



EMPLOYMENT TRIBUNALS

Claimant: Mr T Clayton-Smith

Respondent: Sodexo Limited

Heard at: London Central

On: 30 and 31 March 2022, 1 April 2022 and 6 May 2022.

Before: Employment Judge Heath

Representation

Claimant: Mr Henry Reid (Counsel)

Respondent: Ms Theodora Hand (Counsel)

RESERVED JUDGMENT

1. The claimant was not unfairly dismissed by the respondent and this claim is dismissed.
2. The claimant was not wrongfully dismissed by the respondent and this claim is dismissed.

REASONS

Introduction

1. The claimant claims unfair and wrongful dismissal. The respondent says it dismissed him summarily and fairly for gross misconduct.

Issues

2. At the start of the hearing, I clarified both parties the issues I had to determine with. They were agreed to be as follows:

Unfair dismissal

- a) What was the reason or principal reason for dismissal? The respondent says the reason was conduct.

- b) If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will decide whether:
- i. the respondent genuinely believed the claimant had committed misconduct.
 - ii. there were reasonable grounds for that belief;
 - iii. at the time the belief was formed the respondent had carried out a reasonable investigation;
 - iv. the respondent otherwise acted in a procedurally fair manner;
 - v. dismissal was within the range of reasonable responses.
- c) Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
- d) If so, should the claimant's compensation be reduced? By how much?
- e) Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- f) Did the respondent or the claimant unreasonably fail to comply with it ?
- g) If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
- h) If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?
- i) If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

Wrongful dismissal

- j) What was the claimant's notice period?
- k) Was the claimant paid for that notice period?
- l) If not, was the claimant guilty of gross misconduct?

Procedure

3. The final hearing had been listed for three days from Wednesday 31 March 2022. The matter had originally been listed for four days, and the parties had attended the hearing having had no notification that the listing had been reduced to three days. I could not ascertain how this state of affairs had arisen. Initially, the tribunal, with the agreement of the parties, sought to hear the case within the three day window, but keeping the matter under review. It soon became clear that the case could not be heard in three days, and indeed four days was reasonably tight and involved both

counsel having to be focused in their cross examination. A further date had to be arranged. Unfortunately, it was not until 6 May 2022.

4. With the agreement of the parties, the hearing focused on liability, including *Polkey*, contributory conduct and whether there had been a breach of any ACAS procedure (but not the percentage of any uplift). If the claimant succeeded on liability, a remedy hearing would be listed.
5. I noted the claimant referred to long-standing mental health problems in his witness statement and to a diagnosis of dyslexia. At the start of the hearing I asked if any adjustments for accommodations were required to assist with any difficulties the claimant might face during the hearing. No specific adjustments were required, but I indicated I would keep this matter under review and the claimant need only ask if he required me to consider making any adjustments to the proceedings. No issues arose during the hearing.
6. I was provided with a 1035 page bundle and was provided with witness statements and heard evidence from:
 - a) Mr Andrew Bamford (Account Director UK Energy & Resources)
 - b) Ms Jennifer Wytcherley (Global Contract and Commercial Director)
 - c) Ms Cheryl Grant (HR Director Energy & Resources)
 - d) The claimant;
 - e) Mr Phil King (Planon Integration Manager – called by the claimant).
7. During the course of the hearing a further 114 pages were added to the bundle following an application by the claimant for specific disclosure of certain documents which I granted.
8. At the conclusion of the evidence I reserved my decision and the parties were directed to provide written submissions and replies if they wished. Both parties provided written submissions, but no replies were sent to me.

The facts

Background

9. The respondent is a facilities management company delivering a range of services to clients in the UK and Ireland. The claimant has worked in facilities management for a number of years. He worked for BMG Limited in 2002, before his employment transferred to Carillion. In January 2016 he was moved to work as a Project Interface Manager on the Shell account based at their London Campus. On the collapse of Carillion his employment was transferred to the respondent on 12 February 2018. The respondent says that this was not a transfer under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (“TUPE”), but it accepts he has continuity of employment. Nothing turns on this issue.

The claimant's role

10. Also in February 2018, the respondent took over responsibility for Shell's Thames Valley Park ("TVP") site based in Reading. This site had been substantially neglected over the years.
11. On 1 July 2019 the claimant was promoted to the role of Site Director. This role was a step up from his previous role, and he was initially reluctant to take it on due to his lack of technical experience and qualifications. After some discussion with senior managers, and reassurance that technical support would be available to assist, the claimant took the role. He reported to Mr Joe King, UK Account Director (I will refer to him by his full name, as I will with Mr Phil King, to avoid confusion).
12. The offer letter for the role attached a job description. The "Position Location" was "Shell Centre London".
13. The purpose of the job was set out in six bullet points which included "*Ensure a safe, compliant environment for our teams and customers by ensuring processes are followed and gaps identified and escalated to resolution*".
14. Under "Context and main issues", the following were included:
 - a) "*Lead by example on all aspects of HSE, setting the pace in the journey towards Goal Zero*"
 - b) "*Be the senior manager on site for both Hard and Soft Service ensuring a one team approach*"
15. The section on "Main assignments" included:
 - "*Ensure all aspects of the contract are delivered safely in line with agreed SLSS*"
 - "*Take overall responsibility for ensuring that contracts are operated within their contractual terms;*"
 - "*Lead the management of Health Safety and Environmental Legislation relating to the building portfolio ensuring statutory requirements are met and all records are maintained up to (sic – presumable "date")*"
 - "*Take overall responsibility for ensuring that the contracts are operated within their contractual terms, have a unit business plan which is reviewed at least quarterly showing key objectives, goals and measures that link to the overall business plan and strategy for the segment*"
 - "*Take overall responsibility for ensuring the contracts perform to budget and achieve their unit business plans and improve financial performance utilising nominated suppliers, maximising labour property activity in line with Company models, policies and procedures controlling costs*".

16. The job description contained five accountabilities:
- *“Safety and Compliance of customer, team and assets*
 - *Leadership and people management – engaged teams working efficiently and effectively*
 - *Ensure a one team approach across both Hard & Services*
 - *Retention via client and customer satisfaction*
 - *Rigorous management of results and compliance to commercial terms”.*
17. The Person Specification included *“Experience of working in an environment where HSE is critical to the client”.*
18. The claimant’s contract of employment, dated 19 June 2019, under the heading **Health and Safety**, included *“You must ensure that you do not act in a way that endangers your health and safety, or that of others. Failure to comply with the current requirements of this clause 15 may result in disciplinary action being taken against you, which may include your dismissal without notice”.*

The events giving rise to disciplinary matters

19. TVP had a Technical Services Lead, Mr Deasy, who had overall technical responsibility for the site. He reported directly to the UK Account Director, Mr Wright, until March 2019, and to Mr Joe King thereafter. In January 2020, Mr Deasy left and was not replaced. Mr Joe King made a request to senior management to fill this role, but was told not to recruit to it as the respondent was awaiting the outcome of a global tender to retain the facilities management services for Shell in the UK. The contract was signed in February 2020. TVP also had a Site Engineer, Mr Bennett.
20. In January 2020 Mr Miller was appointed to the role of Technical Services Manager at the Shell London campus. He reported to the claimant.
21. In February 2020 the Coronavirus pandemic began to take a grip and the UK went into lockdown on 23 March 2020.
22. In August 2020 Mr Joe King was made redundant by the respondent and left the business. Mr Dunk took over his responsibilities as EMEA Account Director (which covered around 30 sites), including line management responsibility for the claimant.
23. On 29 October 2020 Mr Dean, an Authorising Engineer from the team dealing with the appointment of Authorised Persons (“APs”), emailed Ms Jay, Director of Development and Deployment, subject line “Shell London” setting out that APs had not been appointed in various positions (Electrical, Mechanical, Confined Spaces, Working at Height and F-Gas – a type of gases whose use is heavily regulated). He outlined difficulties he had attending site and undertaking audits. Ms Jay forwarded this email to Mr Dunk and other senior managers, pointing out that an impasse had been

reached in embedding the respondent's safe systems of work. She asked Mr Dunk whether he had "*formally communicated to Mick as we agreed as I am concerned that we seem to be making little progress?*"

24. On 13 November 2020 Mr Green, Shell's Hard Services Manager, emailed the claimant and Mr Miller, subject line "Re: TVP Open Concerns", stating "*we have a load of statutory failings on site and have not been made aware of any of them, these need to be closed out as a matter of urgency please*". He listed the failings in all buildings. Pausing here for clarity, hard services are services relating to the infrastructure of a site, whereas soft services are matters such as cleaning and catering.
25. On 20 November 2020 Mr Dyett, a more senior manager at Shell, emailed Mr Wright and another of the respondent senior managers, Mr Larman, setting out a list of concerns in 12 bullet points at "London/TVP".
26. On 25 November 2020 Mr Miller emailed a colleague to ask about Planned Preventative Maintenance ("PPM") run on a system called Maximo in relation to TVP. Another colleague confirmed that the Maximo was deployed on site in 2018 and that no PPMs had been run for two years and the site appeared not to be using the system. Mr Miller forwarded this email to the claimant simply stating "Bugger!!!!!!!" The claimant's response was "FFS".
27. On 3 December 2020 Mr Miller emailed Mr Dunk and the claimant with a draft of an email he proposed sending to Mr Green, asking whether they were happy with its contents. The draft set out that an investigation into TVP had highlighted various issues, including that no PPMs have been generated since 2018, but there was, as a result, lack of compliance data, there was a skill shortage with the resident technician and a large number of historic defects and faults had been identified. A number of proposed solutions were set out.
28. Later that day it would appear that Mr Dunk was attempting to reply to Mr Miller's email, but instead he forwarded it to Mr Green with a reply. Mr Dunk said "*We cannot revert back to Ray [Green] until we are clear on the history and root cause of his findings, so please hold off.*" He suggested that there might be records of statutory maintenance carried out which had not been captured by the Maximo system, and he proposed that this be checked. He also added some comments to Mr Miller's proposed draft.
29. On 4 December 2020 Mr Green replied "*Assume this email was sent in error, the below email trail is very concerning for me, can you please let me know when we can set up a meeting to discuss in more detail?*" Later that day he sent a further email to Mr Miller and the claimant pointing out that it had become apparent that many of TVP actions set and budgeted for in the past had not been completed. He asked that in future he be given a monthly report addressing numerous issues. He stressed the need to take control now that the status of TVP was known, and encouraged them to create an agreed template.
30. On 7 December 2020 Mr Green sent another email to Mr Miller, cc'ed to the claimant and Mr Dunk, asking him to finalise the LOD1 document with all the relevant document checks and to supply all been SharePoint

links. He expected him to update the “open concern tracker”. The LOD1 document was, essentially, a maintenance report for audit.

