



EMPLOYMENT TRIBUNALS

and

Claimant

Mr S Morris

Respondent

Nottingham City Council

At a Hearing

Held at: Nottingham

Before: Employment Judge Legard (sitting alone)

On: 13th – 17th January 2020

Representation

For the Claimant:

In person

For both Respondents:

Ms Barney of Counsel

The Employment Judge gave judgment as follows.

JUDGMENT

1. The claim for automatic unfair dismissal under s.103A ERA is not well founded and is dismissed.
2. The claim for automatic unfair dismissal under s.100(1)(c) ERA is not well founded and is dismissed.
3. The claim for 'ordinary' unfair dismissal is well founded and succeeds.

4. The claim for wrongful dismissal is well founded and succeeds.

REASONS

1. Issues

1.1 The matter came before Employment Judge Evans on 7th February 2019 for case management upon which occasion he identified the following issues as matters for determination:

(a) s.100 ERA – Automatic unfair dismissal in ‘health and safety’ cases

1.2 Was the reason (or, if more than one, the principal reason) for the Claimant’s dismissal the fact that, in circumstances of danger which he reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or others from that danger? (s.100(1)(e)).

EJ Evans went on to outline the factual basis upon which the above complaint was advanced; namely that:

- The circumstances of danger related to a proposal to install and operate a steam bypass modification whilst continuing to operate the plant at 100% steam capacity;
- The steps that the Claimant took or proposed to take was to send an email addressed to his line manager Gordon Thomson, dated 8th November and timed at 9.08am, shortly before the planned operation came into effect in which he formally raised health and safety concerns.

(b) Wrongful dismissal

Case number: 2602226/2018

1.3 Was the Respondent lawfully entitled to terminate the Claimant's contract without notice?

1.4 In the context of this case, the above issue is particularly important for the following reasons:

1.5 It is common ground that the Claimant's employment commenced on 9th May 2016 and he was summarily dismissed on 3rd May 2018. Accordingly, on the face of it, he lacks sufficient qualifying service in order for the Tribunal to accept jurisdiction for a complaint of 'ordinary' unfair dismissal. However, as EJ Evans correctly identified (and as the Respondent concedes), if the Tribunal was to find that the Respondent was not lawfully entitled to terminate the Claimant's contract without notice, then the Tribunal would have jurisdiction (for the UDL complaint) on the basis that, pursuant to s.97(2) ERA, his continuity of employment is deemed to have been extended by (in this case) one week. This would, of course, mean that he is to be treated as having completed two years service as at the effective date of termination. On the other hand, if the Tribunal finds that the Respondent was entitled to terminate his contract without notice, then his effective date of termination falls short and accordingly there is no jurisdiction to entertain a complaint of ordinary unfair dismissal.

(c) 'Ordinary' unfair dismissal (s.98 ERA)

1.6 Subject to the above jurisdictional point, the standard questions fall to be considered under s.98 ERA; namely:

- The reason or principal reason for the Claimant's dismissal and whether it constitutes a potentially fair one within the meaning of ss.98(1);
- If it does, whether the Respondent acted reasonably in treating it as a sufficient reason for dismissal (s.98(4)).

In this case, the Respondent relies upon conduct as the reason for dismissal and, consequently, the so-called 'Burchell' test is likely to come into play (considered below).

(d) 'Polkey' and 'contributory conduct'

The Respondent invited me to consider both 'Polkey' and 'contributory conduct' issues at the liability stage and, having explained to the Claimant in layman's terms what was meant by both, I agreed so to do.

(e) 'Whistle-blowing' (s.103A ERA)

- 1.7 At the case management hearing, and subsequently, it became clear that that the Claimant was seeking to advance, in addition to the above complaints, a claim that he had been automatically unfairly dismissed by reason of making protected disclosures. The Respondent did not contest the Claimant's right to advance such a complaint and it was agreed that the claim form did not require amendment.
- 1.8 Unfortunately, however, there had been no attempt prior to this hearing to clarify the factual or legal basis upon which the 'PID' claim was being advanced. There was no agreed list of issues before me. Without wishing to appear disloyal to my judicial colleagues, it is a matter of regret that this specific issue was not considered at the second case management hearing (held on 30th July 2019).
- 1.9 Accordingly, at the outset of this hearing, valuable time was taken up in order to do precisely that. First of all the Claimant confirmed that he was restricting his 'PID' or 'whistle-blowing' complaint to one of automatic unfair dismissal under s.103A ERA. He neither pleaded nor relied upon any detriments, although he sought to refer to and rely upon various events by way of important evidential background.
- 1.10 Following detailed discussion, it was agreed that the Claimant was relying upon four potential protected disclosures. They were as follows:

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- The contents of the Claimant's email dated 8th November 2017 (referred to above);¹
- The contents of an email from the Claimant's union representative, Garth Wallace, addressed to Gordon Thomson and dated 21st December 2017;²
- A reference to 'process safety' contained within paragraph 9 of a grievance document dated 12th February 2018;³ and
- An extract from the Claimant's appeal letter dated 25th May 2018, specifically paragraph 4 referring to, amongst other things, the '...illegal and reckless actions and behaviour...' of Gordon Thomson.⁴

1.11 The fourth alleged disclosure is post-dismissal and could not therefore have had any impact upon the decision to dismiss. The Claimant relies upon it in support of an argument that it infected the decision to uphold the decision to dismiss on appeal.

1.12 The questions therefore that arise are as follows:

- Did the Claimant make the above disclosures of information in accordance with s.43C ERA?
- If so, did the Claimant have a reasonable belief that the information he disclosed tended to show that the health and safety of any individual has been, is being or is likely to be, endangered (s.43B(1)(d))?
- If so, did the Claimant have a reasonable belief that the disclosure was in the public interest?
- If so, was the reason (or, if more than one, principal reason) for the dismissal of the Claimant the fact that he had made such disclosure(s)?

1.13 The Respondent was content to proceed on the above basis and no other jurisdictional issues were identified by either party.

¹ p.393

² p.520

³ p.682

⁴ p.1043

2. **Evidence**

- 2.1 I have been referred to a significant number of documents contained within two files of documents comprising some 1350 or so pages. During the course of the hearing, a significant number of documents were added to the bundle. I have read only those pages to which I have been either directly referred in evidence or which are referenced within the witness statements.
- 2.2 I have heard evidence from, on the Respondents' behalf, Gordon Thomson (the Claimant's line manager); Antony Greener (Initial Investigating Officer); Michael Bexton (Investigating Officer); David Halstead (Dismissing Officer) and Hugh White (Appeal Officer). I then heard evidence from the Claimant himself. All the above witnesses were thoroughly cross-examined. The Claimant also tendered his Union Representative, Mr Wallace, as a witness. Notwithstanding the absence of any witness statement from Mr Wallace (save for a two line email confirming that he agreed with the contents of the Claimant's) I permitted him to be sworn and give evidence. However, because the Respondent elected not to cross-examine him, his time in the witness box was short-lived.
- 2.3 Despite both parties wishing to emphasise 'credibility' issues, I did not find his case to be one which required a significant resolution of factual conflict. That said, there were a number of differences as to factual interpretation and I address these below. In broad terms, I found all witnesses (including the Claimant) to have given credible testimony although I agree with Ms Barney that the Claimant had a somewhat unfortunate tendency to deflect uncomfortable questions.

3. **Findings of Fact**

- 3.1 I find the following facts on a balance of probability.

- 3.2 The non-contentious facts that underpin this case are, particularly for those not well versed in engineering matters, relatively complex but it is important that they are summarised in order to better understand the basis upon which the parties advance and defend these complaints respectively. My summary is bound to fall short from a technical, engineering perspective but it is simply a broadbrush attempt to capture the essential elements of a relatively complicated process.

