



EMPLOYMENT TRIBUNALS

First Claimant: Mr S Lane
Second Claimant: Mr W Turner

Respondent: E.On UK Plc

Heard at: Nottingham
On: 31 July & 1 August 2024
Before: Employment Judge Smith

Appearances

For the Claimants: Both in person
For the Respondent: Mr A Johnston of Counsel

RESERVED JUDGMENT

1. The First Claimant's claim of unfair dismissal is well-founded and succeeds.
2. The Second Claimant's claim of unfair dismissal is well-founded and succeeds.
3. The Claimants' entitlement to a basic award of compensation for unfair dismissal is reduced to nil because of culpable conduct on their part prior to their dismissal.
4. The Claimants' entitlement to a compensatory award of compensation for unfair dismissal is reduced to nil because of culpable, contributory conduct on their part.
5. Applying the **Polkey** principle, there was a 20% chance Mr Lane would have been reinstated on appeal, and a 30% chance that Mr Turner would have been reinstated on appeal, had the Respondent acted fairly.

REASONS

Introduction

1. By an ET1 claim form presented to the Tribunal office on 22 April 2024 Mr Lane brought a claim of unfair dismissal to the Employment Tribunal. On 25 April 2024 Mr Turner did the same. By order of Legal Officer J Skinner on 30 April 2024 the claims were ordered to be heard together given that they had common issues.
2. The hearing took place over two days. I was presented with a bundle of documents amounting to 571 pages and was taken to some of these documents during the course of the evidence.
3. I heard live evidence from the following witnesses:

For the Claimants

- 3.1. Mr Scott Lane (the First Claimant) and Mr Wade Turner (the Second Claimant) for themselves;

For the Respondent

- 3.2. Mr Nick Gibbons (at the time of the events in question, Contracts Manager at E.On Highways Lighting), the investigating officer in the Claimants' cases;
 - 3.3. Mr Keith Allen (Contracts Manager), the dismissing officer in the Claimants' cases; and,
 - 3.4. Mr Carl Lalley (Regional Operations Manager), the appeal officer in the Claimants' cases.
4. Following a discussion with the parties at the outset of the hearing the following issues were agreed as being the questions the Tribunal had to decide in order to determine the Claimants' claims. These were:
 5. What was the sole or principal reason for dismissal?
 6. Whilst the legal burden of proof is on the Respondent to establish a potentially fair reason for dismissal, both Claimants accepted at the outset that the reason for dismissal was a reason relating to their conduct. Conduct is a potentially fair reason for dismissal by virtue of **s.98(2)(b) Employment Rights Act 1996**.
 - 6.1. Did the dismissing officer genuinely believe that the Claimants were guilty of misconduct?
 - 6.2. Was that belief based upon reasonable grounds?
 - 6.3. Did the Respondent carry out as much investigation as was reasonable?

- 6.4. At all times did the Respondent act as a reasonable employer, acting reasonably, could have done (including in relation to the decision to dismiss itself)?
- 6.5. If the Claimants' claims succeed, should any entitlement to a basic award of compensation for unfair dismissal be reduced by a factor (potentially to nil) because they engaged in culpable or blameworthy conduct prior to their dismissal?
- 6.6. If the Claimants' claims succeed, should any entitlement to a compensatory award for unfair dismissal be reduced by a factor (potentially to nil) because they engaged in conduct that was culpable or blameworthy that contributed to their dismissal?
- 6.7. If the Claimants' claims succeed, was there a chance that they would have been dismissed anyway if the Respondent had acted reasonably, and if so, by when and by what factor should compensation be reduced to reflect this chance? This is the question posed by the case of **Polkey v A E Dayton Services Ltd** (House of Lords).
7. We were only able to complete the evidence within the two-day hearing time. I queried with the parties whether they would prefer to attend for a third day in order to give submissions and potentially receive an oral judgment. Both sides agreed that they preferred to provide submissions in writing. Whilst this was a concern for me given that the Claimants were not legally represented, they had however already provided focused, written arguments in a coherent format prior to the commencement of the hearing. I considered that they were not disadvantaged by a requirement to provide submissions in writing but ordered that the Respondent provide its written submissions first in order that the Claimants could consider them – and any statement of the law contained within them – before providing their own.
8. In these reasons I have referred to the submissions of the parties on disputes of fact only where it has been necessary to do so. As to their submissions on the legal questions to be decided, I have also referred to them in my analysis in the closing paragraphs of these reasons insofar as it has been necessary to do so. Neither party's submissions have been rehearsed in full.

Findings of fact

9. My findings of fact have been made according to the applicable standard in the Employment Tribunals: the balance of probabilities. I have made only those findings it has been necessary to make in order to determine these claims.

The Claimants

10. Scott Lane commenced employment with the Respondent on 5 September 2016, initially as a Street Lighting Apprentice and, upon completion of his apprenticeship, as an Electrician/Joiner's Mate.

11. Wade Turner commenced employment with the Respondent as a Highways Lighting Apprentice on 30 September 2019 and, upon completion of his apprenticeship on 30 October 2023, he became a Joiner's Mate.

The Respondent; its size and administrative resources

12. The Respondent is a well-known energy company. No information was provided in the response forms as to how many people it employs in Great Britain, but it is likely to be a large number running well into the thousands. It has an HR department and very substantial resources, including access to legal advice. It also has a compendium of policies and procedures in force from time to time, including (insofar as is material to these claims) an Employee Rules document and a Disciplinary Procedure.

The Disciplinary Procedure

13. Within the Disciplinary Procedure, section 6.4 ("Representation") states:

Individuals who are the subject of disciplinary allegations... have the right to representation at all stages of the formal procedure, including investigations. The representative may be a Full Time Trade Union Official, a certified lay official, or a fellow employee.

Representatives can present the employee's case, present evidence, confer with the employee in private and ask questions in support of the employee but may not answer questions relating to the case on their behalf, unless agreed by the Hearing manager.

14. Section 6.5 ("Investigation") states, in part:

If it is necessary to interview the employee or any witness as part of the initial fact finding investigation, they must be made fully aware of the purpose of the meeting and of their right to representation and support if required.

15. Section 6.7 ("Formal Hearings") provides, in part:

The employee and their representative will be given the opportunity to respond, ask questions and present the employee's case...

Adjournments will also be granted for the employee to consult with their representative.

Background to events

16. The Respondent bids for contracts to maintain street lighting equipment on behalf of highways authorities and carries out works under such contracts it wins. One such contract it serviced at the material time is the Staffordshire Private Finance Initiative (PFI) contract, which as the name suggests, the contract under which the Respondent maintains street lighting in the Staffordshire area.
17. In the street lighting industry it is well known that there are typically two types of street light, namely "base-hinged" columns and "mid-hinged" columns. As their names suggest, the former category are so called because in order to carry out maintenance on the lantern, access is obtained by pivoting part of the structure at a hinge either located at the base of the column or in the middle of the column, depending upon which type of column it is.
18. Whilst it is not necessary for the Tribunal to delve too deeply into the technical detail, lowering the higher section of a mid-hinge column in order to carry out maintenance on the lantern involves attaching a lowering rope to a fixing point towards the top of the column before a lock or latch is released, allowing the upper section to be lowered carefully using the rope. At all times whilst lowering the upper section the operative responsible must keep hold of the rope. This is self-evident but is reinforced by one of the training documents shown to me, where it is stated in clear words to the same effect (page 556). What is also self-evident is that other people should keep clear of what is described as the "danger zone" underneath the upper and lower sections of the column during raising or lowering, and that too is stated in the training document.

The Claimants' training

19. On 19 November 2019 Mr Lane undertook a training course with the Highway Electrical Skills Academy (HESA) entitled "Course 608 – Operating, raising and lowering columns (base hinge and mid-hinge). He was certified as having passed the training. In the checklist which was signed off by the assessor the boxes next to the entries "Carried out the correct lowering technique: mid-hinged column", "Carried out a visual inspection (mid-hinged column)", "Carried out the correct raising technique: mid-hinged column" and "Correctly secured the mid-hinged column" were all marked "N/A".
20. Whilst this may have suggested to the casual reader that Mr Lane had not received training in relation to mid-hinged columns, the true position was

explained by Mr Gibbons, giving evidence for the Respondent. He explained that Mr Lane had received the training in relation to mid-hinged columns but that the persons providing the training were not, in fact, authorised to provide it. Whilst this was an odd situation Mr Gibbons' evidence was corroborated by Mr Lane, who – albeit somewhat begrudgingly – conceded that the training course did cover mid-hinged columns, even if it “mostly” (in Mr Lane's words) covered base-hinged columns. Mr Lane accepted that the course covered the “theory” side regarding mid-hinged columns and involved a demonstration. For these reasons I accepted Mr Gibbons' evidence that Mr Lane had been given the appropriate training in relation to mid-hinged columns.

