Case No: 2204264/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr A Fetnaci

Respondent: Property Management Integrated Service & Employment Co Ltd

Heard at: **London Central** **On:** **14-15 February 2022**

Before: **Employment Judge Gordon Walker (sitting alone)**

Representation
Claimant: Mr MacMillan, counsel
Respondent: Mrs Mankau, counsel

RESERVED JUDGMENT ON LIABILITY

1. The claim of unfair dismissal is well founded, the Claimant was unfairly dismissed by the Respondent.

2. A remedy hearing has been listed on 9 May 2022 by CVP, with a time estimate of one day.

REASONS

Introduction

1. The Respondent is a facilities management company. The Claimant was employed by the Respondent as the estate manager of one of the properties under its management. The Claimant's continuous employment commenced on 6 November 2017. His employment was terminated on 9 March 2021.

2. On 13 July 2021, the Claimant presented a claim of unfair dismissal, pursuant to section 98 Employment Rights Act 1996 ("ERA"). There was a period of ACAS early conciliation prior to this, from 18 May to 16 June 2021.

3. The Respondent contested the claim, maintaining that the Claimant was dismissed fairly on grounds of conduct.

Claimant's preliminary applications

4. The Claimant made two preliminary applications.

5. First, the Claimant applied to amend the name of the Respondent to Property Management Integrated Service & Employment Co Ltd. The Respondent did not object to the application. The name of the Respondent was amended to reflect the true identity of the Claimant's employer.

6. Second, the Claimant applied to amend to add a claim of wrongful dismissal. This application was contested. I heard submissions from both parties and gave my decision orally.

7. In summary, the Claimant's submissions were as follows:

    a. It was conceded that the claim had not been pleaded, since the relevant box in the claim form had not been ticked, and it was absent from the prayer found at the conclusion of the particulars of claim. However, it was asserted that the claim could be implied from the pleaded factual case;

    b. It was accepted that the proposed amendment was a substantial change (as it constituted a new cause of action), and that it was out of time;

c. The Claimant submitted that there was no real prejudice to the Respondent in allowing the amendment, as there was a considerable or complete factual overlap in the causes of action, and it would be no surprise to the Respondent, given the contents of the Claimant's witness statement, that he considered the dismissal to be in breach of contract;

d. The explanation put forward on behalf of the Claimant for (1) omitting to include the claim of wrongful dismissal initially; and (2) his delay in making the application to amend, was that his representation had been changeable, and his status had been akin to a litigant in person until the time that he had formally instructed solicitors in the weeks before the hearing.

8. The Respondent's submissions are summarised as follows:

a. The Respondent would be prejudiced by the proposed amendment. Further time would be needed to prepare cross examination and to explain the new cause of action to the witnesses before they gave their evidence. The length of cross examination would be increased as it would be necessary to go into the issues of health and safety in more detail. There would therefore be a risk that the case would then go part heard, which would be contrary to the overriding objective;

b. The new claim is out of time and the relevant test for extending time would be that of reasonable practicability. The Claimant's explanation was not satisfactory. He had the assistance of his union and a community law centre. He was not a litigant in person.

9. I gave my decision orally, which is summarised below:

a. In ***Vaughan v Modality Partnership*** UKEAT/0147/20 the EAT gave guidance to Employment Tribunals on the correct approach to adopt when considering an application to amend. The paramount consideration is the balancing of the relative injustice or hardship between the parties of allowing or refusing the amendment. In doing so, the Tribunal should consider the real practical consequences of allowing or refusing the amendment. The factors cited in ***Selkent Bus Co Ltd v***

Moore [1996] ICR 836 are not a checklist, but simply a discussion of the kinds of factors that are likely to be relevant when conducting that exercise;

b. The application to amend is refused. The balance of prejudice falls more heavily on the Respondent, because:

   i. If the amendment were allowed, the Respondent would need time to finalise their trial preparation. The new pleading would involve different areas of factual and legal inquiry as it would be necessary to determine whether the Claimant was actually guilty of gross misconduct. This would inevitably lengthen cross examination. The trial timetable is already tight, and the case would therefore probably go part heard, causing further delay and expense;

   ii. If the amendment were refused, the Claimant would not be able to bring a claim of wrongful dismissal in the Employment Tribunal. However, the claim is out of time. The Claimant would only be able to pursue the claim if he could persuade the Tribunal that it was not reasonably practicable to present the claim in time, and it was presented within a further reasonable period. It is unlikely that the Claimant would be able to do this, as his explanation for the omission was not persuasive. The Claimant had professional assistance from his union and a community law centre. He did not make the application to amend until the day of trial, despite having instructed solicitors and counsel before then.

Claims and issues

10. It was agreed that I would determine the issues of liability first, together with the issues of contributory conduct and *Polkey*. If appropriate, I would consider the other issues of remedy at a separate remedy hearing.

11. The legal and factual issues were discussed at the hearing and agreed to be as follows:

1. What was the reason or principal reason for dismissal? The Respondent says the reason was conduct.

2. Did the Respondent genuinely believe that the Claimant had committed the misconduct? The allegations of misconduct against the Claimant were:
   2.1 Failure to cooperate and follow the Occupational Health and Safety "OH&S" management system;
   2.2 Failure to take all reasonable steps to remain familiar with the requirements of the OH&S management system; and
   2.3 Failure to ensure that contractors were managed, and suitable records were kept, in order to control the OH&S risks arising from contractor activities that affect employees and other interested parties.

