colleague was injured from an electrical shock, the claimant, a qualified electrician, was dismissed on 2 August 2022.

2. The claimant presented details of an unfair dismissal in a claim form on 24 August 2022. He also indicated a claim of sexual orientation discrimination, but did not provide any details of those allegations.

3. He was then permitted to add harassment allegations by amendment during case management and in its response and amended response the respondent denied any conduct related to sexual orientation and asserted that this was a fair dismissal.

4. The claimant's harassment allegations were as follows:
Mr G Cockcroft's answer to the claimant: "well you are not really up to it, your too young and want somebody been straight doing the technical managers job. Straight away" on or around 1 October 2020 (list of issues 3.1.1)
Comments by Mr G Cockroft, Ms J Clark and J Lillington to the claimant saying, "faggot, sissy, go fix that machine" on a daily basis until the claimant's dismissal (list of issues 3.1.2).

5. In simple terms the Tribunal had to decide whether this alleged conduct related to sexual orientation had taken place. In the unfair dismissal case we had to decide the Employment Rights Act 1996 section 98 questions set out in the list of issues. That was in the hearing file at pages 54-55 and is reflected below in our conclusions. All were clear on the issues.

The Law

6. As to the law that we apply, I do not rehearse the detailed Equality Act provisions – the respondent accepted that if the conduct as alleged had taken place, it would amount to harassment within Sections 40 and 26 of the Equality

Act. The key task for us in relation to this complaint was to find facts. The claimant's direct witnesses for these allegations did not attend. That is not uncommon. Bearing in mind that evidence of harassment is often hard to adduce, and the purpose of the Equality Act is to put an end to discrimination, we have considered carefully the balance of all the evidence.

7. The claimant's right not to be unfairly dismissed is set out in Section 94 of the Employment Rights Act 1996 and Section 98 sets out how the question of whether a dismissal is fair or unfair is to be determined. This has been developed through case law. In conduct related (and other) dismissals, the Tribunal applies the range of reasonable responses test. That means that we do not ask whether this Tribunal would have dismissed the claimant in all the circumstances including equity and the substantial merits of the case, we ask whether the respondent acted reasonably in treating its reason as sufficient for so doing, and we have to recognise that in any given set of circumstances, one employer may dismiss, acting reasonably, while another may give someone a different outcome. In short, there is a range of reasonable, but different, responses.

8. Section 98 does not require us to ask or conclude whether the claimant engaged in gross misconduct and we have not done so.

9. Section 98 and its predecessor in the 1978 Act have produced a long and well trodden history of case law. The respondent put before the Tribunal an extract from "Harvey on Industrial Relations and Employment Law, paragraphs 1035 to 1043, which reproduced the principles from Hadijoannou v Coral Casinos Ltd [1981] IRLR 352, including at paragraph 25: "*We accept that analysis by counsel for the respondents of the potential relevance of arguments based on disparity. We should add, however, as counsel has urged upon us, that industrial tribunals would be wise to scrutinise arguments based upon disparity with particular care. It is only in the limited circumstances that we have indicated that the argument 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. The danger of the argument is that a tribunal may be led away from a proper consideration of the issues raised by [s 98(4) of the ERA]. The emphasis in that section is upon the particular circumstances of the individual employee's case. It would be most regrettable if tribunals or employers were to be encouraged to adopt rules of thumb, or codes, for dealing with industrial relations problems and, in particular, issues arising when dismissal is being considered. It is of the highest importance that flexibility should be retained, and we hope that nothing that we say in the course of our judgment will encourage employers or tribunals to think that a tariff approach to industrial mis-conduct is appropriate. One has only to consider for a moment the dangers of the tariff approach in other spheres of the law to realise how inappropriate it would be to import it into this particular legislation"."*

10. The claimant's case included that he had been treated more harshly, and therefore unfairly, in comparison with others.

Evidence and fact finding

11. As to witness evidence, the claimant had submitted a statement from himself, and further statements as follows:
    a. two statements from his partner, Mr Burton, who sought to corroborate the claimant's sexual orientation allegations;
    b. two statements from Ms Hudson, who was a cleaning supervisor employed by third party contractors at the respondent's site; Ms Hudson's evidence was the only other corroboration of the claimant's sexual orientation allegations. She said Ms Clark and Mr Cockroft were bullies and she could confirm that they were always shouting names over the balcony to staff with abusive name calling including names to Craig Lamb about his sexuality.
    c. a statement from Mr Lister who worked at the respondent through an agency for around five weeks in 2018;
    d. A statement from Ms Arnold who last worked at the respondent's site in 2018, but (after ill health) her employment ended in 2020; her evidence included that Ms Clark and Mr Cockroft were bullies; and
    e. A statement from Mr Fairburn who worked for the equipment contractors used by the respondent to maintain forklift tuck charging equipment.

12. The Tribunal heard oral evidence from the claimant and Mr Burton. The claimants' other four witnesses did not attend; in Ms Arnold's case she gave an explanation by email of commitments preventing her attendance, and because she was the only third party witness otherwise willing to attend, who might be able to speak to the claimant's sexual orientation evidence, with the respondent's agreement, we agreed that we would hear her by telephone connection, but that was not pursued by the claimant. We also heard Mr Burton out of order to accommodate Mr Burton's commitments.

13. The respondent provided five witness statements and we heard oral evidence from each of:
    a. Mr Lillington, to whom the claimant reported and who investigated matters;
    b. The facilities manager, Mr Dobinson who decided to dismiss the claimant,
    c. Mr Cartwright who heard the claimant's appeal against dismissal;
    d. Mr Cockcroft who was the Supply Chain Director to whom Mr Lillington reported;
    e. and lastly Ms Clark, the senior warehouse manager. Ms Clark and Mr Cockcroft addressed the harassment allegations.

14. We did not hear from Mr Heppleton, who was one of a number of technicians supervised by the claimant informally in a team of four people reporting to Mr Lillington.