31. On 10 December 2020 Mr Dunk emailed the claimant and Mr Miller on the subject “TVP feedback & actions”. He had a few comments to make some additional questions to which he wanted answers by the end of the day.
32. On 15 December 2020 Mr Dunk emailed the claimant asking him to share the detailed and updated TVP action plan with someone called Mark to ask if he was happy with it. He asked the claimant to send the latest version if Mark was happy with it as this would be needed as part of a formal response to Mr Green.
33. On 22 December 2020 Mr Bennett, the TVP Site Engineer, resigned. In his resignation email he complained about the lack of attention from management in London during his tenure as the sole engineer on the TVP site. He said his concerns were ignored, and more recently he had been accused and criticised for the condition of the building, and blamed for the current problems. He said *“I am now having to take the blame for the Sodexo senior management team who have **never** given the building TVP the attention or resource that was required”*.

Suspension

34. On 5 January 2021 the claimant attended a meeting with Mr Tessier, Regional Director, EMEA, at which he was suspended in respect of the following allegations, which were put to him:
 - *“A serious breach of the Company's health & safety rules including record keeping and/or a single error due to negligence which causes, or could have caused, loss, damage or injury to the Company or Client, its employees or customers. Specifically relating to the failure to carry out or keep a record of any statutory and regulatory maintenance carried out at site(s) within your area of responsibility.*
 - *A serious breach of Health & Safety Rules, including record keeping and/or a single error due to negligence which causes, or could have caused, loss, damage or injury to the Company or Client, its employees or customers. Specifically relating to, ongoing lack of Sodexo engagement related to ensuring site(s) within your area of responsibility have sufficient appointed persons.*
 - *Breach of Sodexo Code of Conduct re Specifically relating to the welfare and line management of lone / remote worker in Thames Valley Park.*
 - *A serious breach of trust and confidence.”*
35. The claimant felt this was grossly unfair as he said he was the person who had raised the concerns. He was told that Mr Bamford would be the investigating manager. He was given a suspension letter which confirmed the allegations being investigated. He was asked not to contact colleagues

in respect of the allegations and was asked to return his Shell and Sodexo laptops and mobile phone, which he did.

36. On 6 January 2021, Mr Lean, an Authorising Engineer with the respondent, wrote to Mr Dean (also an Authorising Engineer) to outline numerous problems in appointing APs at the Shell London site.

Investigation

37. On 12 January 2021 Mr Bamford held an investigation meeting with the claimant. At the start of the meeting the claimant asked for his Shell laptop as he believed most of the answers to any questions would be on it.
38. During the course of this meeting Mr Bamford advised the claimant that the allegations related to “all sites including TVP”. The claimant said that he did not think he was responsible for TVP, but was responsible for all hard and soft facilities management services at the Shell Centre London.
39. Despite the charge referring to “site(s)” and Mr Bamford saying the allegations related to all sites, Mr Bamford’s questions focused on TVP. Essentially, the claimant said that that he was not responsible for TVP. He had an engineer who reported to Mr Miller and Mr Miller reported to him and that from “a caring point of view” he had some responsibility but no written responsibility for TVP under his contract or job description. Issues were raised by the engineer, Mr Bennett, he and Mr Miller acted straightaway. At that point he accepted did that he took some responsibility for the site.
40. Mr Bamford told the claimant that he would be interviewing others, and would decide whether further action would be taken on the allegations.
41. On 19 January 2021 Mr Bamford interviewed Ms Ferguson, Finance Manager and produced a statement from her, based on the minutes of that meeting. She was asked who was responsible for the budgets of Shell Central and TVP and she responded “Tim”, i.e. the claimant. She said that she would go to the claimant if she were looking for clarity or information in relation to the Shell Centre or TVP. She said that the claimant discusses the finances of TVP at finance reviews.
42. Also on 19 January 2021, Mr Bamford interviewed Mr Cole, Critical Manager, and produced a witness statement from the interview. Again, the focus was on TVP. Mr Cole outlined the fact that he initially reported to the claimant, and then to Mr Miller from January 2020 based at the Shell Centre. He never raised any health and safety concerns at the Shell site. He found the claimant helpful. He moved over to TVP at the end of November 2020. On his first site visit he immediately raised concerns with Mr Miller about the condition of the site and “*they jumped on it straight away and started doing everything that they needed to do*”. He said the engineer TVP had not done anything in respect of compliance and paperwork prior to that.
43. Again on 19 January 2021 Mr Bamford interviewed Ms Condon, General Services Manager, and produced a witness statement. Again, the focus was on TVP. She explained she was the soft services manager for TVP and said that concerns about issues at TVP “definitely” filtered

through to Mr Miller and the claimant. She said that they were aware that things needed to be done and nothing happened. She said she raised things with Mr Miller and cc'ed the claimant. They never pushed back saying that they were not responsible.

44. On 19 January 2021 Mr Bamford interviewed Mr Fletcher, HSE Manager and produced a witness statement. The focus was on TVP. He was asked who he thought was responsible for TVP, and he responded "*it could be a mixture because when he started there was no Tim*". He went on to say that Mr Miller "*would have been responsible for TVP and then Tim would be the overarching person*". He said that if there was a concern he would raise it with Mr Miller first and then have a chat with the claimant. He was asked about whether he had any burning concerns regarding TVP, and he responded that no Covid risk assessments or site induction had been carried out and that he has put up more signage. He was disappointed that various different levels of management have been to TVP but insufficient action was taken in terms of safety.
45. Mr Bamford held a second investigation meeting with the claimant on 22 January 2021.
46. The claimant was asked whether he knew that TVP sat with one of his direct reports, Ms Condon. He replied that Mr Dunk was responsible for the site and he was there to support Ms Condon when required. He said no one had ever handed over responsibility for TVP to him. He said that he had accountability to his staff for their welfare but not responsible for the site.
47. Mr Bamford offered the claimant the opportunity to access his laptop and arrangements were made to contact HR in this respect.
48. During his investigation Mr Bamford also spoke to various other individuals;
 - a) Mr Larman, Global Health, Safety, Security & Environment Director
 - b) Ms Jay, Director of Development & Deployment, who commented on the claimant and Mr Miller's lack of ownership through the process, and described the claimant as "delusive" (probably meaning elusive).
 - c) Mr Dean, Authorising Engineer, who had no problem with the claimant but said the tech services director was not good in coming forward and said that the AP provision for electrical was "*just like pulling teeth*".
 - d) Mr Dunk was asked if there was anything he could provide to "*discredit the response of I didn't know I was responsible for it?*" He said that the claimant had lied about the AP process, and about the TVP action plan. He said "*Tim just doesn't have a clue!!!*" He commented on the lack of documentation about what had been done anywhere, and commented on the claimant's lack of leadership skills.

- e) Ms Bingham, Global PMO, made a number of negative comments about Mr Miller and said that the claimant “*never got involved at all to own it, drive it not accountability at all, Tim not engaged whatsoever*”. She said that there were no controls in place by the claimant to ensure things were done in the right way and that the level of engagement from October 2020 was shocking, and that he made excuses.
 - f) Ms Horne, Finance, said there were concerns about the claimant who took no accountability and never turned up to meetings along with Mr Miller.
49. Mr Bamford sent a summary of his conversations with these individuals (and the people who he provided witness statement for) to Ms Douglas in HR in an email dated 25 January 2021. The contents of these conversations were not shared with the claimant during the disciplinary process. It is also right to say that the summary of the conversations referred to at paragraph 48 above did not form part of the disciplinary hearing, and was not seen by Ms Wytcherley (see below).
50. 18 February 2021 Mr Bamford produced an investigation report. In it:-
- a) He set out that the initial focus was on TVP but that the Shell London Campus was investigated during the investigation.
 - b) He referred to the site-based engineer (Mr Bennett) resigning and pointing out that he too would be under investigation had he not resigned.
 - c) He listed the interviews he conducted, including those of Mr Larman, Mr Dunk and others, briefly setting out why he had interviewed them, but not detailing the contents of the interviews.
 - d) He indicated the policies and procedures he considered.
 - e) He set out his evaluation of the evidence in relation to each allegation.
51. In this evaluation of the evidence, Mr Bamford set out that the concerns in respect of TVP prompted an audit on the Shell Campus, which was ongoing, but which revealed that for December the status of statutory and mandatory PPMs was “red” at 33% completed.
52. Mr Bamford concluded that there was a disciplinary case to answer in respect of allegations. He set out each allegation indicating policies or procedures had been breached and indicated in respect of all of them that they potentially amounted to gross misconduct if proven.
53. On 19 February 2021 the claimant was invited by recorded delivery letter to a disciplinary hearing on Friday, 26 February 2021 to take place remotely by Microsoft Teams chaired by Ms Wytcherley, Global Contract and Commercial Director. The letter included an information pack containing numerous documents including Mr Bamford’s investigation report, the relevant rules and policies relied on and the documentary evidence relied on. The claimant was invited to produce written

submissions or to provide evidence in advance of the hearing if he chose to. His attention was drawn to the employee assistance programme.

