EMPLOYMENT TRIBUNALS

Claimant: Mr D Hall

Respondents: Wood Group Industrial Services Limited

Heard: Remotely (by video link) **On:** 22, 23 and 24 February 2021

Before: Employment Judge S Shore

Appearances
For the claimant: Mr R Quickfall, Counsel
For the respondent: Ms M Sangster, Solicitor

RESERVED JUDGMENT ON LIABILITY

1. The claimant's claim of unfair dismissal was well-founded and succeeds. The respondent unfairly dismissed the claimant for the reason of conduct.

2. I find that there was a 50% chance that a fair procedure would have led to a fair dismissal.

3. I find that the claimant contributed to his dismissal by culpable conduct to the extent that it is just and equitable to reduce his basic and compensatory awards by 50%.

4. The claimant's claim of detriment (contrary to section 47B of the Employment Rights Act 1996) because he made a protected disclosure is dismissed upon withdrawal.

5. The claimant's claim of disability discrimination (contrary to sections 15 and 20/21 of the Equality Act 2010) is dismissed on withdrawal.

REASONS

Introduction

1. The claimant was employed as Operations Director Construction UK by the respondent from 5 August 1998 to 19 March 2019, which was the effective date of termination of his employment following summary dismissal. The claimant's ET1

was presented on 31 July 2019. At all material times, the respondent was part of a larger group of companies. It specialised in construction projects and environmental projects.

2. The claimant presented claims of:

   2.1. Unfair dismissal (contrary to section 94 of the Employment Rights Act 1996),

   2.2. Detriment (contrary to section 47B of the Employment Rights Act 1996) on the ground that he made a protected disclosure; and

   2.3. Disability discrimination (contrary to sections 15 and 20/21 of the Equality Act 2010).

3. I case managed this case on 15 October 2019. At the preliminary hearing, I discussed with the representatives an issue that arose from the ET1 and ET3: the claimant sought to admit evidence of two meetings in May 2018 and on 25 January 2019 in paragraphs 6 and 11 of section 8 of his ET1. The respondent submitted that the passages should be redacted. I dealt with the issue as a preliminary matter in this hearing and decided that paragraph 6 did not contain without prejudice discussins, but paragraph 11 did. I confirmed my decision on reconsideration.

4. The claimant withdrew his claims of detriment and disability discrimination at a preliminary hearing before Employment Judge Garnon on 26 May 2020. I was advised by Ms Sangster that no formal judgment dismissing those claims has been issued by the Tribunal, so I have dismissed the claims in my judgment above.

5. The claimant's remaining claim of unfair dismissal arises from his dismissal for the stated reason of conduct on 19 March 2019. At the time of his dismissal, the claimant was serving notice after he had been made redundant. That notice was set to expire on 16 September 2019.

6. This case was originally listed by me for a final hearing on 6 to 9 April 2020 inclusive, but was adjourned because of the pandemic. A private preliminary hearing was held on 21 April 2020 when Employment Judge Garnon discussed the case with the representatives of the parties and made case management orders, including listing the case for a remote final hearing by CVP with a time estimate of three days to include remedy.

<u>Issues</u>

7. The parties submitted a joint list of issues. My copy had all references to the claims of disability discrimination and detriment removed, so I was only concerned with the matters listed at paragraphs 1 to 2.6:

1 PRELIMINARY ISSUE: WITHOUT PREJUDICE PRIVILEGE

1.1 Should paragraphs 6 and 11 of Section 8 of the claimant's ET1 be redacted to remove references to conversations in relation to a "Settlement Agreement" on the basis that these discussions were conducted on a without prejudice basis and/or

pursuant to section 111A of the Employment Rights Act 1996 and are therefore inadmissible in evidence?

2 UNFAIR DISMISSAL

Merits

2.1 Was the reason or principal reason for the claimant's dismissal his conduct, a potentially fair reason in accordance with Section 98(2) of the Employment Right Act 1996 (ERA)?

2.2 Did the respondent act reasonably in treating that reason as sufficient for dismissing the claimant in all the circumstances and in accordance with equity and the substantial merits of the case? (Section 98(4) of the ERA)? In particular:

2.2.1 Did the respondent believe that the claimant was guilty of gross misconduct, namely bringing the respondent into serious disrepute following a requirement from a client of the respondent that the claimant be removed from the Stanley Project?

2.2.2 If so, did the respondent have reasonable grounds for believing that the employee was guilty of that gross misconduct?

2.2.3 Was the investigation carried out by the respondent within the range of reasonable responses?

2.2.4 Did the respondent's decision to dismiss fall within the range of reasonable responses available to a reasonable employer in the circumstances?

2.2.5 To the extent that the Tribunal considers there were any procedural defects in the process followed by the respondent prior to the claimant's dismissal, were any such defects remedied by the respondent's internal appeal procedure?

2.2.6 Did the respondent follow the ACAS Code of Practice on Disciplinary and Grievance procedures?

2.3. In the alternative, was the claimant's dismissal fair for some other substantial reason under section 98 (1)(b) of the ERA having regard to the fact that the respondent was contractually obliged to remove the claimant from the Stanley Project and considering the lack of suitable alternative roles for him in the business given his seniority and role.

2.4 If the claimant's dismissal was fair for some other substantial reason under section 98 (1)(b) of the ERA:

2.4.1 Did the respondent act reasonably in treating that reason as sufficient for dismissing the claimant in all the circumstances and in accordance with equity and the substantial merits of the case? (Section 98(4) of the ERA)?

2.4.2 Did the ACAS Code of Practice on Disciplinary and Grievance procedures apply to the claimant's dismissal for some other substantial reason (per **Lund v St Edmund's School, Canterbury UKEAT/0514/12** and **Phoenix House Ltd v Stockman and another UKEAT/0264/15**)?

If so, did the respondent follow the ACAS Code of Practice on Disciplinary and Grievance procedures?

Remedy

2.5 In the event that the Tribunal finds that the claimant was unfairly dismissed, should any award of compensation be reduced on one or more of the following grounds:

2.5.1 to reflect the fact that the respondent would have decided to dismiss the claimant if it had followed the relevant procedure and any procedural failure established to have taken place would have made no difference to the respondent's decision;

2.5.2 to reflect any contribution of the claimant to his own dismissal;

2.5.3 section 123 of ERA on the basis that it is not just and equitable to award compensation to the claimant as a result of the fact that, had he not been summarily dismissed for gross misconduct:

2.5.3.1 he would have dismissed on 19 March 2019 for 'some other substantial reason' in light of the client's requirement that he be removed from the project and the fact that no alternative employment was available for the claimant to undertake; and/or

2.5.3.2 his employment would have terminated on 16 September 2019 by reason of redundancy;

2.5.4 to reflect any sums earned by the Claimant by way of mitigation in new employment elsewhere or through social security benefits following the termination of his employment; and/or

2.5.5 to reflect any failure by the Claimant to mitigate his losses.

2.6 In the event that the Tribunal finds that the claimant was unfairly dismissed, should any award of compensation be increased on account of any failure on the respondent's part to follow the ACAS Code of Practice on Disciplinary and Grievance procedures.

Law

8. I am grateful to Ms Sangster for setting out the relevant law so clearly in her written submissions. Mr Quickfall agreed that Ms Sangster's submissions on the law were correct, so I have reproduced them here with a few slight amendments.

9. Section 94 of the Employment Rights Act 1996 (ERA) provides that an employee has the right not to be unfairly dismissed.

10. For a dismissal to be fair:

    10.1. it must be for one of the potentially fair reasons contained in Section 98(1) or (2) ERA; and

    10.2. the employer must have acted reasonably in treating the potentially fair reason as a sufficient reason for dismissing the employee in accordance with equity and substantial merits of the case in terms of section 98(4) ERA.

Reason

11. It is for the respondent to show the reason (or principal reason if more than one) for the dismissal (section 98(1)(a) ERA).

12. A reason relating to the conduct of the employee is one of the permissible reasons for a fair dismissal (section 98(2)(b)).

