EMPLOYMENT TRIBUNALS

Claimant: **Mr M Rakib**

Respondent: **Mitie Limited**

Heard at: **Cardiff; in person**
On: **18, 19 and 20 November 2024 and 5 December 2024**

Before: **Employment Judge R Harfield**

Representation
Claimant: Ms Johns (Counsel)
Respondent: Ms Minto (Counsel)

JUDGMENT having been sent to the parties on 21 November 2024 and 5 December 2024 and reasons having been requested by the Claimant in accordance with Rule 62(3) of the Rules of Procedure 2013:

REASONS

1. Introduction

1.1 The Claimant presented his Claim Form on 3 February 2024, originally bringing complaints of unfair dismissal, wrongful dismissal, race discrimination, a redundancy payment, and arrears of pay. By the time of the final hearing (and by which time the Claimant had legal representation) the complaints had reduced to unfair dismissal and wrongful dismissal.

1.2 I had written witness statements from and heard oral evidence from Ben Lewis, previous Area Security Manager for the Respondent, and the Claimant himself for the Claimant's case. For the Respondent I had written witness statements and heard oral evidence from Marc Pearson, at the time Interim Regional Operations Manager on the BBC Contract for the Respondent, and Lee Hill, Deputy Account Director. I had a hearing file.

1.3 In the original 3 day listing I undertook pre-reading, heard the witness evidence, heard submissions and gave an oral decision with reasons on liability issues. It was then agreed that I would deal with two further remedy issues of whether there should be a "Polkey" deduction and whether there should be an Acas uplift. I was not able to address other remedy issues at the time because there was not sufficient evidence on mitigation. I therefore heard further submissions on these two issues before giving an oral decision with reasons. A further remedy hearing

was listed for 5 December 2024. I had a remedy witness statement from the Claimant, a remedy hearing file, and an updated Schedule of Loss. I heard evidence from the Claimant. I was asked to give a decision on the assessment of future loss. I heard submissions about this and gave an oral decision with reasons. The parties were then able to agree the final figures for the Remedy Judgment. As the stages of the hearing progressed, I was asked for written reasons and I confirmed I would provide composite written reasons for all the issues I was asked to decide.

2. Unfair Dismissal and Wrongful Dismissal - the legal principles

Unfair Dismissal

2.1 Under section 98 of the Employment Rights Act [ERA] it is for the employer to show the reason or principal reason for dismissal and that it is either 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 the employee held. Subsection 2 includes a reason relating to the conduct of the employee. Under section 98(4) where a potentially fair reason has been shown, the determination of the question of whether the dismissal is fair or unfair, having regard to the reason shown by the employer, (a) depends on whether in 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 the equity and substantial merits of the case.

2.2 In considering whether or not the employer has made out a reason related to conduct, the tribunal must have regard to the test set out in the seminal case of British Home Stores v Burchell [1980] ICR 303. In particular, the employer must show that they believed that the employee was guilty of the conduct. Further, the tribunal must assess (the burden here being neutral) whether the respondent had reasonable grounds on which to sustain that belief, and whether at the stage when the respondent formed that belief on those grounds, it had carried out as much investigation into the matter as was reasonable in all the circumstances.

2.3 Other key case law in the field has also established that:

- In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many cases the function of the tribunal is to determine whether, in the particular circumstances of each case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted (Iceland Frozen Foods v Jones [1982] IRLR 439);

- The band of reasonable responses test also applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23);

- As part of the investigation an employer must consider any defences advanced by an employee but there is no fundamental obligation to investigate each line of defence. Whether it is necessary for an employer to carry out a specific line of enquiry will depend on the circumstances as a whole and the investigation must be looked at as a whole when assessing the question of reasonableness (Shrestha v Genesis Housing Association Ltd [2015] IRLR 399);

- The band of reasonable responses analysis also applies to the assessment of any other procedural or substantive aspects of the decision to dismiss an employee for a conduct reason;

- Where there is a procedural defect, the question that always remains to be answered is did the employer's procedure constitute a fair process? A dismissal may be rendered unfair where there is a defect of such seriousness that the procedure itself was unfair or where the results of defects taken overall were unfair (Fuller v Lloyds Bank plc [1991] IRLR 336);

- Procedural defects in the initial stages of a disciplinary process may also be remedied on appeal provided that in all the circumstances the later stages of the process (including potentially at appeal stage) are sufficient to cure any deficiencies at the earlier stage (Taylor v OCS Group Ltd [2006] EWCA Civ 702);

- Any procedural defects do not exist in a vacuum. Not every procedural error renders a dismissal unfair. Ultimately the fairness of the process as a whole must be looked at, alongside the other relevant factors, focusing always on the statutory test as to whether, in all the circumstances, the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the employee (Taylor v OCS Group Ltd [2006] EWCA Civ 702);

- On sanction: If there is a finding of gross misconduct – then key questions are was the employer acting within the band of reasonable responses in choosing to categorise the misconduct as gross misconduct; and was the employer acting within the band of reasonable responses in deciding that the appropriate sanction for that gross misconduct was dismissal.

Wrongful dismissal

2.4 Wrongful dismissal claims are breach of contract claims. The claimant was summarily dismissed without notice. A dismissal in breach of the contractual term as to notice will be wrongful unless it was in itself a response to the claimant's own repudiation of the contract. The burden therefore falls on to the respondent to show that there was a repudiatory breach of contract by the claimant prior to the date of dismissal in order to avoid liability for what would otherwise be a breach of contract.

2.5 The necessary conduct entitling the employer to dismiss summarily is usually restricted to conduct said to amount to gross misconduct. The classic statement of what constitutes gross misconduct is in Neary v Dean of Westminster [1999] IRLR 288 that the conduct: "*must so undermine the trust and confidence that is*

inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment."

2.6 A wrongful dismissal case is therefore not about the range of reasonable responses. Instead, it is a matter for me to assess for myself whether the allegations against the claimant are made out as a matter of fact on the balance of probabilities. If they are made out, I have to assess whether their nature and gravity is such as to fall within the ambit and meaning of gross misconduct that entitled the respondent to repudiate the contract.

3. Findings of fact - Unfair dismissal

3.1 The Claimant joined a precursor of the Respondent in December 2013 as a security officer in London. After various mergers the employer eventually became Mitie Limited in 2021. In November 2020 the Claimant transferred from London to Cardiff. In April 2022 he was promoted to Duty Security Manager until his summary dismissal on 25 September 2023. The Claimant would manage a team of around 5 security officers on site at the BBC Central Square Building in Cardiff. The BBC is an important client of the Respondent. According to the Respondent's ET3, Mitie Limited is a large facilities management and professional services provider employing over 77,000 people across the UK.

3.2 The disciplinary proceedings initially arose out of a grievance raised against the Claimant by a security officer about alleged bullying. The Claimant was required to attend an investigation meeting on 23 June 2023 conducted by Martyn Barrass [MB]. The minutes of the investigation meeting start at [154].

3.3 As part of the Claimant's account given in the investigation meeting, the Claimant said he was about to do a CCTV review because a security officer had misplaced a bag. Towards the end of the interview MB returned to the topic of the CCTV review and asked the Claimant how he had conducted the review. The Claimant said in the control room and, when asked how, said he thought Mike Small [MS] was there. When asked if MB went and checked the records to see if MS was on shift that day, the Claimant said he would think so but he might be confusing it with a different day. The Claimant said: "*but I happened to be in the control room and NSOC called me. I don't know why. I don't really do CCTV reviews that often, but there was a reason why I was doing it."* MB asked why the Claimant would be doing a CCTV review. The Claimant said right now he could not remember, but that he was in the control room for something and he was looking at footage because he had said to the complainant security officer that the security officer was on the security officer's phone and not to do it as the security officer was on camera.