54. Also on 19 February 2021 the claimant was certified as unfit for work due to “stress at work”. The claimant has had difficulties with his mental health since the loss of his brother in 2012. He also has been diagnosed with dyslexia. A further fit note was provided on 25 February 2022 which suggested that all work-related contact should be avoided including face-to-face, virtual and telephone contact.

Grievance, Health issues and progress of disciplinary action

55. Towards the end of February the claimant put in an undated grievance relating to the disciplinary process. He complained about the length of time it was taking. He pointed out that the allegations related to a site which was not under his responsibility but have been expanded to include an audit of the Shell Campus, which he said was instigated to remove him from the business. He considered the expansion of the investigation was unwarranted and was motivated by a desire to remove him from the business as his face did not fit. He referred to his being signed off with mental health difficulties and said he felt his stress was being exacerbated by being harassed to attend the disciplinary meeting at short notice. He said that he would be happy to be examined by an independent OH professional.
56. On 3 March 2021 Dr Eric Liu, a Consultant OH Physician, prepared a report following a consultation with the claimant. The doctor noted symptoms of impaired mental well-being stemming from work-related stressors to do with the investigation. He considered the claimant to be unfit to work, but was fit to attend meetings with management. He suggested some accommodations to facilitate the investigation, which included having the meeting in a neutral environment, allowing him to submit a written statement prior to meetings so he could get his points across, allowing him to bring a colleague or union member to the meeting and expediting the investigations.
57. On 12 March 2021 Mr Dean produced a Site Compliance Review (“SCR”) which had been commissioned by Mr Dunk the previous month. The SCR covered the Shell London Campus. The executive summary indicated that whilst the Planon system (a facilities management system which contained information on all the assets on a site and allowed for reports showing maintenance tasks required on each asset) detailed a level of compliance, this could not be verified due to the lack of an auditable document management system. The accuracy of the asset and task data held on plan on was questionable. The executive summary highlighted key areas of concern based on its findings in the following areas: Asset & Task Data, Document Management, Change Management, Safe Operating Procedures and SME Engagement. The conclusion of the SCR was that “*the maintenance regime, including management of records and change management is not accurate or effective*”. It made a number of recommendations.

58. A grievance meeting was scheduled for 16 March 2021, which was postponed because of the claimant's ill health.
59. On 24 March 2021 the claimant was sent a Shell laptop by courier. The claimant said that this actually was received by his neighbour, and was not in fact the laptop that he used while in work. On 29 March 2021 he pointed this out to the claimant and suggested postponing the grievance meeting to be relisted as soon as possible, or that the meeting proceeds as planned but is reconvened when he has had the chance to review the correct laptop. On 2 April 2021 Ms McCormick from HR confirmed receipt of the laptop which the claimant had sent back, and indicated that the original laptop used by the claimant would be sent out the following Tuesday.
60. On 24 March 2021 Mr Cuthbert was appointed to the post of Technical Services manager effective from 26 April 2021 reporting to the claimant, but temporarily to Mr Dunk.
61. On 29 March 2021 claimant had a grievance meeting with Mr Thaine. The outcome was communicated to him by letter of 6 April 2021. Mr Thaine considered that some of the grievance concerning matters which were best dealt with under the disciplinary process itself. He considered complaints about the timescale and did not uphold this element of the grievance. In relation to allegations of bullying, this element of the grievance was not upheld. In respect of being harassed to attend to a disciplinary meeting exacerbating his stress, this element was not upheld. In relation to his mental health not being valued or prioritised, this element was not upheld.
62. It is also the case that on 29 March 2021 Mr Miller was dismissed by Ms Wytcherley for gross misconduct relating to identical or very similar charges to those faced by the claimant. On the second charge relating to appointed persons, Ms Wytcherley did not uphold the charge. She found the other 3 charges proven.
63. On 9 April 2021 the claimant was invited to a disciplinary hearing to take place on 14 April 2021.
64. On 13 April 2021 the claimant appealed his grievance decision.
65. At 7:20 PM on 13 April 2021 the claimant emailed Ms Wytcherley, the grievance hearing officer, and Ms McCormick, a statement from Mr Joe King, which he said they could discuss the following day.
66. At 9:36 PM on 13 April 2021, Ms McCormick responded to the claimant asking if he had anything else to submit for consideration. She pointed out that she had been copied in on emails relating to his wish to appeal his grievance and she suggested that it was only right that his appeal against grievance be heard prior to progressing the disciplinary. She said she was mindful of the claimant's well-being and would be looking to progress the appeal hearing swiftly. Thereafter, the disciplinary process would continue.
67. On 14 April 2021 the claimant emailed Ms McCormick saying that he wished the disciplinary hearing to proceed that day. He said that Mr Joe King's statement quashes the allegations completely and he did not want the allegations hanging over his head any longer affecting his well-being. Ms McCormick emailed back to say that as the grievance was directly

linked to the disciplinary and there was an appeal outstanding the right approach was to hear the appeal before the disciplinary. She said the appeal would be heard the following Monday.

68. Mr Joe King's statement was written to address the disciplinary action pursued against the claimant and Mr Miller in relation to maintenance services at TVP.
- a) Mr Joe King says he aimed to provide some context to how the situation evolved from 2018 when the respondent took over TVP. He was unable to comment on matters after his exit in August 2020.
 - b) Mr Joe King said that the mobilisation of hard services was conducted at haste without appropriate due diligence because of the demise of Carillion.
 - c) He mentioned that Mr Deasy was installed as Technical Services Lead, and that responsibility sat with him.
 - d) He said that it was generally accepted that the mobilisation of hard services for Shell London and TVP was poorly executed, not least because of the collapse of Carillion. This was identified and led to the restructuring of senior management on the Shell account.
 - e) He that the claimant was appointed to the role of Site Director London campus, and that there was no intention at this point for this role to hold responsibility for TVP, as this lay entirely with Mr Deasy.
 - f) In January 2020 Mr Deasy resigned. At this point a number of other things were happening. There was a re-mobilisation of the hard services at Shell in London to identify gaps in competency, training and induction. The new management team for London hard services were introduced which identified a number of gaps and failings. Also, the respondent was awaiting the outcome of the global tender which would determine whether it retained Shell contract.
 - g) Mr Joe King requested a replacement for Mr Deasy, but he was told not to recruit pending the results of the tender.
 - h) Shortly after this, in February 2020, the impact of Covid was felt, which meant Shell stepping up its safety measures and a new team being inducted. This was consuming the time of the entire team, and led to furloughs along with suspension of all non-essential maintenance.
 - i) In March 2020, the respondent was successful in the Shell tender and a due diligence process added more pressure to an already stretched team.
 - j) For all of these reasons there was little or no focus at the site at TVP. There was no capacity within the team to take on any additional responsibilities while awaiting the finalised structure for the new Shell EMEA contract.

- k) Mr King said that there was never at any point any formal communication to the claimant or Mr Miller giving them responsibility or accountability for TVP.
- l) From July 2020 Mr Joe King was in consultation about his redundancy. On his redundancy he left the business and handed over all responsibility to Mr Dunk.
- m) Mr Joe King expressed the opinion based on what he knew of the allegations levelled against the claimant and Mr Miller, that they were totally unfounded as they were solely in relation to TVP. He said his understanding was that during autumn of 2020 the claimant and Mr Mellor conducted an audit of the site and escalated these issues within the respondent and set about building a recovery plan. He believed they were being held accountable for issues that they identified at the site over which they have no responsibility or accountability.

69. On 22 April 2021 the claimant's grievance appeal was heard by Ms Quick. In the meeting the claimant confirmed he had now had access to his laptop and had found further evidence to back up his statements in the investigation meeting. He said there was a lot of correspondence between himself and Mr Dunk. Ms Quick advised the claimant he should produce any evidence from his laptop that he wanted to be considered at the disciplinary hearing as soon as possible.

70. The claimant said that he had wanted Mr Thaine to speak to Mr Dunk, and he wanted Ms Quick to do the same. Ms Quick said this was a matter for the disciplinary meeting. The claimant referred to his statement from Mr Joe King and said he believed the production of this statement had been the reason for the postponement of the disciplinary. Ms Quick said her understanding was the postponement was because of the timing of the grievance appeal. That he felt that the disciplinary should not go ahead as he was clearly not responsible for TVP, and Ms Quick said that this would be a matter for the disciplinary hearing. He said he felt the re-auditing of the London site was a witchhunt and he was gathering evidence in respect of it. Ms Quick advised that information would be made available to him. The claimant discussed his mental health. He also questioned why Mr Dunk had not been interviewed in the disciplinary process, and requested that this be done. Ms Quick said she would look into this.

71. On 23 April 2021 Ms Quick gave an oral decision, and she did not uphold any of the points of the claimant's grievance. She recommended that a number of items raised in the grievance should be addressed as part of the disciplinary hearing. She recommended that he should be given four days notice of his disciplinary hearing to allow him to prepare for it given his mental health condition. She advised that any supplementary evidence the claimant may wish to provide should be given 48 hours before the disciplinary meeting.

