EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107505/2020 (V)

Hearing on 16 and 17 June, 10 and 11 August 2021 by CVP

Employment Judge Campbell

Mr John Pullar	**Claimant** **Represented by:** **Mr W McParland, Solicitor**
Forth Ports Limited	**Respondent** **Represented by:** **Mr A Munro, Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the employment tribunal is that:

1. the claimant was unfairly dismissed contrary to section 94 of the Employment Rights Act 1996; and

2. a hearing should therefore be fixed to determine issues relating to remedy.

REASONS

GENERAL

1. This claim arises out of the claimant's employment by the respondent which began on 22 January 2007 and ended with his dismissal on 11 August 2020.

2. The tribunal heard evidence from four witnesses for the respondent. Those were Fiona MacLennan, HR Officer (Grangemouth), Angela McAllister, HR Officer (Tilbury, London), Kenneth Williamson, Deputy Port Manager (Port of Leith) and Derek Knox, Senior Port Manager with responsibility for various Scottish ports. The tribunal also heard the evidence of the claimant and a Mr Sean Hill, who is an employee of the respondent but who had been called by the claimant.

3. It had been agreed that the evidence of each witness would be provided by way of witness statements which were taken as read.

4. It had also been agreed that this hearing would deal only with liability, principally as there was said be potential complexity in calculating the claimant's pension loss in the event that his claim was successful.

5. An indexed joint bundle of documents was provided and pages within it are referred to below in square brackets. Mr Munro for the respondent wished it to be noted that he was unhappy that some of the claimant's documents had been disclosed after witness statements had been exchanged. This is recorded, although there did not appear to be any disadvantage to the respondent's witnesses in giving their evidence as a result of this. Supplementary questions of the witnesses were permitted to ensure that any relevant matters not covered in their witness statements could be dealt with.

6. The parties' representatives helpfully provided skeleton submissions in note form on conclusion of the hearing which were considered in reaching the various findings below.

LEGAL ISSUES

7. The legal questions before the tribunal were as follows:

   7.1. Was the claimant's dismissal on 11 August 2020 by reason of his conduct, and therefore a potentially fair reason for dismissal under section 98(2)(b) of the Employment Rights Act 1996 ('ERA');

7.2. If so, did the respondent meet the requirements of section 98(4) ERA so that the dismissal was fair overall?

APPLICABLE LAW

8. By virtue of Part X of ERA, an employee is entitled not to be unfairly dismissed from their employment. The right is subject to certain qualifications based on matters such as length of continuous service and the reason alleged for the dismissal. Unless the reason is one which will render termination automatically unfair, the employer has an onus to show that it fell within at least one permitted category contained in section 98(1) and (2) ERA. Should it be able to do so, a tribunal must consider whether the employer acted reasonably in relying on that reason to dismiss the individual. That must be judged by the requirements set out in section 98(4), taking in the particular circumstances which existed, such as the employer's size and administrative resources, as well as equity and the substantial merits of the case. The onus of proof is neutral in that consideration.

9. Where the reason for dismissal is the employee's conduct, principles established by case law have a bearing on how an employment tribunal should assess the employer's approach. Relevant authorities are considered below under the heading 'Discussion and Conclusions'.

FINDINGS OF FACT

10. The following findings of fact were made as they are relevant to the issues in the claim.

Background

11. The claimant was an employee of the respondent from 22 January 2007 to 8 August 2020. As such his start date as stated in his job offer letter of 15 January 2007 [28] is taken to be correct.

12. The claimant's role was as a Maintenance Electrician. He was based originally at Port of Grangemouth. He worked 37.5 basic hours per week and could be asked to work additional hours by the respondent, which he regularly did. When

doing so he was paid overtime at double his normal rate. This included weekend working.

13. The claimant reported to a Mr Derek McLean, Electrical Supervisor who in turn reported to Mr Barry Heeps, Port Engineer.

14. The claimant had a clean disciplinary record and there was no evidence of his conduct or performance up until the commencement of the disciplinary process described below being an issue.

15. The respondent maintained a number of policy documents including a Group Disciplinary Procedure [43-48]. This applied to the claimant.

2017

16. On 29 June 2017 the claimant sustained an injury to his right ankle while working. He required medical treatment and rehabilitation, and was absent from work between 30 June and 1 September 2017 as a result.

17. The claimant returned to work but experienced ongoing pain. The biggest contributor was having to climb and descend steps and ladders to repair straddle carriers (effectively types of tall crane). This was part of his duties, particularly on certain shifts which he worked, namely early shifts, back shifts and night shifts. Those were referred to collectively as 'breakdown shifts' or sometimes simply 'shifts'. There was less climbing and descending on day shifts. This is because repairs to the straddle carriers were less frequently required on day shifts.

18. When the claimant worked under the breakdown shift pattern he was paid an allowance in addition to his basic pay.

19. The claimant raised the issue of his ankle pain with Mr Heeps and Occupational Health advisors were asked to assist. There was little or no improvement and the claimant had to stop working again.

2018

20. The claimant was absent from work between 3 May and 26 November 2018. The cause was recurring pain in his foot and ankle and associated restricted functioning, related to the injury in June 2017.

21. The claimant was examined by an occupational health physician, Dr Jonathan Reed, at various times.

22. At an occupational assessment on 2 July 2018 the claimant related that he had experienced increased difficulty with the walking and ladder climbing aspects of his role. His ligaments were inflamed and he was undergoing physiotherapy.

23. The claimant was assessed again on 13 August 2018. He had received specially made insoles but these had not yet caused his paid to subside, although his walking capacity had improved. He was still concerned about returning to his normal duties, which he felt had caused the pain and restriction in movement he was experiencing. Dr Reed, suggested the respondent explore whether the claimant could be given duties with less walking, particularly on uneven ground, and less ladder climbing.

24. There was a further assessment by Dr Reed on 25 September 2018. By this time the specialist insoles had been deemed not to have helped correct the claimant's gait or alleviate his pain. The extent of his restricted movement was set out in detail in the report which was sent to the respondent [51]. It was such that a phased return was not advised and it was believed that were he to return, it would need to be to a different job.

25. The next assessment of the claimant was on 19 November 2018. The claimant's ankle functioning had improved in the interim and he was experiencing less pain. Dr Reed therefore now felt that a phased return to work should be tried, beginning at 50% of his hours and building up to full capacity in 4 weeks. It was still considered advisable to avoid physically arduous tasks where possible, at least to begin with.

26. The essence of Dr Reed's advice, initially given verbally, was conveyed to Mr Heeps by Fiona MacLennan, an HR officer in an email also on 19 November 2018. She suggested that the claimant could combine accrued holidays with

days working to help him build up capacity. Mr Heeps wanted to know if there were to be any restrictions on the claimant climbing ladders, operating on particular types of ground or spending time on his feet. Ms McLennan indicated that the advice of Dr Reed was to use discretion in the first few weeks.

27. The claimant completed a phased return to his duties in January 2019.

2019

28. When reporting to Mr Heeps on 22 January 2019, the claimant's supervisor Derek McLean indicated that the claimant had not indicated any major issues around his ankle, but only 'a few niggles' from time to time.

29. On 26 March 2019 the claimant's solicitors, Thompsons, issued a pro forma 'A2' form to the respondent in terms of the Personal Injury Pre-Action Protocol 2016 [58-60]. In that document they indicated that they were instructed to pursue damages on the claimant's behalf in relation to the injury caused to his ankle. Certain assertions of fact and liability were made and documents were requested.

30. Between 1 March and 31 December 2019 the claimant worked a total of 248 hours of overtime at double rates, and a further 13 extra hours at his standard rate. The nature of the work was similar to his normal duties although often it was as cover and so he would not necessarily be physically working for all of the time. The claimant said in his evidence that the extra work caused his ankle some aggravation but he did it to make up for the pay he had lost out on while absent on account of his injury. He conceded that he could not be ordered to work overtime under his contract of employment, but there was an expectation that people would undertake it.

31. The claimant applied for a number of external Electrician roles in or around October and November 2019. He registered his CV with a recruitment agency, 'TotalJobs'. He was not successful in any of the applications. He did not tell any of his managers or colleagues within the respondent about these actions.

32. In late 2019 the respondent advertised a vacancy for an Electrician at its Port of Rosyth premises with a closing date for applications of 12 December 2019

[61]. The claimant wished to be considered for the role and provided a handwritten note saying that he would like to register an interest in it [62].

33. He spoke to Mr Heeps about the role on 11 December 2019, the day before the deadline for applications, and wished to trial it if possible before deciding whether to pursue it more permanently. Mr Heeps emailed Mr Derek Knox, a Senior Port Manager the next day to raise the claimant's interest and ask whether a trial would be possible. Mr Knox emailed back shortly after to say he had no issue, and that Mr Heeps should discuss it directly with the relevant manager at Port of Rosyth, Jim Watson.

2020

34. The claimant tried out the Rosyth role and enjoyed it. He confirmed his desire to move into the role more permanently. Mr Watson and Mr Heeps discussed it by email on 24 January 2020. There were some minor logistics around cover to be dealt with but both were content for the move to be approved.