3. The Claimant asserts that the Respondent did not have a reasonable belief in the misconduct, because it was simply acting on its client's instructions from 15 January 2021.

4. Did the Respondent have reasonable grounds for their belief in the misconduct?

5. At the time the belief was formed, had the Respondent carried out a reasonable investigation?

6. The Claimant asserts that the Respondent did not have reasonable grounds and/or the investigation was inadequate, because:

   6.1 The Respondent did not carry out a reasonable search for the risk assessment method statements ("RAMs") and permits to work;
   6.2 The Respondent did not reasonably investigate the Claimant's allegation that the RAMs and permits to work had been deleted;
   6.3 The Respondent disregarded copies of the files that the Claimant provided at appeal.

7. If the reason was misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant?

8. Did the Respondent otherwise act in a procedurally fair manner? The Claimant asserts that the process was unfair because:

    8.1 The disciplinary allegations were not made clear to the Claimant before the 22 February 2021 disciplinary hearing; and

    8.2 The Respondent failed, at the appeal stage, to take into consideration the Claimant's new evidence.

9. Was dismissal within the range of reasonable responses? The Claimant asserts that it was not, because:

    9.1 The Claimant had inherited a poorly managed site;

    9.2 The Claimant's workload was too high;

    9.3 The Claimant had not been warned about health and safety concerns prior to his suspension; and

    9.4 The Claimant did not understand, and was not sufficiently trained, in the Respondent's process of reviewing generic RAMs.

<u>Compensation for unfair dismissal</u>

10. If the Claimant is successful in his claim, the Tribunal will consider issues of remedy. The Claimant seeks compensation only.

11. What basic award is payable to the Claimant, if any?

12. Would it be just and equitable to reduce the basic award because of the conduct of the Claimant before the dismissal? The Respondent relies on the Claimant's alleged misconduct. If so, to what extent?

13. If there is a compensatory award, how much should it be?

14. What financial losses has the dismissal caused the Claimant?

15. Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

16. For what period of loss should the Claimant be compensated?

17. Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?

18. If so, should the Claimant's compensation be reduced? By how much?

19. Did the Respondent unreasonably fail to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedure? The Claimant relies on the fact that the grievance was not considered separately from the disciplinary process.

20. If so, is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?

21. If the Claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct? The Respondent relies on the Claimant's alleged misconduct.

22. If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?

23. Does the statutory cap apply?

Procedure, documents and evidence heard

12. I heard evidence from the Claimant, and, on behalf of the Respondent, I heard from Paul Wilson (Head of Residential Facilities Management), Jason Taylor (Head of Central London Facilities Management), and Emma Wise (HR Business Partner). The Claimant produced an unsigned one-page statement from Cosmin Vaduza (Senior Concierge) but Mr Vaduza did not attend to give evidence in person.

13. The parties produced an agreed liability bundle of 960 pages. A remedy bundle of 682 pages was produced but not referred to. I explained that I would only read the documents that I was taken to during the course of the hearing.

14. The parties prepared a short reading list and written closing submissions. The Respondent also made oral closing submissions.

Findings of fact

15. The Respondent is a wholly owned subsidiary of Knight Frank LLP. It provides facilities management services and employs onsite staff within properties under the management of Knight Frank LLP.

16. On 1 October 2020 the Respondent took over the management of a block of apartments in Elephant and Castle in London, called One The Elephant ("OTE"). Prior to this, OTE was managed by Rendall and Rittner ("R&R").

17. The Claimant has worked as an estate manager for around 25 years. He is qualified by the institution of occupational safety and health ("IOSH").

18. The Claimant was employed by R&R as an estate manager from 6 November 2017. Prior to 1 October 2020, he was employed as the estate manager at OTE. On 1 October 2020 his employment TUPE transferred to the Respondent.

19. Initially, the Claimant was line managed by Mr Teixeira (Asset Manager). On 1 December 2020 the Claimant's direct line management was moved to Mr Wilson.

The Claimant's workload

20. On 4 December 2020, the Claimant emailed Mr Wilson, reporting that *"the workload and demands on my time as it stands at the moment, is unachievable and at times it is making me feel ill".*

21. The Claimant contends that his workload had doubled after the TUPE transfer. I accept his evidence on this point as Mr Wilson did not have direct knowledge of the Claimant's workload prior to the transfer, and he was therefore unable to confirm or deny the Claimant's assertion.

22. The Claimant and Mr Wilson exchanged emails about the Claimant's workload and met in person on 8 December 2020 to discuss the issue. It was agreed that some of the Claimant's tasks would be given to the senior concierge and the concierge team.

23. The Claimant's evidence was that he was just being given yet further work to do, as it was left to him to organise the redistribution of tasks. I accept his evidence on this point. Mr Wilson stated under cross examination that he left it

to the Claimant to do this, as he was best placed to do so, given his knowledge of everyone's day-to-day responsibilities.

24. Mr Wilson's evidence was that there was an intention to upskill the senior concierge and to restructure the team, but that those matters would take time to put in place. The Claimant's evidence was that the senior concierge was on holiday until January 2021 and therefore, beyond a discussion about changing the senior concierge's shift pattern, no changes were made to his role before the Claimant was suspended.

25. I find that no tangible steps were put in place before the Claimant's suspension to alleviate his increased workload.

The Claimant's training

26. Following the TUPE transfer, the Claimant was required to carry out 21 online training modules in a three-month period.

