EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102210/2020 (V)

Held in Glasgow by CVP on 12, 13, 14 and 15 October 2020

Employment Judge Rory McPherson

Mr J Gauld	**Claimant** **Represented by:** **R Russell** **Solicitor**
Carl Kammerling International Ltd	**Respondent** **Represented by:** **C Breen** **Counsel** **E Thursfield** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the claimant's claim for **Unfair Dismissal** does not succeed.

REASONS

Introduction

Preliminary Procedure

1. The claimant submitted his ET1 on Friday 17 April 2020 following referral to ACAS Early Conciliation Monday 23 March 2020 and issue of certificate Monday 23 March 2020.

2. This final hearing was appointed to take place by CVP by agreement of the parties at Case Management Preliminary Hearing on Tuesday 30 June 2020, at which it was confirmed that the claim is one of unfair dismissal, the respondent admits the dismissal and alleges that it was due to gross misconduct.

3. The Tribunal heard evidence over the initial 3 days from Mr Ryan Probert who was at the material time an employee of the respondent, together with Clynton Williams, Adam Krawczyk, Jeff Britton who are all employees of the respondent and for the claimant, the claimant himself.

4. Following the evidential element of the hearing writing submission were provided supplemented by oral submissions and summary oral judgment was issued, subject to a request that written reasons be provided. That request having been made for the claimant fuller written reasons are set out.

Unfair Dismissal

5. The claim is one of Unfair Dismissal, the respondent admits the dismissal and alleges that it was due to gross misconduct, the issues for the Tribunal include:

a. What was the principal reason for dismissal and was it a potentially fair one in accordance with Sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a conduct dismissal.
b. Was the dismissal fair or unfair in accordance with Section 98(4) ERA? Was the decision to dismiss a sanction within the "*band of reasonable responses"* for a reasonable employer?
c. If the claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with Sections 98(1) and (2) of the Employment Rights Act 1996 (ERA 1996); and, if so, was the dismissal fair or unfair in accordance with Section 98(4) ERA 1996, and, in particular, did the respondent act within the "*band of reasonable responses"*?

Remedy for unfair dismissal

6. If the claimant was unfairly dismissed and the remedy is compensation:

a. If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would have been dismissed had a fair and reasonable procedure been followed? **Polkey v AE Dayton Services Ltd** [1987] UKHL 8 (**Polkey**).

b. Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to Section 122(2) ERA 1996; and if so to what extent?

c. Did the claimant, by blameworthy or culpable actions, cause or contribute to the dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to Section 123(6) ERA 1996?

Findings in fact

7. Mr Gauld (the claimant) was employed from **Monday 4 April 2016** to **Thursday 9 January 2020** by Carl Kammerling International Ltd (the respondent) as a Territory Sales Manager, role which can be described as peripatetic and covering the geographical area of Scotland including the islands, promoting and selling the respondents products to stores. The respondents are a company engaged in the supply of power hand tools which are sold in stores to both industrial and domestic consumers. They have a network of Territory Sales Managers (TSMs) allocated with specific territorial areas of responsibility across GB to generate sales.

8. The claimant's contract was dated **Monday 4 April 2016** (**the 2016 contract**) and set out that he was employed as a Territory Sales Manager (TSM) within the respondent's Sales department with his geographical sales area being Scotland with a contractual fixed annual salary of £28,000 per annum gross. In addition to the annual salary pay bonuses

were made where sales beyond specified levels were achieved in a Territory Sales Manager's allocated geographical area.

9. Clause 4 of the **2016 contract** provided that "*In general, the Company works a 37 ½ hour week, Monday to Friday, excluding lunch breaks."* That would equate to 7.5 hours Monday to Friday, excluding lunch breaks.

10. The **Company Handbook** provided in relation to Attendance and Time keeping that "*all employees based at the Head office must use of the Company's timekeeping system"* and "*Misuse of the Company's time keeping system will be considered gross misconduct".* The Company Handbook sets out the approach to disciplinary procedures where time keeping is poor and that "*Where an employee's punctuality record highlights a persistent problem which the above approach fails to resolve, management reserve the right to invoke the disciplinary procedure even if the above levels are not reached."* As a peripatetic employee the employee had more effective autonomy than employees based at the respondent's head office although was expected to work the contracted set out and for which he was paid the contracted annual salary. As he was not based at the company head office, he was able to work without the use of the respondent's time keeping system,

11. The Company Handbook set out a non-exhaustive and non-exclusive illustrative list of the type of conduct normally regarded as amounting to gross misconduct and which normally merits dismissal for a first offence including deliberate falsification of records e.g. overtime claims, expense claims, time records.

12. The Company Handbook provided in relation to Appeals, that an employee would have the right of appeal against any formal (disciplinary) decision, subject to the appeal being made within 5 days of the disciplinary decision being communicated. Further that the company would invite the individual to an appeal meeting which would normally take place within 10 working days of the receipt of an employee's letter of appeal against formal (disciplinary) decision. It further set out that "*In other cases, the appeal will normally be heard by a more senior manager than made the*

original disciplinary decision, however in the case of dismissal this shall be the Managing Director."

13. The Company Handbook provided a process in relation to Performance Improvement Policy including

a. Informal Action; identifying that the first instance performance issues should be dealt with informally by the line manager and employee, if an issue related to performance is identified, the manager will identify the areas needing improvement, gain acceptance, through evidence, that there are issues to be addressed, discuss what needs to be done and set targets and an overall time scale for improvement and review.
b. Formal Action sets out;
    1. For stage one; a meeting to set out how the objectives have not been met, providing an opportunity for employee to explain poor performance and ask questions, discussion on training and supervision which may improve performance and set targets and timescale for improvement and review of normally one to three months;
    2. For stage two; arranging a meeting, the objective of which would be to explain why and how required targets have not been met, making clear where the issues are and reasons for entering stage two, providing an employee with opportunity to explain poor performance and ask any relevant questions, discussing additional training or supervision, set target for improvement for and review normally between one to three months.

14. The claimant was provided with a company car, iPad (uploaded with a respondent proprietary app system called Pixsell) together with a smart mobile phone which was provided to carry out tasks; including providing internet access to the iPad to enable location syncing of the iPad for automatic recording of attendance at customer locations. Pixsell is a catalogue ordering app and customer relationship tool.

15. Written instructions on the use of Pixsell (the Pixsell Instructions) issued to the claimant, which the claimant was aware of, and to which the

claimant was required to adhere, set out "*When using Pixsell, there are some basic ground rules that be adhered to at all times and by all TSM's-must*

1. *Each and every working day, it is necessary for you to sync PixSell before you commence work – a normal sync only takes a minute and even if there is new promotion leaflets etc, sent from head office, this wills till only take a couple of minutes. To do this effectively you will obviously need to be connected to either broadband or Wi-Fi. As data related to product stock levels, credit limits and so for the is updated on E7 in Pwihelli at 4.30am each day, the sync needs to be after this time and not the evening before.*
2. *We then need you to observe what we will call the handbrake rule"*

16. The handbrake rule described above operated at the start of the customer visit; when arriving at the first call of the day - after applying the company car handbrake - the company provided iPad should be switched on and Pixsell app opened. In order to sync the mobile phone requires to be on, as the iPad provided does not itself have mobile connection. Thereafter the customer details who is being visited, requires to be opened on the Pixsell app. This has the effect of providing the TSM with relevant information on the customer. It also allows automatic recording of the sales attendance visit time with the customer. It is, however, possible to disabled the location recording on the Pixsell app and manually provide location information, including by not syncing the iPad to the mobile phone as the iPad provided does not have independent mobile network access.

17. The Pixsell Instructions further set out that "*When the call is complete and you are back in your car, remember the handbrake rule and do not set off to your next call without closing the activity down".* This allows the recording of any customer sales orders within the App generated by the TSM's sales visit achieved and also further (if the mobile is synced) automatically records departure time from that customer sales visit.

18. Further the Pixsell Instructions set out that *"It is the responsibility of each TSM and TSA to ensure all records within the customer address and contacts sections are kept up to date."*

19. A report of the operation of the TSM's Pixsell customer attendances /locations and any orders generated by the TSM's customer sales visit, reflecting the inputted data by the TSM, are uploaded to the respondent's central Databridge computer system by the TSM's syncing operation of the iPad data the following day.

20. That data will include; either the customer attended locations as recorded by the iPad synced to the TSM's mobile phone at that location or, in the absence of the mobile phone being synced to the iPad at any location/or if the location facility is otherwise switched off thereby defeating the automatic location recording, the location being manually inputted by the TSM.

21. Additional to the PixSell Instructions, the claimant was familiar and required to operate in accordance with Journey Plan Itinerary & Prospect Guide Lines (**the JPI Guide**).

22. The JPI Guide provided that each TSM was required to provide; a full weekly planned **Journey Plan Itinerary (JPI)**, setting out the times they had scheduled to attend customers on each Call Day (the day they would call on customers) for their respective geographical sales areas, to their relevant Regional Sales Manager (RSM) covering that area, by 6.00PM on the preceding Friday (that is prior to the week the **JPI** applied to). TSM's were not permitted to make any significant departure from the **JPI** provided without informing their RSM.

23. The JPI Guide, which was in operation at the material times and which the claimant knew he required to operate in accordance with, set out that the master territory JPI should form "*the basis of each TSM's plan for territory coverage and should be a true reflection of the ideal and intended call activity over a 12-week period. Submitted weekly itineraries should broadly mirror the details of the 12-week JP whilst accounting for days and calls that may have moved as a result of things such as Bank Holiday, Meeting, and annual leave."* It provides that;

"1. Only planned intended calls are listed in the master JP.

2. All calls should be planed in efficient and logical sequence to maximise selling time, minimise travelling time

3. The main structure of the JP should ensure where possible that ***the first call of the day can be made around 8.30AM and no later than 9.00 AM*** *to ensure call effectiveness and subject to customer availability* ***the JP should allow for making the last call of the day. Ideally not later than 16.30 PM.***

4. Time should be allowed within journey plan for prospecting and effective territory development and formulated to company and RSM guidelines.

5. TSM's should ensure merchandising activities are planned and accrued out in such a way that they do not impact on the planned calls, itinerary wider journey plan.

6. All calls to be listed in on JP in intended call order, and should include all active account…

…

11. Where it is necessary to make appointments prior to visiting planned customers calls that should be highlighted on the JP by inserting Y/N in column.

12. Unless otherwise agreed or advised IST calls covered by IST should not form part of TSM's JP.

13. JP to be kept up to date at all times.

…

16. Notwithstanding unavoidable and unforeseen reasons, such as customer cancelling an appointment is expected weekly itineraries once submitted will be completed in full.

17. Should it be the that case that significant changes are made to a call day once an itinerary has been submitted, the respective RSM needs to be informed.

19. Unless advised or otherwise agreed, weekly itineraries, completed in full need to be sent to the respective RSM by 6.00PM Friday, prior to the week they apply to. "

24. From 2016 to early 2019 the claimant's RSM was Ken Groves.

25. On **Tuesday 10 January 2017** Mr Williams the respondent's HR Manager had occasion to write to the claimant confirming in consequence of the level of sales generated for the respondent over the preceding 12-month period, the claimant would not receive any increase to his basic salary. The letter set out the level of sales the claimant would require to achieve to achieve an increase and set out "*Success for you under the scheme means success for the busines as a whole…. If there is anything which we can do to support you in this goal please do not hesitate to discuss it further."*

26. On **Friday 21 July 2017** Mr Williams, had occasion to write to the claimant confirming in consequence of the level of sales generated for the respondent over the preceding 12-month period, the claimant would not receive any increase to his basic salary. The letter set out the level of sales the claimant would require to achieve to achieve an increase and set out "*Success for you under the scheme means success for the busines as a whole…. If there is anything further which we can do to support you in this goal please do not hesitate to discuss it further."*

27. On **Wednesday 26 July 2017** Mr Groves had occasion to email the claimant expressing concern that the claimant had disabled the location recording on the Pixsell app and requesting that he turn it back on.

28. On **Monday 18 September 2017** Mr Groves had occasion to email the claimant as the claimant had sent the weekly JPI in late (due the pre-ceding Friday) and in the wrong format.

29. On **Monday 6 November 2017** Mr Groves had occasion to email the claimant and others as their weekly JPI's (due the pre-ceding Friday) were late.

30. On **Friday 5 January 2018** Mr Williams, had occasion to write to the claimant confirming in consequence of the level of sales generated for the respondent over the preceding 12-month period, the claimant would not receive any increase to his basic salary. The letter set out the level of sales the claimant would require to achieve to achieve an increase and set out

"*Success for you under the scheme means success for the busines as a whole…. If there is any further, we can do to support you in this goal please do not hesitate to discuss it further."*

31. On **Friday 12 January 2018** Mr Groves had occasion to email the claimant in response to the claimant describing the weekly JPI in an e-mail late on **Thursday 11 January** as still a work in progress.

32. On **Sunday 21 January 2018** Mr Groves had occasion to email the claimant in response the weekly JPI provided by the claimant on Friday 19 January, asking the claimant to confirm what he was doing on the Wednesday as the JPI was not clear, being reference to the claimant having scheduled only one sale visit that day.

33. In **2019** Mr Ryan Probert became the claimant's RSM. Mr Probert became RSM (North) as such his area of geographic coverage of the respondent territory areas included Scotland being the claimant's geographic sales area. Mr Probert was the sole RSM whose area of overview covered Scotland.

34. On **Thursday 14 November 2019** Mr Probert attended a customer evening event in Glasgow.

35. Mr Probert decided to carry out what he described as spot checks on the claimant on **Friday 15 November 2019** by reference to the weekly JPI which had been completed by the claimant to Mr Probert in advance of that week.

36. That weekly **JPI** (the JPI for week including Friday 15 November 2019) set out the scheduled agreed planned customer sales visits for the claimant on Friday 15 November 2019 as;

    a. 9.30am to 10.05am customer Buicks of Alloa
    b. 10.45am to 11.30 am customer CEF Falkirk
    c. 11.45am to 12.15 am customer WJ Electrical
    d. 14.00pm to 14.45pm customer Scott Direct (Grangemouth)

37. The claimant had attended the theatre on the evening of **Thursday 14 November 2019**, and in consequence of what he regarded as a late night decided that he would not make the first call on **Friday 15 November 2019** either in accordance with Journey Plan model above (*which provided that the first call of the day can be made around 8.30AM and no later than 9.00 AM*)***;*** nor in accord with his provided JPI for week including Friday 15 November 2019, which identified a first customer visit at 9.30am. Instead he decided that the he would schedule to attend later and, decided that he would operate to a different schedule without notifying Mr Probert.

38. Mr Probert followed schedule provided by the claimant in accordance with the JPI for week including Friday 15 November 2019, making manual notes. His observations of Friday 15 November 2019 included noting that the claimant had not attended customers set out in the JPI for week including Friday 15 November 2019, and manually noted his own attendances at the scheduled customers locations and made observations.

39. Mr Probert noted that the claimant was not in attendance at all at the Buicks of Alloa customer location at the scheduled 9.30 am to 10.15 am times, nor other customers at the times scheduled in the JPI for week including Friday 15 November 2019, with the exception of Mr Probert noting that the claimant was in attendance at 10.40 am at CEF Falkirk leaving at around 11 am. In addition, from his manual noting, Mr Probert recalled that he spoke to the claimant via his mobile phone at or about 11.20 am, and having travelled to a nearby customer location, recalled that the claimant was in his car for some 5 minutes, and the customer sales visit concluded after around 10 minutes.