35. The claimant visited the respondent's HR department at Grangemouth on 28 January 2020. He spoke to Ms McLennan who summarised the encounter in an email the next day to a Ms Beverley Buchanan and Mr Heeps. He had told Ms McLennan that he enjoyed the secondment to Rosyth and wished to take up the role permanently. He mentioned that it would be beneficial for his ankle. She said in her email:

> *'he cited one of the reasons being that he thinks the type of work at Rosyth would better suit him physically (recently found working with straddles, ladders, etc. at Grangemouth more challenging) and he is thinking to the future in terms of his general health.*
>
> *'He asked if we could provide him with details on what his new terms/conditions would be at Rosyth and Beverley is working on preparing this information to send to him.*
>
> *'I left it with him that he should come back to us if any further queries and it would really be down to him/Barry/Jim agreeing on the final details and*

date of a permanent transfer and we would await further instruction on any administrative actions required in relation to this.'

36. The claimant's move to the Rosyth role was made permanent on or around 6 March 2020. He signed a new statement of principal terms and conditions of employment [36-42]. His weekly working hours increased to 39. His annual salary increased from £29,437 to £32,06 [35].

37. The claimant undertook 127 further hours of overtime work in January to 8 March 2020, 108 hours of which were at double rates. These were at Grangemouth. The respondent did not provide details of the overtime worked by the claimant after March 2020 – i.e. in the Rosyth role.

38. The claimant was paid £1 per hour more in basic salary in the Rosyth role. He did not receive any shift allowances, other time enhancements or weekend overtime at double pay rates at Rosyth, as he had at Grangemouth. There was less overtime available at Rosyth generally. It is possible that the availability of overtime in Rosyth was reduced from around March 2020 as a result of the effects of the Covid-19 pandemic on working practices and patterns.

39. In his mind the claimant was clear that the reason for the move was to alleviate his ankle pain and therefore allow him to go on working for the respondent. He believed that other employees such as Ms Lowey, Ms McLennan and Mr Heeps would have appreciated that too, based on his discussions with them.

Intimation of intention to claim for loss of earnings

40. On 7 May 2020 the claimant's solicitor Mr Stewart White emailed the respondent's loss adjustors in relation to the personal injury claim. Mr White indicated that the adjustors, Crawford SLS ('Crawfords'), that:

'Your insured may not have conveyed this to you yet but my client has changed jobs due to the impact his injuries have on him. As a consequence he claims to be earning less. I am waiting on updated earnings info, but can you assist by providing me with updated earnings details?'

41. Mr Graeme Inglis at Crawfords confirmed to Mr White he was unaware of the new information but indicated he would try to help.

42. On 13 May 2020 Mr Inglis provided some of the claimant's payslips for part of 2018, and undertook to locate payslips from January 2019 onwards.

43. Also on that day, Mr Inglis, or possibly a colleague of his within Crawfords (the email referred to below being redacted to delete the individual sender's and recipient's names) sent an email to the respondent approximately 90 minutes after Mr White's email that day. It read:

> *'I've just been speaking with the Claimant's Solicitors on this case as we've been waiting on them presenting their fully vouched claim for some time.*
>
> *'They've just advised me that their client intends to allege that as a result of injuries sustained in the index incident, he has had to change roles and as a consequence, is earning less. This is contrary to my understanding, which was that after a second absence period (ending 23/11/2018) the Claimant had not exhibited any further issues and had made no further reports to HR/Occ Health. We were therefore working on the basis that the Claimant had essentially recovered and resumed his pre-incident duties.*
>
> *I was wondering whether you were able to confirm if there is any truth in this allegation regarding the Claimant's change of role and if so, can you bring me up to speed on how this developed?'*

The email went on to request the payslips that Mr White had asked for but which Mr Inglis did not already have.

44. On 20 May 2020 Mr White emailed Mr Inglis, this time to ask if he knew about the respondent's intention to summon the claimant to a meeting with an insurance representative present. The claimant had telephoned Mr White to say that he had been asked to such a meeting (which proceeded as a call, and without an insurance representative present, as detailed below).

45. Mr White understood that the respondent had decided to take that step in response to his own attempts to quantify any reduction in earnings the claimant had experienced on moving to the Rosyth role. Mr Inglis was on annual leave and did not appear to reply to the email.

Conference call on 25 May 2020

46. Ms MacLennan arranged a telephone conference call between herself, Jim Watson and the claimant to take place on 25 May 2020. She did so on the instructions of Ms Liz Marshall, who was her line manager in the HR team. She prepared a typed note summarising the discussion [72-74]. The decision to hold the discussion was prompted by the claimant's solicitor's communication of 13 May 2020, as reported that day to the respondent by Crawfords.

47. Ms MacLennan understood that the claimant was now alleging he had been:

> *'forced to transfer permanently from Electrician at Grangemouth to an Electrician position at Rosyth, due to medical reasons.'* and
>
> *'claiming he had no other choice than to make this transfer due to the residual weakness and pain he is still experiencing in his ankle following the injury at work and feeling unable to cope adequately with the duties required at Grangemouth as a consequence. JP also alleges, as a result of this transfer, he is being financially disadvantaged since his earnings capacity is lower when working at Rosyth.'*

48. As is evident from Mr White's original email (and the court summons described below which followed), this was an inaccurate and exaggerated interpretation of the claimant's position. In particular, nothing had been said about the claimant being forced to change roles, whether by the respondent directly or by circumstances more generally. Further, Mr White did not have enough information to know whether the claimant was earning less in the Rosyth role. He was not asserting that a claim for loss of earnings was going to be made. He was requesting payslips so he could understand whether such a claim could be made.

49. At this point Ms MacLennan was aware the claimant had raised a personal injury claim against the respondent but had not seen any documents in connection with it, including any emails between the claimant's solicitor and Crawfords, or the email from Crawfords to the respondent.

50. A part of the call early on involved Ms MacLennan telling the claimant what she understood about the circumstances in which the claimant had asked to move to the Rosyth role. She recalled the conversation the two had had on 28 January 2020, referred to above. She said that she did not get any sense of the claimant feeling he needed to move because he was struggling with his duties at Grangemouth, but rather that she understood he saw the transfer as a way of progressing towards retirement. This was despite her having noted that the claimant had referred to two aspects of his role at Grangemouth as being problematic, identified and recorded by Dr Reed as being caused by the injury. She pointed out that the claimant had not asked for HR or occupational health to become involved in his situation around this time.

51. The claimant said he had spoken to Ms Catriona Lowey, the respondent's Occupational health Advisor, before making his final decision to move to Rosyth, and had asked her if she believed it was a good decision with specific reference to his ankle. She had allegedly said in response that the decision had to be his, but that she would email HR to tell them about the discussion.

52. Ms MacLennan raised that the claimant was being paid £3,271 more by way of basic annual salary in the Rosyth role than in the Grangemouth role. This she considered to be at odds with any suggestion of the claimant being financially disadvantaged by the move. The claimant's response was that he had worked a lot of overtime at Grangemouth before his injury but could no longer do as much since then. He added that he did not have the opportunity to work overtime at Rosyth. Ms MacLennan did not know about the overtime situation for either role, but was aware that overtime was available generally at Grangemouth owing to it being operational around the clock, seven days a week.

53. Ms MacLennan described the new aspect of the claim to be *'very concerning'* to the respondent, particularly as she considered the claimant should have approached HR, occupational health or a manager to discuss any ongoing pain or limitations in his functioning in the Grangemouth role. He could then have been reviewed again by Dr Reed. She reminded the claimant that Dr Reed was of the opinion by 19 November 2018 that the claimant was ready to begin a phased return to his role, and that the respondent went along with his recommendations as to how that should be implemented. There were no reports of ongoing issues to his manager, Mr Heeps.

54. She again described the development in his claim to be *'very significant and worrying'* and advised him to discuss it again with his solicitor. She asked him to contact her by the end of that week with an update on whether he was still proceeding with the allegation. If he did, she said the respondent would have to decide whether to begin a more formal investigation.

55. After the meeting Ms MacLennan got in touch with Ms Lowey about the conversation the claimant had described. Ms Lowey's response is noted in some detail as part of the note of the meeting. It was described as a casual conversation. The claimant's ankle was mentioned. He felt it was better whilst trialling the Rosyth role as there was less climbing and walking involved. The claimant asked her to contact HR to say that the move would be more beneficial for his ankle. She took that to be an attempt by him to improve his chance of securing the role. There is an implication that she thought he was trying to influence the process of selecting a candidate for the role.

56. The claimant called Ms MacLennan two days later on Wednesday 27 May 2020, to report that he had discussed his claim again with his solicitors and that their decision was to progress with the new part. Again the new aspect was described by Ms MacLennan in her note as an allegation that the claimant had been forced to move roles. Ms MacLennan registered her disappointment and told the claimant he would be notified of the next steps to be taken regarding a formal investigation.

Investigation by Angela McAllister

57. In late May or early June 2020 Ms McAllister was approached and asked to investigate the new aspect of the claimant's personal injury claim. She was based at Tilbury in London and was asked to undertake the investigation as she was remote and unconnected with the individuals and events concerned.

58. She believed that the claimant was alleging he was forced to move to Rosyth by the management team, as that is what she had been briefed at the outset. She did not know whether what she was investigating was, or would become, a disciplinary matter. She was unsure to begin with whether there was any apparent misconduct. She did not apparently describe her remit as a disciplinary investigator to anyone she spoke to.