Background

- 3.3 The Respondent ('NCC') operates a district heating scheme supplying heating (and electricity) to approximately 100 commercial and 5000 residential premises in the St Anne's area of Nottingham. This is delivered via a wholly owned subsidiary company of NCC, called Enviroenergy ('EE'). EE's board of directors is made up of elected Councillors.
- 3.4 There are essentially three elements to this district heating scheme. Firstly, there is a waste incineration plant located at Eastcroft in Nottingham ('Eastcroft'). Secondly, there is a heating station in London Road ('LRHS') operated by EE on behalf of NCC where the steam is converted into electricity or heat as the case may be. Thirdly, there is the district heating network itself which comprises a network of pipes and infrastructure supplying heat to the end customer.
- 3.5 Eastcroft is operated by a company called FCC. At all material times, the key personnel at FCC were Phil Eyre, the General Manager (essentially the Claimant's counterpart) and Eric Archibald, the Maintenance Manager.
- 3.6 The incineration of waste produces steam. There are two 'lines' in operation at Eastcroft from which the steam then passes under high pressure via pipelines to the London Road Heat Station ('LRHS'). The steam passes through a High Pressure ('HP') Header to either a turbine (which powers a generator) or, via a Low Pressure ('LP') Header and then a heat exchanger, into the district heating network itself. If necessary (for example when the incinerator is down), steam can be fed into the system via two gas boilers. There are two high pressure safety valves, built into the pipework, in the event of any excess build up of steam

pressure. If necessary the steam passing through the turbine can be redirected through a condenser, restoring it to water and allowing it to be fed back into the system.

3.7 The parties each provided the Tribunal with diagrams of the above system, both of which proved to be extremely useful in understanding the working of the system.⁵

3.8 As stated above LRHS is operated by EE. At all material times, the Claimant ('C') was the Head of District Heating, the most senior employee based at LRHS and Phil Mitchell ('PM') his maintenance manager. C reported to Gordon Thomson ('GT'), the Director of Commercial Infrastructure and Energy, and would also report on operational matters to the Board of EE.

3.9 The system as a whole, including all the pipework, fittings, valves, boilers etc., falls to be regulated in accordance with the Pressure Systems Safety Regulations 2000 ('PSSR'). Regulation 13 PSSR provides as follows:

The employer of a person who modifies or repairs a pressure system at work shall ensure that nothing about the way in which it is modified or repaired gives rise to danger or otherwise impairs the operation of any protective device or inspection facility.

The regulations also contain statutory guidance which includes the following (at paragraph 177 thereof):

Where substantial modifications or repairs (including extensions or additions) are to be carried out which might increase the risk of system failure, the user should consult a person who is competent to advise before work begins.

3.10 The system was insured through Zurich. It is common ground between the parties that Zurich also fulfilled the role of 'Competent Person' for the purpose of advising

⁵ pp.1310-11

upon, authorising and inspecting repair works undertaken to the system. Phil Ryan ('PR') was the main 'Zurich' point of contact in respect of this system and Richard Fairhurst ('RF') was his manager. At all material times, Zurich maintained what was described and referred to within the hearing as a 'database.' In terms, this is a collection of documents which record maintenance and repair work undertaken to the system, detailing the work itself; relevant dates; authorisations and so forth.

- 3.11 It was by reference to the PSSR and C's job description that the Respondent focussed its case although there was passing reference made to a number of internal 'health and safety' policy documents. Particular emphasis was placed on NCC's policy statement for the testing and inspection of fixed installations, specifically the definition of 'responsible person' – C maintaining that this was PM, his maintenance manager, whereas R contended that C was the 'responsible person' as the most senior person on site.⁶

Appointment and job description

- 3.12 There was a dispute on the evidence as to the precise terms of C's employment and, more specifically, the job description relevant to his post. This was relevant because C maintained that his alleged actions or omissions were later judged by reference to the wrong job description criteria.
- 3.13 C was first offered a District Heating Manager post in the autumn of 2015. Whilst expressing an interest, C took the view that the proposed remuneration (c.£51-58k pa) was not commensurate with the demands of the role and essentially counter-offered on the basis of a £70k package. Initially, this counter-offer was rejected. However, in December 2015, C received an email from NCC informing him that, following a detailed review of the district heating scheme, the post had been re-evaluated. In January 2016 a further interview took place following which C was appointed to the post of Head of District Heating (subject to him having to complete his notice period with his then current employer).⁷

⁶ p.871

⁷ p.299

3.14 This post was graded at SLMG 3 level (i.e. significantly higher than the original Manager post had been advertised). It came with a starting salary of c.£68k (in other words, broadly in line with C's original expectation). Attached to C's offer letter was, amongst other things, a job description ('JD'). As one would expect, this JD sets out C's key responsibilities and included:

- Responsibility for all aspects of service delivery and performance management for the allocated group of services.

On 26th January 2016 C signed confirmation of receipt of the above and acceptance of the job.⁸

3.15 Subsequently, at the disciplinary stage, a dispute arose as to whether (a) C had received the correct JD and (b) whether he ought properly to be judged by reference to the JD for the District Heating Manager role (a role graded at 'J' and the JD C claimed to have erroneously received).⁹ Interestingly, despite the differences in seniority between the two roles, there are no stark differences insofar as the contents of both JDs are concerned. Both, for example, refer to responsibility for ensuring effective operational management and that health and safety policies and regulations are followed.

3.16 In any event, I am satisfied that C did receive the JD for the SLMG 3 post and that it was by reference to this JD that the Respondent was entitled to judge his actions or omissions, as the case may be. It seems to me inconceivable that C, a person with a commendable eye for detail, would have failed to notice that his JD failed to match his role and/or failed to pass comment on that anomaly. Equally, it is inherently unlikely that the Respondent, having gone through the detailed process of re-evaluation involving the production of a tailored JD, would then have despatched the wrong one. Finally, the paper trail itself supports the above conclusion.

⁸ p.316

⁹ pp. 942-945

C's relationship with FCC

3.17 It is abundantly clear that C's relationship with FCC was fractious. In email correspondence with GT in the spring of 2017, C complains to GT about the 'bullying' behaviour of certain individuals at FCC (principally directed at PE's immediate line manager, Steve Brown). FCC's profitability depends, of course, on the volume of waste that they can channel through the Eastcroft incinerator and if, for any reason, the district heating system is 'down' or otherwise unable to absorb a full compliment of steam, then this has repercussions on FCC. C's central complaints appear to be that Steve Brown places intolerable pressure on both himself and his engineers; short-cuts safety processes and repeatedly goes over his head.¹⁰

3.18 In response GT expressed solidarity and support, undertaking to write a 'strong message' in support of him and, at one point, stating:

*What you have been subjected to since day 1 is obscene. FCC's behaviour must and will stop, this is an absolute requirement.'*¹¹

Appraisal

3.19 At the end of August 2017, C was appraised by GT. The 'end of year review' contains observations that are both positive and negative. On the negative side, GT records his concerns regarding C's relationships with both FCC (mainly his counterpart Phil Eyre) as well as his own colleagues. He also describes C's reporting of issues as 'sometimes overly strong.' On the positive side, GT refers to, amongst other things, his technical knowledge and work ethic. In his accompanying email, GT describes his positive aspects as 'exceptional' although makes clear that the negative aspects must be addressed.¹²

¹⁰ pp.199-200

¹¹ Email dated 11.5.17 (p.199)

¹² pp.354-355

Repairs to LP Header

- 3.20 On 3rd and again on 23rd August 2017, weld repairs were undertaken to leaks in the pipework feeding into the LP Header (which is essentially a steam storage tank). It is common ground that these repairs were not authorised, inspected or approved by Zurich. It was this failure that formed, albeit in part, the later disciplinary charge against C – formulated as a ‘...failure to ensure PSSR were followed.’
- 3.21 C was aware that the repairs had been undertaken¹³ although the design and execution of the actual repair work itself was the responsibility of PM, the maintenance manager.
- 3.22 On or around 11th October 2017 the LP Header once again sprang a leak and C emailed his counterpart at FCC to inform him that the system would have to come out of service to allow for overnight repairs (planned for 16/17th October) to be undertaken.¹⁴ It is important to bear in mind that, earlier in the year, that there had been an unplanned shutdown lasting 18 or so weeks due to turbine repairs with resulting major financial consequences for both FCC and NCC (EE).
- 3.23 Once again, it is common ground that neither PM nor C sought approval from Zurich in respect of these proposed weld repairs. However, shortly before the repairs were due to be undertaken, Zurich were made aware (it is not clear how or by whom) and immediately intervened. GT was notified and emailed C in the following terms:¹⁵

‘...I’ve been told the LP weld repair can’t go ahead tonight as planned as we weren’t following Zurich procedures relating to on-site inspections and [Non-destructive Testing].’