40. The Pixsell app entries the claimant occasioned to be uploaded subsequently to the respondent Databridge system reported his attendances on **Friday 15 November 2019** to the company as;
    a. 9.55 am to 10.42 am Scott Direct (Grangemouth)
    b. 11.05am to 11.14 am CEF Falkirk
    c. 11.20 am to 11.47am Edmundson Electrical Falkirk
    d. 11.50am to 12.27 pm WJ Electrical

e. 12.45pm to 12.50 pm (not a visit – as customer phone call with Comtec)

f. 14.01pm to 14.36pm Buicks of Alloa

41. Mr Probert as the relevant RSM (RSM North) whose area of responsibility included Scotland, was entitled to have access to the data uploaded to the Databridge system and identified what he considered to be discrepancies from his manual observations, on the which included his recall of seeing the claimant at CEF Falkirk at around 10.40 am when the entry to provided to the Databridge identified that the claimant had recorded his attendance (at that time) at separate located customer Scott Direct. Further and while the Databridge information suggested the claimant had been at Edmundson Electrical Falkirk from 11.20 to 11.47 am this did not accord with Mr Probert's recollection that he was speaking on the mobile phone to the claimant for around the first 10 minutes (and thus was not attending with that customer) and recalled that he saw the claimant sit in his car for around 5 minutes thereafter and attended at the customer for around 10 minutes (as opposed to attending as the claimant has occasioned to be recorded at the customer from 11.20 to 11.47 am). Further and by reference to the Databridge information suggested the claimant had been at WJ Electrical from 11.50 to 12.27pm it was Mr Probert's manual observation at or around that time that, Mr Probert was parked near WJ Probert and was speaking on his mobile phone from around 11.30 to 12 noon but did not see the claimant.

42. As Mr Probert was carrying out manual observations his timings were not wholly accurate.

43. Mr Probert concerns were set out in in an internal e-mail on **Monday 25 November 2019** (**Monday 25 Nov 2019 e-mail)** to Mr Williams as the respondent's HR manager and his HR colleague Ms Edmunds, and copied (cc'd) to Mr Britton (as the respondent's General Manager UK and Ireland Sales and both Mr Probert's immediate line manager and the relevant person immediately below the respondent's Managing Director who had sole oversight and understanding of the claimant's allocated area), those manual notes included Mr Probert noting what he recalled from his own

attendances. Mr Probert set out that normally on such an unannounced visit he would turn up at the first planned visit and wait for the Sales Person to show up; if they didn't, he would then normally call to establish what they would say. In the present case it was Mr Probert's belief that calls were not being completed by the claimant despite the Databridge data which showed they were. Mr Probert indicated that he was alerted to his concerns by high private mileage by the claimant and had concluded that local observations were appropriate. Mr Probert further commented that *"based on what I have observed … I believe Jim I knowingly falsifying his records to leave his work area early. Does this amount to gross misconduct? What are your thoughts on this?".*

44. On **Thursday 28 November 2019** at around 10.12 am, Mr Williams as the respondent's HR Manager sent an e-mail response directed to the Mr Probert although including his colleague Ms Edmunds and cc'ing in Mr Britton, as Mr Probert's line manager, being all those included in the **Monday 25 Nov 2019** e-mail, setting out for Mr Probert's "*a few questions/points to answer*"; including

(1) the claimant would be operating to the handbrake rule starting their recording about 5 minutes before entering at a customer and this could be carried out up to a mile away (or more) to allow the TSM to refresh their memory of the customer info; following the call the TSM would spend 5 to 10 minutes in the car recording notes on customer call.

(2) It was intimated that this handbrake rule may fit the pattern of behaviour observed on the day and may be something the claimant would raise in mitigation. As such it was suggested that the focus would be on calls the claimant said he attended but did not. *"How many actual instances do we have and can we support with evidence".*

(3) It was indicated that Mr Williams was happy this type of behaviour does constitute Gross Misconduct -but indicated that what the company would need to establish is a pattern of behaviour (to a degree), a one-off instance of not attending was suggested as a weak position to begin with. Mr Williams noted it was indicated that

the claimant had not turned up to 4 calls "*Just to be clear";* further he intimated

(4) *"Have you checked his orders for the day? Did he place any? Have you followed up with the customers he didn't visit to see if he rang them?"* and

(5) "I would be inclined to look at a few more examples (in terms of day) which can support what you saw first-hand. In the past I have suggested that RSM's ring the customers following visits, after a review of the Databridge, but that's up to you."

That e-mail expressly directed that it was up to Mr Probert whether or not to make contact with customers.

45. On **Thursday 28 November 2019** Mr Probert issued an e-mail solely to Clynton Williams the respondent's HR Manager, which set out that he "*will do some further digging on this*" that "*I was made aware of the handbrake rule"* and described his observations with other TSM's taking seconds at the start and minutes at the end. He continued that he knew *"the mapping would show differently which is why I decided to focus on the times and if he actually turned up. I ill get some of the customers followed up on just for completeness, however of the calls done on that day I am satisfied that he was not doing the calls he said he had done and updated his Pixsell to show extended times and visit so he could leave his area earlier."* He asked what was required and asked should he put together a package together of the conflicts from his diary, Pixsell and his own actual observations along with the reporting system.

46. On **Friday 29 November 2019** Mr Probert sent an e-mail to the claimant requesting updates on the prospects "*we visited and also discussed this week once you have made contact and appointments"* and advised he had pencilled in for a meeting on 9 and 10 December and would like to visit the contacts on those days.

47. On **Wednesday 4 December 2019** Mr William's e-mailed Mr Probert, copying in Mr Britton as Mr Probert's line manager, setting out some HR guidance, "*great, thanks for the information. First step is to gather all the information (looks like you have already done this in this example. We*

(you) then need to speak to" the claimant- asking does he have an explanation "*Should his explanation be adequate then no further action is taken, however should it not then we would take the decision whether to proceed with a formal process."* It was indicated that the note of conversation should include date and time and *"I will then review, and you and I can discuss whether further action is to be taken. I can take you through the next steps once we have completed the above"* it was indicated that any response to a question from the claimant on what was likely to happen would be that the matter is under investigation, but that the serious nature of the matters can be highlighted although must be done *"in an open non-determined way i.e. no conclusions have been arrived at yet."* It was indicated that time was a factor and the company should act promptly.

48. On **Monday 9 December 2019** Mr Probert held an **Investigatory Meeting** with the claimant. While a Note was created by Mr Probert during the meeting no Minute Taker was present. The Note created by Mr Probert records a number of points:

a. The claimant confirmed that understood the procedure and why the investigation had come about.
b. The claimant indicated that a reasonable start time was 9.30 am and it was reasonable to have 4 to 5 calls attendances in a day.
c. The claimant confirmed that he was comfortable about inputting orders and updating calls.
d. The claimant described the operation of the handbrake rule.
e. When it was indicated that the focus was to be Friday 15 November 2019, the claimant responded with a long silence and intimated that he could not remember anything in particular.
f. When the JPI was put to the claimant he stated "*I obviously didn't do them in that order, I reversed them for whatever reason but I can't recall"* he described attending Buiks in the afternoon, CEF at 11.05 which was on his Pixsell report describing that they could not seen him as they were busy.
g. It was put to the claimant that the last sales attendance call was noted as 2pm ending at 2.45pm and it was asked what he was doing after that time, he responded *"I can't recall"*.

h. The information from the Databridge (representing the data the claimant has uploaded) was put to the claimant. The claimant described that he did not think there was anything inaccurate.

i. The claimant described that he dropped in on Scott Direct on spec and described that his start "*should have been out the door a wee bit quicker that morning"*.

j. Attendance from the Pixsell report were put to him and the claimant intimated that they were correct.

k. Thereafter Mr Probert advised that he had attended each of the scheduled call appointments at the JPI planned times.

l. Mr Probert further stated**, untruthfully** to the claimant that he had followed this up with further discussions with some of the customers and asked what did the claimant think the findings would be.

m. The claimant responded that if Mr Probert had carried out the visits in the JPI "*order they would have said they haven't seen me"*.

n. Mr Probert asked what would the position be if he went on the Pixsell report said, to which the claimant responded *"I don't know"*.

o. Mr Probert intimated that the customer face to face time was just over 2 hours but Mr Probert witnessed the claimant in with customers for less than an hour.

p. Mr Probert intimated "*Do you think I am justified in having concerns about this"*, the claimant after a short silence is noted as responding ***"If you've got what you say then you are justified in having concerns"***

49. On **Monday 9 December 2019 around 9.19 pm** Mr Probert e-mailed his line manager Mr Britton with Mr Probert's Notes of the Investigation Meeting carried out with the claimant that day. Mr Probert indicated that what could be seen from the notes was that the claimant was very vague in some answers, Mr Probert "*was mindful of turning this into some sort of disciplinary meeting."*

50. Mr Probert's comment was to indicate that he had been mindful to avoid the Investigation Meeting turning into some form of Disciplinary Hearing – consistent with the HR guidance from Mr William's on the preceding Wednesday 4 December 2019.

51. Mr Probert continued in his e-mail of Monday 9 December 2019, that there was a bit of conflict of the claimant not being able to remember and then suddenly being able to remember and suggested that there was a lot of "*don't knows*" which Mr Probert's suggested the claimant was not able to answer questions honestly. Further he intimated that early in the interview the claimant was very confident of (matters on) that day, however the claimant could not provide any real detail and suggested that a lot of what was said by the claimant was irrelevant detail about buying groups to detract from the questions.

52. Mr Probert, with the exception of his untruthful statement to the claimant regarding contact with clients, acted in good faith at all material times.

53. On **Tuesday 10 December 2019 at 9.13 am** Mr Britton e-mailed Mr Probert stating *"Excellent… well done. I've added in some further red comment… but there are 2 items requiring further investigation.*

1. *Did Jim actually visit WJ Electrical- Call 4*
2. *Was the Comtec call done on phone or e-mail – Call 5*

Everything else is pretty clear cut

The only big issue now is timing for the Disciplinary. I need to get some HR guidance on this as we may struggle to sort by Xmas…"

Mr Britton had not formed a concluded opinion at the time of sending this email, nor indeed at any point until the conclusion of the Appeal. The e-mail was issued in his capacity as Mr Probert's line manager offering support for completing matters, and did not reflect any concluded opinion on the substance of the issues.

54. On **Wednesday 11 December 2019** the respondent's HR Victoria Edwards sent an e-mail to Mr Williams' the respondent's head of HR, Mr Britton, Mr Adam Krawczyk the respondent's Disciplinary Officer and Mr Probert providing copy of the information which was being sent to the claimant included with the notice for Disciplinary Hearing (date, location) to be heard on 3 January 2020 , the respondent disciplinary procedures, the claimant's call schedule and Mr Probert's Investigation Notes "*minus the red observations"* .

55. On **Wednesday 11 December 2019** the respondent wrote to the claimant advising that he was required to attend a **Disciplinary Hearing on Friday 3 January 2020** at 12 noon at a Premier Inn Hotel in Carlisle to be chaired by Adam Krawczyk. It set out that "*Following your attendance at the investigatory meeting on the 9 December, held by your line manager Ryan Probert, it has been decided that your explanations in relation to the highlighted discrepancies in your call plan and itinerary were not satisfactory.*" The letter set out that the question of disciplinary action, in accordance with the Company Disciplinary procedure, will be considered with regard to: "*A potential act of gross misconduct- namely falsification of company records with regards the logged details on your Pixsell account and Outlook calendar for the date of 15th November 2019. We have an eye witness statement from your line manager that we believe shows that you did not actually attend the calls stated for the times stated, or that you did not attend them at all. In the Companies view these actions constitute Gross Misconduct"* The letter set out that the claimant had the right to be accompanied by a work colleague or a full time official of a trade union (subject to certification of their experience). The letter set out that the outcomes of the disciplinary hearing could result in summary dismissal. It was confirmed that if the chosen companion was unable to attend contact should be made with Mr Krawczyk so that an alternate date and time can be scheduled. Enclosed with the letter were a copy of the Disciplinary Procedure, investigation transcript and what was referred to as the **Call Schedule** for the date in question. No statement by Mr Probert was enclosed. It is the Tribunal's conclusion, on the evidence, that while Mr Probert had sent comments in an e-mail describing his concerns as set out (**Monday 25 Nov 2019 e-mail)** and on the day of the Investigation Meeting after its conclusion **Monday 9 December 2019 around 9.19 pm** no separate statement was created of Mr Probert's observations on Friday 15 November 2019.

56. The **15 November 2019 Call Schedule Comparison** is a simply presented, clear to understand, single page document of information pertaining to Friday 15 November 2019, consisting of two tables;

a. the upper table headed **Outlook/Journey Planner**, was that part of the JPI which had been (before the week in question) provided by the claimant to Mr Probert identifying the scheduled sales attendance visits the claimant was undertaking to attend on Friday 15 November; and

b. the lower table headed **Pixsell Calls Logged** reflected the data obtained for Friday 15 November 2019 from the respondent's Databridge system, which in turn originated from the data uploaded from the iPad held by the claimant.

57. In advanced of the **Disciplinary Hearing on Friday 3 January 2020,** Mr Krawczyk requested that Mr Probert, as the relevant RSM to collate further information, being the **Expanded Data covering the period Friday 1 November 2019 to Wed 4 December 2019** set out below**.** Other than acting to collate this data from the respondents Databridge records**,** which reflected the data provided by the claimant to the iPad and uploaded by him to the Databridge system, Mr Probert had no role in the process beyond conducting the Investigation Meeting on **Monday 9 December 2019.**

58. The **Expanded Data covering the period Friday 1 November 2019 to Wed 4 December 2019** set out that;

a. on **Friday 1 November** the claimant had attended **4 visits** with a recorded start time of **12.27pm** and an end time of **3.35pm;**

b. on **Monday 4 November** the claimant had attended **4 visits** with a recorded start time of **11.33 am** and an end time of **4.14 pm;**

c. on **Tuesday 5 November** the claimant had attended **2 visits** with a recorded start time of **12.45 pm** and an end time of **5.02 pm;**

d. On **Wednesday 6 November** it was recorded that this was a day spent on business planning with Mr Probert.

e. on **Thursday 7 November** the claimant had attended **1** visit with a recorded start time of **2.51pm** and an end time of **3.38 pm;**

f. on **Friday 8 November** the claimant had attended **3 visits** with a recorded start time of **10.37** and an end time of **3.36 pm;**

g. **on Monday 11 November** the claimant had attended **2 visits** with a recorded start time of **1.37pm** and an end time of **5.09 pm;**

h. **on Tuesday 12 November** the claimant had attended **3** visits with a recorded start time of **10.20am** and an end time of **3.34 pm;**

i. **on Wednesday 13 November** the claimant had attended **3 visits** with a recorded start time of **2.41 pm** and an end time of **3.53 pm;**

j. **on Thursday 14 November** the claimant had attended **5 visits with a recorded start time of 9.52 am** and an end time of **4.06 pm;**

k. **Friday 15 November** was not listed as that was the subject of the report above

l. on **Monday 18 November** it was identified that the claimant was at home all day.

m. **Tuesday 19 November** was identified as a holiday.

n. **Wednesday 20 November** was identified as a holiday.

o. **Thursday 21 November** was identified as a holiday.

p. **Friday 22 November** was identified as a holiday.

q. **Monday 25 November** it was identified that the claimant was at home all day.

r. on **Tuesday 26 November** the claimant had attended **6** visits with a recorded start time of **9.44** and an end time of **4.36 pm;**

s. on **Wednesday 27 November** the claimant had attended **5** visits with a recorded start time of **12.32pm** and an end time of **4.38 pm;**

t. on **Thursday 28 November** the claimant had attended **4** visits with a recorded start time of **1.50pm** and an end time of **4.04 pm;**

u. on **Friday 29 November** the claimant had attended **4 visits** with a recorded start time of **11.08am** and an end time of **3.53 pm;**

v. on **Monday 2 December** the claimant had attended **2 visits** with a recorded start time of **10.54am** and an end time of **1.52 pm;**

w. on **Tuesday 3 December** the claimant had attended **5** visits with a recorded start time of **11.24** and an end time of **4.32 pm;**

x. on **Wednesday 4 December** the claimant had attended **3 visits** with a recorded start time of **2.31 pm** and an end time of **4.05 pm;**

The **Expanded Data covering the period Friday 1 November 2019 to Wed 4 December 2019** further identified the number of customer visits on each working day from Thursday 5 December 2019 to Friday 20 December as being between 0 and 6.

