EMPLOYMENT TRIBUNALS

Claimant: **Mr Shaun Rodwell**

Respondent: **Openreach Limited**

Heard at: **Bury St Edmunds** **On:** 24 & 25 February 2022 and 16 May 2022 (Full Merits Hearing)

Before: **Employment Judge S.L.L. Boyes** (Sitting Alone)

Representation
Claimant: In Person (accompanied by Mrs Rodwell)
Respondent: Mr. L. Black, Solicitor

RESERVED JUDGMENT

The Claimant's unfair dismissal claim is not well founded and is dismissed.

The Claimant's claim for breach of contract (failure to pay notice pay) is not well founded and is dismissed.

REASONS

1. The Claimant claims unfair dismissal and breach of contract (failure to pay notice pay). The Respondent denies all claims.

The Proceedings/Hearing

2. After a period of early conciliation through ACAS from 27 March 2021 to 8 May 2021, the claim form (ET1) was lodged with Tribunal on the 30 May 2021.

3. The Respondent filed a response to the claim (ET3) on the 23 July 2021.

4. The Claimant stated in the ET1 that his employer was British Telecommunications plc. On receipt of the ET1, the Respondent initially took no issue with the identity of the employer. However, the Respondent subsequently made an application to amend the ET3 on the 5 November 2021. One of the amendments sought was that the name of the Respondent should be changed to Openreach Limited.

5. Employment Judge Palmer granted the application to amend the ET3 on the 12 December 2021.

6. On the first day of the hearing, the Claimant explained that when he initially contacted ACAS with a view to commencing early conciliation, his understanding was that he had been employed by Openreach. ACAS suggested to him that he check that this was the correct employer. He therefore made enquiries with the Respondent's human resources department. He was informed that his employer had been British Telecommunication plc at the date of dismissal. This is therefore the Respondent that is cited on the early conciliation certificate and the ET1. I indicated to the Respondent that the documentary evidence provided thus far to the Tribunal was inadequate for me to form a proper view as to the identity of the employer. On day two, the Respondent provided further evidence in that respect.

7. I then made a finding that the correct Respondent at the date of dismissal was Openreach Limited.

8. The Respondent named in the ACAS early conciliation certificate is British Telecommunications plc. Having made a finding as to identity of the Respondent, I informed the parties of my decision that, as per regulation 12 (2)(a) when read together with regulation 12(1)(f) of the Employment Tribunals Rules of Procedure, the proceedings may continue despite the ACAS certificate bearing the name of a different, albeit associated, employer.

9. My reasons, which were given to the parties, were as follows. I was satisfied that the Claimant made an error in relation to the name of the Respondent. That error was not his fault. The Respondent previously cited, and the substituted employer, are from the same group. There was no objection from the Respondent. There was no detriment to the Respondent and it would not be in the interests of justice to reject the claim in these circumstances.

10. The Claimant gave evidence. He adopted his witness statement. He was cross examined by the Respondent and asked questions by me.

11. The Claimant's position on days one and two was that he wished to call Lee Davey as a witness. Lee Davey was the Claimant's trade union representative and assisted the Claimant during the disciplinary proceedings and internal appeal. The Tribunal was informed that Mr Davey was presently on sick leave and so was not able to give evidence on the 24 or 25 February 2022 nor was he able to provide a statement. It was not possible to complete the hearing in the two days allocated for it, and so a further day was allocated, not only for to hear submissions from the parties, but also to provide the Claimant with an opportunity to call Mr Davey to give evidence. I granted the Claimant permission to call Mr Davey to give evidence on day three if he was available. I also directed that the Respondent was to inform the Claimant if it intended to call any further witness(es) to respond to Lee Davey's evidence.

12. The Respondent initially called three witnesses. These were Gary Morrison, Oliver Galea and David Kelly. Each was cross examined by the Claimant and asked questions by me.

13. On 26 April 2022, the Respondent made an application for leave to call a further witness, Mr Adam Elsworth. The Claimant objected. In an email dated 13 May 2022 he stated that the Adam Elsworth's evidence contained no new information in relation to the case and that the third day of the hearing was to be related to witnesses answering the testimony of Lee Davey.

14. I permitted the further witness evidence to be admitted. The application was made some three weeks prior to day three, and the Claimant was copied in on that application. The witness statement did not raise any new issues, the subject matter was material and provided clarification regarding the Respondent's health and safety policies relating to work around high voltage power lines. Much of the witness evidence on days one and two focused on this issue and some of that evidence was conflicting. Admitting Mr Elsworth's evidence did not alter the timetable, particularly as the Claimant's witness, Mr Davey, did not attend on day three. Therefore, I considered that it was in the interests of justice and in accordance with the overriding objective to allow Mr Elsworth to give evidence.

15. The Tribunal therefore heard evidence from Mr Elsworth on day three. He was cross examined and asked questions by me.

16. Mr Davey did not give evidence on day three. I was not told why he did not attend.

17. Both parties provided written submissions which they relied upon in closing. Mr Black augmented his written submissions with brief further submission at the hearing.

18. I reserved Judgment.

Documents

19. As well as the documents held on the Tribunal file, the Tribunal had before it a bundle (prepared by the Respondent) of 370 pages, the Claimant's witness statement and the witness statements of Gary Morrison dated 18 February 2022, Oliver Galea dated 3 February 2022, David Kelly dated 2 February 2022 and Adam Elsworth dated 28 April 2022 as well as the written closing submissions of both parties.

Issues to be determined

20. The issues in dispute in this matter were agreed at the beginning of the hearing.

21. In relation to the unfair dismissal claim, the agreed issues were:

    i. Did the Respondent genuinely believe that the Claimant was guilty of misconduct? Was that belief based on reasonable grounds?

    ii. Was the dismissal for reason of conduct or capability?

    iii. Did the Respondent carry out a fair and reasonable investigation in to the matter?

    iv. Were the disciplinary proceedings carried out in a reasonable and fair manner?

    v. Was the decision to dismiss the Claimant within the band (or range) of reasonable responses open to the Respondent?

    vi. If it is found that the dismissal was procedurally unfair, what adjustment should be made to the award, if any, to reflect the possibility that the Claimant would have been dismissed even if a fair and reasonable procedure had been followed?

vii. If it is found that the dismissal was unfair, would it be just and equitable to reduce the Claimant's award on the basis that he caused or contributed to his dismissal? If so by what amount should the award be reduced?

22. In relation to the breach of contract claim, the agreed issues were:

i. Did the Claimant's actions on the 8 January 2021 amount to a fundamental breach of his contract of employment such that the Respondent was entitled to dismiss him without notice?

ii. If the Tribunal were to decide that the Claimant was dismissed in breach of contract what notice/notice pay was due?

Findings of Fact

23. Where there is no dispute between the parties as to a particular fact, my findings of fact are recorded below without any further explanation. Where the facts are not agreed by both parties, I have explained why I prefer one party's account over the other. Where the facts are not clear, I have explained why I have made the finding of fact concerned.

My findings of fact are as follows:-

Chronology of Events

24. The Claimant commenced employment with the British Telecommunications plc, trading as Openreach on 6 August 2017. Initially, he was employed as a trainee engineer and then later as a Customer Service Engineer, a role he continued until his employment ended.

