EMPLOYMENT TRIBUNALS

Claimant: Mr C McGuinness

Respondent: Sovini Property Services Ltd

Heard at: Manchester (remote public hearing via CVP)

On: 5 and 6 August 2021

Before: Judge Brian Doyle

Representation
Claimant: Mr C Green, solicitor
Respondent: Ms R Jones, counsel

RESERVED JUDGMENT

The claim is not well-founded and it is dismissed.

REASONS

Introduction

1. The claimant's claim of unfair dismissal was heard by the Tribunal via the Cloud Video Platform (CVP) over two days on 5-6 August 2021. Having concluded evidence and submissions by mid-afternoon on the second day of the final hearing, the Tribunal reserved its judgment. This is the reserved judgment with written reasons. References to the document file presented at the hearing are in square brackets below.

2. Early conciliation took place on 18 November 2020 [29]. The claim form (ET1) was presented on 24 November 2020 [1-12]. It contains a complaint of unfair dismissal alone. The response form (ET3) was presented on 5 January 2021 [13-28]. Standard case management orders were issued [30-33].

The claim

3. The claim concerns the dismissal of the claimant by the respondent following later acts of misconduct that took place within a short time of a final written warning for earlier acts of misconduct.

4. The claimant's pleaded case may be gleaned from his ET1. He accepted that he had been using equipment that had not been PAT ("Portable Appliance Test") tested. This was a breach of the respondent's health and safety policy. However, his case is that this was not sufficient to dismiss him for gross misconduct. The Tribunal notes that the particulars of claim make no mention that he was already the subject of an earlier final written warning that remained live. The claimant alleges that he was targeted for health and safety inspections. He believes that the respondent was looking for a reason to dismiss him. Taking account of his length of service and the relatively minor misconduct, he pleads a case that immediate dismissal was excessive (although he was dismissed with notice).

5. The claimant's pleaded case became somewhat expanded in his witness statement. In that context, it appeared that the claimant took issue with the earlier final written warning; introduced questions about his mental health; alleged further a breakdown in his relationship with his managers; repeated his concern that there was a "vendetta" against him; and asserted that his breaches occurred against a background of a generally lax culture within the respondent company with regard to health and safety policy, leaving work early, use of company vehicles and private working on other property outside of work.

6. In the cross-examination of the respondent's witnesses, issue was taken with various aspects of the first and second disciplinary investigations; the final written warning; the second disciplinary appeal; the motives of his line manager; the interpretation of comments he made about his attitude towards the company; the company's health and safety "regulations"; the actions of other employees; inconsistent treatment; and several other issues.

7. The scope of the claim largely returned to its original boundaries in the final submissions made on behalf of the claimant. See below.

The response

8. The respondent pleads that dismissal of an employee for a reason which relates to the conduct of the employee is a potentially fair reason for dismissal. The respondent relies on the fair reason of conduct.

9. Its case is that the claimant had received a live final written warning, having been issued to him some six months prior to the disciplinary proceedings. The respondent had notified the claimant when it sent his final written warning that he could be dismissed if there were any further acts of misconduct, or gross misconduct, committed by him within the following 12 months and the claimant accepted this. When further misconduct was reported, the respondent conducted a reasonable investigation and acted reasonably in all the circumstances in treating the misconduct as a sufficient reason for dismissing

the claimant, when factoring in the final written warning. It is therefore denied that the claimant was unfairly dismissed as alleged or at all.

10. The respondent contended that the decision to dismiss the claimant was procedurally fair. If the Tribunal were to find that the claimant's dismissal was procedurally unfair, then the respondent's case is that had a fair process been followed the claimant would have been dismissed in any event or within a short period thereafter. The respondent then relies on *Polkey v A E Dayton Services Ltd* [1987] ICR 142 to argue that the claimant would have been dismissed in any event and to seek a reduction in any award for compensation accordingly.

11. If the circumstances giving rise to dismissal do not amount to misconduct, the respondent then contends in the alternative that the claimant was dismissed for some other substantial reason as the respondent had lost all trust and confidence in the claimant and was dissatisfied by his attitude and approach to work. The respondent found the claimant to be untrustworthy. Upon finding that the claimant had made serious derogatory comments about the Sovini Group, the respondent determined that the relationship had fundamentally broken down.

12. If the circumstances giving rise to dismissal do not amount to misconduct or some other substantial reason, in the alternative, the respondent contends that if the claimant had not been dismissed on 26 August 2020, he would have been given a further warning and it is likely he would have been dismissed soon. If the circumstances giving rise to the dismissal do not amount to misconduct, in the alternative, the respondent relies on the claimant's poor performance. If the claimant had not been dismissed, he would have been subjected to a performance management process which would have resulted in his dismissal soon.

The issues

13. This case had not been subject to bespoke case management. There is no agreed list of issues. However, that is no disadvantage to the parties or to the Tribunal because the issues that arise follow logically from the application of section 98 of the Employment Rights Act 1996 and its associated case law.

14. It is not disputed that the claimant dismissed. The issues that naturally arise are: (1) What was the reason or principal reason for dismissal? (2) Was it a potentially fair reason? (3) Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

15. As this is a misconduct dismissal case, further issues obviously arise: (1) Was the claimant's misconduct the reason or principal reason for dismissal? (2) Alternatively, did the respondent have some other substantial reason for dismissing the claimant? (3) Did the respondent genuinely believed the claimant had committed misconduct? (4) If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? (5) Were there reasonable grounds for that belief? (6) At the time the belief was formed, had the respondent carried out a reasonable investigation? (7) Has the respondent otherwise acted in a

procedurally fair manner? (8) Was the dismissal within the range of reasonable responses?

16. In addition, as the matter has been put in issue in the evidence, to what extent may the Tribunal re-examine or go behind the final written warning?

17. Alternatively, if this is a "some other substantial reason" case: (1) What was the reason or principal reason for dismissal? (2) Was the reason a substantial reason capable of justifying dismissal? (3) Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

The evidence

18. The claimant gave evidence on his own behalf. The Tribunal heard witness evidence for the respondent from Mr Mathew Parkins, Mr Antony Dillon, Mr Mark Bell and Ms Kerry Beirne.