59. The **Expanded Data covering the period Friday 1 November 2019 to Wed 4 December 2019** was not provided to the claimant in advance of the **Disciplinary Hearing on Friday 3 January 2020**

60. The claimant elected to attend the **Disciplinary Hearing on Friday 3 January 2020** without a companion, or representative. Mr Krawczyk was the chair of the Disciplinary Hearing, while Mr Williams HR and Operations Manager for the respondents attended as Notetaker.

61. Towards the start of the **Disciplinary Hearing on Friday 3 January 2020**, the claimant stated **"***can I clarify if we are here to discuss the calls made on"* Friday 15 November 2019, to which Mr Krawczyk confirmed yes and the conduct of those calls. Mr Krawczyk described that he asked Mr Probert to look at "*more detail which we can cover later on if that"* was okay, which the claimant confirmed his agreement to.

62. In the **Disciplinary Hearing on Friday 3 January 2020,** the claimant confirmed

a. that a reasonable start time would be as close to 9am as possible, dependent on some trade counters being busy early and that a reasonable finish time was 3.30pm to 4pm.
b. He intimated that he had changed the attendance order (for Friday 15 November 2019) round but did not recall why and that the way the calls were made was due to him needing to get them done before (his) holiday (the following week).
c. He intimated that he understood the concerns around the discrepancies but intimated that he had made the calls (customer sales visits).
d. He explained that he had attended Edmundson (a non-existing customer) as the manager from the adjacent customer had transferred.
e. In response to discrepancy between information in the 15 November 2019 Call Schedule Comparison and what Mr Probert reported as his observations he intimated that Mr Probert timings could be erroneous pointing that he could not have travelled from customer Scott's any quicker.

f. In response to his position re attendance at WG Electrical the claimant produced his Driving Records Document, to which Mr Krawczyk asked how did it relate to what was being discussed. The claimant responded asking had anyone asked the customer, has anyone spoken to the customer and provided what he said was an image of the door to the customer building, intimating that by entering/existing a side entrance he may not have been seen (by Mr Probert).

The **Driving Records Document** for Friday 15 November 2019 produced by the claimant, which the claimant had created (he indicated from his mobile phone) showed a number of towns (but not addresses) and times at those towns and distances; the towns being Grangemouth, Falkirk and Alloa. It did however set out business address locations attended as follows;

1. a non-customer location which the claimant indicated was where he stopped for lunch from 12.41 and 1.23 pm; and
2. a car wash in Perth showing its postcode which indicated he attended from 3.44 to 3.55pm; and
3. a supermarket in Perth, again showing its postcode which indicated he attended from 4.05pm to 4.22pm.

Further it did, in addition, show a time recorded as arriving at "Home" location (after driving from the supermarket in Perth) at 5.17pm.

It was not created from any company verified data. It was the claimant's position that it the Driving Records Document represented information from his mobile phone, he did not however provide any evidence to demonstrate the veracity of the information set out.

g. In response to questions around the Investigation Meeting, the claimant advised that he was being asked questions which he wasn't expecting, criticising that Mr Probert appeared to have lost track of him between one call and going to a customer around the corner. The claimant did not describe any material errors in the detail of the Note of the Investigation Meeting.

h. In response to question on why the information did not appear to tie up with Mr Probert's observations, the claimant indicated that his Driving Records Document showed where he was and when.

i. In response to a question of the start and end time appeared to show that the start (departure from home) would be 9.15 and finish (return

to his home) by 3.45pm on the 15 November 2019 the claimant respondent that this was accurate but only now after looking at his **Driving Records Document,** he could see that he went to a car wash and a supermarket on his way home.

j. In response to a question on whether this sounded like a full and effective day, the claimant responded no but it wasn't a regular representative day and in response to a question on that he was usually more productive said yes, although in response to a question on other days, intimated that some days recently weren't so good but again repeated his position at the start that this was to discuss the Friday 15 November 2019.

k. At this point Mr Krawczyk advised that he had requested Mr Probert carry out investigation on call details for the whole of the month of November stating that he suggested the meeting adjourn at that point and that he would provide the company findings (the **Expanded Data covering the period Friday 1 November 2019 to Wed 4 December 2019)** to the claimant. The meeting thereafter adjourned at **12.40pm,** with the claimant leaving the room with the **Expanded Data covering the period Friday 1 November 2019 to Wed 4 December 2019**, in order to read same.

l. At **12.53pm** the claimant elected to re-enter the Disciplinary Hearing room and confirmed that he had time to read the provided information. It is the conclusion of the Tribunal that it was the claimant's sole decision to re-enter the Disciplinary Hearing room. The **Expanded Data covering the period Friday 1 November 2019 to Wed 4 December 2019** did not contain complex calculations which required reflection and detailed review to consider its implications, setting out clearly as it did on a single page in table format detail of days of the week, calendar dates, recorded numbers of the claimant customer visits, recorded start time, recorded end time, customer time, distance from home of last call, of which reflected events in close temporal proximity to Friday 3 January 2020**.** Had the claimant wished a longer period and or days to review, the respondent would have permitted same. The claimant's decision to re-enter the Disciplinary Hearing room was solely his own and there was no pressure on him to do so within any timescale. Had he felt that he required a greater period to

consider the terms of the Expanded Date this would have been granted.

63. The focus of the Disciplinary Hearing after the adjournment included the **Expanded Data covering the period Friday 1 November 2019 to Wed 4 December 2019.**

a. The claimant advised that he had not told his previous RSM about changes and while he was fully aware of the guidelines, he did not follow them as the Pixsell app logged what he does and when.

b. The claimant confirmed that he changed the running order for Friday 15 November although he didn't change the relevant schedule.

c. The claimant confirmed that he was aware his contracted hours were 37.5 per week.

d. It was put to the claimant that few of the days from 1 November looked "*full and meaningful"*, the claimant responded that it would appear not if look against the criteria (JPI guide) and indicated that "*there's a reason for most of that I'm sure"* although did not provide such an explanation.

e. The claimant after being taken through the individual dates on the **Expanded Data covering the period Friday 1 November 2019 to Wed 4 December 2019** responded that;

1. on Monday 4 November 2019 that he was merchandising and while had left his home *late* had got home late on that date; and

2. on Thursday 7 November 2019 when only one call was listed, he attended what he described as a pilot branch and filled in the rest of the day with "chasing orders"; and

3. on Monday 11 November 2019 he advised that he was carrying out admin and did not log the times; and

4. on Wednesday 13 November 2019 where the recorded end time was 2.41pm he had been with Mr Probert at a meet the buyer event and noted another date he was attending a call in East Kilbride so would not be back to 7pm.

f. The claimant raised a question of whether the contracted hours (37.5 per week) included driving, to which it was indicated that this was irrelevant as he would still be short.

g. There was an exchange in which the claimant indicated that he would not get home until 7pm.

h. It was again put to the claimant were these days "*full and meaningful"?*, the claimant responded indicating on one date he left home late but got home late but stated "*But I have to answer no to that question, they aren't full and productive days- but I'm sure there are reasons for the times"* He did not offer what those reasons were beyond the comments on the specific dates above, although indicated that his final quarter was the best he had that year.

i. After some discussion the claimant, by reference to his Pixsell app, indicated that there was there was a discrepancy between part of **Expanded Data covering the period Friday 1 November 2019 to Wed 4 December 2019** of some 20 minutes.

j. The claimant was asked if he wanted to add anything and confirmed that he didn't.

k. The claimant was asked if he had any comments on the process and advised *"no I understand it all and its clear enough"*

l. The claimant was advised that one of the outcomes may be dismissal to which the claimant responded "*I'm aware and understand that. I just hope you take into consideration my good performance over the time and how I have increased the area after the previous TSM"*.

m. The claimant was advised that he was placed on suspension with full pay and that a decision would be issued no later than Friday 10 January 2010.

64. The claimant retained access to the company systems as he did during the Disciplinary Hearing throughout that period of suspension until **Thursday 9 January 2020**. It was open to the claimant to access the information until Thursday 9 January 2020 should he have wished to challenge any of the information available to the company including the information contained within the **Expanded Data covering the period Friday 1 November 2019 to Wed 4 December 2019.** The claimant elected not to retain the **Expanded Data covering the period Friday 1 November 2019 to Wed 4 December 2019** after conclusion of the Disciplinary Hearing, he did not however return it.

65. On **Thursday 9 January 2020** the respondent wrote to the claimant (the Summary Dismissal letter of 9 January 2020) confirming termination of his employment without notice with effect from 9 January 2020. The letter was signed, in accordance with the respondent's practice, by Mr Williams as HR and Operations Manager for the respondent, although the findings were those of Mr Krawczyk as the chair of the Disciplinary Hearing. The letter set out that "*Further to your disciplinary hearing on 3 January 2020 regarding your falsification of company records and the non-adherence to contracted working hours in relation to the 15 November (**as well as the weeks preceding this as detailed in the discussion and documents during the Disciplinary hearing*** (the Tribunal's emphasis), *this letter confirms the termination of your contract without notice with effect from 9 January 2020*. It confirmed that the claimant had been given the statutory right to be accompanied and chose to waive same. It described that a "*full investigation of the facts surrounding the complaint against"* the claimant was made by Mr Probert, and having "*put the specific fact to you for you to* comment … *it was decided that your explanation was not acceptable". In additional, having carefully considered the representations that you made, we were not able to find any sufficiently mitigating circumstances"*. The respondent set out that had been "*left with no alternative than to summarily dismiss".* The respondent set out that the gravity of the misconduct was such that the respondent believed that the trust and confidence placed in him as its employee had been completely undermined. The conduct was set out as:

a. The falsification of Company records, by reporting on making calls to customers at stated times but not attending them.
b. Non adherence to company procedures in relation to his call planning and reporting.
c. The non-adherence to his contracted working hours.

66. **The Summary Dismissal letter of 9 January 2020** confirmed that the claimant would receive normal salary up to the date of termination and a sum in relation to untaken annual leave entitled a sum to the value of £1,800 in relation to achievement against the discretionary bonus. The Tribunal accept the respondent's evidence that this discretionary bonus payment was allocated to the claimant reflective of a sale achieved within

the Scotland area but not otherwise attributable to the efforts of the claimant.

67. The **Summary Dismissal letter of 9 January 2020** set out that the claimant had the right of appeal and provided a copy of the respondent's disciplinary procedure.

68. Both Mr Williams and Mr Krawczyk acted in good faith at all material times.

69. By letter dated Wednesday 15 January 2020 (the **Appeal Letter of Wednesday 15 January 202**0) the claimant confirmed that he wished to exercise his right of appeal.

70. In the **Appeal Letter of Wednesday 15 January 2020,** the claimant set out the reasons for the appeal were;

a. *I feel this was incomplete as key witnesses were not contacted in relation to my attendance at appointments and this formed part of the investigation resulting in my dismissal.*
b. *Databridge mapping evidence nor presented to me to support the company claims.*
c. *Evidence I presented in my defence e.g. Phone Timeline, was not properly considered"*

71. In the **Appeal Letter of Wednesday 15 January 2020,** the claimant set out his position regarding the charges as follows: "*The Charges*

a. *I have a faultless work record since first employed*
b. *No prior process before this accusation of misconduct*
c. *I reject the actions could possibly be considered as "Gross" which I consider as wholly disproportionate following long-standing practice and custom"*

72. In the **Appeal Letter of Wednesday 15 January 2020**, the claimant set out his position regarding the consequences as follows: "*Consequences*

a. *Dismissal for gross misconduct is a personal slur.*
b. *May unjustifiably affect my prospects of future employment.*

c. *For this reason, I am determined to pursue the matter both inside and outside the Company's procedures.*

73. The claimant concluded in his Appeal Letter of Wednesday 15 January 2020 setting out that he no longer had access to a vehicle and will rely on public transport (to attend any appeal) and that that he would "*not be choosing to be accompanied at the meeting as I am not a member of a Trade union".*

74. On **Monday 27 January 2020** the respondent notified the claimant by e-mail of the date and location of the Appeal Hearing confirming that Mr Britton would be hearing the Hearing.

75. The **Appeal Hearing** took place on **Tuesday 4 February 2020** in person in Glasgow. While the Company procedures set out that an appeal against dismissal would be heard by the Managing Director, it was not. The Managing Director was not available to attend to hear the appeal owing to business commitment's including training and subsequent leave. The Appeal Hearing was chaired by Mr Jeff Britton as the most senior manager with experience of the claimant's regional areas of responsibility.

76. At the outset of the **Appeal Hearing** on **Tuesday 4 February 2020,** the claimant confirmed that he was not being accompanied by either a colleague or a Trade Union representative. The claimant asked, as he was not accompanied, could he record the Appeal Hearing that was not agreed to. Mr Britton asked the claimant whether he had all the necessary information he had requested relating to the Appeal, to which the claimant responded "*Yes I have all the information required".*

77. Later at the outset of the **Appeal Hearing** on **Tuesday 4 February 2020**, the claimant asked what why the Managing Director was not hearing the case, referring to the Disciplinary Procedures which as set out above provided that "*however in the case of dismissal this shall be the Managing Director."* Mr Britton responded indicating that this was an appeal, and not a grievance, that he was there to represent the Managing Director, and while the procedure stated this it was not a legal requirement "*and in order*

to facilitate the timely holding of this meeting" the Managing Director "*had requested that"* Mr Britton "*deputised for him"* further as the claimant *"had not queried this prior to the meeting, despite having the e-mail informing him that"* Mr Britton " *was hearing the appeal since 27 January 2020".*That was not challenged.

78. Further at the **Appeal Hearing** on **Tuesday 4 February 2020** Mr Britton set out that he wanted to stress that the meeting was solely to hear the appeal against the outcome of the Disciplinary Hearing, it was not a continuation of the Disciplinary Hearing *"so it is not to facilitate an opportunity"* for the claimant "*to answer the same questions all over again. It is a chance for you to present additional information that could give the Company reason to reconsider its decision to dismiss you, or for you to present relevant information to demonstrate the process did not follow an appropriate course."*

79. Subsequently at the **Appeal Hearing** on **Tuesday 4 February 2020** Mr Britton asked the claimant to outline the key points of his appeal in his own words but asked the claimant first to confirm what he believed should be the outcome of the Appeal Hearing. The claimant responded "I *don't know what I am looking for from the appeal. I just believe it to be unfair*". Mr Britton further asked what the claimant would like to happen from the appeal -was it reinstatement or something else, the claimant responded "*I don't want to say".*

80. During the **Appeal Hearing** on **Tuesday 4 February 2020** Mr Britton reiterated the reasons for the company's decision to dismiss and outlined what the claimant had set out as his Appeal points.

81. The claimant at the **Appeal Hearing** on **Tuesday 4 February 2020** stated that he was asked to a meeting with Mr Probert/ Mr Krawczyk to cover events of Friday 15 November 2019 "*which then started to take a wider view of events around this date for which*" he "*was not prepared".* He stated that the company had not "*investigated this properly and hasn't followed up on details*" he had given from his mobile phone which he said showed his movements on Friday 15 November 2019. The claimant stated

that the claim that he *"didn't make the calls is inaccurate, and the information"* he gave "*was ignored".* The claimant stated that it could not be a fair decision *"when it wasn't properly looked at. The decision to dismiss*" him "*when the calls were not properly investigated"* was unjustified and a slur on his reputation. The claimant asserted that his previous reputation and work record had not be taken into consideration including the results in his territory.