59. She obtained emails from Mr Heeps and Mr Watson suggesting that the claimant had chosen to switch roles. Mr Heeps had a call with her about the issue on 17 June 2020.

60. Ms McAllister had a telephone conversation with the claimant on 19 June 2020. She prepared a note of it [89-90]. She had telephoned him before and left a voicemail, and the claimant then called her back. She introduced herself as the person appointed to investigate the new aspect of his personal injury claim. She explained that she would normally have met with him face to face and taken a statement, but restrictions imposed in response to Covid-19 prevented that. In her evidence she accepted that the claimant might not have appreciated the gravity of the concerns she was investigating. However, he seemed to her comfortable answering her questions. She did not provide him with any documents before the conversation got underway.

61. Ms McAllister said she needed to explore why the claimant had moved to the Rosyth role, and his position on how that had affected his earnings in light of what the loss adjusters had said. She did not require the claimant to have the discussion at this point, and instead could reschedule the call. However the claimant was content to speak, and the conversation continued.

62. Ms McAllister asked the claimant about why he had moved from Grangemouth to Rosyth. He referred to his injury, the treatment he received and his periods of absence from work. He mentioned that he had asked occupational health to recommend that the respondent explore other jobs for him, as working on the straddles and climbing ladders was hard.

63. The claimant described seeing the Rosyth vacancy and discussing it with Mr Heeps. He said Mr Heeps had asked him if he fancied a change, but he had replied that it was because of his ankle, and so Mr Heeps had sent the claimant to speak to Ms Lowey in the respondent's occupational health department. He had seen Ms Lowey and she said she would review him and recommend to HR that he move to Rosyth. This was a reference to the same conversation that he had raised when speaking to Ms MacLennan on 25 May 2020.

64. Ms McAllister asked the claimant if he was still under occupational health review or taking medication. He replied that he was not seeing occupational health but was taking painkillers regularly. He said working in Grangemouth was untenable as he was in constant pain and had to move. She asked him to confirm when he had first raised his claim, and he said it was while he was still at Grangemouth. The conversation came to a close.

Raising of personal injury action by way of Summons

65. The claimant's personal injury action was formally commenced on 18 June 2020 when a summons was signeted by the Court of Session – referred to below as the 'Summons'. It was served on the respondent on 22 June 2020.

66. The Summons [80-83] sought the sum of £175,000 by way of damages, together with interest from the accident date and legal expenses. The statement of claim narrated the claimant's account of the accident and his resulting injury. It alleged that as a consequence of the accident, for which the respondent was held liable, he sustained loss, injury and damage. The nature and extent of the injury was described. The claimant was said to continue to have pain when on his feet for prolonged periods, his deltoid in the injured foot

was not fully functioning and damage to articular cartilage was also contributing to his ongoing symptoms. It was said that further surgery may be required to reconstruct the deltoid ligament, and the medical process involved was described. The claimant's two periods of absence were referred to, and it was said that the claimant had continued to have flare-ups of pain when at work in between them. The latter absence was specified to have been between April 2018 and November 2018.

67. The Summons went on to state the following in relation to the claimant's change of roles:

> *'On 9th March 2020 the pursuer moved to a new role of electrician at the defender's Port of Rosyth. He moved because of his injury. He had been struggling with climbing ladders to the extent required of his previous role in Grangemouth. His new role is less physically demanding. His earnings from employment are lower than they were in his previous role. The pursuer has lost and continues to lose earnings.'*

68. The summons alleged that the claimant's restricted ability to climb ladders would restrict his future employability putting him at a disadvantage on the job market. It was said he would lose pension rights. Among the heads of loss claimed were past loss of earnings, future loss of earnings, loss of employability and loss of pension rights as well as solatium, necessary services and other expenses.

Continued investigation by Ms McAllister

69. Ms McAllister received a copy of the Summons at some point during her investigation. She confirmed she did not read it fully.

70. Following her discussion with the claimant, Ms McAllister went back to Mr Heeps by email on 25 June 2020 with a set of questions. He added answers and emailed them back that day, along with some earlier emails in support. He suggested that Ms McAllister may also want to speak to occupational health.

71. Ms McAllister asked if the claimant was restricted from carrying out any work as an electrician at Grangemouth. Mr Heeps replied that he was not.

72. She asked if occupational health had advised Mr Heeps that the claimant has a medical condition that impacted on his ability to work as an Electrician at Grangemouth. He again replied no.

73. She asked whether Ms Lowey or Dr Reed had said it would be advisable for the claimant to consider alternative employment. He said that they had not from the point the claimant returned to work (assumed to be his second return in November 2018). He understood that the claimant was fully fit from then and had raised no further concerns.

74. She asked whether the claimant had raised that he had difficulty climbing ladders and walking on uneven ground. Mr Heeps said no, and he would have recorded any such matter if it had been raised.

75. She mentioned the claimant saying he had been in constant pain, and asked if Mr Heeps or occupational health knew of that. Mr Heeps did not know.

76. She asked what Mr Heeps would have done if he knew the claimant was in constant pain. He replied that he would ask the claimant to go to occupational health and make a record of the matter being raised.

77. She asked Mr Heeps if the role at Port of Rosyth would be a better one for the claimant, and if so, based on what. He said no, and that it was a matter for the claimant to decide.

78. She asked Mr Heeps if he had seen the claimant struggle with ladders. He had not.

79. She asked if the claimant did much overtime. Mr Heeps replied that he did his share of overtime and completion of shift turns (i.e. the early/night/back shift rotation).

80. She asked why Mr Heeps thought the claimant was interested in the Rosyth role. He recalled that the claimant had said before he would like to change environment, and had been based at Grangemouth for over ten years. He

believed the thought of moving to 24/7 shifts (at Grangemouth) was also a consideration.

81. She asked about the claimant being seconded to the Rosyth role initially. Mr Heeps said it was agreed to as it fitted with Rosyth having a lack of cover, and that he could have returned to his role at Grangemouth if it didn't work out.

82. She asked if Mr Heeps was *'surprised by the allegations made in the EL [Employment Liability] claim'*. He replied that he was.

83. Ms McAllister also emailed a set of questions to Ms Lowey, the Occupational Health Advisor, on 25 June 2020 and Ms Lowey emailed back her answers later that day. Ms McAllister's email attached her note of the conversation with the claimant on 19 June 2020.

84. Ms McAllister asked about any restrictions on the claimant carrying out his duties. Ms Lowey stated there were none.

85. She asked if OH advised Mr Heeps about the claimant's condition in terms of it impacting his ability in his role. Ms Lowey referred to the consultations with Dr Reed and his reports.

86. She asked if Dr Reed or OH had said to Mr Heeps it would be advisable for the claimant to consider alternative employment. She confirmed that this had not happened. She referred to a conversation on 25 September 2020 (but later recognised that this took place in 2018, during the second of the claimant's absences) about the claimant saying he could work on the Dock Gates.

87. She asked about Ms Lowey's recollection of the conversation with the claimant when he was considering making a permanent move to Rosyth. Ms Lowey treated the discussion as a casual conversation. She confirmed that the claimant had said he felt his ankle was better there as he did not have so much climbing and walking about to do. He had asked her to recommend to HR the transfer being made permanent as it would be beneficial for him with reference to his ankle. She took this as him asking her to influence the decision HR would take, assumed to be in the sense of improving his chances if there were other applicants. She said she would not be able to have any such influence, and did

not contact HR. She did not understand he was making an official complaint about his role at Grangemouth.

88. Ms McAllister asked if the claimant had mentioned difficulty with ladders and uneven ground. Ms Lowey said that he had only done so following his second return to work when discussing the Rosyth role as above.

89. She asked whether Ms Lowey had been made aware of the claimant being in constant pain or taking medication. The response was that this had not been reported since his return to work in November 2018. When asked what Ms Lowey would have done had she been made aware of such details, she said she would have referred the claimant back to Dr Reed for further assessment.

90. Ms Lowey was asked whether she thought the Rosyth role would have been better for the claimant. Her reply was that if the claimant believed so then she agreed. She did not understand it to be his only option.

91. Ms McAllister asked why the claimant was no longer subject to OH reviews. Ms Lowey confirmed that there was no indication that this was necessary since his return in November 2018, despite the claimant having an opportunity to raise any issues.

92. Ms Lowey was asked if she was surprised about the allegations in the EL claim. She said she was 'extremely' surprised. As a lot of effort was put into managing him back to work, and as there had been no communication about his ankle since then. Ms Lowey was said to be *'shocked to read that John felt he was forced to transfer to Rosyth Port.'*

93. Ms McAllister had a further telephone conversation with the claimant on 2 July 2020. She made a note of the discussion [99-100]. She had prepared a set of ten questions to ask him. She added in his answers during and after the call. There was a degree of discussion in the hearing about the accuracy of the note, particularly around whether the claimant had been asked precisely the questions as phrased in the note, and in that order. It is found that the claimant was asked these questions, either verbatim or in essence, albeit not in the

exact order in which they feature in the note. This was a product of the way the discussion developed. Therefore, the content of the note overall is an accurate record of what the claimant was asked and what he said, even if it does not show the precise flow of the conversation which took place.