Disciplinary hearing 30 April 2021

72. On 23 April 2021 the claimant was invited to a disciplinary meeting to take place by Microsoft Teams on 30 April 2021. He was invited to put any evidence forward to Ms Wytcherley by 5 PM on 26 April 2021.
73. On 30 April 2021 the disciplinary hearing commenced. It was chaired by Ms Wytcherley, assisted by Ms McCormick and a note taker from HR.
74. The claimant produced an eight page statement at the start of the hearing. The thrust of this statement was:
- a) The investigation was fundamentally flawed and designed to make him the scapegoat for senior management failings.
 - b) That there was no evidence to substantiate the claimant's responsibility for TVP.
 - c) There was a failure to identify what failings are attributed to the claimant specifically.
 - d) The failings were historic, relating to a neglected site in which Mr Deasy had not been replaced.
 - e) That neither Mr Dunk nor Mr Joe King had been interviewed.
 - f) That the claimant was being blamed for failings attributed to Mr Miller too had been dismissed already.
 - g) The claimant raised procedural issues relating to lack of access to laptop, his mental health and his sickness pay.
 - h) The claimant also said that the broadening of the investigation to include the London Shell Campus was part of a witchhunt, and that evidence relating to PPMs being in the red 33% are not accurate due to the asset list not being 100% correct.
75. Ms Wytcherley said that some issues raised by the claimant were best picked up in grievance proceedings. She then went through the allegations. The hearing covered the following as well as numerous other issues.
- a) She stressed at the beginning that the allegations related to sites other than TVP. The claimant questioned whether the 33% figure was for TVP, and said that if it was London then the figures were not correct. There would never be 100% compliance depending on when the report was printed. Ms Wytcherley understanding that the report related to the Shell and TVP sites and was prepared following an investigation not just through printing out a report. The claimant commented that that would not be a true reflection of his management as he was not responsible for TVP.
 - b) Ms Wytcherley focused on the London campus and asked whether the statutory and mandatory maintenance was complete. The claimant said "We were on Amber". This meant less than 90% compliance with contractual standards. He was asked what he put in place to correct the performance. He referred to weekly meetings with Mr Phil King who was responsible for producing the data in

Planon. He said he had weekly meetings with Mr Miller and that Amber was acceptable. He was asked what assurance he had in place to ensure the statutory and mandatory maintenance was complete, and he said the reports being run by Mr Phil King and “speaking to the guys to highlight any issues”. He said that he had a project plan which he thought was in the pack.

- c) He was asked, given some assets were not correct on the system, what he did to ensure that rigorous checks were in place to ensure that statutory and mandatory work got done. He said he could only go by what was on the system and looked to see that “the guys were doing their PPMs”. He again said he thought a project plan might be in the pack. He said he did not escalate the problem with the asset list as everyone knew it was wrong including Mr Dunk.
- d) The claimant said that he did not have specialist knowledge in certain areas, for example compliance, and he delegated these issues to subordinates. He said there were if there was an issue with compliance the compliance manager would escalate it to him.
- e) The claimant was asked what he did to ensure he set timelines gave deliverables and held people to account to ensure maintenance was recordable so that reporting could be trusted. He said that should be in the project plan and if something went off track he asked why. He did not performance manage any of his team for technical issues. He said he had one-to-one meetings with them, which he did not document.
- f) He was asked about Mr Miller furloughing Mr Bennett, and asked number of questions about TVP, relating to the line management of people and budgets.
- g) Ms Wytcherley moved on to the statement from Mr Joe King.

Reconvened disciplinary hearing 4 May 2021

76. The meeting reconvened on 4 May 2021. This meeting covered, among numerous other things, the following:-

- a) There was a reasonably lengthy discussion about Mr Joe King’s statement.. The claimant suggested that Mr Joe King and Mr Dunk should be interviewed.
- b) The first allegation (serious breach of health and safety rules) was discussed. She asked whether there was a full complement of appointed persons, and if not what plan the claimant had to resolve this. The claimant said everything was filled apart from F-Gas and Confined Spaces and put more electrical APs were being appointed. He said the F-Gas was being addressed by a contractor identifying someone and training them. Ms Wytcherley pointed out that F-Gas responsibilities could not be delegated. He accepted not having an F-Gas AP was a health and safety risk.

- c) There were further questions about Mr Miller's management of Mr Bennett, and what the claimant was doing to make sure his managers managed their people effectively. The claimant said he spoke to people on an ongoing basis and checked that meetings and safety checks and appraisals were being done.
 - d) Ms Wytcherley said that the trust and confidence allegation would be proven or not based on the other allegations.
 - e) The claimant pointed out that if line management responsibility was being scrutinised then surely Mr Dunk should be doing things as well as the claimant.
 - f) Ms Wytcherley told the claimant that she wished to look in to a number of new points that were not brought up in the investigation meeting.
77. On 10 May 2021 Ms Wytcherley interviewed Mr Dunk, and created a witness statement from the minutes of that interview.
- a) Mr Dunk talked about the handover he received from Mr Joe King when he took over the UK Shell portfolio.
 - b) He spoke of the expectations he set for the claimant, which included responsibility for TVP, which went together with the Shell Centre. Mr Dunk said he could not remember a specific conversation but that it was his "assumption" that the claimant and Mr Miller were managing TVP.
 - c) It was observed that the claimant skill set was predominantly in technical services and project management.
 - d) Mr Dunk could not remember a handover for TVP specifically. "Come into play" until he got an email from the client Mr Green chasing a number of things.
 - e) Mr Dunk believed he signed the actual budget in respect of TVP.
 - f) Mr Dunk said that TVP did not have any attention, but he got the impression that it was being used as a "stick" to beat the respondent with because of a poor relationship with the claimant and Mr Green, and between Mr Green and his own boss Mr Clelland. Mr Dunk questioned whether the respondent had in fact "dropped the ball" or whether TVP was being used as a stick to beat them with.
 - g) Mr Dunk said the responsibility for the project plan to address the issues it TVP was given to Mr Miller. He said this plan was not finalised until January when the claimant and Mr Miller were suspended. Mr Dunk said his meetings with the claimant and not Mr Miller, and thus held him accountable.
 - h) Mr Dunk said the claimant never raised any concerns about his staff. The first time an escalation in respect of the AP was in

November. The claimant did not make Mr Dunk aware of any performance concerns in relation to the Shell Campus.

78. On 12 May 2021 the claimant was emailed an invitation to the reconvened disciplinary meeting to take place the following day at 3 PM. He was sent additional evidence, namely an Open Concerns from audit document dated 14 October 2020, the Shell London Compliance Review, and minutes of the meeting with Mr Dunk.
79. The claimant replied to the email saying he was very upset that he had not been given sufficient time to review the new documents meeting the following day. He asked for a postponement until the following week, which was granted.

Reconvened disciplinary hearing 17 May 2021

80. On 17 May 2021 the disciplinary meeting reconvened. The claimant produced a further statement. In a statement the claimant said:-
- a) He believed he was being unfairly blamed while others were being shielded.
 - b) Lines of questioning had not been properly followed, such as highlighting his lack of technical qualifications.
 - c) He felt that the disciplinary process was urging him to take up certain matters during the grievance process, while at the same time the grievance process was urging him to deal with matters within the disciplinary process. He felt this contradiction was denying him a fair trial. He also felt that certain allegations of harassment and discrimination were not being acknowledged.
 - d) He was being rushed through the process without adequate preparation time.
 - e) Mr Dunk should have been interviewed early to assess his culpability rather than interview late to support the case against the claimant. He was being asked about the claimant's faults and not about his own culpability. Mr Dunk's evidence did not support the claimant having responsibility for TVP. If anything, Mr Dunk held responsibility. He made detailed observations on Mr Dunk's statement.
 - f) In respect of the Shell London Compliance Review, he said that it confirms that incomplete and potentially inaccurate data was being used to show there were failings in the sites that the claimant managed and that this was being done in order to support a witchhunt for TVP. He said that an assumption within the document that a small sample was representative of the whole site was unwarranted. There were health and safety leads and the health and safety manager who had not escalated anything to the claimant. They have not been spoken to about any of this. He questioned why this report did not feature in the investigation stage of the disciplinary.

- g) In respect of the Open Concerns document, he said this was an incomplete document and questioned what it was, who owned it, who created it, who published it, what its context was and why there were no dates on the tabs. He felt this was an attempt to pin something on him in addition to TVP.
- h) He then went on to make a number of observations about the case in respect of TVP.
81. Ms Wytcherley adjourned the meeting for 20 minutes to read the statement. She asked a couple of questions about it at the outset, and dealt with a couple of points.
- a) She said that payment for sickness absence was a grievance matter. She would deal with any matters which were disciplinary in nature.
- b) She said that she could not discuss potential culpability of anyone else. However, if someone who the claimant had managed had been found accountable then it would need to be looked at to see how the claimant managed the situation. She confirmed that this would apply to the claimant's boss if the claimant was found not to have managed things correctly.
- c) Ms Wytcherley clarified that the allegations were about all sites. She said the claimant had referred her to the Shell SharePoint, and so she looked there and found the LOD 1 client audit carried out in October. The "*audit results found serious failures on compliance*". The claimant said he was aware an audit took place in October but he did not ask to see the result as he was told that there was nothing urgent or related to health and safety and the client did not escalate anything to him. Ms Wytcherley was concerned that the claimant claimed to know nothing about the audit findings given that he was the Site Director. The claimant said the findings were not accurate as it was just a tracker. If there were major issues the client would have approached the claimant.
- d) Ms Wytcherley pointed to the SCR which found "*non-compliance almost reiterating the clients audit*". The claimant said that the information was not going to be 100% correct as the Planon data was all wrong.
- e) Ms Wytcherley pointed out that the claimant could be held responsible as the Site Director in a court of law from a health and safety perspective if something went wrong. She felt he did not understand the severity of the situation.
- f) The claimant confirmed that he knew the LOD audit went ahead but he did not speak to Mr Green about it. He was asked if he had put rigour and steps in place to check compliance through his health and safety and hard services team. The claimant said that they work to the respondent's safe systems of work and that is the checks that were used.