25. On day one of the hearing, the Claimant stated that he was not entirely sure who his employer had been at the termination of his employment.

26. The Respondent's position was that the Claimant was initially employed by British Telecommunication Plc, but that certain employees, including the Claimant, were transferred to Openreach Limited on the 1 October 2018. British Telecommunications Group is the parent company and both Openreach Limited and British Telecommunications plc are subsidiary companies. Previously Openreach was a trading name for part of the British Telecommunication plc operation. After an Ofcom ruling it was necessary to create a separate legal entity and Openreach Limited was formed.

27. Further evidence was provided by the Respondent on the second day of the hearing. This includes an email to all employees on the 1 October 2018 which states that Openreach people became employees of Openreach Limited on that date. There is also a computerised record at page 68 of the bundle which records the Claimant as an employee of Openreach Limited. I have also been provided with an excerpt from Companies House for Openreach Limited. This shows that the address provided is the same as the address provided for the Respondent in the ET1.

28. Taking all of the evidence that was before me in to account, and as there was no objection from the Claimant, I indicated that I was satisfied that the Claimant was employed by Openreach Limited at the point that his employment was terminated.

29. The Claimant was based at the Telephone Exchange, Hadleigh, Suffolk, and worked 37½ hours per week. His role involved visiting customer's properties and installing the necessary infrastructure for broadband services.

30. On the morning of the 8 January 2021, the Claimant was allocated a job at the West Meadows site in Ipswich which houses people from the Traveller community. There was no information on the job notes relating to hazards and warnings. He tried to access any such information on his laptop via a system called Informe but was unable to do so as the job was what is called a SOGEA task and so Informe would not accept the job number. There was no telephone number for these tasks, so he was not able to access any notes for this site with regard to hazards and warnings.

31. He spoke to the patch lead, Martin Kiddle, who confirmed that it was a two person working site and that he should watch out for any dogs that may be running free around the site.

32. As it was identified as a two person working site, another engineer, Lowell Bird, accompanied the Claimant on to the site as a safety assist. This was because there had previously been issues such as theft at the site and the safety assist's role was to ensure that the vans were safe and that the areas in which the Claimant was working were safe.

33. There was a dispute between the parties as to whether the Claimant and Lowell Bird were of the same rank on this particular job. The Claimant was the engineer allocated the job on the morning concerned. He was told that he should have a safety assist as it was a two person site. He was the one responsible for the finding the appropriate solution on site. Lowell Bird was present only because it was a two person job. Lowell Bird is an experienced engineer with longer service than the Claimant but was on limited/light duties and did not, at the time, carry out such jobs on his own. I therefore find that the Claimant was the engineer responsible for performing this particular task and Lowell Bird was his safety assist.

34. The original underground cable on site was damaged. The Claimant therefore called the patch lead in charge, Simon Canon, to inform him that the job would need to go back to planning and to ask if he should add a cable chamber (for an underground cable) when putting in for a new cable. He explained that he had been told by the customer that the building where the current connections were was to be knocked down and so he asked Simon Canon if there was another way to provide a service as he and Lowell Bird had seen evidence of overhead cable clamps and eye bolts on the building. He told Simon Canon that an overhead solution might be possible, but that it might involve the building that is going to be demolished, and then the customer would be out of service. Simon Canon told the Claimant that he should proceed on the assumption that the building may not be demolished.

35. He later spoke again to Simon Canon and reported back that he had spoken to the customer and that they were going to proceed with the overhead option.

36. The Claimant, then ran a drop wire under a high voltage electricity, with the assistance of Lowell Bird. The drop wire concerned passed directly under a high voltage cable.

37. On 8 January 2021, Gary Morrison, Patch Manager, and the Claimant's line manager from 1 September 2020 onwards, made enquiries about the work being carried out at the West Meadows site, having become aware that the Claimant had been on site for around 6 hours. He called Simon Canon who informed him that the Claimant was struggling to find a solution to connect the customer and that he had performed an overhead solution. Gary Morrison knew

the site from previous visits, and so he was aware of the high voltage overhead power. He then contacted Ashley Hood, one of his Patch Leads, to check what had happened.

38. Garry Morrison visited the site on the 9 January 2021. It was confirmed that the Claimant and Lowell Bird had run the drop wire under very high voltage electricity cables. The Respondent's safety team was contacted. The drop wire was taken down on 9 January 2021 once the go ahead had been obtained from them. It was not taken down on the 8 January 2021 as they were unable to proceed without the safety team's permission and by the time that this was confirmed it was dark and so not safe to proceed.

39. On 12 January 2021, an investigatory meeting took place. The Claimant was not aware, prior to the meeting, what the meeting was about. The investigation was undertaken by Gary Morrison. The Claimant was present at the meet as was Ashley Hood whose role was to take the notes of what was said [109-115].

40. At the meeting the Claimant confirmed that he was trained in the working in the vicinity of overhead power and has a copy of the *Working in the vicinity of overhead power glove box guide* ("the glove box guide"). He stated that he saw the pylons in the distance but he was focusing on getting the customer in service and he did not notice the power lines above the property. He did not know how he missed the wires.

41. Following the meeting, the Claimant was suspended pending investigation.

42. The investigation report [116] was prepared by Gary Morrison on the same date. His conclusions, as stated in that report, are as follows:

    i. That the Claimant was trained and aware of the dangers of working in the vicinity of overhead power.

    ii. By his own admission his on site risk assessment was lacking and he did not notice the high voltage lines crossing his line or route.

    iii. He stated that he would not have run the drop wire if he had noticed the overhead power, demonstrating that he knew the processes for working in the vicinity of overhead power.

    iv. He failed to carry out a robust risk assessment on the job which has led to him putting himself, his safety assist and the company's customers at risk.

    v. He failed to fill in his tetra eye bolt holes which is a quality failure and not up to job standards.

    vi. He recommended that the case be progressed as gross misconduct under the company's disciplinary procedure,

43. On 12 January 2021 Gary Morrison also held an investigation meeting with Lowell Bird.

44. On 13 January 2021 the Claimant was given a letter confirming that he was suspended, effective from 12 January 2021, whilst allegations of gross misconduct were investigated.

45. Lowell Bird was not suspended but it was recommended that his case be advanced to the disciplinary stage.

46. Oliver Galea, the senior area manager, was appointed to deal with the Claimant's disciplinary proceedings on 15 January 2021. He wrote to the Claimant on the 18 January 2021 inviting him to a disciplinary meeting on 26 January 2021 at 3pm. The letter detailed the allegation "*failing to comply with the correct safety policy and working practices in that on 8 January 2021 whilst working in the vicinity of overhead power failed to complete a risk assessment and ran a drop wire under high voltage*." The letter also stated that if the allegations were proven that that this could amount to gross misconduct which could lead to summary dismissal.

47. The meeting on the 26 January 2021 was convened as planned, remotely, with the Claimant and his union representative, Lee Davey, present. Prior to the meeting, Oliver Galea telephoned Lee Davey and they spoke on the telephone. The Claimant, Oliver Galea and Lee Davey then spoke by telephone briefly but the disciplinary hearing did not proceed; it was rescheduled for the 29 January 2021.

48. There is a disagreement between the parties as to what was said during the course of the telephone conversation between Oliver Galea and Lee Davey and at the point when the meeting was due to start on the 26 January 2021.