13. 'Some other substantial reason' is also a permissible reason for a fair dismissal (section 98(1)(b) of the ERA).

Did the employer act reasonably?

14. If the Tribunal is satisfied there was a potentially fair reason for dismissal, it should proceed to determine whether the dismissal was fair or unfair, applying the test within s.98(4). The determination of that question (having regard to the reason shown by the employer):-

    14.1. (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

    14.2. (b) shall be determined in accordance with equity and the substantial merits of the case.

Conduct – Reasonableness

15. The approach to the determination of this issue has been developed through case law. Where an employee has been dismissed for misconduct, **British Home Stores v Burchell [1978] IRLR 379**, sets out the questions to be addressed by the Tribunal as follows:

    15.1. Whether the respondent believed the individual to be guilty of misconduct;

    15.2. whether they had reasonable grounds for believing the individual was guilty of that misconduct; and

    15.3. whether, when it formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.

16. However, compliance with **Burchell** is not in itself sufficient. For a dismissal to be regarded as fair, the Tribunal also requires to find that the respondent had carried out a fair procedure in accordance with principles of natural justice, taking into account the terms of the ACAS Code of Practice. Whilst a failure by an employer to follow the code is relevant to the question of reasonableness and thus liability, it does not *per se* render the dismissal automatically unfair: Tribunals should take all factors into account. In assessing whether an employer has adopted a reasonable procedure, consideration should be given to whether the disciplinary process as a whole was fair, which may be the case notwithstanding the presence of some particular procedural flaw. It is possible that procedural defects in an initial disciplinary hearing may be remedied on appeal, provided that the appeal is sufficiently comprehensive - see **Taylor v OCS Group Limited [2006] IRLR 613**.

17. The approach in Taylor was endorsed by the EAT (Simler P) in **D'Silva v Manchester Metropolitan University and others UKEAT/0328/16**. Dismissing the appeal, the EAT reiterated that what mattered was whether the disciplinary process as a whole was fair. Where an early stage of a process had been defective or unfair, subsequent stages would require particular careful examination in order to determine whether, overall, the process had been fair (§44).

18. Lastly the Tribunal requires to consider whether the decision to dismiss was a reasonable sanction, given the misconduct found to have taken place.

19. In determining these various issues, the Tribunal is not to approach the matter by effectively substituting its own view for what it would have done if it had been the employer, but to apply the object of standards of a reasonable employer. In doing so, the Tribunal should bear in mind that there is a range of responses to any given situation available to a reasonable employer and it is only if, applying that objective standard, the decision to dismiss is found to be outside that range of reasonable responses, that the dismissal should be found to be unfair (**Iceland Frozen Foods Limited v Jones [1982] IRLR 439**). If the Tribunal determines that a reasonable employer might reasonably have dismissed the employee, when faced with the same circumstances, then the dismissal would be fair, regardless of whether another reasonable employer might have taken a different or more lenient view.

20. I was referred to a number of precedent cases by Ms Sangster, which I have quoted in this decision where appropriate:

    20.1. **Sandwell & West Birmingham Hospitals NHS Trust v Westwood UKEAT 0032/09**;
    20.2. **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**;
    20.3. **Shrestha v Genesis Housing Association Ltd 2015 IRLR 399, CA**;
    20.4. **Taylor v OCS Group Limited [2006] EWCA Civ 702**;
    20.5. **Sharkey v Lloyds Bank plc UKEAT/0005/15;**
    20.6. **City and County of Swansea v Gayle UKEAT/0501/12**;
    20.7. **Neary v Dean of Westminster [1999] IRLR 288**;
    20.8. **Adesokan v Sainsbury's Supermarkets Limited [2017] IRLR 346**;
    20.9. **Scott Packing & Warehousing Co Ltd v Paterson [1978] IRLR 166**;
    20.10. **Dobie v Burns International Security Services (UK) Ltd 1984 ICR 812, CA**;
    20.11. **Polkey v AE Dayton Services Limited [1987] ICR 142**;

20.12. **Software 2000 Ltd v Andrews and others UKEAT/0533/06**;
20.13. **Anderson v Chesterfield High School UKEAT/0206/14**;
20.14. **W Devis & Sons Ltd v Atkins [1977] IRLR 314**;
20.15. **Parker Foundry v Slack [1992] IRLR 11**;
20.16. **Nelson v BBC (No2) 1979 IRLR 346**;
20.17. **Hollier v Plysu [1983] IRLR 260**;
20.18. **Phoenix House Ltd v Stockman and another UKEAT/0264/15**; and
20.19. **Kuehne And Nagel Ltd v Cosgrove UKEAT/0165/13**.

Housekeeping

21. The respondent called three witnesses.

    21.1. Susan Leight is an HR Business Partner with the respondent. She supported the investigating officer, Ian Ramsey, who conducted the investigation into the claimant's alleged misconduct. Her statement consisted of 20 paragraphs.

    21.2. Chris Foulkes was Senior Vice President, Industrial Services of the respondent at all material times, and chaired the disciplinary hearing involving the claimant. He made the decision to dismiss Mr Hall. His statement consisted of 25 paragraphs.

    21.3. Nigel Lees was Senior Vice President of Integrated Solutions for Wood UK Limited at all material times and heard the claimant's disciplinary appeal. His statement consisted of 25 paragraphs.

22. The claimant produced four witnesses:

    22.1. The claimant himself, whose statement consisted of 73 paragraphs.

    22.2. Barrie Thornton, who worked with the claimant between February 2018 and November 2018 on the project that is the subject of these proceedings. His witness statement consisted of 7 paragraphs.

    22.3. Danny Woodhouse, who was Construction Manager for the respondent and reported to the claimant. His witness statement consisted of 16 paragraphs.

    22.4. John O'Donnell, who worked for the respondent as Divisional Director (Marine). His witness statement consisted of 54 paragraphs.

23. The parties produced an agreed bundle of 427 pages. If I refer to a pages in the bundle, the page number(s) will be in square brackets. One additional document was produced on the first day of the hearing that contained two emails. It was given page number 428.

24. At the end of the evidence, I heard closing submissions from Mr Quickfall and Ms Sangster. Ms Sangster produced written submissions, which I considered. The hearing was conducted by video on the CVP application and mostly ran smoothly, with some technical issues. I am grateful to all who attended the hearing for their patience and good humour in the face of a few technical glitches.

25. I was conscious of the tight timetable that we would be facing and asked the representatives to limit cross examination of each other's witnesses to four and a half hours, which they both did.

26. As a preliminary issue, I dealt with the respondent's application to redact paragraphs 6 and 11 of the claimant's ET1, which it contended, were protected by without prejudice privilege. I decided that there was no reason to redact paragraph 6, but that paragraph 11 Should be redacted. No evidence related to the conversation set out in paragraph 11 was allowed.

27. I was unable to finalise my decision on the last day of the hearing because of the large amount of factual information I had to process and make findings upon. My task was made more difficult because I was advised that there was an ongoing dispute between the respondent and its client, HBV, which had not been resolved. I was keen to avoid making any findings of fact on that dispute, when I was determining whether or not the claimant had been unfairly dismissed.

28. I therefore advised the parties that I would make a reserved decision and provisionally listed a remedy hearing with a time estimate of three hours for **10:00am on 26 March 2021** by remote video hearing. I advised the parties that my reserved decision would deal with the merits of the claim, including contributory fault and **Polkey**. In order to assist the parties to reach an agreement on remedy without a further hearing and in furtherance of the requirement to me to assist the parties with alternative dispute resolution, I have given an indication of my initial thoughts on the applicability of an uplift to any compensatory award because of a failure of the respondent to apply the ACAS Code. I would stress that this indication is not my judgment and that if the question of remedy returns to me for a hearing I will hear argument from the parties before making a decision on the point.

Findings of Fact

29. All findings of fact were made on the balance of probabilities. If a matter was in dispute, I will set out the reasons why I decided to prefer one party's case over the other. If there was no dispute over a matter, I will either record that with the finding or make no comment as to the reason that a particular finding was made. I have not dealt with every single matter that was raised in evidence or the documents. I have only dealt with matters that I found relevant to the issues I have had to determine.