- g) Ms Wytcherley adjourned the meeting for 15 minutes and then gave the claimant an outcome verbally.
- h) She upheld allegation 1 as she found that the claimant had not taken accountability and there had been a lack of due diligence to ensure that there was compliance and that people reporting to him were performing their duties appropriately. She felt that the claimant had failed to escalate things appropriately where there had been concerns. She considered he failed to log the risk involved on site in a formal way and that it was lucky that somebody had not been seriously injured.
- i) Ms Wytcherley upheld the second allegation because the claimant knew there were gaps in appointed persons. She considered the claimant did not take accountability to ensure he understood the consequences of not having those appointed persons in place such as not knowing that there were specific actions which could not be passed on to a supplier. He failed to understand the risks and left the sites exposed.
- j) Ms Wytcherley did not uphold allegation 3 despite some concerns.
- k) Ms Wytcherley upheld allegation 4 based on the lack of accountability relating to the two allegations she upheld.

82. On 21 May 2021 Mr Cuthbert was promoted to Site Director for Shell Centre and TVP.

83. On 25 May 2021 Ms Quick provided a written outcome to the claimant's grievance appeal.

Dismissal letter 9 June 2021

84. On 9 June 2021 the claimant was provided with a written outcome to the disciplinary hearing. The latter covered the following:

- a) Ms Wytcherley set out the allegations and noted some of the procedural history. She said that the claimant had been given plenty of opportunity to provide supporting evidence relating to the control and assurance to show he closed out risks alleged against him. She noted the evidence that he had provided.

Allegation 1 – serious breach of health and safety relating to failure to carry out or keep a record of statutory and regulatory maintenance

- b) Ms Wytcherley observed the elements of the claimant's job description detailing his responsibilities, in particular relating to health and safety.
- c) Ms Wytcherley observed that the claimant had confirmed he used the asset system to record information on the completion of planned maintenance, and that this was still not up-to-date for the Shell centre on the date of his suspension.

- d) The claimant was unable to provide evidence of a structured action plan to correct problems. She noted the clients KPIs on statutory and mandatory performance were 100% and 95% respectively. Amber performance was below the client targets, was not acceptable and showed the claimant did not fulfil the requirements of his role.
- e) Ms Wytcherley found that the claimant did not have any activity, checks or processes set up in place for clear assurance of statutory and mandatory activities ensuring that this was closed out each month. She noted the claimant stated that conversations had taken place to confirm all was okay, but this was not documented. She considered that clear processes to check assurance and clear evidence of statutory and mandatory tasks having been completed should be expected. There was no corrective action plan in place and this was unacceptable.
- f) Ms Wytcherley noted the claimant saying he was not qualified in hard services and was assured he would have people in place to support him to carry out these tasks. No evidence had been provided to support this professed lack of knowledge. The claimant had in fact transferred from a hard services company to the respondent and confirmed he had 20 years of experience. She considered it would be expected that he would understand the health and safety and statutory and mandatory requirements of the role.
- g) Ms Wytcherley noted the claimant's contention that roles in areas he needed support left the business in 2020 and were not replaced. She observed that the claimant did not undertake any formal escalation about any concerns the claimant may have had about a skills gap. Although the claimant had said he had a couple of conversations with Mr Joe King these were not documented and no further steps were taken to ensure risks to the sites were known. She observed that the claimant had recruited Mr Miller as Technical Services Manager, but that he failed to manage him or hold him to account. The claimant had not taken Mr Miller through any performance management process. She said it was not acceptable that the claimant had not ensured he had visibility of compliance of statutory and mandatory activities on site and that he did not hold his direct report accountable for this.
- h) Ms Wytcherley referred to the LOD report loaded onto the system on 5 October 2020 by Mr Green, and which was accessible to the claimant's team. A file had been uploaded by the client on 14 October 2020 which Mr Miller had seen and saved. This would have been available to the claimant at any time. Ms Wytcherley considered that the claimant saying he acknowledged the audit had taken place and his taking verbal confirmation from his team that all was okay was not acceptable. Not knowing what actions had been agreed by his direct reports emphasised how the claimant's approach of having off the record conversations with his team did not provide the necessary rigour to ensure that he carried out appropriate due diligence and that the site he was accountable

remained compliant with statutory and mandatory obligations. Ms Wytcherley went on "*The findings from the audit are clear, from no record of insurance, no record of authorised persons, no risk registers as required etc and the urgency required to close out these issues are unacceptable. These actions as of the Sodexo audit are still found to be open and unresolved at the point of your suspension. It is evident from this list of actions that the health and safety of site was compromised and the lack of accountability of this area of services is unacceptable*".

- i) Ms Wytcherley went on to quote from the SCR. She noted that the claimant had questioned the validity of the reports and referred her to the Shell system. Ms Wytcherley discussed the performance of the Shell campus for 2020, in the Pharaoh report results (produced by the Planon system). She went on to say "*It should be noted that the allegations are not about one area i.e. planned jobs not been completed as per requirement but the combination of compliance record keeping, task completion, correct training etc that ultimately could lead to the causes, or could have caused, loss, damage or injury to the Company or Client, its employees or customers*".
- j) Ms Wytcherley said that questioning had demonstrated to her that the claimant did not accept direct responsibility as Site Director for the safety of his colleagues and client employees in ensuring the site is compliant. She pointed out that a worst case scenario could be that a fatality occurred on site due to the lack of statutory or mandatory obligations being undertaken, and that a charge of corporate manslaughter could be levelled against him as Site Director.
- k) Ms Wytcherley dealt with the evidence of Mr Joe King. She considered that the claimant had never raised in writing concerns about not having responsibility for TVP, and that he had in fact made decisions that led to him taking accountability. The claimant had combined results from both TVP and London South in meetings with the client and approved purchase orders. However, she accepted that it was not clear until the claimant was asked to "own the action plan of TVP" but nothing was formally communicated to him that his site remit covered TVP. She observed he had direct line management responsibility for someone who made decisions on that site and that he did not raise any formal escalation that the site had not been managed. She noted that Mr Dunk "assumed" the claimant was accountable for TVP but had not gone into the detail when Mr Joe King handed over to him. She found that, in relation to TVP, the claimant was aware of decisions by his direct reports that led to questionable decisions being made, and the claimant have not taken appropriate steps to escalate these concerns. She said that she had not based her decision on TVP and focused on the Shell campus to make her decision.

Allegation 2 – serious breach of health and safety relating to the appointment of appointed persons

- l) Ms Wytcherley noted the claimant accepted that there were gaps in appointed persons, but that the claimant did not take accountability to establish the risks of not having these persons on site. She noted the claimant's evidence that certain duties were passed on to suppliers that the claimant did not know could not be done. It was clear the claimant did not take steps to understand the risks and create a risk mitigation plan.
- m) The claimant stated he was aware of gaps but did not understand the implications of not having an appointed person on site. He said that he requested the responsibilities to be given to a subcontractor. Ms Wytcherley considered this decision alone was not acceptable as responsibilities could not be passed on to suppliers for certain tasks.
- n) There was no evidence to show the claimant took appropriate intervening action to mitigate the risks. The claimant took no appropriate steps to accelerate the process or to performance manage the hard services manager he had delegated to resolve the issue.

Allegation 3 - breach of rules relating to welfare and line management of lone worker in TVP

- o) Ms Wytcherley observed that the claimant was aware that lone worker (this would have been Mr Bennett) was managed by Mr Deasy. In September or October Mr Miller, a direct report of the claimants, took over the line management of Mr Bennett. She accepted that the decision to furlough Mr Bennett was taken by Mr Miller and not the claimant.

Allegation 3 - breach of trust and confidence

- p) Ms Wytcherley found this proven. She considered the claimant had not accepted he failed to carry out his duties, and instead suggested all responsibly lay with people above or below him. She considered his lack of action, lack of ownership and lack of accountability were what had failed. He had not carried out the duties entrusted to him, had not taken accountability for gaining knowledge he said was missing, and did not request any of this in a formal way. He did not escalate in an acceptable manner any areas of the business he knew to be failing, and therefore the Shell campus had been left exposed to risk. She considered that it was fortunate that a serious incident had not occurred that could have resulted in tragedy. She considered that the safety of staff, client staff and visitors had been put at risk as well as the reputation of the respondent.

85. Ms Wytcherley confirmed the date of termination of the claimant's employment was 17 May 2021. She stated that this was a summary dismissal and the claimant would not receive payment in lieu of notice or notice pay.

86. On 23 June 2021 the claimant emailed his grounds of appeal against dismissal to the respondent's HR department. His grounds ran to 11 pages

and will not be set out in detail. In them he considered that he was being made a scapegoat for the failings of others. He raised procedural issues. He questioned why the focus of the disciplinary abruptly shifted from TVP to other sites. He considered that the disciplinary consistently threw out evidence which he was not given the opportunity to prepare for. He was presented with evidence relying on flawed data which could be used to tell any story the respondent would want it to. He asserted that he did not have access to emails and documents and was hampered in preparing his defence. He considered that failings levelled at him about performance could easily be levelled others, and that the Planon would show red and amber issues today. He observed that his position had been filled prior to the appeal conclusion. He asked whether any action was being taken against Mr Dunk, who had not raised any concerns about sites he oversaw. The decision to dismiss failed to consider mitigation. The claimant's questions remained unanswered. The grievance process was conducted unfairly. He had been offered no help with reading documentation despite suffering dyslexia. He had been found guilty of allegation 2, which have not been upheld against Mr Miller in the disciplinary proceedings that led to his dismissal. The AP system at Shell Centre was still non-compliant, but no one else was being held accountable.