3.4 On 26 June MB sent the minutes of the investigation meeting to the Claimant which the Claimant returned on 4 July. On 25 July the Claimant emailed MB asking for an update. There was no reply at that time.

3.5 MB had also been in contact with the BBC. On 21 July 2023 he emailed Joel Adlington [JA] Corporate Security Manager at the BBC with an update, so there must have been earlier contact between the two that I do not have the details of. The email was not about the bullying allegation but was headed "CCTV

Investigation." MB said he had concluded the investigation, and that the Claimant had admitted the breach in interview. MB also referred to a statement taken from the complaint security officer who had said the Claimant had told him the Claimant had been reviewing 12 hours of footage to catch who had made a mess in the kitchen, but had come across two guards on their mobile telephones instead. MB reported that the Claimant had said in interview that he conducted a review because another member of staff had misplaced a bag, and that the Claimant had also gone on to say he could not remember why he did the CCTV review and maybe NSOC called him. MB said to JA the Claimant had also said he does not do CCTV reviews that often, suggesting it was not the first occasion the Claimant had breached data protection and the Claimant had also suggested another officer operated the CCTV but that this officer (i.e. MS) was in fact on a rest day. MB said: "*In my opinion, his story changes at least twice in a short time suggesting he is concocting a lie. I have a statement confirming him admitting to accessing the CCTV and also an admission during interview. I will now escalate this to a full gross misconduct hearing."*

3.6 JA replied to say it was his usual position to remain neutral in the disciplinary processes of Mitie staff, but he was concerned particularly about the misuse of CCTV in this instance. JA said: *"The use of the BBC CCTV systems by a non licensed staff member, without a DPA request or any oversight, for what appears to be personal benefit or superfluous use is unacceptable and may put us in breach of ICO regulations and GDPR legislation. I must put on record that it is a significant breach of trust between the staff member and the organisation and you have my full support in your assessment of gross misconduct."*

3.7 There is also a document at [244] headed summary of investigation into data breach which looks likely to have been drafted by MB. MB summarised the Claimant had said he was accessing CCTV to locate a lost bag, that when challenged had said MS was on site, and then had claimed NSOC had called him to review CCTV. MB said the security officer complainant had also referred to the Claimant saying he had reviewed CCTV to see who had left the kitchen in a mess. MB said that NSOC would never request an officer to access CCTV. MB said MS was not on duty on 8 May. MB said: "*It is possible that [the Claimant] may have accessed the CCTV system against company policies and in breach of the Data Protection Act. He is not SIA licensed to do so."* MB recommended escalation to a gross misconduct disciplinary hearing.

3.8 On 9 August the Claimant chased MB again saying the allegations were made over 2 months ago and it was a month since he had returned the minutes. MB replied that day to say the files were now with Marc Pearson [MP], Interim Regional Operations Manager, for review and for MP to invite the Claimant to a hearing. MB said the file had been submitted to MP the previous week after massive HR delays and annual leave.

3.9 Therefore MP had the case papers in around early August 2023. MP accepted in evidence he had seen the email exchange between MB and JA. MP also said he may have taken a few weeks annual leave in August 2023.

3.10 On 4 September MP sent the Claimant a letter saying there were allegations of gross misconduct which could result in summary dismissal, and it was alleged the

Claimant had breached the Disciplinary Policy/Equality Diversity and Inclusion Policy regarding:

- An allegation of bullying a staff member on 8 May 2023; and
- A separate bullet point saying: "*Serious breach of your data protection obligations. Specifically on 8 May 2023 to compound this issue*[1] *it is further alleged that you reviewed the CCTV footage in the control room while not possessing a suitable SIA License, which is a direct breach of GDPR.*

3.11 There is a disciplinary policy the Claimant was sent which I do not have. MP said he had also sent the Claimant the documentation the previous week. It is not entirely clear to me what that was, but it included something from MB.

3.12 The Claimant emailed MP on 4 September in response to the material and the invite letter saying it was a new allegation of gross misconduct and:

- It was not a matter that had been investigated to any thorough degree to warrant a disciplinary meeting;
- It was something he had mentioned in passing and he may have got the details and dates wrong;
- That MB was wrong in his summary.

3.13 MP forwarded this on to MB and Terry Havard [TH] Employee Engagement Manager for BBC Security at Mitie.

3.14 The disciplinary hearing took place on 8 September 2023. The minutes start at [192]. At the start of the meeting, the Claimant's trade union representative said there were problems with the evidence provided, including that there was no clear definition of what the GDPR breach was and the Claimant had not been given the company policy covering the breach. The Claimant was asked what was his reason for conducting a CCTV review. The Claimant said, as he had said to MB, he already forgot as it happened in late June. The Claimant said there was an incident in his mind that happened on that shift he was looking for a misplaced bag of a MOS. He said NSOC might have called him for something but there was a reason to be there. MP asked if the Claimant had a CCTV license to do CCTV reviews. The Claimant said "*No. I've been asking for years, I was told repeatedly we don't need a license on our system as we don't download any footage. On our system, the guards' log in does not allow a review, the DSM's log in allows us to do playbacks. For the last 2 years, when we submit footages for the police, you'll find my name on it as I have a DSM's log in that allows me to review it. It can't just be me that does that.*" MP said there needed to be a legitimate purpose for the review. The Claimant said he did not remember the purpose, and it might have been for the misplaced bag. The Claimant said he was looking internally and not through external cameras, and he had been told they could do that, but when it goes its external footage, then that goes to NSOC. The Claimant said again he was not the only one who had done that, and none of the DSMs have a CCTV license.

3.15 The Claimant was also asked about the alleged kitchen incident (i.e. the allegation he had said he had been reviewing CCTV to see who had made a mess in the kitchen). The Claimant said he did not think it was the same day, and it might have

[1] Which I take to mean compounding the bullying allegation

been another day when someone had misplaced their bag. The Claimant denied that he had been sitting there for 12 hours looking for who made a mess in the kitchen. He also said: "*When it comes to data breach, I don't think its possible, the investigation is quite limited. No one has a CCTV license, we've been told we don't need one."*

3.16 The Claimant also again said he had been told they did not need a CCTV license to conduct reviews using CCTV internally, and it was what he had been told when Mark Barwood [MBA] from Corporate Security for the BBC set up the CCTV in the office, whereas all external footage goes through NSOC.

3.17 MP asked the Claimant if the Claimant had any emails to evidence the directive. The Claimant said he did not, but for the last two years the DPA was signed off by the Corporate Security Manager. The Claimant said he had requested repeatedly a CCTV license but had been refused one. The Claimant's trade union representative again said the internal policy, or what the breach was, had not been laid out in the GDPR allegation.

3.18 MP prepared a document called the fact finding investigation summary report [207] which refers to an allegation of breach of the CCTV usage policy. If there is in fact a written CCTV usage policy it was not given to the Claimant or to the tribunal in these proceedings. MP also termed it CCTV misuse allegation.