21. Mr Turner's evidence in relation to the training he received was unsatisfactory. He said he could not remember what the course covered, which I found to be unlikely given that he had undertaken Course 608 much more recently than Mr Lane had. It was evident from the checklist and his certificate that Mr Turner had completed that course on 21 November 2022. Mr Turner was at least prepared to accept that if the course materials mentioned mid-hinged columns and the safe means of raising and lowering them, then it was likely that the course did cover those subjects. I found that the course Mr Turner attended did indeed cover mid-hinged columns, and although his checklist bore the indicator “N/A” next to the same entries as Mr Lane's, I again accepted Mr Gibbons' explanation for this.

The incident of 24 October 2023

22. On 24 October 2023 the Claimants were instructed to attend at a location in Tamworth to change a lantern on a street lighting column. The column in question was one of the mid-hinge type. It was not a defective column.
23. Prior to commencing the works the Claimants were required to complete a site risk assessment form, and I was shown a copy of this document (page 253). The document is a proforma and requires the operative(s) to carry out around two dozen specific checks prior to the commencement of works, ticking them off once complete. Specifically, two of the things required of the Claimants were to check that there was a “safe system of work [was] understood and clearly followed”, and that the “correct PPE/RPE/harness/lanyard available [was to be] worn correctly”. On the form relating to the Tamworth job, all of the boxes are shown as ticked by the Claimants, including these two.
24. At the bottom of the risk assessment proforma the message “Declaration of Compliance: I fully understand the work to be undertaken. I will comply with the safety & environmental control measures that are recorded”, appears in capital letters and bold type. The Claimants each wrote their first names and applied their signatures to the relevant section underneath.
25. I found that the Claimants took a slapdash approach to completing the risk assessment form and did not really pay it any proper attention. They signed it off merely because it had to be signed off, and that they did not ascribe any

importance to the checks the form required. Filling in the document and performing the checks was to them a trivial inconvenience.

26. However, I did not find that the Claimants signed off the risk assessment form with an intention to deceive: given what went on to happen, I found that their actions in doing so were seriously negligent but were not dishonest. If something adverse happened whilst carrying out the works (as did happen here) that would be evident and not capable of being concealed through whatever might have been written on the risk assessment form. That in my judgment pointed away from dishonesty.
27. The Claimants proceeded to carry out the works on the column, at around 11.30am. Both Claimants agreed in evidence, and I found, that neither of them were wearing their hard hats as they did so. They further agreed, and I therefore also found, that the wearing of a hard hat was part of the requirement to wear the “correct PPE” that the risk assessment form had insisted upon.
28. In terms of the works themselves, Mr Turner was the person responsible for lowering the column and because of this I found that he was the person whose responsibility it was to connect the rope to the upper section of the column in order to raise and then lower it. He did so, but he did not attach the rope to the top of the upper section properly, using a carabiner that is typically used for this task. Having raised the column and then prepared to lower it, upon the latch being released the upper section of the column (with the lantern at the top) promptly dropped uncontrolled, swinging around the hinge from near the twelve o'clock position to the six o'clock position in an instant.
29. At the time, Mr Lane – who was not wearing his hard hat – was standing directly underneath the column in the six o'clock position, in the area described in the training materials as the “danger zone”. He was struck on the head by the falling upper section of the column, in a heavy blow.
30. Mr Turner attempted to perform first aid on Mr Lane. Mr Lane conceded that had he not been so lucky, he could have been killed as a result of what happened. It is astonishingly fortunate that Mr Lane was not indeed killed by such a heavy piece of equipment coming down on his unprotected head in an uncontrolled fashion as had happened that morning. As Mr Gibbons commented in his evidence, Mr Lane is fortunate that the circumstances of the incident were being dealt with in the Employment Tribunal and not in the Coroner’s Court. I agree. If Mr Lane had died, criminal proceedings may have been contemplated. By any measure, what had occurred in Tamworth that morning was of a very great seriousness indeed.

Immediate aftermath of the incident

31. Immediately following the incident and his administering first aid on Mr Lane, Mr Turner called Mr Rajdeep Gosal, the Claimants’ supervisor, to report what had happened. Mr Gosal attended the site about 45 minutes later. As a result of his

injuries Mr Lane then had to be taken to Accident and Emergency at Burton Hospital. Luckily for him, his wounds were capable of being dealt with by being glued and by stitches. He did require some time off work in order to recover.

32. Mr Gosal attended the site but was not wearing his hard hat. Mr Lane stated that Mr Gosal rejected his offer that he could wear his hard hat and that Mr Gosal then proceeded to complete the Claimants' task without using the rope or ladders that were required. That account was corroborated by the evidence of Mr Turner. The Respondent's response (paragraph 7) flatly denied that Mr Gosal was not wearing full PPE at the time, but that denial was exposed as being unsustainable during the course of the evidence. Mr Lalley's evidence was that Mr Gosal told him that he could not remember whether he was wearing PPE or not, which is materially different and contradictory to his positive assertion that he had been (page 260). Mr Allen, also for the Respondent, said that he had referred this matter to Mr Gosal's line manager at the time, but regrettably none of the Respondent's witnesses could provide me with any information as to what then happened in relation to Mr Gosal as a result.
33. On the basis of the unsustainable position taken by the Respondent in its pleaded case and its general lack of candour surrounding this specific issue, and the clear evidence from both of the Claimants on the point, I therefore accepted Mr Lane's evidence as to what happened when Mr Gosal came to the Tamworth site. My finding is that Mr Gosal proceeded to complete the works on the column without wearing the appropriate PPE (the hard hat) and that he did not use the ladder or the rope that was essential to completing that task safely.

Initial interviews by Mr Gosal

34. At around 2pm on the same day Mr Gosal spoke to Mr Lane about the incident at the Tamworth column (the notes begin at page 257). Mr Lane stated that he could not remember who had attached the rope to the upper section of the column. He confirmed that it was he who had released the upper section and that the works had been completed (swapping lanterns). He stated that it was upon Mr Turner attempting to lower the column that he was located at its foot, ready to reapply the safety latch, when the upper section came down on his head. He recalled being struck on the head, being disoriented, and noticing his hand had blood on it from where he had touched his head. Mr Lane confirmed that the risk assessment had been completed by Mr Turner and that neither of them were wearing their hard hats during the works. When asked why neither was wearing their hard hats, Mr Lane's explanation was that he "didn't think anything would [have] happened with it being a raise and lower column." Mr Lane signed the notes of this conversation at the time, and I therefore accepted that they contain an accurate, if not verbatim, account of what was said at that meeting.
35. At around 2.30pm on the same day Mr Gosal spoke to Mr Turner about the incident (the notes begin at page 254). Mr Turner confirmed that it was he that completed the risk assessment referred to above, and also that neither he nor Mr Lane were wearing their hard hats at the time of the works. The explanation given

by Mr Turner as to why the correct PPE was not being worn was “complacency”. In common with Mr Lane, Mr Turner could not recall who had been responsible for attaching the rope to the upper section of the column, but he did state that he didn’t think the rope had been properly attached (by means of a carabiner) “seeing as it came off”. Mr Turner also signed the notes of his conversation at the time and I therefore accepted they also contain an accurate, if not verbatim, account of what was said at that meeting.

Mr Gibbons’ investigation

36. Mr Gibbons was appointed to investigate the incident of 24 October 2023. He began by speaking to Mr Turner at what was described as an informal meeting on 25 October 2023, the day after the incident itself. The meeting lasted about 20 minutes and took place in a Portakabin at the Burton Depot. Mr Gosal was also present at that meeting, but no notes are available from the meeting itself.
37. In the document he submitted to the Tribunal along with his claim form Mr Turner put this meeting at the front and centre of his case, referring to specific examples of the oppressive treatment he alleged he had been subjected to at the hands of Mr Gibbons in this meeting. Despite the Respondent having been legally represented throughout these proceedings, it did not address that point in its response. For his part, Mr Gibbons did not answer those allegations in his witness statement. This was unsatisfactory.
38. Mr Gibbons conceded in cross-examination by Mr Turner that he was indeed frustrated during the meeting and that he swore at Mr Turner. On the basis of the Respondent’s apparent avoidance of this issue in its conduct of the proceedings, and Mr Gibbons’ concession, I preferred Mr Turner’s evidence. I find that Mr Gibbons took an unnecessarily confrontational approach to this meeting, as Mr Turner described. At the time of the meeting Mr Turner was still a few days off completing his apprenticeship. He had been invited into the meeting on his own and faced not only his supervisor but Mr Gibbons, a highly experienced individual of some seniority within the business, with whom he had had no prior dealings. To have conducted the meeting in an oppressive style, and to have accused an apprentice such as Mr Turner of lying and “bullshitting” him was, in the view of this Tribunal, wholly unacceptable.
39. The approach taken towards Mr Lane was somewhat different. In contrast to the ostensible informality of approach taken towards Mr Turner, Mr Lane was invited to a formal investigatory meeting with Mr Gibbons, which took place on 2 November 2023. That meeting was minuted (pages 270A-C) and Mr Lane was permitted to be accompanied by a colleague. There being no challenge to the accuracy of those notes, I accepted them as a broadly accurate reflection of what was discussed.
40. Whilst Mr Lane made no complaint of the kind Mr Turner had made about the conduct of his meeting with Mr Gibbons, he did state that Mr Gibbons had warned him about the “consequences of lying”. Whilst the (non-verbatim) notes

do not record this, consistent as it was with the approach taken towards Mr Turner as I have described above, I find that Mr Gibbons did indeed warn Mr Lane of the “consequences of lying”. Nobody provided evidence of what such consequences would be, but plainly the comment was not being made by way of reassurance.