19. The documentary evidence comprised a file ("bundle") of 382 pages. During the claimant's evidence, it became apparent that he and his representative only had the first 251 pages of that bundle. The Tribunal adjourned to allow the legal representatives to address the matter, which was resolved without any further difficulty or objection.

Assessment of the evidence

20. The claimant was an honest witness, but one who lacked insight into and perspective upon his conduct in the workplace. His evidence tended to focus upon single aspects of his disciplinary history rather than seeing the bigger picture presented by examining that history in the round.

21. The account given by the respondent's witnesses was a consistent account within and between themselves. That was an account corroborated by the documentary evidence. The Tribunal has no hesitation in drawing its findings of fact largely from the respondent's witness evidence, with cross-references to the relevant documents. It does not follow at this stage of the Tribunal's task, however, that the Tribunal has accepted the respondent's defence to the claim. It will in due course turn to examine the issues by reference to the factual findings.

22. The Tribunal made the following findings of fact based upon its assessment of the evidence and the balance of probabilities.

Findings of fact

23. The respondent company, Sovini Property Services Ltd, is based in Bootle, Merseyside. It is a maintenance provider primarily operating for in-house repairs and maintenance. It is part of the Sovini Group, which is a housing association.

24. The claimant commenced employment with the respondent on 13 June 2011. He was employed as a multi-skilled operative. His employment contract

documentation is at [368-377]. He was dismissed with notice for misconduct on 26 August 2020 at a time when he was the subject of a live final written warning.

25. The final written warning had been issued on 15 January 2020. The claimant had been absent from work between 22 October 2019 and 5 November 2019. He had submitted a statement of fitness for work [63-64]. Thus, he was on sick leave at this time. His statement recorded that he was suffering from low back pain. He was unable to work due to limited physical ability [65-67].

26. The respondent received an allegation from another employee (Mr Mathew Parkins) that the claimant was working while off sick at a property where renovation works were being carried out [53]. The claimant had been seen attending a property not managed by the respondent in his work uniform and using the vehicle provided by the respondent.

27. Mr Parkins was the claimant's line manager. Mr Parkins is a Project Manager, who has worked for the respondent for 10 years. He manages a team of 60 employees carrying out vacant property refurbishments for several social housing providers. He regarded the claimant as a good worker, but in his assessment, from time to time there were issues with his attitude, and he could be difficult and confrontational.

28. An investigation was carried out by the respondent in November 2019. The investigation was conducted by Mr Graham Ball, a quantity surveyor employed by the respondent. As part of that investigation vehicle tracking data were considered [55-59]. That revealed that the claimant had used the company vehicle to visit two properties that were not part of the respondent's estate [102-103]. One of the properties belonged to his father and his visit to that property is not really in issue. The other property was one that the claimant was "doing up". Although he was working at the property, he was delivering materials to it. The question of the claimant leaving working early on occasions was also examined [105-110].

29. Mr Ball interviewed Mr Parkins [69-73] and another manager, Mr Martin Mather [75-79]. The claimant was also interviewed [81-89].

30. On 20 December 2019 the claimant was invited to a formal disciplinary hearing [42-43]. He was provided with a copy of Mr Ball's investigation report and appendices [44-110].

31. In the invitation letters dated 17 and 20 December 2019 [111-114] the claimant was warned that a possible outcome of the disciplinary hearing was dismissal. The hearing would be conducted to consider whether the claimant had committed acts of gross misconduct, namely: (1) a potential breach of trust and confidence; (2) a potentially serious breach of the respondent's fleet management policy [91-100]; (3) dereliction of duty; (4) acting in own interest trading in conflict with the respondent; and (5) potential fraud – relating to the claimant's receipt of statutory sick pay.

32. Following the disciplinary hearing conducted by Mr Paul Elliott (Senior Site Manager) on 13 January 2020, the claimant was issued with a Stage 2 final written warning dated 15 January 2020 [115-117]. The claimant was found to

have committed serious misconduct in line with those five allegations. The claimant was provided with a copy of the disciplinary hearing notes [119-127].

33. On 15 January 2020, the claimant was informed of the outcome of the hearing. He was told that the final written warning would lapse after a period of 12 months, subject to satisfactory conduct in accordance with the respondent's disciplinary policy.

34. On 18 February 2020, the claimant appealed against the decision to issue him with a final written warning [128]. The appeal hearing was eventually conducted by Mr Steve Parker (Director) with assistance from Ms Kerry Beirne (People and Learning Director) on 2 March 2020 [129-132]. The appeal was rejected on 5 March 2020 [138-139], and the warning remained live on the claimant's file. Notes of the appeal hearing appear at [133-137].

35. The Covid-19 pandemic then intervened. The claimant among other employees was furloughed, although not without some dispute as to the basis or conditions upon which he was being furloughed [140-146]. He later was recalled to work some time before the next incident.

36. On 18 June 2020 Mr Parkins received an email [169] from Martin Hunt (Group Health and Safety Officer) regarding a health and safety audit Mr Hunt had undertaken with the claimant on 16 June 2020 [154-168]. Mr Hunt reported that the claimant had failed the health and safety audit. There were three reasons: (1) not having his equipment PAT tested; (2) not using his RCD ("Residual Current Device") when he was meant to; and (3) not having his fire extinguisher inspected.

37. Mr Hunt also reported that the claimant's attitude had been particularly poor when he attended site. The claimant was sat in his van drinking a cup of tea. When Mr Hunt introduced himself, the claimant told him that he would have to wait until the claimant had finished his break. Mr Hunt also remarked that the claimant was not particularly happy working at the respondent company. He reported that the claimant had said that the company had massively gone downhill. Mr Hunt felt it appropriate to report this as he did not want customers hearing such remarks by the claimant.

38. Mr Parkins agreed with Mr Hunt's concerns. If it were true, it would be a serious issue. He decided to speak to his line manager, Mr Peter Baker (Operations Manager), about the situation. Mr Parkins knew that the claimant had received a final written warning in January 2020 and that it was still live. Mr Parkins and Mr Baker discussed Mr Hunt's email and the fact of the final written warning. They decided that it was appropriate to refer the matter to HR and for an investigation to be launched.