¹³ See email trail at p.699 between C and FCC

¹⁴ p.358

¹⁵ p.363

This is becoming unsustainable. Please come and address that with me when you are next in ASAP.'

- 3.24 Zurich (PR) attended on site the following day and produced a report confirming that there were visible cracks and 'pin hole' leaks discovered in the LP Header pipework and that repairs had been previously undertaken without their consent or involvement.¹⁶ At least one of the leaks had occurred in the same place as the original weld repairs. Zurich insisted upon the repairs being re-done within a tight timescale, namely 4 weeks. The plant could continue to operate at capacity until 14th November but, in the event that the repairs had not been undertaken by then, the plant would have to shut down until such time as they were.
- 3.25 This incident also produced an internal report (authored by Mo Mustafa) which confirmed that the weld repairs had been carried out incorrectly and would have to be re-done.¹⁷
- 3.26 Later, on 23rd October, GT emailed Antony Greener ('AG'), amongst others, expressing his 'increasing operational/financial concerns' regarding both PM and C. It was clear that, by this time, GT's patience with EE (and specifically both C and PM) was wearing thin. He decided to take action. On 27th October he sent an email, reminding the recipients (of which C was one) of the major repercussions of the 18 week outage earlier that year, and effectively stripping C of a number of his major responsibilities with immediate effect. In terms, all major EE staffing, financial and operational decisions (including planned shut downs) would henceforth require his personal approval. GT also instructed Clive Williams ('CW') to formulate a plan for by-passing the LP Header to enable heating to continue to be fed into the network and both incineration lines kept open at normal operating capacity whilst the necessary repair work to the LP Header was undertaken. GT

¹⁶ pp.450-455

¹⁷ p.373

made it clear that any such by-pass works were subject to the Zurich's satisfaction and approval.¹⁸

Concerns raised by EE team engineers

- 3.27 In early November 2017 a number of concerns were raised by members of the EE team; mainly directed at PM, their maintenance manager, many of which were serious and safety-related. One of the many complaints related to the failure to inform Zurich of the planned repairs to the LP header. C was instructed to investigate those concerns and report back to GT.
- 3.28 C interviewed PM and emailed GT with his findings. Essentially, C discounted the complaints as a 'witch hunt' and unprofessional and personal 'point scoring.' Insofar as the Zurich failure was concerned, C simply stated:

*'PM acknowledges his mistake with failing to inform the Zurich Inspector and he had apologised and will learn from this.'*¹⁹

- 3.29 The above statement is important for other reasons which will become apparent later on (specifically when he attempted to argue that there was no case to answer at both the disciplinary and appeal hearings in respect of the PSSR allegation) because it clearly demonstrates that, as at 3rd November at the latest, C was aware that PM had failed to inform Zurich of the repairs.

The by-pass modification

- 3.30 CW was an EE engineer, one of C's team and responsible for designing this modification. In order for repairs to the LP Header to be undertaken, it had to be devoid of steam. CW's plan was to completely isolate the HP from the LP system. Steam would be fed from the gas boilers directly into the district heating system, thereby by-passing the LP header. The valve between the turbine and LP Header would be shut off so as not to allow any steam (generated from the incineration

¹⁸pp.375-6

¹⁹ p.410 and 415

plant) to enter the LP Header. The turbine would be placed into fully condensing mode so that any steam passing through the turbine would be condensed back into water, fed back into the system and ensuring no accidental leakage into the LP system. It is important to note that, under full capacity, steam passes from the incinerator to the HP header under extreme pressure (approximately 50bar). It is important to note that there is precedent for the turbine to be placed in full condensing mode – indeed this is what happens during ‘Triads’ (i.e. peak periods, often on winter evenings, when electricity demand is at its highest) although it is fair to say that these are short-lived and last approximately half an hour.

- 3.31 The above is a very simplistic description of a much more complicated plan. A considerable amount of time was spent in evidence debating the engineering intricacies of the above plan but the purpose of the above summary is to do no more than provide the essence of the by-pass plan.
- 3.32 This plan would be supported by what are risk mitigation measures. For example, FCC agreed to ensure that the control room was manned 24/7 so that, in the event of the turbine ‘tripping’, FCC could immediately put a halt to the incineration burn (thereby reducing the pressure, albeit not instantaneous). It was also agreed that, if necessary, the superheater vents could be operated to release any significant pressure build-up. Of course, there were safety valves as well which would open automatically in the event of abnormal build-up of pressure.
- 3.33 The by-pass was scheduled to come into operation on 8th November and would remain in place for as long as required (at that time it was not known precisely how long the repairs would take).
- 3.34 It is clear that C had serious misgivings about this plan. He emailed GT to that effect on 6th November. C’s position was essentially this. He had no problem with a by-pass per se but, if it was to operate safely, then one of the Eastfield incineration two lines must be shut down. In this way, the pressure would be reduced effectively by half and to a comparatively safe level so that the chance of any accidental escape of pressurised steam would be negligible. GT disagreed. Both incineration lines could continue to be operated at full capacity on the basis that the steam

generated by them would be wholly and safely isolated from the LP system and district network heating system (which would instead be fed steam direct from the gas boilers).

- 3.35 C appears to have worked on the assumption that there was an agreement or understanding that the by-pass modification would come into effect with only one incineration line operational (in other words, in accordance with his position). It is not clear where or how this assumption was generated. C struggled to articulate in evidence the basis for the same. GT had not approved or authorised a one-line solution and I am satisfied that neither Zurich nor FCC (nor, for that matter, the designer of the proposal, CW) were advocating a one-line proposal. This was a unilateral position adopted by C and one which ran contrary to his line manager's express instructions.
- 3.36 On 6th November C had emailed FCC informing them that they were required to take one line out of service. As stated above, it is unclear as to where this directive had emanated and I am satisfied that C was acting wholly independently (and notwithstanding GT's October email in which he specifically made clear that all operational decisions regarding planned shut downs were subject to his approval). Unsurprisingly, C's email triggered alarm with FCC who faced, once again, a serious (and unlimited) impact upon their waste incineration operations.
- 3.37 On the morning of 7th November a meeting took place (to which C was not invited) during which a risk mitigation strategy was further discussed. GT made clear, at the conclusion of that meeting, that the by-pass plan (involving the continuing operation of both lines) was conditional upon the mitigation measures being sufficient.²⁰ GT (who was at home and unwell at this point in time) subsequently emailed the relevant personnel, including C, confirming that the two-line plan would proceed but subject to and conditional upon the entire plan being signed off by a Zurich inspector (*'...if he is satisfied that we are complaint with regulations...'*) and all of the identified risk mitigation measures being in place. Final approval was further subject to confirmation of tests undertaken to see that the turbine could operate safely in full

²⁰ p.387

condensing mode. GT instructed C to '*...co-operate fully with his proposals herein...*' This email could not have been clearer.

- 3.38 Notwithstanding the above, C responded the following day (email timed at 9.04am) re-iterating safety concerns; describing the mitigation measures as 'unreliable' and referring to 'unknown risks.' C concluded his email by making clear that, despite his line manager's clear instructions, he would proceed on the basis of one line being shut down '*...unless we hear otherwise...*'
- 3.39 There was an evidential dispute as to what had passed between C and CW, before the sending of this email. The Respondent's position was that CW had gone to C, armed with the technical information supporting the by-pass operation in an attempt to alleviate any lingering safety concerns that C purported to have; that C had refused to read his report and had simply sent this pre-drafted email without properly taking into account anything CW had to say. C's position was quite different. CW had himself expressed similar safety concerns and that there had been no report shown to him as alleged. In the absence of CW, I found it difficult to resolve this particular dispute but, on balance, I prefer the Respondent's evidence on this point particularly as there was no evidence whatsoever of CW ever having raised any concerns of his own. I also found GT's evidence on the point convincing.
- 3.40 The repair works did proceed as planned (with the by-pass modification in place and both incineration lines operational) and were concluded on or about the 14th November without any mishap.

