



# THE EMPLOYMENT TRIBUNALS

**BETWEEN**

**Mr Ben Prigmore**

*Claimant*

and

**Openreach Limited**

*Respondent*

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**Region:** London Central

**ON:** 12 and 13 August 2021

**Before:** Employment Judge Paul Stewart

**MEMBERS:** sitting alone

**Appearances:**

**For Claimant:** Mr Alastair Hodge of Counsel

**For Respondent:** Mr James Gunnion – Solicitor

### JUDGMENT

Both the claims of unfair and wrong dismissal are dismissed.

### REASONS

1. The Claimant began work for the Respondent on 1 February 2007 as a Customer Service Engineer. He was promoted to C3 Senior Engineer taking up that position in May 2017. His employment ended on 18 December 2020. On 6 April 2021, he presented an ET1 to the Employment Tribunal claiming that he had been unfairly dismissed and was owed notice pay.
2. This hearing was conducted on the Cloud Video Platform. At the conclusion of the second day of the hearing with there being insufficient time to hear submissions, I gave directions (with which both parties have complied) to provide their submissions in writing.
3. The Claimant was dismissed for gross misconduct. With dismissal being admitted, I heard evidence from the Respondent's witnesses first. These were:
  - a. Mr Michael Bevan who was the Claimant's line manager;
  - b. Mr Dave Lynch. a Senior Manager who heard the appeal from the decision to dismiss the Claimant that was taken by the third witness -

- c. Mr Nick Book, the Head of Openreach Civil Engineering – UK West, who conducted a disciplinary hearing on 22 October 2020 and determined that the Claimant should be dismissed.
4. I then heard the Claimant give his evidence followed by two witnesses called on his behalf:
  - a. Mr Jason Martin, who described himself as a colleague of the Claimant and another C3 Senior Engineer, and
  - b. Mr Winston Richards, a trade union representative with the Communication Worker's Union (CWU), who represented the Claimant at the disciplinary hearing on 22 October 2020 before Mr Book.

### The Facts

5. Mr Bevan provided a helpful introduction to the work that he and his team of engineers, including the Claimant, were engaged in. This introduction was not challenged and therefore I adopt it.
2. I joined the Respondent in October 1999 and since July 2019 I have been performing the role of Technical Fibre Professional in the Chief Engineers division, which is my second managerial role for the Respondent. My role involves managing a team of around 20 experienced engineers to build fibre networks in the South East of England, dealing with high level escalations and run/build projects in the South East of England. I became the Claimant's line manager from July 2019 until the end of his employment.
3. The Claimant performed his role under the Respondent's home park scheme where an engineer is allowed to take their work van home and park it in a safe location each day, rather than collect their work van from the Respondent's site and parking it there after finishing work. Under the home park scheme, the first 30 minutes of travelling time to work and from work to home are not counted towards the Claimant's hours of work, therefore he could not claim this time back on his timesheets. For example, if an engineer's normal working hours are 08:00 to 17:40 and the engineer leaves their house at 7 a.m., they can only book from 07:30 on their timesheets. If they return home at 18:30, their timesheet should reflect this and 30 minutes travel time taken off so would show a finish time of 18:00.
4. The Claimant was responsible for manually submitting his hours worked on his timesheets weekly via the Respondent's CSS computer system. The Claimant's wages were based on the time he logged on his timesheets. Engineers have to input what times they did for each day they worked using the CSS programme online. If these hours are outside their standard rostered time (either before their start time e.g. 08:00am or after it 17:40) this would be input as overtime on a separate line, they would then input their rostered working times i.e. 08:00 – 17:40 minus their 40-minute mandatory lunch break and then any overtime worked past their normal finish time, once again on a separate line. The code OT (overtime) would be input in a separate section to show overtime hours worked. For example, I refer to **[page 240 of the Bundle]**, which shows a screen shot of the CSS system. The first 4 lines inputted shows the date, 21/11/19, first line shows 06:00-08:00 and has the OT code meaning 2 hours of overtime. Line two shows 08:00-13:00, normal working hours. Line three shows 13:40-17:40, this is also normal working hours but shows that the mandatory 40-minute lunch break has been taken. Lastly, line four shows 17:40-19:25, another 1 hour 45 minutes of overtime, again, shown with the OT code input.
5. The Claimant's normal rostered working hours were Monday to Thursday 08:00 to 17:40. The Claimant was on a special roster known as a Personal/Domestic, or P&D roster pattern, which is granted by the company if an employee has welfare, health, personal or