49. The Claimant says that at around 2:30pm he received a call from Lee Davey who told him that Oliver Galea had called him to offer him a deal: he could resign before the meeting took place and avoid a disciplinary. The Claimant states that before the recording began it was agreed that he could have a few extra days to discuss the situation with his wife. The only reason this extra time was needed was because of the suggestion that he could resign.

50. Oliver Galea denies that there was any offer or suggestion that the Claimant could resign. He said that the purpose of the call to Lee Davey was solely to make sure that the Claimant had the appropriate union support and to explain the seriousness of the allegations and the details of the alleged offence so that he was aware of them prior to the meeting. He said that he always makes the union aware when there are serious safety breaches. He also stated that he was not certain that the Claimant understood the seriousness of the allegations because he seemed distressed as the meeting began.

51. The Claimant did previously apply for a postponement so that his union representative could give evidence, which was refused. Lee Davey had not been able to attend the Tribunal on days one and two because of ill health. However, no witness statement from Mr Davey has been provided, nor has he attended the Tribunal to give evidence. The Claimant was not a party to the telephone call between Oliver Galea and Lee Davey. It would have been a straightforward matter for Mr Davey to provide a statement confirming what was said during that telephone, even if he was unable to attend the hearing to give evidence. He has not done so.

52. David Kelly's evidence is that Oliver Galea told him that he did not suggest that the Claimant could resign at the meeting on the 26 January 2021.

53. There is no reference in the record of the meeting held on 29 January 2021 to any offer that the Claimant could resign rather than face disciplinary

proceedings. However, the Claimant did refer to this in his appeal submission, written and signed on the Claimant's behalf by Lee Davey [235 -237].

54. Having carefully considered the Claimant's evidence and the evidence of Oliver Galea, in the context of the surrounding circumstances, as well as what is said in the appeal submission, I prefer the Claimant's evidence of what happened in this respect. Whilst Lee Davey did not give evidence, he did sign the appeal statement which refers to a suggestion being made by Oliver Galaea of the option that the Claimant resign.

55. It seems to me unlikely that the Claimant and Lee Davey would have fabricated such account in such a manner. Further, I am fortified in this view by the fact that the meeting of the 26 January 2021 was postponed, which fits with the series of events as described by the Claimant.

56. In reaching this conclusion, I have borne in mind that Lee Davey did not attend the Tribunal to give evidence. However, when all of the evidence before me is looked at in the round, I find that there was a conversation of some sort between Lee Davey and Oliver Galea in which the possibility of the Claimant resigning, rather than going through disciplinary proceedings and facing the possibility of dismissal for gross misconduct, was mentioned.

57. As I have not heard evidence from Lee Davey, and as Oliver Galea denies any such conversation took place, I do not make specific findings as to exactly what was said, but I do accept that the possibility of the Claimant resigning was mentioned in some manner on the 26 January 2022. Therefore whilst I am satisfied on the balance of probabilities that a conversation took place in which resignation was alluded to, I am not persuaded on the evidence before me that Oliver Galea stated that dismissal for gross misconduct was a foregone conclusion.

58. The disciplinary meeting took place on the 29 January 2021 with both the Claimant and Lee Davey attending. The meeting was recorded and a transcript has been provided [210-219]. It took place by telephone because of the Covid 19 restrictions.

59. At the commencement of the meeting, the allegation was put to the Claimant that is that he failed to follow the correct safety policy and working practices.

60. A picture had been taken on site by somebody from the company [149]. In the picture large pylons can be seen to the left of the picture. It is uncontentious that these pylons, whilst appearing very imposing in the picture, were not on the site. However, on the top half of the right hand side of the picture further overhead power wires can be seen as well as the drop wire that had been run by the Claimant.

61. In the meeting the Claimant provided a detailed account of what happened on the 8 January 2021 from his perspective.

62. The Claimant made the following points in the meeting:

    i. In deciding how to proceed with the job, he had taken into consideration what Simon Canon had said and what the customer said. He thought about customer service and delivering first time, how long he had been on the task and his completion rate. He then re-risk assessed the job.

ii. He looked at the height of the drop wire, whether it would be too low and whether he could set up his tetra on both buildings safely. They could see the high-voltage pylons outside the site and could hear the noise from the pylons.

iii. Whilst the (off-site) pylons that can be seen in the picture were visible, there were no warning signs on site, such as signs on poles about high-voltage or anything to alert him of anything nearby. They considered how much light there was left in the day and whether they will be able to do the whole job before it got dark when conducting his risk assessment. He thought that he had taken everything into account.

iv. He accepted that if he had taken a step back from the site, he may have picked up the overhead power lines, but moving around the site was difficult. It was quite an intimidating site having been told that he may face abuse, theft and have dogs running around so they did not want to move too far around the site.

v. He felt his risk assessment was good enough to proceed. He stated that in hindsight he could see that his risk assessment was lacking. He wished that he could change the situation but he cannot. All that he can do is to learn from it.

vi. He considers himself very safety conscious but he made a mistake on that job, which he does regret.

vii. The risk assessment was down to him.

viii. The photograph [149] was not taken on the ground looking at the building. It was taken from higher up. Where he was working it was very close to the building and unless you looked directly up into the sky the overheard power lines concerned would not be visible.

ix. Even though there were two of them working on the site, it did not occur to either of them that anything that they were doing breached any safety rules. He tried to look up as best he could. He took advice from people who were familiar with the site and he risk assessed it to the best of his ability.

x. When Oliver Galea asked him whether, when undertaking a risk assessment, he should be looking everywhere including directly above him, the Claimant agreed but replied that there were other hazards to consider on that site, including dogs running around which means that you tend to keep your eyes more focused on the ground. Until someone else is in that exact position they cannot say whether they would have seen or noticed the overhead power lines: it is not as clear-cut as it is being made out.

xi. When Oliver Galea asked him if he understood the safety implications of doing what he did in respect of him and customers, he confirmed that he knew that the rules stated that telecom wires cannot be run under high voltage wires of over 11 kV. This is because of arking and also because they can travel through the air and hit other objects. However, there was some indication on site that there had been overhead wires previously. He said that he understood the risk involved, he understood his mistake. He can only take responsibility for that mistake but it was a mistake. He has got a good track record of safety in the years he has worked for them, but

he made an error. However, if he had seen the cables overhead he would have stuck to his original plan, which would have been to ask for buried armoured cable.

63. Lee Davey was given the opportunity to make further comments at the end of the disciplinary meeting, which he did. Both the Claimant and Lee Davey confirmed that the disciplinary meeting had been conducted in a fair manner. The Claimant confirmed that he been given time to state his case.

64. On 8 February 2021, the Claimant was informed by letter from Oliver Galea that he was dismissed effective from 9 February 2021 [223-224]. This appears to be an error as the last day of employment is recorded elsewhere as the 8 February 2021. The Claimant was informed that he had a right of appeal to be exercised by the 16 February 2021. The reason given for the dismissal in the letter is as follows:

"The reasons for your dismissal for gross misconduct was a result of your conduct.

My reasons for this decision are shown in the attached rationale. In reaching this decision I've taken into account the mitigation put forward and due to the seriousness of the misconduct I have also considered all the possible alternatives such as a lesser sanction when making my decision to summarily dismiss you for gross misconduct."