94. The claimant was asked why he thought the Rosyth role would be easier. He said it was physically easier, with the ground being even and involving less ladder climbing. He had noticed a reduction in pain in his ankle. He was asked what specifically interested him in the role, and replied that he had been looking at external roles for a while as the role he was in was causing him pain and was therefore not a long term option. When the Rosyth job came up he went to Mr Heeps to discuss it. When asked why he waited until the Rosyth vacancy came up, and whether he had applied for anything else, he said he never saw any internal vacancies on the notice board before Rosyth, although had been looking. He had been actively looking outside of the respondent also.

95. The claimant was asked how he made his employer aware of the pain he was experiencing, and was there any evidence. He said that he told Mr Heeps and saw him *'loads of times'* to tell him he was struggling with his ankle. He understood the respondent's position to be that after his phased return had been completed allowances could no longer be made for him.

96. Ms McAllister asked about the pay difference between Rosyth and Grangemouth. The claimant said that basic pay at Rosyth was £1 per hour more, but there was no shift allowance and overtime was sporadic. In Grangemouth, overtime was said to be regular and intimated in advance, such as at weekends. The claimant had only worked one day of overtime at Rosyth, on a Saturday, and the rate was not enhanced. Ms McAllister commented that when an individual applies for an internal vacancy, they require to accept the terms that go with the role, although she did not suggest that the claimant would have appreciated the extent of overtime available.

97. Ms McAllister asked why the claimant thought his employer was taking his allegations so seriously. He said he was only following the advice of his solicitors, and that he applied for the Rosyth role because he could not continue

at Grangemouth with his ankle pain. When asked why he had instructed his lawyer *'to make a claim about being relocating to Rosyth/Loss of earnings'* he said he did not know what his lawyers had claimed, he had not seen 'the letter' and had only answered the questions he had been asked by them.

98. The claimant was asked whether he hoped to increase his claim against the respondent by making the new claim. He again said he was merely following his solicitors' advice, and had been consistent in what he said to everyone.

99. Ms McAllister asked the claimant if he believed he was *'behaving in an honest and straightforward way towards his Employer'.* He acknowledged that no one had forced him to transfer to Rosyth.

100. Lastly, Ms McAllister asked the claimant when he last had a medical. He said it had been his annual medical in December (2019) with someone named Anne Day. He said he had told her his ankle was still giving him pain.

101. Ms McAllister closed the call by thanking the claimant for his time. The claimant asked her if she knew what would be happening next, and she said she would pass her findings over to Ms Marshall back at Forth Ports in Scotland to decide if any action would be taken.

102. Ms McAllister did not see it as being within her remit as investigator to make formal findings or resolve apparent differences between the accounts of the people she spoke to. Her role was to gather evidence and pass it on to the next person in the process to deal with those issues. She considered that she was permitted to make recommendations, which she did as referred to below.

Investigation summary

103. Ms McAllister drew together her investigation in a 'Disciplinary investigation summary form' which she completed and dated 25 June 2020 [101-106]. It was therefore dated on the day she received email responses from Mr Heeps and Ms Lowey, but before her second conversation with the claimant on 2 July. However, elsewhere in the report her note of that conversation was referred to

as a relevant document and it is taken that the report was finalised after that discussion.

104. In a box entitled 'Summary of disciplinary allegation against employee' she stated:

> *'The allegation arises from an Employment Liability claim that John Pullar has lodged against the Company for an ankle injury that John sustained in 2017 and that John was forced to transfer permanently from an Electrician position at Grangemouth to an Electrician position at Rosyth, due to medical reasons.'*

105. In a separate box she summarised the evidence she had gathered, which was a combination of her own notes of conversations with individuals, emails and other items. She prepared an index of those documents to accompany the report which were numbered 1 to 24 on its last two pages. Not all of those items were produced for the hearing. For example, items 23 and 24 appeared to be information about overtime. The list did not include the claimant's solicitor's email of 7 May 2020, although it did include the redacted email of 13 May 2020 from Crawfords to the respondent. The list included 'Citation from the Sheriffs' office re John Pullar's claim' dated 22 June 2020. It is assumed this included the Summons which contained the details of the claim itself.

106. In a box titled 'Summary of investigation findings' Ms McAllister added:

> *'It is established that John Puller applied for the position voluntarily and asked for a four week trial which he was granted. After the trial period he asked to be taken on in a permanent position.*
>
> *'There is no evidence that John was forced to transfer to Rosyth as an Electrician on account of a medical condition.'*

107. In the hearing Ms McAllister conceded that the term 'no evidence' more properly meant 'no medical evidence', and that the claimant's own evidence had been that he had moved roles because of his ankle, albeit that he had not been forced.

108. Immediately below that, next to the question *'Invite to a disciplinary hearing? YES/NO'* Ms McAllister chose the option *'YES'*.

109. In completing this document Ms McAllister's investigation was brought to an end. She sent it back to Ms Marshall in the respondent's HR department in Scotland.

110. Ms McAllister spoke directly to Ms Lowey, Mr Heeps and the claimant during her investigation. She did not speak to anyone else. The claimant did not ask her to speak to any other person.

111. Ms McAllister was not contacted again in connection with the process until Mr Knox was in touch with her in the course of the claimant's appeal.

Disciplinary hearing 23 July 2020

112. Based on Ms McAllister's investigation a decision was taken by the respondent's management to invite the claimant to a disciplinary hearing. The Deputy Port Manager at Grangemouth, Craig Torrance, was identified to chair the hearing.

113. Mr Torrance wrote to the claimant on 14 July 2020. He confirmed that *'the Disciplinary Investigation has been completed'* and that it *'sought to establish the circumstances surrounding your Solicitor's claim that you were transferred to the Port of Rosyth on the basis that you were unable to cope physically with your duties as Electrician at the Port of Grangemouth.'*

114. Mr Torrance continued to say *'Your solicitor also alleges that as a result of this transfer you are now financially disadvantaged due to the lower earning potential at the Port of Rosyth.'*

115. A hearing was scheduled for Friday 17 July 2020.

116. It was said that the hearing would focus on the following allegation:

'That you have made false allegations against the Company regarding the reason for a transfer of job role to help support the validity of your personal injury clam.'

117. The letter stated that the claimant should be aware the allegation was being dealt with as 'Serious Misconduct', the penalty for which could be dismissal with payment in lieu of notice. Provision was made in the respondent's Group Disciplinary Procedure for such a sanction to be levied *'for more serious offences, or the repeated occurrence of less serious offences, or for unsatisfactory conduct or work performance which occurs during the currency of the final written warning.'*

118. The letter stated that a copy of Ms McAllister's report and the respondent's disciplinary procedure were attached.

119. The claimant asked to reschedule the hearing and Ms Liz Marshall, HR Manager, confirmed that it would be put back to 23 July 2020. As a result, Mr Torrance was on annual leave and so Mr Kenny Williamson, another Deputy Port Manager but for Leith, was brought in as chair. Ms Marshall was also to attend and the claimant had asked to call a Mr Jason Thirwall to the hearing, which was agreed.

120. The disciplinary hearing took place on the morning of 23 July 2020. Mr Williamson, Ms Marshall and the claimant attended. Mr Thirwall did not, but the claimant brought along a colleague, Mr Sean Hill instead.

121. Mr Williamson could not recall in evidence which documents he had available to him for the disciplinary hearing. It is found that he had the investigation summary report of Ms McAllister, as this was the principal document and as it had been sent to the claimant. Mr Williamson could not recall if he had any of the documents listed in the report, although he recalled having some notes. It is clear from the discussion that he had a copy of the email from Crawfords dated 13 May 2020, or a copy extract of it, and the Summons. He also had the various occupational reports of Dr Reed.

122. Ms Marshall took notes and converted them into a document after the hearing [110-117].

123. There was discussion of a 'disciplinary investigation summary pack' although it was unclear what was in the pack other than the investigation summary document itself which had been sent to the claimant ahead of the meeting. Some documents were copied and given to Mr Hill. It is understood that those were some of the documents itemised at the end of the investigation summary documents, but there is no specification as to which. There is reference to 'statements/letters/emails'.

124. The allegation as stated in the invitation letter was said to be the focus of the meeting and the claimant was reminded that he was at risk of being found to have committed serious misconduct as the term is used in the disciplinary policy.

125. The claimant was asked to describe and contrast the Grangemouth and Rosyth roles he had held. He was asked to comment on the notes taken of his conversations with Ms McAllister. The claimant had no comments to make about the first note but said the second (that of the conversation on 2 July 2020) contained inaccuracies. It was noted that the claimant had not sought to challenge those notes previously. As discussed above, the issue came down to whether each question had been asked in the order shown, and not the validity of the claimant's responses as recorded, which he confirmed were correct.

126. There was discussion of how the respondent's loss adjusters had related the claimant's solicitor's position about the transfer to Rosyth and reduction in earnings. The Summons was also discussed. The claimant was asked whether *'the claims made by his lawyer in the citation are accurate and that his move to Rosyth (and subsequent loss of earnings) was at the Company's instruction and not voluntary?'*. It is noted that this is not what the Summons says. The claimant said in reply that he had *'no option but to move from the Port of Grangemouth because his ankle was so painful; he would not have moved*

otherwise. As a consequence of this he had lost money because the Port of Grangemouth had a high overtime culture.'