82. Mr Britton interjected that "*the initial allegation was not fixed on whether you made the calls or not"* and stated that he believed that there was only one instance where the claimant attendance was disputed *"but the biggest concern from the Company was in the fact that you didn't attend the calls at the times you entered on the Databridge via Pixsell and the main witness*" was the claimant's RSM who was witnessing the days proceedings. Mr Britton continued that the concern was further highlighted with the claimant claiming to be in meetings with customers longer than he was and didn't match what the claimant had put on his call planner (the JPI for the relevant week)" *but more importantly and more significantly was your actual working hours for the day"* this being indicated to be the main cause for concern from the meeting notes.

83. The claimant produced his **Driving Records Document,** explaining that he had produced this during the Disciplinary Hearing and asserted that it had not been taken into account.

84. The claimant continued (**referred to hereafter as the customer contact exchange in the Appeal Hearing**) that *"not only was this not taken into consideration but none of the customers have been approached by the Company to check it. So how do you know what happened if you have not spoken to the customers".* Mr Britton responded "*Firstly how do you know we haven't spoken to any of your customers".* The claimant responded "*So who are they then, **because I know you haven't**".* Mr Britton asked how the claimant could be "*so sure if we have or haven't spoken to any of your customers. How would you be aware if any of them specifically asked us for confidentiality once we had discussed the situation with them."* The claimant asked *"Well who did you speak to then",* to which Mr Britton

responded that the company was not obliged to furnish the claimant with any information it may or may not have where a customer has specifically asked for confidentially, nor was it obliged to disclose information if the company chose not to for privacy reasons. Mr Britton stated that Appeal Hearing was not a court of law so there was no requirement for a cross examination and continued "*it is interesting that you appear so confident that your customer hasn't spoken to us though*". The claimant responded "*I know he hasn't because I've spoken to the main person there since and I know you haven't done anything"*. Mr Britton responded that this was one of the reasons why obtaining customer feedback or evidence was often unreliable. He described that it was not always appropriate as it placed a customer in a difficult situation with possible commercial repercussion for the company and secondly it was recognised that sales people often have close personal relationship with some customers and that that can influence the accuracy of the information provided.

85. Mr Britton continued that the Appeal was primarily for the claimant to present new evidence or to specifically address each of the disciplinary issues with information to persuade the company to reconsider the decision.

86. The claimant stated that according to the letter **of Wednesday 11 December 2019** inviting him to the Disciplinary Hearing on 15 November was "*the only thing I had to answer",* Mr Britton confirmed that Friday 15 November 2019 was the trigger to further investigation and not the sole factor for dismissal.

87. Mr Britton stated that Mr Probert identified discrepancies between the JPI and Pixsell report (the 15 November 2019 Call Schedule Comparison). The claimant asked "*so why are all the other days being suddenly included in this as I wasn't given any information or detail about them. I was in with all those customers so there shouldn't be a problem."* Mr Britton responded that he understood, that when the investigation information was reviewed it was decided that it would be appropriate to look at other days to get a balance on whether Friday 15 November 2019 was a one

off, looking at comparison between JPI and Outlook (15 November 2019 Call Schedule Comparison).

88. Mr Britton asked whether the claimant would expect the company to take such a wider a view and the claimant confirmed that he would. Mr Britton confirmed he also agreed and that when the information was passed to Mr Krawczyk, he felt it could be included but that the claimant would be offered a chance to review the information. The claimant stated "*But I wasn't given any information or details about them. I didn't have a chance to look at it before today's meeting. The disciplinary was meant to be about the 15 November and I can provide where I was then.*"

89. The claimant was incorrect when he asserted that he wasn't give any information or details. The **Expanded Data covering the period Friday 1 November 2019 to Wed 4 December 2019** was provided to the claimant at the adjournment during the **Disciplinary Hearing on Friday 3 January 2020.** It had been open to the claimant to seek a longer adjournment after receiving the **Expanded Data covering the period Friday 1 November 2019 to Wed 4 December 2019**, further the claimant had access to the Pixsell information and the respondent Databridge system until **Thursday 9 January 2020** should he have wished utilise same to provide alternate position using the company records generated from the data he had entered via Pixsell for any of those day. Similarly, it had been open to the claimant to provide any alternate position via diary and or other entries. He did not do so.

90. **The Expanded Data covering the period Friday 1 November 2019 to Wed 4 December 2019** did not require any complex analysis to understand or indeed to retain an understanding of what it showed, covering as it did what was said to be the claimant start and end times and customers visited over the period Friday 1 November 2019 to Wednesday 4 December 2019 which was in close proximately to both the Disciplinary Hearing and the Appeal.

91. The claimant confirmed that he was given the **Expanded Data covering the period Friday 1 November 2019 to Wed 4 December 2019** but

stated that it was not given to him for the Appeal. In response to whether the claimant asked to retain same he confirmed he did not. Mr Britton asked whether he requested it in preparation for the Appeal Hearing and the claimant confirmed that he had not**. *"No … I didn't think the questions would include anything other than 15 November***", he was asked why not to which the claimant responded *"I didn't think they were important as the letter only said the disciplinary related to the 15 November."* Mr Britton explained that it was his understanding that once the claimant was in the Disciplinary Hearing it was made clear that further dates had been looked and a result of this wider view, the Company's concern had now become more serious to which the claimant responded "*Yes, but I didn't fully understand it was serious".* Mr Britton asked the claimant did he not believe that being been invited to a disciplinary was a serious situation and anything raised at that meeting would be equally serious in respect of being addressed, to which the claimant responded "*Not really".* Mr Britton expressed surprise to which the claimant responded "*I didn't understand these were relevant or serious"*. Mr Britton referred to the notes of the Disciplinary Hearing noting that Mr Krawczyk had been insistent on an adjournment to allow the claimant to look at the **Expanded Data covering the period Friday 1 November 2019 to Wed 4 December 2019**, to which the claimant confirmed that he had taken time to examine the information and stated "*I don't think I paid them enough attention*" describing that he was focused on hitting year end targets.

92. Mr Britton further indicated that he wanted the claimant to clarify what he *"genuinely believed to be an appropriate start time for a TSM to be making calls and similarly an appropriate time when covering areas of the Territory less than 2 hours away from home",* to which the claimant responded that he had *"answered this already in previous meeting, isn't this meant to be focussing on my Appeal".* Mr Britton stated that he was asking this in response to the discussion around Friday 15 November 2019 to which the claimant responded that he *"would look to be at trade counters between"* 9 am and 9.30am. The claimant confirmed that it was reasonable for a company to expect its employees to work their full contracted hours excluding reasonable travelling time. Mr Britton noted that the claimant's effective starting time on Friday 15 November 2019 was 9.55 am, at a

location that was only an hour and 10 minutes away from the claimant's home and asked why did the claimant first call not start at 9.15 to which the claimant responded "*I can't answer that. It probably not acceptable*". Mr Britton noted that the last call was logged at 4.56pm at a location loess than an hour away from home and asked whether this was reasonable behaviour for a sales person, to which the claimant responded *"I suppose not but maybe I went home early to clear the desk before I went off on holiday".*

93. Mr Britton summarised the **Expanded Data covering the period Friday 1 November 2019 to Wed 4 December 2019**, noting of the 24 days the claimants activities included only 2 days with customers visits starting before 10am; 8 days had start times past 12 noon with 5 of those days showing orders taken at home between 9 am and 12noon; only 3 days had customer activity of more than 4 hours ; 3 days had less than 1 hour customer activity; 5 days had 3 or less calls in a day; only 8 days had a finish time past 4pm; 7 days had a finish time before 4pm. Mr Britton noted that there was not one day in the period examined where the claimant appeared to work a full 7.5 hours, nor a week where 37.5 hours was completed and asked "*Does this surprise you*?" to which the claimant responded "*Not really but November may have been a one off and did not represent all the time I've spent travelling for work and all the late nights in other months".* Mr Britton stated that on viewing the 6-week period their appeared to be a justified reason for concern, and in essence what had gone before is irrelevant as this appeared to be a significant period of contravention of the Company's rules and lack of compliance to the contract of employment. Mr Britton indicated that the meeting in part was for the claimant to present information relating to those periods and noted that this had not happened and asked whether there was else the claimant would like to add as part of his Appeal to which the claimant responded "*As I said I didn't realise this was important or serious and that we were only looking at the 15 November"* . Mr Britton stated that he was struggling to understand the claimant's view to which the claimant responded "*It wasn't obvious in"* the Disciplinary Hearing.

94. Mr Britton went on address the appeal points;

a. key witnesses were not contacted, the claimant stated that he would like to know if the company, with Mr Britton intimating that the key witness was the claimant's RSM *"and in the fact that his operation triggered the wider investigation"* he noted all the information had been provided intimating that it was for the claimant to provided tangible evidence or information to explain it.

b. Databridge mapping not presented, Mr Britton intimated that the company was not obliged to furnish the claimant with details of the facilities it may have for assessing team member stating "*Information on the output of this system was provided during the Disciplinary Hearing"* intimating that it was for the claimant to provided tangible evidence of his activity, the claimant made no response to this.

c. Driving Records Document not properly considered. Mr Britton intimated that all information provided had been noted and given thorough consideration, however the outcome was that the claimant had been unable to provide consistent and tangible information to explain significant gaps in working hours, the claimant made no response to this.

d. Faultless work record. Mr Britton intimated that this was not relevant where gross misconduct was found, the claimant made no response to this.

e. No Prior Process. Mr Britton intimated that this did not appear to be accurate, there was a formal investigation, the claimant was given opportunity to respond and there was a formal Disciplinary Hearing at which the claimant was given the opportunity to respond. The claimant made no response to this.

f. Wholly disproportionate (to dismiss) following long-standing custom and practice. Mr Britton intimated that falsification of records is listed within items for Gross Misconduct and a regular occurrence of avoiding carrying out working hours was "*effectively an act of insubordination"* which is included in that list. The claimant made no response to this.

g. Gross Misconduct is a person slur. Mr Britton intimated that there was no defamation that this was an appropriate course of disciplinary action. The claimant made no response to this.

h. The dismissal may unjustifiably affect prospects of future employment, Mr Britton intimated that this was irrelevant. The claimant made no response to this.

i. The claimant intention to pursue the matter inside and outside the company procedures. Mr Britton intimated that the claimant was free to pursue any further action he considered justified. The claimant made no response to this.

The claimant confirmed he had nothing to add. Mr Britton asked for clarity on the Driving Records Document and the claimant confirmed that he agreed on the start and end date for 15 November 2019. Mr Britton confirmed that he wanted to recheck the information provided during the Disciplinary Hearing.

95. The claimant was asked if he felt he had been given the opportunity to voice the reasons for his appeal, although initially responding that he "*would rather not say*", Mr Britton framed the question as whether the claimant had, had time to add information to address the Disciplinary outcome the claimant responded *"Yes, I suppose so if you want to put it like that".* The claimant confirmed he had nothing to add, and it was confirmed he would receive copy of the transcript. The Appeal Hearing concluded.

96. A draft letter of Monday 10 February 2020 setting out Mr Britton's conclusions was prepared.

97. On **Monday 10 February 2020** the respondents wrote to the claimant, the letter signed for and behalf of the respondents by Mr Williams HR & Operations Manager, confirming that the Appeal Hearing was conducted by Mr Britton (**the Appeal Outcome Letter of Monday 10 February 2020**); it set out that "*the Company has now taken a decision on your appeal, namely that the original decision is hereby upheld*", and that the original disciplinary decision is upheld. The letter set out that the reasons for the decision reflecting the initial summarisation presented at the end of Appeal Hearing, the previous week "these are detailed within the attached minutes from the meeting. The letter set out that Mr Britton having taken items away for review and followed those up and was satisfied that;

1. The information the claimant presented at the disciplinary hearing (The Driving Records Document) was looked several times but it did not provide conclusive answers to the claimant activities on the day in question; and
2. The claimant was presented with an A3 document listing all of the claimant's Databridge logged calls for the period between 1November and 4 December. It was not returned to Mr Williams at the conclusion of the Disciplinary
3. The investigation meeting and disciplinary hearing were conducted in accordance with the company procedure and allowed the claimant a fair opportunity to respond to all of the allegations.

98. Mr Britton acted in good faith at all material times.

Submissions

99. Written submissions were provided by the claimant supplemented by oral submissions. Those submissions set out that:
    a. An employee has the right not to be unfairly dismissed under s94 of ERA 1996. Further under s98 it is for the employer to show the reason for dismissal and that the reason for dismissal falls within s98(2) ERA 1996 or some other substantial reason which justifies dismissal and it was not disputed that this case concerns "*conduct".*
    b. In determining whether the reason was fair or unfair will depend on whether in the circumstances (incl. size and admin resources) did the employer act reasonably or unreasonably in treating the conduct as a sufficient reason for dismissing, and that should be determined in accordance with equity and the substantial merits of the case.
    c. For the claimant I was referred to **Sharkey v Lloyds Bank PLC** UKEATs/0005/15 (**Sharkey)** and for ease I set out the passage at para 9 referred to *"The focus is thus on the employer's reason for dismissal and whether the employer's actions, focusing upon those actions, were reasonable or unreasonable. The conventional approach, derived from British Home Stores Ltd v Burchell [1978] IRLR 379, is that it is for the employer to show the reason (here, the reason was conduct; that is not controversial). Then there is a four-stage test in order to determine*

the question arising under section 98(4): does the employer have a genuine belief in the misconduct, are there reasonable grounds for that belief, do they follow a reasonable investigation, and is the decision to dismiss one that is within the band of reasonable responses?".

d. It was further intimated that the band of reasonable responses also applies to the procedure by which the decision is reached referencing the Court of Appeal decision **Sainsbury's Supermarket Ltd v Hitt** [2003] ICR 111 (**Hitt**) para 30 which sets out *" In my judgment, the appeal tribunal have not correctly interpreted the impact of the decision of the Court of Appeal in Madden's case. The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question whether the investigation into the suspected misconduct was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss for the conduct reason."*

e. It was further argued that regard should be had to the size of the respondent operation, which operates all across the UK and submitted that it was not believed to be controversial to suggest that the respondent is a large organisation which should be held to the highest standard.

f. In relation to witness evidence it was submitted that;

   1. the Investigation Officer Mr Probert was not credible or reliable, pointing to his position in oral evidence a 20-minute difference between the time he said he arrived CEF Falkirk location (at 11am) and the written minute (he said he arrived at 10.40am).
   2. Further it was put to him that he could not have driven from Buick to Falkirk in 10 minutes *(taking the time he said he arrived in oral as being 10.40)* he refused to make that concession although it was subsequently pointed out that in the documents (page 290) he stated that this was a 13 mile drive which took 20 minutes (not the 10 minutes he suggested in oral evidence).
   3. Again, in examination in chief it was suggested he indicated it was his recollection the claimant had not attended any appointments, although this was not his conclusion at the time of the investigation.
   4. He witnessed the claimant go into the customers premises and that it was put to him that he had seen the claimant "*come out*" of

customer premises CEF he suggested this was the car park, and in response to cross examination it was put to him that this was a lie.