3.19 MP found the allegation of bullying not proven on the evidence. MP said of the CCTV misuse allegation that it was established in the investigation and at the hearing the Claimant had used the CCTV system to review footage without a CCTV license. MP Pearson specifically referred to the Claimant's assertion he had been told by MBA the license was not needed. MP said the Claimant had produced no evidence of his claims he had permission to review CCTV from the client and there was no DPA request lodged that day. MP wrote that neither of the Claimant's explanations for conducting a CCTV review would be deemed an appropriate use of the system even if the Claimant did have a license. MP said the Claimant needed a CCTV license to interrogate the system, and that the Claimant still appeared to believe he was entitled to review CCTV footage. MP wrote the allegation was proven and that the Claimant had gone beyond the scope of his training and authority and had also caused reputational damage to Mitie as the client was aware of the allegations. MP wrote that it had ultimately damaged the trust the BBC client had in Mitie's ability to protect its systems. MP recommended dismissal for gross misconduct.

3.20 MP says in his witness statement for these proceedings that he found there was a direct breach of the GDPR and the breach of trust with the client was so serious that he considered dismissal to be the correct course of action.

3.21 The outcome letter was sent to the Claimant on 25 September 2023. In the letter MP said the reason for dismissal for gross misconduct was a serious breach of the Claimant's data protection obligations and specifically on 8th May it was alleged the Claimant had reviewed CCTV footage in the control room whilst not possessing a suitable SIA license which was a direct breach of GDPR. MP noted that the Claimant had admitted to conducting CCTV reviews whilst not in possession of a valid SIA CCTV license and MP said it was not only illegal but created a serious breach of trust between Mitie and the BBC client. MP wrote the Claimant had

incorrectly stated it was permitted and that the Claimant had no permission from the CSM and no DPA was in existence.

3.22 MP wrote: "*Reviewing recorded CCTV footage is a licensable activity and requires a CCTV License see extract from SIA website: "In short, if any licensable activities of a CCTV Operative, or Public Space Surveillance Operative, are carried out, then a license is required. These activities include:*

- *Actively monitoring the activities of a member of the public*
- *Using CCTV equipment (such as cameras) to identify (focus or track or look for) a particular individual*
- *Review recorded footage through CCTV equipment to identify individuals or investigate the actions of individuals.*
  Important: Unless your employer has been given an exemption under Section 4(4) of the Private Security Industry Act 2001, it is illegal to carry out any licensable activity of a CCTV Operative without the necessary SIA License."

3.23 MP wrote that he had taken account of the Claimant's length of service and that the Claimant had relocated for the position, but given the seriousness of the misconduct and having considered all possible alternatives including a final written warning the damage in trust created with the client was so serious he felt the correct decision was summary dismissal. The Claimant was given the right of appeal.

3.24 MP said in oral evidence that:

- He was not aware of any written policy by Mitie on the use of CCTV other than the Assignment Instructions;
- He understood that reviewing CCTV required a CCTV license;
- He understood the process was that any reviewing of CCTV needed to be done through the control room in London (who were licensed);
- He considered the Claimant would have known the Claimant needed a CCTV license to review CCTV as an experienced professional working in the industry;
- He did not find the Claimant's account that when a new system had been set up DSMs had been given an account that allowed reviewing of CCTV was plausible in evidencing the Claimant legitimately thought the Claimant was entitled to have such access. He said a CCTV engineer would not be able to give that training or assurance and the Claimant would have known that;
- He thought the Claimant, in the Claimant's accounts of the circumstances in which the Claimant may have been reviewing CCTV, had been shifting the narrative because the Claimant may have realised he was in trouble. He thought that the Claimant was in general trying to throw a smokescreen over the fact the Claimant had been reviewing CCTV without an appropriate license;
- He did not investigate the Claimant's assertion that the Claimant had been told repeatedly the Claimant did not need a CCTV license. MP said he did not believe the Claimant would have been told to crack on and review CCTV;
- He did not investigate the Claimant's assertion that footage for the police would have the Claimant's name on it as the Claimant had a DSM log in that allowed the Claimant to review footage, as he did not believe the Claimant was actually doing that;

- Likewise, he did not investigate the Claimant's assertion that the Claimant had been told the Claimant could review internal camera footage with external footage going to NSOC because it was just hearsay coming from the Claimant when the Claimant's back was against the wall;
- He did not investigate the Claimant's assertion that other DSMs would be acting the same way; saying that would be no defence if there had been misuse of a license;
- He did not investigate the Claimant's assertion that MBA had said they did not need a CCTV license as they were internal cameras and external footage went through NSOC. He also did not investigate the Claimant's assertion that for two years MBA had signed off DPAs because if MBA said they did not need a license for viewing the CCTV that was correct, and MBA may have thought regarding DPAs that the Claimant had gone through the proper channels through NSOC with DSMs doing viewing only. He said MBA had left the BBC by this point, but potentially he could have got in touch with MBA, however it was the Claimant's job to obtain and present the Claimant's evidence on mitigation. MP said if the Claimant had established the Claimant had been told by the security manager to do such things it may have changed the whole outcome but the Claimant did not give him that evidence;
- He did not see the DPA records as he based his decision on what was before him at the time, and again he thought these things were a smoke and mirrors distraction by the Claimant;
- He could not say now which part of the GDPR he found the Claimant had directly breached but he would have had it to hand at the time. The specific GDPR breach had not been put to the Claimant, but the Claimant was aware that the heart of the allegation was that the Claimant was reviewing CCTV without a suitable license.

3.25 On 28 September 2023 the Claimant submitted his appeal. The Claimant said the sanction imposed was unduly harsh and that the decision was based on a flawed investigation. He said the investigation was poorly conducted and the outcome letter did not answer valid questions that had been raised. He said MP had ignored mitigating factors around practice and guidance.

3.26 The appeal hearing took place on 23 October conducted by Mr Lee Hill [LH], Deputy Account Director for the BBC contract. The minutes start at [211]. The Claimant also followed it up with the letter found at [217].

3.27 Points the Claimant raised included that the activity of the bag search was a non licensable activity as he had been looking for an inanimate object in a private area. The Claimant said it was not in breach of GDPR. The Claimant referred to a SIA flowchart. LH said he did not look at the flow chart because it was clear the activity the claimant was accused of was a licensable activity.

3.28 The Claimant said if a CCTV license was required then MB did not have one when using footage against the Claimant in the disciplinary and that Mr MB had the footage on his phone. The Claimant said he had also asked for the DPA documents but they had not been provided. LH said in evidence that once MB had a DPA he could have the footage without a license as investigating officer. LH said the DPA had not been shown to the Claimant or in these proceedings because he could not get access to it from the BBC. When pointed out that his outcome letter to the

Claimant said that he had personally reviewed the DPA, LH said that he could not recall that and HR had incorrectly inserted that detail into the letter.

3.29 The Claimant said that other DSMs had been reviewing CCTV too, and gave a specific example of pulling footage recently that had led to another officer's dismissal. LH said in evidence that he could not investigate this because the system had a generic log in, so could no identify who was doing what and when. LH accepted he had not asked the Claimant for more information that would allow LH to follow up in other ways such as asking who the DSM in question was. LH said he did not see any evidence that management were aware the system was being used unlawfully. LH said even if it was the case that in Cardiff there was wider practice of DSMs reviewing CCTV, that the Claimant was an experienced and intelligent person who knew what the licensing restrictions were and it would not have changed LH's decision on dismissal if LH had known others were doing the same.