127. Ms Marshall challenged the claimant on this, saying that it was not correct for him to say he had to move, when he had made a personal choice to move.

128. Mr Williamson asked the claimant to provide evidence of being forced to move to Rosyth, as he could see none in the materials. The claimant repeated that he had not been forced to move, and had never alleged that. He felt he had no option but to move because of his ankle and accepted that he had made a personal decision based on that. He had been looking for other work within the respondent and externally. He thought the Rosyth role would suit his circumstances. He therefore pursued it, initially on a trial basis and then permanently.

129. It appears that it is only at this point that the respondent became aware that the claimant was not claiming to have been forced to change jobs in the sense of being ordered or coerced.

130. Mr Williamson asked about the specific issue of alleged lost earnings raised in the Summons. He asked whether the claimant knew what the Rosyth role paid before taking it. The claimant said he knew he would earn less at Rosyth because of the prevalence of overtime at Grangemouth, including double time payments at weekends. In addition, a shift allowance was paid at Grangemouth when he worked a shift pattern. The claimant conceded that the hourly rate of pay at Rosyth was greater by one pound per hour. Mr Williamson raised that this equated to some £3,000 per year, which was pensionable. He accepted that there would be less overtime at Rosyth, but said that the claimant would have known that when making the move there.

131. Mr Williamson said that it was difficult to conduct a clear comparison between the pay situation for each role owing to the effect of Covid-19 on operations. It was not possible for him to quantify any reduction in overall earnings that had followed the move to Rosyth. He believed it could be the case. When asked in cross-examination if this was misconduct Mr Williamson stated that misconduct

was saying the claimant had to move because of the ankle injury and then claiming a loss.

132. Ms Marshall asked the claimant whether by introducing a claim for lost earnings after being granted a transfer to a new role he had requested, he might be taking advantage of the company. The claimant did not agree with that.

133. After an adjournment the discussion moved to the claimant's injury and rehabilitation back into work. It was suggested to the claimant that the picture painted by the documents was that he had recovered sufficiently well to undertake his normal duties without issue by January 2019 and that there was no evidence of him experiencing pain or difficulty from then on, save the 'odd niggle'. Ms Marshall asked whether there was anything to stop him returning to Grangemouth tomorrow. He said that he would be unable to, as the work did not suit his ankle. Again he was challenged by both Ms Marshall and Mr Williamson on this being inconsistent with the medical material and statements in the pack. He was accused of misrepresenting events to his lawyer. He responded to say that he had raised problems with his ankle to Mr Heeps and Ms Lowey. He denied misrepresenting matters to his solicitor. He suggested that the new claim was something for the respondent's lawyers and his own to come to an agreement about.

134. Mr Williamson ended the meeting by saying that he had no further questions for the moment, but would need to reflect on what had been discussed so far. He was not sure whether there needed to be a further meeting. His last recorded remark was to ask the claimant if he understood how serious his position was and that he could lose his job *'because of the accuracy of his claim'*. The claimant confirmed he understood.

135. Mr Hill, the claimant's companion in the hearing, took some notes of his own [161-171]. Those were not said to be a complete record of the meeting, but Mr Hill and the claimant contended that what had been noted was accurate, in the sense that each entry had been said in the meeting by the person it was attributed to. Mr Hill had not revised the notes since the point when the meeting ended. It was his handwritten notes which were produced to the tribunal, as he

had made them during the meeting. He had not edited them or converted them into another document.

136. Parts of Mr Hill's note are uncontroversial inasmuch as they are consistent with Ms Marshall's note. However, the following aspects are featured in his note but not hers:

136.1. Ms Marshall is said to say that the claimant's job is in jeopardy and his claim is fraudulent, and that he would be given five minutes to reflect on that;

136.2. She allegedly said that Mr Heeps did not agree with the claimant's statement, and therefore did the claimant consider Mr Heeps was lying;

136.3. In the context of the claimant saying that the issues were for the parties' legal representatives to be dealing with, she reportedly said *'This isn't about your solicitor, this is about you. This is your decision'*, and when the claimant said he needed to talk to his solicitor, she said *'Stop talking about solicitors.'*

136.4. The claimant was said to have been asked to read through the citation and tell Mr Williamson and Ms Marshall what it meant, and replied that it was a legal document and he was not qualified to make comments about it;

136.5. Mr Williamson was said to be pressing the claimant for his feelings on the wording of the new claim, and the claimant replied that he wanted to take legal advice on it;

136.6. Ms Marshall allegedly asked the claimant *'Where do we go with this now? Can you see it's fraudulent?'*, to which the claimant replied *'No'*;

136.7. The claimant being pressed again by Ms Marshall to drop his claim (taken to mean the earnings loss element and not the entire action) and replying that he needed time to think about it with his lawyer.

137. Mr Hill in his evidence confirmed that at the end of the meeting the claimant was given a 10 minute break in order to then let Mr Williamson and Ms Marshall

know how he wanted to proceed. This was an invitation to the claimant to confirm that he would instruct his solicitors to withdraw the loss of earnings element of his claim. The claimant tried to call his lawyer to seek advice but did not manage to reach him. At the end of the break the claimant said he wanted to speak to his lawyer and in response Ms Marshall said that he would hear further from her as she and Mr Williamson needed to discuss matters.

138. It is found that the notes of Mr Hill were substantially accurate. Whilst this was disputed to a large degree by Mr Williamson, it is noted that both the claimant and Mr Hill were prepared to confirm that the notes were accurate. Further, Mr Hill had no evident interest in the claim and indeed as a current employee of the respondent he may have been wary of providing evidence to the tribunal that he would have appreciated would be helpful to the claimant's case.

Further actions after disciplinary hearing

139. Mr Williamson decided to speak to some of the individuals who had been referred to in the disciplinary meeting.

140. Mr Williamson spoke to Ms Lowey on 5 August 2020 using Microsoft Teams. Ms Marshall also took part and made notes [118]. It was explained that Ms Lowey was being asked about her earlier email responses to Ms McAllister (of 25 June 2020). Ms Lowey confirmed she had nothing to add. She reiterated that the claimant had come to her but that she understood his motive to be that he wanted to improve his chance of securing the Rosyth role rather than to raise a medical complaint. She was able to add that at the claimant's routine medical in December 2018 he had ticked a box to indicate he had an ankle injury, but there was no record of a conversation about that, or any related medication.

141. Also on 5 August 2020, Mr Williamson spoke to Mr Heeps. This was by way of a telephone conference call, also involving Ms Marshall. A note was prepared by her [119-120].

142. Mr Williamson raised that the claimant had stated that Mr Heeps would have been aware of his experiencing ankle pain. Mr Heeps admitted he knew of the history of the injury and its effects, but said that the claimant had returned under occupational health direction. He mentioned that Derek McLean was the claimant's line manager and more involved from day to day. Mr McLean had in turn kept Mr Heeps up to date. Everything seemed to be progressing well and no issues were said to have been reported.

143. When asked what he would have done if the claimant had reported struggling with pain, Mr Heeps said that he would have contacted HR and OH for advice. He had had to do that in relation to other employees before.

144. Mr Heeps also said that the claimant had never approached him about the transfer to Rosyth, linking it to his ankle injury or difficulty with ladders. Mr Heeps also said he thought the claimant simply wished a change of focus in role, and possibly wanted to move to a position which did not involve shift work, as the Grangemouth role had done. He knew that the Grangemouth role involved climbing but less than in the past. He stressed that he would have expected the claimant to feel able to raise any issues with him.

145. Ms Marshall put it to Mr Heeps that the claimant had specifically referenced a discussion between the two on 24 January 2020 (the note reads 2021 in error) in which the claimant had said he was in pain, and Mr Heeps had advised him to see OH. He did not recall that conversation.

146. It was agreed that Mr McLean should be interviewed, given the responses of Mr Heeps. A conference call was arranged for Thursday 6 August 2020. Mr Williamson and Ms Marshall joined and again a note was drafted [121-123].

147. Ms Marshall gave context to the discussion by summarising the allegation which the disciplinary process was concerned with. She explained the claimant's position as being that he had experienced pain after returning to work in November 2018, that climbing ladders had made the pain worse, that the claimant had considered he had no option but to transfer to Rosyth and that he had been financially disadvantaged as a result.

148. Mr McLean recalled the claimant's absence and phased return to work, which went into January 2019. He recalled that around that time the claimant had reported *'the odd niggle'* but did not see it to be of concern. He recalled no other comments from the claimant. He was surprised to hear that the claimant said he had gone on experiencing pain, and said that had the claimant said that he would have referred him to OH and/or HR.

149. Mr Williamson asked Mr McLean about the claimant's overtime working. Mr McLean said he had carried out *'his fair share'* of overtime and had done so willingly. This was mainly at weekends and occasionally in midweek. Mr McLean thought it odd that the claimant would work overtime if he was in pain.

150. Mr McLean did not have much direct interaction with the claimant about the move to Rosyth. The claimant did not tell him the move was because of ankle pain. The claimant had not approached him about any personal matter, but had spoken to Mr Heeps about such things.