domestic reasons where a standard attendance pattern does not work for them. Therefore, the Claimant did not work on a Friday as he had childcare responsibilities on that day, so the Respondent accommodated this request not to work on this day.

6. From July 2019, the Claimant worked on the Respondent's Ethernet Tail Reduction Programme project (the Ethernet Project). The Claimant was allocated work by a senior colleague; James Day, Senior Engineer (now promoted to Manager) who managed and allocated the work to engineers, including to the Claimant, and would maintain contact with the Claimant throughout the day. Each job had an A end (start pointing at the BT exchange) and B end (finish/end point to the end user: either consumer or business premises), which the Claimant's purpose was to get a fibre connection to with the support of contractors who he was supervising.
  7. On completion of a job, the Claimant would then send a report with photos to the Respondent's management team, including to me stating what work was carried out. The Claimant would also update the Ethernet control team each day on the status/progress of each job. Each Ethernet engineer, including the Claimant, would have a team of two contractors working with them who would be doing the majority of the cabling and splicing work with each of these Ethernet circuits (an Ethernet Circuit is the, high speed, fibre broadband connection from the exchange to the end users equipment). The engineers would update the Ethernet control team as to if they still needed these contractors on that job or what work they would be doing each day/week. The Claimant was responsible for managing/supervising the contractors in his role as Contract Liaison Officer.
  8. At least 85% of the project work conducted by the Claimant was field-based working on site. Any administrative or computer related tasks were encouraged to be performed on site at the exchange where work was being conducted. All the Respondent's telephone exchanges have desks with secure broadband connections with secure parking onsite, toilet and welfare facilities, including kitchen facilities (e.g. kettles and microwaves), essentially the same as an office - so admin / desk-based work could be conducted at the exchange so engineers would not be required to conduct it at home, including not having to claim overtime to conduct such work at home.
  9. The Ethernet Project required minimal working from home / desk-based work – less than an hour per day e.g. for tasks such as reviewing/sending emails, inputting vehicle logsheets, logging timesheets (all these types of tasks could have been done at an exchange where there are desks). The engineers were responsible for completing their own timesheets based on the hours they actually worked, which they were meant to record daily, and submit weekly to myself. This timesheet submission is based on trust that the engineers submit timesheets honestly and accurately. The engineers, including the Claimant were the most senior engineering grade senior (C3), therefore were in a position of trust.
6. The events that led to the Claimant's dismissal were as follows:
- a. The Claimant in or about November 2019 spoke to Mr Lynch about the possibility of moving from the area he was working in that was based in Maidstone to the London area. The fact that the Claimant wished to explore a transfer of his work area was relayed to Mr Bevan, the Claimant's line manager, by Mr Mark Graham, the Senior Operations Manager and Mr Bevan's line manager without Mr Bevan being informed that the Claimant regarded his conversation with Mr Lynch as being confidential.
  - b. The Claimant asserts that Mr Bevan "had it in for him" once he was informed that the Claimant wished to move to the London area.