39. Mr Parkins knew that when employees fail PAT tests the respondent did not always proceed to inform HR and launch an investigation. PAT tests are regarded as very important for health and safety reasons, but usually the respondent would give an employee the opportunity to get their equipment tested at the first instance. However, in Mr Parkins's view, the claimant had failed the audit on three counts and, from what Mr Hunt had said, he had demonstrated a poor attitude. Mr Parkins felt that there were other issues at

play which needed to be examined. In his assessment, the claimant's general attitude had been poor for a while. The reason he had received the final written warning was evidence of this.

40. Following his discussion with Mr Baker, Mr Parkins emailed Ms Kayleigh Aston in HR [381-382]. He recommended that Mr Antony Dillon carry out the investigation as he was regarded as impartial.

41. Mr Dillon is now employed by the respondent as a Project Manager, but at the relevant time he was a Team Manager. He has 10 years' service with the respondent. He is currently running a contract for the respondent in London on void maintenance, overseeing the job, ensuring the health & safety of the respondent's employees, and managing its relationship with its client. He had worked with the claimant some years earlier as a fellow tradesman. He had been quite friendly with him when they worked together. Later, as their career paths diverged, he had much less to do with him and they did not speak as much as they used to. There was no malice or animosity between them.

42. When Mr Dillon was asked by HR to carry out an investigation into a potential disciplinary issue the claimant, he was made aware by HR that the claimant had failed a health and safety audit following an inspection by Mr Hunt. He was initially shown the email dated 18 June 2020 sent by Mr Hunt to Mr Parkins [169]. He noted that Mr Hunt had also raised some concerns about the claimant's attitude and conduct.

43. Mr Dillon was aware that the claimant had failed the audit because he was using his mobile phone charger and power tool battery charger on the respondent's property and neither had been PAT tested. He had also not been using his RCD, which is a safety device to prevent electric shocks and damage to an appliance in the event of a fault with the current or power supply. In addition, his fire extinguisher had not been inspected within the required period.

44. Mr Dillon's evidence, which the Tribunal accepts, is that it is important that PAT tests are carried out and RCDs are used because if they are not, and if there is an issue with the power, someone could be electrocuted, or it could cause a fire. The respondent requires all equipment charged on site to be PAT tested if it is to be charged on site. Where appropriate an RCD should always be used. The claimant had been working alone at the property and he was putting himself at risk by not following procedure.

45. The respondent is willing to PAT test the equipment of its operatives free of charge. This is usually done once a year. The respondent is a large company, and it is good practice to do this. The reason that it carries out health and safety audits is to ensure that its staff are maintaining the standards it expects. Health and safety audits are done at random, often depending on where people are on a particular day. If the health and safety officer is near to where the operatives are, they often just call in and see them. From time to time, Mr Dillon does health and safety and quality audits in this way.

46. When staff join the respondent, they are given induction training on the importance of electrical health and safety. Every three years, the respondent has a training course that covers health and safety. One of the topics is

electrical testing. These courses are compulsory. It is not in dispute that the claimant will have attended such courses. Furthermore, during monthly "toolbox talks", staff are reminded about audits and about ensuring equipment is PAT tested.

47. Mr Dillon was asked to investigate allegations of potential gross misconduct. The allegations related to a refusal by the claimant to follow a reasonable request and a contravention of safety "regulations" (the Tribunal's quotation marks). He was also asked to consider allegations of misconduct, which were inappropriate conduct and a potential breach of trust and confidence. He was assisted in carrying out the investigation by Ms Kayleigh Aston, who works in the HR team. They discussed the allegations before they informed the claimant.

48. Before Mr Dillon began the investigation, he was not aware of any issues between the claimant and the respondent. He knew that it was not his job to make any decisions as to what might happen to the claimant if he recommended disciplinary action. His job was just to do an investigation by gathering information from those involved, consider any documents, and then to make a recommendation as to whether any disciplinary action needed to be considered.

49. Mr Dillon was then informed when he began the investigation that the claimant had a live final written warning on his record from January 2020. He knew the reason for that warning and that it was a serious issue. Mr Dillon was alert to this not having an impact on his role as investigator. He did not take it into account when making his recommendation, which was based purely on the allegations he was asked to investigate.

50. Mr Dillon's investigation report and appendices dated 6 August 2020 appear at [147-188]. He interviewed three people as part of the investigation: Mr Hunt [170-172], Mr Parkins [178-179] and the claimant [173-176]. Mr Dillon was able to refer to the Health and Safety audit report and the email from Mr Hunt to Mr Parkins informing him of the breach. He also had copies of emails confirming what equipment had eventually been tested and a copy of the disciplinary policy [180-188].

51. Mt Dillon interviewed the claimant on 20 July 2020. The minutes are at [173-176]. At the start of the meeting, he explained to the claimant that it was not a disciplinary meeting and that it was a meeting to gather all the facts and evidence. The claimant did not deny that his equipment was not PAT tested nor did he try to argue that he was using the RCD. Mr Dillon asked him why he was not using the RCD and he said that it was just in the van and his van was "rammed". He said he would have to move about 30 items to get it and it was always not convenient. The claimant confirmed that he had now had his power tool charger PAT tested, but not his mobile phone charger.

52. Mr Dillon questioned the claimant regarding his attitude on the day in question. He asked the claimant why he had made Mr Hunt wait 10 minutes while he took his break. The claimant said he was entitled to his break and that he had just poured himself a cup of tea.

53. Mr Dillon then asked the claimant about his negative comments and not being particularly happy at the company. Initially the claimant said that this was a personal matter and that he did not want to talk about it. He then said that he felt he got spoken to in a certain way and that the investigation would be negative towards him. The claimant suggested that there were issues with his manager and in toolbox talks, but he was not willing to go any further without speaking to his union. Mr Dillon asked him if it was appropriate to make negative comments to a health and safety officer. The claimant said he did not want to say anything else in case it got used against him.

54. On 27 July 2020 Mr Dillon interviewed Mr Parkins. The minutes are at [178-179]. Mr Parkins informed Mr Dillon that in the past the claimant had been difficult about getting his equipment PAT tested and so an agreement had been reached with him that, provided he did not charge his cordless equipment on site, he did not have to get it PAT tested. This facilitated the claimant's use of his equipment at weekends as they remain in his possession and control.

55. Mr Dillon then considered his decision. He referred to the company's Disciplinary Policy [180]. He concluded as follows.