3.30 The Claimant said there had been inconsistent messaging about when they could and could not use the CCTV system. He said he had been given an instruction he could review footage by Johan, Alec and Martyn and that the Respondent was mistaken in saying that all of the reviews were exclusively done by NSOC because it had never been the case at BBC Wales. The Claimant told LH that as long as he had been a DSM, and prior to that, DSMs had processed almost all footage requests and reviews. LH said in evidence that he had not followed that up with any specific enquiries but he did not consider there was evidence that anyone in management specifically said the claimant did not need a license.

3.31 The Claimant said that he had submitted many DPAs to MBA who had said at the end of the previous year, when CCTV monitors were being placed above the DSM's desk, that they did not need CCTV licenses. The Claimant said that Alec and Johan had also advised when the new monitors went live that it would be best if the DSMs had a CCTV licensed colleague with them when downloading footage but they did not say why. LH said he had tried to contact MBA but that MBA had left the BBC. LH said he could not get MBA phone number, the number he had was the old BBC one, and he had asked Nigel Brown to reach out to MBA but they had never got hold of MBA. LH said he also contacted previous line managers to see if they knew where MBA had gone but they did not know and did not have contact details. LH said he had not googled MBA to see if he could find MBA.

3.32 The Claimant said that the company had signed off on countless requests for footage that he had pulled from the system with the company's full knowledge and that if LH looked over the last 2 year's DPAs there were times when NSOC could not pull footage so they had asked him to do so. LH accepted in evidence he had not looked into the DPA records that the Claimant said would show management were aware of what was happening on the ground in Cardiff, and it could have potentially affected the outcome. LH said he had also not spoken to NSOC about requests.

3.33 The Claimant said that LH himself had seen that the DSM had their own login to review live footage and asked why that login would be given if they were not allowed to view the footage without a CCTV license. LH said in evidence this was the first he heard of the DSM log in and that it should not exist and he got it closed down. LH said he did not accept the login would confirm the Claimant's belief DSMs

could operate CCTV because if set up by an engineer the engineer would not know the licensing restrictions and the Claimant should have known not to rely on that. LH said the Respondent would not have given the engineers instructions to set up the separate DSM account with download and playback facilities.

3.34 LH sent his decision letter on 29 November 2023. LH upheld the decision to summarily dismiss. In his decision letter LH said the Claimant required a CCTV license to review CCTV in any capacity and the Claimant would have been aware of this given the Claimant had been asking for formal training.

3.35 LH said the argument that the action was focused on an inanimate object, and not in breach of the GDPR, was not valid and was intentionally misleading because the Claimant had been intending to monitor the area for potential human interactions with the bag. LH said the Claimant had consciously chosen to investigate the matter using CCTV without seeking guidance or support from area manages or the NSOC which would have resulted in a rejection of the request or instruction to obtain a DPA from the BBC.

3.36 LH said a DPA would have been needed for the bag search, and he referred to the BBC policy about DPA requests saying it explicitly stated reviewing CCTV was only appropriate for alleged misconduct. He said the Claimant had also failed to log the activity in the daily occurrence book.

3.37 LH said that MS was not on duty on 8 May and that "piggybacking" on another officer's license was illegal and a serious breach. LH said these things raised significant concerns about the claimant's integrity and the trust and confidence placed in the claimant. LH said he had contacted the NSOC manager who had confirmed that there was no log of any call to the Claimant on 8 May 2023.

3.38 LH said: "*In summary your confidence that you did not breach clear guidance or rules is misplaced. The disciplinary manager corrected attributed the allegation namely "(Review recorded footage through CCTV to identify individuals or investigate the actions of individuals,) and although the dismissal outcome letter could have been clearer on the specific point I am providing clarification now*." LH said the Claimant was aware the original finding was direct breach of the GDPR, and that he did not consider this was a reframing of the allegation. LH said it was one of the bullet points in MP's outcome letter, and that the Claimant had reviewed CCTV in breach of the licensing regulations with the GDPR aspect being around BBC data protection.

3.39 LH said that MB having CCTV on his phone was not an equivalent situation and as investigating officer MB was permitted to review the footage and a DPA form had been submitted to the BBC. The letter said (as already mentioned above and which LH now says is not accurate): "*I have personally viewed the DPA and confirm its accuracy."*

3.40 LH said: "*Regarding your claim about unlicensed officers using the CCTV system we want to assure you that the business takes such matters seriously. If there is evidence supporting this claim appropriate actions will be taken to address the issue*."

3.41 The Claimant sent a further response to LH found at [237].

3.42 LH said in evidence that before reaching his appeal decision he had conducted a thorough investigation. LH says in his witness statement he reviewed the BBC's policy on DPA requests to confirm that reviewing CCTV data for the purposes of investigating misconduct requires a DPA, and that the Claimant had not obtained one. In his witness statement LH says he cross referenced the company's CCTV and data protection policies to determine the proper protocols for accessing and reviewing CCTV footage which confirmed that a license and authorisation were required. LH said in oral evidence that the control rooms had standard operating procedures and BBC codes of practice. The Claimant and the Tribunal have not seen these. LH said that he could not comment on why they had not been produced for this tribunal case. LH said the Claimant would not have been informed of the policies because there was no need on the site for the Claimant to be interrogating CCTV. LH said there was no standard operating procedure for CCTV usage in Cardiff because there is no requirement for anything other than live viewing. There is also no standard operating procedure for just the watching of a live feed in general. LH said that hypothetically if the Claimant was licensed and reviewing CCTV the Claimant would have received training with a separate set of standard operating procedures relating to CCTV usage.

3.43 In his witness statement LH says he gathered statements from relevant personnel including on duty officers and area managers to understand the communication and instructions provided by the Claimant regarding the investigation into the officer's bag. LH said in evidence that the duty officers and area managers was in fact a reference to the witness evidence already gathered in the original investigation. LH said he had spoken to national control room manager Gemma Jilbie [GJ] and Alec Mellis [AM] the regional operations manager. LH said he made a mistake in not telling the claimant about these discussions. LH said he only asked AM about CCTV training. He did not ask AM about the Claimant's assertion that "Alec" was one of the individuals who had instructed the Claimant that the Claimant could review footage. LH did not ask AM about the Claimant's assertion that "Alec" had said, when the new monitors were installed, it would be best if they had a CCTV licensed colleague with them when downloading footage. LH said he did not ask AM about this because the Claimant was an experienced officer who knew he should not be interrogating CCTV.

3.44 LH says he checked CCTV system logs to verify who accessed the CCTV and when which helped establish the Claimant had reviewed the footage without proper authorisation. LH said he reached out to the NSOC manager to confirm whether there had been a call on the date of the incident. LH said he consulted SIA regulations and company legal advisors to understand the legal implications of piggy backing on another officer's CCTV license.

3.45 LH says after he learned of the DSM log in account he instructed that the account be closed and all access removed. Since the claimant's dismissal Area Managers are to obtain CCTV qualifications and either they or the control rooms undertake the CCTV reviewing.

3.46 In his supplementary witness statement LH says the Claimant's door supervisor license entitled the Claimant to view live feeds but not to review footage for any form of investigation without prior approval from the data controller (BBC or nominated person). LH says the two instances a door supervisor license holder is

permitted to access stored data is to identify a trespasser or protect property. LH then says a CCTV license is required if guarding premises, property or people by using any CCTV equipment. LH says if CCTV needed to be reviewed or ring fenced then the process was to contact the security operations centre who would undertake the review and save data if it fell within the parameters of a DPA. Once data has been ring fenced a DPA is required to release it to use in an investigation to release to the police. LH said in evidence he could see his statement about there being two instances of accessing stored data contradicted what he said about being ineligible to review CCTV in any capacity, but that in any event the Claimant could not access stored data to look for a bag because it was not about identifying a trespasser or protecting property.