- c. Mr Bevan spoke to the Claimant about the possible transfer requesting that he contact one of the London managers.
  - d. In a regular weekly call to engineers and managers involved in the Ethernet Project on Friday 6 December 2019, Mark Graham had told the engineers involved in the Ethernet Project that the Chief Engineers' involvement in that project would end on Friday 20 December 2019. It was made clear to engineers that Friday 20 December 2019 was the end date for this team and all work related to the Ethernet Project must be concluded by then i.e. therefore no additional work was required to be conducted on this project after this date, and consequently there would be no need for any staff to claim overtime after 20 December 2019.
  - e. This message of 20 December 2019 being the end date for all work related to the Ethernet Project was repeated a week later by Mr Graham in his call on 13 December 2019.
  - f. On 13 December 2019 (10:31am), Mr Bevan emailed the team (including the Claimant) thanking them for their hard work over the last few months on the Ethernet Project. Included in his email was a reference to the finishing of the Ethernet Project:

As you know, we finish on Ethernet next Friday 20th December  
Can you make sure that ALL the jobs that you have are completed by then and please DO NOT carry anything over past Friday 20th December.
  - g. On 20 December 2019, the Claimant emailed to various managers including Mr Bevan and Mr David Deadman, Hypercare Lead Manager, an Ethernet Project completion report. On 22 December 2019 in a short email, he responded to a query and confirmed that Mr Deadman had a copy of the completed report.
  - h. The Claimant then claimed 8 hours of overtime for 22 December 2019 in a timesheet that Mr Bevan saw on or about 27 December. The Claimant was the only engineer that had claimed overtime on the Ethernet Project after 20 December 2019.
7. On 6 January 2020, Mr Bevan took the opportunity when alone with the Claimant at the Respondent's Medway office of asking him why he had booked overtime for 22 December when Mr Bevan was not aware the Claimant would be working on that date. Was the claiming of these hours a mistake, Mr Bevan asked? The Claimant said it was not a mistake and that he had done some admin work. Mr Bevan asked him to send by email details of exactly what he had done. The Claimant complied with this request the same day by emailing Mr Bevan one line to the effect that the overtime he worked on 22 December 2019 was for:
- ... signing off on Ethernet Project getting my access for Orion and vehicle admin etc.
8. On 8 January 2020, Mr Bevan spoke to the Claimant again on the subject as to what was the work he had carried out in the 8 hours of overtime claimed. The Claimant said he had done his vehicle log sheets for his van but, when

Mr Bevan pointed out that his vehicle log sheets had not been updated since 10 December, the Claimant then said that, thinking about it, he had had an issue with the online system not working properly.

9. The Claimant said that he had also applied to get access to some new systems (including Orion system, which is used for surveying street networks and INS system, which is used for looking for spare/unallocated fibres within the network) that he would have to use for the other projects the Chief Engineers were working on that he hadn't already got access for.
10. Whenever an engineer in Mr Bevan's team requests access to any systems, Mr Bevan receives an email requiring him to approve or reject the request. He had not received such an email in respect of the Claimant's application to obtain access to any systems.
11. The Claimant stated that he also completed a couple of computer-based training (CBTs). Mr Bevan asked the Claimant what online CBT's he had completed as Mr Bevan had not received any confirmation emails for any CBT completions, something that he would normally receive once an engineer completes an online training course.
12. The Claimant's email of 6 January 2020 had not mentioned conducting CBTs. It had not mentioned that he could not access the vehicle log sheets website nor had the Claimant mentioned this to Mr Bevan on 6 January 2020. The first time he mentioned this was on 8 January 2020, only after Mr Bevan had told him that the vehicle log sheets had not been accessed since 10 December 2019.
13. Later, on 8 January, Mr Bevan phoned BT Fleet to find out if there had been an issue with the vehicle logsheets site because the Claimant stated that it had not been working properly, but they confirmed that there were no issues with the site. Mr Bevan then sought advice from the Respondent's HR department to the effect that there was cause for an investigation into the claim for 8 hours overtime on a date when Mr Bevan had not expected the Claimant to be working.
14. For the Claimant to be paid for the hours he recorded on his timesheets, his line manager had to authorise such payment. The Claimant pressed Mr Bevan to authorise the payment on the December timesheet and, on or shortly before 15 January, Mr Bevan sought advice again from HR as to whether he should so authorise payment given his concerns about the validity of the hours recorded. The advice he received was that he could authorise the timesheets notwithstanding his concerns. Accordingly, on 15 January 2020, Mr Bevan authorised the Claimant's timesheet, which included the 8 hours' overtime he logged on 22 December 2019.
15. Mr Bevan then held an investigation meeting with the Claimant on 29 January explaining to him that the investigation concerned an allegation of falsification of timesheets. On this occasion, Mr Bevan questioned the Claimant about what he, Mr Bevan, had discerned as multiple discrepancies between the data recorded by a tracking device fitted to the Respondent's van which was provided for the Claimant's use and the Claimant's timesheets on which he recorded his in/out work times for the period between 27