41. The account given by Mr Lane in the meeting with Mr Gibbons was materially consistent with that which he gave to Mr Gosal on the day of the incident, about which I have made findings already.
42. In relation to none of the investigatory meetings – with either Mr Gosal or Mr Gibbons – were the Claimants told of their right to representation under section 6.4 of the Respondent’s Disciplinary Procedure. Even if I was minded to accept that the initial meeting between Mr Turner and Mr Gibbons was of an informal nature – which, for the avoidance of doubt, I do not given that the potential outcome of the process for Mr Turner would inevitably have been disciplinary in nature – section 6.5 of the same Procedure would have applied to him as a mere witness.

Ms Twemlow accuses Mr Lane of dishonesty

43. On 8 November 2023 Mr Lane had a conversation with Ms Sarah Twemlow, the individual responsible within the Respondent for the Staffordshire PFI contract, of which the Tamworth column works were part. Ms Twemlow was further up the Claimants’ management chain in that she was the manager of their supervisor, Mr Gosal. She informed Mr Lane that his “story” was not being believed and that if he continued “lying” he would be dismissed. This evidence was unchallenged and no evidence was led by the Respondent in rebuttal. I therefore accepted it and found that this exchange occurred. It was an example of the general antipathy shown by management towards the Claimants following the incident of 24 October.

Investigation report

44. On 19 January 2024 Mr Gibbons produced his investigation report. The Claimants criticised him for the delay in doing this, but I found that there were good reasons that explained the delay. The first was that Mr Gibbons was waiting for a report to be produced by health and safety investigators. It was not confirmed to me when exactly it was that their report was complete, but I was shown a copy (beginning at page 261). It was clear to me that it must have taken some time given its contents and the fact that recommendations were made to Mr Gibbons for compliance in January 2024. The other reasons were that Mr Gibbons was called for jury service in December 2023 and the Christmas holidays then intervened. I accepted Mr Gibbons’ explanations for the delay in producing his own report, which in any event was completed within some three months of the incident itself.

45. In his investigation report (page 279 onwards) Mr Gibbons concluded that there was a disciplinary case to answer in respect of both Claimants and what had happened on 24 October 2023. The evidence surveyed by Mr Gibbons and collated within the report were the notes of the Claimants' meetings with Mr Gosal of the same day, a statement from Mr Gosal taken shortly afterwards (page 260, referred to above), what had been said in the meetings Mr Gibbons had conducted himself, the site risk assessment for the Tamworth column, and photographs and a video of the column, tether rope and carabiner. In particular, Mr Gibbons referred to the Claimants having demonstrated a "certain amount of vagueness" in the accounts he had procured (or attempted to procure) from them as to the events of the day and how they had carried out the works.

Disciplinary stage

46. By letters dated 25 January 2024 both Mr Lane and Mr Turner were invited to disciplinary meetings, intended to take place sequentially on 5 February 2024. Mr Keith Allen was to be the disciplinary officer. In their letters the Claimants were both informed that the allegations against them were:

46.1. Not wearing PPE; and,

46.2. Not practicing a safe system of work when exchanging the lantern on a mid-hinge column.

47. It was stated that the allegations, if proven, would be in breach of section J of the Employee Rules. Within that section the Respondent states that an example of something it would deem to be gross misconduct is, "Deliberate or negligent failure to discharge safety responsibilities. Serious, deliberate or negligent failure to comply with safety rules or safety procedures, including failure to wear protective clothing/equipment provided by the company; serious failure to comply with other organisations' safety rules while working at their premises" (page 80).

48. The Claimants were both offered the right to be accompanied at the meeting and were provided with copies of the Respondent's Disciplinary Procedure and Employee Rules. They were also warned that one possible outcome of the meeting was that they may be dismissed in the event that any allegation proven against them amounted to gross misconduct.

49. Mr Lane's meeting occurred first in time, commencing as it did at 9am. Mr Turner attended accompanied by a colleague, Mr Finn Moran. Mr Allen was present and also present were both Ms Twemlow (as notetaker) and Mr Gibbons. The notes of the meeting appear from page 289 onwards.

Conduct of the disciplinary meetings by Mr Allen

50. In the introductory section of the notes it is recorded that Mr Allen informed Mr Lane that his companion "could not ask questions during the meeting". In his

witness statement (at paragraph 17) Mr Allen stated that this was inaccurate, and that all he had said was that Mr Moran could not answer questions on Mr Lane's behalf, not that he could not ask questions. Upon my inquiry, Mr Allen stated that he believed he had stated what he had put in his witness statement, but could not guarantee it. He conceded, however, that Mr Lane's companion Mr Moran did not ask any questions in the meeting itself. That is evident from the notes of the meeting as taken by Ms Twemlow. I shall return to this issue, and Mr Lane's meeting, shortly.

51. At 11.05am on 5 February 2024, Mr Turner attended his meeting with his companion, Mr Charlie Torry. The same three individuals were present for the Respondent. Whilst the notes (beginning at page 295) do not record the same introductory remarks by Mr Allen, they do record him stating that Mr Torry "was there in a support role and not as a representative". In light of sections 6.4 and 6.7 of the Respondent's Disciplinary Procedure, this statement was made but plainly wrong as Mr Turner had a right to representation and not merely to someone being present as support.
52. Mr Turner's second criticism of the handling of his disciplinary meeting by Mr Allen was that he was denied the ability to confer privately with his representative, Mr Torry. The notes record that Mr Turner was permitted to leave the room, but whilst it was not minuted it was nevertheless agreed by Mr Allen in evidence that Mr Turner was only allowed to leave on his own. Whilst this too was not minuted, Mr Turner was in fact told he could not leave if the purpose of doing so was to confer privately with Mr Torry. Mr Allen confirmed that he decided this in order that Mr Turner and Mr Torry could not confer and "put an answer together". Mr Allen said he was "looking for the truth".
53. In my judgment, the Claimants' versions are to be preferred. The notes of the meetings are deficient in that they record inconsistent opening remarks despite Mr Allen's evidence that he read from a "toolkit" document in both meetings. That "toolkit" document was not shown to me. They also omit key details such as the reason why Mr Turner was only permitted to leave on his own. Finally, the notes were written by Ms Twemlow, who plainly had taken against the Claimants in advance of these meetings given what she had said to Mr Lane on 8 November 2023. She could not be regarded as a fully accurate or impartial notetaker.
54. My findings are, therefore, that Mr Allen did inform Mr Lane in his meeting that his representative Mr Moran could not ask questions on behalf, and that that was the reason Mr Moran did not do so. Mr Allen also denied Mr Turner his right under the Procedure to confer privately with his representative Mr Torry. In my judgment, whilst the approach taken by Mr Allen to the disciplinary meetings was not of the oppressive and confrontational kind taken by Mr Gibbons in his meeting with Mr Turner, it did nevertheless place the Claimants at disadvantages the Respondent's own Procedure expressly safeguards against. In addition, it is understandable that the Claimants would feel uncomfortable about the presence of Ms Twemlow given her predisposition against them, particularly in the case of Mr Turner who had only recently completed his apprenticeship.