Suspension

- 3.41 The above email proved to be the final straw for GT. On the same day, GT suspended C, citing 'serious concerns' regarding his management. The actual letter of suspension was hand delivered by Dave Halstead ('DH' – the Director of Neighbourhood Services and later disciplinary officer) because GT remained unwell.²¹ In evidence, GT, quite candidly and, in my Judgment, honestly, explained

²¹ pp.399-400

his reasons for suspending C. In terms, he had come to the end of his tether. Although very concerned about the failure to notify Zurich of the August and proposed October repairs, he had decided not to suspend C at that juncture mainly on operational grounds (he simply could not afford to have his Head of District Heating suspended from work at such a critical time). He had become increasingly exasperated by C's failure to take seriously and manage the legitimate concerns expressed by members of his own team (see above) and C had either refused to cooperate with or been implacably hostile to legitimate management instructions (most notably the instruction to facilitate the by-pass modification plan whilst permitting the operation of two incineration lines). However, the main trigger event behind the suspension was C's refusal to support the agreed line on the steam bypass modification.

The Disciplinary and Grievance processes

- 3.42 Initially GT was the nominated Disciplinary Officer and Antony Greener ('AG') was charged with the investigation.²² At or about the same time, AG was tasked with effectively overseeing all operations at EE. C was suspended and, since about 8th November, PM had been absent on grounds of ill health. PM subsequently returned to work on 15th January 2018 and promptly resigned. It was clear that CW, the senior engineer, could not cope on his own without both C and PM. AG stepped into the breach at an unarguably busy period. It was principally for this reason that AG, by his own admission, failed to conduct let alone initiate any investigation. Aside from making some preparatory notes, he failed to conduct any interviews with relevant witnesses, collate documentary information or even speak to the Claimant. Each Respondent witness associated with the disciplinary and appeal processes were all quick to inform me that they had sought and received HR advice and guidance at very stage.
- 3.43 On 6th December 2017 (almost one month after he had been suspended) C received a letter informing him that he was being investigated for potential gross misconduct.²³ He faced four allegations:

²² AG was in fact appointed on 8th December – p.511

²³ p.507

- A failure to ensure that PSSR was followed (in connection with the August and October LP Header repairs);
- Providing contradictory and misleading information to senior management and stakeholders;
- Failing to collaborate with FCC;
- A failure to follow reasonable management instructions.

3.44 On 21st December, Garth Wallace ('GW'), C's TU representative emailed GT referring to each of the four allegations, in terms stating that each of them related to 'process safety', the inference being that it was inappropriate and unfair to discipline an employee for raising legitimate health and safety concerns.²⁴

3.45 In the meantime, in early December, C had lodged a grievance. Both the contents of this grievance (and the process it followed) received very little 'air time' within the context of this hearing. James Douglas was nominated as the grievance investigation officer and he produced a comprehensive report dated 12th February 2018.²⁵ The essence of the grievance was that GT had failed to protect C from bullying at the hands of FCC management. Within the grievance material, there is a paragraph in which C complains that GT had '*...recklessly ignored and actively suppressed the safety concerns of myself and other EE managers...*'²⁶ (relied upon by C as an alleged protected disclosure). Andrew Errington chaired the stage 2 grievance meeting and subsequently did not uphold it.²⁷ This was not a matter explored in evidence before me.

3.46 On 15th March 2018, C received a further letter informing him that the original 4 allegations of gross misconduct had been reduced to one; namely the alleged failure to ensure compliance with PSSR.²⁸ GT explained the reasons that lay behind this. Essentially, this allegation was considered the most serious and it would be beneficial logistically, by reducing the scope of the investigation. By this time C had,

²⁴ p.520

²⁵ pp.569-584

²⁶ p.682

²⁷ pp.726-7

²⁸ p.724

of course, been suspended for a period of approximately 4 months and accordingly it was in his best interests that the matter was brought to a conclusion. In evidence C made much of this 'moving of the goalposts' and claimed, amongst other things, that it had been done for sinister motive. I disagree. Employers are entitled to alter the charge sheet (in the same way perhaps as an indictment is subject to change often at the 11th hour before trial) and, in this case, I am satisfied that NCC did so for understandable and legitimate reasons, namely to consolidate and focus the investigation on the charge that they considered to be the most serious.

- 3.47 At or around the same time, GT was replaced by DH as the disciplinary officer. This was on HR advice, given that GT was the subject of a formal grievance by C (see above). Wayne Bexton ('WB') replaced AG as the investigator.
- 3.48 WB interviewed RF,²⁹ the Zurich manager who confirmed, by reference to the database, that the August repairs to the LP Header had been undertaken without their approval or authorisation and, but for the intervention of an EE engineer (either CW or Darren Hault), the October planned repairs would have followed the same course. In the view of Zurich, this amounted to as breach of statutory regulations and carried with it serious implications, including invalidating the insurance policy.
- 3.49 WB interviewed C on 3rd April 2018.³⁰ GW was not available on that day but there was no right to TU representation at an initial fact finding meeting. WB insisted that the interview take place. C refused to answer any questions and instead read out a pre-prepared statement. That statement was later sent to the Respondent (although it is clear that it was updated post-interview).
- 3.50 WB then interviewed CW and GT. Amongst other things, GT explained to WB that, shortly after being appointed into the role of Head of District heating, C had produced an internal document (referred to as a 'Risk Register') for EE in which he himself had made clear that PSSR must be followed in respect of all work carried

²⁹ p.762

³⁰ p.764

out to LP Header.³¹ GT emphasised that unauthorised repairs and a failure to follow PSSR could have severe consequences including:

- Health & Safety risks;
- Invalidating insurance;
- Legal implications (potentially involving prosecution by HSE);
- Operational (i.e. shutdowns);
- Financial; and
- Reputational.

3.51 WB did not interview PM. This was because PM had, by this time, resigned. PM was contacted but refused to co-operate with the investigation. In evidence before me, the clear implication was that PM had resigned on his first day back at work, following ill health, when confronted by the consequences of the failure to inform Zurich of the repairs to the LP Header. It is also of note that his ill health more or less coincided with the suspension of C.

3.52 WB produced his report which essentially set out the facts and, following consideration of it on 10th April 2018, DH wrote to C inviting him to attend a Disciplinary Hearing scheduled for 23rd April.³² On 13th April 2018 C lodged a further grievance essentially complaining of victimisation at the hands of GT and Andy Vaughan, including subjecting him to ‘...multiple Protected Act breaches under both Equality Act...’ and Health and Safety legislation.³³ There was scant detail accompanying this grievance and ultimately it was determined that it should be heard as part of the disciplinary process on the basis that the allegations contained within it were inextricably entwined with the disciplinary process itself.³⁴

3.53 The disciplinary hearing duly went ahead on 23rd April. C was accompanied by GW and DH was supported by Shakeel Khalil from HR, the latter supposedly in an advisory as well as note-taking capacity. Bizarrely, no (Respondent) notes of this

³¹ p.787

³² p.795

³³ p.799

³⁴ p.846

hearing exist, the same having been destroyed following the compilation of the outcome letter. DH's explanation, which I found wholly unsatisfactory, was that the intention was to incorporate all relevant matters within the outcome letter itself, a matter which he forewarned to C and his TU representative. This is extremely poor HR practice and I find it surprising, in an organisation as large as this, that such a practice is condoned. The purpose of taking a summary note is, in part, to ensure that all parties to the hearing can agree on what topics were covered; evidence called; explanations given and so forth so as to allow for fair scrutiny. It would be usual practice for a summary record of the hearing to be sent to the other side for their comment and/or agreement before a decision is taken. This is particularly important in a complicated technical case such as this, where gross misconduct is alleged and where cross-examination of a key witness (GT) had been permitted. For example, C insisted that GT had made a series of important concessions during the course of his evidence.³⁵ The Respondent denied this was the case. A written note of the proceedings may have assisted the Tribunal in determining where the truth lay.