65. Attached to the dismissal letter is a document entitled 'Rationale for Decision at Conduct or Gross Misconduct stage' [227-228]. The key points made can be summarised as follows:

i. The Claimant was trained to work in the vicinity of overhead power and had the relevant guide.

ii. He last had an 823 safety check on 20 February 2020 which covered working in the vicinity of overhead power.

iii. The action taken was not only dangerous for him it was dangerous for anyone in the vicinity and could have caused major injuries.

iv. It was the Claimant's responsibility to carry out a risk assessment and he did not undertake a thorough one as he ran the drop wire under high voltage. The guide says that this should not be done if the wire is over 33 Kv or above.

v. The length of time that a customer has been out of service does not make a difference as a cable should never have been run under that voltage.

vi. Had he completed a thorough assessment he would not have missed a major safety risk. He acknowledged that he should have looked directly above him.

vii. The Claimant has acknowledged that in hindsight the risk assessment was lacking that he has made a mistake, and regrets his decision. Whilst he has acknowledged his mistakes, due to the severity of what he has did, running a drop wire under high voltage, which could have caused severe damage to both him and members of the public, was inexcusable and he had has no choice but to dismiss him.

66. On the 8 February 2021, Lowel Bird was sent a letter confirming that due to the severity of the breach he was being given a written warning that would stay on

his personnel file for 12 months. It states in the letter that everyone is responsible for carrying out risk assessments and that he is trained in overhead power, but that he was on the job as an assist, did not decide on the overhead method of connecting the customer and did not put the cable in place. Therefore, the individual that he was with, who did this should have been certain that that everything was safe and is responsible for his own safety.

67. Oliver Galea's evidence is that, at the time of the incident, Lowell Bird was only completing work as an assist on sites: he was not working as the lead engineer on jobs. He stated that Lowell Bird was on restricted duties and had not carried out work of this nature by himself since October 2019 or before. He cannot climb or do underground work: he normally only does cabinet work. He took this in to account when reaching his decision to give him a written warning rather than dismissing him.

68. On the 10 February 21, Lee Davey emailed Oliver Galea and confirmed that the Claimant wished to appeal against the decision to dismiss. He requested a copy of the recording of the disciplinary hearing.

69. On the 5 March 2021, Raja Khalid, Regional Director East Anglia, wrote to the Claimant to confirm that the appeal hearing was scheduled for 19 March 2021.

70. On 18 March 2021, Lee Davey wrote to the Respondent and pointed out that the appeal should really be conducted by someone outside of the Claimant's direct hierarchy to ensure impartiality. He also provided the Respondent with a copy of the appeal submission and confirmed that the Claimant wanted his appeal to be dealt with on the basis of written submissions only.

71. The appeal submissions [235-237] are written by Lee Davey on behalf of the Claimant and are signed by Lee Davey. They main points made can be summarised as follows:

    i. The Claimant has not been subject to any form of disciplinary investigation or any formal warnings.

    ii. He is not infallible, therefore a mistake, error of judgement or momentary lapse of reason happening at some point is not inescapable.

    iii. Oliver Galea had already spoken to him and moved the meeting date when the Claimant logged on. Oliver Galea made it perfectly clear that he had no choice but to dismiss the Claimant and even asked if the Claimant wished to resign. What was said at the beginning of the meeting on 29 January 2021 that no decision had been made was not correct. There was a premeditated decision to dismiss the Claimant.

    iv. Oliver Galea's statement that the Claimant's actions "*could have caused major injuries*" is not accepted.

    v. The Claimant never stated that he asked Simon Canon to perform a risk assessment for him.

    vi. Oliver Galea incorrectly stated that a drop wire cannot be run under high voltage cable under 33 kV when, as per the guide, it is 11 kV.

    vii. In view of the hazards on the site, it is not hard to see how mistakes could be made and also why the Claimant would not have been looking directly upwards.

viii. National Grid have been spoken to and, in their view, the Claimant did not put anyone in danger as it was impossible that an arc would reach that low down. If there was such danger, no single caravan should ever have been placed on the land as they would all be dangerous conductors. There was evidence of past drop wires having been used on the site and a large collection of satellite dishes bolted higher on the wall. The assertion that the Claimant's actions could have caused a cataclysmic event is not rational.

ix. The Claimant's assistant watched him put the drop wire up yet, despite having over a decade more experience than the Claimant, he saw no danger.

x. The Claimant took ownership of the mistake and apologised profusely.

xi. The Claimant is not an habitual offender and has not habitually broken company procedures and policies, nor is he a poorly performing engineer.

xii. The punishment is disproportionate for an engineer who made his first mistake in over three years of loyal service.

72. David Kelly, Regional Director for London South East, was appointed to deal with the appeal on 5 May 2021 instead of Raja Khalid. A copy of the Claimant's written appeal submissions was provided at that date. He was also provided with information from National Grid, obtained by the Claimant.

73. On 17 May 2021, David Kelly wrote to the Claimant confirming that the charges were proven and that he was upholding the decision to dismiss. He stated that it was clear that the Claimant breached the company's safety policy. He stated that the Claimant confirmed that he was aware of what to do whilst working in the vicinity of power but he chose not to do so. The process, training and guidance is there to keep him and others safe. Not following them raises the risk to him and others and could have resulted in serious injury or death. His response to the grounds of challenge raised by the Claimant [245] can be summarised as follows:

i. Oliver Galea has a different view of what was discussed on the 26 January. He allowed the meeting to be conducted 3 days later to enable the Claimant to have time to discuss the matter with his union representative, which was a fair thing to do.

ii. Looking at the picture, the drop wire is run under electricity cables carrying electricity far in excess of 11 KB; possibly 275kv. Oliver Galea was right when he said that a cable cannot be run under 33 kV.

iii. As a company they will support team members and employees to feel safe in any environment and if that is not possible the company would support the decision not to work in that area. In this case an assist was provided to ensure that he had a buddy on site. It does not appear that the Claimant made anyone aware that he was not willing to work in that area

iv. Whilst the information provided by National Grid is not challenged, any business that works in the vicinity [of overhead power] is required by the Health and Safety Executive to ensure that the individual and members of the public are safe. Each company will have their own standards and train

people to those standards. The Claimant has been trained and is aware of the working practises when working in the vicinity of power.

Terms and Conditions of Employment and Disciplinary Procedure

74. In the Claimant's detailed terms and conditions of employment it states that employees must comply with the Respondent's health, safety and well-being policy. It also states that employees must keep to their rules and use their systems appropriately. It continues:

"*We may end your employment without notice or pay if you:*

- *commit an act of gross misconduct*
- *don't comply with our health and safety policies and procedures*"

75. In the Respondent's disciplinary procedure, at section 4 [135-136] it identifies the difference between conduct and capability, whilst at the same time stating that each case needs to be considered on its merits.

76. At section 5 [136], the meaning of misconduct is explained. Examples of misconduct are given and these include "*not doing something you should have done, according to a policy, procedure or process*", and "*not following health and safety standards that apply to your role*".

77. Section 9 [138–139] deals with gross misconduct. It states that acts of gross misconduct may lead to summary dismissal. There follows a long, non-exhaustive, list of the types of conduct which may be considered to be gross misconduct. Examples provided include "*gross negligence, which might have a major impact upon the company*", "*seriously breaching our health and safety rules (including breaches to the Safety and Sustainability policy/Health and Safety policy)"* and "*doing something that causes (or may cause) significant loss, damage or injury through serious negligence*."