Discussions at the disciplinary meetings

55. In terms of the discussions that took place with the Claimants at the disciplinary meetings, it is true that neither of them asked any questions of Mr Gibbons themselves, who presented his investigation report at both meetings. Mr Lane accepted having performed over a hundred mid-hinge column lantern repairs in his career with the Respondent; Mr Turner confirmed that he too had performed some but not as more than fifty during the course of his apprenticeship.
56. In relation to the wearing of PPE, Mr Lane accepted he ought to have been wearing his hard hat and the importance of doing so, but that he “just didn’t think”; for his part, Mr Turner also accepted that he ought to have been wearing his hard hat but that he had been “complacent just filled [the risk assessment] in not thinking about it.” Mr Lane described what had occurred as a “stupid lapse”, stating that it was a “stupid decision that I have learnt from”; Mr Turner specifically apologised for his actions, stating that “what I did was wrong and I have learned from my mistake... I should have focused more on the site and potential problems.”
57. During the respective disciplinary meetings a specific subject was discussed, namely the completion of the site risk assessment document referred to above (page 253). Whilst it was agreed that Mr Turner had been the one to fill it out, the declaration had been signed off by both Mr Turner and Mr Lane. In the meetings themselves Mr Allen, quite properly, focused his inquiry into the Claimants’ understanding of the importance of filling out such documents accurately, and the importance that wearing the correct PPE has as part of a broader risk assessment.
58. It was common ground that the completed risk assessment was inaccurate as neither Mr Lane nor Mr Turner had worn their hard hats despite having formally declared that they had. What Mr Allen did not do was put to the Claimants the idea that the risk assessment had been completed and signed off by them dishonestly, as opposed to merely mistakenly or negligently. Dishonesty – or the falsification of company documents (for want of a more specific phrase) - was not one of the allegations mentioned in the letters inviting the Claimants to their disciplinary meetings. Alleging that a person has acted dishonestly, as a matter of common sense, is very serious.

Mr Allen’s decision

59. At the conclusion of each disciplinary meeting Mr Allen retired to deliberate before reconvening to announce his decision. In both cases he decided to dismiss the Claimants without notice and gave summary reasons at the time, as the notes record (in identical terms). His reasons were confirmed to both Claimants in letters dated the following day (pages 301 and 305).

60. Those letters set out the two allegations that had featured in the invitation letters, together with section J of the Employee Rules. Mr Allen concluded in each case that the Claimants had failed to wear PPE (in not wearing their hard hats whilst carrying out the Tamworth column works), and had not practiced a safe system of work when exchanging the lantern (Mr Allen finding that had the Claimants had not followed the correct procedure when undertaking the works because if they had done so, control would have been retained over the column and the incident would not have occurred).
61. The disciplinary allegations that were levelled against both Claimants in their invitation letters were therefore found to have been made out. I accept that Mr Allen genuinely believed that the Claimants were guilty in this regard. Indeed, it would have been surprising if any other conclusion would have been reached given the admissions made by the Claimants and what had actually happened at the Tamworth column.
62. In the case of Mr Turner, Mr Allen additionally found that he had not practiced a safe system of work because of a “lack of attention to detail and adherence to procedure” in relation to the fitting of the carabiner to the upper section of the column. Whilst his findings do not specifically say this, the impression I took from Mr Allen’s dismissal letter to Mr Turner was that blame was assigned to him due to his inability to recall, when asked, details regarding the works and specifically who attached the carabiner on the day in question. In essence, Mr Allen concluded Mr Turner’s guilt in relation to this additional matter by drawing a negative inference against him. I also accept that Mr Allen genuinely believed that Mr Turner was to blame in this regard.
63. Mr Allen did not, however, stop there. In both letters the following passages appear:

Furthermore, [Mr Lane’s/Mr Turner’s] dishonesty in filling out the risk assessment and signing and dating it, confirming all PPE was present and being worn at the time of work that requires this level of protection, demonstrates a serious breach of trust and a disregard for the safety protocols in place...

...

As [Mr Lane/Mr Turner] failed to comply with safety protocols, including disregarding safe working practices leading to injury, not wearing correct Personal Protective Equipment (PPE) required for the task as set out in the operations manual supplied and providing dishonest information in the risk assessment form, the decision is dismissal without notice.

64. Paragraph 25 of Mr Allen’s witness statement stated that “one of the main factors that led to my decision to dismiss the Claimants was their dishonesty”. That evidence was totally consistent with the evidence of the dismissal letters. I found

that central to Mr Allen's findings of guilt in relation to both Claimants was his finding that they had acted dishonestly in relation to the risk assessment form. It was his genuinely held belief that the Claimants had acted dishonestly.

65. The Claimants' honesty had certainly been a line of inquiry for Mr Gibbons (who had resorted to oppressive tactics in pursuing it with Mr Turner, and insinuated it in relation to Mr Lane), and Ms Twemlow had expressed her own beliefs on the matter to Mr Lane in November. However, no allegations of dishonesty had been put to the Claimants either in writing or by Mr Allen in the meetings at the disciplinary stage.

The Claimants appeal

66. The Claimants appealed the decision to dismiss them. Mr Turner's letter of appeal (page 309) reiterated his apology but in summary, he wished to challenge Mr Allen's decision on the basis that:

66.1. The decision to dismiss was excessive and harsh;

66.2. Neither he nor Mr Lane were suspended before being dismissed and had continued to be assigned work together, indicating that the Respondent did not consider what had occurred to have been serious enough to warrant dismissal;

66.3. Mr Allen ought not to have prevented his companion from asking questions;

66.4. Ms Twemlow ought not to have been present at the disciplinary meeting; and,

66.5. Mr Gibbons treated him badly at the investigation stage.

67. Whilst his appeal was considerably longer (page 313), Mr Lane sought to challenge Mr Allen's decision in several ways, with the overarching points being set out in headings:

67.1. There were breaches of the Disciplinary Procedure;

67.2. There were issues with the investigation and investigation report;

67.3. There were issues with the disciplinary meeting;

- 67.4. The Claimants not wearing PPE was down to complacency and their supervisor, Mr Gosal, did the same thing when he attended the site on the day;
- 67.5. The Respondent had not trained the Claimants properly in relation to the correct working procedure for mid-hinge columns, and had not provided a specific work instruction for the particular column;
- 67.6. The issue of dishonesty had not been raised with the Claimants until the dismissal letter; and,
- 67.7. Dismissal was a disproportionate outcome, in particular because a similar incident had occurred on 9 July 2021 and the person at fault had not been dismissed.
68. Mr Lalley was appointed to deal with the Claimants' appeal. He is responsible for a different region of the Respondent's business and had had no prior dealings with either of the Claimants.
69. The Claimants' cross-examination of Mr Lalley essentially amounted to an attempt to persuade him to change his mind in relation to his decision on each ground of the appeal. That was not of great assistance to me in terms of finding facts in relation to what happened and why, so in the circumstances I have again restricted my findings to those which I have considered it has been necessary to make in order to determine the claim.
70. By letters dated 19 February 2024 (pages 318 and 320 respectively) the Claimants were invited to attend appeal meetings with Mr Lalley. Both were scheduled for 27 February 2024, although Mr Turner's letter bore the erroneous date of 22 February. The meetings were again scheduled to take place sequentially, with Mr Lane's first (at 10.30am) followed by Mr Turner's (at 1.30pm). They were informed in the invitation letters that Mr Allen would be in attendance in order to present the management case for dismissal.

The appeal meetings

71. The minutes of the appeal meetings appeared at pages 327-330 (Mr Turner) and 331-335 (Mr Lane). There was no challenge to the veracity of these notes and I therefore accepted them as being a broadly accurate record of what was discussed. The Claimants brought the same companions as they had to the disciplinary meetings with Mr Allen, but the notetakers were different in each case. Ms Twemlow was not involved at this stage.
72. It is evident from the meeting notes that Mr Lalley took a structured approach to each of the meetings, discussing in turn each of the grounds of appeal the respective Claimant had put forward in their letters of appeal, as set out above. Neither Claimant suggested that Mr Lalley conducted the meetings oppressively

(as Mr Gibbons had done) and there was no repeat of Mr Allen's decisions to prevent questions from the companions and private conferring. Mr Lalley is therefore not to be criticised in relation to his handling of the meetings.

The issue of dishonesty

73. One of the topics for discussion in the meetings was the issue of dishonesty, which had formed a central part of Mr Allen's reasoning but had not formally been put to the Claimants during the disciplinary stage. In cross-examination Mr Lane asked Mr Lalley why he concluded that dismissal without notice was appropriate. He said that from the material presented to him, he said there were various things from Mr Allen's stage that "pointed in that direction" and that he could not see any change that might have cast doubt on Mr Allen's findings. When I asked a follow-up question about what it was he thought "pointed in that direction", he confirmed without hesitation that it was the dishonesty element relating to the signing-off of the risk assessment in circumstances where the Claimants were not wearing hard hats. Mr Lalley referred back to the circumstances of what had happened at Tamworth and emphasised that there had to be trust in the relationship between the Respondent and its employees tasked with carrying out works of that kind.

74. In his meeting Mr Lane told Mr Lalley that whilst he could not be sure who it was that had attached the carabiner to the upper section of the column (and that he did not want to guess), he said he was "70%" sure it was Mr Turner. In his meeting Mr Turner disputed that he had acted dishonestly, referring again to his contention that he had acted "complacently" when it came to completing the risk assessment and not wearing hard hats.