30. In assessing the reasonableness of the respondent's actions in this case, I have used the guidance in **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR** 23. If a step taken by an employer in disciplinary proceedings was one that was open to a reasonable employer acting reasonably, that will suffice.

31. It was never disputed by the respondent that the claimant had an unblemished service record from his commencement of employment on 5 August 1998 until his dismissal on 19 March 2019. He was appointed to his final post of Operations Director Construction UK in March 2018.

32. The respondent entered into 3 construction projects for a company that I will refer to as HBV. The projects were at Shiremoor, Blyth and Stanley. The claimant was Operations Director Construction UK and it was not disputed that he was ultimately

responsible for the successful completion of all three projects. Mr Quickfall made a remark in his closing submissions that the ultimate responsibility lay with the senior officer of the company, but that was never put in evidence or pursued in cross-examination and I do not consider it to be a valid point in the context of this case.

33. In May 2018, the respondent decided to close its Construction Division and the claimant had conversations with Derek Byrne, who was Director Industrial Services from January 2018 and Craig Shanaghey, who was Senior Vice President. As a result of those conversations, the claimant was given 12 months' notice of termination for the reason of redundancy, which was to expire on 16 September 2019. The claimant brought no claim arising out of his redundancy.

34. It was agreed evidence that following the decision to close the Construction Division, the respondent bid for no new contracts and committed to finishing the contracts it had already entered into. By autumn 2018, the Shiremoor and Blyth contracts had ended, which left the Stanley contract as the only remaining contract that the respondent had to fulfil.

35. The claimant says that it was agreed in September 2018 that he would enter a period of garden leave on or around 31 December 2019. I was taken to page 165 of the bundle, which was a letter from the respondent to the claimant dated 17 September 2018 that confirmed his redundancy. The letter said that the claimant would be "placed on garden leave on or around 31 December 2019 subject to agreement between [him] and Craig Shanaghey". I find that to be no more than agreement to make an agreement at a future date. It is entirely conditional.

36. The claimant's evidence in chief was that he agreed with Mr Shanaghey in December 2018 that he would delay his garden leave until the end of January to assist with the final stages of the Stanley project. In cross-examination, he added that Mr Shanaghey announced the new date at the Christmas party. He was challenged on the evidence by Ms Sangster and it was put to the claimant that it was not credible that Mr Shanaghey would agree to allow someone else to manage the end of the last project.

37. I find that the claimant has not met the standard of proof required to show that it had been agreed that he could start his garden leave on 31 January 2021, as there was no confirmation in writing produced and the chain of events that led to the claimant's dismissal were prompted by HBV's letter of 25 January 2021; only six days before the claimant says he was to leave the workplace. Further, in his letter of 5 February 2019 to the respondent [177-178], the claimant wrote (§3) that "Unfortunately, the expected work end date of December 2018 was postponed as the project at Stanley was delayed and I agreed, in good faith, and despite the fact that my health was not good, to stay on at work into 2019, **until this project was completed**." (my emphasis). It was agreed that the project was not completed until the date that claimant was dismissed in March 2019. I find that the claimant had not shown that the agreement set out in the letter of 17 September 2018 had been superseded. The claimant's inconsistency on the point undermines his credibility.

38. The circumstances that led to the claimant's dismissal arose out of the project with HBV at Shiremoor, Blyth and Stanley. I have tried to avoid falling into the trap of becoming distracted by the dispute between the two companies, as this case is

about the claimant's dismissal, but it is necessary to look at the contractual disagreement between the companies as context for the unfair dismissal claim.

39. On 25 January 2019, Laurence Basturkmen, the Chief Operating Officer of HBV wrote to Mr Shanaghey of the respondent [167-168]. The letter was mistakenly dated 25 January 2018. It was agreed between the parties that the letter was actually authored by Neil MacKrell of HBV. The heading of the letter was "Removal of Wood Group Industrial Services Personnel" and invoked the contractual right of HBV to require the respondent to remove a person from a contract. Neither side suggested that this clause had been activated unlawfully. HBV sought the removal of the claimant.

40. It has been the subject of dispute between the parties as to the breadth of matters that the letter contained which was included in the investigation of the claimant's conduct. I make the finding that the letter is clearly critical of Mr Hall's conduct over a substantial period of time on all three contracts at Shiremoor, Blyth and Stanley. I make that finding because:

    40.1. The first paragraph of the letter complains that Mr Hall "…has continued to act in a manner that is obstructive to the successful completion of the Contract in a timely manner."

    40.2. The third paragraph of the letter stated that "The unsatisfactory performance and obstructive behaviour has been numerous (sic) throughout the project and whilst the issues highlighted in this letter are not exhaustive we would bring your attention to the following specific items that demonstrate poor conduct."

    40.3. Under the heading "Validation reports", the letter states "Mr Hall has failed to procure and issue validation reports for soils testing on other projects that caused significant delay"

    I therefore find that it was in the band of reasonable responses for the respondent to consider investigating the claimant's conduct over the period of the three construction projects with HBV at Shiremoor, Blyth and Stanley. I also find that whilst the letter itself makes some very generalised complaints, the claimant (with or without the benefit of legal advice) should have realised that the scope of the letter encompassed all 3 projects at Shiremoor, Blyth and Stanley and the respondent's investigation would cover all three sites.

41. It was not disputed between the parties that on 24 January 2019, the claimant attended the Emergency Department of his local hospital with symptoms that could have indicated a minor stroke. He underwent tests but was released on the same day and instructed not to drive. He informed Mr Shanaghey's PA of what had happened on Friday 25 January and did not attend work that day. He had been given an appointment at the local stroke clinic for Monday 28 January.

42. It was not disputed that on the afternoon of Monday 28 January, Mr Shanaghey called the claimant and asked him to attend the office. The claimant was reluctant to attend because of his health situation and his resultant inability to drive. Mr Shanaghey arranged for a taxi to pick the claimant up and take him home. The

claimant said he was offered no explanation about the purpose of the meeting. I therefore find that he was not required to attend the office under “false pretenses” as submitted by Mr Quickfall.

43. On arrival, the claimant was shown a copy of the 25 January letter by Messrs Byrne and Shanaghey on a computer screen and was asked for his comments. I find the claimant’s evidence that he said that most of the letter was inaccurate and/or incorrect and that he offered to Mr Shanaghey to draft a response jointly or from Mr Shanaghey alone to be credible because this is what they had done previously when HBV had raised “unfounded complaints.”

44. It was not disputed that Mr Shanaghey’s response was to hand Mr Hall a letter dated 28 January 2019 from Joanna Barry, Senior P&O (People & Organisation Manager) [169-170] confirming that he was suspended. The letter:

    44.1. Confirmed that the respondent had received a complaint from the COO of HBV alleging that Mr Hall had acted in a manner that had been obstructive to the successful and timely completion of the contract, and that Mr Hall’s performance and conduct was sufficiently unsatisfactory to submit a formal complaint to the respondent;

    44.2. Confirmed that, if proven, the allegations could be construed as gross misconduct;

    44.3. Requested the claimant to make himself available to assist with the investigation and ongoing matters;

    44.4. Asked, “at this stage”, that the claimant not contact any of the respondent’s customers, suppliers, or his work colleagues to discuss the matter;

    44.5. Advised the claimant that his access to his IT, office/site and work mobile would be “temporarily restricted during the investigation stage;

    44.6. Advised the claimant that he would be contacted at the earliest opportunity to attend an investigation meeting

45. I find that the respondent’s procedures allowed it to restrict the claimant’s access to email, IT, telephones and colleagues and that it’s conduct to this point was not outside the band of reasonable responses. I should also confirm that I find that the decision to suspend the claimant was not outside the band of reasonable responses.

46. The respondent initially appointed Richard Byrne to investigate the claimant’s conduct. He was removed after the claimant objected to his appointment. I find that the appointment of Mr Byrne was not outside the band of reasonable responses, but the respondent was wise to accede to Mr Hall’s request that he be replaced.