15. On or around 12 August 2022 Mr Heppleton sent an email to the claimant headed "dismiss set up", telling the claimant he had been set up because he had heard so many conversations between Mr Cockroft, Ms Clark and Mr Lillington over the past few weeks and that all managers and HR are friends. He further said in a text message, that those three colleagues had been overheard "the other week' saying, I don't think he will be back. The significance of Mr Heppleton was that the claimant referred to him in his ET1 details of claim:
"I was classed as engineering supervisor, basically my tech asked me to help him move a faulty truck charger, on the 21st June, I assisted him with this, but I said to him to leave it safe or lock it off so it couldn't be used. We was busy that day, and he didn't do it, one of the operatives got an electric shock. So they have basically put the full blame on me, nothing happened with the other guy, just dismissed me. The business kept using the words, " you are the most senior electrical person on site and I am responsible" but there is no where in writing to say I am this person, and nothing in my contract to state this. Also Teva have an electrical policy which states you need a letter of Authority to be this responsible person, which I have also not got.
There trying to use a work permit related to this incident to say I checked a work area was left safe and tidy, this is not even related to this. I have a witness what overheard 3 managers discussing that I will not be back at the business before my hearing date 2, personally I think I have been setup as the business are also looking to reduce costs."

16. We understand Mr Heppleton remains employed by the respondent which may explain why he has not attended, or provided a statement. The Tribunal has to do its best with the information and evidence we have. We were told the claimant did not contact him for a statement because he had no means to contact him.

17. Further, the claimant's previous retired manager, Mr. Kenny Gray had messaged the claimant telling him he was being scapegoated - page 425 of our bundle. On a close reading of that text it is clear the claimant had told Mr Gray the version of events which is his case before the Tribunal and recorded above – that he had instructed Mr Link to lock off the equipment and Mr Link should have been subject to the same disciplinary procedure as him.

18. We did not hear from Mr Gray, but he had provided the claimant with a personal and very favourable reference on 14 August 2022, which confirmed the claimant had been promoted in 2018 to a Senior Technician with the added responsibilities of supervising others and that he rose to that challenge very

well – or words to that effect. We asked the claimant if he would he had been approached to give evidence but the claimant explained Mr Gray was on holiday at the time of this hearing. There was no postponement request in respect of the attendance of any of the claimant's witnesses.

19. As to documents, the Tribunal had a bundle of documents of some 600 pages to which we added, with the respondent's consent, the full information sent by the claimant to the Tribunal in hard copy. We arranged for that to be scanned in, and provided to all, and from it we were able to see a number of extra documents, but in particular a full log from the "ethics line" with which the claimant had communicated – the respondent had no objections to that.

20. We also admitted documentation provided late by the respondent about a previous injury at the site in January 2013, involving a colleague whose arm was caught up in a conveyor, while working on a repair with another colleague. The claimant did not object to these documents. This incident had been identified by the claimant as comparable. It was clear he was provided with this information by Mr Gray. His point, in short, was that no disciplinary action had been taken in relation to any colleague or colleagues concerning the conveyor injury and that is what Mr Gray had told him.

21. The Tribunal also viewed the parts of CCTV evidence on which the claimant relied as exonerating him from any misconduct.

22. The primary duty of this Tribunal is to find facts and we use a wide range of tools for that purpose, including examining what the parties said and did at the time, and in particular what the contemporaneous records say of that. Often the contemporaneous records are the most faithful to the truth, as opposed to what is written months later. In many cases records come from social media or other messaging services, at it did in this case. We remind the parties that we assess matters on the civil standard – ultimately assessing what is more likely than not – rather than the criminal standard which is "beyond all reasonable doubt".

23. We take into account the impression the witnesses make when giving their oral evidence, but that is but what factor. In this case the claimant asked all the witnesses focused questions on the evidence that he considered supported his case. He put his harassment case to them in plain terms, including evidence the evidence of Ms Hudson and Ms Arnold. Equally, the respondent's case was put to the claimant clearly and carefully.

24. As I indicated, I am not going to rehearse the full chain of events and findings of facts because they are lengthy across the claimant's disciplinary process, but I simply make this observation because it has been an important feature of the evidence. Our hearing file of 600 pages contained a great deal of duplication. The reason for that was that the respondent has included all attachments at every point that the material has been re-visited in some

particular part of the process. That has enabled the Tribunal to be very clear about what was known or understood by those involved at each point in the chronology and to make those findings in our deliberations. The Tribunal examines the minds of those involved at various points to be able to consider their beliefs and knowledge and reasonableness (or indeed whether they engaged in harassment).

Background Facts

25. The claimant was first employed by the respondent on 23 May 2011 as a facilities/electrical technician. For a period site services were contracted out, but he moved to a new employer with that process. He then moved back to the respondent as Senior Site Services Technician. By 2023 all four technicians reported to Mr Lillington, Technical Manager. The claimant organised their work, generally organised contractors by raising purchase orders to be signed off, sat on the site Health and Safety committee and had completed all relevant training.

26. The respondent had an electrical policy which described the Electricity at Work Regulations 1989 imposing a duty in connection with safety on various people: the Site Senior Director was the "Duty Holder"; the "Senior Authorised Person" was appointed by the Duty Holder to take responsibility for the safe effective management of the electrical systems and was required to have the necessary qualification and training independent from the respondent.

27. The claimant was recorded in the policy, which he helped to review, as the Senior Authorised Person, but there was no reference to that in his contract of employment, nor did he have a separate side letter confirming that appointment.

The 2013 injury

28. In 2013 a technician was working on replacing worn out bearings on a conveyor. The technician was inspecting something and he did not ask for the machine to be locked off while he checked something. A sensor triggered the belt to recommence and his hand was dragged into the machine. The senior technician hearing the cries of pain hit the emergency lock off. Neither technician were disciplined. The senior technician had followed the correct emergency procedure, and the matter was addressed by training. In simple terms the senior technician was not disciplined in circumstances in which the junior technician had taken a step which caused injury to himself. Mr Gray, the claimant's previous boss, had investigated the matter.

The 2022 injury and disciplinary process

29. In the early hours of 17 July 2022 a colleague of the claimant's in the warehouse suffered an electric shock whilst attempting to use a fork lift truck charger. He suffered burns and was taken to hospital with an indication of potential skin graft. He was very lucky and the incident was subsequently categorised as a potential fatality from electric shock.