5. It was submitted that it became clear that Mr Probert did not have any discussions with customers.
6. It was suggested that Mr Probert's evidence was to the effect that his sole role was the observation on Friday 15 November 2019 however by contrast Mr William's and Mr Krawczyk evidence he was involved in further investigation.

g. In relation to **Mr Williams** it was submitted that he was in the most part credible. However, in relation to CKI's decision not to speak to customers it was suggested that he was lacking in credibility. It was argued that the suggestion that CKI's Regional Sales Managers and CKI had felt that discussion in this instance with customers could damage the business reputation was not true. It was suggested that as Mr Williams had intimated that Mr Probert should follow up with customers and that he had *"in the past … suggested that RSM's ring the customers following visits, after review of the data bridge".* It was argued that this was inconsistent.

h. In relation to **Mr Krawczyk** it was submitted that in the most he was credible and reliable. It was argued that he contradicted Mr Probert's evidence on a number of occasions;

1. It was argued that Mr Probert indicated that he had no further involvement following the **Investigation Meeting** on **Monday 9 December 2019**, Mr Krawczyk it was suggested was confident in his evidence that Mr Probert had carried out further analysis (the **Expanded Data covering the period Friday 1 November 2019 to Wed 4 December 2019)**.

i. Mr Krawczyk indicated (in evidence in chief) that he had not spoken to Mr Probert following the **Investigation Meeting** on **Monday 9 December 2019** but changed his evidence when it was put to him (in cross) that testing of Mr Probert's observations should have been made, it being argued that there had not been a proper investigation.

j. In relation to Mr Britton it was argued that he made a number of concessions under cross examination.

1. It was accepted that insubordination was never put to claimant prior to the appeal.
2. It was indicated that in cross examination it had been put to Mr Britton that he had been involved from the start, reference was made to Mr Britton's email to Mr Probert on the **Tuesday 10 December 2019 email** (page 279). It was argued that Mr Britton's position that he had not formed a view was contradicted by the terms of that e-mail.
3. It was argued that Mr Britton was on purpose deceiving the claimant at the Appeal on the issue of whether customers had been spoken to.

k. For Mr Gauld it was argued that he was both credible and reliable, although it was accepted that he at times did go off onto tangents.

l. It was argued that the respondent had failed to consider its policy to deal with Attendance and Time Keeping

m. It was argued that the respondents had failed to consider it Performance Improvement Policy and that non adherence to the company policy and contracted hours do not constitute gross misconduct.

n. It was argued by reference to the EAT in **Kefil v JJ Food Service Ltd** [2013] IRLR 850 (**Kefil**), which indicated that it would be unfortunate if people were not warned that repeat conduct would lead to dismissal. It was argued that the respondent did not follow a fair procedure having regard to the ACAS Code, although it was acknowledged that a failure to follow the ACAS code does not necessarily render a dismissal unfair.

o. It was argued that the Disciplinary Hearing on Friday 3 January 2020 took an unprecedented wider view without prior notice.

p. It was argued that the claimant was only give 13 minutes to consider the new documents and allegations.

q. The claimant argued that it was well established in law that the claimant has the right to know the specific allegations.

r. It was argued that two of reasons of dismissal had not been put the claimant.

s. It was argued that it was Mr Britton's view that the claimant's actions were not "*simply breaching his contract but insubordination*"

t. It was argued that Mr Britton at the appeal was only considering points which the claimant elected to raise.

u. It was argued that the reasons for dismissal had not been put to the claimant.

v. The claimant referred **Strouthos v London Underground** 2004 IRLR 636 CA (**Strouthos)** indicating that the disciplinary charges should be precisely framed and it was argued that the evidence should be limited to those particulars.

w. It was argued that the claimant did not receive a copy of the Mr Probert's e-mail.

x. It was submitted that the central issue in this case was whether the employee would understand from the way the case was put that the charges in issue were being made. Further that the claimant was not aware of the charge and /or allegation and it was his understanding the original matter (Friday 15 November 2019) was the only matter which was at issue.

y. It was argued for the claimant that procedural failings and errors rendered the dismissal unfair.

z. It was argued for the claimant "*no Polkey reduction should be made"* to any award as he was challenging his dismissal on a number of reasons and *"not purely procedural failings"*.

aa. It was argued that if the Tribunal decide that that the dismissal was unfair due to procedural failings then no reduction should be made as it would not be just and equitable to reduce an award, it being submitted that the claimant had suffered an injustice in that he did not receive a fair hearing as a result of those procedural failings.

bb. It was submitted that that there should be no reduction for contributory conduct on the part of the claimant.

cc. It was argued that the claimant had mitigated his loss.

100. For CKI written submissions were provided, supplemented by oral comments, it was argued that that the dismissal was fair within the meaning of s98 of ERA 1996.

a. It was argued that in order to prove a fair reason the employer need only show the reason related to the employer's conduct and the Tribunal should not be drawn into a trap of constructing the concept of

conduct too narrowly, reference was made to the **Royal Bank of Sc v Donaghay** UKEAT/0049/10 (**Donaghay**) where the Tribunal had erred in requiring misconduct, for the purposes of s98(2) of ERA 1996 to have been reprehensible. Further it was argued that the is not need at the stage of considered s98(2)(b) to determine whether the conduct was culpable or whether the employee was aware what he was doing would be subject to disapproval by his employee, reference was made to **JP Morgan Securities v Ktorza** UKEAT/0311/16 (**Ktorza**). The Tribunal notes that in Ktorza the EAT from para 41 states, that the Tribunal Judge had:

> *"… concluded that it was for the Respondent to establish at the s98(1) stage that the conduct was culpable, eliding s 98(1) and (4). It seems to me that he stated this expressly at para 57 of his Reasons. Indeed, he appears to have gone further and said that the person accused must have subjective awareness that what they were doing would be subject to the disapproval of employer, clients or fellow employees, and he relied on at least one criminal case for that proposition.*
>
> *[42] In my judgment the Employment Judge's approach was wrong in law. At the s 98(1) stage the Employment Tribunal is only concerned with establishing what the reason was and that it was a reason of the kind that s 98(1)(b) and (2) identify. In a conduct case the employer will no doubt generally believe that there is something to be criticised about the employee's conduct, otherwise the employer will not be putting it forward as the reason for dismissal at all. (Mr Carr suggested that there were cases where this would not be the position, for example repeated short-term absence, but these may be better regarded as dismissal for some other substantial reason.) However - and this is the key point - it is not a requirement at of s 98(1) and (2) that the employer establish the conduct to be culpable.*
>
> *[43] In Donaghay the ET corrected a similar mistake. The Employment Tribunal had decided that the Claimant did not satisfy the requirement of s 98(2) because "the conduct must be in some way reprehensible" and in their view it was not (see paras 22 and 23). This was the wrong approach."*

b. It was submitted that there is no requirement that the conduct be wilful, serious neglect or careless can suffice. Further the conduct must be personal to the employee in issue and it need not amount to a breach of the contract of employment.

c. Reference was made to the formulation in **British Homes Stores v Burchell** citation (**Burchell test)**

d. It was argued that for a dismissal to be fair it must have been reasonable for the employer to have dismissed the employee for the misconduct in question, dismissal must be he a first sanction and the Tribunal should focus on whether or not the sanction fell within the band of reasonable responses, whether a reasonable employer could have take the decision to dismiss in similar circumstances reference also made to **Hitt,** the Tribunal should not substitute its over factual findings for those of the dismissing officer and should impose its view of the appropriate sanction.

e. It was argued that the reasonableness of the investigation should be assessed by the way the employee puts his case during the internal procedure, and while considering whether the investigation was reasonable should not substitute its view as to what it would have done (for example interviewing customers), and if the Tribunal is satisfied that the investigation was reasonable the employer satisfies this limb of the test.

f. It was submitted that the claimant did not seek to argue that Mr Probert had a hidden vendetta or was lying in the information provided to Mr Williams and subsequently to the Disciplinary Hearing on Friday 3 January 2020.

g. It was submitted that it was reasonable for Mr Probert to put the events of Friday 15 November 2019 to the claimant to at the Investigation meeting on Monday 9 December 2019 and that in reality there were two issues being considered namely the cause of the discrepancy between the Outlook calendar and the Pixsell entries (the 15 November 2019 Call Schedule Comparison) in relation to times the claimant had suggested he had been with the customers.

h. It was argued that taken as a whole the claimant was well aware of the two principal issues being time spent with customers and contractual working hours.

i. It was argued on Friday 15 November2019 the claimant had worked around **3.5 hours** in contrast to his contracted **7 or so hours.**

j. It was argued that it was reasonable for Mr Probert to undertake the investigation and it was noted that it was not suggested that in the Disciplinary Hearing or the Appeal that Mr Probert was biased against the claimant.

k. It was argued that the letter of invitation to the Disciplinary hearing was not "*opaque"* and the claimant was well aware from the discussion with Mr Probert, of what were said to be the two issues.

l. It was acknowledged that the respondent did not provide the **Expanded Data Friday 1 November 2019 to Wed 4 December 2019** in advance of the Disciplinary Hearing on Friday 3 January 2020, and it was suggested that this arose from a view by the Disciplinary Officer (Mr Krawczyk) that it was supporting what were at the time central allegations around the events of Friday 15 November 2019 and it was accepted that the Tribunal may regard this a procedural irregularity (the Tribunal does!) but that it was not in dispute that the respondent offered the claimant the opportunity to read the information and adjourn, and that the respondent would have adjourned to another day had the claimant made that request. In these circumstances it is argued that any procedural irregularity was corrected.

m. It was argued that it was reasonable for Mr Krawczyk to consider evidence provided by Mr Probert and any explanation advanced by the claimant but that it is not for the Tribunal to sit in the shoes of the Disciplinary Officer to decide which version the Tribunal would have accepted.

n. In relation to the Disciplinary Hearing on Friday 3 January 2020 the principal attack is that Mr Probert's evidence should not have been accepted because he should not have investigated and the fact that Mr Probert did not contact customers. It was argued that the reason for not contacting the customers was a reasonable one.

o. It was argued that a Disciplinary Hearing is not a counsel of perfection and it is not open to the Tribunal to conclude that a Disciplinary Officer should investigate each and every point made by the claimant. The issue before the Tribunal is the present case, it is not for the Tribunal to conclude whether a Disciplinary Officer should investigate "each and

every point" as a general statement. The issue is whether a reasonable investigation would have required, in these circumstances, to make contact with the customers who the claimant had scheduled by reference to the Journey Planner to attend at specific times.

p. It was argued that the claimant had every opportunity to bring whatever evidence he wanted to the disciplinary on Disciplinary Hearing on Friday 3 January 2020 and that the sole supportive evidence he elected to provide were the Driving Records Document and that apart from handing them in, he did not reference them in any way. Further there was a conflict between those records and the information which the claimant entered into Pixsell. It was argued that the respondent that was entitled to consider the Pixsell/Databridge records.

q. It was argued that the claimant had, in the period which was considered, never started worked before 9 am and on occasions not started work until mid-day or later while his finish times were not later than 17.02 pm. The claimant had the opportunity to give an alternate version of events but chose not to and this persisted through to the Appeal. The respondent had no evidence from the claimant why he did not start work until the times identified in the Expanded Data Friday 1 November 2019 to Wed 4 December 2019, and why he was not working his contracted hours.

r. It was argued that in the face of Mr Probert's evidence, the claimant's explanations and the Expanded Data Friday 1 November 2019 to Wed 4 December 2019, the respondent's policies taking with the absence of explanation provided for not working contracted hours this conduct cumulatively amounted to gross misconduct and in essence a serious breach of trust and confidence. In all the circumstances the dismissal was said to be clearly within the band of reasonable responses.

s. It was argued that the claimant's letter of appeal lacked any detail or veracity, the evidence was provided to claimant and/or in any event he could have downloaded it. It was argued that the claimant presented evidence from his phone but without any explanation from the claimant and that evidence was not preferred.

t. It was argued that there were a number of relevant points;

    a. It was not suggested that Mr Probert was biased;

    b. It was not suggested that the dismissal was premediated;

c. It was not alleged in the appeal letter than widening the scope (to include the Expanded Data Friday 1 November 2019 to Wed 4 December 2019) that the Disciplinary Hearing was unfair;

d. It was not suggested that the claimant was unable to understand the original charge;

e. It was not suggested that the time line of the Expanded Data Friday 1 November 2019 to Wed 4 December 2019 was wrong

f. There was no explanation, for the claimant failing to work his contracted hours.

u. It was argued that Mr Britton was an impressive and balanced witness.

v. It was argued that it was startling that the claimant appeared not to understand that the reasons for dismissal encompassed not only the working hours issue on Friday 15 November 2019 but also the preceding weeks, the claimant had admitted at the appeal hearing that the it was reasonable for the company to take a wider view rather than limit is assessment to Friday 15 November 2019 and he cannot now criticise the decision after the event. The claimant accepted at that his work pattern on Friday 15 November 2019 reflected a start time of 9.55 am and his work pattern was unacceptable. It was argued in his evidence the claimant accepted that there was not one day in the 24 days (the Expanded Data Friday 1 November 2019 to Wed 4 December 2019) that he completed a full working day of 7.5 hours. It was the claimant's position that he did not regard this as important or serious.

w. It was argued that in the event there was any procedural irregularity not corrected in the Disciplinary it was corrected on Appeal. It was argued that the disciplinary officer took the correct decision which was within the band of reasonable responses and to uphold the decision to dismiss and that it is all too easy to criticise a disciplinary process after the event via cross examination.

Witness evidence

Discussion and decision

101. Where the claimant's evidence was contradicted by Mr Britton, Mr Krawczyk Mr Williams and Mr Probert, I did not accept those aspects of the claimant's evidence. I would not wish these reasons to be misunderstood as implying a finding that he lied. I was unable to accept the accuracy of the claimant's honest but I consider inaccurate recall when compared to those who gave contradictory accounts.

102. It was suggested that witnesses for the respondents who gave evidence for the respondent were either unreliable or lying. The Tribunal does not accept that Mr Probert was in untruthful in his evidence to the Tribunal. Mr Probert accepted that he was untruthful in discussion with the claimant in the Investigation Hearing on Monday 9 December 2019 when he said that he had contacted customers. He had not. It was Mr Probert was carried out all the local observations on Friday 15 November 2019 and was thereafter involved in reporting and providing additional information to those proceeding with disciplinary process he was not however a decision maker.

103. The Tribunal notes there were some discrepancies in the manual timings in his observations on Friday 15 November 2019 as recorded by Mr Probert. That having been said it does not follow that Mr Probert must have been untruthful in the Tribunal. Mr Probert was found to given honest evidence of his recollection of the events he investigated and the wider issues. He agreed that he had been asked to make further inquiries in particular of customers but did not do so, it was his view that such an approach was commercially unwise. He initiated collation of both the 15 Nov 2020 Call Schedule Comparison and the Expanded Data Friday 1 November 2019 to Wed 4 December 2019 from the respondent held data. The collation of both was neutral.

104. The suggested inconsistency in relation to Mr Williams evidence is not accepted, Mr Williams expressly stated that it was up to Mr Probert in the e-mail of Thursday 29 November 2019 whether to contact customers. It was Mr William's evidence that such an approach was in effect potentially prejudicial, it is accepted that seeking to involve third parties such as

customers would present a risk of reputational damage to both the claimant and CKI.

105. The Tribunal concludes that was suggested to be inconsistency in Mr Krawczyk reflect his responses to differently contextualised questions including around the degree and materiality of communication, Mr Probert, having subsequent to the investigation collated the Expanded Data covering the period Friday 1 November 2019 to Wed 4 December 2019 at the request of Mr Krawczyk, as Krawczyk advised the claimant during the Disciplinary Hearing.

106. The Tribunal found the evidence of Mr Britton, Mr Williams and Mr Krawczyk to be straightforward and compelling in their responses to the questions formulated. The Tribunal finds that Mr Britton was not deceptive in relation to the customer contact exchange in the Appeal. The claimant elected not to set out the basis for his assertion that some, at least, of customers for 15 November had not been spoken to.

107. The Tribunal preferred the evidence of Mr Britton, Mr Williams and Mr Krawczyk to that of claimant where there were any discrepancies.

Unfair Dismissal

Applicable Test

108. An employer need not have conclusive direct proof of an employee's misconduct, but a genuine and reasonable belief reasonably tested. In terms of the Burchell guidance it is appropriate to consider whether the respondent had a reasonable belief in the misconduct of the claimant so:
    a. did the employer believe it; and
    b. did they have reasonable grounds upon which to sustain that belief?