- 3.54 Notwithstanding the absence of a written note, we do nevertheless have some handwritten notes taken by C or GW; we also have a statement from C which formed the cornerstone of his defence and we do have a comprehensive outcome letter (although, for reasons that I have set out above, this does not constitute a fair substitute for contemporaneous notes).
- 3.55 There were three aspects of C's case (advanced during the Disciplinary and Appeal hearings and again before the Tribunal) that I found particularly troubling. First, C's insistence that he was being judged by reference to the wrong JD and that, notwithstanding his senior SLMG 3 graded position as Head of District Heating, the Respondent should consider his actions by reference to the Operations Manager JD. In my judgment, this was nothing more than a poor attempt by C to distract the Respondent from the essence of the allegation but, in any event, the fundamentals of both JDs were broadly similar. Secondly, C defended himself against this surviving allegation on the basis that PM had complied fully with PSSR; had notified

³⁵ pp.930-931

Zurich and that consequently there was, in effect, no case to answer.³⁶ This position was clearly unsustainable. C knew in November 2017 that PM had admitted a failure to notify Zurich (C confirmed that when undertaking an investigation into the engineer concerns). Furthermore C had, by this time, sight of the Zurich database which also confirmed that there had been a failure to notify and seek authorisation from them. Thirdly, I was troubled (as indeed DH was) by C's implacable refusal to accept any responsibility whatsoever for the failure to ensure that the repair works were notified to the insurers, seeking to lay the entire blame upon the shoulders of his maintenance manager PM. C's case was, in essence, that he was not himself 'PSSR trained or qualified' and had fulfilled his duty by undertaking 'DIP' checks (a form of audit control) on PM and therefore he was entitled to assume that PM had notified Zurich. In terms, C abrogated total responsibility, notwithstanding the fact that he was, by his own admission, the most senior person on site with overall responsibility for all matters, including health and safety and regulatory compliance.

3.56 DH was unable to conclude matters on 23rd April and a follow-up meeting was held on 3rd May 2018. I do not find this surprising given C's tendency to (a) avoid giving direct answers to direct questions and (b) deviate from the point in issue. That said, there were also further 'follow-up' investigations that DH quite properly wished to make before finalising his decision (for example, further exploration of the 'correct JD' issue). Furthermore, in the interim, Phil Ryan (from Zurich) had been contacted and confirmed that he had known nothing about the LP Header repairs until he had been contacted by Darren Hault.³⁷ At the conclusion of the hearing on 3rd May, DH notified C of his decision, namely that the allegation of gross misconduct was upheld and he was summarily dismissed.

3.57 On 14th May DH wrote to C confirming the above decision.³⁸ DH found that C had known that the LP Header repairs had taken place (or were planned) and he rejected C's defence, namely that he himself bore no responsibility for ensuring prior notification and authorisation from Zurich.

³⁶ p.804

³⁷ pp.1007/1010 – one of C's concerns was that there had been a failure to interview PR during the investigation stage.

³⁸ pp.1017-1023

3.58 C appealed on the basis that the penalty was excessively harsh; alleged bias on the part of DH and procedural unfairness.³⁹ By this stage C had also appealed his first grievance outcome (decided by Andrew Errington). Both the Grievance and Disciplinary Appeals were therefore heard separately (but on the same day, 16th July 2018) by Hugh White ('HW'), the Director of Sport and Culture. HW rejected both appeals and wrote to C confirming the same on 3rd August 2018.⁴⁰ In the context of this hearing, very little time was spent on cross-examining HW or indeed any matter concerning the appeal process.

3.59 On 25th September 2018 C presented his claim form.

4. Relevant law

'Whistle-blowing'

4.1 'Whistleblowing' is protected under PIDA if, but only if, it constitutes a 'protected disclosure' (ERA s.43B). A protected disclosure concerns a past, present or anticipated wrongdoing. Wrong doings covered by PIDA are crimes, miscarriages of justice, failure to comply with legal obligations, risks to health and safety, damage to the environment and the covering up of any of these (s.43B).

4.2 The Act provides a broad definition of what amounts to a disclosure and 'any disclosure of information' will qualify (ERA 1996 s 43B(1)). There must still be a 'disclosure of information' as such and not simply 'allegations' about the wrongdoer (see *Cavendish Munro Professional Risks Management Ltd v Geduld* [2010] IRLR 38, EAT - '...sharps lying around..' and *Smith v London Metropolitan University* [2011] IRLR 884, EAT). For a statement to be a qualifying disclosure there must be

³⁹ pp.1042-1048

⁴⁰ pp.1088-1096

sufficient factual content and specificity to show that one of the relevant matters in s.43B(1) is engaged. However Tribunals should be careful about drawing a distinction between 'information' and 'allegation' as the two concepts will often be tied together and it is best to focus the enquiry on the context in which the statement, information or allegation is made – see *Kilraine v LB of Wandsworth [2018] IRLR 846*. Depending upon the facts, it may be possible to 'aggregate' more than one communication in order for them to be read together as constituting a protected disclosure – *Norbrook Laboratories Ltd v Shaw [2014] ICR 546*.

- 4.3 In all cases, the worker making the disclosure must have a 'reasonable belief' that the disclosed information 'tends to show' the wrongdoing (s.43B(1)) and is in the public interest (see *Chesterton Global v Nurohamed [2017] IRLR 837* and *Morgan v Royal Mencap Society [2016] IRLR 428*). Caselaw suggests that Tribunals are encouraged to adopt a broad and purposive approach to the question of whether a disclosure passes the 'public interest' hurdle. If the worker makes the disclosure purely out of self interest then, even if it might otherwise have passed the 'public interest' hurdle, the disclosure may fail for want of 'reasonable belief' – see *Parsons v Airplus International UKEAT/0111/17*.
- 4.4 A disclosure may nevertheless be a qualifying disclosure even if it subsequently transpires that the information disclosed was incorrect - *Darnton v University of Surrey [2003] IRLR 133, EAT*. The statutory test (for reasonable belief) is subjective - *Korashi v Abertawe Bro Morgannwg University Local Health Board [2012] IRLR 4, EAT*.
- 4.5 Furthermore, the disclosure must be made to the appropriate category of persons defined within the Act. Useful guidance on the approach to such cases can be found in the case of *Blackbay Ventures v Gahir [2014] IRLR 416*.
- 4.6 Under s 103A ERA it is automatically unfair to dismiss an employee if the reason or principal reason for that dismissal is that they have made a protected disclosure. The proper approach to be adopted by Tribunals in s.103A cases, where there are opposing reasons for dismissal put forward by the parties, was explained by the

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Court of Appeal in *Kuzel v Roche Products Ltd*, [2008] IRLR 530. Although it is for the employer to prove that he dismissed the employee for a fair and admissible reason, it does not follow, as a matter of law, that if he fails to establish this, the Tribunal must accept the alternative reason advanced by the employee. If the employee puts forward a positive case that he was dismissed for a different reason, he must produce some evidence supporting that case (and also see *Smith v Mid-Essex Hospital Services NHS Trust* [UKEAT/0239/17]).

4.7 In *Kuzel* Mummery LJ put it:

'It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason' (para 57). The identification of the reason, being a question of fact, turns on direct evidence and permissible inferences from it, with the consequence that it is open to a tribunal to find that the true reason for dismissal was neither that advanced by the employer nor by the employee, but was some other reason.'

4.8 It is permissible, therefore, in s.103A cases for the Tribunal to draw such inferences from the primary facts as they deem appropriate. The process of drawing inferences involves a consideration of all the facts of the case, and will include the assessment of the parties and their witnesses when they give their evidence (*Qureshi v Victoria University of Manchester* [2001] ICR 863, EAT). However, an inference of discrimination cannot be drawn simply from the fact that an employer has behaved badly or unreasonably (in industrial relations terms) towards an employee – *Zafar v Glasgow City Council* [1998] IRLR 36, HL.

4.9 In *Martin v Devonshires Solicitors* UKEAT 0086/10 [2011] EqLR 108 the EAT, while agreeing with the test in *Khan*, went on to hold that 'there would in principle be cases where an employer had dismissed an employee in response to a protected act but could say that the reason for dismissal was not the act but some

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feature of it which could properly be treated as separable'. According to Underhill P (as he then was):

'it would be extraordinary if these provisions gave employees absolute immunity in respect of anything said or done in the context of a protected complaint'.