47. There was then an exchange between the respondent (through Ms Leight) and the claimant (in person and then through his solicitors) about the date for a proposed investigatory meeting. I find that there is no requirement in the ACAS Code of Practice 1 – Code of Practice on Disciplinary and Grievance Procedures (2015) (“the ACAS Code”) that requires an employer to hold an investigatory meeting. The

claimant was invited to a meeting on 6 February 2019 by a letter dated 31 January 2019 [173].

48. There was a paucity of medical information from the claimant about his health at this time. Other than MED3 certificates stating he had “stress at work”, the only medical evidence I was taken to was a letter from his GP dated 18 March 2019 stating that the claimant was unfit to attend the disciplinary meeting. The first MED3 was dated 31 January 2019 and was for a period of one month [172]. It was accompanied by a letter from Mr Hall saying it was self-explanatory, which I take to mean that he was saying he was not going to attend the meeting scheduled for 6 February.

49. It was not disputed that Ms Leight responded to the letter from Mr Hall attaching his MED3 with a letter dated 4 February 2019 [174-175] suggesting it would be helpful to progress with the investigation, confirming the meeting date of 6 February and offering to hold the investigation by telephone, Skype, in writing or at a different venue. The claimant was asked which, if any of the options he would prefer.

50. It was not disputed the claimant replied on 5 February 2019 [177-178] and said he was unable to attend an investigatory meeting arranged for 6 February. may be able to answer questions.

51. Ms Leight replied on 7 February 2019 [179-180] setting the date of the investigatory meeting for 12 February and asking that if the claimant wanted questions to be sent to him, he should confirm by Monday 11 February. His responses would be expected by close of business on Tuesday 12 February.

52. Mr Hall had asked for access to emails and documents for a minimum of a week prior to responding to questions. This request was refused, as the meeting was only investigatory at this stage and the respondent required his response to the letter from HBV dated 25 January 2019. Ms Leight added:

    “Please be assured that there will be ample opportunity for you to prepare your defence should the findings of the investigation lead to a disciplinary hearing. At this point you will receive in advance, all the evidence to be discussed in the disciplinary hearing.”

    I do not find that the respondent’s position as set out above to be outside the band of reasonable responses.

53. The claimant then made a Subject Access Request (“SAR”) dated 12 February 2019. As I indicated at the hearing, the Tribunal has no jurisdiction to deal with any alleged failures to comply with a SAR. We have a process of disclosure of documents and if a party thinks that documents that should be disclosed have not been, they are at liberty to apply to the Tribunal for an order of specific disclosure. To my knowledge, no such application has been received in these proceedings.

54. The claimant’s solicitors responded to Ms Leight’s letter of 7 February on 12 February 2019 [183-184]. It is not a major point, but their letter states that the claimant had received Ms Light’s letter on 9 February. This ignored the fact that it was not challenged that Ms Leight sent letters to the claimant by email and post. I find it disingenuous for the claimant’s solicitors to imply that a letter had been

received only on that date that it was delivered by post. I note that the solicitor's letter was sent by email only. I also find that Mr Quickfall's submission that the emails to the claimant were sent to a private address and therefore could not be proven to have been received by him to extend the disingenuous conduct.

55. Ms Leight gave unchallenged evidence that the solicitors' email was received just over an hour before the investigatory meeting was due to start. Ms Leight responded on 18 February 2019 [187-188] with a list of questions that she asked Mr Hall to respond to by midday on Friday 22 February 2019. Those questions were set out in a document at pages 189 to 190.

56. Mr Hall responded by letter dated 21 February 2019 [191-192]. In the second paragraph of his letter, he asserted that he had agreed to the respondent's proposal of a meeting "by telephone, Skype, in writing or at an alternative venue" in his previous letter of 5 February 2019 and his solicitors' letter of 12 February 2019. I have read both letters carefully and cannot agree that such agreement is present in either letter. He goes on to renew complaints made previously about the time limits imposed for responses and other matters.

57. The claimant wrote to Ms Leight again on 27 February 2019 [193] with three documents:

    57.1. Appendix A – Brief summary of HBV projects over last 3/4 years;

    57.2. Appendix B – Response to Investigation Hearing Questions; and

    57.3. Response to 4 headings contained in HBV letter dated 25/01/19.

58. I find that in the absence of any documentary evidence concerning his ill health, other than MED3 forms, there was no good reason for the claimant not to have been able to provide the information in the three documents before 27 February. I find that he and his solicitors would have been better engaged in addressing the legitimate questions from the respondent than engaging in what I find to have been stalling tactics. I therefore find that the claimant's failure to provide information as late as he did is an instance of culpable or blameworthy conduct on his part that contributed to his dismissal.

59. I find that the questions asked by the respondent [189-190] could only reasonably be interpreted as requiring answers to questions about the Shiremoor and Blyth sites as well as the Stanley site. The first and second bullet points to question 1 clearly indicate as much. The questions relate to the letter of 25 January 2019 and the letter clearly references all three sites and the claimant's allegedly continuing behaviours.

60. Up to the receipt by the respondent of the claimant's answers to the questions it had asked Mr Hall, I find it had done nothing that could be characterised as falling outside the range of reasonable responses on an employer investigating a matter of alleged misconduct.

61. Mr Ramsey produced an Investigation Report dated 28 February 2019 [203-206]. In it, he states that the investigation closed on 27 February 2019. That was the same date that the respondent received the claimant's answers to the questions he had been asked. I find that no reasonable employer would have ignored the answers

provided by Mr Hall in the circumstances of this case. I find that Mr Ramsey did ignore the claimant's answers. I make that finding because:

61.1. the claimant's answers were not listed in the paragraph headed "Investigation Information" [204];

61.2. the final bullet point in the paragraph headed "background" states that "It is believed that Mr Hall has had reasonable time to respond to the questions and therefore recommendations are made **on the information available**" (my emphasis);

61.3. the first paragraph under the heading "Conclusions" [205] states "It is important to note that Darren Hall did not respond to written questions sent to him within the timeline that was provided and as a result I have had to base my conclusion on the information available to me at the present time."; and

61.4. the third paragraph under the heading "Conclusions" [206] states "Note: 28 February 2019; I am now in receipt of formal responses to the questions sent to Darren Hall. I have reviewed the information provided and do not believe that it materially changes the conclusions already drawn.

I find the final two points above to be contradictory. One states that the claimant had provided no information within the time limit, so Mr Ramsey proceeded without his input. The second states that he considered Mr Hall's answers and discounted them. I find that the more likely scenario is that Mr Ramsey took no account of Mr Hall's answers, as he gives absolutely no rationale for concluding that he had considered them and found that they did not materially change the conclusions he had already drawn.

62. I find Mr Ramsey's investigation to fall short of the reasonable standard. In effect, I find that no reasonable employer would have conducted an investigation and analysis of the allegations made in this case in the way that Mr Ramsey did. I agree with Mr Quickfall's submission that Mr Ramsey appears to have taken every word of HBV's letter of 25 January at face value and not questioned any of it. Specifically;

62.1. Mr Ramsey ignored the claimant's answers to questions put to him;

62.2. He failed to look at any of the claimant's emails or files to test the allegations that HBV had made; and

62.3. He failed to interview any of Mr Hall's colleagues to check the facts of the matters alleged.

63. Joanna Barry sent the claimant a letter dated 1 March 2019 [208-209], by post and attached to an email from Ms Leight dated 1 March 2019, inviting him to a disciplinary hearing on 6 March 2019 to consider a single allegation:

> *"That you have brought the company into serious disrepute following complaints received from the Chief Operating Officer of* [HBV] *and the subsequent request to be removed from your role on site".*

The claimant was told of his right to be accompanied and advised that the hearing could be conducted by telephone, Skype or in writing. He was told that if he did not attend, the meeting could proceed in his absence. He was told that if the allegation was proven, he could be dismissed. The invitation was sent with 66 pages of documents [210-276] that included:

63.1. An email from Neil MacKrell dated 29 January 2018 to Mr Shanaghey and another executive at the respondent complaining about delays at all three sites;

63.2. An email dated 26 January 2018 from John Nicholson, Associate Director – Health and Safety at AA Projects to the claimant and Danny Woodhouse with a report that highlighter “numerous issues which require action by Wood Group” at the Stanley site. The report was at pages 236-258;

63.3. An email from Mr MacKrell to Mr Shanaghey and another executive about gas verification reports at Shiremoor and Blyth and delays at Stanley that include criticisms of the claimant;

63.4. An email from Mr MacKrell to Mr Shanaghey and another executive dated 26 February 2018 with further details about the alleged delays at the three sites; and

63.5. An email dated 21 June 2018 from Mr MacKrell to Mr Shanaghey expressing “very little confidence” in Mr Hall and his team completing the three sites. The letter threatens terminating the contract for non-performance and escalating the complaints “higher up the Wood plc business.”