30. Having heard of that incident at the warehouse the claimant, the same day, contacted the contractors who had been working on site over the last few weeks and asked them for information. He said this:
"*Hi Callum, one of our members of staff has had an electric shock off the existing chargers. Looks like the charger wire has been damaged at some point. There is no blame here. We just need to find out how its happened, can we have a statement from your guys please. I've briefly spoken with them yesterday and I do understand there was unplugging and disconnecting chargers in that area to gain access with the scissor lift when the install was taking place.*

Many thanks."

That was sent by the claimant at 9:45 in the morning on Sunday 17 July.

31. At 7:37 the following day Monday, the claimant received a reply:

"*Sorry to hear this. Hopefully the person is ok. I have spoken to Nick this morning and he has sent the statement below. Please keep me informed and if we can be of any more help please do not hesitate to contact me*."

That statement said as follows:

"The chargers were unplugged from the canalis and removed to allow access with the scissor lift due to the disabled VNA. After the work was completed we moved the chargers back into position and reconnected the canalis supply, we didn't disconnect the chargers as such just unplugged them. On Saturday we were alerted to the circuit tripping overnight so the damage was potentially caused on Friday night when the van was returned for charging. "

32. It was clear from the initial report of the first aider on duty, and photos that were taken at the time of the injury, that there was a split cable to the charger. The claimant had been aware of this when talking to the contractors and seeking their information. He provided the contractor's statement on to the respondent's health and safety manager Mr Rafferty, and to Ms Clark, to Mr Lillington, Mr Cockcroft, and Mr Reynolds, also in health and safety, and to the operations team. He did so as soon as he received the information.

33. He had also spoken to Ms Clark by telephone on Sunday 17 July and she had asked him if he knew, in short, anything about the incident. The claimant said he was exploring with the contractors whether they had damaged the cable causing the accident. Ms Clark asked the claimant if he had been aware of any damage to the charger and he said, no, he had started the investigation. She again asked him what awareness he had of the damage and was told that he was not aware of a damaged cable.

34. The incident was again discussed at the Monday morning management meeting and Ms Clark asked if anyone was aware of the damaged cable and the claimant again said, no.

35. During the course of 18 July Mr Cockcroft asked Mr Lillington to complete an investigation. Its purpose was fact finding and involved collecting the relevant statements, photographs, and viewing CCTV. Mr Lillington also completed a statement himself saying the following:

    "*Whilst working from my office, Richard Rees entered the site services office, he engaged in conversation with Craig Lamb, Richard informed Craig of a damaged charger for VNAs.*
    Craig then goes on to investigate the issue."

36. Mr Lillington signed and dated that statement on 18 July 2022. As part of his investigation he then reviewed CCTV within the site security office, which identified 21 June as a date when the claimant and Mr Link, the claimant's technician colleague, could be seen inspecting the cable of the charger. The claimant could be seen assisting Mr Link to turn the charger to the wall as a means of putting it out of action.

37. Mr Lillington then completed a statement indicating what the CCTV had shown and it was clear at that stage that an issue arose as to whether the charger had been "locked out" in accordance with the respondent's "lock out tag out" or "LOTO" policy. That required, in summary, the use of a padlock to prevent faulty equipment which had been put out of use being inadvertently used and also required particular labelling to indicate that the equipment was not to be used until it had been properly repaired and signed as safe.

38. The same day, 18 July, Ms Clark and Mr Lillington met with the claimant and explained to him that Mr Lillington was completing an investigation and that Ms Clark would take notes. Indeed Ms Clark did take notes but she also asked questions that were pertinent and relevant bearing in mind that she had had a conversation herself the previous day with the claimant about his knowledge of events.

39. The claimant was asked what he knew about the incident and he said Arter (one of the colleagues in the warehouse) told him on Saturday morning the power was off in the charging room. The claimant reset it; only one charger was working and he said he would get an engineer to look at it.

40. Ms Clark explained the shock incident was not with those chargers it was with the large green charger. The claimant was asked by Mr Lillington whether that charger was previously reported to him as being damaged and the claimant replied that he couldn't remember properly.

41. Mr Lillington had a statement from the member of staff who reported it, saying this: "*Several weeks ago while putting my VNA on rhacge I noticed that the cable just below the charger connector had a 5cm split in the cables plastic coating and copper cable was visible. I reported this to [] who advised me to*

report it to site services which I did to Craig Lamb. James Lillington was in office too. Craig told me he would attend to it but it wouldn't have harmed me as it was a charge of about 40 Volts. The following day the charger had been turned around so we could not use it."

42. Mr Lillington explained this statement to the claimant who again said he couldn't really remember. Mr Lillington also explained that the CCTV showed the claimant and Mr Link inspecting the charger and the cable and turning it round and when asked about that the claimant then said he was in-between jobs and he went down and asked whether there was follow up action and he couldn't remember because he had so much on, but he thought the contractors would have come in and that Jon [Link] would have logged a call but they would have to check. The claimant apologised if "I have done it wrong".

43. Ms Clark asked the claimant in this type of electrical situation what should have happened. The claimant replied that it should have been logged with the battery people. When she asked what should be done on site with the site service team the claimant replied, "should lock off".

44. Mr Lillington had reasonable grounds, having heard from the claimant in that meeting and watched the CCTV, to consider that the claimant had been at fault - he had not locked off the equipment, not tagged it, and had said to Ms Clark that he did not know of any damage to the charger when asked previously.

45. The claimant was told that he was suspended without prejudice and on full pay to determine what had happened. He immediately asked whether his colleague Mr Link was also being suspended and he indicated that he did not want to lose his job having never done anything wrong and been there for 13 years. Mr Lillington was clear they would be in touch once the investigation had concluded and the claimant was asked to refrain from contacting colleagues and so on and he complied with that direction. Mr Link was a new technician, who reported formally to Mr Lillington, but who the claimant supervised.