November and 22 December 2019. Mr Bevan had found 16 inconsistencies between the time which the Claimant entered on his timesheet that he had left his home and the time the tracking device recorded the van leaving his address. Further, Mr Bevan noted 16 occasions when the Claimant recorded his arrival back at his house that was later than the time recorded by the tracking device for the van's arrival back at the house. In addition, on 6 occasions, the tracking device recorded the Claimant's van remaining stationary at the Claimant's house on days when the Claimant recorded himself as having worked a number of hours overtime. These 6 occasions each involved a Saturday or Sunday in December 2019. The least number of hours claimed for any of those days was the 8 he claimed to have worked on 22 December. The explanations received from the Claimant did not quell Mr Bevan's concerns.

16. He took advice from HR again and, on 29 January, acted on the advice by suspending the Claimant on full pay pending an investigation into allegations of misconduct that, between 21 November 2019 and 22 December 2019, he claimed excessive overtime. He provided the Claimant with a letter dated 29 January 2020 to that effect. Mr Bevan sought from the Claimant's trade union representative, Ms Charlotte Regan, additional evidence that the Claimant wished to provide, receiving the same in or about 3 February 2020.
17. In anticipation of receipt of the additional evidence, Mr Bevan prepared an investigation report which he completed after receipt of the additional evidence but still dated 29 January 2020. The additional evidence provided did remove Mr Bevan's concerns about the discrepancies between the Claimant's timesheets and the tracking device data.
18. In his investigation report, Mr Bevan recommended that there was a case to answer, and the matter should be progressed under the Respondent's disciplinary procedure for an allegation of gross misconduct.
19. The Respondent wrote to the Claimant inviting him to attend a disciplinary meeting on 11 March 2020 concerning allegations that were set out as follows:

FALSIFICATION OF RECORDS in that:

Between 21st November 2019 and 22nd December 2019, you entered overtime in excess of 100 hours. However, there is little evidence to support that you worked this time. In fact, our data shows that on 6 different occasions, your van did not move from your home parking location when you claimed overtime.

WASTING COMPANY TIME in that:

Between 21st November 2019 and 22nd December 2019, you left your home park location later than stated on your timesheets on 16 different occasions during the same time period.

You also returned to your home park location before your finish time on 16 different occasions.

20. The Claimant was informed of his right to be accompanied to the disciplinary meeting by a companion and that a finding of evidence supporting the

allegation of falsification of records could amount to gross misconduct which would lead to summary dismissal. The Claimant was provided with a copy of the Respondent's disciplinary policy and procedure, investigation report, timesheets and other relevant documentation.