27. The Claimant received automated reminders to complete the training. For example, on 23 November 2020 he was informed by email that he had one week to complete five courses and one assessment.

28. Mr Wilson estimated that the modules would take between 20 to 45 minutes to complete. The Claimant was not given time off to complete the training.

29. The Claimant received a certificate to certify that he had completed the ISO 45001 induction and employee commitment training on 17 November 2020 with a score of 100%.

30. The training materials were not in the bundle. The Respondent's 53-page Occupational and Health and Safety (OH&S) Policy Manual was provided.

Occupational and Health and Safety (OH&S) Policy Manual ("the manual")

31. The manual refers to the Respondent's risk register. At paragraph 4.1.3 it states that the register will be reviewed or updated annually or following significant changes or by the onset of a significant event. The ongoing suitability of the register shall be assessed by Top Management as part of the Management Review.

32. Appendix 3 provides an organogram. Top Management is at the top, followed by the Operations Board. Building (Estate) Managers are at the level below.

33. Paragraph 5.1.3 states that top management and their respective service line board are responsible for (amongst other things) (1) ensuring the availability of resources (including human resource) essential to establish, implement, maintain and improve the OH&S management system; and (2) monitoring and reviewing OH&S performance and achievement of OH&S objectives, ensuring they are compatible with the strategic direction of the organisation.

34. Paragraph 5.3.6 states that the regional facilities management directors have the responsibility to (amongst other things) define and communicate roles and responsibilities to meet the requirements of the OH&S management system.

35. Paragraph 6.1.5 states that building managers (which is the Respondent's term for estate managers) will be responsible for ensuring risk registers are implemented at site level and reviewed annually as a minimum. Paragraph 6.1.8 states that assessing OH&S risks is a continuous process that takes into account any changes to the work environment including to any changes to the organisational structure or working procedures resulting from contract renewal or amendment and replacement or addition of contractors and service providers.

36. Section 7.3 deals with documentation. This states at 7.3.2 that the Respondent will ensure that consistent documentation and records are used at all managed properties. These are detailed in the risk registers and include risk assessments, safe systems of works, and permits to work. There is a reference to other policies about document control, but those were not referred to during the hearing.

37. Section 8.2 relates to contractors. It states at 8.2.3 that the Respondent is responsible for ensuring that contractors are managed in order to control the OH&S risks arising from contractor activities that affect employees and other interested parties. Documented information will be maintained to evidence contractor management. This will include review of contractor risk assessments, method statements and worker competency. Paragraph 8.2.4 states that the effectiveness of contractor management will be assessed during

internal audit and by Top Management during the Management Review. Section 9.3 sets out the procedure for the management review.

The complaint about the Claimant

38. On 13 January 2021 Mr Berg, Board Chair and Director of OTE, emailed Mr Wilson and Mr Toogood (Partner. Department Head Residential Asset Management / Customer Care of Knight Frank), to raise some health and safety concerns regarding the Claimant. These concerns related to a range of maintenance issues. There was also an allegation that contractors were not being managed properly whilst onsite.

39. These concerns had originated from Air Cool Engineering Service and Maintenance Ltd ("ACE"). ACE was the main contractor at OTE. They were on site on Wednesdays and Fridays to carry out weekly checks and to deal with minor maintenance issues.

40. Mr Berg, Mr Toogood, and Mr Wilson spoke about the issues later that day and exchanged further emails on the subject.

41. ACE formalised their concerns by letter dated 17 January 2021, which concluded as follows: *"The current way in which the building is being managed falls short of the expected and we will on your invitation to tender for the annual contract due to commence on 01-04-2021 have to look carefully at any proposed changes to the systems"*. Mr Wilson considered this to be a threat by ACE to pull out of their contract with the Respondent's client OTE.

42. Mr Berg wrote again on 26 January 2021, stating *"we now feel very uncomfortable for the current Estate Manager to return and resume his duties at OTE, and we would seek for Knight Frank to please suggest another member of your team who can continue the relationship and manage the site here at OTE"*.

Risk Assessment Method Statements ("RAMs") and Permits to Work

43. RAMs are documents used to identify and record the health and safety risks of a task on site, and explain how those risks can be mitigated. They include a method statement of how to conduct the task in a way that reduces or removes the risks.

44. A permit to work is issued after the RAM is approved. It gives details of the company carrying out the work, the work that is taking place, and the time and date that the work will be conducted.

45. ACE, as the main contractor, had generic RAMs in place to cover their work on site. Those RAMs would need to be reviewed. Mr Taylor explained in oral evidence that there was no *"predetermined frequency"* for reviewing generic RAMs. He said that the Respondent's training stated that good practice would be to review one generic RAM each month. He confirmed that, given that there may be three such RAMs for a site, this would mean each RAM would be reviewed once a quarter. Mr Taylor referred to paragraph 8.2.3 of the manual as evidence to support his assertion that the generic RAMs would need to be reviewed if there was a "significant change". This would include the change of management of OTE from R&R to the Respondent.

<u>The Claimant's suspension</u>

46. The Claimant was suspended on 15 January 2021.

47. The Claimant was informed of the suspension at a Microsoft Teams meeting with Mr Wilson and Ms Gibson (Estate Director). This was followed by a suspension letter dated the same day.

48. The suspension letter stated that there had been "a number of allegations" made. Mr Wilson recalls that, at the Teams meeting, he informed the Claimant that a number of serious health and safety concerns had been raised in relation to the building. The Claimant recalls that the was informed that a health and safety allegation (singular) that had been made, but that Mr Wilson declined to provide him with any further information.