46. The claimant's suspension letter said that he was placed on suspension while investigations were taking place into the following allegation: "serious breach of health and safety". That letter also directed him to the employee assistance programme as a means of support.

47. It was clear from text messages at that time that Mr Cockcroft, Ms Clark, Mr Lillington and others and Ms Jolly (HR) were the key management team involved in investigating matters and taking all the appropriate steps following the accident. Those colleagues included health and safety colleagues reporting the incident of the health and safety executive and liaising with the HSE representatives. It was a very serious matter.

48. The purpose of the investigation was to establish the root cause of the incident and to consider any preventative measures. Preventative measures were immediately put in place on 18 July before the claimant was suspended: he and Mr Link checked another charger and found that also had damage and they carried out the correct lock out procedure on that charger together.

49. Returning to the text messages between the relevant management group - Mr Cockcroft, Mr Lillington and Ms Clark, it was clear that the contractors considered the potential for fatality classification as appropriate and that there was a need for attention to detail in the investigation, particularly around training and knowledge. It was clear that in separate communications with HR, the HR advice was to the effect, “whatever happens with Craig”.

50. On 19 July, Mr Link and others had been interviewed and questions had been prepared for them all in advance. Mr Link was asked when he was first aware of any issue regarding the VNA charger and he said he couldn’t remember the exact time, “Craig mentioned and asked me to tag along to look saw the state of it, not useable”. He said he turned it to the fence and wrapped the cable wanting to put it out of use. He said, “at the time I didn’t/wasn’t aware of a lock out kit. Recently found that we have one because I asked Craig yesterday and he told me we did”.

51. When he was asked what immediate actions were taken with whom, he had replied that he had expected Craig to call Windsor, “that’s Craig’s role I don’t deal with contractors.” When he was asked what actions were agreed he said, “there was no action given to me, and I took it that Craig was doing it as he always does”. He also said that he wasn’t electrically qualified. “If there is any issue I go to Craig as he is electrically trained”.

52. On the evening of Tuesday 19 July the claimant sent an email after his suspension communicating to Mr Lillington and Ms Clark that he had been thinking about matters. He said: “I hope this helps with the investigation as yourself and Jane brought up yesterday that I had moved the charger with Jon back in June. This is correct. More and more I think back I was asked by Jon to assist re turning the charger around as been advised from Jon there was a fault with the charger. I didn’t ask what the fault was at the time and said I will leave it with you to sort out and make safe or words to that effect. I remember leaving that to go to sort the contractors out. I hope this helps.”

53. It was clear from that further statement from the claimant and the statement from Mr Link that there was a conflict in their accounts and they were both interviewed again.

54. During a second interview with the claimant on 22 July he was told there was a conflict with how the faulty charger was first reported. He was asked about what he had seen, in particular, when looking at the charger, and the actions that were taken afterwards and he said he didn't know what was wrong or damaged and he was just helping Jon turn it around. He said he might have told Jon, make sure an out of order sign is on and lock off. He said everyone has a lock off kit.

55. In his second interview Mr Link gave a consistent answer about when he was first involved. He said “I was walking back to the site services office. I ran into Craig. Craig told me there was an issue with one of the chargers and suggested I tag along.”

56. On the evening of the second interviews, 22 July, the claimant sent an email to HR and Mr Lillington which said: "*for my records and understanding I would like to know why only me who got a letter with the allegation of health and safety breach when there is another person. I know this will be discussed in further detail but I must stress I can't be responsible for every task I allocate to another tech to complete. Please attach this to the investigation."*

57. On 26 July the claimant was sent an invitation to a disciplinary hearing with Mr Dobinson which contained the investigation documentation including: notes of the investigation and interviews with Mr Link, Mr Lillington's statement that he had witnessed Mr Reece coming to the office to report the incident to the claimant, Jane Clark's witness statement from the conversation with the claimant on 17 July, and a work permit signed by the claimant on 12 July which concerned work in the room in which the faulty charger was located. The claimant had signed the work permit to say that the area was left clean, tidy and safe. Further he had minutes of a meeting, his further interview on 22 July, and his training documents indicating he was fully trained in lock out procedures and health and safety and other procedures.

58. He was also provided with a copy of the disciplinary policy, a copy of an email from the witness to the incident on 17 July, the photographs of both the charger and the injury, notes of an interview with an injured person on 19 July. That was a telephone conversation with Mr Lillington. Further he had witness reports from Mr Reece and Ms Coulthard, colleagues who confirmed the damaged charger had been noticed and reported to the claimant on or around 21 June.

59. The claimant's emails of 19 July and his further email of 22 July were also included and the CCTV footage of 21 June and of 12 July had been discussed with him in the meeting on 22 July and it was made clear that the CCTV would also be available in the disciplinary hearing upon request.

60. The allegations within the disciplinary invitation letter were a serious breach of health and safety rule and a serious breach of trust and confidence. The letter then set out the detail of the events and allegations including:

    on 21 June a damaged charger cable was reported to the claimant and the claimant did not raise a query with the contractors to repair the damaged cable, which was one of his responsibilities;

    on 12 July he signed a work permit at 3:20pm to say that the area was safe, clean and tidy whereas the repair had not been undertaken and the contractor on 12 July had put the charger back into use without realising there was any damage to it;

    The fact of the shock injury to the colleague, his attendance at hospital, how the injury had occurred and the report to HSE;

    The locking off by the claimant on 18 July of another charger;

    That the claimant had stated during investigation that he did not know about the damaged cable but a CCTV and a witness had confirmed that he knew of it.

    The lock out process was not completed on 21 June which led to the accident and injury occurring; the claimant was the most senior

electrically qualified person and was engineering supervisor with IOSH training and a member of the on site health and safety council, such that the incident and investigations have led to a loss of trust and confidence in your work and lack of accountability.

61. The matter of the claimant not checking on the contractors on 12 July was verified by CCTV review on 29 July – after the claimant had been sent the invitation to the disciplinary hearing. A further witness statement of 29 July indicating the review of that CCTV footage was then sent to him together with Ms Clark's statement on 1 August.