109. The employer requires to show a potentially fair reason within s98(2) of ERA 1996.

110. If so in terms of s98(4) was the dismissal fair or unfair (that is

a. was it reasonable to dismiss, or
b. can it be said that no reasonable employer would have dismissed - there is a band),

having regard to the matters set out in s98(4) (a) and (b) – whether taking into account the size and administrative resource of the employer, it acted reasonable or unreasonably in treating the reason as a sufficient reason for dismissing the employee in accordance with equity and the substantial merits of the case.

Relevant Law

111. The starting point is the Section 98 of the Employment Rights Act 1996 (ERA 1996) provides, so far as material for this case, as follows:

"98 General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) ……

(b) relates to the conduct of the employee,

(4) 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."

112. The approach as both representatives confirmed for the Tribunal is set out in the case of **British Home Stores Ltd v Burchell** [1978] IRLR 379, in which the EAT stated: *"What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element.*

***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.*

It is the employer who manages to discharge the onus of demonstrating those three matters, we think, who must not be examined further."

113. Subsequently and in **Iceland Frozen Foods Ltd v Jones** [1982] ICR 432 the EAT stated, referring to the then statutory provision now found in section 98(4) of the Act

"We consider that the authorities establish that in law the correct approach for the Industrial Tribunal to adopt in answering the question posed by s.57(3) of the 1978 Act is as follows.

(1) the starting point should always be the words of s.57(3) themselves;

(2) (2) 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."

114. While an investigation and hearing may not always be required, the importance of doing so normally in the case of alleged was set out by the House of Lords in **Polkey v AE Dayton Services Ltd** [1987] IRLR 503, in which Lord Bridge made the following comments: "*Employers contesting a claim of unfair dismissal will commonly advance as their reason for dismissal one of the reasons specifically recognised as valid by [ERA 1996 s 98(2)]. These, put shortly, are:*

(a) that the employee could not do his job properly;

(b) that he had been guilty of misconduct;

(c) that he was redundant.

But an employer having prima facie grounds to dismiss for one of these reasons will in the great majority of cases not act reasonably in treating the reason as a sufficient reason for dismissal unless and until he has taken the steps, conveniently classified in most of the authorities as 'procedural', which are necessary in the circumstances of the case to justify that course of action. Thus…….; in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation;.. If an employer has failed to take the appropriate procedural steps in any particular case, the one question the [employment] tribunal is not permitted to ask in applying the test of reasonableness posed by [s 98(4)] is the hypothetical question whether it would have made any difference to the outcome if the appropriate procedural steps had been taken. On the true construction of [s 98(4)] this question is simply

irrelevant. It is quite a different matter if the tribunal is able to conclude that the employer himself, at the time of dismissal, acted reasonably in taking the view that, in the exceptional circumstances of the particular case, the procedural steps normally appropriate would have been futile, could not have altered the decision to dismiss and therefore could be dispensed with. In such a case the test of reasonableness under [s 98(4)] may be satisfied."

115. The foregoing guidance was endorsed and helpfully summarised by Mummery LJ in **London Ambulance Service NHS Trust v Small** [2009] IRLR 536 where he said that the essential terms of enquiry for Employment Tribunals in such cases are whether in all the circumstances the employer carried out a reasonable investigation and at the time of dismissal genuinely believed on reasonable grounds that the employee was guilty of misconduct. If satisfied of the employer's fair conduct of a dismissal in those respects, the Tribunal then had to decide whether the dismissal of the employee was a reasonable response to the misconduct.

116. I have further reminded myself of the comments of the EAT in **Boys and Girls Welfare Society v McDonald** [1997] ICR 693 "*Whilst accepting unreservedly the importance of that test, we consider that a simplistic application of the test in each and every conduct case raises a danger of industrial tribunals falling into error in the following respects.*

(1) The burden of proof

… as a result of the 1980 amendment, it was no longer necessary for the employer to satisfy the tribunal that it had acted reasonably. The burden of proof on the employer was removed. The question was now a "neutral" one for the industrial tribunal to decide.

The risk that by following the wording of Arnold J.'s test in Burchell a tribunal may fall into error by placing the onus of proof on an employer to satisfy it as to reasonableness is not confined to industrial tribunals.

(2) Universal application of the Burchell test

Setting aside the question of onus of proof, it is apparent that the three-fold Burchell test is appropriate where the employer has to decide a factual contest. The position may be otherwise where there is no real conflict on the facts.

…

(3) The range of reasonable responses test

It should always be remembered that at the conclusion of the three-fold test in Burchell Arnold J. observed that it is the employer who manages to discharge the onus of demonstrating those three matters, who must not be examined further… Leaving aside the onus of proof, we do not understand Arnold J. to be saying that the converse is necessarily true; that is to say, an employer who fails one or more of the three tests is, without more, guilty of unfair dismissal. In British Leyland U.K. Ltd. v. Swift [1981] IRLR 91 the Court of Appeal formulated the range of reasonable responses test. Lord Denning M.R. said, at p. 93:

> *"It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was … reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may have not dismissed him."*

117. The test was further formulated by the appeal tribunal in **Iceland Frozen Foods Ltd. v Jones** [1983] ICR 17, 24–25:

> *"Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in answering the question posed by section 57(3) of the Act of 1978 is as follows:*
>
> *(1) the starting point should always be the words of section 57(3) 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."

118. I have similarly reminded myself of the comments of the Court of Appeal in **Foley v Post Office, HSBC Bank (formerly Midland Bank) v Madden** [2000] ICR 1283:

"(1) 'The band or range of reasonable responses' approach to the issue of the reasonableness or unreasonableness of a dismissal… remains binding…

(2) The tripartite approach to (a) the reason for, and (b) the reasonableness or unreasonableness of, a dismissal for a reason relating to the conduct of the employee… remains binding… Any departure from that approach indicated in Madden [2000] IRLR 288 (for example, by suggesting that reasonable grounds for belief in the employee's misconduct and the carrying out of a reasonable investigation into the matter relate to establishing the reason for dismissal rather than to the reasonableness of the dismissal) is inconsistent with binding authority"

"The possibility of an employment tribunal or of the Employment Appeal Tribunal substituting its own view for that of the employer in question could, in theory, arise in at least three different situations:

(1) Either tribunal may be tempted to substitute its own views as to the correct conclusion to be arrived at as to the employee's responsibility for the misconduct complained of.

(2) The employment tribunal is charged under s.98(4) with the determination of the question whether the dismissal is fair or unfair and, in so doing, has to decide whether the employer acted reasonably or unreasonably in treating the s.98(2) reason as a sufficient reason for dismissing the employee.

(3) The Employment Appeal Tribunal may be tempted to substitute its own views as to the s.98(4) question of reasonableness or unreasonableness.

In my judgment, only the second of those three alternatives is legitimate. As a matter of authority binding in this court, that determination required by statute is to be answered by the employment tribunal with the assistance of the 'band of reasonable responses' approach set out in the judgment of Browne-Wilkinson J in ***Iceland Frozen Foods Ltd v Jones*** *[1982] IRLR 439*".

Discussion and Decision

Unfair Dismissal-Applicable Test

119. While the Supreme Court has expressed the view the **Burchell i**s rather better suited to identifying the reason for dismissal than answering the question set by ERA 1996 s98(4) concluding that the Court of Appeal had long applied the Burchell test when determining reasonableness in all the circumstances. In the absence of full argument, no harm appeared to have resulted, and so the test remains good law.

120. This all means that an employer need not have conclusive direct proof of an employee's misconduct, but a genuine and reasonable belief reasonably tested. In terms of the Burchell guidance it is appropriate to consider whether the respondent had a reasonable belief in the misconduct of the claimant.

121. The Courts have repeatedly warned against simply reading across from the regime of the Equality Act to that of the Employment Rights Act. Mummery LJ (Court of Appeal) said in **Kuzel v Roche Products Ltd** 2008 IRLR 530 (**Kuzel**) (dealing with a whistleblowing case) at para 48. *"Unfair*

dismissal and discrimination on specific prohibited grounds are …different causes of action. The statutory structure of the unfair dismissal legislation is so different from that of the discrimination legislation that an attempt at cross fertilisation or legal transplants runs the risk of complicating rather than clarifying the legal concepts."

122. In **London Ambulance Service NHS Trust v Small** [2009] IRLR 563 (**Small**), Mummery LJ observed that, as a general rule, it might be better practice in an unfair dismissal case for the tribunal to keep its findings on that particular issue separate from its findings on disputed facts that are only relevant to other issues, such as contributory fault. Separate and sequential findings of fact on discrete issues may help to avoid errors of law, such as substitution, even if it may lead to some duplication. In **Small**, the Court of Appeal held that the tribunal's findings of fact about the claimant's conduct, which were relevant to the issue of contributory fault, had seeped into its reasoning about the unfairness of the dismissal. In allowing the employer's appeal, Mummery LJ noted:

"It is all too easy, even for an experienced ET to slip into substitution mindset. In conduct cases the Claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question – whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."

Procedural defects and appeals

123. In **West Midlands Co-operative Society Ltd v Tipton** [1986] IRLR 112, the House of Lords held that the failure to permit an employee to exercise a right of appeal may render an otherwise fair dismissal unfair.

124. While procedural defects are in principle capable of rendering the dismissal unfair as the EAT commented in **Whitbread & Co plc v Mills** [1988] IRLR 501 (**Mills),** "*not every formality of legal or quasi-legal process is required during the disciplinary and appeal procedures. Each set of circumstances must be examined to see whether the act or omission has brought about an unfair hearing."*

125. Subsequently in **Tarbuck v Sainsbury's Supermarkets Ltd** [2006] IRLR 664 (**Tarbuck**) the EAT stated that the suggestion in **Post Office v Marney** [1990] IRLR 170 (**Marney**) that a defect in the appeal process will only be relevant if a properly conducted appeal would have made a difference to the outcome was wrong and inconsistent with the decision of the House of Lords in **West Midland Co-Operative Society Limited v Tipton** [1986] IRLR 112 (Tipton). The EAT in **Tarbuck** noted that if dismissal would be likely to have occurred in any event, then that would affect compensation, but not the finding of unfairness itself.

126. For the claimant reference was made to **Sharkey**. In **Sharkey** an employee was dismissed following a disciplinary hearing at which the dismissing officer formed a view of misconduct and which was argued not to be based on reasonable grounds after a reasonable investigation. The officer who heard the appeal asked critical questions which the earlier officer had not, and had an assurance from technicians that he did not have, but which was permissibly regarded as conclusive. The email containing the advice was not before the Employment Tribunal. There were a number of procedural shortcomings in the procedure adopted by the employer. The Employment Tribunal did not find the dismissal unfair.

127. The EAT in **Sharkey** dismissed the appeal, rejecting appeal grounds that; the Employment Tribunal had asked not whether the dismissal was fair but whether it would have happened anyway if the unfairness had not existed was rejected, that the appeal procedure was necessarily unfair because of earlier failings; it was perverse to accept the appeal officer's evidence of the contents of the critical email without producing it, and grounds arguing it was wrong of the Employment Tribunal to find dismissal

fair given that there had been relevant breaches of the ACAS Code and of the employer's disciplinary policy.

128. Whether or not the appeal process is sufficiently comprehensive to redress any earlier procedural defects will be a question of fact for the employment tribunal (see **Taylor v OCS Group Ltd** [2006] IRLR 613, CA (**Taylor**) following **Whitbread & Co plc v Mills** [1988] IRLR 501, EAT). However, this will not depend upon an analysis of whether or not the relevant appeal was by way of rehearing or simply a review.

129. Indeed, the Court of Appeal in **Taylor** specifically commented that the terms rehearing and review should not be used in this context. What is necessary is for the employment tribunal to consider the disciplinary process as a whole when assessing the fairness of the dismissal. In **Khan v Stripestar Ltd** UKEATS/0022/15 (10 May 2016, unreported) (**Stripestar**) (Lady Wise sitting alone) the EAT stated that there was no limitation on the nature and extent of the deficiencies in a disciplinary hearing that could be cured by a thorough and effective internal appeal.

130. In **Elmore v The Governors of Darland High School** UKEAT/0209/16 *(4 May 2017, unreported)* (Simler P presiding) (**Elmore**) the EAT considered the question of whether a tribunal was entitled to find that the dismissal procedure was fair in the absence of a reasoned appeal decision and any evidence from a member of the appeal panel. The employment tribunal had concluded that it could be *'gleaned that by upholding the original decision the appeal panel accepted the decision made and the reasons for the decision made at the earlier stage'.* In upholding the employment tribunal decision, Simler P observed that the discussion and questioning of the claimant reflected by the minutes of the appeal hearing was inconsistent with any suggestion that the appeal hearing as being treated as a mere formality or rubber-stamping exercise, and did not provide any basis for thinking that irrelevant factors were in the minds of the appeal panel or being treated as a basis for any of the decision-making. Simler P also stated that there was no legal requirement in every unfair dismissal case where reasons for dismissing an appeal are not given, for the appeal

officer to give evidence at the tribunal hearing in order to enable a tribunal to find that the dismissal procedure as a whole is fair.

131. The band of reasonable responses test does not solely apply to the decision to dismiss but also to the procedure followed by the employer **Sainsbury's Supermarket v Hitt** [2003] IRLR 23(**Hitt**).

132. I directed myself to the following passage in **Hitt**, which I found to be relevant to this case: -

"The investigation carried out by Sainsburys was not for the purposes of determining, as one would in a court of law, whether Mr Hitt was guilty or not guilty of the theft of the razor blades.

The purpose of the investigation was to establish whether there were reasonable grounds for the belief that they had formed, from the circumstances in which the razor blades were found in his locker, that there had been misconduct on his part, to which a reasonable response was a decision to dismiss him.

The uncontested facts were that the missing razor blades were found in Mr Hitt's locker and that he had had the opportunity to steal them in the periods of his absence from the bakery during the time they went missing. Investigations were then made, both prior to and during the period of an adjournment of the disciplinary proceedings, into the question whether, as Mr Hitt alleged, someone else had planted the missing razor blades in his locker. In my judgment, Sainsburys were reasonably entitled to conclude, on the basis of such an investigation, that Mr Hitt's explanation was improbable.

The objective standard of the reasonable employer did not require them to carry out yet further investigations of the kind which the majority in the employment tribunal in their view considered ought to have been carried out."

133. It is crucial to assess gravity of every procedural defect and consider its impact on the fairness of the decision as a whole **Pillar v NHS 24** UKEAT/0005/16/JW April 2018 (**Pillar**)

134. The employer must have investigated the relevant facts adequately, provided that requirement is met, the reason for and fairness of the action taken by the employer is determined by examining the circumstances known to it at the time including when he maintains the decision at an internal appeal **West Midland Co-op Society v Tipton** [1986] IRLR 112 (**Tipton**).

The significance of procedural defects

135. Whether a procedural defect is sufficient to undermine the fairness of the dismissal as a whole is a question for the Tribunal. Not every procedural error will do so; the fairness of the whole process should be looked at. This is part of the ratio in **Lloyds Bank v Fuller** [1991] IRLR 336 (**Fuller**). In the more recent case of **South Maudsley NHS Foundation Trust v Balogan** UKEAT0212/14 (**Balogan**), the EAT explained at paragraph 9: "*As this Tribunal has said countless times, the crucial thing is the statutory test in section 98(4) namely whether in all the circumstances the employer acted reasonably in treating its reasons for dismissing the employer sufficient.*

A procedural defect is a factor to be taken into account but the weight to be given to it depends on the circumstances and the mere fact that there has been a procedural defect should not lead to a decision that the dismissal was unfair. The fairness of the whole process needs to be looked at and any procedural issues considered together with the reason for the dismissal, as the two will impact on each other."