Was running a drop-wire under the cable concerned in contravention of the Respondent's policies?

78. It states in the introductory section of the glove box guide [152] that,

"***This guide is for engineers who encounter overhead power. This doesn't replace formal training. First rule when working with overhead power: fully understand what voltage you are dealing with. DON'T guess!*** *If you aren't sure what voltage you are dealing with* ***DO not start work****. Contact someone, either your FMA/Coach/Manager, safety services… Or refer to the listed ISIS documents*.

79. Later in the guide [156] it states that unless an engineer is absolutely certain that a powerline is low voltage, an ultrasonic measuring device must be used

80. At section 4 of the guide, the dangers of high voltage are outlined [171].

81. At section 4 of the guide there are details as to how to recognise high voltage [172-174].

82. At section 4 [175] the safety standards for working under and over high voltage are specified. In summary, it states that metallic drop wires or aerial cable can only by run over or under voltage of 11kV or less, although non- metallic ADSS fibre cables can be run under voltage up to 33kV.

83. Also at section 4, the minimum safe working distances are outlined [176]. For 11 and 33kV this is 3 metres, 6 metres for 132kV and 7 metres for 275kV and 400kV. This is referred to as the red zone and it can be seen from the diagram that is provided that it runs horizontally either side of the high voltage wire for the requisite distance. In that section it states,

    "*The minimum safe working distance is shown below.* ***Important:*** *you do not take equipment or work in this zone. If you can't achieve the minimum safe working distance from the HV, contact your manager and the safety team* ***before you start ANY work***."

84. Adam Ellsworth's evidence is that the Respondent has a complete blanket rule whereby the entire red zone detailed in the glove box guidance should not be worked in by an engineer. He states that with 275kV and 400 kV the minimum horizontal safety distance is 7 metres and that a drop wire must never be run under voltage over 11kV in any circumstances. He disagreed with the Claimant's evidence that if the drop wire was running over 7 metres away from the high-voltage line, including vertically, that that this is a safe distance. He stated that the Respondent blocks out the horizontal 7 metre working area to ensure the safety of their engineers. Within the Respondent's guidance, there is no safe distance to running a drop wire directly under overhead power above 11kV.

85. In respect of what the safe working distances set by the Respondent are, I prefer Respondent' evidence to the Claimant's evidence. I have reached that conclusion based upon what is said in the glove box guide [176] corroborated and expanded upon by Adam Ellsworth in evidence. I find as a fact that the Respondent's working practises require that (a) no cable is to be run under any power line over 11kV and (b) that engineers are not permitted to work within 3, 6 or 7 metres horizontally of a high voltage power line depending upon the voltage concerned. It is not possible to say which distance applied in this case because the exact voltage of the power line concerned is not known, although the Claimant does not dispute that it was 33kV or more.

86. The Claimant does not dispute that he ran a drop wire directly under voltage in excess of 11 kV. He stated in the investigation interview when asked "*Yeah, I know there is separation distances to consider when working in the vicinity of overhead power*. *I wouldn't have done it, if I thought it was directly under the power lines*." He accepted in live evidence that the wire that he erected ran directly under the high-voltage power line. In the circumstances, I find as a fact that the Claimant erected a drop wire which passed directly under high voltage in contravention of the Respondent's own health and safety rules found in the glove box guide.

87. The Claimant has provided evidence from National Grid which he submits shows that his actions in running the drop wire in the manner that he did was unlikely to have caused danger to him or others because the distance that he ran the drop wire away from the high voltage wires was within National Grid's safety margins.

88. The Respondent does not dispute the National Grid evidence. However, Adam Elsworth's evidence was that the Respondent has its own safety guidance and procedures that they expect their engineers to follow. He stated that the safety zones were agreed with various power networks via the Energy Networks Association.

89. Adam Elworth's evidence is that the Respondent takes a more cautious approach than National Grid. It has a uniform rule across all sites so that engineers do not have to check different distance rules for every individual site they work at with each local operator as they all vary. Each worksite is individual and have different layouts, gradients and work equipment which would need to be adapted for each electricity network operator. They put the rule in never to run a drop wire under voltage over 11kV as a blanket rule to protect their engineers and avoid the need for them to calculate the correct safety distances for each site. In addition, measuring the exact distances would require ultrasonic measuring devices which would not be cost effective. Therefore, it is not possible for an engineer to know what risk they are taking on a specific site and at a particular time if they run a drop wire under high voltage.

90. Adam Elsworth states that there are many potential severe risks to engineers and others working in the vicinity of overhead high voltage power. He states that he is aware of several previous examples where due to weather damage or damage to equipment, cables have either directly contacted, or got close to, high voltage conductors. This typically results in extensive damage to the telecoms network in the immediate area as the voltage passes through it which can cause damage to premises and customer equipment. Had anyone been using the equipment this could have resulted in serious injuries. He also explained that the Respondent was previously subject to a Health and Safety Executive investigation after an engineer was very severely injured when working in the vicinity of high power. On another occasion a contractor was killed.

91. I accept Adam Ellsworth's evidence of the reasons why the Respondent has set the safety margins specified in the glove box guide. His evidence was specific and clear, given without hesitation and internally and externally consistent.

92. On the evidence before me, I accept the Respondent's explanation as to why its high voltage policy is couched in the terms that it is and why it has wider safety margins than National Grid.

What relevant training had the Claimant had or not had. How, if at all, did his level of knowledge cause or contribute to his actions on the 8 January 2021

93. The Claimant states that his Energy and Utility Skills Register (CSCS/EUSR) card had expired before his dismissal. He states that he raised this with his manager on many occasions to no avail. His asserts that his training was therefore not up to date in particular in respect of risk assessments.

94. I accept Gary Morrison's evidence that a CSCS card is only required for work on an external CSCS controlled construction site, that it is only needed to demonstrate that an engineer is aware of safe working practices on construction sites and that the training does not cover working in the vicinity of overhead power. Information about the training has been provided [90 and 97] which states that the EUSR registration allows access to CSCS controlled sites for utilities work. No evidence to the contrary has been provided by the Claimant.

95. I therefore accept Gary Morrison's evidence that it was not a requirement that the Claimant had a CSCS card to work on the West Meadows site on the 8 January 2021.

96. Adam Elsworth's evidence was that new engineers undertake training on risk assessments when they undertake training run by Outreach trainers provided at

various venues including Peterborough. They have mocked up environments to enable learning. They have to have done the risk assessment training in order to do ladder work.

97. The Claimant last undertook training on working in the vicinity of overhead power on the 20 February 2020 [93]. The module concerned was '823-Working in the vicinity of O/H Power'. The training involved the employee working through various sub modules with a manager. Amongst other areas the training involves risk assessments, separation distances, power, and power hazard assessment. The checklist or crib sheet for the training provides more details of what is including in the training [92]. In the central section it states that a drop wire should not be run under voltage of 11kV and above.

98. Whilst the Claimant states that the CSCS training included modules relating to risk assessments, he has undertaken other training about carrying out risk assessments both when he was a trainee engineer and when he completed module 823.