87. The claimant went on to make detailed submissions about the allegations themselves. In relation to allegation 1 he commented that the case against him had been upheld on unreliable data. He observed "*Phil King who is the Planon operator is not in my reporting line*".
88. In relation to allegation 2, he commented that the only gap was for F-Gas and made observations about arrangements in relation to this. He set out how he said he had taken accountability in relation to electrical APs.
89. The claimant went on to make procedural observations and set out at length how he said the claimant had failed to accommodate his mental health problems during the process. He set out his exemplary work record and accused the respondent of not living up to its own ethical values.
90. On 25 June 2021 the claimant was invited to an appeal on 2 July 2021 to be heard over Microsoft Teams by Ms Grant, HR Director. The invitation attempted to distil the claimant's 11 page grounds of appeal into fifteen bullet points.
91. The claimant's witness statement does not go into any great detail about the appeal. Paragraph 46 of Mr Reid's Skeleton Argument suggests Ms Grant's evidence did not address key issues and highlights that she was not in possession of the entirety of the relevant material at the start of the appeal process. At paragraph 81m of his submissions Mr Reid identifies a failure to ensure that Ms Grant had full access to all of the relevant documents as the sole procedural failing relied on relating to the appeal. No other submissions are made about fairness relating to the appeal phase of the disciplinary process. Given the narrowness of the claimant's case relating to the appeal, detailed findings of fact will not be made.
 - a) Ms Grant started the meeting setting out the scope of the appeal, which was to discuss any new evidence that may have

come available, to consider whether the correct procedure had been followed or the original decision was not in a band of reasonable responses, or whether the decision was inconsistent with sanctions for similar disciplinary issues.

- b) The claimant asked if Ms Grant had a copy what he termed statement 1 (his statement dated 30 April 2021 for the the disciplinary hearing) and statement 2 (his statement dated 17 May 2021 for the disciplinary hearing) as well is his statement 3 (his grounds of appeal).
- c) There was much discussion about whether Ms Grant had these and whether they had been incorporated into minutes of previous disciplinary hearings as requested by the claimant. Ms Grant stressed that if the claimant wanted her to review this then he should by all means send the statements to her. She repeated this information on more than one occasion. The claimant was adamant that he had asked for them to be incorporated into minutes and also that HR were already in possession of these statements, and questioned why he had to send them again.
- d) The claimant made the point that he was dismissed for non-compliance in the London site based on incorrect information. In relation to a number of questions he was asked he replied that the information was all in his statement.
- e) The meeting did not conclude on 2 July 2021 and Ms Grant adjourned it to 6 July 2021. She asked if there was anything that the claimant wanted her to review, and the claimant confirmed that he wished her to look at his three statements.
- f) The meeting did not resume on 6 July 2021 as the claimant was unwell. It went ahead on 15 July 2021. Ms Grant confirmed she was in possession of statement one and statement two in addition to the grounds of appeal which the claimant had caused statement three. Everyone was comfortable to move on on that basis.
- g) The hearing covered 15 points that Ms Grant had distilled from the claimant's grounds of appeal. The minutes of the appeal hearing run to 28 pages.
- h) On 2 August 2021 Ms Grant sent the claimant a written disciplinary appeal outcome. She did not uphold the appeal on any of the grounds.

The law

92. Under section 98(1) ERA 1996 it is for the employer to show the reason for the claimant's dismissal, and that this is a potentially fair reason under section 98(2) ERA 1996. In this context, a reason for dismissal is "*a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee*" (*Abernethy v Mott, Hay & Anderson* [1974] ICR 323).

93. Potentially fair reasons include a reason relating to conduct (section 98(2)(b))
94. The approach to fairness of dismissal is governed by section 98(4) ERA, which provides: -

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

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

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

95. The EAT set out the approach to what is now section 98(4) ERA in *Iceland Frozen Foods v Jones* [1983] ICR 17.

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

(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 was 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.

96. Where the reason for the dismissal is misconduct, the approach to fairness is the test in *British Home Stores v Burchell* [1980] ICR 3

"First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds,

had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.”

97. It is important to focus on the wording of section 98(4) ERA, which does not set out a perversity test. It is for the tribunal to decide how serious the claimant’s conduct was on the information available to the employer. It is for the tribunal to assess whether the conduct in question was such as to be capable of amounting to gross misconduct, and a failure to do so could mean that the tribunal would have failed to determine whether it was within the range of reasonable responses to treat the conduct and sufficient reason for dismissing the employee summarily (*Elson v Robbie’s Photographic Ltd* UKEAT/0282/18/RN, *Newbound v Thames Water Utilities* [2015] IRLR 734).
98. In considering a dismissal that is disciplinary in nature, the tribunal will have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures.
99. Under the principal in *Polkey v AE Dayton Services Ltd* [1987] IRLR 503 where there is a failure to adopt a fair procedure at the time of dismissal, dismissal would not be rendered fair just because the procedural unfairness did not affect the end result. Compensation can be reduced to reflect the chance of dismissal taking place had a fair procedure been adopted.
100. The burden is on the employer to show what might have happened had a fair procedure been followed, but the tribunal is to take account of all the evidence in making an assessment. Sometimes reconstruction of what might have been is so uncertain or speculative that no sensible prediction can be made (*Software 2000 v Andrews* [2007] IRLR 569 and *King v Eaton (No 2)* [1998] IRLR 686.)
101. Section 123(6) ERA provides that the tribunal shall reduce the amount of the compensatory award by such proportion as it considers just and equitable where it finds that the dismissal was to an extent caused or contributed to by any action of the employee. This involves a finding that there was conduct “*deserving of blame*” by the employee *Sanha v Facilicom Cleaning Services Ltd* UKEAT/0250/18.

Conclusions

Reason for dismissal

102. The claimant’s case was that he was scapegoated. He says that the reason the respondent dismissed him was that they had to find someone to pin the blame on in order to satisfy their client. The claimant was a convenient “fall guy” and that people further up the chain, notably Mr Dunk, were culpable, but being shielded from blame.
103. Paragraph 35 of the claimant’s Grounds of Complaint suggests “*the concerns raised would be classified as performance issues and not conduct. However, it is denied that there were any genuine performance concerns whatsoever*”. However, the case run at the final hearing was not that performance, or capability, concerns were being inappropriately dressed up as conduct related concerns.

104. Ms Wycherley set out her rationale for dismissal in her letter of 25 May 2021. The tenor of this and her evidence to the tribunal was that she genuinely believed, on the basis of evidence before her, that the claimant had committed serious breaches of health and safety rules. She was of the view that he had failed to keep sufficient records of statutory regulation maintenance within the area of responsibility, and ensured sufficient appointed persons were appointed. She believed that this amounted to a serious breach of trust and confidence.
105. The claimant has raised reasonable issues about why the respondent determined that accountability lay with him and not above him. He raises the perfectly proper question: - if he is to be blamed for not adequately ensuring his reports and doing their job properly, what does this say about managers senior to himself? While these are reasonable questions, I do not find that the evidence indicates the witchhunt to pin the blame on him that the claimant suggests. It is suggested that the impetus to find a “fall guy” arose only after the client was inadvertently alerted to issues relating to TVP. However, the totality of the evidence strongly suggests that once TVP issues were escalated, the examination of compliance of sites widened. There is nothing sinister in this, and it stands to reason that where serious failings, and serious questions health and safety arise, an examination expands. It may be that the accountability of others merits examination, but this does not detract from what I find to have been Ms Wycherley’s genuine beliefs.
106. I find that the reasons given in her dismissal letter accurately reflect the set of beliefs she held which caused her to dismiss. She believed that the claimant’s actions amounted to gross misconduct. I find it the reason she dismissed him related to his conduct.

Genuine belief in misconduct held on reasonable grounds

107. These issues are considered two different issues under the *Burchell* test, but it can be convenient to consider them together.
108. The respondent’s genuine belief in the claimant’s misconduct has, to an extent, been dealt with above. Ms Wycherley genuinely believed the claimant had failed to do his job in a way that potentially put others at great danger.
109. The claimant attacks the reasonableness of the respondent’s grounds for its belief in the claimant’s misconduct on three grounds. The unreasonable inclusion of TVP failings in the dismissal grounds; unreasonable grounds regarding allegation 1; and unreasonable conclusions regarding allegation 2.
110. Before going further, I remind myself that it is my role to assess whether the actions of the respondent fell within the band of reasonable responses. This band is not infinitely flexible, but I am not here to retry the disciplinary process.
111. It is worth repeating what the disciplinary allegations that the claimant faced actually were: **Allegation 1:** “*A serious breach of the Company’s health & safety rules including record keeping and/or a single error due to negligence which causes, or could have caused, loss, damage or injury to*

the Company or Client, its employees or customers. Specifically relating to the failure to carry out or keep a record of any statutory and regulatory maintenance carried out at site(s) within your area of responsibility (emphasis added).