75. Mr Lalley ultimately accepted that there was a difference between someone acting dishonestly and someone who could not be sure but was doing their best to recall events.

Mr Lane's video footage

76. In advance of his meeting Mr Lane provided the Respondent with video footage he contended showed how a carabiner could become detached, it being relied upon to show that the incident could have happened even when the task was carried out correctly (putting aside any issue about Mr Lane standing in the "danger zone" with no hard hat on, of course). Whilst it was not necessary for me to view this footage, it was not provided to Mr Lalley. He was unaware of it until it was mentioned in cross-examination. Mr Lalley did have some video footage, but it had been provided to him by Mr Gibbons. It was not necessary for me to view this footage either, but whatever the footage provided by Mr Gibbons was, it was not Mr Lane's footage and it was not shared with the Claimants at any stage. None of the witnesses explained why it was not shared with the Claimants.

Ms Twemlow's attendance at the disciplinary meetings

77. In both appeal meetings Mr Lalley acknowledged that Ms Twemlow should not have been in attendance at the disciplinary meetings. The reason given for her attendance was that the originally intended notetaker had called in sick that day. That reasoning was not challenged in the evidence before me and I therefore found that that was why Ms Twemlow was present on those occasions.

The Milton Keynes case

78. In his grounds of appeal Mr Lane made express reference to another employee whom, he contended, had been found guilty of materially similar conduct but had not been dismissed. Mr Lane referred to the date of the incident as having been 9 July 2021. In his meeting with Mr Lalley Mr Lane referred to the employee in question as “someone from Stoke,” who “got hit on the head and was still on site.” Whilst not set out in his grounds of appeal it is plain that Mr Turner also knew of this case prior to his appeal meeting because in the meeting itself he provided Mr Lalley with a document (presumably about it) and said, “falling debris and ops had no hard hat on and are still working for us.” It was therefore incorporated into his arguments on appeal at the meeting itself.

79. It transpires that the reference to Stoke was in error, but there was indeed an incident that occurred on the date Mr Lane identified, in Milton Keynes. I was shown a report into the incident from the time (page 212), together with a disciplinary interview note with the employee in question (page 215), a disciplinary investigation report (page 216) in relation to that employee, a letter inviting that employee to a disciplinary meeting (page 219) and a disciplinary outcome letter (page 221).

80. From the report at page 212 I was able to find that on the morning of 9 July 2021 whilst breaking out tarmac at a location in Milton Keynes a 320g lump of concrete fell from the top of a nearby concrete lamp-post, landing on the head of one of the Respondent’s employees. The employee in question was not wearing their hard hat at the time because it was a warm day and the employee had been sweating due to the physical activity of using a road breaker. They had instead been wearing a cloth cap. The employee sustained a 25-30mm cut to the head which required immediate first aid, attendance by the emergency services and medical treatment at a walk-in centre. The employee also required a short period of time off as a result.

81. Mr Lalley’s evidence (at paragraph 28 of this incident) was that upon the Claimants raising this, he had “investigated this further and found that the case in question was not similar” to those of the Claimants. Mr Lalley’s evidence was that the employee in question had taken his hard hat off “momentarily” (paragraph 29), in contrast to the Claimants who had not worn theirs “at all.”

82. Such investigations as were carried out by Mr Lalley involved speaking to a Mr Jason Everall, who informed him of the hard hat being taken off “momentarily”. Mr Everall also informed Mr Lalley that the employee in question had been given

a final written warning in relation to this incident. Mr Lalley confirmed in evidence that he did not find out what the reason for the final written warning was, and although he did ask, somebody went away to find the reason and they never came back to him.

83. Mr Lalley confirmed that of the documents relating to this case that were in the bundle, he was only provided with the initial report into the incident (pages 212-214), and the person who provided that document to him was Mr Lane. He was not provided with any of the other documents which indicated what had happened with the employee in question as a result of the incident. The Claimants were not provided with those documents either, although they must have been available as the Respondent was able to locate them in order to include them within the hearing bundle.
84. Upon being taken to the full set of documents, Mr Lalley conceded that “momentarily” was probably not an appropriate description of how long the Milton Keynes employee had not been wearing his hard hat. I agree. On the evidence before me, this was an incident where the employee had removed his hard hat and then proceeded to carry out specific works, in this case breaking tarmac. This was not “momentarily” in the sense of a very short period; the hard hat had been removed deliberately and for the duration of a particular task.
85. The disciplinary outcome letter (page 221) revealed that the Respondent had treated what had happened as a matter of gross misconduct. Mr Lalley accepted that he was not aware of this at the time, and that he had not asked.
86. It was apparent from the disciplinary interview note (page 215), the disciplinary investigation report (page 216) and the outcome letter that the employee admitted to the allegation that the correct PPE had not been worn.
87. It was also apparent from the disciplinary outcome letter that a site risk assessment was available to the disciplinary officer handling the Milton Keynes employee’s case. Whilst this was not produced to the Tribunal or indeed to Mr Lalley at the time, Mr Johnston sensibly conceded that it must have been the case that if someone had taken their hard hat off and carried on working, such risk assessment as may have existed at the time would still have likely said they were wearing their hard hat.
88. In re-examination Mr Johnston asked Mr Lalley what he would have done had he had conduct of the Milton Keynes employee’s case at the time. He confirmed that he would have dismissed that employee. In fact, the employee was not dismissed: they were issued with a final written warning for a period of 12 months.

Mr Lalley’s decision

89. Mr Lalley held a follow-up meeting on 8 March 2024 with Mr Turner, in order to clarify some matters that had been discussed on 27 February.

90. Mr Lalley sent outcome letters to Mr Lane (page 343) and Mr Turner (page 342) respectively, on 8 March 2024. In both Claimants' cases, Mr Allen's earlier decision to dismiss was upheld. Whilst the letters do not go into much detail in terms of reasoning, it can be summarised as follows:
91. In Mr Lane's case Mr Lalley disagreed that there had been a procedural breach at any earlier stage and that in any event, he had given Mr Lane a full and unimpeded opportunity to put his case at the appeal stage. Mr Lalley also concluded that the Milton Keynes case was not similar to Mr Lane's, stating that his case was not simply about not wearing a hard hat.
92. In Mr Turner's case Mr Lalley referred to the same reasons as with Mr Lane, but made no reference to the Milton Keynes case. Mr Lalley also stated that whilst the health and safety report into the Tamworth incident found that certain lessons needed to be learned, this did not absolve Mr Turner of his personal culpability as he did not follow procedure.
93. In both cases, Mr Lalley concluded that there was no new evidence that could have resulted in a change of decision.
94. In neither letter did Mr Lalley refer to the dishonesty element that Mr Allen expressly found. He did, however, state in his witness statement that he "could not get past the trust part of the Claimants not being able to tell me the truth about what happened. They had both also indicated on their risk assessment that they had worn PPE, which they had not and was again, dishonest." I found that Mr Lalley did genuinely believe that the Claimants had behaved dishonestly, but it was a belief that was formed without any evaluation of whether the risk assessment had been ticked because of deliberate intent on the Claimants' part to mislead, or because of negligence or incompetence (for example).

The law

Unfair dismissal

95. A claim of unfair dismissal is a statutory claim. **Section 94 Employment Rights Act 1996** confers the right upon an employee not to be unfairly dismissed by their employer, subject to the qualification (under **section 108(1)**) that they have two years' continuous service. There are categories of unfair dismissal claim for which two years' continuous service is not required, but the Claimants' cases do not fall into any of them.
96. One of the potentially fair reasons for dismissal is a reason relating to the conduct of the employee (**section 98(2)(b)**). The burden of proof is on the employer to show a potentially fair reason for dismissal (**section 98(1)**).