21. The person who wrote that letter to the Claimant on behalf of the Respondent was Mr Henry Wallace who was, then, the Senior Fibre Professional. Mr Wallace had been appointed Disciplinary Officer for the Claimant's case, but he was replaced at the request of Mr Winston Richards, a trade union representative acting for the Claimant. The request had been made because, it was said, Mr Wallace had accused the Claimant of delaying the disciplinary meeting. Mr Nick Book was then appointed to be the Disciplinary Officer.
22. The disciplinary meeting that initially was scheduled for 11 March did not take place until 22 October 2020. This was a considerable delay occasioned because of the interaction of Covid restrictions and the insistence of the Claimant that the meeting should be in person.
23. For the first 7 weeks of this long hiatus whilst the Claimant was suspended on full pay, Mr Bevan had made telephone calls to the Claimant on a weekly basis, the purpose of which was to keep the Claimant up-to-date on the investigation, to allow the Claimant to ask any questions about it and to permit the Claimant to state whether he required any support. However, he stopped making these calls once Mr Wallace had been appointed to be the Disciplinary Officer because he understood Mr Wallace would take over that duty. In the event, Mr Wallace did not start making such calls and nor did his successor as Disciplinary Officer, Mr Book.
24. As a result of the cessation of Mr Bevan's weekly telephone calls, the Claimant submitted a grievance about Mr Bevan asserting that Mr Bevan was guilty of gross misconduct in that he had failed to discharge his duty of care to the Claimant of phoning him on a weekly basis. He also asserted that Mr Bevan had discriminated against him, had isolated him from the rest of the team, had lied to him and had misled "during proceedings" and had shown incompetence.
25. On 22 October 2020, Mr Book conducted the Claimant's disciplinary meeting face to face. The Claimant was represented by his trade union representative, Mr Richards. Mr Book sought from the Claimant a detailed explanation for the hours that were claimed as overtime. Mr Richards on the Claimant's behalf commented that the Claimant was unable to give details as to what he was working on when he claimed overtime because he did not have his laptop to refer to, that having been removed from him when he was suspended.
26. When Mr Book continued to press for an explanation, the Claimant appeared unable to give specific details regarding the precise activity in which he had been engaged, saying that he would have been going over the job packs for the week ahead (a job pack being typically a paper or electronic work pack containing maps, any previous surveys, notes, routings, diagrams and work instructions). Mr Book asked him about Thursday 19 December, a date on

which the Claimant had claimed to have worked in excess of six hours overtime. As Mr Book reported in his statement:

26. ... He was unable to provide specifics and provided a generic answer stating that he was dealing with paperwork accumulated during the day but did not elaborate further.

27. During the meeting I told him that I would give him his work laptop back so he could provide me with emails he sent justifying the hours/work, and I suggested a Teams meeting to go through these emails or any calls he made to give the Claimant an opportunity to justify the hours claimed as he was not providing clear answers. The Claimant stated that he had six email reports "but that's all you will receive". The Claimant acknowledged that he could access emails on his phone i.e., to obtain additional evidence, which he still had in his possession.

28. I told the Claimant that I wanted him to tell me what systems he said he accessed, what emails he sent/received, calls he made – essentially what he was doing to justify the hours claimed. But the Claimant did not explain or justify the hours claimed.

27. The disciplinary meeting was adjourned to allow Mr Book to arrange for the Claimant to have access to his laptop. In the afternoon of 22 October, Mr Book conducted a hearing into the Claimant's grievance when, again, the Claimant was represented by Mr Richards.

28. After that meeting was over, Mr Book arranged for the Claimant's laptop to be delivered to the Claimant's house and, on 26 October 2020, he emailed the Claimant requesting him to provide additional information about his activity on the days he claimed overtime. Mr Book invited the Claimant to access his Outlook account and send to Mr Book a summary of emails sent and emails received. If this was too difficult, Mr Book offered to arrange to share the Claimant's screen with him so that he could see the Claimant's activity. Mr Book asked the Claimant to send a list of the systems he would have accessed during the dates when overtime was claimed and the login IDs that the Claimant had used. He asked for information on the timings of any calls, data and text usage during the period in question. He also requested copies of the reports based on individual ethernet circuit numbers that the Claimant had previously claimed to have sent and anything else that would help Mr Book to understand more of the detail on activity undertaken during the overtime hours claimed. When the Claimant sent through information, Mr Book reviewed it and formed the opinion that it did not evidence or justify the overtime hours claimed by the Claimant.