49. It is common ground that the Claimant was informed at the time of his suspension that there had been an allegation made against him relating to health and safety, but he was not provided with specific details of the complaint at that time.

50. Whether the Claimant was told at the meeting that there was one or more allegations is not material in my opinion. The concerns raised about the Claimant could be described in the plural (as there were several issues raised)

or in the singular (as they all arose from the same source). In any event, by the time he received the suspension letter, the Claimant was aware that there were allegations (plural) made against him.

The investigation

51. The Claimant attended investigation meetings on 20 and 29 January 2021. The first meeting was chaired by Ms Gibson. The investigation process was subsequently passed to Mr Wilson, who chaired the second meeting, as Ms Gibson became unwell.

52. At the first investigation meeting, the Claimant was asked about the maintenance issues that had been raised by ACE. The Respondent was broadly satisfied with the Claimant's responses to those issues.

53. At the conclusion of the meeting, Ms Gibson then asked what she described as *"some overall questions"*. She asked the Claimant about RAMs and permits to work. The Claimant confirmed that all the necessary documentation was in place and could be found in "my documents" on his laptop.

54. On 23 January 2021, Ms Gibson and Mr Ahmed (Interim Estate Manager at OTE during the Claimant's suspension) conducted a site visit to search for these documents. They found very few RAMs or permits to work located on the Claimant's laptop or on the shared drive. Those that were found were unsigned and/or potentially out of date.

55. The site visit was discussed with the Claimant at the second investigation meeting. Mr Wilson informed the Claimant that only two RAMs had been found, and that this did not correlate with the work that had been done on site. The Claimant said he did not know what the concern was. He maintained that there were only two works that had required RAMs since the Respondent had been on site. The Claimant said that he did not have access to the generic RAMs in place for ACE, as they were still stored with R&R. He confirmed that he had not asked to see those RAMs since the Respondent took over management of OTE. The Claimant complained that he was unclear on the process, he had not been trained, and he was never told that, for their visits, ACE needed a permit to work.

The disciplinary hearing

56. By email from Ms Wise dated 11 February 2021, the Claimant was invited to a disciplinary hearing on 15 February 2021. The email stated that the allegations made against the Claimant were: "*failure to comply with [the Respondent's] Compliance and Health and Safety procedures resulting in risk to the overall business, the onsite team and the residents. [And] Some other substantial reason specifically the client has expressed concerns regarding your ability to run the Estate".* The Claimant was provided with the disciplinary procedure and the site visit notes.

57. The disciplinary hearing was postponed to 22 February 2021 to accommodate the availability of the Claimant's trade union representative.

58. The 22 February 2021 hearing was adjourned as the Claimant stated that he was unclear of the allegations against him.

59. On 23 February 2021 Ms Wise emailed the Claimant, stating that the allegations made against him were:

    a. *Failure to comply with [the Respondent's] Compliance and Health and Safety procedures resulting in risk to the overall business, the onsite team and the residents. Specifically:*

        i. *Failure to co-operate and follow the OH&S management system*
        ii. *Failure to take all reasonable steps to remain familiar with the requirements of the OH&S management system*
        iii. *Failure to ensure that necessary training is received and recorded by their direct reports*
        iv. *Failure to ensure that contractors are managed, and suitable records kept, in order to control the OH&S risks arising from contractor activities that affect employees and other interested parties.*

    b. *Some other substantial reason specifically the client has expressed concerns regarding your ability to run the Estate as outlined in attachment 1.*

60. Ms Wise attached the following documents to her email of 23 February 2021:

a. The Respondent's disciplinary policy;
b. The suspension letter dated 15 January 2021;
c. The notes from the two investigation meetings;
d. The notes from the site visit of 23 January 2021;
e. The complaints from ACE (dated 17 January 2021) and OTE (through Mr Berg) (dated 26 January 2021).

61. Although the complaints were included in the documentation sent to the Claimant, Mr Taylor confirmed that many of the points raised in the complaints had been addressed satisfactorily and it was the findings of the Respondent's investigations, and in particular the site visit of 23 January 2021, that determined that there was a disciplinary case to answer.

62. The disciplinary hearing was initially scheduled for 25 February 2021, but this was postponed to 1 March 2021 to accommodate the availability of the Claimant's trade union representative.

63. Shortly before the 1 March 2021 hearing commenced, the Claimant's trade union representative submitted a grievance on the Claimant's behalf. The points raised in the grievance were closely related to the investigation and disciplinary process. The Respondent therefore decided to consider the grievance as part of the disciplinary process. In oral evidence, Mr Taylor and Ms Wise stated that the Claimant agreed to this course of action. This evidence was not challenged by the Claimant and therefore I accept that the Claimant consented to this approach.

64. At the 1 March 2021 disciplinary hearing, Mr Taylor asked the Claimant about RAMs, permits to work, and the Respondent's OH&S management system.

65. The Claimant initially stated that he had not been trained on the management system. When Mr Taylor reminded the Claimant of the online learning system, he stated that he had completed it, but he had not reviewed it. He confirmed that he had seen the manual as part of his induction, but that he *"wouldn't remember everything".*

66. The Claimant was asked whether he had implemented a risk register. He said that he had not started it yet as he was sick with his workload.

67. The Claimant explained that the R&R process for reviewing generic risk assessments was to do so every quarter. He said that the RAMs were on the R&R system, and he had lost access to this.