56. The claimant had clearly charged his equipment on site when it had not been PAT tested. He knew that it had not been PAT tested. He was aware that he should not be charging it on site. This was against company practice and the agreement between the claimant and the company. The claimant also knew that he should be using his RCD when on site, but he had chosen not to. He had returned from furlough on 17 May 2020. The audit visit had not been on his first day back. He had forgotten to charge his equipment while he had been off as the incident had happened on 16 June 2020.

57. In respect of the allegations regarding the fire extinguisher, Mr Dillon was happy to find that this had been resolved as the claimant had arranged for it to be tested [177]. The issue seemed to have arisen due to the impact of the pandemic. Mr Dillon felt that the lack of RCD and PAT testing was more dangerous in this instance because of the potentially serious health and safety consequences.

58. With regards to the claimant's inappropriate conduct, Mr Dillon considered that the comments the claimant had made to Mr Hunt were concerning. The type of comments he was making were worrying. He believed that his negative attitude could have a negative impact on the business.

59. Mr Dillon considered the Disciplinary Policy. He looked at the list of examples of misconduct (paragraph 3.1.4) and gross misconduct (paragraph 3.1.5). In terms of the misconduct examples listed, Mr Dillon felt that the claimant had at least contravened minor safety regulations, company policies and procedures, and potentially breached trust. In terms of gross misconduct, he had also potentially seriously breached the company's policies and procedures because of how serious the consequences of not complying could be. He could also have caused reputational damage to the company if something had gone wrong.

60. For these reasons, Mr Dillon felt that it was appropriate for the company to proceed to a disciplinary against the claimant. He completed his report and he sent it to HR.

61. The disciplinary procedure was then handled by Mr Mark Bell, the respondent's Head of Finance – Commercial. He has worked for the company for 12 years. His role involves producing management accounts for the commercial companies at the Sovini Group, including the respondent company. He had previously conducted a disciplinary investigation at the Sovini Group, and he had also carried them out in previous jobs. He did not know the claimant personally. He had never heard of him.

62. Mr Bell chaired the disciplinary hearing. He was supported in the process by Mr Steven Scott, who is now Head of HR, but who at the time was People and Learning Business Partner within the HR team. Mr Bell was asked to carry out the disciplinary process because of his position in the organisation, the fact that he was independent and the seriousness of the allegations.

63. The disciplinary meeting took place on 19 August 2020, as a result of an invitation issued to the claimant on 6 and 11 August 2020 [189-192]. In addition to the claimant, Mr Bell, Mr Scott and Mr Dillon, the claimant's trade union representative, Mr John Sheppard, was also present. Notes of the disciplinary hearing are at [198-207].

64. Mr Scott introduced the meeting and explained its purpose. He informed the claimant that one of the outcomes could be the termination of his employment. The claimant confirmed that he was not recording the meeting.

65. Mr Bell started by setting out the allegations against the claimant. He confirmed that there were two allegations of gross misconduct and one of misconduct. The allegations of gross misconduct were a refusal to follow a reasonable request and contravention of health and safety regulations. The allegation of misconduct was inappropriate conduct and a breach of trust and confidence. Mr Bell checked if the claimant and Mr Sheppard had read Mr Dillon's report. They confirmed that they had.

66. Mr Bell had invited Mr Dillon to attend the disciplinary meeting at the start as there was a point he wanted to clarify. The point related to the agreement that the claimant had with the company about not having his equipment PAT tested provided he agreed not to charge it while on company property. Mr Dillon addressed this and dealt with another matter that is detailed below. He then left the meeting. He was not involved in the decision to terminate the claimant's employment.

67. Mr Sheppard asked why the claimant had been targeted for audit. He said that one of the issues was really a health and safety issue, and that although the claimant had failed the audit, he had not been given the opportunity to rectify it. Mr Sheppard asked whether when an audit is flagged up to a line manager if the line manager should inform the employee who has failed and give them the opportunity to rectify it. He seemed to be saying that the employee should be allowed to fix it before any disciplinary action was taken. Mr Bell explained that whether the matter progressed to a disciplinary investigation depended on

the severity of the failure. If it was serious, it could go down the disciplinary route. Mr Sheppard said that he did not think that this was a consistent approach and he asked what was defined as a serious breach.

68. Mr Dillon explained that the claimant had reached an agreement with the company some time ago that he would not get his equipment PAT tested provided he agreed not to charge any of that equipment on company property. This was a verbal (that is, oral) agreement between the claimant and the company. Mr Bell asked Mr Dillon about an earlier health and safety audit done on 5 March 2020 which the claimant had passed. Mr Dillon confirmed that no issues had been raised in that audit with the claimant's equipment. Mr Dillon then left the meeting. Mr Bell asked the claimant to present anything which he felt was necessary to support his case.

69. In relation to the fire extinguisher, the claimant explained that it had never been mentioned to him that it needed to be tested. He said it had been tested previously, but that he had not had any reminders.

70. In relation to the battery charger for his drill, the claimant confirmed that he did have an agreement with the company not to charge his equipment on company property. He said that as he had been on furlough it was an oversight and he had come in and charged it while working. He said that as soon as he had realised that he had done wrong he had gone and got it PAT tested.

71. Finally, in relation to the RCD, which is a circuit breaker, the claimant said that Mr Dillon's report was not accurate because he said that Mr Hunt only asked him if he had an RCD and the claimant said he had replied, "yes it's in the van". The claimant accepted that the equipment was not PAT tested and that he had not been using the RCD.

72. The claimant referred to an "off the record meeting" in September 2019 between himself, Mr Parkins and Mr Mather where he alleged that issues had first arisen. He said that he had been told that if he did not change his attitude then he would have to look for other work. He said that whatever he did was thrown back in his face and that his name was held in a bad light by the company. Mr Bell asked him if this meeting was pivotal. He said it had all gone downhill from there.

73. At the end of the disciplinary meeting the claimant produced a written statement [193]. In this statement the claimant refers to having mental health issues. He said that he had not wanted to explain these to Mr Dillon during his investigatory meeting because he felt uncomfortable. He also made allegations of being put under too much pressure. He said he was constantly being bullied and subjected to accusations from management. He said it had been a "full scale witch-hunt". He sought to explain the interpretation of the comments he had made to Mr Hunt.