29. Mr Book set out in his statement how he arrived at his decision on the disciplinary issue:

35. On 7 December 2020, having considered all of the evidence, including the Claimant's representations at his disciplinary meeting on 22 October 2020 (and listening to the disciplinary meeting audio recording) and additional information submitted on 28 October 2020, I decided that the allegation of falsification of records between 21 November 2019 and 22 December 2019 was well founded [349-351].

36. The time recorded by the Claimant on his timesheets was inconsistent with the vehicle tracking data, which showed that the Claimant's vehicle didn't move for 4 consecutive Sundays and 3 consecutive Saturdays between 23 November 2019 and



22 December 2019 [349-350]. The vehicle not moving indicated that the work being undertaken could only be desk work conducted via computer, rather than field-based work or travelling. The Claimant was unable to provide evidence of desk-based work carried out for such lengthy periods. Furthermore, the majority of role (approx. 85%) was a field-based role which involved being away from the desk / admin work.

37. [349-350] The Claimant also averaged over 40 hours' overtime per week over a four-week period, which was in addition to his basic hours. The additional 40 hours' overtime was more than double the normal 37.5 hours standard week/basic hours. The Claimant failed to provide evidence to justify this overtime claimed, which was effectively two employees' work he was claiming for.

38. The Claimant failed to provide detailed answers on the specific tasks that he carried out and provided vague answers when explaining the tasks that he undertook. When I asked the Claimant to provide details of specific tasks undertaken at the weekends, his answers were generic "reading, scrutinising, analysing, going over" and he did not provide a detailed explanation justifying the hours claimed.

39. I found that the work claimed to have been carried out by the Claimant on 22 December 2019 was not commensurate to the 8 hours' overtime claim for this day. I concluded that the Claimant claimed hours where he was unable to justify his tasks/activity performed during these hours being claimed. Michael Bevan had asked for all work on the Ethernet Project to be completed by 20 December 2019 [127], before the weekend in question (22 December 2019) and therefore wasn't aware the Claimant was working on the weekend because the project had finished and there was no work required to be done for it. When the Claimant was asked to justify and evidence the 8 hours he claimed as overtime it amounted to minimal time (emails, Computer Based Training (CBT), applying for system access, van admin). The CBT, system access application, and logsheets are not tasks we expect senior engineers to complete whilst being paid premium rate Sunday overtime and in my experience are tasks which would have taken a short duration, if they were carried out on 22 December 2019. The Claimant was not forthcoming with any subsequent evidence to justify multiple hours spent creating/sending the emails.

30. Mr Book dismissed the allegation of wasting company time. In respect of the allegation he found to be proven, that of falsifying records, he decided that the appropriate sanction was dismissal. He set out his decision in a letter dated 15 December 2020 to which he attached his 3-paged memorandum entitled "Rationale for Decision at Gross Misconduct stage" wherein he justified his choice of sanction saying:

The decision to dismiss you is as the result of the breakdown of trust between you and the business, and is something which I believe is beyond reasonable repair.

31. The date when dismissal took effect was 18 December 2020.
32. In cross-examination, Mr Book denied that his decision was based on a hunch. He suggested that the reason why the Claimant had not been challenged earlier by Mr Bevan about the overtime he was claiming was:

... because he [*Mr Bevan*] trusted the Claimant – as a manager you have to trust people until that trust is broken and then you have to get out the magnifying glass.

33. He went on to point out that he, Mr Book, had 30 years' experience in the business, had done the jobs that both the Claimant and Mr Bevan had done and that he regarded himself "as reasonably qualified to judge a fair day's work for a fair day's pay".
34. The Claimant appealed the decision to dismiss. His appeal was heard on 14 January 2020 by Mr Lynch. One of the points advanced in the appeal by the Claimant was that Mr Bevan had authorised the payment of 8 hours overtime on 22 December. After the hearing, Mr Lynch spoke to Mr Bevan and ascertained that Mr Bevan had only authorised the payment after receipt of advice from HR that it would not prejudice the live investigation. Mr Lynch was also able to examine three email chains which the Claimant forwarded to him after the hearing although, in Mr Lynch's view, they did not provide support or evidence that the overtime he claimed was genuine. He rejected the appeal.
35. The Claimant presented his ET1 on 6 April 2021 claiming unfair dismissal.