4. Discussion and Conclusions – Unfair Dismissal

What was the reason or principal reason for dismissal? Did the Respondent genuinely believe the Claimant had committed misconduct?

4.1 In my judgment MP dismissed the claimant because MP thought the Claimant had reviewed CCTV footage when not holding a SIA license to do so and contrary to the Respondent's and the BBC client's expectations and arrangements for reviewing CCTV. Likewise, that was LH belief at appeal stage. They were genuinely held beliefs on MP and LH's part that the Claimant had committed misconduct.

Were there reasonable grounds for that belief based on the Respondent carrying out a reasonable investigation (in the sense of being within the range of reasonable responses)?

4.2 My starting point here is that an employee has to be on notice that their employer considers something to be gross misconduct and a potentially sackable offence, so that the employee knows not to do the thing, or appreciates the risks that come with doing it. Some conduct (that is not relevant here), such as assaulting a colleague or theft from the employer is obvious and generally would not need to be spelt out. But other conduct matters can be less obvious and need a clearer statement of expectation.

4.3 There is a disciplinary policy that I do not have, but nobody is saying that it is spelt out there; LH said it is a brief, generic document.

4.4 There is no detailed written internal policy that the Respondent can point to which it says the Claimant had access to and which it is said clearly spelt out what a DSM in Cardiff could and could not do. There are the Assignment Instructions starting at [116]. The Claimant said he did not see these and the electronic signature on them does not appear to be completed by him as his name is spelt incorrectly. But the Claimant did also accept that Assignment Instructions existed and were regularly updated so I accept he would have seen something similar.

4.5 The Assignment Instructions say that on site a CCTV license is not required and a Door Supervisor SIA License (as the Claimant had) would be sufficient because CCTV is used to guard against trespassers, protect staff and the property from

destruction, damage or theft. But the Assignment Instructions do not go on to say there (or indeed in the section below it about the SIA Code of Conduct and standards required as security professionals) that this only covers the live watching of CCTV and not any operating steps such as rewind and playback (i.e. reviewing), or indeed that a breach will be considered gross misconduct.

4.5 The Respondent's case is that the Claimant would have known he could not do reviewing of CCTV without a CCTV license because of the Claimant's industry experience and training, including his SIA door supervisor's license.

4.6 Against that background MP had before him the Claimant's assertion that the Claimant had been told they did not need a CCTV license to review internal footage. MP had before him the assertion that other DSMs were doing it too. MP had before him the Claimant's statement that MBA from the BBC had also told the Claimant that the Claimant did not need a CCTV license for reviews of internal footage and that MBA had signed off DPAs which would show the Claimant was reviewing CCTV. MP had the Claimant's assertion that footage sent to the police would have the Claimant's name on it as the Claimant had a DSM log in that allowed the Claimant to review footage.

4.7 MP ultimately thought the Claimant would have known he should not be doing reviews of CCTV, and that the Claimant was saying these things as a distraction technique. MP thought that the Claimant had given a changing picture of explanations why and how the Claimant was reviewing CCTV because the Claimant was back peddling.

4.8 In my judgement, it would have potentially been in scope for MP to reject the Claimant's account that the Claimant did not know the Claimant could not do a CCTV review to do things such as checking for a missing bag. But such a rejection had to be made having first carried out a reasonable investigation.

4.9 I do not consider that MP's assessment in that regard was based on having conducted a reasonable investigation in the circumstances. It was outside the reasonable range. In my judgement, any reasonable employer in MP's position would have:

4.9.1 Firstly, looked at what other DSMs in Cardiff were doing, were they doing CCTV reviews and if so in what circumstances? What is it they say they were told or understood? MP said if others did it, it would not be an excuse for the Claimant. But it would have gone to the important question of whether the Claimant in reality was likely to have known that he should not be doing CCTV reviews of internal footage. It would also have gone to the issue of consistency in treatment. Why single the Claimant out for disciplinary action and indeed summary dismissal if other DSMs were in same position?

4.9.2 LH had the same assertion before him at appeal stage, and indeed had been given more information about it by the Claimant, including a specific example of review activity by another DSM. LH also at that point knew the DSMs had access to the new system to review CCTV because LH took the step of closing that DSM enhanced access down. LH also had the ability to interrogate the system to see when DSMs had been reviewing CCTV (albeit not the specific DSM who had logged in as it was a generic log in). But LH would have been able to see in general if there was a pattern of DSMs generally reviewing CCTV. Yet LH, despite saying

he did a detailed investigation, also did not take steps to consider the activity of other DSMs. Instead, all LH did in his appeal outcome letter was fudge the issue by saying if there was evidence of other DSMs undertaking such activity then appropriate action would be taken to address it. But that does not inform his decision making in relation to the Claimant;

4.9.3 Secondly, MP should have taken steps to try to contact MBA. The Claimant's assertion about MBA's involvement, if correct, went beyond MBA saying the site did not need CCTV licenses or that MBA would always have thought NSOC had been properly involved. On the Claimant's account MBA had said they did not need a license for internal reviewing, and that MBA had signed off DPAs that would have shown the Claimant reviewing CCTV. Any reasonable employer would have tried to make enquires of MBA in such circumstances. Instead, MP appears to have pre-supposed what MBA's knowledge and understanding would have been without actually checking with MBA. That did not, in my judgement, approach the point with an open mind. In my judgement MP also unreasonably placed the evidential burden on the Claimant to prove what the Claimant said MBA's involvement was and then, when the Claimant could not produce such proof, said the Claimant had not proved his case. But MP was under a duty to investigate reasonable lines of enquiry that could support the Claimant's defence, and MP acknowledged it could be an important point. Realistically it would be very difficult for the Claimant to contact MBA or to get him to engage. It was the Respondent who had the relationship with MBA as a former employee of their BBC client. LH's oral evidence was that he did try to make enquires with MBA. It has to be said I do struggle with the credibility of that evidence given it featured for the first time in LH's oral evidence, and there are no documents at all to back that up such as emails. But even if I am wrong about that, I do not consider LH took reasonable steps to contact MBA because, on his own account, LH left it to others to try to track MBA down or make contact, LH did not, for example, do a simple google search to find where MBA now works and try to make contact that way;

4.9.4 Thirdly, MP (and thereafter LH) should have looked at the DPA records to see what NSOC, MA and Mitie managers knew or reasonably could have drawn from their contents as to whether the Claimant and other DSMs were in fact, in practice, doing CCTV reviews, or indeed other CCTV operational activities beyond mere viewing and, if so, in what circumstances. Again, it would have gone to the Claimant's understanding of what he could and could not do, what other DSMs were doing, the consistency of treatment between the Claimant and other DSMs in Cardiff, and what the managerial knowledge was. LH had also spoken to the head of the NSOC, but had not asked her about this issue.

4.9.5 Furthermore, by appeal stage, the Claimant had given LH further information about being given instructions to review CCTV footage, saying he had been given the instruction by Alec, John and Martyn. He gave a further example of AM and Johan saying that it may be best to have a CCTV licensed colleague with them when downloading footage (so the piggyback point). LH said in oral evidence that he had spoken to AM, but had not asked AM about such points. Such enquiries should reasonably have been made by any reasonable employer in the circumstances. Similar to MP, LH appears to have just pre-supposed the outcome of enquiries.