74. On 26 August 2020 the disciplinary meeting was reconvened as an outcome meeting. Present at this meeting were the claimant, Mr Bell and Mr Scott. Mr Sheppard did not attend this meeting in line with the company's normal procedure. Notes of this meeting are at [208-210].

75. Mr Bell explained to the claimant that with regards to the allegations of gross misconduct, while Mr Bell did not believe the claimant's actions amounted to gross misconduct, it was clear that he had failed to adhere to company policies and reasonable requests. Despite the agreement the claimant relied upon not to have equipment PAT tested as it was his own, he had continued to use non-PAT tested appliances on site. While the claimant referred to it as an oversight, it was still in Mr Bell's view a misconduct issue. The claimant accepted his actions, and he knew that this was against company practice, and therefore accepted this was proven misconduct. Additionally, the claimant had been back from furlough since 17 May 2020 and so it was not as though it was his first day back.

76. With regards to trust and confidence, Mr Bell explained that he felt there had been a breakdown in the relationship between employer and employee. Taking everything into account, Mr Bell felt that the claimant's attitude was negative. He found he had made disparaging remarks about the company. There were questions about his trustworthiness, and his intentions and feelings towards the company. Mr Bell considered whether he could visualise the claimant going to work in another role or in another team within the business, but it was evident to him from the claimant's attitude that this was not a relationship capable of continuing. Mr Bell felt that it had broken down completely. The claimant was in no way apologetic or willing to recognise his own failings.

77. Mr Bell then considered the fact that the claimant had in place a live final written warning for previous gross misconduct. In that warning he had been warned that any further incidents of misconduct could result in his dismissal. Mr Bell felt that this demonstrated a pattern of behaviour and a breakdown in trust and confidence. He felt that the claimant just refused to do things he did not want to do.

78. The claimant had referred to struggling with his mental health, but Mr Bell could not see how this impacted on his decision to use the non-PAT tested equipment or not to use the RCD equipment on site or to demonstrate such a poor attitude. While he had made references to his mental health, he had not actually provided Mr Bell with any explanation as to how these issues impacted on his decision-making. The claimant also alleged that he was being targeted and that all this had stemmed from the meeting he had with his line manager in 2019. Mr Bell considered whether there was any such targeting taking place. There was simply no evidence of this. Mr Sheppard had said that that four health and safety audits over three years was excessive. Mr Bell did not agree. He found no evidence that the company was treating him unfairly or trying to catch him out. The position the claimant found himself in was entirely of his own doing.

79. Taking everything into account, Mr Bell made the decision that it was appropriate to terminate the claimant's employment on the grounds of misconduct. He factored in the previous final written warning. He decided to dismiss the claimant with notice. The whole point of a final written warning was that it was a warning to an employee that, if they commit further misconduct while it was live, it was likely they will be dismissed. In Mr Bell's view, the claimant had shown complete disregard for the warning. The reason he had been given that final written warning was because he had been caught working

on another job while he was off sick. Mr Bell felt that this further demonstrated the claimant's disregard for the company and its policies.

80. The claimant's employment was terminated immediately, but with a payment in lieu of notice. When Mr Bell had finished explaining this to the claimant, Mr Scott began to explain what this meant. The claimant interrupted Mr Scott and said that he was not interested, and he asked about his appeal. Mr Scott then explained about when he would receive his notice and holidays. The claimant then said something about two weeks in hand and Mr Scott said he would investigate that. See [211-212]. Mr Scott then arranged with the claimant to return his company property [194] and the meeting came to an end.

81. On 28 August 2020 Mr Bell wrote to the claimant and explained his decision [195-197].

82. On 11 September 2020 the claimant appealed the decision to dismiss him [213-214]. His grounds were that his mitigation was not considered and that the action was harsh in the circumstances. Arrangements were then made for an appeal hearing [215-217].

83. The claimant's appeal was conducted by Kerry Beirne, the group's Group People and Learning Director within the HR team. She has worked for the company for 9.5 years. Ms Beirne has overall responsibility for Human Resources, Learning and Development, and more recently Marketing and Communications and the group's PA Service. She has over 20 years' experience of working in HR and is very experienced in carrying out disciplinary processes and appeals.

84. Ms Beirne did not know the claimant personally. She was aware that he had been through a disciplinary in January 2020 relating to working while he was off sick. She knew that he had been given a final written warning as she assisted the appeal officer from a HR point of view in that process.

85. Ms Beirne chaired the claimant's appeal hearing. She made the decision to uphold the decision to terminate his employment after investigating his appeal submissions. She was supported in the process by Ms Donna Brown, an Assistant HR Business Partner within the Sovini Group.

86. The appeal hearing took place on 5 October 2020. Present at the meeting were the claimant, Ms Beirne, Ms Brown and Mr Sheppard (the claimant's trade union representative). The claimant had appealed on two grounds via an email on 11 September 2020. His grounds of appeal were a failure of the hearing officer to take into account mitigation, and he felt the action was too harsh under the circumstances.

87. Ms Brown made the initial introductions. The claimant confirmed that he was not recording the meeting. Ms Beirne explained that the reason for the meeting was to consider the claimant's appeal against Mr Bell's decision to terminate his employment. She explained that the appeal process was not an opportunity for a re-hearing of the original investigation. She would consideration the fairness of the decision, any new facts or evidence that have come to light, and the reasonableness of the procedure. She would then decide whether to

uphold, revoke or reduce the original sanction. Her decision in relation to this matter would be final. There would be no further opportunity to appeal after her decision had been made. The claimant confirmed he understood this.

88. Ms Beirne began by asking the claimant to set out his grounds of appeal. In relation to the first part of the appeal, Mr Sheppard stated that the claimant had been treated differently from other members of staff who had committed similar health and safety breaches in the past.

89. The claimant alleged that Mr Hunt had singled him out as they had got off to a bad start. The claimant accepted that he had breached health and safety rules, but he believed that this does not normally lead to disciplinary action. If an issue is raised after an audit, he said, the normal procedure is for this to be flagged by the employee's line manager, who issues an improvement notice. An improvement notice is a letter reminding employees of their obligations and warning them of the need to improve. It is less serious than a formal disciplinary warning.