### **Discussion**

36. The parties have not agreed a list of issues. I intend to follow the helpful headings in which Counsel for the Claimant in his written submissions has set out.

### ***Unfair Dismissal***

37. The Respondent has satisfied me that the reason for the Claimant's dismissal related to his conduct which is, of course, a reason specified in section 98(2)(b) of the Employment Rights Act 1996.
38. Further, on the evidence before me, I find that the Respondent acted reasonably in deciding that the Claimant's conduct was sufficient reason for dismissing him.
39. Given that it was a dismissal for misconduct, I adopt the three-stage test expounded in *British Home Stores v Burchell* [1980] ICR 303 as approved by the Court of Appeal in *W. Weddel & Co. Ltd. v Tepper* [1980] ICR 286. I am satisfied that Mr Book had an honest belief that the Claimant was guilty of gross misconduct.
40. The Claimant in the period from 27 November to 22 December 2019 had claimed to have worked 291 hours of which 165 (that is 58% of the hours) were overtime.
41. Counsel for the Claimant submitted that there was no documentary evidence before Mr Book which clearly indicated that the Claimant had not worked the hours for which he had claimed. I accept that to be the case. However, 8 hours were claimed for working on 22 December which was two days beyond the date by which Mr Graham had indicated that all work related to the Ethernet Project must be concluded. Not only had Mr Graham repeated this instruction but Mr Bevan had reiterated it in his email of 13 December 2019.
42. So, the fact that the Claimant was asserting he had worked on 22 December thereby ignoring Mr Graham's instruction justified the Respondent's

management seeking an explanation from the Claimant as to what it was that he had been doing during those 8 hours. The explanation supplied by the Claimant did not appear adequate to Mr Bevan. Hence, the issue passed to Mr Book.

43. Mr Book had first-hand experience of doing both the job that the Claimant was doing and the job that Mr Bevan did which was to line manage people doing the Claimant's job. I accept his evidence that the Claimant could have supplied detail as regards the activity he undertook during the hours for which he claimed overtime payment and that such detail as the Claimant provided came nowhere near demonstrating that the Claimant was truly engaged in activity connected with the proper performance of his job. Because of his work experience, Mr Book was qualified to make that assessment and I am satisfied that he made that assessment after giving the Claimant the opportunity of trawling through his laptop and producing evidence of the activity he asserted himself to have been engaged in.
44. I do not accept the submission made by Counsel for the Claimant that the conduct for which the Claimant was dismissed was really an aspect of capability. It is clear to me that an essential component of the employment relationship that existed between the Claimant and the Respondent was the trust that the Respondent placed in the Claimant to record the hours he worked honestly. Once that trust is broken, it is within the range of reasonable responses on the part of an employer to conclude that counselling concerning the need to avoid breaking that trust again is not going to restore it.
45. This conclusion of Mr Book that the Claimant had misconducted himself in claiming hours he had not worked was, to my mind, reached after a reasonable investigation of the allegations against the Claimant in which the Claimant was afforded a number of opportunities to satisfy Mr Book that he had indeed worked the hours he asserted he had worked.
46. The Claimant has claimed that, after Mr Bevan had learned of the Claimant's desire to move to the London area, he "had it in for" the Claimant. I found no evidence of such a malevolent desire on the part of Mr Bevan. I note that the Claimant did not raise this point with Mr Book or with Mr Lynch at the appeal stage. Further, it is apparent that Mr Bevan viewed the Claimant's work as deserving only praise both before and after learning of the Claimant's desire to move to the London area.