136. **Stuart v London City Airport** UKEAT/0273/12/BA 2013 Jan – the EAT considered that heightened scrutiny applied where allegation of dishonestly having taken goods w/o paying – such an allegation was serious and required careful investigation which included gathering evidence which might be potentially be viewed as exculpatory is consistent with the claimant's explanation. The Court of Appeal overturned the EAT decision simply on the basis that the there was no basis for EAT to have suggested that Tribunal had overlooked the gravity of the allegation which assessing the extent of the investigation.

137. **Shreshra v Genenis Housing** [2015] IRLR 399 (**Shreshra**) the Court of Appeal refused to hold that each line of an employee's defence must be investigated unless it is manifestly false or unarguable – as it was necessary to have regard to the context when assessing the reasonableness or otherwise of the investigation.

138. The EAT in **Khanum V Mid Glamorgan Health** [1978] IRLR 215 (**Khanum**) natural justice required that the employee should know the allegations, be given an opportunity to state her/his case and the members of the management team and the appeal team should act in good faith.

139. I have reminded myself that the Court of Appeal identified in **Taylor v OCS Group** [2006] IRLR 613 (**Taylor**) there is no rule of law that earlier unfairness can be cured only by an appeal by way of a rehearing and not by way of a review because the examination should be the fairness of the disciplinary process as a whole.

140. I have reminded myself that in **Hotson v Wisbech Conservative Club** [1984] 422 (**Hotson**) it was identified that there was a clear difference between allegations of, in effect, mere inefficacy and dishonesty.

141. In **Kefil,** referred to for the claimant, the employee worked in a managerial capacity for the employer. He had been the subject of no disciplinary action other than an informal warning in 2010. In 2011, a formal complaint was made against another manager that included some general criticism of an authoritarian manner management style. The employer investigated the complaint and concluded that the employee's actions had amounted to gross misconduct. He was subsequently dismissed. The employment tribunal (the tribunal) which found he had been wrongly dismissed and unfairly dismissed, on the grounds that it had been outside the range of the employer's reasonable responses to dismiss the employee before he had been given a formal warning. The employer appealed. The issue being whether the tribunal had erred. Consideration was given to the Employment Rights Act 1996. The appeal was dismissed. It was indicated that was well established that it was the essential business of

the tribunal to consider whether once the employer had established the reason for the dismissal the decision to dismiss for that reason was fair or unfair. In order to see if a tribunal had stepped beyond the permissible and gone outside the scope of its duty as set out in s 98(4) of the 1996 Act, it was necessary to have regard to a tribunal's decision as a whole, but what the EAT was looking for was some indication that the tribunal had, in dealing with a complaint of unfair dismissal, asked not whether what the employer did was fair but asked instead what it would have done in the light of the basic and underlying facts (see [18] of the judgment).In the instant case, there had been no error by the tribunal. It had neither fallen into the error of substituting its own decision for that of the employer, nor had its judgment been perverse. Firstly, it had not been possible to discern anything in its decision which showed that the tribunal had substituted its own decision for that of the employer. Secondly, it had been impossible to conclude that the tribunal, in finding that the employer's response had been outside the range of reasonable responses, in those circumstances, for those allegations of misconduct, without first giving him a warning which had not just been a warning about what he was doing, but had indicated that he might have been dismissed if he had gone on doing it had been far beyond reason as to be perverse. It was suggested that the over-authoritarian manager was not unknown in industry and the lay members, in particular, had made the point that it would have been unfortunate if such managers were not warned, if the circumstances were such that they might not have clearly understood, that repeat of that conduct might lead to their dismissal (see [19], [24], [25] of the judgment).

ACAS Code and Process

142. I have remined myself of what is set out in the ACAS Code of Practice on Disciplinary and Grievance Procedures which came into effect on 11 March 2015: Code of Practice (Disciplinary and Grievance Procedures) Order 2015, SI 2015/649 provides:

    1. *This Code is designed to help employers, employees and their representatives deal with disciplinary and grievance situations in the workplace.*

• *Disciplinary situations include misconduct and/or poor performance. If employers have a separate capability procedure they may prefer to address performance issues under this procedure. If so, however, the basic principles of fairness set out in this Code should still be followed, albeit that they may need to be adapted*

…

2. Fairness and transparency are promoted by developing and using rules and procedures for handling disciplinary and grievance situations. These should be set down in writing, be specific and clear. Employees and, where appropriate, their representatives should be involved in the development of rules and procedures. It is also important to help employees and managers understand what the rules and procedures are, where they can be found and how they are to be used.

3. Where some form of formal action is needed, what action is reasonable or justified will depend on all the circumstances of the particular case. Employment tribunals will take the size and resources of an employer into account when deciding on relevant cases and it may sometimes not be practicable for all employers to take all of the steps set out in this Code.

4. That said, whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly. There are a number of elements to this:

• *Employers and employees should raise and deal with issues **promptly** and should not unreasonably delay meetings, decisions or confirmation of those decisions.*

• *Employers and employees should act **consistently**.*

• *Employers should carry out any necessary **investigations**, to establish the facts of the case.*

• *Employers should **inform** employees of the basis of the problem and give them an opportunity to **put their case** in response before any decisions are made.*

• *Employers should allow employees to be **accompanied** at any formal disciplinary or grievance meeting.*

• *Employers should allow an employee to **appeal** against any formal decision made.*

5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.

*6. In misconduct cases, **where practicable,** different people should carry out the investigation and disciplinary hearing.*

7. If there is an investigatory meeting this should not by itself result in any disciplinary action. Although there is no statutory right for an employee to be accompanied at a formal investigatory meeting, such a right may be allowed under an employer's own procedure.

8. In cases where a period of suspension with pay is considered necessary, this period should be as brief as possible, should be kept under review and it should be made clear that this suspension is not considered a disciplinary action.

Inform the employee of the problem

9. 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. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification.

10. The notification should also give details of the time and venue for the disciplinary meeting and advise the employee of their right to be accompanied at the meeting.

Hold a meeting with the employee to discuss the problem

11. The meeting should be held without unreasonable delay whilst allowing the employee reasonable time to prepare their case.

"*12 Employers and employees (and their companions) should make every effort to attend the meeting. At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered.*

The employee should be allowed to set out their case and answer any allegations that have been made.

***The employee should** also **be given a reasonable opportunity** to ask questions, present evidence **and call relevant witnesses**.*

They should also be given an opportunity to raise points about any information provided by witnesses.

Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this.

…

23. Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence. But a fair disciplinary process should always be followed, before dismissing for gross misconduct.

24. Disciplinary rules should give examples of acts which the employer regards as acts of gross misconduct. These may vary according to the nature of the organisation and what it does, but might include things such as theft or fraud, physical violence, gross negligence or serious insubordination.

25. Where an employee is persistently unable or unwilling to attend a disciplinary meeting without good cause the employer should make a decision on the evidence available. Provide employees with an opportunity to appeal.

*26. Where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against the decision. Appeals should be heard without unreasonable delay and ideally at an agreed time and place. **Employees should let employers know the grounds for their appeal in writing.***

*27. The appeal should be dealt with impartially **and**, **wherever possible,** by a manager who has not previously been involved in the case.*

28. Workers have a statutory right to be accompanied at appeal hearings."

143. Supplemental to the comments of Lord Bridge in the House of Lords in **Polkey**, and although not referred to by either party, I have reminded

myself of the comments of Mr Justice Wood (then President of the EAT) in **ILEA v Gravett** 1988 IRLR 498 (**Gravett**) para 15 "*at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including questioning of the employee, is likely to increase".*

144. Again, and although not referred to by the parties, I have reminded myself of the Court of Appeal decision in **Slater v Leicestershire Health Authority** [1989] IRLR 16 (**Slater**) that for some employers, it may not always be straightforward to avoid a situation where the same person carries out the investigation, discipline and the appeal and set out that *"it could not be held that because the person, conducting the disciplinary hearing had conducted the investigation, he was unable to conduct a fair inquiry. While it is a general principle that a person who holds an inquiry must be seen to be impartial, the rules of natural justice do not form an independent ground upon which a decision to dismiss may be attacked* ".

145. However, and again though not referred to by the parties, I have reminded myself of the comments of the EAT in St **Nicholas School (Fleet) Educational Trust Ltd v Sleet** UKEAT/0118/17 (**Sleet**) that at such an appeal, the focus is on the impartiality (or otherwise) of the decision-taker who "*might have a particular conduct issue in mind as the reason for dismissal, but dismiss unfairly because they have a closed mind to the possibility that the employee might be innocent, or that the conduct in issue might not justify dismissal.".*

Gross Misconduct

146. **Reilly v Sandwell Metropolitan Borough Council** [2018] IRLR 558 (**Sandwell)** sets out that what amounts to gross misconduct involves deliberate wrongdoing or gross misconduct and found that it involves deliberate wrongdoing or gross negligence. I further noted that in the case of deliberate wrongdoing, it must amount to wilful repudiation of the

express or implied terms of the contract (referencing **Wilson v Racher** [1974] ICR 428 (**Racher**).

147. I have further reminded myself that the courts have considered when *'misconduct'* might properly be described as *'gross'*: **Neary v Dean of Westminster** [1999] IRLR 288 **Neary** (para 22). In **Neary,** Lord Jauncey rejected a submission that gross misconduct was limited to cases of dishonesty or intentional wrongdoing. Neary was considered more recently by the Court of Appeal in **Adesokan v Sainsbury's Supermarkets Ltd** [2017] I.C.R. 590 (**Adesokan**) at paragraph 23, Elias LJ said that the focus was on the damage to the relationship between the parties; that some deliberate actions which poison the relationship obviously fall into the category of gross misconduct.

148. Gross misconduct means misconduct so serious that it breaches the contract of employment in such a way as to relieve the other party to the contract of being bound by it. Most such terms are implied. A classic formulation of the implied term of confidence and trust between employer and employee was set out in **Woods v PWM Car Services (Peterborough) Ltd** 1981 IRLR 347 (**Woods**), as approved in **Malik v BCCI** (1997) IRLR 468 (**Malik**), cases dealing with employer's conduct, as that a party to the contract must not "*without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee*".

Allegations

149. It is important that the employee knows the full allegations against him or her. As was observed for the claimant, the Court of Appeal has stated that disciplinary charges should be precisely framed, and that evidence should be limited to those particulars **Strouthos v London Underground Ltd 2004 IRLR 636, CA (Strouthos)**. However, where the employee is fully aware of that case and has a full opportunity to respond to the allegations.

150. The tribunal has reminded itself that the Court of Appeal set out in **Hussain v Elonex plc** 1999 IRLR 420, CA (**Elonex**) that where the employee is fully aware of the case and has a full opportunity to respond to the allegations and the obtained statements are peripheral to the decision reached, the failure to disclose will not render a dismissal unfair

Discussion and Decision

151. The Tribunal does not accept (as set out in the Appeal Outcome Letter of Monday 10 February 2020) that the process was exactly to the respondent's Disciplinary Process as set out in the Appeal Outcome Letter of Monday 10 February 2020. It was not**.**

152. The Tribunal the letter of invitation to the Disciplinary Hearing issued on Wednesday 11 December 2019 did not give advance notice of the **Expanded Data Friday 1 November 2019 to Wed 4 December 2019**.

153. The claimant was not notified in advance of the Disciplinary Hearing of the **Expanded Data covering the period Friday 1 November 2019 to Wed 4 December 2019.** The claimant was, however, notified during the meeting and the respondents expressly initiated an adjournment having provided the **Expanded Data covering the period Friday 1 November 2019 to Wed 4 December 2019.** The claimant having taken the offered adjournment elected without any suggestion of prompting to re-enter the Disciplinary. He did not require to do so. He elected to do so do without qualification as to what was to be considered. He was given a breakdown of Expanded Data covering the period Friday 1 November 2019 to Wed 4 December 2019. It was a short period in time. The issues were clear. The claimant elected not to take the breakdown away. That was his choice. The claimant had access to the relevant data from the Pixsell app on the iPad. The claimant had from the point the adjournment was offered on **Friday 3 January 2020** until the end of his suspension on **Thursday 9 January 2020** to make access to the respondent's computer systems and or otherwise remotely seek to access the company computer records, although suspended, had he wanted to provide an alternate view such as to support a view that he had on any of those dates worked in accordance

with contractual hours. The claimant could have provided diary and other evidence, for what was at that point a relatively proximate period of **Friday 1 November 2019 to Wed 4 December 2019** if he had considered that he was able to demonstrate that he was working to the hours he was contracted to between **Friday 1 November 2019 to Wed 4 December 2019.** He elected not to do so, beyond the limited response he provided during the Disciplinary Hearing. In particular the claimant during the disciplinary hearing engaged with the some of the dates set out in the **Expanded Data covering the period Friday 1 November 2019 to Wed 4 December 2019**, it would have been reasonable in all the circumstances and in accordance with the ACAS Code for the claimant to have elected to provide an alternate explanation and or evidence for the dates in the period Friday 1 November 2019 to Wed 4 December 2019 prior to the conclusion of the Appeal. He did not so. That was his choice.

154. In particular and taking the process as whole, the Tribunal's conclusion that the claimant knew of the specific allegations, before the conclusion of the Disciplinary Hearing and before the Appeal he initiated.

155. It is the Tribunal's conclusion that the respondents did not rely upon Mr Probert's e-mail in their decision. The respondents in response to the original communication from Mr Probert elected to focus on the neutral empirical comparison evidence the 15 November 2019 Call Schedule Comparison. That information was provided to the claimant in advance of the Disciplinary Hearing on Friday 3 January 2020**.** During the Disciplinary Hearing on Friday 3 January 2020 and shortly prior to the respondents' insisting that an adjournment of the Disciplinary Hearing was appropriate, the claimant was provided with **Expanded Data Friday 1 November 2019 to Wed 4 December 2019.** Neither the 15 November 2019 Call Schedule Comparison nor the **Expanded Data Friday 1 November 2019 to Wed 4 December 2019** were complex documents. Both were concerned with relatively proximate dates to the Disciplinary Hearing on Friday 3 January 2020 being only a few weeks earlier.

156. In the specific circumstances of this case the Tribunal concludes that the provisions 15 Nov 2020 Call Schedule Comparison negated any

requirement that customers could usefully be contacted. The Tribunal accepts that in this instance the respondent had formed the view there was a reasonable belief on the part of the respondent that contact with customers could have given rise to risk to those commercial relationships.

157. The claimant elected not to offer any contrary evidence which was considered as persuasive by the respondents.

158. It is the Tribunal's conclusion that the claimant knew of the specific allegations and that the articulated reasons did not alter the allegations. Taking the process as a whole (case law) the reasons for dismissal were clear. The claimant was offered an opportunity to appeal. He took that opportunity. In doing so however the claimant elected to seek to disregard the **Expanded Data Friday 1 November 2019 to Wed 4 December 2019** and focus on the initial date of inquiry being Friday 15 November 2019. The claimant elected not provide evidence seeking to challenge the allegation that he had falsified company records, by reporting on calls making calls to customers at stated times but not attending them. Instead and disregarding company process elected to focus on his position that he had attended customers, not at the times he had undertaken to do so by reference to the 15 November 2019 Call Schedule but at different times on Friday 15 November 2019.