112. Ms Wycherley's dismissal letter, in relation to allegation 1, states in terms that she has not based her decision on TVP, and has focused on the Shell campus to make a decision. That said, in cross examination she was asked whether "TVP influenced the thinking on allegation 1". She said "Yes, the decisions he made jeopardised safety". In the minutes of the 17 May 2021 disciplinary hearing when she gave an oral decision it is recorded, in relation to allegations 3 "*I have decided not to uphold this allegation due to the fact that there was a period of time where your direct report did not have direct line management of this, and then there was a line management change stop I am concerned however about some of the things that we have discussed in relation to this allegation*". Additionally, in the dismissal letter in relation to allegations 3, Ms Wycherley makes observations about the claimant never raising issues he might have done, and it being questionable that things were being raised with him by Mr Miller if the two of them did not have accountability for the site. However, she finds that final decisions were not made by the claimant.
113. On this issue in isolation, I find that it is not outside the band of reasonable responses for an employer to acquit an employee of one disciplinary charge but still retain reservations about how they have gone about things, which may impact decision-making in respect of other charges.
114. Turning to the broader conclusions on allegation 1, I remind myself of the conclusions reached by Ms Wycherley as set out in her dismissal letter (at the risk of repetition).
- a) She had regard to the claimant's duties by reference to his job description, which focused heavily on taking overall responsibility for health and safety and contract compliance.
 - b) She noted evidence that the claimant himself had confirmed that the asset system (this would have been Planon) was not up-to-date for the Shell Centre.
 - c) She noted the claimant not providing any evidence of a structured action plan to correct the lack of transparency of performance, and she referenced him saying he had "*weekly meetings with Phil King who was responsible for producing the data in Planon. We then implemented the new procedure. I had weekly meetings with Mick (Miller) to see where we were with the PPMs. Amber is acceptable but I wanted green*".
 - d) She observed that the claimant "*did not have any activity, checks or processed setup in place for clear assurance of statutory and mandatory activities, ensuring this was closed out each month. You stated conversations took place to confirm all was okay, but not documented*". She considered this was not acceptable and would have expected clear processes to assurance check and clear

evidence that statutory and mandatory tasks had been completed. She found the claimant had no corrective action plan in place.

- e) Of the claimant's suggestion that he was not qualified in hard services and needed support, she observed his lengthy experience in hard services, the presence of a hard services manager as a direct report and the lack of evidence of any request for support in this area.
- f) She noted a lack of escalation in areas where he reported a skills gap and considered it unacceptable that he had no visibility of compliance of statutory and mandatory activities and had not held his direct report accountable for this.
- g) She referenced the LOD audit action tracker and noted that this had been seen by the claimant's direct report. She considered that not knowing what actions had been agreed by his direct report showed that the claimant's approach to off the record conversation with his team did not provide the rigour necessary to ensure the site remains compliant with statutory mandatory obligations. She goes on "*The findings from the audit are clear, from no record of insurance, no record of authorised persons, no risk registers as required et cetera and the urgency required to close out these issues are unacceptable. These actions as of the Sodexo audit are still found to be open and unresolved at the point of your suspension. It is evident from this list of actions that the health and safety of site was compromised and the lack of accountability of this area of services is unacceptable*".
- h) Ms Wycherley then referenced the SCR, noting that while Planon suggested a level of compliance "*this cannot be verified due to the lack of an auditable document management system*". She highlighted key areas of concern.
- i) Importantly, she noted that the allegations were not simply about one area, such as planned jobs not been completed, "*but the combination of compliance record keeping, task completion, correct training etc.*" that could have caused damage or injury to people or the company.

115. Mr Reid observed in his Skeleton Argument that the starting point for the investigation of the Shell Centre was the LOD report which suggested that it was 33% compliant on P1 and P2 PPMs. He pointed to unchallenged evidence from Mr Phil King that the figure was fundamentally wrong.

116. Mr Reid observed in his Skeleton Argument that the respondent sought to place huge emphasis on the LOD and SCR which he claims the respondents suggest show failings of the Shell site which warranted dismissal on allegation 1. He submitted that the LOD was a moving document which showed outstanding actions which move towards completion. He suggests that 100% compliance in respect of P1 and P2 PPNs have been achieved by January. He suggests red in the document did not suggest a statutory failing but a task that remains to be completed.

He suggested that reliance on the LOD and the SCR was a last-minute attempt to bolster the case against the claimant.

117. With the greatest respect to Mr Reid, who represented his client with conspicuous diligence and skill, the charge against the claimant was not that the sites have not achieved statutory or mandatory compliance. It was, as a review of the documentation shows, about systems, recording, visibility of issues, and taking accountability. It is recognised within the dismissal letter that evidence of compliance, certainly going from the Planon system, was problematic because of the lack of an auditable document management system and the accuracy of the asset task data.
118. The thrust of the claimant's case seems to be the LOD report and the SCR report were unreliable and do not show a lack of compliance, therefore to find him guilty of the charge was unsustainable. This appears to miss what the allegations against him actually were. It also ignores the evidence, often emerging from the claimant himself during disciplinary hearings, of the lack of systems and oversight of his direct reports, his non-recording of information and willingness to deal with matters by way of off the record conversations. During the disciplinary process the claimant himself acknowledged the Shell site was not compliant, being Amber.
119. In respect of allegation 1, I find that there were reasonable grounds on which the respondent could reasonably believe the claimant was guilty of the misconduct alleged against him. Had the charge been simply about achieving compliance rather than a more systems-based charge the claimant's submissions would have carried more weight. However, Ms Wycherley reasonably found a substantial lack of systems, record-keeping and processes emerging from the claimant, and reasonably relied on the evidence, in particular of the SCR, substantiating a lack of systemic rigour. Wycherley's evidence was that she would have expected to have seen GANT charts or site plans detailing what needed to be delivered by what date and how teams would be structured to deal with this. She saw no such plans.
120. Allegation 2: *"A serious breach of Health & Safety Rules, including record keeping and/or a single error due to negligence which causes, or could have caused, loss, damage or injury to the Company or Client, its employees or customers. Specifically relating to, ongoing lack of Sodexo engagement related to ensuring site(s) within your area of responsibility have sufficient appointed persons"*.
121. The claimant submits it was unreasonable to conclude this allegation proven. First, he says that this Mr Miller had been found not guilty in respect of this very same allegation, and it was therefore unreasonable to hold his superior guilty. The claimant says that this allegation related to matters on both TVP and Shell sites, despite a finding absolving him of blame in respect of TVP. There were mitigating circumstances in respect this allegation which were ignored. Finally, there was evidence from Mr Dean, who was responsible for APs, but he "had no problem" with the claimant in connection with this issue, and which may have caused Ms Wycherley to reach a different decision on this allegation.
122. In respect of this allegation I note that the quote from Mr Dean that he had no problem with the claimant was in an interview carried out by Mr

Bamford that was not shared with Ms Wycherley. This may be an issue to be considered in relation to the fairness of the investigation, but in terms of reasonable belief, she could only go on the evidence before her. Ms Wycherley fairly conceded that she might have wanted to interview Mr Dean and his evidence could have changed her outcome on this particular allegation.

123. The disparity of treatment between Mr Miller and the claimant is troubling. In her evidence the tribunal Ms Wycherley said there were different reasons for a finding against Mr Miller but she was not allowed to say why. She said he was trying to get things done and escalated but the communication dropped.
124. That said, there was evidence coming from the claimant himself that he delegated the AP process in respect of F-Gas to a contractor which was wrong. There is no reference to this in Mr Miller's disciplinary letter. On balance, therefore, I find that there was a reasonable basis for Ms Wycherley to conclude the claimant was guilty of misconduct in this regard. It may be that this is a matter which features in other aspects of the fairness of the dismissal.
125. Allegation 3 itself does not add anything of substance, but simply characterises as a breach of trust and confidence.
126. I find that the respondent had a genuine belief based on reasonable grounds that the claimant was guilty of the misconduct alleged against him.

Reasonable investigation

127. Again, I remind myself not to substitute my view that the employer and to look at the whole of the disciplinary process in the round rather than focusing too tightly on any one aspect. The fairness of the procedure overall is what is important. I also remind myself that the ACAS Code of Practice on Disciplinary and Grievance Procedures sets out useful keys to handling disciplinary issues in the workplace.
128. Mr Reid raises a number of allegations of unreasonableness in the investigation process:-
- a) The allegations were deliberately vague, referring to "site(s)" which made it difficult for the claimant to know the case he was facing.
 - b) Mr Bamford's investigation focused entirely on TVP until the reference to the 33% P1 and P2 figures referred to in his investigation report.
 - c) There were gaps in Mr Bamford's investigation, such as not interviewing Mr Dunk nor Mr Joe King, not checking the 33% figure with Mr Phil King, failing to investigate the claimant's responsibility for TVP, overlooking elements of the investigation which supported the claimant (such as Mr Dean saying that he had no problem with the claimant).
 - d) Failing to investigate the claimant's concern that the 33% figure was inaccurate.

e) Ms Wycherley not speaking with Mr King or Mr Dean.

129. I do not find that the charges were vague, deliberately or otherwise. It is right to say that the focus of Mr Bamford's investigation was very much on TVP. This was the matter inadvertently brought to the client's attention by Mr Dunk's mis-sent email to Mr Green. That said, Mr Bamford was clear that the investigation related to all sites. During the course of the disciplinary process Ms Wycherley was equally clear that the disciplinary investigation related to all sites. While I can see how the claimant might be puzzled to see a shift in focus in the disciplinary proceedings, it did not come out of the blue, and I do not find it an approach that would take it outside of the reasonable band of responses open to a reasonable employer.

130. It is easy to see, from the claimant's perspective, that it appeared to him that the investigation focused on TVP, he denied that he was responsible for the site, and then the investigation changed course in order to pin something else on him. However, the evidence suggests that by the time Mr Bamford's investigation concluded, although it has focused on TVP, issues were coming to light about the London campus. It is a fact of disciplinary investigations that they can evolve. The evidence here suggests an evolution of an investigation rather than the employer casting around for something to make stick. I do not find that this was an unreasonable approach by the respondent.

131. This was a complex investigation covering complicated technical processes. Nonetheless, it did seem odd that the claimant's line manager, Mr Dunk, did not figure in Mr Bamford's investigation. Mr Bamford's evidence as to why he did not interview Mr Dunk was that "*He forms part of the EMEA contract and as much as the claimant reported into him, he was new to the Shell side of business*". He went on to say that he did not feel the need to interview Mr Dunk as the issue had come to light through emails.