- 4.10 The *Martin* principle has subsequently been followed in *Panayiotou v Kernaghan* [2014] IRLR 500 and *Shinwari v Vue Entertainment Ltd* (EAT, unrep. Mar 2015).
- 4.11 Often the 'causation' question (i.e. determining the 'reason' for the dismissal) depends upon the state of knowledge of the decision maker. However, that must now be considered and read in the light of the recent Supreme Court decision in *Royal Mail Group v Jhuti* [2019] UKSC 55 which confirmed that, in circumstances where the decision-maker had, albeit in good faith, relied upon an invented reason for dismissal but the real underlying reason was because for dismissal was the fact of having made a protected disclosure, the dismissal will be automatically unfair pursuant to s.103A.

Health & Safety dismissals

- 4.12 Employees have a right not to be unfairly dismissed in certain circumstances connected with health and safety. No qualifying period of employment is needed. The individual rights cover a variety of 'protected acts'. It is automatically unfair to dismiss an employee if the reason (or, if more than one, principal reason) for the dismissal is that in circumstances of danger which s/he reasonably believed to be serious and imminent, s/he took (or proposed to take) appropriate steps to protect himself or others from the danger – s.100 (1)(e).
- 4.13 The 'appropriateness' or otherwise of the steps in question are to be judged by reference to all the circumstances including, in particular, his knowledge and the advice and facilities available to him – s.100 (2). It is a defence for the Employer to show that such steps, if taken would have been so negligent on the part of the employee as to justify dismissal – s.100(3).

- 4.14 In practice, the central issue in such a claim will typically be (similarly to a s.103A complaint) what was the true reason for the dismissal – see, for example, *Shillito v Van Leer (UK) Ltd [1997] IRLR 495* and *Goodwin v Cabletel Ltd [1998] ICR 112*.

Wrongful dismissal

- 4.15 It is a question for the Tribunal as to whether the Claimant committed a repudiatory breach of contract entitling the Employer to dismiss without notice. The Tribunal must reach its own findings of fact on the topic, applying an objective test to all the material circumstances. See, for example, the observations and guidance provided by Choudhury J (as he then was) in *Mbubaegbu v Homerton University Hospital NHS Foundation Trust UKEAT/0218/17 (18 May 2018, unreported)* (helpfully summarised by the Respondent in its written submissions) and in which he stated that misconduct may be sufficiently serious to warrant summary dismissal if it is such as to undermine the relationship of trust and confidence between employer and employee.

Unfair dismissal

- 4.16 The law relating to unfair dismissal is well rehearsed. In summary it is for the employer to establish a potentially fair reason for dismissal. Should it do so, the Tribunal will go on to consider whether it “*acted reasonably in treating (the reason) as a sufficient reason*” within the meaning of Section 98(4) of the 1996 Act and in doing so will take into account, amongst other things, the size of the Respondent's undertaking and the administrative resources at its disposal. The test of ‘reasonableness’ is to be determined “*...in accordance with equity and the substantial merits of the case.*”

- 4.17 Misconduct is a potentially fair reason. However in order for the Respondent to have “*acted reasonably*” the Tribunal must be satisfied that the decision

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itself fell within a “*range of reasonable responses*” and a fair procedure was followed.

4.18 *British Home Stores Ltd – v – Burchell [1978] IRLR 379* which is still a leading case on this issue, makes clear that, in general terms, an employer must show that he genuinely believed that the employee committed the misconduct in question; that he had reasonable grounds on which to sustain that belief and that his belief, genuinely and reasonably held, was the product of a reasonable investigation.

4.19 Finally the Tribunal is also charged with determining whether the sanction (dismissal) was a fair one in all the circumstances. In looking at whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in the employer's view, have been appropriate, but rather whether dismissal was within the band of reasonable responses that an employer could reasonably make in the circumstances. The fact that other employers might reasonably have been more lenient is irrelevant (see, for example, the decisions of the Court of Appeal in *British Leyland (UK) Ltd v Swift [1981] IRLR 91* and of the Inner House of the Court of Session in *Gair v Bevan Harris Ltd [1983] IRLR 368*).

4.20 In determining whether the Respondent has acted reasonably or otherwise, it is not the role of the Tribunal to enter the arena and conduct its own mini-trial of the Claimant (or indeed any other employee). The one clear and consistent principle which has always been applied is that it is not for the Tribunal simply to substitute its own opinion for that of the employer as to whether certain conduct is reasonable or not. Rather its job is to determine whether the employer has acted in a manner which a reasonable employer might have acted, even although the tribunal, left to itself, would have acted differently.

4.21 In *Iceland Frozen Foods v Jones [1982] IRLR 439* the test was formulated in the following terms:

(1) the starting point should always be the words of [s 98(4)] themselves;

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- (2) in applying the section an Industrial Tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the Industrial Tribunal) consider the dismissal to be fair;
- (3) in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer;
- (4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;
- (5) the function of the Industrial Tribunal, as an industrial jury, 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. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.'

4.22 Where an employer acts inconsistently as between two or more employees, and without there being any rational basis for doing so, then, depending upon the circumstances of the case, a Tribunal might conclude that it had acted unreasonably – *PO v Fennell* [1981] IRLR 221; *Hadjioannou v Coral casinos* [1981] IRLR 352; *Securicor Ltd v Smith* [1989] IRLR 356.

4.23 The nature of the business/profession/industry may dictate that some forms of misconduct, not apparently serious in themselves, may justify dismissal for a first offence - see *Siraj-Eldin v Campbell Middleton Burness & Dickson* [1989] IRLR 208.

4.24 In *Taylor v OCS Group Ltd* [2006] IRLR 613 the Court of Appeal has stressed that tribunals should not consider procedural fairness separately from other issues arising. They should consider the procedural issues together with the reason for the dismissal, as they have found it to be. The two impact upon each other and the tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason they have found as a sufficient reason to dismiss. So for example, where the misconduct which founds the reason for the

dismissal is serious, a tribunal might well decide (after considering equity and the substantial merits of the case) that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as a sufficient reason to dismiss the employee. Where the misconduct was of a less serious nature, so that the decision to dismiss was nearer to the borderline, the tribunal might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee. The Court of Appeal said the following dicta of Donaldson LJ in *Union of Construction, Allied Trades and Technicians v Brain* [1981] IRLR 224 was worth repetition:

"Whether someone acted reasonably is always a pure question of fact. Where parliament has directed a tribunal to have regard to equity – and that, of course, means common fairness and not a particular branch of the law – and to the substantial merits of the case, the tribunal's duty is really very plain. It has to look at the question in the round and without regard to a lawyer's technicalities. It has to look at it in an employment and industrial relations context and not in the context of the Temple and Chancery Lane."

4.25 Should a Claimant succeed in his Unfair Dismissal claim he will (generally) be entitled to a basic award (a sum, identical to a statutory redundancy payment, calculated by reference to both his age and years served) and a compensatory award. The latter (and, occasionally, the former) can be subject to reduction and/or extinguishments on the following grounds:

- contributory conduct
- 'Polkey' principles
- failure to mitigate

4.26 A so-called 'Polkey' reduction reflects the chance that the employee might have lost his job, irrespective of how the redundancy exercise/disciplinary process had been conducted. When considering the question the Tribunal must reach its own view on the answer to the hypothetical question whether dismissal might have occurred in any event, and express its contribution in percentage terms.

4.27 In *Software 2000 Ltd v Andrews* [2007] IRLR 568 (Elias P presiding) the EAT concluded, amongst other things, that 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; that the mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence and that the Tribunal must take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely.

5. **Submissions**

5.1 There was insufficient time available at the conclusion of the hearing for submissions, whether oral or written. This was a relatively complicated case and the Claimant, in particular, needed time to collect his thoughts and articulate his position. He is an intelligent individual, occupying a senior position and was well practised in producing detailed written reports. I was confident that written submissions would not prejudice his position in any way. In any event, it was his expressed wish that the parties exchange written submissions by way of closing. I duly gave directions for the exchange of written submissions.

5.2 I subsequently received written closing submissions from both the Claimant and Ms Barney. Both documents were impressive in terms of their detail and clarity of argument and I am extremely grateful to both for the careful way in which each has advanced their respective positions. I would particularly like to thank Ms Barney for her fair and accurate summation of the relevant legal principles. I do not intend to rehearse the contents of both within the context of this Judgment but set out below a broad summary of the main arguments.