159. The Tribunal does not accept, by the time of the adjournment on Friday 3 January 2020, that the claimant considered that the sole area of concern were the events of Friday 15 November 2019. It is the Tribunal's conclusion that the claimant was fully aware of the full issues including the 15 Nov 2019 Call Schedule Comparison and the **Expanded Data Friday 1 November 2019 to Wed 4 December 2019** by the time of the adjournment on adjournment on Friday 3 January 2020. The claimant elected to approach matters on the basis that he elected to attend some customers on 15 November 2019 although in a different order (to that set out in the pre- arranged Outlook Planner) not by reference to the respondent's Pixsell Calls Logged, disregarding the respondent procedures including in respect of the expected working hours, by using what he suggested was a report he had constructed from general locations

in his mobile phone, he did not require to demonstrate adherence to the contracted hours or the pre- arranged Outlook Planner. Further in adopting this approach he could elect to disregard the Expanded Data Friday 1 November 2019 to Wed 4 December 2019, although had during the Disciplinary Hearing, engaged on some of the dates within the Expanded Data Friday 1 November 2019 to Wed 4 December 2019, offering limited responses. The claimant did not set out objection in his letter of appeal to the Expanded Data Friday 1 November 2019 to Wed 4 December 2019.

160. It is the Tribunal's conclusion that taken as a whole there was a fair process, in particular it cannot be said that by the time of the adjournment on **Friday 3 January 2020**, the claimant was unaware of the full extent of the allegations. The allegations were put to the claimant by the time of the adjournment in writing. The Tribunal concludes by the time of the adjournment and prior to re-entering the Disciplinary Hearing the claimant understood the wider allegations. The claimant was afforded the opportunity to set out his case and an answer the allegations, including the wider allegations, the claimant set out his position in relation to some, though not all the dates, within the **Expanded Data Friday 1 November 2019 to Wed 4 December 2019**.

161. It was the claimant's own decision to re-enter the Disciplinary Hearing shortly after being provided with the adjournment. The respondents had given an explanation to the claimant of the complaints against him set out simply within the **Expanded Data Friday 1 November 2019 to Wed 4 December 2019**. The claimant was allowed to set out his case and answer the allegations against him. The claimant was provided with a reasonable opportunity to answer questions, present evidence and, should he have wished to do so, to call witnesses (and or provide witness statements).

162. It was the claimant's own decision not call witness evidence and rely principally upon his Driving Records Document which did not address the Expanded Data Friday 1 November 2019 to Wed 4 December 2019 the respondents considered in relation to Friday 15 November 2019 but did not accept as persuasive against their own documentation in relation to the 15 November 2019 Call Schedule Comparison.

163. The claimant was provided with and took the opportunity to appeal. The claimant set out the grounds of his appeal in writing.

164. The Tribunal does not accept that the claimant did not understand that the reasons for his dismissal following the Disciplinary Hearing encompassed not only the working hours issue on Friday 15 November 2019 but also the preceding weeks. That was set out in the Summary Dismissal letter of 9 January 2020. The claimant had admitted at the appeal hearing that it was reasonable for the company to take a wider view rather than limit is assessment to Friday 15 November 2019**.** The claimant accepted that his work pattern on Friday 15 November 2019 reflected a start time of 9.55 am and his work pattern was unacceptable. The claimant accepted that there was not one day in the 24 days (the Expanded Data Friday 1 November 2019 to Wed 4 December 2019) that he completed a full working day. It was against the dismissal set out in the set out in the Summary Dismissal letter of 9 January 2020 that the claimant elected to Appeal. His Appeal Letter of Wednesday 15 January 2020 set out the specific grounds of his appeal, those did not set out that he challenged use of the Expanded Data Friday 1 November 2019 to Wed 4 December 2019, his first set out ground of appeal set of that he felt that what he suggested were key witnesses were not contacted, although he elected not to provide witness evidence. The respondent had present relevant evidence, they considered his Driving Record Document and while he suggested that there was a long-standing practice and custom (in relation to his working times) he offered no support for same at the Appeal.

165. It is the Tribunal's conclusion that it was the claimant who elected to bring the adjournment which had been provided by the respondent to an end. He re- entered the meeting. That was his choice, there was no pressure on him to do so, the claimant was able to identify from the information his position and did not suggest that he required to consider at a later date.

166. The Tribunal considers that the claimant's approach was one to focus on the area where he wishes to focus namely aspects of Friday 15 November 2019, to broadly disregard the evidence presented in relation to the

Expanded Data covering the period Friday 1 November 2019 to Wed 4 December 2019. While the claimant did not consider that there should be any material sanction, he was however clear that there was no underlying adverse motivation on the part of Mr Britton, nor indeed on the part of Mr Probert. The claimant responses at the Disciplinary Hearing included accepting that days to which he was referred were not full and productive and while he suggested he was sure there were reasons but did not materially expand on same. At the appeal hearing he conceded in relation to a start time that he could not answer (explain) and accepted that it was not acceptable. In relation to the finish time in response to whether this was reasonable behaviour of a sales person confirmed it probably was not with the comment that "*maybe"* he went home early to clear the desk before going on holiday.

167. The claimant elected to provide a limited report which was not derived from the company data and was intended to show that he had attended locations at different times than were previously scheduled on 15 November 2019. His contractual terms were clear. Prior to the appeal the claimant had had access to the company systems which would have enabled him to create any contrary breakdown to that presented in the Expanded Data covering the period Friday 1 November 2019 to Wed 4 December 2019. The claimant elected not provide any statements or data offering an alternate view undermining the analysis presented in the Expanded Data covering the period Friday 1 November 2019 to Wed 4 December 2019.

168. The tribunal considers that the principal criticism of the Disciplinary Hearing in relation to Mr Probert is not that he should not have investigated but that certain of his timings were erroneous estimates. The Tribunal however concludes that taken as a whole the focus of the Disciplinary Hearing up to the adjournment offered was the 15 Nov 2019 Call Schedule Comparison, rather Mr Probert's timings. The Tribunal is satisfied that Mr Krawczyk did not approach the Disciplinary Hearing with any degree of pre assessed position or closed mind.

169. The absence of a separate statement created by Mr Probert of his observations on Friday 15 November 2019, did not amount to a breach of the process.

170. The respondent had neutral empirical evidence of the timings from the data available. It is accepted that against the available data for 15 November 2019 Call Schedule Comparison and indeed the Expanded Data covering the period Friday 1 November 2019 to Wed 4 December 2019 the respondent's concluded approach to customers would have, as CKI concluded, involve a possible reputational damage and in any event by the time of the Expanded Data was available in effect an unnecessary risk.

171. It is not accepted by the Tribunal that Mr Britton had formed any view prior to concluding the Appeal. Mr Britton's evidence is accepted as straightforward. While Mr Britton accepted that he had sent Mr Probert the e-mail on Tuesday 10 December 2019 it is the Tribunal's conclusion that the e-mail was intended as an informal statement acknowledging the steps taken by Mr Probert who was junior to him. The Tribunal accepts that it was not practical for the Managing Director to Chair the appeal and that it was not possible, in all the circumstances, for a manager other than Mr Britton to deal with appeal, against his specific area of knowledge and responsibility encompassing the claimant's geographic region of Scotland.

172. The terms of the claimant's appeal did not give any notice of any challenge the use the Expanded Data covering the period Friday 1 November 2019 to Wed 4 December 2019.

173. The Tribunal concludes that the appeal was dealt with impartially and in particular while Mr Britton had previous connection with the case, the Tribunal accepted his evidence and concludes that he was impartial in his approach. The Tribunal is satisfied that Mr Britton did not approach the appeal with a closed mind. Further it was the claimant's decision not to provide exculpatory explanations and or substantive evidence addressing the **Expanded Data Friday 1 November 2019 to Wed 4 December 2019** and while the claimant, in effect, elected to rely upon his **Driving Records**

Document in relation to the events of Friday 15 November 2019 that was not accepted by the respondents to be persuasive when compared with the 15 November 2019 Call Schedule Comparison.

174. The customer contact exchange in the Appeal hearing was raised by the claimant, Mr Britton was essentially seeking to understand what, absent the claimant having elected to provide any supportive evidence from such customers, why the claimant appeared to state with confidence that customers had not been spoken. Mr Britton confirmed that customer contact was not a matter which he considered would require to be disclosed. The Tribunal concludes that Mr Britton in the customer contact exchange in the Appeal Hearing was not being deceptive. It was in any event a narrow matter by the date of the Appeal at which time the claimant was aware of the Expanded Data covering the period Friday 1 November 2019 to Wed 4 December 2019.

175. The Tribunal concludes that Appeal was as thorough and effective as was reasonable possible based on the information the claimant was willing to disclose and was sufficiently comprehensive as to redress any earlier procedural defects including the non-disclosure prior to the commencement of the Disciplinary Hearing of the **Expanded Data Friday 1 November 2019 to Wed 4 December 2019.**

176. The Tribunal notes that clause 10 of the Attending and Time Keeping policy sets out expressly that where an employee's punctuality records highlights a persistent problem which that approach set out fails to resolve, the respondent reserves the right to invoke the disciplinary procedure even if the levels were not reached.

177. He was required to operate in accordance with the JPI guide, the Pixsell Instructions and the 2016 Contract. The respondents having carried out reasonable investigations formed the view that he had not done so.

178. The Tribunal notes that Gross Misconduct is expressly set out in a non-exhaustive list. The Tribunal considers that that the respondent was entitled to consider that, the claimant, as peripatetic employee he operated

with more autonomy than employees at the head office, and with a need for a higher degree of trust than employees at its head office and had in effect a higher degree of responsibility for working to the contracted hours he was paid for, than employees at their head office. The respondents were not, in all the circumstances, required to invoke the Performance Improvement Policy.

179. It is the Tribunal's conclusion as explained by Mr Briton that the phrase *effectively amounting to insubordination* was expressly used in a broad non-technical sense (i.e. in effect amounting to) and did not amount to a materially new type charge it was an attempt to offer a form of a label, unlike the position in **Hotson** where there was a clear difference between inefficacy and dishonesty.

180. The Tribunal concludes that the respondent was in all the circumstances entitled to consider the information extracted from the Pixsell/Databridge records. The Tribunal accepts that the Pixsell data reflected the information the claimant had elected to enter into the respondent's systems, it was the claimants own contemporaneous evidence and report to the respondents of his actions. That extracted information formed the Call Logged element of the 15 Nov 2019 Call Schedule Comparison and further the **Expanded Data Friday 1 November 2019 to Wed 4 December 2019.** The Tribunal concludes that the use of this information was the least intrusive method of providing a neutral analysis based, as it was, on the claimant's own contemporaneous reporting through the Pixsell app.

181. In the present case the claimant as a peripatetic employee had more autonomy than employees at the head office, the manager in **Kefil** had been subject to only general complaints of his management style, the factual matrix is different from those in **Kefil.**

182. It is the Tribunal's view that the whole procedure requires to be considered as identified in **Balogan** above.

183. The claimant elected to not to provide persuasive evidence that he had worked the contracted hours he was paid for.

184. The respondents taking the process as a whole formed a belief in the employee's misconduct; the respondent's had reasonable grounds on which to sustain that belief; and at the stage at which the respondent formed the belief on those grounds had carried out as much investigation into the matter as was reasonable in all the circumstances of the case, including by reference to the claimant's essentially absent response to the **Expanded Data Friday 1 November 2019 to Wed 4 December 2019** and further on the balance of the information before them in relation the claimant's actions on **Friday 15 November 2019.**

185. The claimant was afforded the right to be accompanied at both the disciplinary hearing and the appeal.

186. The process taken as a whole was compliant with **Burchell** and **the ACAS Code of Practice on Disciplinary and Grievance Procedures.**

187. It is the Tribunal's conclusion that taking the process as a whole the claimant was provided with a fair hearing.

188. An issue for the Tribunal, if the dismissal was procedurally unfair, would be consider what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would have been dismissed had a fair and reasonable procedure been followed? **Polkey v AE Dayton Services Ltd** [1987] UKHL 8 (**Polkey**); There were procedural failings. Mr Britton heard the appeal, he had not formed a view prior to doing so, however the contract provided that the Managing Director would hear such an appeal. The Tribunal accepts that the Managing Director had alternate commitments and as such Mr Britton who knew the geographical area of the claimant's responsibility, was the reasonable substitute. It is not accepted that Mr Probert in not interviewing customers amounted to a procedural failure, there was no requirement for him to do so, Mr Williams had indicated that it was entirely up to Mr Probert. The respondent having been altered to the issue through Mr Probert's observations relied upon

neutral evidence of the 15 Nov 2019 Call Schedule Comparison. It is not accepted that Mr Probert's unwise and untruthful statement to the claimant to the effect that he had spoken to customers undermines the procedure as whole.

189. The Tribunal concludes that the respondents did not rely on the observations of Mr Probert in coming to their final decision**.** While it had been indicated to Mr Probert that customers had been spoken to in the past, it was expressly stated that it was up to Probert whether to do so. It is not accepted that the respondent required to do make contact with any customer against the what they reasonably considered to be neutral evidence of the 15 Nov 2019 Call Schedule Comparison**.** That evidence was the least intrusive available evidence. The Tribunal accepts that the respondent's reliance on what the Tribunal concludes was reasonably neutral evidence of the 15 Nov 2019 Call Schedule Comparison had the effect of removing what might have been an otherwise difficult discussion with customers and which may reasonably have embroiled customers in an internal matter for the company adversely impacting on those valuable customer relationships.

190. Taking the claimant's position that the process was unfair, regard would require to be given to **Polkey** in relation to compensation. It would have fallen to the Tribunal to assess the possibility of a fair dismissal, had the procedure adopted been fair. That requires an assessment of whether in all the circumstances a fair dismissal could have been decided upon by a reasonable employer.

191. ERA 1996 s 122(2) provides in relation to basic awards that *(1) Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.*

192. ERA 1996 s 123 (6) provides in relation to compensatory awards that *"(6) Where the tribunal finds that the dismissal was to any extent caused*

or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

193. In the Court of Appeal decision in **Nelson v BBC (No 2***)* [1980] ICR 110 LJ (**Nelson**) Brandon stated that *"an award of compensation to a successful complainant can only be reduced on the ground that he contributed to his dismissal by his own conduct if the conduct on his part relied on for this purpose was culpable or blameworthy".*

194. In all the circumstances, it is the Tribunal's conclusion that, had the Tribunal concluded that the dismissal was procedurally unfair, the adjustment, if any, which should be made to any compensatory award to reflect the possibility that the claimant would have been dismissed had a fair and reasonable procedure been followed, would have been 100%, including the Tribunal notes that at no point in the process did the claimant maintain any significant contrary position to information set out in the **Expanded Data Friday 1 November 2019 to Wed 4 December 2019.**

195. It is the Tribunal's conclusion having regard to whether it would be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to Section 122(2) ERA 1996; and if so to what extent, that it would in the whole circumstances be just and equitable to reduce the amount of the claimant's basic award because of blameworthy or culpable conduct before the dismissal by 100% and further in respect of any question as to whether the claimant by blameworthy or culpable actions, caused or contributed to the dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to Section 123(6) ERA 1996, it would be just and equitable to reduce the amount of any compensatory award by 100%.

196. The Tribunal accepts that the claimant had mitigated his loss, he had sought to move into a different area of employment seeking a public service vehicle licence. The Tribunal accepts that in consequence of the

pandemic the claimant was unable to fully complete the PSV course, having regard to the pandemic, it is accepted that the claimant had been unable to obtain alternate employment. Further, the Tribunal agrees that there was no contrary evidence led by the respondent suggesting that the claimant had failed to take reasonable steps to minimise his loss. However, in all the circumstances no award of compensation falls to be made.

197. The role of the Tribunal is to weigh the evidence before it. This involves an evaluation of the primary facts and an exercise of judgment. The Tribunal has done so applying the relevant law.

198. If there are further submissions which either party considers it is necessary, in the interests of justice, to address supplemental to their respective existing submissions, they should set out their position in a request for reconsideration in accordance with Rule 71 of the 2013 Rules.

199. The Tribunal in conclusion, apologies to the parties for the unanticipated length of time and delay taken to issue this full written judgment.

Employment Judge: **R McPherson**
Date of Judgment: **07 December 2020**
Date sent to parties: **07 December 2020**