68. The Claimant concluded the meeting by stating that his workload had dramatically increased, and he had not received the extra resource he needed.

69. Mr Taylor adjourned the hearing to conduct further investigation. He spoke to Mr Wilson about the RAMs, permits to work, and the support provided to the Claimant. Mr Wilson informed Mr Taylor that the Claimant was being supported by way of weekly remote meetings and additional resource was given to assist with completing tasks on the Respondent's on-line compliance system. No minutes were produced of this conversation. Mr Taylor explained in evidence that the additional resource provided to the Claimant was in managing the risk wise system, which was managed by others, even though this would usually form part of the Claimant's duties. Given that this had never formed part of the Claimant's responsibilities, this support did not serve to alleviate the two-fold increase to the Claimant's workload.

70. The disciplinary hearing was reconvened on 9 March 2021. Mr Taylor identified that the Claimant appeared to still be working under R&R processes, even though he had been trained in the Respondent's processes and he had stated, as part of that training, that he had read and understood the requirements of the Respondent's management system. The Claimant explained that it was a lengthy document and that he would not remember everything. He said that there had been pressure to finish 21 training modules by the end of November.

<u>Dismissal</u>

71. Mr Taylor concluded the 3 March 2021 hearing by informing the Claimant that he was dismissed on grounds of gross misconduct.

72. The outcome of the disciplinary meeting, and the grievance, was communicated to the Claimant by letter dated 15 March 2021.

73. This letter stated that the Claimant was dismissed without notice due to the seriousness of the health and safety breaches. The Respondent's disciplinary procedure cites examples of gross misconduct, which include a failure by the

employee to comply with the Health and Safety policy, whether or not harm results.

74. The dismissal letter stated as follows in respect of the disciplinary findings:

When reaching the decision to dismiss you the following was considered:

- *You had completed the training on the Learning Management System confirming that you had understood the Promise protocols and processes*
- *You confirmed that Permits to Work and RAMs had been completed but as part of the investigations that took place, these were not where you had confirmed they were. On further investigation, you had confirmed that you were following the Rendall and Rittner processes rather than the Promise processes, despite having confirmed that you had correct training and had understood the training*
- *You were an experienced Estate Manager, having TUPE transferred into Promise*
- *You had opportunity to ask for help on a number of occasions*
- *There is sufficient evidence substantiating that:*
    - *Failure to co-operate and follow the OH&S management system*
    - *Failure to take all reasonable steps to remain familiar with the requirements of theOH&S management system*
    - *Failure to ensure that contractors are managed, and suitable records kept, in order to control the OH&S risks arising from contractor activities that affect employees and other interested parties*

75. In oral evidence, Mr Taylor explained that the Claimant was dismissed because he had failed to (1) review the generic RAMs for ACE; (2) store the generic ACE RAMs in an accessible place; and (3) maintain the risk register.

76. Mr Taylor stated that, if the only failing on the part of the Claimant had been not reviewing the generic ACE RAMs, this would have been a performance issue.

77. However, Mr Taylor considered that there was a systemic failure by the Claimant. This was evidenced by the fact that (1) the Claimant had not reviewed the RAMs following the significant change of the Respondent taking over the contract for management of OTE; and (2) the Claimant's failure to store the RAMs in an accessible place.

78. Mr Taylor stated that, if there had been a site audit by the Health and Safety Executive, it is likely that enforcement action would have been taken, as the RAMs were not accessible. Such action would be a matter of public record against the Respondent and/or OTE. The Respondent would have had to

disclose this when it tendered for new business. This evidence was not challenged by the Claimant, and I therefore accept it.

79. Mr Taylor stated that, if he had decided that a lesser sanction was appropriate, he would have tried to persuade the client to change their mind and take the Claimant back on site. If that had failed, the Claimant could have been redeployed to a different site. I accept Mr Taylor's evidence on this point. Given the size of the Respondent, it is probable that redeployment opportunities could have been available.

Appeal

80. On 19 March 2021, the Claimant appealed the decision to dismiss.

81. The Claimant attended an appeal hearing on 7 April 2021, chaired by Mr Watson (Managing Director of the Respondent).

82. On 9 April 2021 the Claimant sent an email to the Respondent with some RAMs that he had discovered when clearing his work bag, which he stated would be found on the estate manager's laptop. The Claimant also included a deleted files notification from OneDrive. This notification was dated 13 February 2021 and stated: *"we noticed that you recently deleted a large number of files from your OneDrive*".

83. I accept the evidence of the Respondent that, on 23 January 2021, they searched all the files on the estate manager's laptop. I have accepted this evidence because:

    a. It is corroborated by the notes of the site visit; and

    b. The findings of the site visit were consistent with the Claimant's statement to Mr Wilson on 29 January 2021 that there were only two works that had required RAMs since the Respondent had been on site.

84. I therefore reject the Claimant's suggestion that the RAMs he discovered in his work bag were also stored on the estate manager's laptop.