64. I find that at the date that the claimant received the invitation to a disciplinary hearing and the attached documents, the combination of both could not have left him in any doubt that he faced disciplinary action about his conduct across all three projects. I also find that the letter of 25 January 2019 included allegations about his conduct across all three sites, so when it was confirmed that the disciplinary related to that letter, the claimant should have expected the investigation and disciplinary to have covered all three sites and the allegations relating to all of them. In making these findings, I acknowledge that the disciplinary invitation could have been worded more precisely and could have split the allegations into a series of specific instances drawn from the letter of 25 January 2019 and the emails from 2018.

65. I also recognise that the claimant, who was represented by solicitors at this point and thereafter, did not seek clarification of the exact nature of the allegations other than the confirmation that the disciplinary concerned the 25 January letter.

66. On 5 March 2019, Mr Hall wrote to Joanna Barry by email from the address that the disciplinary invitation had been sent to. He complained that he had received the postal version on 4 March and that had been the first time he had seen the invitation letter and documents. Much of the correspondence between the parties had been by email using the claimant’s personal email account, so I do not find it credible that he claims not to have seen it before 4 March.

67. Mr Hall declined the invitation because:

    67.1. He was signed off work;

    67.2. His absence was "good reason" for non-attendance per the respondent's disciplinary policy and would remain so until the expiry of his MED3 certificate;

    67.3. Ms Leight had assured him in her letter of 7 February 2019 that he would have ample opportunity to prepare his defence should the findings of the investigation lead to a disciplinary hearing. He claimed that he could not properly prepare is defence until the response to his SAR had been received and he had access to all his work emails;

    67.4. Two working days' notice was inadequate and was less than the three days' notice required by the respondent's disciplinary policy; and

    67.5. John O'Donnell, who had agreed to attend as his work colleague was only returning from holiday on 5 March.

68. I find that the claimant's first point above was reasonable. I find that the second point is not entirely reasonable. I find that the respondent's disciplinary policy dated 25 September 2017 [64-69] states [65]:

    The employee must take all reasonable steps to attend the meeting. If the employee cannot attend the meeting they should inform the Company immediately in order for an alternative time to be arranged. If the employee fails to attend without good reason, or they are persistently unable to do so, the Company may have to take a decision based on the evidence available.

    It is therefore clear that whilst absence for a good reason is permissible, if the inability to attend is "persistent", the hearing can proceed in the employee's absence. I find that to be a reasonable policy for the respondent to take in the circumstances of this case. I find that the claimant's solicitor was incorrect in asserting that there was no basis or justification for holding a disciplinary hearing in the claimant's absence because the respondent's own policy "makes it clear that it should not proceed if the employee has 'good reason' for not attending" in his email to Joanna Barry of 6 March [280] for the reasons stated above in this paragraph.

69. It is an increasingly common feature of Employment Tribunal cases that a claimant makes an SAR. As I have already stated above, an SAR is made under a jurisdiction in which this Tribunal has no authority. The relevant guidance concerning disciplinary hearings and dismissals is contained in the ACAS Code, which is silent on the need to allow the employee to their email account, mobile phone or other information. I therefore find that the appropriate place to consider an allegation by a claimant that they were not allowed to see certain documents is when a Tribunal assesses the reasonableness of the investigation and the reasonableness of the decision to find the conduct to warrant dismissal. I therefore find the claimant's position that he would not be able to properly prepare his defence (and, by implication, would not attend a disciplinary hearing) to be unreasonable. I also find his solicitor's assertion that the SAR was not a separate process to be incorrect (email of 6 March [280]).

70. I find that a respondent that denies an employee access to documents they say will assist their defence runs the risk of a finding that their investigation of the allegations did not meet the third leg of the test in **Burchell**.

71. I do not accept that the claimant had had only two clear days' notice of the hearing for the reasons set out above. The respondent's disciplinary policy requires three days' notice (where practicable, which it was in this case), which I find the claimant was given.

72. I find the claimant's point about Mr O'Donnell's availability to be reasonable of itself, but the respondent's policy states [67]:

> *If the companion cannot attend on the date the employer has set for the meeting/appeal, the employee should propose an alternative time for the meeting. The alternative date must be reasonable and fall within 5 working days (or longer if both the Company and the employee agree) of the originally proposed date. The Company may ask you to choose a different companion if they are not available within 7 calendar days (or such time as agreed by the Company) of the originally proposed date.*

I find that the claimant did not propose an alternative time for the meeting, which was a minor act of culpable conduct on his part.

73. I have mentioned the intervention of Mr Hall's solicitors by email on 6 March. The respondent's solicitors become involved in correspondence by replying on 8 March 2019 [283-284]. The email makes what I find to be a perfectly valid point that the claimant's MED3 did not state that he could not attend work-related meetings. The meeting had been rescheduled for 12 March 2019 and the offer was repeated to conduct the meeting by telephone, Skype, paper, via a nominated representative of the claimant's or at a neutral venue. The email ended by stating:

> *"Finally if there are any particular additional documents or evidence that relates specifically to the issue under consideration (i.e. the concerns raised by the third party and their requirement that he be removed from site) that your client feels is missing, please let me know the details of any such evidence and my client will have a chance to consider relevancy."*

74. The response from the claimant's solicitor was only to repeat the assertion that the MED3 was sufficient evidence that the claimant was unfit to attend work meetings [282]. I cannot find and was not taken to any response from the claimant or his solicitors that identifies any particular additional documents that he wished to see.

75. Mr Hall emailed Joanna Barry on 11 March to advise that he had been advised that morning that he had to attend hospital for a further MRI scan on 12 March, the day set for the postponed disciplinary. No corroborative evidence of the appointment was provided and the claimant did not submit any documents that I was taken to in this hearing that suggested that his absence from work after 24 January 2019 was for any other reason than work related stress.

76. On 11 March, Ms Barry advised the claimant that the hearing would be rescheduled for 13 March 2019 and reiterated the possibility of using methods other than a face to face meeting. The claimant was advised that the hearing may proceed in his

absence. There was further correspondence that ended with the respondent advising the claimant by email dated 12 March 2019 [290] that the hearing would proceed at 12:30pm on Monday 18 March 2019.

77. There was also correspondence between the parties and their respective solicitors about the SAR. The claimant was advised on 12 March 2019 [297] that the respondent had been unable to locate any relevant data concerning eight individuals that the claimant had asked to be searched for in the respondent's records. These included Mr MacKrell and the COO of HBV. The letter stated that the respondent had completed sections 1, 3 and 4 of the 4 sections that the claimant had requested data about.

78. At 11:15am on 18 March, the claimant sent an email to the respondent to which was attached a letter from the claimant's GP dated 15 March 2019, which confirmed that the GP had been seeing the claimant recently and that the claimant was "experiencing significant stress related to work which has caused various physical as well as mental health symptoms and I agree that he is not able to attend meetings at work whilst he is off sick."

79. I find the late submission of the GP's letter to be culpable conduct on the part of the claimant because he had known that he faced a disciplinary hearing since 1 March 2019 and had been protesting his inability to attend since that date. I find that his covering email gave no explanation why the letter had been produced so late. I find that the claimant gave no explanation why a letter dated 15 March 2019 from his GP was not collected until the morning of 18 March [305] and not forwarded to the respondent until 75 minutes before a disciplinary hearing was due to start.