97. If the employer has satisfied the Tribunal that the sole or principal reason for dismissal is a potentially fair one, the question for the Tribunal is whether the dismissal was actually fair. The test to be applied is that set out in **section 98(4) Employment Rights Act 1996**. The burden of proof is neutral but the Tribunal must determine the fairness of the dismissal, having regard to the employer's reason, depending "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 "in accordance with equity and the substantial merits of the case".
98. In conduct cases there is a considerable bank of settled authority governing Employment Tribunals in how they should assess the fairness of a dismissal through the lens of **section 98(4)**. The leading case remains **British Home Stores Ltd v Burchell [1978] IRLR 3** (EAT), which sets out three principal points for the Tribunal to consider, namely:
- 98.1. Did the employer genuinely believe in the employee's guilt? That is a factual matter which looks at the mind of the dismissing officer.
- 98.2. If so, did the employer have reasonable grounds upon which to sustain that belief? That involves looking at the evidence that was available to the dismissing officer.
- 98.3. If so, did the employer nevertheless carry out as much investigation as was reasonably required, in all the circumstances of the case? The assessment of what amounted to a reasonable investigation will differ from case to case but it would generally involve looking at the steps the employer actually took in addition to those it could reasonably have taken but did not. Generally, what is reasonable will to a significant degree depend on whether the conduct is admitted or not (**ILEA v Gravett [1988] 25 IRLR 497**, EAT), and the question is to be determined from the outset of the employer's procedure through to its final conclusion (**Taylor v OCS Group Ltd [2006] IRLR 613**, Court of Appeal).
99. At all stages in a misconduct case the actions of the employer are to be objectively assessed according to the established standard of the reasonable employer acting reasonably or, as it is sometimes put, whether the employer acted within a "band of reasonable responses" (**Iceland Frozen Foods Ltd v Jones [1982] IRLR 439**, EAT). The Tribunal is therefore not concerned with whether the employee actually did do the things the employer found that it did; in line with the objective tests set out above, the task for the Tribunal is to determine whether the employer, acting reasonably, could have concluded that he had done (**Devis (W) & Sons Ltd v Atkins [1977] AC 931**, House of Lords).
100. Equally, the Tribunal cannot substitute its own view as to what sanction it would have imposed had it been in the dismissing officer's position (**Trust Houses Forte Leisure Ltd v Aquilar [1976] IRLR 251**, EAT); it is the sanction imposed by this employer which falls to be determined according to the band of reasonable responses test.

101. Of particular relevance to the “band of reasonable responses” test can be the question of whether the employer acted consistently. A dismissal may be found to be unfair under **section 98(4)** if the same employer has treated other employees found guilty of similar misconduct more leniently (**Post Office v Fennell [1981] IRLR 221**, Court of Appeal). However, the scope of this principle is generally restricted to cases in which the allegedly similar situations are truly similar (**Hadjoannou v Coral Casinos Ltd [1981] IRLR 352**, EAT), and a dismissal will not usually be deemed to be unfair in circumstances where an employer consciously and rationally distinguishes between the two situations (**Securicor Ltd v Smith [1989] IRLR 356**, Court of Appeal).
102. At all times I am required to have regard to the Acas Code of Practice on Disciplinary and Grievance Procedures, which is informative about the standards of procedural fairness to be expected of employers when dealing with disciplinary matters in the workplace. I have borne the Code in mind in my determination of this case.
103. If I find that the Claimants’ dismissals were unfair I may nevertheless reduce any basic award under **section 122(2) Employment Rights Act 1996** if I find that the Claimants engaged in culpable or blameworthy conduct prior to their dismissal.
104. Equally I may also reduce any compensatory award under **section 123(6) Employment Rights Act 1996** if I find that the Claimants’ culpable or blameworthy conduct caused or contributed to their dismissal. Any reduction on this basis should be in a proportion the Tribunal considers just and equitable.
105. Also, if I find that the Claimants’ dismissals were unfair it is necessary for me to consider whether there was a chance that they would have been dismissed in any event (the principle expressed in **Polkey v A E Dayton Services Ltd [1987] 3 All ER 974**, House of Lords). The task for the Tribunal has been explained by the EAT (in **Hill v Governing Body of Great Key Primary School [2013] IRLR 274**) in the following terms:

“First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have been dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between the two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer would have done) ... The Tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand.”

106. Polkey deductions are not limited merely to procedural unfairness. They may be made in cases of substantive unfairness as well (**Gove v Propertycare Limited [2006] ICR 1073**, Court of Appeal).

Analysis and conclusions

107. Applying the law to the facts I have found, my conclusions on all the matters to be decided are set out as follows. Where necessary, I have referred to the parties' submissions but it has not been necessary to fully rehearse them.

Reason for dismissal

108. As I found at paragraphs 60 and 61, above, the reason why the Claimants were dismissed was because Mr Allen found they were guilty of failing to wear PPE (in not wearing their hard hats whilst carrying out the Tamworth column works), and of not practicing a safe system of work when exchanging the lantern (Mr Allen finding that had the Claimants had not followed the correct procedure when undertaking the works because if they had done so, control would have been retained over the column and the incident would not have occurred, and the matter specific to Mr Turner in relation to which I made findings at paragraph 62). Also part of Mr Allen's reasoning was the dishonesty element with regard to the completion of the risk assessment form (see paragraphs 63 and 64, above). Taking these components together, the reason the Claimants were dismissed was a reason relating to their conduct, which is a potentially fair reason by virtue of **section 98(2)(b) Employment Rights Act 1996**.

109. Whilst it was not in dispute that the reason the Claimants were dismissed related to their conduct, based on the concession and my findings as set out above, I consider that the Respondent has satisfied the burden under **section 98(1)**.

Fairness: Genuine belief in guilt

110. I now turn to the issues regarding the fairness of the dismissals, the first of which can be determined swiftly. The Claimants did not challenge Mr Allen as to whether he genuinely believed they were guilty of misconduct: indeed, given what had occurred on 24 October 2023 and the admissions and apologies the Claimants had made, it would have been surprising if they had taken the position that he did not believe they were guilty of misconduct. In any event, given my

findings at paragraphs 60 to 64, I have accepted that Mr Allen's belief in guilt was genuine.

Fairness: Reasonable grounds for belief

111. It is obvious that there were reasonable grounds for Mr Allen to believe that the Claimants were guilty of not wearing the correct PPE whilst undertaking the works at the Tamworth column: that was admitted by the Claimants.

112. Equally, it is obvious that there were reasonable grounds for Mr Allen to believe that the Claimants were guilty of not practicing a safe system of work. Not only was it admitted that the Claimants were not wearing hard hats whilst carrying out the works on the column, it was also recognised by the Claimants that one of them must not have attached the rope to the column properly. Given that everyone accepted that Mr Turner was responsible for lowering and raising the column at the time, there were reasonable grounds for Mr Allen to find, through the drawing of inference, that he was to blame for not attaching the carabiner properly. The result was that the upper section of the column fell swiftly and Mr Lane was struck on the head. Mr Lane was of course not wearing his hard hat and was standing in the "danger zone" at the time. He could have been killed and is fortunate that he was not.

113. What is not obvious is what reasonable grounds there were for Mr Allen to conclude that the Claimants had been dishonest. Not only was an allegation of dishonesty not set out for the Claimants to answer in their invitation letters to their disciplinary hearings, Mr Allen did not give them the opportunity to comment on it during the meetings themselves. There is a significant difference between doing something dishonestly and doing it negligently, carelessly or even mistakenly where the mistake is in fact made innocently. Mr Allen did not consider any alternative to dishonesty as an explanation for why the Claimants had signed off the risk assessment in the way they did.

114. However, I remind myself that I must determine this issue from the vantage point of Mr Allen at the time, and not from my own more beneficial position after having heard all the evidence in the case. I also remind myself that the test does not impose too high a threshold. Despite the shortcomings mentioned above there were, in my judgment, reasonable grounds from which Mr Allen could conclude that the Claimants had acted dishonestly. There was no doubt that the risk assessment the Claimants had signed off did not reflect the true position. Furthermore, Mr Gibbons presented his findings from the investigation in both Claimants' disciplinary meetings, and as I have found (at paragraph 45, above) the investigation report referred to the vagueness of their versions of events regarding what happened on the day. Finally, at his disciplinary meeting Mr Turner presented himself to Mr Allen as someone apparently unable to recall critical details about what must have been a highly memorable event (paragraph 62). Regardless of whether the Claimants' conduct was actually dishonest, there were reasonable grounds upon which Mr Allen could conclude that it was.

Fairness: reasonableness of the investigation

115. In focusing on this issue I have reminded myself that in determining the question of the reasonableness of an investigation it is not appropriate to import a standard of perfection. I have not heard of an investigation that has ever been found to reach perfection, and in any event the standard the law does impose is one of reasonableness. Following **Taylor v OCS**, I am to look at the whole of the process from start to finish, and that what is reasonable in a case where the conduct is admitted may be less of a burden than in a case where it is not (**ILEA v Gravett**).
116. In this case, the core allegations were admitted by the Claimants. Indeed, they could not sensibly be disputed. The Claimants had undertaken the works on the Tamworth column without wearing the correct PPE, namely their hard hats. They had done so despite both certifying on an official document of the employer that they had been wearing their PPE. It was obvious that the Claimants had not used a safe system of work in carrying out the lantern exchange on the column because (as Mr Gibbons pithily put it during cross-examination) Mr Lane ended up getting injured. It was self-evident that had a safe system of work been used by the Claimants, Mr Lane would not have been injured.
117. As a result of the admitted matters and those which, even if not admitted, were blindingly obvious, the standard of a reasonable investigation in the context in this case was necessarily relatively low. However, that is not to say that no standard was expected at all, or that the Respondent was absolved of any responsibility to investigate. In my judgment, there were certain problems with the way the Respondent conducted its investigation which meant that it fell below even the relatively low standard I have determined it had to meet.
118. The first problem arose at the investigatory stage itself. In my judgment, whilst Mr Gibbons was charged with carrying out an investigation and necessarily had to speak to Mr Lane and Mr Turner about the incident of 24 October 2023, he did so in a way which fell short of the required standard. Paragraph 4 of the Acas Code of Practice emphasises that it is important to deal with issues fairly, and paragraph 1.5 of the Respondent's own Disciplinary Procedure states that, "In applying this procedure the Company will treat all employees fairly, with dignity and respect and in a way that is free from... bullying."
119. In his dealings with Mr Lane (see paragraph 40 above), Mr Gibbons used a veiled threat regarding the "consequences of lying" that in my judgment demonstrated a predisposition against the person he was supposed to be investigating and indicated to me that he did not approach the investigation with an open mind but with a prosecutorial objective. Worse, in his dealings with Mr Turner, Mr Gibbons' conduct advanced from that of prosecutor to that of oppressor, with him swearing at him and accusing him of dishonesty during a meeting in which Mr Turner was unaccompanied. Mr Turner was, of course, still an apprentice at the time.