### ***Polkey reduction***

47. If I am wrong about the procedure adopted by the Respondent and have failed to identify some aspect of it which renders the dismissal unfair, I do not think that the correction of that unidentified unfairness would have led to some extension of the Claimant's employment. It was the case, after all, that the disciplinary hearing to which the Claimant was first invited was scheduled for 11 March 2020 but did not take place until 22 October 2020. Therefore, any unfairness could have been corrected either before or at the disciplinary hearing. The date of dismissal – 18 December 2020 – would not have been affected. Therefore, any compensatory award would be

reduced according to the principle set out in [Polkey v AE Dayton Services Ltd \[1987\] IRLR 503](#).

### **Contributory fault**

48. In the event that that the above assessment that the dismissal was fair comes to be overturned with the result that compensation for unfair dismissal becomes necessary, it is appropriate that I state my view that the Claimant contributed to his own dismissal to the tune of 100%.

### **Wrongful Dismissal**

49. It is agreed that the Tribunal must be satisfied, based on the evidence presented to it by the Respondent, that the Claimant did, on the balance of probabilities, act as alleged and commit gross misconduct,
50. The Respondent has established before me that the Claimant in the period from 27 November to 22 December 2019 had claimed to have worked 291 hours of which 165 (that is 58% of the hours) were overtime. It has also established that the Claimant had received at least three messages from management informing him that the team working on the Ethernet project had to have completed their work by 20 December 2019. On 13 December, Mr Bevan had spelled out the message thus:
- As you know, we finish on Ethernet next Friday 20th December  
Can you make sure that ALL the jobs that you have are completed by then and please DO NOT carry anything over past Friday 20th December.
51. The Respondent established that the Claimant had submitted a claim that he had worked 8 hours overtime on 22 December. Thus, the Respondent established that the claim was anomalous, and the Respondent was thus entitled to seek further information from the Claimant as to what it was that had occupied him for 8 hours on that day.
52. The Respondent also established that the Claimant was not able to supply such information in such detail that would have permitted verification of his activity.
53. Further, the Respondent has established that the Claimant advanced as an explanation for his work on 22 December that he had “completed collating and updating of routing information and test results and all other documentation that Joe” Finney had requested. However, examination of email traffic established that the substantive report such as the Claimant suggested had been sent on 22 December was, in fact, sent on 20 December and that what the Claimant sent on 22 December was an email referring Mr Finney to the “full report” that was in the possession of Mr Dave Deadman (one of the recipients of the email of 20 December) and repeating the results that had been included in the email of 20 December (albeit with an inconsistency in the result given for “Distance” that probably was caused by a typo). On any view, the email of 22 December could not have taken the Claimant much more than 10 minutes to draft and send.
54. The Respondent established that the Claimant had further stated that part of the activity he had undertaken on 22 December had been to apply “for

system access INS/ORION” and to have ‘Downloaded the program for ORION and used some of its features such as opening maps and general navigating of the tool”. However, the Respondent also established that the Claimant’s line manager, Mr Bevan, would have been alerted to any member of his team seeking access to any of the systems and that Mr Bevan had not been so alerted. Therefore, the Respondent had reason not to believe the Claimant’s account of what he had done.

- 55. And I am satisfied by the Respondent’s evidence that the Claimant not only was unable to account for the activity he claimed to have undertaken on 22 December but, in two respects, asserted activity which was inconsistent with other evidence.
- 56. Thus, I am satisfied on the balance of probabilities that the Claimant did not work the 8 hours overtime he claimed to have worked on Sunday 22 December 2019 and, thus, his claim for wrongful dismissal fails.

**Summary**

- 57. For the reasons set out above, the claims of unfair and wrongful dismissal are dismissed.

**24 November 2021**

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**Employment Judge Paul Stewart**

**DECISION SENT TO THE PARTIES ON**

**26 Nov. 21  
AND ENTERED IN THE REGISTER**

.....  
**FOR SECRETARY OF THE TRIBUNALS**