62. The claimant did not raise any objection during the course of the hearing to the additional evidence.

63. At the disciplinary hearing on 2 August the claimant was represented by a colleague, Mr Richard Goode. After a disciplinary hearing which, in total, took about two hours or so, Mr Dobinson took the decision to dismiss the claimant.

64. Mr Dobinson explained on the day the reasons why he considered the disciplinary charges to be upheld and he then communicated that to the claimant confirming matters in full in a letter dated 3 August 2022.

65. The claimant presented his appeal indicating that he had checked the contractors on 15 July, and he asked that CCTV and swipe car evidence be looked at for 15 July.

66. It was clear throughout these events that Mr Lillington was trying to establish the root cause of the accident to ensure that such an incident did not happen again. At the end of the claimant's disciplinary hearing Mr Dobinson also worked with HR to identify that there were recommendations/matters to be taken forward by him and these were emailed to Mr Lillington as follows on 3 August:

    that the permit to work from was not correctly filled out by Mr Heppleton because the area where the contractors were working was not properly identified and further training was required on that;
    the operative did not use the correct procedure when using the charger. He was at that point on holiday and Ms Clark was going to speak to him;
    Jon could have followed up about the charger being turned around and it not being logged anywhere;
    A hazard card was not put in by any of the four people who knew of the problem - including Mr Reece or Craig;
    LOTO equipment ought to be available possibly placed in the warehouse but available to all staff;
    A review of the process of when a fault is found what is to be done, double checking it and also liaison with contractors in those situation;
    The standard operating procedure for electrical refers to an "authorised person" and all that is required was somebody electrically trained;
    The possibility of monthly or weekly checks of equipment, cables and so on, built into the operator checks carried out in the warehouse.

67. On 9 August the claimant took part in his appeal meeting with Mr Cartwright. His grounds of appeal included:
    a. Three people being involved, himself, Jon and the injured person – the claimant said both of these people failed – the injured person by not following the charger instructions on the wall, or visually inspecting the charger, and maintaining that Jon had not done as instructed by him;
    b. He was not the authorised person, regardless of qualifications because he did not have a letter of authorisation as per policy, nor did his contract record he was;
    c. He was asked to hand in his phone after a week and a half of suspension;
    d. He considered others were treated less harshly and gave examples and reiterated his respect for the business, and his loyal and trustworthy service over 12 years. His position remained that he had instructed Jon to lock off the charger.

68. A note taker was there and the claimant was again represented at the appeal. That required CCTV to be examined for 15 July when the claimant had undertaken a review of the contractors work and Mr Cartwright wanted to investigate that, on the claimant's request, as well as all the other matters that were raised on the appeal. The claimant's position arguably became worse from that further investigation because on reviewing the CCTV the claimant had signed a permit to work on 16 July, that is on the Saturday, but again there was no evidence of the claimant checking the plant room before doing so to ensure matters had been left safe, clean and tidy at the point that he signed off the paperwork.

69. Mr Cartwright did not consider the claimant's grounds of appeal, as discussed and put in the meeting, were such as to overturn the decision. The claimant had challenged the notes of the disciplinary meeting, but Mr Cartwright was reasonably satisfied that although, not verbatim, they did not misrepresent what was said.

70. The claimant did not mention at any time that he considered Mr Lillington or Ms Clark should not have been involved in the investigative process because they had made homophobic remarks against him or were not truthful in their statements, nor had he ever complained, before this disciplinary process, about the alleged comment of Mr Cockroft in 2020 or alleged daily shouting of homophobic remarks.

71. The claimant relied in his appeal on the CCTV showing (from what could be seen, there was no audio) that he had given an instruction to Jon Link to explain to him what to do and how to use a LOTO kit. That was at odds with Mr Link's evidence and Mr Cartwright was not able to verify or accept that such an instruction had been given on the basis of that CCTV, bearing in mind Mr Link had consistently said otherwise. Mr Cartwright did undertake to review CCTV evidence on 12 July, and CCTV and swipe card evidence on 15 July, and he did so before giving his decision. There was no evidence that the charger area had been inspected by the claimant before forms were signed by him to confirm the area was safe.

72. After his appeal the claimant reported Mr Cockroft to the police for homophobic remarks. On 18 August 2022 at 20:32pm the claimant made a report to the respondent's ethics line, having already reported to that line that he was being set up in the context of an injury at work. He then added this: "I would also like to add Gary Cockcroft does not like my sexuality within the business as always making jokes."

73. Mr Lillington subsequently replaced the claimant's post, and had to pay a 20% premium on the claimant's earnings to recruit to the post.

Were the alleged homophobic remarks made – issue 3.1

74. It is tempting to deal with the harassment allegations first and in isolation, but the Tribunal considers matters across the whole timeline and what that can tell us, and how that impacts on the likely reliability of the witnesses.

75. Using our industrial knowledge in light of the findings above, it is not unlikely that a comment, "I don't think he is going to be back in the business", or as the claimant put it to Mr Lillington "he's done at the business", might have been said by one of Mr Lillington, Ms Clark or Mr Cockroft. They spoke together on operational issues gathered in the office at least once a day. This was reported to the claimant as having been overheard by Mr Heppleton before the claimant's disciplinary hearing. It was the genesis his complaint of to the ethics line.

76. The context for such a remark is that two of those three managers have conducted or been present through a full investigation, and the third has been party to communications with HSE about the incident. They had good relationships, and they did not take any decisions on a disciplinary outcome. They could not mandate what would happen, but they no doubt had views. The industrial knowledge of all the members of the Tribunal tells us that holding such a view was not unreasonable or indicative of any ill will towards the claimant – it simply reflected the seriousness of the incident, the part his role was expected to play and his lack of recollection (at best) when asked about the matter initially.

77. Unwise though it was to express such a remark (and we consider it was made, but we cannot say by whom), it does not tell us anything about the likelihood or not of whether homophobic remarks were made. Each manager denied having made a remark about the claimant "being done at the business", but that is not to say they are giving untruthful accounts - memories fade, and particularly about what was said in any given daily meeting across a month or so.