90. The claimant explained that he had received two improvement notices in the past. The first notice was three or four years previously when the fire extinguisher he used was out of date. The second notice he received was four or five years ago when it was agreed that he would not need to have his equipment PAT tested provided he did not charge any of that equipment at work premises.

91. In relation to the second part of the appeal, Mr Sheppard stated that the claimant's comments about the company going downhill had been taken out of context. He implied that the decision to believe Mr Hunt's version of events rather than the claimant's account was because he was on a final written warning. He said that the claimant's mental health was a factor and that he had gone to "great lengths" after the final written warning to try and arrange a mediation. Mr Sheppard said that the claimant had been suffering more and more, but he had not received any help. He said that since December 2019 the claimant had been audited four times, which was disproportionate to his colleagues. He seemed to think that the company had targeted the claimant as eventually he would slip up and make a health & safety breach.

92. Ms Beirne asked the claimant why he thought the decision to dismiss him was harsh. Mr Sheppard explained in more detail that normally when there is a health and safety breach it is flagged up to the line manager and the employee is given an opportunity to rectify the breach. He then stated there was no clear evidence that there was a breach of trust. He believed the decision to give the claimant a final written warning in January 2020 was harsh. Although the claimant had admitted that he said the company was going downhill, his words had been taken out of context because he and Mr Hunt had got off on the wrong foot.

93. Ms Beirne wanted to confirm whether the claimant had been treated differently to other members of staff. She asked the claimant to provide her with specific examples of when similar health and safety audits had occurred, and staff were given the opportunity to rectify any issues. In one of these examples, the claimant alleged that he had been targeted by his line manager, Mr Parkins,

who he said had a vendetta against him. It seemed that the claimant was suggesting that Mr Parkins wanted him out of the company. The claimant explained the steps he had taken to address this and how this was impacting his mental health. He said he had tried to speak to HR and his line manager about this, but he was given no support.

94. Ms Beirne asked the claimant if there was anything else in relation to mitigation that had not been considered. Nothing else was put forward. Mr Sheppard summarised the claimant's grounds of appeal. The meeting then adjourned. The meeting minutes are at [225-229].

95. After the meeting had adjourned, Ms Beirne and Ms Brown discussed what the claimant and his trade union representative had raised in the meeting. Ms Beirne asked Ms Brown to email Mr Hunt (the Group Health and Safety Officer who had audited the claimant) to get some more information. Her email and Mr Hunt's reply are at [219-220]. The claimant was advised [218].

96. Mr Hunt confirmed to Ms Brown that since 1 November 2019 138 staff had been PAT test audited and that there had only been one health and safety fail. This was the claimant on 6 June 2020. Ms Beirne knew from the investigation report that the claimant had previously refused to have his chargers PAT tested – hence the agreement that he could use his equipment provided it was not charged on site. It was clear to Ms Beirne from Mr Hunt's reply that the claimant had not been disproportionately targeted for audits and that it was not the case that it was common practice for employees not to have their equipment PAT tested. The claimant was the only PAT test fail in the last 12 months.

97. In her evidence to the Tribunal Ms Beirne informed the Tribunal that she had recently been made aware that the claimant had also failed a PAT test on 13 December 2019. This was following a management audit. Clearly Mr Hunt had interpreted Ms Brown's email to mean that she was only requesting audits carried out by the health and safety team and not by management. At the time of the appeal, therefore, Ms Beirne did not know that Mr Hunt had not included the audits carried out by managers when he reported the figures to her.

98. Having seen the Trades 'on site' HSEQ Audit and Vehicle Inspections Form [322-326], the claimant was told to get all equipment PAT tested by 16 December 2019. In subsequent audits on 18 December 2019 [328] and on 5 March 2020 [334] the claimant was either not charging his equipment as per his agreement or he was not doing a job which required electrical equipment (such as painting). Given that the claimant failed the audit in June 2020, Ms Beirne's evidence to the Tribunal now is that he clearly was not taking the safety policies and procedures seriously.

99. Returning to the contemporaneous evidence, notwithstanding the PAT testing issue, Ms Beirne was aware that the claimant had been dismissed for other reasons as well. He had failed to use an RCD circuit breaker when required. He was aware of his health and safety obligations and the risks involved. It was reasonable to expect the claimant to adhere to what had been agreed about him charging his equipment at home.

100. The dismissing officer, Mr Bell, had also found that the claimant had made negative comments about the company. Mr Bell had decided this demonstrated the employment relationship had fundamentally broken down. Taking the claimant's attitude into account, Ms Beirne felt that it was correct that there had been a breakdown of trust and confidence. She understood that the claimant was alleging that the comments had been taken out of context, but she did not get the impression that this was really the case.

101. In Ms Beirne's assessment, the claimant's actions spoke for themselves and demonstrated his disregard for the company and its processes. He also did not appear to be sorry or willing to accept responsibility for his actions. The arrangement in place relied on the claimant's cooperation and trust to carry out the correct procedures. It was clear to Ms Beirne that the claimant had disregarded this completely.

102. Ms Beirne considered the mitigation evidence which the claimant had put forward and whether the decision to dismiss him was harsh given these circumstances. However, she could not see how any of this mitigation had impacted his decision to use non-PAT tested equipment on site, nor not to use the RCD.

103. Finally, Ms Beirne considered the claimant's allegation that his line manager had been targeting him and that the company was looking for a reason to dismiss him. She could not find any evidence to support this. It was evident to her that had the company wanted the claimant out of the business, it could have dismissed him in January 2020 after the claimant had been caught working on another job while he was off sick. This behaviour was gross misconduct, in her view, but instead of being dismissed, the claimant had been given an opportunity to improve. In the appeal outcome of the final written warning, the appeal officer had confirmed that the claimant could have been sacked for gross misconduct. Ms Beirne agreed with this. She felt that the claimant had missed this opportunity and that his recent actions amounted to misconduct.

104. The Tribunal accepts Ms Beirne's evidence that she went into the appeal investigation with an open mind. Upon carefully considering the facts of the case, she decided to uphold the decision to terminate the claimant's employment. She felt that the decision Mr Bell had made was correct. The claimant had admitted breaching health and safety, which was misconduct. That, combined with the final written warning, meant that a correct outcome had been reached, in her analysis. The decision was not too harsh. She felt that the mitigation the claimant had offered was insufficient to mean that he should not be dismissed.