151. There was discussion about the amount of ladder climbing and work on straddle carriers the claimant would have undertaken, two tasks he had said particularly aggravated his ankle injury. Mr McLean explained that the claimant would climb ladders to work on straddle carriers. He explained what 'Engineers' would do but in context this is taken to include the claimant. Occasionally, Engineers would stay up on a straddle carrier to finish a job. There would be more of that work when working shifts (i.e. not the standard daytime hours). Those tasks would be intermittent with bursts of activity. Overall Mr McLean did not see the climbing and working on straddle carriers as a big part of the claimant's role.

152. Following his discussions with the three individuals, Mr Williamson wrote to the claimant to ask him to a reconvened disciplinary hearing on 11 August 2020.

Reconvened disciplinary hearing 11 August 2020

153. The reconvened disciplinary hearing was attended by the claimant, Mr Williamson, Ms Marshall and Craig Smith, a colleague of the claimant brought along at his request. A note of the discussion was prepared [125-129].

154. In the interim, Ms Marshall's note of the first meeting on 23 July 2020 had been circulated. The claimant said there were inaccuracies in it. He also said that he had not received a copy of the citation (i.e. the Summons) before, and was not able, or qualified, to comment on it. It was pointed out that the Summons was part of the investigation pack.

155. The claimant's specific issues with the minutes of the last meeting were that the claimant denied his claim was fraudulent, and that Ms Marshall had pressed him in the meeting to withdraw his full claim, but there was no mention of it. Ms Marshall denied saying anything to that effect and Mr Williamson would not accept the minutes were inaccurate. Ms Marshall pointed out that the focus of the meeting was the new claim for lost earnings in relation to the transfer to Rosyth, and not the original claim of personal injury.

156. Mr Williamson recapped on what he had found out by speaking to the three individuals since the first disciplinary meeting. It is not clear that the notes of those discussions were provided to the claimant.

157. The claimant could not recall with any detail a conversation with Mr McLean about his ankle troubling him. He said that when he first returned to work in November 2018 his ankle was rested and he was not performing shift work. As a result he was not in any particular pain. As the months progressed his ankle became more painful.

158. Mr Williamson pointed out that Ms Lowey, Mr Heeps and Mr McLean all denied that the claimant had raised ongoing issues with his ankle from the time of his return in November 2018. The claimant said he had spoken to Mr Heeps on two or three occasions about it, including at the end of January 2019 when discussing his desire to move to Rosyth. He also referred to a conversation on 10 January 2019 which he had recorded in his notebook. He said that he had

been installing a lighting tower and told Mr Heeps in his office that he was struggling with the pain in his ankle and leg. He confirmed that his ankle was very painful at this point.

159. There was a discussion about the type of work the claimant did in his role at Grangemouth. It was agreed that there was more climbing involved when the claimant worked in a shift pattern than when working daytime hours, although the claimant said he could be climbing up and down ladders dozens of times on a given shift. Mr Williamson asked the claimant if he had ever mentioned ankle pain to any of the Fitters he would have worked alongside on his jobs. The claimant said he often worked with Tam McPherson and Alan Martin and they were aware he was in pain. When asked if they made allowances for him, the claimant said it was a fast paced, high pressure environment and people just had to get on with it.

160. Mr Williamson raised the specific matter of alleged pension loss in the Summons. He produced an email which showed the claimant receiving slightly higher pension payments in the Rosyth role. The claimant said he had not discussed this matter with his solicitor.

161. Mr Williamson raised that the effects of Covid-19 prevented him from undertaking a proper comparison between overtime at Grangemouth and at Rosyth. He asked if the claimant had explained that to his solicitor. The claimant was reluctant to discuss conversations with his solicitor as he said they were legally privileged. Mr Williamson remarked that the earnings claim appeared more opportunistic than factual.

162. The claimant was asked what he had been doing to manage his pain. He replied that he had paid to see a podiatrist and had purchased specialist insoles. He was also doing exercises and taking painkillers.

163. The meeting was brought to a close with Mr Williamson saying he would notify the claimant as soon as he had reached an outcome.

Disciplinary outcome letter

164. Mr Williamson did not take any further investigatory or clarificatory steps following the second meeting and before reaching a decision in relation to the disciplinary allegation against the claimant. He did not for instance go back to Mr Heeps to ask him about the alleged meeting on 12 January 2019 the claimant had raised, or to speak to the two Fitters the claimant had said were aware of his ankle difficulties whilst working.

165. Mr Williamson reached a decision on the outcome of the process by 17 August 2020 and sent a letter to the claimant on that date [130-135].

166. Mr Williamson summarised the steps he had taken and set out in six points what he understood to be the sequence of events around the claimant's ankle injury, return to work and transfer of roles.

167. In a section of the letter titled 'Findings' Mr Williamson narrated what he believed to be the relevant facts of the situation.

168. Mr Williamson's findings are largely factually correct. However, they tended to omit evidence supporting the claimant's position, such as that he had said he had notified Ms McLennan, Ms Lowey, Mr Heeps, Mr McLean, Mr McPherson and Mr Martin of his ankle pain after returning to work in November 2018.

169. The essence of the findings was that the claimant's colleagues denied that he had raised any issues with ongoing ankle pain after the end of January 2019, and therefore those issues were found not to have existed.

170. Mr Williamson returned to the allegation which set the scope of the disciplinary process, namely:

> *'You have made false allegations against the Company regarding the reason for a transfer of job role to help support the validity of your personal injury claim.'*

171. He accepted that the claimant had not made false allegations, but had deliberately created a false impression of events. He believed the claimant had done so not merely to support the validity of his claim, but to enhance it. In

doing so, Mr Williamson thought the claimant sought to take advantage of the company.

172. The claimant's comments about Ms Lowey and Mr Heeps knowing, or being deemed to know, about his ankle pain beyond January 2019 were described as an attempt to discredit the reputation of those individuals.

173. The claimant's decision to accept the Rosyth role, knowing the terms and conditions which went with it, and then to allege loss of earnings was described as *'duplicitous'*. In his evidence Mr Williamson accepted that the claimant would have been entitled to seek loss of earnings as part of his court action had there been any, but he would have expected those to be claimed at the outset. The issue was more that the claimant had made the claim after he moved role.

174. Mr Williamson went on to consider the claimant's position that he had been asked to withdraw his entire action by Ms Marshall, rather than merely the loss of earnings part, at the first disciplinary meeting. Mr Williamson found that the claimant was wrong to assert the former.

175. He concluded that section of this letter by saying:

> *'In summary, I find that you have not been truthful and straightforward and I believe that you have deliberately misrepresented events in order to enhance your claim against the Company.'*

176. The final section of the letter set out Mr Williamson's decision. He said that he had taken into account the claimant's 13 years of service and previously clean disciplinary record. He expressed that he had hoped the claimant would appreciate and adopt the respondent's perspective in the course of the disciplinary process. He viewed the claimant's stance as being to the contrary and went on to say:

> *'Unfortunately, your approach to this matter has been uncompromising and according to you, you have had no option but to move and that you have suffered a loss of earnings as a consequence. Your position is at odds with the Company's position which leads me [to] believe that your conduct has breached our trust and confidence in you.*

'I therefore confirm that the allegation of Serious Misconduct has been upheld and you will be dismissed from your job with effect from 11 August 2020. Your dismissal will be in line with Stage 3 of the Company's Disciplinary Procedure. You will receive 12 weeks payment in lieu of notice plus payment for 2.5 days of accrued holidays untaken.'

177. A right of appeal to Derek Knox, Senior Port Manager, was confirmed.

178. In his evidence Mr Williamson said that had the claimant withdrawn his claim for loss of earnings, a different outcome may well have been reached. This was taken to mean action short of dismissal. However, the situation never arose.

Appeal

179. On 16 August 2020 the claimant emailed his grounds of appeal to Ms Marshall [136]. It appears he separately submitted a letter seeking to do the same thing [137], using much of the wording of the email but not identical to it. In both, the first and second grounds of appeal are *'I have not committed an act of misconduct'* and *'The company shouldn't have been discussing my claim with me when I have a solicitor'*. In the email, a third ground reads *'The allegations against me were not set out clearly'* whereas in the letter that changes to *'The allegations against me have not been proven.'* Under each ground was further text expanding on the point.

180. Mr Knox, the appointed appeal hearer, wrote to the claimant on 26 August 2020 to make arrangements for the appeal to be heard [138-139]. He acknowledged receipt of the claimant's email of 26 August 2020, which is deemed to be a reference to the claimant's email of 16 August. The three appeal grounds as he described them matched that email. He enclosed minutes of the reconvened disciplinary hearing on 11 August 2020, as well as the notes Ms Marshall had taken of Mr Williamson's discussions with Mr Heeps and Mr McLean on 5 and 6 August 2020 (but not the note of the discussion with Ms Lowey on the former date).

181. An appeal hearing was scheduled for 2 September 2020. Present at the appeal hearing were the claimant, Mr Craig Smith as his companion, Mr Knox and Ms Jackie Anderson, an HR Manager who took notes and generated a minute of the discussion afterwards. This was in table format, with the questions and comments of Mr Knox or Ms Anderson on the left of the page and the claimant's comments and responses on the right [140-151].