99. That being so, I do not consider that the expiry of the Claimant's CSCS card, for whatever reason, meant that the Claimant was not appropriately trained to work in the vicinity of overhead power.

100. In his investigatory meeting the Claimant confirmed that he was trained in in working in the vicinity of overhead power. He also confirmed that he knew that there were separation distances to consider when working in the vicinity of overhead power. In his disciplinary hearing he stated that he knew that telecom wires cannot be run under voltage in excess of 11kV because of arking and because they can travel through the air and hit things.

101. Consequently, I find that the Claimant was appropriately trained to undertake the work concerned, that he was aware of the rules relating to undertaking risk assessments and working in the vicinity of high voltage at the time of the incident and so his level of knowledge in this respect did not cause or contribute to his actions on the 8 January 2021.

The Relevant Law

Breach of Contract (Wrongful dismissal)

102. An employer will be in breach of contract if they terminate an employee's contract without the contractual notice to which the employee is entitled, unless the employee has committed a fundamental breach of contract which would entitle the employer to dismiss without notice. This includes circumstances in which the breach is one that amounts to gross misconduct.

103. Gross misconduct can include cases of gross negligence. In *Philander v Leonard Cheshire Disability* UKEAT/0275/17/DA (EAT), in relation to a claim for wrongful dismissal, the EAT held:

'We are mindful that Ms Hopkins' investigation found that the Claimant did not seem to comprehend the range of responsibilities required of him, and accept Mr Milsom's submission that this was not a case of deliberate wrong-doing by the Claimant. But the Tribunal was entitled to conclude from the evidence before it that the Claimant's shortcomings were serious enough to constitute gross negligence, amounting to repudiatory conduct, such as to entitle the Respondent to dismiss without notice.' [paragraph 62]

Unfair Dismissal

104. The question of whether a dismissal was fair or unfair is a two stage process. The first stage is that it is for the Respondent to show a potentially fair reason for dismissal, and secondly, if that is done, the question then arises as to whether the dismissal is fair or unfair.

105. The reason for the dismissal and the reasonableness of the dismissal is based on the facts or beliefs known to the employer at the time of the dismissal (as per *W Devis and Sons Ltd v Atkins* 1977 ICR 662, HL). However, a Tribunal should consider facts that came to light during the appeal in considering whether the employer's decision to dismiss was reasonable (as per *West Midlands Co-operative Society Ltd v Tipton* 1986 ICR 192, HL).

106. In an unfair dismissal case in which the employee had been employed for two years and no automatically unfair reason is asserted, the burden lies on the employer to show what the reason or principal reason was, and that it was a potentially fair reason under section 98(2) of the Employment Rights Act 1996 ("the ERA"). Once that is done there is no burden on either party to prove fairness/unfairness.

Reason for dismissal

107. Section 98(2) identifies a number of potentially fair reasons for dismissal which include conduct and capability. In this case, the Respondent says that the Claimant was dismissed because of his conduct. The Claimant submits that the real reason for his dismissal was capability rather than conduct.

108. Section 98(3)(a) of the ERA provides a definition of capability which reads as follows:

"capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality […],

109. A Tribunal is not bound by the label the employer puts on its reasons, but it is seeking to characterise the employer's reasons rather than make findings of its own about the employee's conduct or capability (*UPS Ltd v Harrison* EAT 0038/11).

110. In *Sutton and Gates (Luton) Ltd v Boxall* [1978] IRLR 486 (EAT), the EAT held that "*cases where a person has not come up to standard through his own carelessness, negligence,* […] *are much more appropriately dealt with as cases of conduct or misconduct rather than of capability*… [The Tribunal should] *clearly distinguish in their own minds how far it is a question of sheer incapability due to an inherent incapacity to function, compared with a failure to exercise to the full such talent as is possessed*."

111. In *Adesokan v Sainsbury's Supermarkets Ltd* [2017] EWCA Civ 22 (CA), which related to wrongful dismissal, the Court of Appeal held that gross negligence can be misconduct, and the question for the Tribunal is whether the negligence is so grave and weighty as to justify summary dismissal. It will not often be fair to dismiss for an omission, but in some cases it can be - including in that case [paragraphs 23-25].

112. The claimant in *Philander* was the manager of care homes regulated by the CQC. He was dismissed after the care homes he managed failed inspections due to omissions on his part. The Tribunal found that his dismissal was for a

reason related to conduct and was fair because the Claimant had failed to carry out his role properly despite the training received and access to support if required. That decision was upheld by the EAT. The EAT held that the Tribunal was entitled to find the claimant's lack of comprehension and his failures, given the personal responsibility of his role, were gross misconduct and the dismissal fair [paragraph 51].

113. In *Philander*, the EAT stated that:

'The dividing line between conduct and capability can be paper thin and even porous. Some behaviours or acts or omissions which fall within the definition of extreme negligence can be considered as either capability matters or conduct matters and can properly be described as either. The Respondent in this case was entitled to consider the Claimant's behaviour as conduct. It could also have concluded it was capability. Even if it had plumped for a capability label it would, on the facts, have been entitled to dismiss, given the extensive recent training on the matters identified in the CQC report and the seriousness of the failings.' [paragraph 52]

114. In *Burdis v Dorset CC* UKEAT/0084/18/JOJ (EAT), the EAT confirmed that serious neglect, omission or carelessness can be a reason related to conduct (para 45). The Tribunal were entitled to conclude that the Claimant's prioritisation of service delivery over ensuring appropriate checks and balances were in place amounted to gross misconduct. [paragraph 49]

Fairness

115. Section 98(4) of the ERA specifies the test to be applied by the Tribunal in order to determine whether a dismissal is fair or unfair. It reads as follows:

"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."

116. In misconduct dismissals, there is well-established guidance for Tribunals on the approach to be taken when assessing fairness under section 98(4). This can be found in the cases of *British Home Stores v Burchell* 1978 IRLR 379 and *Post Office v Foley* 2000 IRLR 827. The Tribunal must decide whether the employer had a genuine belief in the employee's misconduct. The Tribunal must then decide whether the employer held such genuine belief on reasonable grounds after carrying out a reasonable investigation. The Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. The Tribunal must take in to account all aspects of the case including the investigation, the grounds for belief, the

penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4).

117. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (*Iceland Frozen Foods Limited v Jones* 1982 IRLR 439, *Sainsbury's Supermarkets Limited v Hitt* 2003 IRLR 23, and *London Ambulance Service NHS Trust v Small* 2009 IRLR 563).

118. In considering the fairness of the dismissal, the appeal should be treated as part and parcel of the dismissal process (*Taylor v OCS Group Limited* [2006] ICR 1602). The Tribunal's task under S.98(4) of the ERA, is to assess the fairness of the disciplinary process as a whole. Where procedural deficiencies occur at an early stage, the Tribunal should examine the subsequent appeal hearing, particularly its procedural fairness and thoroughness, and the open-mindedness of the decision-maker.

119. In the unfair dismissal context, a finding of gross misconduct does not automatically mean that dismissal is a reasonable response. An employer should consider whether dismissal would be reasonable after considering any mitigating circumstances [*Brito-Babapulle v Ealing Hospital NHS Trust* [2013] IRLR 854]. The employee's length of service and disciplinary record are relevant [*Trusthouse Forte (Catering) Limited v Adonis* [1984] IRLR 382) as well as the attitude of the employee to his conduct (*Paul v East Surrey District Health Authority* [1995] IRLR 305].