80. As for the letter itself, I find that it was hardly surprising that the claimant was "…experiencing significant stress related to work…", given that he was facing dismissal, but no medical diagnosis was given that I recognise as describing a particular condition. The claimant had never said he had "various physical" symptoms and had never described what his "mental health" symptoms were. I view this letter with the hindsight of the claimant having produced no medical evidence to this hearing other than this letter and his MED3 forms.

81. I find that the GP's letter entirely fails to engage with the options that the claimant was given on multiple occasions to participate in the hearing by Skype, telephone, at a neutral venue or otherwise. The GP's letter specifically states that the claimant is "…not able to attend meetings **at work** (my emphasis) whilst he is off sick."

82. I find that the claimant failed to respond to the offer to hold the disciplinary meeting by other means. I find that is culpable conduct on his part that contributed to his dismissal.

83. I find the claimant's conduct to be culpable and that it contributed to his dismissal. I find that the claimant seems to have been able to give his solicitor detailed instructions on the disciplinary process and his SAR.

84. Mr Foulkes decided to proceed in the claimant's absence for the reasons he set out in the section of the outcome letter dated 20 March 2019 [306-309] headed "Background", which he said "included":

- *Over 6 weeks have passed since you were suspended from your employment on 29 January 2019. The Company has a duty to deal with matters promptly and without significant delay.*

- *The seriousness of the disciplinary issue under consideration. As you know the allegation against you is that you had brought the Company into serious disrepute and, if upheld, it could result in your dismissal from the business. It was therefore of the utmost seriousness. Additionally, as it resulted from a complaint from a client and a request from them that you be removed from an important project, we were also conscious of the wider impact that this may have on the Company.*

- *We have made numerous adjustments to the date of the Disciplinary Meeting. The meeting was originally scheduled for 6 March 2019 but this was cancelled at your request. We then rearranged it for 12 March but when you were given a last minute appointment for the 12 March, we moved it again to the following day. You had indicated that your companion would not be available for 13 March 2019 so, to give you and your companion a further opportunity to attend, we rearranged the meeting to Monday 18 March 2019.*

- *You and your solicitor were informed on a number of occasions (including by email to you on 5 March 2019 and 11 March 2019 and to your solicitor dated 12 March 2019) that if you failed to attend then we may have to conduct the meeting in your absence.*

- *We have been trying to engage with you to discuss whether there were any adjustments that you feel could have been made to help you attend the Disciplinary Meeting. This included proposing the following measures:*

    - *Moving the meeting to a neutral venue off-site;*

    - *Conducting the meeting by telephone conference call or Skype;*

    - *Considering written submissions that you could submit as an alternative to attending. I appreciate that you had been able to provide detailed written answers as part of the investigation process;*

    - *Permitting you to make representations through a colleague or trade union representative attending the meeting in your place.*

- *You have not responded to any of these proposals. We were therefore not in a position to assess the likelihood of you feeling able to attend a rearranged meeting in the near future.*

- *We'd asked you if there were any particular additional documents or evidence that related specifically to the disciplinary issue under consideration that you felt was missing from the information provided to you with your original invite letter. You have not provided details of any such information.*

- *I appreciate that you feel unwell and I am aware that these procedures can be very stressful for those involved. We are keen to minimise that as much as*

possible. Given the stated reasons for your absence, it is hoped that a resolution could possibly assist in this.

In all the circumstances, we therefore concluded that it would not be appropriate to delay matters any further.

85. I find that Mr Foulkes' decision to proceed per the above rationale to be within the respondent's own policy and within the band of reasonable responses. In making this finding, I took note of the ACAS Guide: Discipline and Grievances at Work (2019) under the heading "What if an employee repeatedly fails to attend a meeting?" and made the following findings:

    85.1. The respondent's policy permitted the hearing to proceed;

    85.2. The matter to be considered was serious;

    85.3. The claimant's long service, senior position and clean disciplinary record mitigated against proceeding; and

    85.4. The medical opinion was equivocal and the claimant had not engaged with alternative methods of participating in the disciplinary hearing. He had stated that he wasn't going to attend until he was fit to work and that he had received responses to his SAR.

    I was shown no evidence as to how other cases had been dealt with on this point in the past.

86. The claimant suggested that the prohibition on his contacting colleagues after his suspension was a factor that made his dismissal unfair. I find that the respondent's procedure made the following provision for disciplinary hearings [65]:

    "*The employee will be given an opportunity to state their case and, if necessary, call relevant witnesses and present any evidence of their own. The Company reserves the right to decline the attendance of witnesses called by the employee where it reasonably regards their attendance as inappropriate in the circumstances."*

87. I find that the claimant never asked the respondent for permission to approach any colleague for the purposes of getting a witness statement from them. He was represented by solicitors throughout and I therefore find that his criticism on this point is unjustified. The respondent's policy envisages cases where employees call witnesses to give evidence. The claimant simply failed to exercise that option. I find that the decision to deny the claimant access to his office, colleagues, IT and phone on suspension is not outside the band of reasonable responses because there are often good organisational, IP or commercial reasons for doing so, which is why many companies reserve the right.

88. I find the claimant's failure to either attend the hearing in person, or engage in an alternative method of attendance, submit representations, arrange for someone to represent his interest or suggest any alternative is conduct that contributed to his dismissal for which he is culpable.

89. I find that Mr Foulkes' disciplinary hearing was tainted by the inadequate investigation by Mr Ramsey as set out in paragraphs 61 and 62 above. The evidence of Mr Foulkes and Ms Leight seemed to place the responsibility for any failures in the process on each other or Ms Barry.

90. In his evidence in chief, Mr Foulkes said he made his decision in accordance with the matters set out in the outcome letter under the heading "Findings" [307-308]. I will not set out those reasons again here, but it is fair to say that he found every one of the specific and general allegations made in HBV's letter of 25 January 2019 to be proven regarding the management of the sites at Shiremoor, Blyth and Stanley.

91. To summarise, Mr Foulkes found that:

    91.1. HBV had brought matters to the respondent's attention about Mr Hall's performance on the three sites on 29 January 2018, 15 February 2018, 26 February 2018 and 26 June 2018 that led it to the conclusion that it had little confidence in the claimant and his team completing the schemes;

    91.2. HBV had considered terminating the contract;

    91.3. The claimant was made aware of the complaints and had opportunity to rectify the issues;

    91.4. Despite this, HBV wrote on 25 January 2019 requiring Mr Hall's removal from the contract;

    91.5. The letter highlighted four specific failures mentioned in the letter from HBV dated 25 January 2019 relating to:

        91.5.1. Repeated failures to place orders with sub-contractors that caused delays and refusal to pay sub-contractors;

        91.5.2. Relocating a lamppost;

        91.5.3. Procuring and issuing gas validation reports that caused significant delays; and

        91.5.4. Not responding to reasonable requests for information.

92. The only reference to the claimant's case as set out in his replies to questions from the respondent [193-202] were:

    92.1. Mr Hall's submission that Mr Shanaghey had told him to play 'bad cop', which Mr Shanaghey had denied;

    92.2. HBV had offered Mr Hall a job, which Mr MacKrell had denied;

    92.3. HBV was the "single most underhand unprofessional and difficult client" that the clamant had ever worked with; and

92.4. One of the factors that the claimant had cited as a cause of delay was the operatives on site, who knew this was the respondent's last project, were effectively on a 'go slow' to stretch out the period they would be paid for.

93. Mr Foulkes then wrote a paragraph in a larger font that stated that the Stanley project was completed on 18 March 2019 (the date of the disciplinary), so the respondent had "contractually incurred Liquidated and Ascertained Damages (LADs) to the value of £6.5k per week for approx. 38 weeks which to date is approx. £274k". He said in his evidence that this was the starting point for his consideration of the disciplinary and that he 'worked backwards' from there.