105. Ms Beirne wrote to the claimant on 14 October 2020 and explained her decision [221-224]. The claimant was provided with notes of the appeal hearing [225-229].

106. For completeness, the Tribunal notes the respondent's health and safety documentation at [230-238] and the health and safety audit records that relate to the claimant or sites on which the claimant was working [239-367].

107. The Tribunal also needs to deal with an audio recording that the claimant is said to have made of a discussion with Mr Parkins and Mr Mather at or after a "toolbox meeting" he alleges took place on 3 October 2019 (and which is referred to in passing above). In his evidence, Mr Parkins has stated that he was not aware that this meeting was being recorded and he implies that he had not consented to it being recorded. Despite correspondence between the legal representatives of both parties [378-380], a transcript of this meeting was not put in evidence, as would be the normal practice in Employment Tribunal litigation. Accordingly, the Tribunal has not listened to the audio-recording.

Submissions

108. The claimant's solicitor and the respondent's counsel presented oral submissions for the Tribunal's consideration. The Tribunal has noted those submissions in its record of the proceedings. It will deal with those submissions in its discussion and conclusions below.

Relevant legal principles

109. The relevant legal principles in a complaint of unfair dismissal by reason of conduct are well-known, but bear summarising here.

110. The headline principles are: (1) What was the reason for the dismissal falling within the Employment Rights Act 1996 (ERA 1996) section 94(1) and (2)? (2) Was the dismissal for that reason fair and reasonable in the terms of section 98(4)? (3) Did the dismissal result from a fair procedure? (4) How did the Acas code of practice apply?

111. The question is whether the respondent acted reasonably and not whether the claimant suffered unfairness or injustice. The test is an objective one. It is not for the Tribunal to step into the respondent's shoes or to substitute its judgment for that of management or by promoting what it might have done in these circumstances in place of what the respondent did. The test focuses upon how a reasonable employer might or would have behaved in these circumstances. That test is predicated on the range of reasonable responses available to a reasonable employer in similar circumstances. The Tribunal takes care not to adopt a "substitution mindset".

112. See *British Leyland (UK) Ltd v Swift* [1981] IRLR 91 CA; *Iceland Frozen Foods v Jones* [1982] IRLR 439 EAT; *Foley v Post Office, HSBC v Madden* [2000] IRLR 827 CA.

113. The test is based upon the set of facts or beliefs known to the employer at the time of the dismissal. Account is also to be taken of the size and administrative resources of the employer: section 98(4).

114. The importance of a fair procedure is underlined by the decision in *Polkey v AE Dayton Services Ltd* [1987] IRLR 503 HL. The *Polkey* principle emphasises the importance of a fair procedure involving a reasonable investigation and a fair hearing. The Acas code of practice also stresses the staged approach to a decision to dismiss, involving an investigation; informing the employee; inviting the employee to a meeting; affording the employee a

right to be accompanied; making a decision; and extending an opportunity to appeal.

115. In a conduct dismissal, the well-known guidance in *BHS Ltd v Burchell* [1978] IRLR 379 EAT is to be accounted for. Did the employer have a genuine belief that the employee had misconducted himself? Was that genuine belief based upon reasonable grounds? Did it follow upon a reasonable investigation? Has the employer accounted for any mitigation? Has the employee's record and length of service been considered? Has the employee been treated consistently with other employees (in similar situations)? Is dismissal a proportionate sanction?

116. In the present case, much has been made of the presence of a live final written warning. An existing final written warning is a relevant consideration to a decision to dismiss in the face of further misconduct: *Auguste Noel Ltd v Curtis* [1990] ICR 604 EAT.

117. As a rule, it is not for the Tribunal to judge whether a final written warning was a reasonable one to give, provided it is satisfied that it was given in good faith, that there were grounds for it on the face of it and that it was not manifestly inappropriate: *Davies v Sandwell MBC* [2013] ICR 374 CA. See also: *General Dynamics Information Technology Ltd v Carranza* [2015] ICR 169 EAT; *Wincanton Group plc v Stone* [2013] ICR D6 EAT. The question is whether it was reasonable to treat the later conduct reason, taken together with the earlier final written warning, as a sufficient reason to dismiss. It is not for the Tribunal to reopen the earlier warning and to judge whether it was valid or is a nullity. The final written warning is relevant to the reasonableness of the decision to dismiss having regard to all the circumstances, including the circumstances of that warning.

Discussion and conclusion

118. The Tribunal accepts the characterisation of the claimant as a very good worker, perhaps one of the respondent's best workers, as described in particular by Mr Parkins. He was clearly a very competent tradesman and well regarded by the respondent after more than 9 years' service. Nevertheless, there had clearly been a change in his relationship with his employer and with his line managers. Whether that was because of mental health problems is more difficult to say. The evidence is inconclusive and the suggestion of a mental health dimension to the claimant's conduct and relationships in the workplace is somewhat elusive and vague.

119. The Tribunal does not accept that the claimant was somehow being targeted for health and safety audits or that his line managers wanted to be rid of him or that he was the subject of a personal vendetta. The suggestion of an adverse or negative meeting with Mr Parkins and Mr Mather in October 2019 has not been made good – although had a different approach been taken to the disclosure of the evidence of that meeting, it might have been. The Tribunal doubts that it would have made any significant difference to the outcome in the light of the wider evidence.

120. So far as the audits are concerned, whether conducted by management or by a health and safety auditor, they appeared to be randomised and selected by property rather than by employee concerned. The number of audits on the claimant's record, of course, raises a suspicion or a question to be answered, but the Tribunal is not satisfied that they evince a pattern whereby the claimant was being subjected to a campaign of audits designed to manage him out of the business. The evidence was that he was well regarded as an employee and that the respondent had no reason to wish to lose him. Had it wished to engineer his dismissal, then the occasion of the first written warning was sufficiently serious to have led to a decision to dismiss, either at first instance or on appeal.

121. The claimant's evidence focused disproportionately upon his failure of the PAT test requirement in respect of his drill charger and mobile phone charger. The Tribunal accepts that the normal practice would be that an employee would usually be asked to rectify the failure or non-compliance, but this was not the orthodox position. The claimant had also not been using an RCD and he gave an unacceptable, almost dismissive, excuse for not using it. There had also been the question of the fire extinguisher, although in the event that was not pursued. More significant, however, was the evidence of a poor attitude towards the company and the very important context of the existing and live final written warning.