78. When we come to assess the dismissal in the round, the remark is to be weighed against the patently fair and diligent investigative and disciplinary process in which the HR person advising on it wrote, in an unguarded email, "whatever happens with Craig". That indicated to the Tribunal open and fair minded advice. Indeed that was the impression given by the entirety of the disciplinary process, which was scrupulously fair. It was also the case that none

of these three managers took, or influenced, Mr Dobinson's decision to dismiss the claimant. We accepted Mr Dobinson's evidence about that.

79. The claimant's suggestion that he was "set up", or that dismissal was pre-determined, was also advanced because Mr Lillington had suspended his site access (by number plate recognition) and asked for his telephone. Mr Lillington had forgotten to ask the claimant for his telephone on suspending him, which was the respondent's normal procedure, and he called him because and asked him to return it before his disciplinary hearing. Mr Lillington considered that he had to act cautiously given the risk that a disgruntled suspended person could pose if they had free access to the site – he did not necessarily think the claimant posed that risk but on balance he considered removing site access was the right thing to do. His evidence about this was balanced and compelling and again, did not indicate any ill will towards the claimant.

80. Returning to the alleged homophobic remarks, they are wholly abhorrent, and in the Tribunal's industrial experience, unlikely in 2022 to be shouted from a balcony by these managers for all to hear. That would be wholly at odds with our assessment of them as witnesses, and in indicative of a sinister and unpleasant place to work. Yet the claimant loved his job and had good working relationships.

81. We also note that the claimant called Ms Clark, not his boss Mr Lillington, on Sunday the 17th after the electric shock injury had been made known to him. He had called her to say that he had started an investigation by contacting the contractors. In our judgment, this is further indication of their general trusting and friendly working relationship.

82. Furthermore the claimant's partner, Mr Burton, messaged back to Ms Clark when she contacted him to see how the claimant was. Again, that is not indicative of a poor relationship where homophobic remarks have been reported to have been made by her to the claimant at any stage during his employment.

83. It was also the case that the claimant did electrical works for Ms Clark privately, and he was her "go to" person for all things electrical. Again, not likely if Ms Clark was someone who made homophobic remarks at work.

84. We have to weigh against these contrary indicators, the corroborative evidence that has been assembled by the claimant, and indeed it is clear throughout the preparation of this Tribunal case, the claimant has carefully sought to put in front of the Tribunal all of the material that he says is in his favour, and we have considered all of that material.

85. We also consider what was reported by the claimant at the time? It was limited to homophobic joking by Mr Cockroft on the ethics line – nothing about Ms Clark or Mr Lillington.

86. Mr Burton of course, gave evidence of the claimant's upset. It was put to him, "in your statement you suggest that Mr Lamb was communicating to you as he experienced these remarks. When do you say that happened? The answer was, "he did start talking about it more when he got suspended. While he worked there he didn't really speak about the gay things at work".

87. We find that there was, in fact, no communication to his partner at all of any perceived prejudice or harassment while he was at work before his suspension.

88. As to the 2020 allegation against Mr Cockcroft. The claimant says in his statement that Mr Cockroft was stuttering. Mr Cockcroft was stuttering or struggling with his words because he was in difficulties answering the question that the claimant was asking him. That question was, in essence, "why can't I have the manager's job, we don't need two people doing it, that is my job and the manager's job. It is not necessary". In our judgment if Mr Cockcroft had communicated that the claimant could not have the role because of his youth and sexuality, but particularly the second of those characteristics, it is inconceivable that the claimant would not have raised that with somebody at the time.

89. There was an ethics line or similar, and there was HR and no doubt a grievance policy. This was a decision with a direct impact on the claimant's career and earnings. It is simply inconceivable that he would not have raised such an outrageous remark.

90. He did not, in truth, believe that what he had been told or heard, was that he was not getting the job because of his sexuality. It was much more likely in reality that Mr Cockcroft had said what he said during his evidence. Essentially, he wanted someone straightaway to hit the ground running in that role, and he might have stumbled over those words. In all the circumstances we find there was no conduct related to sexuality in that conversation and that the claimant knew that at the time.

91. We weigh Ms Hudson's witness statement evidence because she did seek to corroborate the general homophobic name calling (by Mr Cockroft and Ms Clark). She did not give any particular examples, dates, times, or context, where she was when she heard them, for example. We also note that she was very unhappy with the respondent's managers because she was wrongly removed from the site. It was believed that she had been the source of the "set up" suggestion. She worked for a third party cleaning company, which the claimant had managed. In fact it was Mr Heppleton who had been the source of that information. She was a very unhappy person about these events when she provided her two statements.

92. In the warehouse where there is a raised platform. On occasions Ms Clark did have to raise her voice to communicate down to individuals on the warehouse

floor. There was a subsequent ethics investigation and staff were invited to make their comments known. There was no corroboration of the alleged comments from that investigation.

93. Ms Arnold's evidence was of bullying by Ms Clark, but Ms Clark had to manage Ms Arnold through a difficult lengthy ill health absence, culminating in an agreed departure. At times they had shared a hotel room for work purposes and had previously had a good relationship.

94. Weighing all the evidence in the round, and bearing in mind the suggested corroboration that the claimant sought to put before us and the general likeliness or unlikeliness of these matters, we reflect on our assessment of the three protagonist witnesses and our assessment of the claimant.

95. Our assessment generally was that the three managers gave helpful and straightforward evidence. Unsurprisingly they denied that they shouted abhorrent words at the claimant on a daily basis, or at all. As to the claimant, surprisingly he did not set out any particulars of alleged daily remarks, and by whom, until December 2022 at the case management hearing – some two years after the alleged "want someone straight" remark by Mr Cockroft. We accept it can be very difficult to complain at work, but there was no good explanation why the claimant had not been clear in his ethics complaint after dismissal, or in his ET1, or at an earlier stage about such abhorrent remarks.

96. In short, we consider he is not reliable at all on this, and nor is Ms Burton. Against that we consider the respondents witnesses of truth.

97. The result of those deliberations and considerations is that the sexual orientation harassment complaints are dismissed.