4.10 I also do not consider it was a given that the outcome of such investigative enquiries would not make a difference. Pragmatically I can see it may have ended up being difficult to get Mr MBA to engage, but we do not ultimately know that as no contact was made. But in any event, there is nothing to say what the evidence from other DSMs would have been, or what the DPA records would have shown (some of which would have involved MBA in any event) or what managers such as AM would have said. I note in that regard Mr Lewis' evidence that he had spoken to AM about his concerns around CCTV misuse; that in Mr Lewis' experience DSMs were being tasked with undertaking activities they needed a CCTV license for such as obtaining footage for the police; and that AM had ultimately said CCTV licenses were not a requirement of the BBC on site. Likewise, the Claimant says that DPAs were also sent to AM for approval and he had a conversation with AM after Mr Lewis left about not needing CCTV licences. The Claimant says that AM knew DSMs were ringfencing and playing back footage. I appreciate at the point in time LH did not have the detail that is now in the Claimant's witness statement. However, the point is that there was scope for AM to give information about such things to LH if enquiries had been made. Likewise if LH's enquires with people such as GJ and AM had been revealed to the Claimant, and revealed to the Claimant before a final decision was made, the Claimant would had the opportunity to respond and give further detail.

4.11 I also do not consider that LH at appeal stage reasonably investigated what had happened with the setting up of the DSM log in on the new system, and who and how the instruction was given to set it up. It must have come from the Respondent that the DSMs would be given the play back facility. LH simply supposed that the Claimant should have known better, rather than looking at the whole wider picture of what was going on and had been going on, on the ground in Cardiff.

4.12 In such circumstances I consider the findings reached by the Respondent were not reached having followed an investigation that was within the reasonable range. It was not rendered in the reasonable range by simply relying on the fact the Claimant did not have a CCTV license, and by saying the Claimant's experience and SIA door supervisor license meant the Claimant knew he should not be doing it. There was no clear picture before the Respondent as to what the Claimant's training was, and they had not given him any training themselves or any standard operating procedures on CCTV usage for example. The Respondent had the Claimant's account of what was happening on the ground in Cardiff, and that it was done with the knowledge and direction of managers and the BBC, which would have suggested the Claimant did not necessarily know he should not, from his employer's perspective, be reviewing CCTV.

4.13 There is no one clear statement of exactly what the SIA picture is in the flow chart or other SIA material before me. For example, on one interpretation of the flow chart, a Door Supervisor License (amongst other licenses) would cover use of CCTV to guard against trespassers, or protect property. It does not on the face of it clearly say that does not cover activity reviewing CCTV (and indeed LH's supplemental statement seems to acknowledge this). It does not expressly say it only covers passive watching of live CCTV. Another interpretation of the flow chart could be that if the activity ultimately becomes one of potentially identifying particular individuals (so a movement from passive to active operation of CCTV), it would move back to the left hand side of the flow chart and potentially need a CCTV license. But that really is not clear. So I do not consider that is sufficient to say that from an SIA perspective the position would have been inherently obvious to the Claimant.

4.14 It is also not in my judgment inherently obvious that looking for what happened to a backpack would fall outside of the protection of property provision. I understand the Respondent's point that if you are looking at what happened to a backpack you are in reality looking at potentially whether individuals interacted with the backpack. The Claimant may therefore have overstated this point about only looking at an inanimate object. But again that dividing line between the right hand side and left hand side of the flow chart is not particularly clear (or indeed the text boxes at page 95).

4.15 The Claimant also referred LH to this flowchart but LH did not look at it and go through it with the Claimant

4.16 In any event this SIA analysis ignores the question of what was happening on the ground at the BBC Cardiff site.

4.17 Relying on SIA documents also begs the question why does the Respondent not set out clearly in their own staff documentation and training materials the standards and rules they were applying? That way the Claimant, and everyone else would have been in a position of certainty.

4.18 So in my judgement, the Respondent's defence to this case falters in that first part of the Burchell test analysis. The Respondent did not act reasonably in the circumstances, including their substantial size and administrative resources which would have allowed them to take proper investigatory steps, in treating their misconduct reason as a sufficient reason to dismiss the Claimant.

4.19 But I would make a further few observations. Firstly, an employee should be able to clearly understand the charges they are facing and the charges that are ultimately found against them. I do not find that the Respondent ever clearly said to the Claimant what the direct GDPR breach was said to be. This was outside the reasonable range, particularly bearing in mind the size of this employer and also the fact they say the BBC client and protection of the BBC's data is of fundamental importance to them. That was unfair and it had been pointed out by the Claimant's trade union representative.

4.20 Secondly, the final finding on appeal became a finding that the Claimant had reviewed CCTV footage to identify individuals or investigate the actions of individuals. It is poorly set out, but in essence I can see that it is adopting the language of the SIA about where it is said a CCTV license was needed, and as set out in MP's decision letter. The GDPR and SIA points may be linked because I anticipate that data protection provisions are probably one of the reasons behind SIA licensing. But nonetheless, the Respondent should have framed their allegations and findings clearly and consistently. The failure to do so was unfair and outside the reasonable range. LH in reframing it in the appeal outcome also deprived the Claimant of the opportunity for final input, and final input about the SIA standards which are not in themselves clear.

4.21 Thirdly, I do not go so far as to find there was a pre-determined decision to dismiss by MP and LH. But what MB had done in his interaction with JA was misconceived and dangerous. MB had framed the Claimant in the mind of the BBC as, in essence, potentially a rogue operative and someone who had not told the truth, when proceedings were at an early stage. It led to JA making his comments about trust which MP and LH were aware of. There is then a real risk of conscious or subconscious bias given the importance of the client relationship that MP described as being worth millions. It would bring with it a potential desire to not expose wider working practices

or knowledge of practices of DSMs in general on the part of Mitie and the BBC, and to instead treat the Claimant as a standalone case and then shut down the DSM review access to stop other instances happening. It also would have made it hard to go back to the BBC and explain the whole picture (if the Claimant ultimately was correct) and explain why, for example, the Claimant would not ultimately be dismissed. I do have genuine concern that even subconsciously these factors were weighing on the mind of MP and LH in their treatment of the Claimant's case and why, for example, they were keen to simply find the Claimant knew he should not be doing CCTV reviews and why they did not dig further into what was happening on the ground at the BBC Cardiff site. I would also find that this rendered the dismissal unfair.

4.22 I also consider the delay in the proceeding was outside the reasonable range, albeit if I were looking at that point in isolation I would not find of itself it rendered the dismissal unfair in the round. But bearing in mind my other findings of unfairness above, it does contribute to the overall unfair dismissal. Having regard to the reason shown by the employer, and regard to all the circumstances including the size and administrative resources of the Respondent, equity and the substantial merits of the case, the Respondent acted unreasonably in treating it as a sufficient reason for dismissing the employee. The Claimant was unfairly dismissed.

5. Discussion and Conclusions – Wrongful Dismissal

Was the Claimant guilty of gross misconduct? Did the Claimant do something so serious that the respondent was entitled to dismiss without notice?