122. The claimant's case returned to the PAT testing. He correctly argued that, despite the respondent's use of the word "regulations", PAT testing was not the law, and it was not a legal requirement. The Tribunal is satisfied, however, that it was part of the respondent's health and safety policy and practice, and that it is in that sense that the respondents used the word "regulations".

123. Although the final written warning was subjected to scrutiny in the cross-examination of the respondent's witnesses, including an attack on Mr Parkins's motives and his ability to recollect the event, in submissions the claimant's legal represented accepted that he could not go behind that warning. He was correct to do so. There is no suggestion that that warning was given in bad faith. There were reasonable grounds for it. It was not manifestly inappropriate. Instead, the claimant's final objections to the warning were that it was considered as part of the cumulative evidence against him (where the other evidence would not have justified dismissal) within a working environment where the culture was that employees often left work early, used company vehicles for private business, and worked on other properties on their own account.

124. The claimant himself appeared to take a somewhat blinkered approach to the final written warning. In the Tribunal's judgment, it might be right that the failures in respect of PAT testing and the use of the RCD might not have led to a dismissal in and of themselves. Nevertheless, they had to be viewed alongside the implications of his negative comments about the company and the fact of the final written warning which was only a few months old. The final written warning was not given simply or solely because the claimant had done what many other employees (including managers) were alleged to have done (working for themselves in company time and using company vehicles), but the claimant had done this while on sick leave and in receipt of statutory sick pay.

That is what merited a final written warning and, as the first appeal hearing had recognised, could have led to summary dismissal for gross misconduct.

125. Objection was taken to the second investigation in that Mr Dillon was made aware of the existence of a final written warning. Nothing in the case law suggests that an internal investigation in the workplace has to take place in such a vacuum. Internal investigations are subject to the range of reasonable responses. They are not to be compared to a police investigation subject to PACE codes of practice or to judicial proceedings subject to strict rules of evidence. Some employers would not have revealed to Mr Dillon the fact of the final written warning; others might have done so perfectly reasonably. Mr Dillon explained to the Tribunal why he might need to be aware of the claimant's disciplinary record as background to his investigation, but of how he took care not to let it influence how he went about the investigation or the recommendations he then made. The Tribunal can find nothing to criticise here. It was not a tainted investigation.

126. The evidence does suggest that the claimant had become known to the company's senior management. That was inevitable because of Mr Bell's and Mr Parker's involvement in the disciplinary process at varying times. The claimant had come rather close to dismissal on the first occasion, but had been saved from dismissal by Mr Parker, a director, who confirmed the final written warning despite viewing the first disciplinary concern as being gross misconduct. The Tribunal is not concerned by the use of the word "company" in the second appeal letter. Strictly speaking, the decision to dismiss is a corporate decision taken by a relevant manager as a delegate of the company. Yet, even if the use of that word might suggest that the decision to dismiss was influenced by senior management, beyond the mere fact of being aware of the claimant as someone with an existing disciplinary record, the evidence does not bear that out, whether directly or by inference.

127. Turning to examine the case from the respondent's perspective, the Tribunal agrees that the respondent knew and believed that the claimant had breached its PAT testing requirements. The claimant had admitted it. He conceded that he had acted in breach of both his agreement with his managers and with the company's policy. It was not a mere oversight, however much he might seek to minimise it. Similarly, he was not using the RCD in circumstances where he should have been. He did so without any real excuse and offered only the flimsiest of excuses that also betrayed his attitude to such matters. An explanation that he gave now was not an explanation that he offered at the time (that there was no need for an RCD at this property).

128. There is no suggestion that the allegations of misconduct levelled against the claimant on both occasions were somehow made up or manufactured. There were real and genuine concerns that required investigation and determination. They furnish no suspicion of the motives of Mr Parkins or Mr Mather or Mr Dillon (or any other managers involved) that might require the Tribunal to be prepared to look beneath the surface of the charges against the claimant. This was not a case of a conspiracy to get rid of the claimant. Mr Parkins held him in high regard as a worker and did not want to lose his services. Moreover, apart from reporting his concern that led to the first

investigation, he played no part in making decisions in either disciplinary process.

129. The Tribunal notes the respondent's point that, even if the respondent was motivated to get rid of the claimant, that could still amount to a fair dismissal. The Tribunal does not consider that that is the situation with which it is engaged.

Disposal

130. Taking all these matters into account, the Tribunal is satisfied that the dismissal of the claimant was a fair dismissal.

131. The reason or principal reason for the claimant's dismissal was his cumulative conduct over two disciplinary investigations. The reason was misconduct. It was a potentially fair reason. The respondent acted reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant.

132. The Tribunal is satisfied that the claimant's cumulative misconduct was the reason or principal reason for dismissal. It is not necessary to consider whether the respondent had some other substantial reason for dismissing the claimant. The respondent genuinely believed that the claimant had committed misconduct. The respondent acted reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant. It had reasonable grounds for that belief. At the time the belief was formed, the respondent had carried out a reasonable investigation.

133. The respondent otherwise acted in a procedurally fair manner and moreover did so in adherence to the requirements of the Acas Code. The procedural fairness of the dismissal has not been put in issue. There was no substantive evidence of inconsistent treatment of other similar cases, where the cumulative effect of misconduct repeated in the face of a final written warning was asserted and/or established.

134. The sanction of dismissal was within the range of reasonable responses and was in substance fair. A transfer to alternative employment was not an appropriate substitute for dismissal. Length of service was accounted for. Any mitigation, such as it was, was properly considered. The claimant's reliance upon mental health issues then (and now before the Tribunal) has not really been established.

135. This is not a case where it is necessary or appropriate for the Tribunal to re-examine or go behind the final written warning. It was issued in good faith, upon reasonable grounds and it was manifestly appropriate.

136. In conclusion, therefore, the claimant was fairly dismissed by reason of misconduct. The complaint of unfair dismissal is not well-founded. The claim is dismissed.

Judge Brian Doyle
Date: 16 August 2021

RESERVED JUDGMENT & WRITTEN REASONS
SENT TO THE PARTIES ON

17 August 2021

FOR THE TRIBUNAL OFFICE

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