<u>What was the principal reason for dismissal?</u>

98. The claimant's case was that his dismissal was really about cost cutting. He relied on some detailed background. His previous boss Mr Gray had been made redundant after site services were brought back to the direct employment of the respondent in a TUPE transfer. The claimant had also previously received a pay rise consistent with promotion to the senior technician, but at the start of 2021 Mr Lillington was recruited as a technical manager (the role the claimant considered was unnecessary and he could have done that role in his conversation with Mr Cockroft).

99. The claimant also suggested that when Mr Gray was made redundant Mr Cockcroft had spoken about achieving his cost cutting targets. This was not put to Mr Cockroft, but even if it had been, the claimant's post was filled after his dismissal and it cost the respondent more than his salary to do so.

100. There is absolutely no doubt that the principal reason for dismissal was the claimant's conduct in failing to lock off the charger, or make sure it was locked off, and subsequently signing the area had been inspected as safe for contractors. Mr Robinson did not believe that he had given clear instructions to Mr Link to lock off the charger, but even if he did, he certainly did not provide him with the equipment or follow up on it and Mr Link was new, and junior to the claimant. The claimant had signed a permit to work to say the area was safe without inspecting it. These were the principal facts and beliefs of Mr Dobinson which caused the claimant's dismissal.

101. It follows that we accept the oral evidence and indeed the written evidence of Mr Dobinson, and indeed on appeal, the evidence of Mr Cartwright: they believed that the claimant had conducted himself in a way which could not maintain trust and confidence. They believed he had not taken the first opportunity to avert harm, which is a very serious breach of the respondent's approach to health and safety.

<u>Were there reasonable grounds for that belief and had the respondent carried out a reasonable investigation (in particular was Mr Lamb given enough time to consider the evidence?)</u>

102. This matter started with the claimant's conversation with Ms Clark on the 17th July, and ended with a dismissal on 2 August (and an appeal outcome was given on 10 August 2022).

103. The claimant knew well before his disciplinary hearing, the vast majority of the evidence that was to be discussed. The CCTV of him and Mr Link in June had been discussed and observed with him. He had the full pack of materials provided to him, which included that Ms Clark and Mr Lillington were also witnesses because of their early conversations with him. He had a reasonable amount of time to consider those materials. At no stage did he seek more time or delay to consider matters further, or adduce further material.

104. At the very outset the claimant had said that he did not know about the damaged charger. As events unfolded there was a full and thorough investigation. In no sense could it be said that any lines of enquiry were not pursued, or that any matters were not looked into, considering matters from beginning to end.

105. The setting out of the matters of concern for the claimant was very clear in the disciplinary invitation letter – matters could not have been clearer. It was very clear that the aspect of not taking the first step to prevent injury at the time, was the matter for which the claimant was initially suspended.

106. As the investigation had progressed, the issue of trust became apparent because the respondent had reasonable grounds to believe that the claimant was not being straightforward about what he knew and when, and, in terms of lack of accountability, the email that he sent on the 19th and indeed on the 22nd sought to put the blame, or at least equal blame, on his new colleague Mr Link.

107. These are matters of fact with which the claimant, including in his claim form details, fundamentally disagrees. There is a fundamental dispute of fact between the parties and there was such a dispute before the respondent at the time.

108. The claimant said, ultimately, in the disciplinary process, that the colleague, Mr Link, came to him and asked him to go and see the faulty charger, and the matter was therefore Mr Link's responsibility. Over that there was a fundamental dispute of fact which pertained right up until the appeal and indeed during the appeal.

109. As the lines of enquiry were followed up by Mr Lillington he was hoping something would come out of these enquiries which would exonerate Mr Lamb because he liked him, he'd worked really well with him, and they had a good working relationship. He had absolutely no interest in any disciplinary outcome for Mr Lamb. The Tribunal accepts his evidence about all these matters. He was seeking to conduct a fair investigation.

110. There are two aspects of the investigation which we have considered could arguably put the investigation outside the band of reasonable investigations. It was clear at the outset that Mr Lillington and Ms Clark were witnesses in that investigation: Mr Lillington said/corroborated that it was Mr Reece who had come into the office and reported the fault to Mr Lamb, as well as the evidence of those directly involved. Ms Clark confirmed the claimant had said he knew nothing when she first asked him about it.

111. Does their involvement as witnesses mean this was not a reasonable and fair investigation when Mr Lillington was charged with conducting the investigation and Ms Clark was present as notetaker, and asked some questions.

112. Ironically, if Mr Cockcroft had conducted this investigation, the person against whom the claimant directs a lot of his anger and upset and belief that this was a set up, this question on the investigation would not arise at all. The claimant alleged that he felt bullied in the investigation meetings but that is not at all the impression given by the notes, or by the witnesses. He had every opportunity to say what he wanted to say, and he had a colleague with him who fairly made points.

113. The Tribunal raised the matter of the roles of Mr Lillington/Ms Clark, and asked the respondent to comment upon it, even though it was not argued by the claimant. It is part of our duty when a claimant is not represented by lawyers or any other sort of representative, to put the parties on an equal footing, and that involves considering any aspect of the case which we consider would make this an unreasonable dismissal. That is so provided everybody has had a chance to cover the territory, and in this case we have had three days to comprehensively consider that territory.

114. We go back to looking at the reasonableness of the investigation in the round, and we give ourself a typical Sainsburys v Hitt direction: Section 98(4) does not require a perfect investigation, it has to be a reasonable one, that is within the band of reasonable investigations of a reasonable employer. Applying that standard we are satisfied that this was a reasonable investigation albeit Mr Lillington and Ms Clarke also gave statements: Mr Lillington was trying fairly and reasonably to get to the root cause and to establish whether there was any potential for disciplinary, and he hoped something would emerge to remove the claimant from criticism. At no stage did the claimant suggest Mr Lillington or Ms Clark were wrong or not being truthful in their accounts – had he done so, it would not have been appropriate for Mr Lillington to continue – but he did not.

115. That is our finding on the reasonableness of the investigation. It goes without saying that having reached that conclusion, the respondent had reasonable grounds for concluding that there had been misconduct by the claimant.