5.1 In the wrongful dismissal claim I have to consider the position for myself on the evidence before me. On the balance of probabilities, I do not find it established that the Claimant clearly knew he was not entitled to review CCTV to undertake an activity such as a bag search, and that if he did so it would be considered gross misconduct. There is no clear statement of such standards before me from the Respondent to the Claimant whether in a disciplinary policy or a standard operating procedure, for example. The SIA license position is not, for reasons already given, sufficiently clear, particularly in the absence of a clear standard set by the Respondent. I accept the Claimant's evidence that on the ground DSMs were doing things such as lost property searches, and that this was a known activity. I do not find the Claimant clearly knew he should not be doing that. The Claimant did not on the facts do something so serious the Respondent was entitled to dismiss without notice, and the wrongful dismissal claim succeeds

6. Remedy – the legal principles – "Polkey"

6.1 Section 123 ERA says:

> *(1) Subject to the provisions of this section and …, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.*

6.2 The origins of the so called Polkey principle are that to assess a compensatory award in a way that complies with Section 123 ERA it may be legitimate to reduce

the compensation to reflect the chance that the Claimant would have been fairly dismissed even if a proper procedure had applied: Polkey v A. E. Dayton Services Ltd. Respondents [1988] AC 344.

6.3 In O'Donoghue v Redcar and Cleveland Borough Council [2021] EWCA CIV 701 the Court of Appeal reminded us that the test is a just and equitable one and can, where appropriate, apply where the employee has been dismissed both substantively and procedurally unfairly. It does not, in my understanding, limit the potential impact of Polkey to cases of procedural unfairness and indeed more modern authorities in general do not draw such a bright line between procedural and substantive issues when deciding if a dismissal is unfair because Section 98(4) is ultimately a unitary test. A tribunal may look at the question of whether, but for the dismissal, the Claimant would still at some point have been dismissed such that it is just and equitable for the compensation to be adjusted on that basis.

6.4 In Hill v Governing Body of Great Tey Primary School [2013] ICR 691 it was said:

A "Polkey deduction" has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done.

6.5 While the determination necessarily involves a degree of speculation it must be based on evidence. The assessment is what this employer would have done if it had acted fairly, not what some other hypothetical fair employer would have done.

6.6 The principles were summarised in Software 2000 Ltd. v Andrews [2007] ICR 825 as:

"(1) In assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal.

(2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future.)

(3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct

what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

(4) Whether that is the position is a matter of impression and judgment for the tribunal. But in reaching that decision the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence."

7. Discussion and Conclusions – "Polkey"

7.1 Here I acknowledge the need not to shy away from the fact the task involves some speculation and uncertainty. But I do consider that this case falls within the bracket of being a case where the whole exercise of seeking to reconstruct what might have been if this employer had acted fairly is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made. I decline to make a Polkey reduction.

7.2 Firstly, because I have to consider what the position may have been if MB had not had the exchange he had with JA, which in turn led to the pressures it brought to bear in MP and LH in having to navigate the position with the BBC. If that interaction between MB and JA had not happened there would not have been such a difficulty in terms of being seen to backtrack in respect of the Claimant's situation because the BBC's expectations would not have been as they were once MB and JA had that exchange. So if, for example, a fuller investigation found there were general practices at play in Cardiff that were not satisfactory (and indeed potentially the BBC had a part to lay in that too with MBA) then it is not the case that inevitability the Respondent would have been looking at dismissing the Claimant and any other DSM counterparts involved**.**

7.3 Secondly, whilst I said that MP and LH had it technically open to them to reject the Claimant's account that he did not know he should not be reviewing CCTV, that was predicated on the basis of having undertaken a proper investigation into the working practices of the DSMs and what was known about those working practices by the Respondent and the BBC. I have identified above a whole series of enquiries that were not undertaken. I simply do not know what those enquiries would have thrown up because the investigations were never done. If the Claimant is correct they potentially would have shown that many people knew what was happening on the ground at BBC Cardiff including MBA and AM. Again, on the face of it, that is not in the territory of dismissal but rather one of learning, resetting and training. In these circumstances I find the task of apportioning a Polkey deduction as being too speculative for me to meaningfully undertake it.

8. Remedy – The legal principles – Acas Uplift

8.1 Section 207A(2) TULR(C)A provides that: "*If in any proceedings to which this section applies, it appears to the employment tribunal that – (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) the employer has failed to comply with that Code in relation to that matter, and (c) the failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25 per cent*."

8.2 Under section 124A ERA any adjustment only applies to the compensatory award.

9. Discussion and Conclusions – Acas Uplift

9.1 Paragraph 5 of the Acas Code of Practice on disciplinary and grievance procedures says that it is important to carry out necessary investigations without unreasonable delay to establish the facts of the case. It says in some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In the Claimant's case there was not a fair investigation meeting with the Claimant. He had attended a meeting about the bullying allegation. Given how serious the CCTV allegation turned out to be the Claimant should have had an investigation meeting where he understood what was being investigated.

9.2 Paragraph 11 of the Acas Code requires the disciplinary meeting to be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case. There was a breach of paragraph 11 because the disciplinary hearing was not held without unreasonable delay.

9.3 On behalf of the Claimant it was submitted there was also a breach of paragraph 12 which says that 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 made. The employee should be given a reasonable opportunity to ask questions, present evidence, and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. I do not find there was a breach of paragraph 12 because at the meeting itself the Claimant was given the opportunity to set out his case and answer the allegations, he had the opportunity to go through the evidence that was gathered, ask questions, present his evidence and the like. He was given the opportunity to raise points about information provided by witnesses. In reality the heart of the Claimant's complaints and my findings are about the investigation points rather than the disciplinary meeting itself.

9.4 The point better falls within paragraph 23, which says that a fair disciplinary process should always be followed, before dismissing for gross misconduct. There was not a fair disciplinary process here because of the failure to undertake important investigatory steps in the various ways I have found above.

9.5 There was also a breach of paragraph 24 which says that disciplinary rules should give examples of acts which the employer regards as acts of gross misconduct. Whilst I did not see the disciplinary policy, LH accepted that it was generic and short.

9.6 There was also a breach of paragraph 27 which requires the appeal to be dealt with impartially. The appeal was not dealt with impartiality in the sense of the impact that the actions of MB had on LH, even subconsciously.

9.7 In those regards the Respondent failed to comply with the ACAS Code of Practice and I find those failings were unreasonable. I then have to consider whether it is just and equitable to make an adjustment, and if so the size of that adjustment. I decide that it is just and equitable to make an adjustment and to increase the compensatory award payable to the Claimant by 15%.

9.8 I set it at that level because it is not the case that the Respondent followed no procedure at all. There was the disclosure of documents, there was a disciplinary hearing where the Claimant was allowed to give his account. The Claimant was given the right of appeal. LH did some investigations albeit not enough. The Claimant was given the rationale for the decisions. It is also not the case that MP and LH deliberately set out to dismiss the Claimant in some bad faith way, rather than subconscious pressures being placed upon them. So it is not case that they were deliberately just going through the motions, for example. Instead, it is more the situation that the Respondent made a series of mistakes, even if they were serious mistakes. But I also consider it appropriate to reflect the fact that the investigatory steps that were not taken were important ones. Therefore, I consider a 15% uplift is a just and equitable one.