94. Mr Foulkes said that he considered the claimant's actions to constitute gross misconduct and that after considering his seniority, length of service and [lack of] disciplinary record, the relationship between the respondent and the Mr Hall had broken down to such an extent that ongoing employment was not sustainable and that dismissal was the appropriate sanction.

95. In the alternative, Mr Foulkes said that had he not decided to dismiss Mr Hall, there would have been nowhere in the business that he could have been placed because he had been removed from the HBV contract.

96. Insofar as Mr Foulkes' decision is concerned, I make the following findings:

96.1. He had a genuine belief in the claimant's guilt;

96.2. That belief was not based on reasonable grounds because the investigation was flawed and there was insufficient evidence presented to me which showed that Mr Foulkes had undertaken a thorough investigation of the evidence. It must have been clear to him from the document submitted by the claimant on 27 February that he had major disputes of fact with HBV about the matters it had asserted. I have already found that Mr Ramsay failed to adequately investigate Mr Hall's case and I find that Mr Foulkes made the same error. The error is mitigated to some extent by the claimant's failure to engage in the disciplinary hearing;

96.3. The respondent had not conducted a reasonable investigation, as I have detailed above; and therefore

96.4. It was not reasonable to dismiss the claimant.

97. Mr Hall appealed the dismissal by a letter dated 28 March 2019 [314-315]. His points of appeal were:

97.1. The investigation and disciplinary process was a sham from his suspension;

97.2. He had been requested to attend the respondent's premises on 28 January by Mr Shanaghey under false pretences in order to deal with HBV's letter of 25 January 2019;

97.3. He was shown an electronic copy of the HBV letter on 28 January but had been denied a copy and denied access to his IT, office and work phone;

97.4. The letter from HBV had been taken at face value and his side of the story had not been listened to. The HBV allegations had not been investigated properly;

97.5. He was denied reasonable means to defend himself;

97.6. The outcome of the disciplinary was prejudged;

97.7. The respondent's disciplinary policy required investigations to be completed in 7 days, which was not done;

97.8. Mr Ramsay's investigation was inadequate;

97.9. Mr Ramsay had not taken account of Mr Hall's replies to the questions he was asked;

97.10. It was not fair to require him to say what documents he required sight of;

97.11. He could prove the comments about failing to pace orders with sub-contractors were inaccurate;

97.12. He could now prove that the plasterer had been paid;

97.13. He could prove that no discussions took place in December 2017 about the relocation of the lamppost;

97.14. The soil validation reports had been placed and dealt with in December 2018;

97.15. He had been denied access to his documents at the investigation stage;

97.16. He had not been given ample or any opportunity to prepare his defence;

97.17. The respondent had removed his personal belongings from the office prior to the disciplinary hearing;

97.18. He had been absent because of ill health throughout the investigation and disciplinary process;

97.19. He had been discriminated against because of disability;

97.20. He had not been informed about the allegations about his conduct at the time of the emails from HBV in 2018. The company had secured satisfactory financial compensation on the Blyth and Shiremoor projects, which demonstrated a history of HBV raising issues that "were without foundation";

97.21. The allegation that he had failed to respond to request for information was so general as to be impossible to respond to.

97.22. He could show that Neil MacKrell had offered him a job is he was given access to his emails. Mr MacKrell's denial was disputed;

97.23. He could disprove Mr Shanaghey's denial of the 'good cop/bad cop' allegation if he was given access to his IT;

97.24. The agreed completion date for the Stanley project was 20 July 2018, not June 2018, as Mr Foulkes had said; and

97.25. Barry Thornton, the former Commercial Manager, had been removed at the end on October 2018. Before then, he had been assisting in trying to manage the overrun and damages.

98. Nigel Lees was appointed to hear the appeal on 1 April 2019. He worked in a different part of the business to the claimant and had no prior involvement with him. It took some time and many attempts to set up the disciplinary hearing, which was eventually set for 10 June 2019. Mr Lees was provided with a set of documents, which he reviewed before the hearing. I reminded myself that an appeal can remedy a faulty disciplinary in some circumstances.

99. Mr Hall attended the hearing with his colleague, John O'Donnell. The notes of the appeal were produced at pages 324 to 331. These minutes were disputed by Mr Hall, who produced an annotated set of the minutes [367-382] shortly after the appeal hearing and included Mr O'Donnell's handwritten notes of the hearing [414-419] and annotated copy of the respondent's minutes [420-427]. The only point of dispute that was argued before me was the note on page 325 of the respondent's minutes that:

> *Both parties asked what the primary reason for the dismissal and sought clarity on the reasoning for the commencement of this process.*
>
> *Confirmed that it was the letter dated 25th January 2019 from HS Villages*

100. Mr Hall's suggested annotation [370] was:

> *DH seeked clarification that the sole reason for his suspension, disciplinary and subsequent dismissal was only on the receipt and contents of this HBV letter and that if that if he could prove that the contents of the letter to be inaccurate or untrue then he should not be in this predicament. NL and PI accepted and agreed.*

101. Mr O'Donnell's annotated version of the respondent's minute [423] includes his comment "Note only on this basis". I was not able to see anything in Mr O'Donnell's handwritten note of the meeting that references the comment. I therefore find that the respondent's note is the correct note of the comment above. I find the claimant's version to be self-serving. It is not supported or corroborated by Mr O'Donnell's evidence in chief, or either of his contemporaneous handwritten notes or his annotation of the respondent's minutes. After making that finding, I repeat the finding made earlier in these reasons that the letter of 25 January was broad enough to

include Mr Hall's conduct on all thee sites over the period of construction on each. I find that the point has no relevance to the fairness of the claimant's dismissal.

102. It was undisputed that he took Mr Hall through the 25 points of his appeal, which he found to consist of three main points:

    102.1. The investigation was inadequate and insufficient;

    102.2. The claimant had not been given reasonable opportunity to defend himself; and

    102.3. The process was a sham that had been predetermined.

103. Mr Hall produced a number of documents:

    103.1. A witness statement from Barry Thornton [344-345];

    103.2. Customer feedback from Mr MacKrell dated 30 March 2017 [336];

    103.3. Payment confirmation from the plasterer dated 27 March 2019 [340-341];

    103.4. Letter from Dunelm Geo dated 17 February 2018 [337-339];

    103.5. Email from Dunelm Geo dated 5 June 2019 [342];

    103.6. Minutes of a meeting between the claimant and a number of stakeholders in the Stanley project dated 20 December 2017 [332-335]; and

    103.7. An email from Steve Brookes to the claimant dated 19 March 2019.

104. Mr Lees concluded the hearing and told the claimant that a number of matters had been raised that required further review. I find that to be a reasonable and wise decision. Mr Lees then spoke to Derek Byrne, Neil MacKrell, the COO of HBV, Ian Ramsay and Craig Shanaghey. Paul Leneghan, from the respondent's P&O department, who was supporting Mr Lees, discussed the alleged clearance of the claimant's office with Brian Gordon, spoke to Barry Thornton about his statement and spoke to Stuart Sandilands , who had been Construction Manager at Stanley.

105. Mr Lees concluded his additional investigation by 29 July 2019 and then considered his decision. He decided to uphold the appeal. His reasons given in his evidence in chief were:

    105.1. The investigation undertaken by Mr Ramsay was appropriate given the lack of engagement from the claimant and the concerns raised by HBV were well-founded (§21);

    105.2. The claimant had had a reasonable opportunity to defend himself. He had been invited to ask for documents he needed throughout the investigation process (§22);

105.3. The process was not a sham because it had been triggered by a letter from a third party that required Mr Hall's removal from a contract. The claimant had not suggested that the ulterior motive was to avoid paying him notice or redundancy pay (§23);

105.4. The claimant's actions were gross misconduct justifying dismissal (§24).

106. A letter dated 31 July 2019 confirming his decision [396-402] was sent by Mr Lees to the claimant. Mr Lees made a number of findings that overturned the findings of Mr Foulkes:

106.1. The plasterers had been paid;

106.2. The lamppost had not featured in discussions in December 2017; and

106.3. Soil testing validation reports had been engaged in February 2018.

However, Mr Lees found that whilst these instances were not proven, the overlying general allegation of delay, failure to respond, failure to deal with matters and failure to achieve the programme were proven.