182. The claimant was asked to talk through his grounds of appeal. He did so. He said he had not committed an act of misconduct, but rather had acted on legal advice to seek his claimable losses. He felt that aspects of the disciplinary discussion were not appropriate given that he was being advised by a solicitor in relation to his claim. It was not for the company to be having a discussion with him directly over the subject matter of his claim when the solicitors of both parties would be dealing with the issues separately in that process. He mentioned being *'pressured to withdraw his claim'* in the disciplinary hearing. He said he was asked to disclose what he and his solicitor had said to each other. He felt he was being penalised for seeking losses which he was entitled to claim, and that this was not duplicity, fraud or opportunism, of which he had been accused. No case of misconduct had been established.

183. The claimant took issue with the content of Ms McAllister's note of her discussion with him on 2 July 2020. He said some questions had been changed from what he was asked, and some were completely different. Mr Knox said he would speak to Ms McAllister about the parts the claimant said were inaccurate.

184. There was discussion about the claimant's injury, his absences and the period after he returned to work in November 2018. The claimant outlined who he had told about difficulty with his ankle, when and what other steps he had taken such as looking for other roles, although he confirmed that he had not made any manager aware of him seeking work outside of the respondent. He gave his account of how he had become aware of the Rosyth role, discussed it with various people, applied and then permanently moved into it.

185. Mr Knox asked the claimant why he had not managed his situation more proactively before applying for the Rosyth role, or disclosed it formally to OH or Mr Heeps. The claimant said that he was trying his best to get back into the role and hoped his ankle would improve.

186. There was some discussion of the way the new claim had been phrased in the Summons. Ms Anderson said that the respondent had to investigate that in the context of the claim being insured.

187. Mr Knox asked what the claimant would have done had the Rosyth opportunity not come up. The claimant mentioned quality of life and that he was giving his ankle a chance (i.e. to improve), and also was looking for external roles.

188. There was discussion of the extent to which the claimant allegedly suffered a drop in earnings by moving to Rosyth. The claimant said he made less per month at Rosyth than he did at Grangemouth. He admitted he did not know the details of the respective pension benefits. He knew what his pay would be at Rosyth before taking the role.

189. Mr Knox said he would speak to Ms McAllister and Mr Heeps before reaching a decision on the appeal. He closed the meeting and said he would issue his outcome as soon as possible.

190. Mr Knox held a conference call with Mr Heeps later on 2 September 2020. Ms Anderson also participated and a note was taken [152]. On that day he also spoke to Jim Watson, the Engineering Manager at Rosyth that the claimant worked under. Again a note was made [153]. He also clarified with Ms McAllister what notes of their conversations she had sent to the claimant.

Appeal outcome letter

191. Mr Knox issued his outcome by letter on 3 September 2020, the day after the hearing [154-155]. During the tribunal hearing it was discovered that the second of its three pages was missing from the bundle, and it was added as page 154a.

192. The letter stated that Mr Knox interviewed Mr Heeps and Ms McAllister. Mr Knox said that his conversations with Mr Heeps and Ms McAllister reinforced what they had said before.

193. Mr Know acknowledged that he had also spoken to Mr Watson. He said that Mr Watson had not been advised of any concerns about the claimant's medical fitness during the secondment into the role or at the point it was made permanent. Mr Knox did not mention that Mr Watson had confirmed to him that the claimant had asked about the extent of ladder climbing in the role, and had said he had a *'dodgy ankle'*.

194. Mr Knox gave his conclusions on what the claimant had said about the earnings loss claim in the Summons. He said that this was *'at best a misrepresentation of the facts. It does not matter if the citation was prepared by your solicitor as your solicitor is acting on your behalf and with your instructions.'*

195. Mr Knox then stated that the decision had been taken to talk to the claimant to highlight the respondent's view that the move to Rosyth was completely voluntary. That was not an attempt to have him withdraw his entire claim, but only one element of it. He said that it was not the respondent's responsibility to challenge potential errors with the claimant's solicitor. In point of fact, there had been no error between the claimant and his solicitor on the question of whether the claimant chose or was forced to move to Rosyth. The process Mr Knox was describing was initiated on an inaccurate reading by the respondent, directly or through its loss adjusters, of the claimant's case in that respect. Only during the disciplinary hearing did Mr Williamson come to appreciate that the claimant was not saying he was forced to move.

196. Further, in discussing how Mr Knox believed the process should operate between the claimant and his solicitor in the preparation of hie personal injury claim, he omitted to note that such matters are likely to be covered by legal privilege. This was raised by the claimant himself as his second ground of appeal. Mr Knox's view was:

'In respect of your second ground of appeal, in relation to discussing your claim with you when you are legally represented, I confirm that the Company has a right to discuss any matter with its employees and draw to your attention matters the Company would raise at the sheriff court in response to the citation.'

197. In relation to the third ground, Mr Knox agreed with Mr Williamson that the claimant had deliberately created a false impression of events, rather than make false allegations against the respondent, to enhance his claim.

198. Mr Knox said that the claimant failed to answer his question why he did not take responsibility to raise with his line manager or OH that his ankle was painful and aggravated by his role between February 2019 and January 2020. He said he preferred the evidence of Mr Heeps, Mr McLean, Mr Watson, Ms Lowey, Dr Reed and *'the OH documentation which states you were fully fit to carry out your duties.'*

199. As a result of all he had outlined, Mr Knox believed that the allegation of serious misconduct was upheld and refused the claimant's appeal.

200. Mr Knox's decision represented the conclusion of the disciplinary process.

DISCUSSION AND CONCLUSIONS

Reason for dismissal

201. The parties appeared to agree that the claimant had been dismissed because of his conduct in terms of section 98(2)(b) ERA but disagree over whether the requirements of section 98(4) ERA had been satisfied.

202. It is found that conduct was the reason for the claimant's dismissal. That is evident from all the documents in the process, from investigation through to appeal. The claimant was dismissed because of what he consciously chose to do, namely to pursue a claim for monetary compensation as part of his personal injury action.

Reasonableness

203. In assessing the overall reasonableness of an employer's actions in such cases ***British Home Stores Ltd v Burchell [1978] IRLR 379*** will apply. That decision requires three things to be established before a conduct dismissal can be fair. First, the employer must genuinely believe the employee is guilty of misconduct. Secondly, there must be reasonable grounds for holding that belief. Third, the employer must have carried out as much investigation as was reasonable in the circumstances before reaching that belief.

Genuineness of belief in misconduct

204. Mr Williamson, as disciplinary hearing chair and the person who decided to dismiss the claimant, genuinely considered the claimant was guilty of misconduct. Specifically the finding was 'serious misconduct' as the term was used in the respondent's disciplinary rules and procedures. That was in essence misconduct that justified the possible sanction of dismissal, but with notice. His outcome letter of 17 August 2020 makes this clear. He concluded that by introducing a claim for loss of earnings into his existing personal injury action the claimant had *'deliberately created a false impression of events'*. In doing so he acknowledged that he was unable to make a finding that the original, more serious allegation was substantiated, namely making false allegations against the respondent regarding the reason for the transfer of role to help support the validity of the personal injury claim.

205. At the appeal stage, Mr Knox agreed with Mr Williamson's categorisation of the claimant's conduct and the sanction imposed.

206. There was no suggestion, from the claimant or in the evidence, that the respondent dismissed the claimant for an ulterior motive.

207. As such, it is found that the respondent satisfied the first limb of the ***Burchell*** test. It genuinely believed that the claimant was guilty of misconduct.

Reasonableness of belief in misconduct

208. It is next necessary to consider whether the respondent had reasonable grounds for holding the belief that the claimant was guilty of misconduct. In relation to this second limb of the ***Burchell*** test, it is found that the respondent did not have reasonable grounds for doing so.

209. Put simply, the ultimate finding by Mr Williamson that the claimant had *'deliberately created a false impression of events'* to such an extent that he was guilty of serious misconduct, as the term was used in the context of the respondent's disciplinary policy, was unsustainable.

210. The claimant's position in relation to a claim for loss of earnings was set out in essentially two documents – his solicitor's email of 7 May 2020 and the Summons itself. Both were carefully worded and their content could not, reasonably viewed, be said to have created a false impression of events. Their contents were either factually correct and evidently so at the time they were created, or set out a scenario which the claimant was offering to prove to a court at a future date in his claim. The claimant was entitled to do so. Mr Williamson was not in a position at the time of the disciplinary hearing to validly ascertain that a false impression of events was conveyed. At best, his assessment was premature and at worst it was without proper foundation.

211. What is telling in relation to the respondent's evaluation of the claimant's conduct is that from the outset reliance was placed on the email from Crawfords to the respondent dated 13 May 2020 and little or no consideration was given to the email from the claimant's solicitor which prompted it. The Crawfords email simplified and, unfortunately, distorted what the claimant's solicitor had said. This set in motion a chain of events beginning with Ms McLennan's interview of the claimant and culminating in the claimant's dismissal which was upheld on appeal. Ms McLennan did not even get the opportunity to see the email from Crawfords before interviewing the claimant about his rationale for making a claim for loss of earnings.