120. Inconsistency of punishment for misconduct may give rise to a finding of unfair dismissal (*Post Office v Fennell* 1981 IRLR 221, CA). However, whilst a degree of consistency is necessary, there must also be considerable latitude in the way in which an individual employer deals with particular cases.

121. In *Securicor Ltd v Smith* 1989 IRLR 356, CA, the Court of Appeal held that the claimant's dismissal was fair on the ground that there was a clear and rational basis for distinguishing between the cases, that is that the claimant was more to blame for the incident.

122. In considering disparity of treatment, Tribunals must be careful not to substitute their own view for that of the employer.

MY CONCLUSIONS

Breach of Contract (Wrongful Dismissal)

123. The Claimant was not paid notice pay as he was summarily dismissed for gross misconduct. The Claimant claims breach of contract (wrongful dismissal) and the Tribunal must decide whether he committed an act of gross misconduct such as to entitle the employer to dismiss him without notice.

124. The Claimant submits that his actions on the 8 January 2021 were not in fact unsafe: he has obtained evidence from National Grid that demonstrates that what he did on site was not unsafe. This is on the basis that National Grid's safety margins are less than the Respondent's safety margins. The Respondent accepts that it has built in additional safety margins.

125. The Respondent is entitled to set more conservative safety margins than the power network provider and has provided legitimate reasons for doing so.

126. The Respondent gives examples of gross misconduct in its disciplinary procedure. It makes reference to gross negligence which might have a major

impact upon the company and seriously breaching health and safety rules as reasons. It makes it clear that gross misconduct may result in summary dismissal.

127. The Respondent has produced a document, the glove box guide, which details its rules when working in the vicinity of high voltage. The Respondent also provides training to its engineers on working in the vicinity of high voltage. The Claimant has undertaken that training.

128. I am satisfied that the Claimant's actions on 8 January 2021, in failing to carry out a risk assessment and in running a drop wire under voltage in excess of 11 kV, can, quite properly, be categorised as a serious, rather than more minor, breach of the Respondent's health and safety rules. Alternatively, it could be categorised as gross negligence.

129. The requirement to follow the Respondent's health and safety rules relating to carrying out risk assessments and working around high voltage was so integral to the Claimant's role as an engineer that it was a serious breach of his duties to fail to carry out a satisfactory risk assessment and to lay the drop wire under high voltage.

130. For those reasons, I am satisfied that the Claimant's actions were a fundamental breach of his contract of employment and so amounted to gross misconduct which therefore permitted the Respondent to dismiss him without notice.

131. The Claimant's claim of breach of contract (failure to pay notice pay) is therefore not well founded and is dismissed.

Unfair Dismissal

The Reason for the Dismissal

132. When identifying whether the reason for dismissal relates to conduct or capability, I should first make findings as to the employer's own reasons for dismissal, and then assess how those reasons should be characterised in terms of the statute.

133. It is clear, on the facts before me, that the reason for dismissal was the events of the 8 January 2021 when the Claimant ran a drop wire directly under a high voltage cable. In the investigatory meeting, the Claimant accepted that his own on site risk assessment was lacking and that he did not notice the high voltage lines overhead. He stated that he would not have run the drop wire if he had thought that it was directly under power lines. In his disciplinary hearing, he accepted that with hindsight his risk assessment was lacking, that he made a mistake and that the risk assessment was down to him. He accepted that a risk assessment requires a full 360 degree assessment and that he did not look up.

134. The Claimant does not suggest that his dismissal was as a consequence of anything other than the events of the 8 January 2021.

135. The Claimant submits that his actions did not amount to misconduct but rather capability: he was not guilty of deliberate wrongdoing. Caselaw establishes that gross misconduct can include acts of gross negligence rather than intentional acts. The difficulty for the Claimant in this respect is that he was aware of the need to undertake a risk assessment before running the drop wire on the 8 January 2021. He was aware of the rules relating to working around high voltage as laid out in the glove box guide. He confirmed on several occasions during the investigation and disciplinary proceedings that he had undertaken training

relating to working around high voltage and that he was aware of separation distances. Other than in respect of his actions on the 8 January 2021, the Respondent accepts that the Claimant was a competent engineer. However, for whatever reason, he failed to carry out an effective risk assessment on the 8 January 2021 and so failed to identify that he was laying a drop wire under very high voltage. This was not a momentary lapse of judgement: he was on the site concerned for around 6 hours.

136. Whilst the Claimant did not intentionally disregard the Respondent's health and safety rules, the failure to carry out a risk assessment in the circumstances of this case can, given the potentially catastrophic health and safety implications, be quite properly categorised as gross misconduct. The Respondent's disciplinary procedure identifies failure to follow procedures and health and safety standards as misconduct. In addition, it states that gross negligence, seriously breaching health and safety rules, doing something that may cause significant loss, damage or injury through serious negligence can amount to gross misconduct. That being so, I find that it was open to the Respondent to categorise the reason for dismissal as being conduct rather than capability on the facts of this case.

137. I am satisfied on the evidence before me that the sole reason for the Claimant's dismissal was the events of the 8 January 2021, that the Respondent genuinely believed that the Claimant's actions on that date amounted to misconduct which could justify dismissal and that that belief was based upon reasonable grounds.

138. The Respondent has therefore shown that a potentially fair reason for dismissal existed, namely conduct, and that it held a genuine belief based upon reasonable grounds that his actions amounted to misconduct.

Fairness

The Procedure

139. I am satisfied that the Claimant was given a full opportunity, at each stage in the investigation and disciplinary process, to explain from his perspective what happened and why on the 8 January 2021. It can be seen from the record of the investigatory meeting that he provided a full account of what happened and why. It can be seen from the record of the disciplinary meeting that he was given the opportunity to provide a very full account of what occurred. He spoke for about 15 minutes without interruption when providing his account of the day concerned.

140. The Claimant submits that the photograph that he was first shown at the investigation meeting was not taken from the ground but rather higher up and so does not represent the position as it was on the ground. However, I do not consider that this was in any way procedurally unfair because the Claimant does not dispute that the drop wire was run under the high voltage concerned or that the drop wire in the photograph was the one that the Claimant had installed.

141. The Claimant asserts that his dismissal was pre-determined. At the point when Oliver Galea gave him the opportunity to resign he had made up his mind. The Claimant states that he felt as though Oliver Galea was trying to force him into making a rash decision and pushing him to quit.

142. I have made a finding that there was some manner of conversation referring to the option of the Claimant resigning before the disciplinary hearing, but that the

evidence before me was insufficient to show that Oliver Galea told the Claimant that his dismissal was inevitable.

143. The reality is that given the Claimant's actions on the 8 January 2021, and what is said in the Respondent's disciplinary policy, dismissal for gross misconduct was one of the possible outcomes. That being so, I do not consider that a reference in a conversation to there being the option of resigning means that Oliver Galea did not approach the disciplinary process in a fair manner. I am satisfied from the record of the disciplinary interview that the Claimant was given a full opportunity to explain the events of the 8 January 2021 and raise mitigating factors. There is nothing about what was said in that interview which suggests that Oliver Galea had already decided that he was going to dismiss the Claimant for gross misconduct. I therefore do not consider that the procedure in this respect was unfair.