10. Remedy – The legal principles – Mitigation

10.1 In an unfair dismissal claim, section 123 Employment Rights Act 1996 provides (so far as relevant for present purposes):

"(1) Subject to the provisions of this section … the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

…

(4) In ascertaining the loss referred to in subsection (1) the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as to damages recoverable under the common law…"

10.2 In this case I was asked to make findings about future loss. In reviewing the case law relevant to the question of mitigation, the EAT in Cooper Contracting Ltd v Lindsey UKEAT/0184/15 laid down the following guidance:

(1) The burden of proof is on the wrongdoer; a Claimant does not have to prove they have mitigated their loss.
(2) It is not some broad assessment on which the burden of proof is neutral; if evidence as to mitigation is not put before the tribunal by the wrongdoer, it has no obligation to find it. That is the way in which the burden of proof generally works; providing information is the task of the employer.
(3) What has to be proved is that the Claimant acted unreasonably; the Claimant does not have to show that what they did was reasonable.

(4) There is a difference between acting reasonably and not acting unreasonably.
(5) What is reasonable or unreasonable is a matter of fact.
(6) That question is to be determined taking into account the views and wishes of the Claimant as one of the circumstances but it is the tribunal's assessment of reasonableness - and not the Claimant's - that counts.
(7) The tribunal is not to apply too demanding a standard to the victim; after all, they are the victim of a wrong and are not to be put on trial as if the losses were their fault; the central cause is the act of the wrongdoer.
(8) The test may be summarised by saying that it is for the wrongdoer to show that the Claimant acted unreasonably in failing to mitigate.
(9) In cases in which it might be perfectly reasonable for a Claimant to have taken on a better paid job, that fact does not necessarily satisfy the test; it would be important evidence that may assist the tribunal to conclude that the employee has acted unreasonably, but is not, in itself, sufficient.

10.2 Assessing future loss is an inherently speculative task. It was said in Cooper Contracting that it is a predictive enquiry. It must take account of the possibilities, many of which will be far less than certain. In that context it is entirely permissible to adopt a period of time to express a fair assessment of the losses.

11. Remedy – Discussion and Conclusions – Mitigation

11. My starting point is that it is important to remember that the Claimant lost a job as a Duty Security Manager or what the Respondent now calls a Team Leader. He did not just lose a job as a security officer. At the time of dismissal the rate of pay was £12.90 an hour. I can see from the bundle of job records that the Respondent provided that the standard Mitie security officer rate, whether at the BBC or elsewhere, is £12 an hour.

12. The Claimant is now a security officer at SGD Guarding earning the minimum wage which is now £11.44. He also does some ad hoc work for Citi Security.

13. The work the Claimant does suits him in terms of travel and the hours of work because he does not drive and has caring arrangement for his mother.

14. The Respondent provided a bundle of job advertisements that are in the Remedy Bundle and there is no benefit to be gained in my trying to summarise them all here. But I considered them all and heard the Claimant's evidence in cross examination about them. In my judgement, there is nothing in that mitigation evidence presented by the Respondent that shows there is a preponderance of team leader work available locally (or indeed further afield like Bristol) in the security industry. The Claimant's evidence that there are few such opportunities does therefore seem to be demonstrated by the Respondent's mitigation evidence. It is also supported by the fact it took the Claimant 8 years and a move to Cardiff to get promoted.

15. The Claimant says he is now at back of the queue at SGD Guarding in terms of promotion opportunities. He says he thinks it will take another 5 years. 4 years future loss is sought in the updated Schedule of Loss, which is an increase from 2.5 years future loss, which is where the position stood at last hearing before me.

16. But the Claimant does also have a long career history of working in the security industry and his past experience as DSM in his favour. I appreciate what the Claimant says about a lack of academic qualifications but I have had the benefit of hearing evidence from him twice, and he is also a personable, intelligent, reliable individual and I can see he has lots to offer in terms of the security management industry.

17. The Claimant says employers also ask for 5 years of references and that makes it difficult to his history with Mitie and this previous tribunal claim. He says he is also hampered by a lack of a personal reference from Mitie, other than factual reference.

18. Doing the best I can in what all the authorities appreciate is a speculative assessment; I consider the Claimant is likely to get an equivalent team leader role, with equivalent level of pay, in approximately a further 2.5 years' time. He already of course has just over 1 year in his new employment since his dismissal.

19. I find this because whilst I acknowledge what is said about frequency with which team leader roles come up, but against this the Claimant is not saying there are no opportunities, and there are (albeit with a waiting list) with his current employer. I also factor in what I have said about the Claimant's personal abilities, what has to offer, and his long career history including previous management experience. I acknowledge the lack of a personal reference but Mitie will give factual one, and as time goes on the absence of a personal reference becomes less material and he will be able to get one from his current two employers. The Claimant is also working in two jobs and within that has the ability to gain personal contacts and recommendations, and again the prospect for that increases as time goes on. Further, as time moves on the relevance of the tribunal claim dissipates and likewise the Claimant is able to rebuild his confidence and self-esteem. The ending of tribunal proceedings often helps people in that regard. So that additional 2.5 years is my best, forward looking assessment.

20. There is then the question of whether the Claimant should reasonably move elsewhere in meantime to gain a higher pay in security officer role than he is currently earning. Again, looking at the bundle of job adverts, some of the vacancies pay the same rate the Claimant is currently earning. Some like Mitie are £12 an hour, for example Asda. There are a few which pay a bit more again, although some have variable rates and it is difficult to understand what affects the range.

21. The minimum wage is due to increase £12.21 in April 2025. What that will do to market at Mitie or elsewhere is really hard to say because it does not necessarily mean there will be an increase in the general market, other than by those employers who are currently at a level below that rate.

22. Doing the best I can, I do not consider it reasonable to expect the Claimant to move to a role that would take him from £11.44 to say £12 an hour or thereabouts in that period of time. It is difficult to see how the difference would be worth the potential consequences in terms of difficulties potentially with transport links and the Claimant's caring responsibilities. I do not think travel to, for example Bristol, in reality makes that much of a difference in terms of opportunities and it is hard to see how it would be reasonable to expect the Claimant to do so given he does not drive and his caring responsibilities. The Claimant lost his job, not through his fault,

where those needs were accommodated at the Respondent in terms of his hours of work, place of work and transport links.

23. Moreover, and importantly, if the Claimant moves around it is actually likely to make the prospects of getting promoted to a team leader role more difficult because he would lose his place in the pecking order at his current employer and he would look, to potential employers, like someone who moves around. So to, in effect, require the Claimant to move on in the next 2.5 year period would end up being detrimental to the first finding I made about setting that 2.5 year period in the first instance and my reasons for doing so.

24. I should also add that this 2.5 year period is a figure I genuinely reached on my own account and following the analysis I set out above and having heard the evidence and the parties' submissions. I say that because I acknowledge that it has ended up being the same figure that was in the Claimant's previous schedule of loss. But I do consider it is a fair reflection of the Claimant's likely losses.

25. The parties should then be able to work through and agree the figures but the Claimant's actual earnings should be calculated on the basis of £12.21 an hour from April 2025 when the national minimum wage is due to increase.

12. Remedy – final figures

12. With time the parties were then able to agree the figures set out within the Remedy Judgment, namely:

- Notice pay/Wrongful Dismissal (including the 15% uplift) the gross sum of £2799.08
- An unfair dismissal basic award of £4761.38
- An unfair dismissal compensatory award (including the 15% uplift) of the net sum of £24,077.26.

Employment Judge R Harfield

Date 2 April 2025

JUDGMENT SENT TO THE PARTIES ON

07 April 2025

Katie Dickson
FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Recording and Transcription

Please note that if a Tribunal hearing has been recorded you may request a transcript of the recording, for which a charge may be payable. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings, and accompanying Guidance, which can be found here:

https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/