5.3 On the Claimant's behalf, Mr Morris pointed to the clear and unequivocal demarcation of responsibility as between himself and his Maintenance Manager, PM. It was PM who was PSSR trained and qualified and it was PM who was the

main point of contact with Zurich. At all material times, it was PM who fulfilled the role of 'responsible person' to whom all PSSR-related H & S issues ought properly to have been delegated. He (SM) had been wrongly targeted and had, at all times, acted in accordance with his JD. It was wholly inappropriate for someone in his position to be held accountable for failing to micro-manage an ostensibly competent, PSSR-trained and qualified Maintenance Manager. Mr Morris highlighted a number of flaws within the investigative process (delay; failure to interview critical witnesses; failure to conduct a timely interrogation of the PSSR database; destruction of DH minutes; re-formulation of allegations and so on). Mr Morris argued that it was clear that the real reason for his dismissal was the fact of raising H & S concerns with regard to the 'by-pass modification.' The allegation for which he was ostensibly dismissed (allegation 1) was essentially window-dressing to disguise the real reason for his dismissal (namely the ingredients of the original allegation 4). Allegation 4 had been deliberately case aside in favour of allegation 1 because the Respondent knew that, if dismissed for that reason, a finding of automatic unfair dismissal under the whistle-blowing provisions would inevitably follow. He went on to reject any bases for adverse 'Polkey' or 'contributory conduct' findings.

- 5.4 On the Respondents' behalf, it was argued that none of the four alleged disclosures qualified for protection under the whistle-blowing provisions (either because they failed to disclose any or any relevant information or because the information disclosed was not 'reasonably believed' or because it failed to satisfy the 'public interest' hurdle.) In relation to the 'reasonable belief' of SM, the Respondent sought to rely upon apparent inconsistencies between SM's position on keeping open 'two lines' which he previously advanced in 2016⁴¹ and his failure to undertake a risk assessment of his own upon which a 'reasonable belief' could be sustained. The Respondent maintained that, in any event, both the whistle-blowing and H&S complaint failed on causation grounds. In terms of the wrongful dismissal allegation, the Respondent argued that the failure to ensure that Zurich were notified of the repair works was sufficient to amount to a fundamental breach of contract justifying summary dismissal. This was compounded by SM's actions and

⁴¹ See email correspondence between SM and FCC

behaviour during the disciplinary process itself (refusal to answer questions; accept responsibility; obfuscation on the subject of JDs; failure to acknowledge a breach of PSSR and so on). The Respondent's position, on the unfair dismissal allegation, was that the reason for dismissal was conduct, a potentially fair reason, and, whilst admitting to some shortcomings in the investigative process, the Burchell test had been met in full. The decision to dismiss fell well within acceptable parameters open to a reasonable employer and, in any event, there was a 100% chance of dismissal in any event.

6. **Conclusions**

'Automatic' unfair dismissal (s.103A ERA)

Disclosures of information

- 6.1 I am entirely satisfied that the contents of the C's email dated 8th November 2017 and timed at 9.04am qualifies for protection within the meaning of s.43B. C discloses specific information including, but not limited to, risks associated with incinerator steam decay; loss of steam containment; electric valve actuator reaction time and so forth. This information tends to show potential endangerment to health and safety and it clears the 'public interest' hurdle by a significant margin. I am equally satisfied that, when he sent that email, C reasonably believed that state of affairs to exist and I am not persuaded by the Respondent's principal argument, namely that he could not have held such a belief without having conducted a risk assessment himself. C was perfectly entitled to hold that belief and it was entirely reasonable for him to sustain that belief on the basis of both his personal knowledge and experience and the information before him at the time. Neither am I persuaded by the Respondent that C lacked 'reasonable belief' because of remarks exchanged between him and FCC in 2016 – the circumstances were not in any way comparable.
- 6.2 GW's email dated 21st December 2017 (timed at 13.12) does not qualify for protection under the whistle-blowing provisions. The email does little more than

either (a) make the point that the disciplinary allegations faced by C 'relate to process safety' or (b) refer to serious H&S 'failings.' The email does not incorporate any 'disclosure of information' as such (see *Cavendish Munro; Kilraine supra*). There is, in short, insufficient factual content and specificity to show that one of the relevant matters in s.43B(1) is engaged.

- 6.3 The same applies in relation to the alleged disclosure incorporated at paragraph 9 of C's formal grievance on p.682. Although there is, for example, a reference to GT 'recklessly ignoring and actively suppressing' C's safety concerns, the paragraph in question (and upon which C relies) lacks specificity. There is insufficient detail within that paragraph which could fairly and reasonably be interpreted as a 'disclosure of information.'
- 6.4 The final disclosure relied upon is found within the appeal letter at paragraph 4 on p.1043 of the bundle. Within it C refers to 'illegal and reckless actions and behaviour of GT...' placing '...EE Operational Assets at extreme risk and EE personnel in imminent danger...' He also refers to very serious H&S non-compliance in connection with the 'bypass engineering modification.' In my Judgment (and having in mind the remarks of the EAT in *Norbrook Laboratories*) the contents of this paragraph, when taken as a whole, amount to a disclosure of information qualifying for protection within the meaning of s.43B(1), albeit by the narrowest of margins.

Causation

- 6.5 I accept the evidence of both DH and HW, namely that neither were aware of the contents of the 8th November email (not indeed the broad thrust of the same) at the time that they took their respective decisions. That said, lack of knowledge is not necessarily determinative (see *Royal Mail Group v Jhuti*). However, having considered the matter with care, I am entirely satisfied, on the evidence that I have heard, that this was not a case where, for example, DH had, albeit in good faith, relied upon an invented reason for dismissal and that the real underlying reason was because for dismissal was the fact of C having made a protected disclosure.

- 6.6 I was particularly impressed with DH's evidence – he came across as a person of integrity and he was, at all times, clear headed and fair. He was clearly someone who was the master of his own mind. Nevertheless, I looked to see if his decision was potentially infected by the unscrupulous motives of others, including GT. Having done so, I am satisfied that neither his decision nor that taken at appeal by HW were in any way undermined or influenced by others or that they acted as window-dressing to an unlawful attempt to dismiss C for having made a protected disclosure. I looked particularly hard at the reason for C's suspension as this may have triggered a 'Jhuti' concern. Again, having done so, I was entirely satisfied that C was suspended not because he had raised H&S concerns but because he repeatedly failed to co-operate with his superiors on a matter of substantial importance. It is important to note that C maintained his opposition to the by-pass modification (and did so in a somewhat belligerent and non-co-operative manner) notwithstanding the fact that the proposed steam bypass modification had been approved by Zurich and senior management and despite the fact that the engineering team (including CW) were equally content; subject to and conditional upon a variety of risk mitigation measures, reducing any risk to within tolerable, acceptable parameters.
- 6.7 C was dismissed because DH genuinely believed him to be guilty of gross misconduct and not for any reason connected to the fact that he had made a protected disclosure. Although C did advance a positive case that he was dismissed for that very reason and, in doing so, produced some evidence supporting that case (see *Smith v Mid-Essex Hospital; Kuzel*) I was nevertheless quite satisfied that the Respondent has proved that C was dismissed for a fair and admissible reason, namely conduct.
- 6.8 For the avoidance of any doubt, the same conclusions apply in respect of both protected disclosures although it is right to point out that, as a matter of common sense, the disclosure contained within the appeal letter could not have influenced DH's decision to dismiss.

'Automatic unfair dismissal (s.100(1)(e) ERA)

- 6.9 I am satisfied that the circumstances of this case do fall within s.100(1)(e). C reasonably believed that the steam bypass modifications (work upon which was due to start within the day) presented circumstances of danger that were serious and imminent. His email (and specifically his stated intention that EE would only run one line as opposed to two) constituted a 'step' or 'steps' which were appropriate in order to protect himself and others from that danger.
- 6.10 However, for the very same reasons as set out in paragraphs 6.5 to 6.8 above, this complaint must also fail on causation grounds.