120. The second problem concerned the issue of dishonesty. As I have already remarked, an allegation of dishonesty is a serious matter. At no stage had the Claimants admitted to dishonesty, and as a result there was a greater expectation upon the Respondent to investigate that matter.
121. Under the heading “Inform the employee of the problem”, paragraph 9 of the Acas Code of Practice states that, “If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting.” In addition, section 6.6 of the Respondent’s Disciplinary Procedure states that individuals must be notified “as soon as possible” of the “specific details of the allegations”, and that “The above is based on the principle that there should be no surprises at the [disciplinary] Hearing.” These excerpts are identical in substance even if they differ in their wording.
122. Whilst I accept that individuals in the positions of Mr Gibbons, Mr Allen and Mr Lalley would have been able to reasonably conclude that the Claimants had acted dishonestly on the basis of the wrongly completed risk assessment form and the evidence of their vague answers when interviewed about the events of 24 October 2023, an allegation of dishonesty was never actually put to the Claimants, either in the letters inviting them to their disciplinary meetings or indeed by Mr Allen in the meetings themselves. The Claimants were therefore prevented from being able to prepare to answer a case of dishonesty that was being levelled at them by the disciplinary officer.
123. Whatever the Claimants may have said (if the allegation of dishonesty had been explicitly put to them) was unlikely to have changed the outcome, as Mr Allen could not conceive of the possibility that a wrongly completed risk assessment might have been done through negligence, carelessness or innocent mistake as opposed to deliberate dishonesty, and they did have the chance to argue the point before Mr Lalley. However, the fact remains that an issue as serious as dishonesty, occupying a position of centrality in the thinking of the key decision-maker (see paragraphs 63 and 64), was something that the Respondent ought to have properly informed the Claimants about in order that they could prepare to address it.
124. The third issue concerned the video footage presented by Mr Lane to the Respondent, and referred to at paragraph 76 (above). This did not make its way to Mr Lalley but was relied on by Mr Lane as supporting his case in relation to his appeal. The point being made by Mr Lane was that the carabiner could have come loose even if not defective and attached properly. Given that he was not the person whose responsibility it was to attach the carabiner to the upper section of the column, this was not in fact relevant to his appeal but to that of Mr Turner, whose responsibility it had been (paragraph 28). If there could have been an explanation for the upper section of the column coming loose and falling that did not involve culpability on Mr Turner’s part, that may have been relevant to Mr Lalley’s determination of his appeal.

125. The final issue regarding the investigation concerns the Milton Keynes case. Although he referred to it by date rather than by name, Mr Lane had expressly raised the issue of the Milton Keynes case and the fact that the employee in that case was not dismissed, in his appeal letter. Mr Turner raised the issue in substance in his appeal meeting with Mr Lalley. Understandably, the Claimants placed importance on their argument that they had been treated inconsistently with the Milton Keynes employee.
126. In my judgment, Mr Lalley's handling of the Milton Keynes issue fell short of the investigative standard of reasonableness required of the Respondent. Mr Lalley did discover that the Milton Keynes employee had not been dismissed, and he did have access to the report at page 212, but nothing else. That report said something about the facts of the incident, which of itself did bear the core similarities of an employee not wearing their hard hat carrying out works and sustaining a head injury in the process. Mr Lalley also knew that disciplinary action had resulted from the incident. Even on the basis of the limited information he had, Mr Lalley's conclusion that the Milton Keynes case was "not similar" to that of the Claimants' (paragraph 28 of his witness statement) was in my judgment perverse.
127. The report at page 212 said nothing about what happened to that employee as a result of the incident, in terms of disciplinary action, or why he was not dismissed and simply issued with a final written warning. Whilst Mr Lalley did take one step to follow up on the issue – by asking an unnamed source the question why the Milton Keynes employee was issued with a warning – his source did not get back to him. He took no further steps to ascertain the position by chasing. This indicated to me that he was not minded to take the Claimants' appeals seriously.
128. The explanatory evidence, in the form of pages 215 to 222, was in fact available to the Respondent then as much as it was to this Tribunal in the hearing bundle. It was not looked for by Mr Lalley specifically, and no-one at the Respondent thought it prudent to provide it to him despite its obvious relevance to the Claimants' appeals. No-one at the Respondent provided it to the Claimants either. Had they had it, they may have used it to highlight the similarities in their cases and attempted to persuade Mr Lalley that they too ought not to have been dismissed and instead have been given final written warnings.
129. In re-examination Mr Lalley confirmed that had he been handling the Milton Keynes' employee's disciplinary hearing, he would have dismissed that individual. That is not, however, what happened. In my judgment, this failure on the Respondent's part may have affected the outcome of the appeal because had Mr Lalley seen the Milton Keynes documents he did not have at the time, he would have appreciated the similarities between his and the Claimants' cases. He would – as he did in the hearing – have realised that Mr Everall's characterisation of the removal of the hard hat in the Milton Keynes case as being "momentarily" was wrong. He would also have had a greater understanding of the reasoning behind the respective sanctions imposed. It may also have led to his realisation (as Mr Johnston fairly conceded) that there must have been a wrongly completed risk assessment form in the Milton Keynes case as well, which may have had an

impact on his conclusion about the Claimants' honesty. Unfortunately, this potentially significant line of inquiry was not taken seriously and a critical opportunity for the Claimants was lost.

130. For these reasons, I have concluded that the Respondent did not carry out as much investigation as was reasonable in the circumstances of this case. For this reason, in my judgment the Claimants were unfairly dismissed.

Band of reasonable responses

131. In my judgment, a reasonable employer acting reasonably could well have dismissed the Claimants in respect of what happened on 24 October 2023. Whilst it is not necessary for me to re-state my findings, it is plain that what occurred amounted to serious negligence on the part of Mr Turner in not properly attaching the rope and carabiner to the upper section of the Tamworth column, serious negligence on the part of Mr Lane in standing in the danger zone whilst the works were carried out, serious negligence on the part of them both in not wearing their hard hats and callously disregarding the measures the Respondent had put in place to ensure that their health and safety would be protected, namely the risk assessment form. Their serious negligence resulted in Mr Lane being injured. On a less fortunate day, their serious negligence may have resulted in the death of Mr Lane and then possibly also the criminal prosecution of Mr Turner.

132. Even without the finding of dishonesty, a disciplinary offence of this gravity was something which any manager in Mr Allen's position could reasonably have dismissed the Claimants for. It was that serious. However, having concluded that there were reasonable grounds for Mr Allen to find that the Claimants had acted dishonestly (although that was not my own conclusion), I am reinforced in that view. The reasonable employer, acting reasonably, would have been entitled to dismiss the Claimants in circumstances where they had been found guilty of what was serious negligence and dishonesty.

133. That conclusion is, however, subject to my determination of the inconsistency point, relevant as that is to the band of reasonable responses test. Whilst **Hadjoannou** reminds me that before a conclusion on unfairness by reason of inconsistent treatment may be reached the situations must be truly similar, it would not be right to impose a standard of complete identity. It is unlikely that such a standard could ever be reached.

134. I have made findings in relation to the Milton Keynes case and those of the Claimants, and have decided that the Milton Keynes case brought a key issue into the internal proceedings from an investigation perspective. However, I have reached the conclusion that what happened in the Milton Keynes case was not of sufficient similarity to bring the Claimants' cases within the ambit of the **Hadjoannou** principle.