116. Did the respondent otherwise act in a procedurally fair manner (in particular was the outcome pre-determined and was the appeal outcome comprehensive)?

117. Was dismissal within the range of reasonable responses?

118. It will also be apparent from the conclusions above that in the round the respondent acted fairly in its disciplinary process.

119. The appeal outcome letter was relatively short, but it dealt with the matters discussed in the appeal. It noted that beyond the CCTV/swipe card review that there was no new evidence and explained other conclusions.

120. The appeal outcome letter did not specifically address all of the matters raised by the claimant in this appeal grounds: a colleague on the sick, and a colleague who had allegedly stolen, had been treated less harshly than him; the colleague using the equipment was also at fault; there was no written letter confirming he was an authorised person to complete permits to work (albeit he had always done so in recent times) as per policy. These last two points were

also the subject of recommendations from the respondent (in the last it was recommended the policy be changed to remove the letter requirement).

121. The claimant's case on the respondent's decision in the round included that there were learning points and recommendations from this investigation, discussed in the dismissal meeting and appeal and formally recommended after his appeal outcome. They were referred to frequently by the claimant throughout his cross-examination.

122. That reflected the reality that at every stage of the chain of events there had been an opportunity which might have taken matters down a different track and averted injury. Had the original fault "reportee" documented their observation/report in some form, for example. Had the user of the equipment conducted a visual check before engaging the equipment or switched off the supply before connecting. There were a number of learning points that could have improved matters. Certainly these matters were something to be weighed in the mix by the reasonable employer and they were.

123. The evidence that we heard from Mr Dobinson and Mr Cartwright was that they considered everything in the round and hoped something would emerge to exonerate the claimant; but the claimant was a person in a critical position of trust. He was the electrically qualified person on site named in the respondent's policy and on their reasonable findings he had failed to take steps he should have taken. That wholly outweighed the other learning points which, reasonably, in an environment where safety had to be maintained, they also sought to apply.

124. They were also reasonable in concluding that Mr Link could be believed about the original visit to the machine, and to whom the fault was first reported – and the basis for that was addressed in the appeal and outcome – there was no sound on the CCTV and it could not be concluded from that that Mr Link had been instructed to do the LOTO procedure.

125. Failing to address the alleged leniency to two colleagues (theft/sickness) does not put the appeal outcome letter outside the band of reasonable outcomes – they were patently not comparable cases.

126. Not addressing the lack of a letter/contract reference appointing the claimant to be the Senior Authorised Person similarly did not render the appeal outcome inadequate or unreasonable. It was a point without any substance – the claimant knew he was the Senior Authorised Person because he was named in the policy and completed all the relevant work and paperwork. It was a technical point he put to the witnesses, along the lines of, "surely policies must be complied with?". As a question of Section 98(4) reasonableness, we simply consider, did the respondent act reasonably in treating its reason as a

substantial enough reason to dismiss the claimant, considering that in accordance with equity and the substantial merits of the case? The claimant's point on the alleged lack of "is appointed in writing" concerning his electrical responsibilities was of very little weight in that balance.

127. As far as the consistency issue is concerned, in reality Mr Link, is the comparable. Looking back some nine years or ten years previously to the 2013 injury, we give ourselves the Coral Casinos direction. Mr Lamb's point on this, not raised or known about in the disciplinary process, is why have I been dismissed when others have not in circumstances which I consider are similar. In simple terms, the circumstances are different between the 2013 injury and the 2022 injury - the senior technician, in 2013, was not found to be at fault.

128. The theme of the claimant's position from the very outset was that he was being singled out - in the initial meeting on 18 July when he asked whether Mr Link was also being suspended? That sense of not being treated equally and fairly with another colleague was there from the very beginning. The difficulty with that approach is that it was plain and obvious why the respondent was reasonable to do so at the time. At the time of suspension the claimant had not said what he later said about instructing Mr Link. The evidence suggested that the fault was reported to the claimant, the more senior and electrically qualified person to tackle the issue, and on the health and safety committee and there was no evidence on suspension day that he had instructed Mr Link. What was known from CCTV was that he and Mr Link had attended on the charger on the relevant day in June. From witnesses it was understood that the issue had been reported to the claimant.

129. Had the evidence from the outset pointed to a report to Mr Link, rather than the claimant, it was possible that the claimant would have been believed and Mr Link would not have been believed and a different approach might have been taken to suspension and the way that these events unfolded.

130. Until the claimant's email after suspension, on the 19th, it was not known that he was going to say that he had told Mr Link to lock out the charger - essentially, it was Mr Link's fault, not mine.

131. We do not consider that the respondent acted unreasonably in not treating them equally from the outset because of the information that the respondent had. Our findings are clear that the respondent acted reasonably, fairly and in good faith in those circumstances.

132. The point that could have been advanced by the claimant, and which we considered, is whether having had that allegation raised by the claimant, that Mr Link was told to lock out, a reasonable employer would then have suspended Mr Link and put the allegation to him.

133. Instead there was a subsequent interview with Mr Link, and he gave a more or less an identical answer about his involvement, which was also likely, with his being new to the respondent and its own knowledge of the claimant's role and responsibilities. Again, the respondent acted reasonably in not suspending, nor disciplining Mr Link, in all the circumstances and the circumstances give rise to no suggestion that the claimant was being, "set up".

134. It will be apparent, considering all these matters in the round as part of the Section 98(4) test, that we do not conclude that this was an unreasonable dismissal. The claimant had 11 years' service and an unblemished record, but unfortunately those matters did not outweigh for the respondent the seriousness of the events, and his part in them. He characterised this as one mistake in all those years for which he apologised. A different employer acting reasonably might have chosen the "benefit of the doubt" or "final written warning" approach, but in all the circumstances, the respondent did not act unreasonably in dismissing when it could not, despite an extensive and thorough investigation, find evidence to support the claimant's position or restore trust in him. Fundamentally he had signed documents to certify safety, without performing the necessary checks, and had failed to ensure harm was prevented and sought to blame a junior colleague.

135. The unfair dismissal complaint is also dismissed.

JM Wade

Employment Judge JM Wade