85. The outcome of the appeal was communicated by letter dated 4 May 2021. The letter set out the Claimant's grounds of appeal and summarised the points that the Claimant had made at the hearing. The further information sent by the

Claimant in his email on 9 April 2021 was not expressly referred to. The letter concluded that *"further to your dismissal you have not provided any new evidence which could change the outcome of your dismissal and in consideration of all of the above, I have decided that your dismissal should be upheld."*

The law

86. Section 94 ERA provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by his employer.

87. Section 98 ERA provides, so far as relevant:

> *(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –*
> *(a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) A reason falls within this subsection if it—*
>
> *…*
> *(b) relates to the conduct of the employee ... ...*
>
> *(4) ... where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
> *(b) shall be determined in accordance with equity and the substantial merits of the case.*

88. As noted in ***Abernethy v Mott, Hay and Anderson*** [1974] ICR 323, the reason for dismissal is the:

> *'… set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee.'*

89. It is a basic proposition of disciplinary proceedings that the charge against the employee facing dismissal should be precisely framed: ***Strouthos v London Underground Ltd*** [2004] IRLR 636.

90. The EAT has given guidance to Tribunals in considering the reasonableness of a conduct dismissal. In ***Burchell v British Home Stores*** [1980] ICR 303 at 304:

> *'What I have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily,*

dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case'.

91. There are therefore three stages and questions to consider:

    (1) did the Respondent genuinely believe the Claimant was guilty of the alleged misconduct?

    (2) did the Respondent hold that belief on reasonable grounds?

    (3) did the Respondent carry out a proper and adequate investigation?

92. Whereas the burden of proving the reason for dismissal lies on the Respondent, the second and third stages of the ***Burchell*** test are neutral as to burden of proof (***Boys and Girls Welfare Society v McDonald*** [1996] IRLR 129, [1997] ICR 693).

93. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. In ***Turner v East Midlands Trains Ltd*** [2013] ICR 525, Elias LJ (at paras 16–17) held:

    '… the band of reasonable responses test does not simply apply to the question whether the sanction of dismissal was permissible; it bears upon all aspects of the dismissal process. This includes whether the procedures adopted by the employer were adequate: see Whitbread plc (trading as Whitbread Medway Inns) v Hall [2001] ICR 699; and whether the pre-dismissal investigation was fair and appropriate: see J Sainsbury plc v Hitt [2003] ICR 111.'

94. In looking at whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in my view, have been appropriate, but rather whether dismissal was within the band of reasonable responses. The fact that other employers might reasonably have been more lenient is irrelevant (***British Leyland (UK) Ltd v Swift*** [1981] IRLR 91). The question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for me to substitute my own decision.

95. An employee's culpable or blameworthy conduct prior to dismissal can potentially reduce the value of the basic and compensatory award.

96. In relation to the basic award, section 122 (2) ERA states:

Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

97. In relation to the compensatory award, section 123(6) ERA states:

Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

98. In ***Hollier v Plysu Ltd*** [1983] IRLR 260, the EAT suggested that the contribution should be assessed broadly and should generally fall within the following categories: wholly to blame (100 per cent); largely to blame (75 per cent); employer and employee equally to blame (50 per cent); slightly to blame (25 per cent).

99. General guidance on *Polkey* reductions was provided in ***Software 2000 Ltd v Andrews*** [2007] ICR 825, to which I have had regard. Paragraph 54 of the judgment states as follows:

54. The following principles emerge from these cases. (1) In assessing compensation the task of the tribunal is to assess the loss flowing from the dismissal, using its common sense, experience and sense of justice. In the normal case that requires it to assess for how long the employee would have been employed but for the dismissal. (2) If the employer seeks to contend that the employee would or might have ceased to be employed in any event had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for him to adduce any relevant evidence on which he wishes to rely. However, the tribunal must have regard to all the evidence when making that assessment, including any evidence from the employee himself. (He might, for example, have given evidence that he had intended to retire in the near future.) (3) However, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made. (4) Whether that is the position is a matter of impression and judgment for the tribunal. But in reaching that decision the tribunal must direct itself properly. It must recognise that it should have regard to any material and reliable evidence which might assist it in fixing just compensation, even if there are limits to the extent to which it can confidently predict what might have been; and it must appreciate that a degree of uncertainty is an inevitable feature of the exercise. The mere fact that an element of speculation is involved is not a reason for refusing to have regard to the evidence. (5) An appellate court must be wary about interfering with the tribunal's assessment that the exercise is too speculative. However, it must interfere if the tribunal has not directed itself properly and has taken too narrow a view of its role. (6) The section 98A(2) and Polkey exercises run in parallel and will often involve consideration of the same evidence, but they must not be conflated. It follows that even if a tribunal considers that some of the evidence or potential evidence to be too speculative to form any sensible view as to whether dismissal would have occurred on the balance of probabilities, it must nevertheless take into account any evidence on which it considers it can properly rely and from which it could in principle conclude that the employment may have come to an end when it did, or alternatively would not have continued indefinitely. (7) Having considered the evidence, the tribunal may determine: (a) that if fair procedures had been complied with, the

employer has satisfied it-the onus being firmly on the employer-that on the balance of probabilities the dismissal would have occurred when it did in any event: the dismissal is then fair by virtue of section 98A(2) ; (b) that there was a chance of dismissal but less than 50%, in which case compensation should be reduced accordingly; (c) that employment would have continued but only for a limited fixed period. The evidence demonstrating that may be wholly unrelated to the circumstances relating to the dismissal itself, as in O'Donoghue v Redcar and Cleveland Borough Council [2001] IRLR 615 ; (d) that employment would have continued indefinitely. However, this last finding should be reached only where the evidence that it might have been terminated earlier is so scant that it can effectively be ignored.