135. It was an agreed fact that the employee in the Milton Keynes case was not dismissed but the Claimants were. To that extent, there was inconsistent treatment. In his witness statement (paragraph 29) Mr Lalley stated that the differences between the situations were, firstly, the nature of the jobs being

carried out. To me, that was not of material significance: what was material was that works of some kind were being carried out. Secondly, it was said that the employee in the Milton Keynes case had only taken his hard hat off “momentarily”. As I noted at paragraph 84 (above), upon being presented with the fuller information that was available in the bundle, Mr Lalley conceded that that description was probably not correct. On that basis it is difficult to see what practical difference there was between the Claimants not wearing their hard hats and the Milton Keynes employee not wearing his. It is agreed that an object fell onto the Milton Keynes employee’s head, injuring him, whilst he was carrying out the works and where he was not wearing his hard hat. That seems to me to be materially on all fours with what happened to Mr Lane.

136. From a consistency perspective the problem lies in what the Milton Keynes employee was accused of in the disciplinary proceedings. The allegations against him in his disciplinary meeting invitation letter bear almost complete similarity with what was contained within the Claimants’ equivalent letters. However, from the invitation letter and the outcome letter it does not appear that the Milton Keynes employee was charged with, or found to have committed, dishonesty.

137. Whilst Mr Johnston was no doubt right to have conceded (on behalf of the Respondent) that in the Milton Keynes case there must have been a completed risk assessment form that showed the PPE box ticked in circumstances where the employee was not wearing his hard hat, there is no indication in the evidence before me that such risk assessment form as may have existed ever gave rise to an allegation of dishonesty on the Milton Keynes employee’s part, or indeed that that employee’s dishonesty ever was taken up as an issue.

138. Given the significance of the dishonesty issue in the Claimants’ cases and in both Mr Allen and Mr Lalley’s decision-making, I have reached the conclusion that this factor sets their cases apart from the Milton Keynes case so as to render them not sufficiently similar.

139. Finally in relation to the band of reasonable responses test, if the matter needed re-stating it is my judgment that for the reasons set out in paragraphs 115 to 130 (above) the Respondent’s specific failures in discharging its responsibility to investigate fell outside the band of reasonable responses.

Conclusion on unfair dismissal

140. By virtue of the matters set out in paragraphs 115 to 130 and 139 of these Reasons, my judgment is that the Claimants’ claims of unfair dismissal are well-founded and succeed.

Conduct

141. The Claimants do not seek reinstatement or re-engagement and thus the only available remedy for unfair dismissal is compensation. In the first instance

that requires me to consider, from the perspective of the basic award for unfair dismissal, whether I should reduce the Claimants' basic award – by factor of up to 100%, and thus potentially to nil – because they engaged in culpable or blameworthy conduct prior to dismissal.

142. Ultimately I must determine whether it is just and equitable to make a reduction to the basic award. That is a matter of discretion. I have reached the conclusion that it would be just and equitable to exercise that discretion and make a reduction in both the Claimants' cases, and in both cases I reduce the Claimants' basic award by a factor of 100%, to nil.

143. I do so because of my findings of fact regarding their conduct, set out at paragraphs 22 to 30, above, which I repeat. Whilst I have not found that the Claimants conducted themselves dishonestly, those findings I have made, and my assessment of their seriousness (at paragraph 131) demonstrate a very high degree of culpability on both their parts. The Claimants' conduct was extremely serious; awarding even a relatively modest basic award of compensation could be perceived as the Tribunal condoning that conduct or, worse, rewarding it. This Tribunal neither condones, nor will it reward or be perceived as rewarding, such negligent and dangerous conduct. It is in these circumstances that it is just and equitable to reduce the basic awards.

Contributory conduct

144. I then turn to the compensatory award for unfair dismissal, and whether it is just and equitable for me to reduce the Claimants' entitlement to a compensatory award on account of any culpable conduct on their part which contributed to their dismissal. In determining whether I should, in principle, reduce for conduct reasons any compensatory award that might otherwise be due to the Claimants I must apply a different test. Whilst I must of course find there to have been culpable or blameworthy conduct on their parts in order to make such a reduction, any such conduct must have contributed to the dismissal. The focus is on the conduct of the employee, which must be contributory, and not on what the employer did (or might have done differently) that made the dismissal unfair. Contribution in this context is not a contribution to the unfairness of the dismissal, but to the dismissal itself.

145. I remind myself that I must also reach consistent conclusions. In my judgment, these are paradigm cases where it is just and equitable to reduce the Claimants' entitlement to compensatory awards. Their conduct (set out at paragraphs 22 to 30 and assessed at paragraph 131, above) not only demonstrates a very high degree of culpability – given that the result of them might have been Mr Lane's death – but in my judgment their actions on 24 October 2023 wholly caused their dismissal. They were entirely the authors of their own downfall.

146. I must then consider whether it is just and equitable to make a reduction to any compensatory award on this basis. That too is a discretionary exercise. However, I again remind myself that I must reach consistent conclusions and consider that I should exercise that discretion for precisely the same reasons as

those expressed in paragraph 143, above. Accordingly, for these reasons any compensatory award should be reduced by a full factor of 100%, to nil.

Polkey

147. Although this matter has now been rendered academic given my findings in relation to conduct, I have nevertheless gone on to set out what my conclusions would have been in relation to it.
148. In determining whether any reduction in the compensatory award should be made according to the Polkey principle I have reminded myself of the explanation of that principle in the Hill case. I must start by considering whether the Respondent could have dismissed the Claimant fairly. I have concluded that it could (paragraphs 131 and 132). The allegations upon which Mr Allen based his decision were very serious and any employer could reasonably take the view that such seriousness required the most severe disciplinary sanction.
149. I must then consider what the chances were of the Claimants being dismissed, not on the basis of what a hypothetical employer might have done but on the basis of what this employer might have done, working on the assumption that it would have acted fairly. In reaching my conclusion on this issue I have reviewed my findings in relation to the investigation carried out by the Respondent, which has formed the basis of my conclusion that the Claimants were unfairly dismissed.
150. In my judgment, had this Respondent's investigator not resorted to prosecutorial and oppressive approach Mr Gibbons adopted and investigated in a fair and measured way, there still would have been a disciplinary case for the Claimants to answer in relation to the events of 24 October 2023, and that investigator would certainly have made that recommendation in their report. In relation to this element of unfairness, had the Respondent acted fairly it would have made no difference to timescales or indeed the outcome.
151. Similarly, on the basis of my analysis at paragraph 123 (above), even if the allegations of dishonesty which Mr Allen upheld against the Claimants had been put to them in advance of the disciplinary meetings, this would have been unlikely to have an impact on timescales or the outcome. Mr Allen would, as I have observed, have been able to dismiss the Claimants on the basis of their conduct on 24 October 2023 alone, without any need to bring dishonesty into the equation. The Claimants would not have needed any more time than they had been given in order to prepare to meet a case of dishonesty against them, as that would have focused on their states of mind rather than on the facts of what happened.
152. In relation to Mr Lane's video footage, I consider that the only impact this may have had was that Mr Lalley may have given greater consideration to the case of Mr Turner, as it was he who was responsible for attaching the rope and carabiner to the upper section of the column. The footage may have caused Mr Lalley to reassess Mr Turner's culpability in relation to the attachment of the rope and thus the safe system of work allegation, but would have had no impact on

other matters such as the non-wearing of the hard hats. Even though he relied upon it, in Mr Lane's case the footage being available to Mr Lalley would have made no difference as he was not the person responsible for attachment and was stood in the "danger zone" without his hard hat on whilst the works were carried out.

153. Adopting a broad-brush approach, for these reasons I consider that there was a small chance of Mr Lalley allowing Mr Turner's appeal on the basis of what Mr Lane's footage might have shown. I assess the chance as being 10% that Mr Turner's appeal would have been allowed. I consider the chances small because having considered the methodology from the training documents and the inherent unlikelihood of a carabiner coming loose when attached properly, I think that Mr Lalley would have still found it unlikely that this is what would have explained what happened with the Tamworth column on the day.

154. In relation to the Milton Keynes documents, however, I consider that there was a greater chance that Mr Lalley would have considered whether to allow the appeals and reinstate the Claimants (possibly on a final written warning, as the Milton Keynes employee had been given) had he been provided with the full documentary picture and not been misled by Mr Overall. From my findings and analysis at paragraphs 78 to 88, 125 to 129 and 135, and again adopting a broad-brush approach, I consider that there was still only a 20% chance that Mr Lalley would have upheld the Claimants' appeals however, because the thrust of Mr Lalley's evidence in re-examination was that he would in fact had deemed what the Milton Keynes employee had done to be a dismissable offence, notwithstanding the fact that that is not what happened in that case.

Conclusion

155. It follows from these Reasons that my judgment is that the Claimants were unfairly dismissed, but that they are not entitled to any compensation.

Employment Judge Smith

Date: 2 October 2024

JUDGMENT SENT TO THE PARTIES ON
03 October 2024

AND ENTERED INTO THE REGISTER

FOR THE TRIBUNAL OFFICE