107. Mr Lees supported Mr Ramsay's position on the investigation, which I find to be an error that is not in the band of reasonable responses.

108. I find that Mr Lees' failure to put the results of his further enquiries back to the claimant for comment (even if he had just written to the claimant with a copy of the statements/transcripts of conversations) is a step that no reasonable employer would have done. The people that Messrs Lees and Leneghan spoke to gave evidence that was the polar opposite of the claimant's. The claimant had provided evidence that three of the specific allegations made in the letter from HBV dated 25 January 2019 were unreliable. I find it outside the band of reasonable responses, therefore, for Mr Lees to not allow Mr Hall to comment on the results of his further investigations before making a decision.

Assessment and Conclusions

109. I find that the respondent has shown on the balance of probabilities that the claimant was dismissed for the sole reason of misconduct. That misconduct related to the claimant's management of the Shiremoor, Blyth and Stanley sites. The claimant brought no evidence that there was any other reason and brought no evidence that there was an ulterior motive for his dismissal.

110. I find that both Mr Foulkes and Mr Lees genuinely believed the claimant to be guilty of gross misconduct. Both gave clear and cogent evidence in relation to this and there was no evidence that met the required standard that showed their decisions were predetermined or that they were put under pressure to dismiss the claimant.

111. I find that there were reasonable grounds for believing the claimant to have been guilty of gross misconduct, but only after Mr Lees had made further enquiries. I find

that Mr Hall sought to minimise his responsibility for the things that went wrong with the three sites at the time, in the investigatory and disciplinary procedures and in this hearing, but the fact remains that he *was* responsible and all three sites were delayed. He sought to blame everyone but himself, including his own witness, Mr Woodhouse and the sub-contractors on site.

112. The disciplinary matters that were investigated included the delays on all sites and whilst the claimant put some of the blame on the workforce, his evidence was that his action to address the problem was to suggest a financial incentive scheme for the sub-contractors, which appears to me to be rewarding people who won't do the job they were paid to do, and removing one of them.

113. I find that the evidence brought to this Tribunal, some two years after the event, shows on the balance of probabilities that the claimant was responsible for at least some of the delays on the project. He may have been able to show that some of the examples were not sustainable, but that still left projects that overran and cost the respondent many thousands of pounds. I was not convinced that Mr Foulkes knew what the exact number was, but it was a substantial amount, whatever the figure.

114. I also find that no new documents were presented to this hearing that were not available and used in the disciplinary hearing or appeal. That fact therefore casts some considerable doubt on whether the claimant's assertions that he could not properly defend himself because of his inability to see all his emails, because I have to presume that the claimant could have sought such documents through the SAR route or through applications to this Tribunal for specific disclosure. I therefore find that the claimant's case at appeal was his case at its height at the time.

115. I accept the evidence given that the removal of an executive at the level of the claimant from a project is rare, but it was legally possible and not unprecedented. I am not naïve enough to reject the possibility that HBV may have requested the claimant's removal as a tactic to remove someone who would stand up to the company in negotiations, but the claimant's own evidence was that his position was weakened by the removal of Mr Thornton's skills in dealing with disputes with the client. I find it very unlikely that a company of the size and resources of the respondent would simply pay LADs if it felt that it did not have to.

116. I cannot substitute my own view of what a reasonable investigation should be. I should ask whether the employer's actions were within the 'band of reasonable responses' open to a reasonable employer in the circumstances that the employer found itself in (***Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23).*** This means that I have to decide whether the investigation was reasonable in the circumstances, not whether I would have investigated things differently.

117. I have already found that Mr Ramsay's investigation was not reasonable in all the circumstances and was outside the band of reasonable responses. I find that Mr

Foulkes did not make any further investigations and accepted Mr Ramsay's report as read. I find that also to have been outside the band of reasonable responses.

118. I find that whilst Mr Lees is to be commended for making further enquiries after hearing from Mr Hall, his failure to go back to Mr Hall for comment on those enquiries was a step that no reasonable employer would have taken in the circumstances of this case where Mr Hall had very long unblemished service, was in a senior position and had shown (to my satisfaction at least) that three of the specific factual allegations made in HBV's letter of 25 January were not sustainable.

119. I do not find that the case of ***Shrestha v Genesis Housing Association Ltd 2015 IRLR 399, CA***, which Ms Sangster seeks to relay upon is relevant to the facts of this case. The investigation was flawed because Mr Ramsay failed to consider Mr Hall's submissions. Mr Foulkes took Mr Ramsay's report at face value and Mr Lees did not go back to Mr Hall for a response to his additional enquiries.

120. I find that the only material failures in the respondent's procedure were the failures of investigation. I accept Ms Sangster's submission that in any unfair dismissal claim it is "almost inevitable that the claimant would be able to identify a flaw in the employer's process". I also accept her submission that procedural issues do not sit in a vacuum, but the nature of the failure in this matter is central to the case and one of the three legs of **Burchell**.

121. I find that the claimant did not help his own cause by the way he reacted to his suspension and the bringing of disciplinary proceedings. I find his stance to have been obstructive and unreasonable for the reasons I have set out above.

122. I find that because of the failures in the investigation, dismissal was not a reasonable sanction.

123. In all the circumstances, I find that the dismissal of the claimant was unfair.

124. The reason for dismissal was not some other substantial reason. It was misconduct.

Polkey

116. In ***Software 2000 Ltd v Andrews and others UKEAT/0533/06,*** the EAT gave the following guidance on the approach to be adopted:

> *"The question is not whether the Tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice".*

117. As I have indicated in my findings above, the extent of the respondent's failure to follow a fair procedure was its investigation into the claimant's alleged wrongdoing

at the disciplinary and appeal hearings. I find that if the respondent had completed a reasonable investigation that met the threshold in **Burchell**, there is a chance that the decision to dismiss would have been fair, as I find that if Mr Lees had put the results of the post appeal investigation to the claimant, the fact that he has been unable to expand on the documentary evidence produced at the appeal for this hearing means that he would struggle to answer all the matters that were alleged against him.

118. The claimant may have answered some of the specific matters raised in the 25 January letter from HBV, but I find that a holistic view of the evidence available to the respondent after Mr Lees' investigation leads me to a finding that there is a percentage chance that the claimant would have been fairly dismissed. I put that percentage at 50%.

Contributory fault

119. As I have indicated in my findings above I find that the claimant contributed to his dismissal. I find that when I look at the causative or contributory conduct of the claimant, there is justification for the reduction of the basic and compensatory awards to which he would otherwise be entitled

120. I applied the authority of the case of ***Nelson v BBC (No2) 1979 IRLR 346*** which gives guidance on the findings that the Tribunal must make for there to be a finding of contributory fault:

    120.1. Culpable or blameworthy conduct by the employee; and

    120.2. That conduct must have caused or contributed to the dismissal; and

    120.3. It is just and equitable to reduce the assessment of loss to a specified extent.

121. I find that the claimant's failure to engage with the investigatory process, his failure to request specific documents, his failure to respond to the options of holding the disciplinary hearing, but most importantly, his failures in managing the three sites, for which I find he has to bear some responsibility result in a finding that the appropriate just and equitable percentage reduction in the basic and compensatory awards should be 50%. Mr Hall fought this case on the basis that if he proved that the three specific allegations in the HBV letter were disproved, then the respondent's case would evaporate. I do not agree with his position for the reasons set out above.

122. As indicated in my reasons above, I have not made a decision on whether the respondent breached the ACAS Code, but my inclination is to prefer Ms Sangster's argument that the respondent ticked the required boxes for a disciplinary process,

so it would not be just to award any uplift. However, I will hear argument on the issue at the remedy hearing.

123. I have made case management orders for the remedy hearing in a separate order.

Note: This has been a remote hearing. The parties did not object to the case being heard remotely. The form of remote hearing was V - video. It was not practicable to hold a face to face hearing because of the Covid19 pandemic.

Employment Judge Shore
2 March 2021