132. I am not sure I follow this explanation. However, looking at things in the round it is right to say that Mr Dunk was interviewed during the disciplinary process, albeit later than might have been expected. It may well be that the claimant's determination in pressing for Mr Dunk being interviewed played a part in this decision. But there is nothing to suggest there was anything in time critical about this statement, which the claimant was provided and commented on.

133. Mr Joe King had left the respondent organisation before the claimant's disciplinary process. Mr Joe King's statement made it clear that he believed the allegations were unfounded as they related solely to TVP, and this was the focus of his evidence. Ms Wytcherley considered his evidence and the allegation relating to TVP was not upheld. While he provided contact details, and I accept he was willing to be interviewed, a decision not to contact an ex-employee does not take the investigation outside the band of reasonable responses.

134. It is right to say that some employers would have ensured that Mr Dean's evidence that he had no problem with the claimant would have found its way into the disciplinary phase. Mr Bamford conducted a number of background conversations, including one with Mr Dean, that he did not

incorporate into his investigation report. Ms Wytcherley fairly conceded that this evidence could have impacted on her decision. In the round, however, I do not find that this omission took the investigation as a whole outside the band of reasonable responses. In terms of the background conversations, it is right to say that there was considerable negative evidence against the claimant in those that Mr Bamford did not incorporate. Perhaps, however, the more important point is that Ms Wytcherley's decision in respect of the AP appointments (to which Mr Dean's evidence might have gone) rested mainly on the claimant's own evidence about F-Gas APs being delegated.

135. In respect of failing to investigate the 33% figure (perhaps taking it up with Mr Phil King), I repeat the observation I have made above. There was a recognition that the actual figures were problematic, largely due to the lack of an auditable document management system and the accuracy of the asset task data. But the claimant's own case was that the position was amber. At the risk of repetition, Ms Wytcherley focused on systems rather than numbers and found ample evidence of systemic failure, some of which emerged from the claimant's own evidence. The claimant mentioned Mr Phil King a few of times during the disciplinary (saying that he had weekly meetings with Mr Phil King, and that he was not in his reporting line), but in contrast with the evidence of Mr Joe King and Mr Dunk, the claimant did not suggest him as a person who needed to be spoken to. In all the circumstances I do not find that this approach was outside the reasonable range of approaches.

136. As a whole I find that the respondent undertook a disciplinary process that was both compliant with the ACAS Code and not outside the band of reasonable responses open to a reasonable employer

Fair procedure

137. Mr Reid in his Skeleton Argument relies on the following procedural unfairness:

- a) Not citing any perceived failing or issuing any warning during the pre-investigation phase.
- b) Not providing the claimant with a warning of his suspension or the investigation until his suspension.
- c) Not giving access to his Shell laptop.
- d) Not disclosing a list of who was interviewed during the investigation and failing to take proper notes and conducting the interviews in a prejudicial manner.
- e) Not providing the notes of Mr Miller's interview.
- f) Not interviewing Mr Dunk until late in the process.
- g) Delaying the disciplinary process to hear the grievance but rejecting the grievance as matters related to disciplinary issues.

- h) Rejecting the grievance appeal without interviewing Mr Dunk or Mr Joe King.
- i) Delaying hearings to consider Mr Joe King's statement but not giving the claimant, a dyslexic person, adequate time to consider evidence.
- j) Disclosing the SCR late.
- k) Not providing minutes of disciplinary hearings until long after dismissal
- l) Delaying providing the claimant with the dismissal letter.
- m) Not giving Ms Grant access to the relevant documents.

138. I do not find that a) and b) led to any unfairness. It is often the case that employees are only confronted with allegations at a suspension meeting.

139. There were difficulties giving the claimant access to his Shell laptop. This belonged to the client, Shell, and this caused initial difficulties. Agreement was secured to provide it, and the claimant did have access to it over a few days prior to the disciplinary hearing. The claimant seemed to be saying he needed to see emails, but as I understood the evidence, these were web based and he did not need a dedicated laptop to view them. Also, as documented in the dismissal letter, he actually did provide emails to the disciplinary process, which were considered. The claimant did not satisfy me that the lack of his specific Shell laptop deprived him of anything he needed to access during the investigation.

140. The claimant actually was provided a list of who was interviewed in Mr Bamford's investigation report. I do not find his notes were inadequate or unfair. It is difficult to find that non-provision of Mr Miller's disciplinary notes was unfair when it is not known what they say or how they may have helped.

141. I have observed that it was odd that Mr Dunk was not interviewed earlier, but that he was interviewed and his evidence provided to the claimant.

142. The claimant may have felt frustrated that he appeared to shuttle between the grievance process and the disciplinary process and that each process was indicating that parts of what he was raising should be dealt with in the other process. However, I have not found that either process unfairly failed to deal with anything. In particular, in assessing whether the dismissal was procedurally fair or unfair, I do not find that the grievance process unfairly failed to interview Mr Dunk or King. Ms Wytcherly considered their evidence and the claimant was able either to introduce it or comment on it.

143. It is right to say that the claimant was provided with 3 key documents on 12 May 2021 the day before his resumed disciplinary hearing. Any unfairness this may have caused was removed by delaying to hearing to the following week (17 May 2021) as he asked. I find the reason the

respondent postponed the hearing due to take place on 14 April 2021 was the claimant putting in an appeal to his grievance finding on 13 April 2021 and not his providing Mr Joe King's statement. There was no evidence until the claimant saying the process caused him difficulties as a dyslexic person until he mentioned it in his appeal against dismissal.

144. It was not ideal that the claimant was not provided his written disciplinary outcome and the minutes until 9 June 2021, over 3 weeks after the oral outcome he was given. This was not so delayed as to constitute procedural unfairness.
145. Ms Grant was at great pains to ensure that she had access to all of the claimant's statements, which she read. This was not procedurally unfair.
146. Standing back and looking at the process as a whole, I do not find that the claimant's dismissal followed an unfair procedure. As with many complex investigations, it did not run entirely smoothly, and there were features where the respondent acknowledged it could have done better, but overall it was not outside the bands of reasonable responses in terms of procedural fairness.

Fair sanction

147. Mr Reid highlights a number of factors which take dismissal outside the range of reasonable responses: -
- a) TVP problems were longstanding and well-known to the respondent.
 - b) Covid made compliance especially difficult, including matters such as furloughing and redundancies.
 - c) The claimant's positive review and unblemished record.
 - d) The respondent being a large multinational who can conduct a fair investigation.
148. "Serious breach of health and safety rules" appears in the non-exhaustive list of what may constitute gross misconduct in the *ACAS Guide: Discipline and Grievances at Work (2019)*. This was exactly how the respondent framed the allegations it upheld against the claimant.
149. The dismissal letter set out the fact that as Site Director the claimant had specific responsibilities for health and safety of users of the sites he was responsible for. She also made it clear that the misconduct she upheld could have "*caused loss, damage or injury to the Company or Client, its employees or customers*". In her dismissal letter Ms Wytcherley suggested that it was "*fortunate that no serious incident had occurred which could have resulted in tragedy*" and pointed out that the worst case scenario would have been a fatality which could have led to a corporate manslaughter charge.
150. Turning to the specific challenges of the claimant. It could potentially be said that the longstanding well-known problems at TVP suggest that the respondent has a lax attitude towards health and safety. However, there is

not evidence that there was a tolerance of systemic lack of rigorous health and safety processes. The manner in which Mr Green followed up on the mis-sent email from Mr Dunk would suggest that it was not something the client tolerated. In any event, those potentially accountable for TVP (Mr Deasy, Mr Bennett and Mr Miller) were no longer in the respondent organization at the time of his dismissal.

151. The claimant did mention the demands of Covid during the disciplinary process in relation to the furloughing of Mr Bennett. Ms Wytcherley focused on 2020 and noted that the claimant did not escalate any support needs that he had beyond undocumented conversations.

152. In respect of the claimant's record, Ms Wytcherley gave evidence that she took account of his unblemished record, but did not consider this to be sufficient to consider any sanction less than summary dismissal given the seriousness of the misconduct. Demotion was not appropriate as trust had totally eroded.

153. Given the claimant's responsibilities, the seriousness of the misconduct (which I accept could have dire consequences in a worst case scenario) I do not consider that the factors identified by Mr Reid take the decision to dismiss outside the range of reasonable responses. I consider that the misconduct was capable of amounting to gross misconduct, that the respondent itself considered whether a lesser sanction than dismissal was appropriate and I find that it was within the range of reasonable responses to treat the misconduct as sufficient reason for dismissing the claimant in all the circumstances.

Conclusion on unfair dismissal

154. It follows that I find that the respondent did not unfairly dismiss the claimant.

Polkey, ACAS, contributory conduct, wrongful dismissal

155. I have not found any procedural unfairness. Had I done so, this is highly likely to have been a case where I would have concluded that despite the unfairness there would have been some likelihood of a dismissal following a hypothetically fair procedure. It is difficult to create such a hypothetical state of affairs when procedural unfairness has not been found, as the nature of the unfairness might have helped decide the likelihood of what would have otherwise happened. However, given the fact that much of what Ms Wytcherley found as misconduct emerged from evidence from the claimant himself, the likelihood of a fair dismissal would have been substantial. I will not commit myself to a figure given I have not found unfairness and am not required to conduct a *Polkey* exercise.

156. In the light of my above findings, I have not found a breach of the ACAS Code of Practice.

157. While I have examined the facts so far under the lens of unfair dismissal, I find that the claimant did in fact fail to have in place such things as records of insurance, records of authorized person, risk registers. I find that he did commit gross misconduct. As such he was not wrongfully

dismissed. Also, had I been required to assess contributory fault, it would have been substantial.

Employment Judge **Heath**

5 August 2022_____

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

.08/08/2022

FOR EMPLOYMENT TRIBUNALS