Conclusions

Disciplinary allegations

100. The dismissal letter dated 15 March 2020 states that the following allegations against the Claimant were substantiated:

a. Failure to cooperate and follow the OH&S management system;
b. Failure to take all reasonable steps to remain familiar with the requirements of the OH&S management system; and
c. Failure to ensure that contractors are managed, and suitable records kept, in order to control the OH&S risks arising from contractor activities that affect employees and other interested parties.

101. These allegations were generic and did not contain specific factual detail.

102. It was not until the Tribunal hearing that the Respondent (through Mr Taylor) explained the underlying factual allegations against the Claimant. Namely, a failure to (1) review the generic RAMs for ACE; (2) store the generic ACE RAMs in an accessible place; and (3) maintain the risk register.

103. These specific factual allegations are examples of the generic allegations contained in the dismissal letter. For the sake of precision, I shall assess the fairness of the dismissal on the basis of the specific factual allegations given by Mr Taylor at the hearing.

The *Burchell* test

104. I find that the Respondent had a reasonable belief in the disciplinary allegations, based on reasonable grounds, and a reasonable investigation.

105. The Claimant admitted the misconduct during the investigation and disciplinary process. He stated that:

a. He had not reviewed the generic RAMs for ACE since the Respondent had taken over management of OTE;

b. The generic RAMs were held by R&R, and he did not have access to them; and

c. He had not started the risk register yet.

106. There were therefore reasonable grounds for the Respondent's belief.

107. The Respondent carried out a reasonable investigation through the two investigation meetings and the site visit.

108. The Claimant put forward various arguments, which were incorporated into the agreed list of issues. I shall address these in turn.

109. First, the Claimant asserted that the Respondent was simply acting on the client's instructions. I reject that submission, because:

a. The Respondent investigated the client complaint and was satisfied with the Claimant's responses to the maintenance issues;

b. Whilst it is correct that the client also raised issues of contractor management, the Respondent did not simply accept these. The Respondent conducted its own investigations which went beyond the client complaint, and which were broadly admitted by the Claimant; and

c. I accept that there were options open to the Respondent if it had not upheld the client complaint. For example, the Respondent could have considered redeployment of the Claimant to an alternative site.

110. Second the Claimant asserted that the Respondent did not carry out a reasonable search for the RAMs and permits to work. I reject that submission because:

a. The Respondent conducted a site visit and checked all the files on the laptop, as well as the shared drive. The Claimant had stated at the first investigation meeting that the documents were stored on the laptop;

b. At the second investigation meeting, the Claimant stated to Mr Wilson that he did not know what the concern was, as there had only been two works that had required RAMs since the Respondent had been on site. The Claimant did not suggest that there were additional documents that could be found on a further search; and

c. In any event, the specific factual allegation against the Claimant relates to the generic RAMs for ACE. The Claimant admitted that these were stored by R&R and he had not reviewed them since the Respondent had taken over management of OTE. A further search for the RAMs and permits to work would therefore not have been relevant to the specific factual allegations in issue.

111. Third, the Claimant asserted that the Respondent did not reasonably investigate the Claimant's allegation that the RAMs and permits to work had been deleted. I reject this submission because:

a. The notification of the deletion of files post-dated the site visit. Therefore, even if files were subsequently deleted, that was not material to the reasonableness of the investigation;

b. The matters set out at paragraph 110(b)-(c) apply and are repeated.

112. Fourth, the Claimant asserted that the Respondent disregarded copies of the files that he provided at the appeal stage. It is not clear that the Respondent considered this evidence at appeal. The appeal letter is ambiguous. It does not explicitly refer to the documents. But it does refer to "new evidence" in the concluding remarks. Even if this evidence was disregarded, it does not render the investigation inadequate or unreasonable. I have reached this conclusion because:

a. I have found that the files provided by the Claimant at appeal were present in his work bag but were not stored on the estate manager's laptop. The files were therefore only in the Claimant's possession and would not have been found on a search by the Respondent; and

b. The matters set out at paragraph 110(b)-(c) apply and are repeated.

Procedural fairness

113. The Claimant makes two allegations of procedural unfairness, as set out in the agreed list of issues. I shall deal with these in reverse order.

114. First, the Claimant asserts that the process was unfair as the Respondent failed to take into consideration the Claimant's new evidence at the appeal stage. I reject this submission for the same reasons as set out at paragraph 112.

115. Second, the Claimant asserts that the disciplinary allegations were not made clear to the Claimant before the 22 February 2021 disciplinary hearing. I accept this submission, and I find that the dismissal was therefore unfair. I have reached this conclusion because:

a. Prior to 22 February 2021, the Claimant had been provided with very little information regarding the disciplinary allegations. At the suspension stage he had been told that there were health and safety allegations made against him, but he was not provided with any factual detail. The email from Ms Wise dated 11 February 2021, provided little more by way of detail. As relevant to the allegations found proven by the Respondent, the Claimant was merely told that there had been a "*failure to comply with [the Respondent's] Compliance and Health and Safety procedures resulting in risk to the overall business, the onsite team and the residents."* The Claimant was only given the disciplinary procedure and the site visit notes at this time;

b. Although the Claimant was furnished with more information thereafter, he was never given details of the precise factual allegations. It was only at the Tribunal hearing that this information was forthcoming;

c. As per the guidance of the Court of Appeal in ***Strouthos***, it is a basic proposition of disciplinary proceedings that the charge against the employee facing dismissal should be precisely framed;

d. The Claimant was never made aware of the precise nature of the allegations against him. The allegations were phrased so broadly as to cover a very wide range of potential misconduct;

e. Although the factual issues were discussed with the Claimant during the disciplinary process, so too were a large number of other issues, such as the non-generic RAMs and permits to work. It is clear from the documents submitted by the Claimant at his appeal (which related to non-generic RAMs) that he did not understand the precise reason for dismissal. If this had been properly explained, as it ought to have been, the Claimant may have argued his defence and his appeal differently;

f. The factual allegation regarding the risk register was only raised at the 1 March 2021 disciplinary hearing, and without prior notification to enable the Claimant to prepare his defence. This was not mentioned in the dismissal letter. Therefore the Claimant would not have known that this was a specific reason for dismissal, that would need to be addressed in his appeal.