Wrongful dismissal

- 6.11 When it comes to determining whether an employer was entitled to dismiss an employee without notice it is the Judgment of the Tribunal that matters. C was essentially found guilty of having failed to ensure that PSSR process was correctly followed in relation to some weld repairs (both actual and proposed) to the LP Header. In my Judgment, at its very highest, this was a case of negligence and fell woefully short of gross misconduct.
- 6.12 I fully appreciate the importance of following strict procedures when undertaking repairs to pipework and associated infrastructure, particularly when one is concerned with heating plant on an industrial scale designed for the benefit of members of the public. I note GT's valid safety, operational, insurance, financial and reputational concerns which he expressed with clarity.
- 6.13 However, on any fair view, it was the Maintenance Manager, PM who was clearly the interface between Zurich (specifically Phil Ryan) and the plant. It was PM who designed and supervised the repair work and it was PM who bore primary responsibility for ensuring that it was completed in accordance with PSSR and due protocol. It was PM who was the PSSR trained and qualified individual. It was

PM who was responsible for ensuring that the weld repairs were notified to and approval sought from Zurich and that appropriate post-repair inspections were carried out and the repairs signed off. It is perhaps not surprising that PM resigned on his first day back at work following a bout of ill health.

6.14 That said C was not free from blame. He was the senior individual on site and ultimately the buck stopped with him. The consequences of weld repair failure were undoubtedly serious (although I note that Zurich were content for the plant to continue to operate at full production for a period of four weeks). C ought properly to have double-checked that his Maintenance Manager had obtained his prior approvals and authorisations. This would have been a relatively simple thing for him to have done and he failed to do so. This was negligent and exposed him to disciplinary investigation and action but it was not, in my judgment, sufficient to justify dismissal without notice. It was not gross misconduct.

6.15 In arriving at that conclusion, I also bear in mind that, upon a strict reading of the gross misconduct allegation, C was charged with a failure to ensure PSSR was followed. Despite being taken to a significant number of documents, it is still not clear whether there was in fact a breach of statutory regulation (namely PSSR) as opposed to a failure to ensure that protocol was followed (i.e. that pre-authorisation was sought and obtained from Zurich). In the course of the hearing the Respondent relied heavily on statutory guidance with particular emphasis on the following (although it sought to expand upon this in written submissions):

Where substantial modifications or repairs (including extensions or additions) are to be carried out which might increase the risk of system failure, the user should consult a person who is competent to advise before work begins.

Although it appeared to be common ground that Zurich were the 'competent person' there was no clear evidence put before the Tribunal which supported a view that the weld repairs were 'substantial' or otherwise. Furthermore the Respondent struggled in evidence to identify the specific category of Gross Misconduct into which the above allegation was supposed to have fallen.

- 6.16 The Respondent argued that C was guilty of gross misconduct justifying summary dismissal in part due to his evasiveness and dishonesty during the disciplinary process. This, maintained the Respondent, contributed to an irretrievable breakdown in trust and confidence. It is right that C was, at times, evasive in the answers he gave or failed to give. However, his actions and behaviour during the disciplinary process were not the subject of any separate charge or investigation; did not form the basis for any decision to dismiss and, in any event, did not in my Judgment entitle the Respondent to dismiss summarily or otherwise.
- 6.17 It follows that, pursuant to s.97(2) ERA, C's continuity of employment is deemed to have been extended by (in this case) one week. This means that he is to be treated as having completed two years service as at the effective date of termination and accordingly the Tribunal has jurisdiction to hear a complaint for 'ordinary' unfair dismissal.

Ordinary unfair dismissal (s.98(4)ERA)

- 6.18 I am satisfied that the Respondent has proved that C was dismissed for a potentially fair reason, namely conduct. I am further satisfied that the Respondent (specifically DH) genuinely believed C to be guilty of gross misconduct at the time he took the decision to dismiss.
- 6.19 However, I am of the view that the above belief was neither reasonably held nor was it the product of a reasonable investigation. I note that the Respondent is a sizeable undertaking with significant administrative resources at its disposal. Looking at the whole investigative and disciplinary process in the round, as opposed to piecemeal, there were significant shortcomings. There was inexcusable delay which was a clear breach of the Respondent's own policy⁴² but, perhaps more importantly in the context of this case, caused significant prejudice to C. Several months elapsed before he was interviewed during which time he faced being suspended (a supposed 'neutral' act); AG, the first investigative officer, did precisely nothing over several months during his tenure of the post

⁴² See p.237: 'Where a matter arises,...., this should be put to the employee as soon as possible for an explanation.'

(something which he candidly admitted on oath, admitting that the investigation was 'light'). There is no doubt that he was busy and EE was short-handed (due to C's suspension and PM's ill health). Under those circumstances, the role ought properly and reasonably to have been given to someone else better placed to perform it.

- 6.20 There was little, if any, attempt to interview key witnesses. PM and Phil Ryan were important witnesses to the charge as both could speak to the pre-authorisation protocol and practice for undertaking repairs; the relevance of PSSR and where day-to-day responsibility lay. Although PM was absent on grounds of ill health (he was neither suspended or charged) and resigned on his first day back, the Respondent conspicuously failed to provide any evidence demonstrating at least an attempt by one or more investigating officer to interview him. There was no attempt to speak to PR who would have been much better placed than his manager to speak to the EE/Zurich interface. Evidence from Fairbank was of limited assistance because he could only speak to the database, a document there for all to see.
- 6.21 No signed statements as such were taken from anyone – there were just a few notes of telephone conversations. The disciplinary notes themselves were destroyed – I reject the Respondent's position that it was entitled to do so provided it produced a reasonably comprehensive outcome letter. The purpose of taking notes is to ensure that an accurate, albeit not verbatim, record is made of the questions and answers spoken during what is often a critical meeting at which the employee's job and livelihood may be at stake. Those notes should then be shared with the employee so that their accuracy can be agreed – this is standard HR practice and something well within the capability of an organisation the size of NCC. It was especially important in this case because C was adamant that GT had made a series of concessions during the meeting, under cross-examination, that exculpated him from blame. A fair analysis of those comments attributed by C to GT could have been undertaken had proper notes been taken and retained.
- 6.22 There was a failure on the part of successive investigative, disciplinary and appeal officers to properly understand the PSSR and identify the precise breach of the

statutory regulations. All appear to have been working on the assumption that there was a failure to follow PSSR but no-one thought it appropriate to pause and clarify the breach. This shortcoming alone fatally undermines the reasonableness of the belief in the misconduct (where the allegation was 'a failure to ensure PSSR were followed').

- 6.23 Finally, in my Judgment, the sanction of dismissal was one that fell outside a band of responses open to a reasonable employer and, for that reason in addition to those set out above, rendered the dismissal unfair.

Contributory conduct

- 6.24 C clearly bore some responsibility for the failure to seek and secure pre-authorisation for the weld repairs. There were times during the investigative and disciplinary process when he was disingenuous and evasive in the answers he gave. Specifically C sought to defend himself on the basis that PM had complied with PSSR protocols despite knowing full well he had not. C was also deliberately uncooperative at times, essentially refusing to answer questions at the investigative stage and seeking instead to rely upon a pre-prepared statement. C also set irrelevant hares running, such as whether he was being adjudged by reference to the correct JD. He implacably refused to accept any responsibility whatsoever for the failure to inform Zurich (which was a serious matter) and sought to lay the entire blame upon the shoulders of his subordinate. All the above were major contributory factors towards dismissal for which he, and he alone, must accept the blame. Taken as a whole, this amounted to blameworthy conduct which directly contributed to his dismissal and I assess the level of his contribution at 50%.

'Polkey'

- 6.25 It is clear, on any objective view, that C's relationship with GT was, irrespective of the PSSR disciplinary charge, at a very low ebb. There was disaffection afoot within the LRHS engineering team; his relationship with the major stakeholder (FCC) was appalling and there was a repeated lack of co-operation and

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undermining of his line manager. The PSSR issue (and the above) had all contributed towards an erosion in trust and confidence (albeit not sufficient to warrant dismissal at the time). It seems to me highly probable in such circumstances that C would not have remained in his employment beyond 12 months from the date of his dismissal.

6.26 This matter will now be listed administratively for a Remedy Hearing with a time estimate of one day, such to be listed administratively. As the parties are well aware, I now sit full time in an alternative jurisdiction which inevitably restricts potential dates going forward. In the meantime both parties are encouraged to explore settlement.

.....
Employment Judge Legard

Date: 12th February 2020

JUDGMENT SENT TO THE PARTIES ON

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AND ENTERED IN THE REGISTER

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FOR SECRETARY OF THE TRIBUNALS