212. Anything which was said by the claimant's solicitor by email on 7 May 2020 was in any event superseded by the Summons, which represented the case

he was formally pursuing. Unlike the email, Ms McAllister and Mr Williamson did have sight of the Summons. The essence of the loss of earnings claim was conveyed in a few short sentences reproduced above at paragraph 67. There is nothing that the respondent could reasonably consider to be a deliberately false version of events in those words, much less anything that could be described as serious misconduct. However, the assumption persisted on the part of Ms McAllister, and then Mr Williamson, that the claimant was alleging being forced to change roles.

213. As a result of the gap in the respondent's understanding of the claimant's case it was only in the course of the disciplinary hearing before Mr Williamson in July 2020 that it became apparent to the respondent that the claimant was not alleging that he was forced to move to Rosyth. Whilst Mr Williamson then acknowledged the misunderstanding, his conclusion that the claimant was guilty, but of a lesser form of deception, belies a process that had so much momentum behind it that the outcome had an air of inevitability. This is reinforced by some of his additional findings, such as that he considered the claimant was attempting to damage the reputation of his colleagues by giving an alternative account of his interactions with them, and describing him as duplicitous.

214. The respondent clearly placed great importance on the evidence gathered from people the claimant interacted with between his return to work in November 2018 and the completion of his transfer to Rosyth in March 2020. There is nothing wrong with an employer weighing up the account of an accused employee against the recollections of other individuals involved in the same events or matters, and then evaluating one against the other. However, what the respondent was essentially trying to do in this process was prove a negative, in concluding that because the claimant had said little or nothing to certain colleagues about experiencing ongoing pain, or about this being the reason he wished to move roles, then those things were untrue. That does not follow. Even if the respondent was right to believe fully the accounts of those other employees who were consulted, that did not disprove the claimant's central assertion. Again that points to the issue that the respondent was essentially trying to determine part of the claimant's personal injury claim in

advance. This is evident for example in the wording of Mr Williamson's dismissal letter as reproduced above at paragraph 176: *'Your position is at odds…'.* That approach was repeated by Mr Knox as is clear from his outcome letter.

Adequacy of investigation

215. The third limb of ***Burchell*** requires consideration of whether the employer carried out as much investigation as was reasonable in the circumstances in order to reach its genuine belief in the employee's misconduct. That does not require an employer to uncover every metaphorical stone, but no obviously relevant line of enquiry should be omitted.

216. Considering again the disciplinary allegations raised, the evidence gathered and the claimant's response to them, it is found that the respondent's investigation did not meet the required legal standard. The legal test, as emphasised in ***Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23*** is whether the investigation fell within a band of reasonable approaches, regardless of whether or not the tribunal might have approached any particular aspect differently.

217. There were flaws in the respondent's investigation of the claimant's conduct. By way of example, Ms McAllister did not tell the claimant that her discussions with him were part of a disciplinary process. The gathering, itemising and passing on of documents from person to person in the process left something to be desired. In itself these would not have been sufficient to take the investigation outside the limits of what is a reasonable investigation. It should not be overlooked that much of the work was being undertaken remotely against the background of a pandemic.

218. However, the investigation fell short of the requirements of ***Burchell*** and ***Hitt*** in the following ways.

219. First, as is evident from the fundamental misunderstanding about the claimant's position until well into the process, the respondent did not properly

investigate and then identify what the claimant's new head of claim was. The disciplinary allegation on which the whole process was based was inaccurate from the start. The effect of the Crawfords email of 13 May 2020 was compounded by it not being provided to Ms MacLennan who had an initial informal discussion with the claimant before any decision to undertake an investigation was made. It was apparently provided to Ms McAllister, but neither she nor Ms MacLennan provided a copy to the claimant to comment on. Had either of them done so the process which followed may well have been different. The claimant could have confirmed clearly that he had given his solicitor no such instructions as far as the suggestion of him being forced by the respondent to move roles was concerned.

220. Ms McAllister also received the Summons before concluding her investigation, but had no particular recollection of considering it at the time. When it is read, it can be clearly appreciated that the claimant's position – by this point a formal one - was not as Crawfords had reported it.

221. In any event, the claimant's responses to Ms McAllister's questions on 19 June and 2 July 2020 should have made it clear he was not saying he was forced to transfer to Rosyth. She should not have concluded her investigation when she did and in the way she did, by recommending that the claimant be invited to a disciplinary hearing on the basis of the original allegation.

222. A second critical flaw in the respondent's investigation was that the claimant raised in his reconvened disciplinary hearing on 11 August 2020 that he had mentioned being in pain to two Fitters he worked alongside, Mr McPherson and Mr Martin. No steps were taken to speak to those individuals and verify their recollection. Given the importance the respondent placed on what the claimant had said to colleagues about his health, this was an obvious step to take. Although the information emerged in the disciplinary hearing rather than the investigatory phase, Mr Williamson had seen fit to interview three other individuals after the first meeting. There was no evident reason why he could not have a short conversation with these two additional employees. Their evidence could have been important, particularly if it corroborated what the claimant had said.

223. A third and even more fundamental flaw was in relation to the timing of the process. If it was not clear at the outset then it should have become evident as the process moved forward that it was premature. Whilst there is no absolute rule preventing an employer from investigating potential misconduct while parallel proceedings are anticipated or underway, there was always a risk which should have been apparent that in order to defend himself, the claimant would have to play out an aspect of his personal injury claim ahead of time. He should not have been put in that position. That risk began to become real from the point when he was asked by Ms MacLennan to consider dropping any plan to claim for loss of earnings, then to be told that further investigation would follow after he had discussed it with his solicitor and decided to continue with it. The issue came to a head in the initial disciplinary meeting when the claimant was pressed repeatedly to explain his case and withdraw it. In responding the claimant said with some justification that it was a matter for the parties' solicitors to deal with. He revisited the point as one of his appeal grounds, stressing that the respondent had strayed into the domain of privileged communications, but without success.

224. In relation to each of these three separate issues, and certainly when they are taken cumulatively, it is found that the respondent's investigation of the claimant's alleged misconduct did not fall within the band of reasonable responses.

The band of reasonable responses

225. In addition to the ***Burchell*** test, a tribunal must be satisfied that dismissal fell within the band of reasonable responses to the conduct in question which is open to an employer in that situation. The concept has been developed through a line of authorities including ***British Leyland UK Ltd v Swift [1981] IRLR 91*** and ***Iceland Frozen Foods Ltd v Jones [1982] IRLR 439.***

226. The principle recognises that in a given disciplinary scenario there may not be a single fair approach, and that provided the employer chooses one of a potentially larger number of fair outcomes that will be lawful even if another

employer in similar circumstances would have chosen another fair option which may have had different consequences for the employee. In some cases, a reasonable employer could decide to dismiss while another equally reasonably employer would only issue a final warning, or vice versa.

227. It is also important that it is the assessment of the employer which must be evaluated. Whether an employment tribunal would have decided on a different outcome is irrelevant to the question of fairness if the employer's own decision falls within the reasonableness range and the requirements of section 98(4) ERA generally. A tribunal must not substitute its own view for the employer's, but rather judge the employer against the above standard. How the employee faced with disciplinary allegations responds to them may also be relevant.

228. Mindful of the above approach which a tribunal must take in dealing with the question of reasonableness, it is found that dismissal of the claimant was not within the band of reasonable responses open to the respondent in these circumstances. Essentially that relates to the flaws which have already been referred to above in relation to the ***Burchell*** requirements. In summary:

228.1. The disciplinary process was based on a flawed accusation which should have been clarified quickly and efficiently. As a result of that the claimant found himself at risk of dismissal when he should not have been in that position. Although the respondent better understood his case by the time the dismissal decision was taken, the process had become tainted with the suggestion of deception and duplicity which was not supported by the evidence.

228.2. The whole disciplinary process was premature. There was insufficient evidence at the time of dismissal to substantiate any form of conduct serious enough to warrant dismissal, even with notice. It may well have been the case that had the personal injury claim proceeded to be heard in court or been disposed of at some other point along the way, that evidence would have been gathered on which to take action against the claimant, and with no similar prejudice to him in relation to other proceedings by taking that action. As it was, and as is stated

above, he was essentially put in a position to pursue his loss of earnings claim in disciplinary context to the satisfaction of one of his managers in order to save his job.

228.3. Related to the above point, the claimant was unreasonably pressured into both discussing and disclosing his loss of earnings claim and withdrawing it, on the clear basis that retaining his job depended on doing so. He raised that he was being asked to divulge legally privileged information but that was not heeded.

228.4. The above flaws were reinforced and compounded in the treatment of the claimant's appeal by Mr Knox.

229. It is found that no reasonable employer would conduct a disciplinary process, culminating in dismissal which was then upheld on appeal, in the above way.

230. Considering all of the above it follows that the respondent did not act reasonably in the sense it is required to under section 98(4) ERA.

Conclusions

231. As a result of the above findings it is determined that the claimant was unfairly dismissed.

232. It will therefore be necessary to schedule a hearing to determine remedy and the parties will be notified as to further procedure in that regard.

Employment Judge: Brian Campbell
Date of Judgment: 17 September 2021
Entered in register: 21 September 2021
and copied to parties