Sanction

116. I remind myself of the reasonable range of responses test and that I must not substitute my own decision.

117. I find that it was not within the reasonable range of responses for the Respondent to dismiss the Claimant because (1) the Respondent did not make the Claimant's responsibilities explicitly clear to him beforehand; and (2) in the context of the other demands that the Respondent had placed on the Claimant at the time. Specifically:

a. At the time of the Claimant's suspension, the Respondent had been managing the site for a relatively short period of time (3.5 months);

b. During this period, the Claimant's workload had doubled, and he complained that this was making him unwell. No tangible steps had been taken by the Respondent to reduce the Claimant's workload;

c. On top of his busy workload, the Claimant was required to learn and adjust to a new management system. He had to complete at least seven hours of online training. The Claimant was expected to digest, understand, and implement the manual, which ran to 53 pages;

d. The manual did not dictate a specific time frame, or frequency, by which the generic RAMs should be reviewed. It is therefore not clear that the first factual allegation amounts to misconduct. Indeed Mr Taylor's evidence was that this was a performance issue;

e. Whilst the manual refers at 6.1.8 to changes in organisational structure, there is no explicit statement that it was the Claimant's responsibility to review all generic RAMs following the TUPE transfer;

f. Although the manual states that the estate manager has specific responsibilities relating to the risk register, this was also the responsibility of those at a higher level. Paragraph 4.1.3 states that the ongoing suitability of the register shall be assessed by Top Management as part of the Management Review;

g. It was the Respondent's responsibility, as per paragraph 5.1.3 of the manual to ensure:

    i. Availability of resources essential to implement the OH&S management system. Contrary to this, given his workload, the Claimant did not have the human resource or time to carry out a review of all generic RAMs;

    ii. Ensure there are defined roles and responsibilities and to monitor and review OH&S performance and achievement of objectives. Contrary to this, the Claimant was not specifically told that it was his responsibility to review all generic RAMs upon the TUPE transfer, or to obtain copies of these from R&R. Mr Wilson did not explain this to the Claimant or oversee or check the Claimant's work.

h. The Claimant explained in mitigation during the disciplinary process that he was unclear about the Respondent's process, he could not remember the entirety of the manual, his workload was too high, and the training was insufficient. The Respondent did not have reasonable regard to these factors. Mr Taylor merely spoke to Mr Wilson about support available to the Claimant. He did not take into account the fact that the Claimant's workload had doubled, and that this was making him unwell.

Contributory conduct

118. Although I have found that dismissal was outside the range of reasonable responses, that does not mean that there was no culpable or blameworthy conduct on the part of the Claimant. The Claimant admitted that he had not started to compile the risk register and he did not have access to the ACE generic RAMs. He did not raise these matters with his line manager. These were potentially serious breaches of health and safety that could have resulted in enforcement action. As explained by Mr Taylor, and as I have found as a fact, these were the specific factual allegations on which the decision to dismiss was made.

119. When considering the apportionment of blame, I take into account the fact that the Claimant was an experienced estate manager who had received some training on the Respondent's OH&S system. I also have regard to his workload at the material time and the fact that the delineation of responsibilities was not made explicitly clear to him by the Respondent. I conclude that the Claimant and Respondent were equally to blame, and that a reduction of 50% should therefore be made to any basic or compensatory award.

Polkey

120. As per the guidance from ***Software 2000***, if the Respondent seeks to contend that the Claimant would or might have ceased to be employed in any event, had fair procedures been followed, or alternatively would not have continued in employment indefinitely, it is for them to adduce any relevant evidence on which they wish to rely. Although I must have regard to all the evidence when making that assessment, including any evidence from the Claimant himself.

121. On the issue of *Polkey*, the Respondent submitted that *"in the event of any finding of unfair dismissal on procedural grounds, the Claimant would have been fairly dismissed very quickly following a fair procedure. In the Respondent's submission a 100% Polkey reduction would be appropriate".*

122. The Respondent did not adduce or refer to any relevant evidence on which they wished to rely.

123. I do not consider it appropriate to make a *Polkey* reduction in this case.

124. If I had only made a finding of procedural fairness (regarding the way that disciplinary allegations were communicated to the Claimant) a *Polkey* reduction may have been appropriate.

125. Given that I have found that dismissal was not a reasonable sanction, I would only make a *Polkey* reduction if there was evidence that the Claimant would have been fairly dismissed for some other reason in the future. There was no such evidence or assertion. Mr Taylor's evidence was that there were options open to the Respondent, such as redeployment, if the Claimant had not been dismissed, and the client had refused his return to OTE. I therefore make no reduction.

Employment Judge **Gordon Walker**

Date 28 February 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 28/02/2022.

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FOR EMPLOYMENT TRIBUNALS