144. Further, the Claimant had the right to appeal against the decision to dismiss. He was entitled to have a hearing, although he opted to make written submissions instead. At the Claimant's request, the appeal officer, David Kelly, was from a different region from the Claimant. The Claimant's representative provided detailed appeal submissions. I am satisfied based upon what is said in David Kelly's response to the appeal submissions, that he engaged with the points raised by the Claimant and re-considered whether dismissal was the appropriate sanction before reaching the conclusion that it was.

145. That being so, even if it had been the case that I had found that the initial part of the disciplinary process had been made unfair because of the suggestion by Oliver Galea that the Claimant had the option to resign (which I have not found), I am satisfied that any unfairness would, in any event, have been cured by the appeals process.

146. Having considered all of the evidence before me in the round, I am satisfied that the Respondent carried out an adequate investigation and that there was nothing about the disciplinary process that rendered it procedurally unfair.

Was the dismissal with the range of reasonable responses and just and equitable?

147. The Respondent is a very large employer with considerable resources with a dedicated human resources department. I have borne that in mind when assessing the fairness of the decision.

148. The Claimant asserts that he was treated differently to Lowell Bird without any justification. He also submits that there was no difference between his role and Lowell Bird's role; there is not a role of 'safety assist'.

149. The Respondent's position is that Lowell Bird was treated differently because he was not a comparable employee and because there were mitigating circumstances which justified that differential treatment.

150. I do not consider that Lowell Bird was a comparable employee to the Claimant. He was on site to assist the Claimant: he was not the engineer who had been allocated the job. He was not involved in the telephone calls relating to finding a solution and he was not responsible for making the decision to run the drop wire. Whilst Lowell Bird was trained in working around high voltage and was a qualified engineer, he had been on restricted duties for some time and was not allocated jobs such as the one on the 8 January 2021 other than as an assist. The Respondent took these factors in to account when reaching its decision as

to the penalty to impose on Lowell Bird. The Claimant accepted in his disciplinary hearing that the risk assessment was down to him.

151. The Respondent has provided a clear and rational basis for distinguishing between the Claimant and Lowell Bird. There is nothing irrational or unfair in the approach that was taken, which was that the Claimant was the in effect lead engineer on site and bore more responsibility than Lowell Bird. I therefore do not consider that the difference in treatment in this respect renders the dismissal unfair.

152. On the 8 January 2021, when on site the Claimant breached the Respondent's health and safety rules relating to working in the vicinity of high voltage. He was not aware that he was doing so because he failed to carry out an effective risk assessment and consequently ran a drop wire under very high voltage.

153. The Respondent accepts that the Claimant was otherwise a well performing engineer and previously had an unblemished safety record. However, there are circumstances in which an employer is entitled to dismiss an employee despite a previously clean disciplinary record.

154. The Claimant submits that he did not do anything unsafe and the evidence from National Grid demonstrates this. However, the Claimant cannot have known this at the time because, on his own evidence, he did not notice the high voltage cables because he did not look directly above him. Therefore, he cannot possibly have known whether what he was doing was safe or not, or the level of risk that he was taking, because his own account is that he did not know that the high voltage cables were there.

155. It may be that with the research that the Claimant has since done, that it is possible for him to argue that National Grid's rules are different but he had no idea that that was the case at the time.

156. Further, the Claimant did not suggest at any point during the investigation and disciplinary proceedings that there no risks emanated from his actions. He confirmed in his disciplinary hearing that he understood the safety implications.

157. In any event, the Respondent is required to ensure that it has health and safety processes in place to protect its employees and the public. It is therefore entitled to set health and safety rules to achieve this. It is for the Respondent to decide what health and safety rules it sets and the margin for error that it builds in to those rules.

158. The Respondent submits that dismissal was the most appropriate sanction because the Claimant was working in a dangerous field and had failed to conduct the most basic risk assessment. He broke one of the most basic rules having run a drop wire under voltage over 11 kV. The Respondent states that it could not trust that he might not do this again.

159. No-one was hurt as a consequence of the Claimant's actions. The sole consequence of the Claimant's actions was that a team had to be sent out to assess the situation and the next day they then removed the drop line and replaced it with a ground level cable.

160. The Claimant states that he was trying to find a solution as he was asked to do by his patch lead. However, his patch lead was not familiar with the site and would not have been aware of any potential hazards. He was not told to find a solution regardless of any hazards on site. The Claimant did not inform his patch

lead that there was high voltage power overhead. He could not do so as he was not aware of it.

161. I have considered whether the Respondent should have placed more weight on the challenges on the site concerned when weighing up the penalty to impose upon the Claimant. However, I am satisfied on the basis of the evidence that I have heard that the Claimant knew that the job could be sent back to planning. There is no evidence before me which would suggest that he was under any undue pressure to complete the job on that day. There is also no evidence before me to suggest that the Claimant was finding the working environment so challenging on that day that he was unable to complete an effective risk assessment. Indeed, he was on site for a considerable portion of the day which is not indicative of this and there is no suggestion that he asked to be taken off site because of any particular difficulties on the day.

162. It may be that another employer would have placed more weight upon the Claimant's concerns about what he understood to be the challenges of working on the site, and another employer may have accepted that the Claimant was distracted and that this resulted in his failure to carry out a risk assessment. However, I do not consider that this one factor in isolation renders the Respondent's decision to dismiss outside the range of reasonable responses open to it. This is, in particular, because there were other options open to the Claimant such as informing his patch lead that he did not feel able to carry out a full risk assessment or to send the job back to planning so more careful thought could be given to the most appropriate solution.

163. It is clear from the evidence before me that the Respondent takes the risks of working around high voltage extremely seriously. Engineers have been killed and seriously injured previously. As well as risk of death or injury, there is also the risk of damage to infrastructure and reputational damage. The Respondent has produced the glove box guide to alert its engineers to the issues when working around high voltage. The Claimant was aware of the glove box guide. He had a copy of it. He had also undertaken training on working around high voltage. In his investigatory and disciplinary meetings, he accepted that what he had done was in breach of the rules. The rule that the Claimant breached was not a rule about a minor matter; it was a rule put in place to prevent serious injury, loss of life, damage to property and damage to the Respondent's infrastructure.

164. It is difficult not to have sympathy for the Claimant's situation. For whatever reason he made an error on that day in failing to properly risk assess the site. People make mistakes and have lapses in concentration. In the Claimant's case this has resulted in his dismissal for gross misconduct. It may be that another employer would have opted for a lessor penalty given that he had a clean disciplinary record previously and as it is accepted that he was a good engineer.

165. However, even if another employer may have decided not to dismiss the Claimant, that does not mean that the Respondent acted unfairly provided its actions were within the range of reasonable responses open to an employer. I am not permitted to substitute my own opinion for that of the Respondent. Taking into account all of the above factors, I find that the Respondent's action in dismissing the Claimant for gross misconduct, whilst at the harsher end of the scale of responses, was within the range of reasonable responses.

166. Therefore, the Claimant's claim for unfair dismissal is not well founded and is dismissed.

_____

Employment Judge S.L.L. Boyes

_____

Date: 5 August 2022

Reserved Judgment and Reasons Sent to The Parties On
18 August 2022

FOR EMPLOYMENT TRIBUNALS

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