EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Numbers: 4104784/2017, 4104791/2017 & 4104792/2017

Held in Glasgow on 8, 9, 10, 15, 16, 17, 18 and 30 May 2018

Employment Judge: Claire McManus

Mr William Allison	**First Claimant** **Case No. 4104784/2017** **Represented by:** **Ms H Hogben** **(Counsel)**
Mr Peter Nisbet	**Second Claimant** **Case No. 4104791/2017** **Represented by:** **Ms H Hogben** **(Counsel)**
Mr Malcolm Nugent	**Third Claimant** **Case No. 4104792/2017** **Represented by:** **Ms H Hogben** **(Counsel)**
Marshalls Group Limited	**Respondent** **Represented by:** **Mr J Cran** **(Solicitor)**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that:-

E.T. Z4 (WR)

1. The First Claimant's (William Allison) claim for constructive unfair dismissal under Section 95(1)(c) of the Employment Rights Act 1996 is unsuccessful and is dismissed.

2. The Second Claimant's (Peter Nisbet) claim for constructive unfair dismissal under Section 95(1)(c) of the Employment Rights Act 1996 is unsuccessful and is dismissed.

3. The Third Claimant's (Malcolm Nugent) claim for unfair dismissal under Section 98 of the Employment Rights Act 1996 is successful and the third claimant is awarded the total sum of £6,276 (SIX THOUSAND TWO HUNDRED AND SEVENTY SIX POUNDS), comprising of a basic award of £2,934 (TWO THOUSAND NINE HUNDRED AND THRTY FOUR POUNDS) and a compensatory award of £3,342 (THREE THOUSAND THREE HUNDRED AND FORTY TWO POUNDS).

REASONS

Background

4. All claimants were employed by the Respondent. The First and Second claimants resigned from their employment with the respondent and claimed constructive unfair dismissal. The third claimant was dismissed by the respondent and claims unfair dismissal and breach of contract in respect of notice. The claims were conjoined to be heard together because the resignation of the first and second claimants and the dismissal of the third claimant arose from the same factual circumstances.

5. The Final Hearing in respect of all three claims was originally scheduled to take place on the 8, 9, 10, 15 and 16 May 2018. During the course of those initial dates, it was the position of both parties' representatives that additional days would be required and so additional hearing dates were arranged, with further evidence being heard on 18 and 19 May and it being agreed that parties' representatives would then speak to their written submissions on 30 May 2018. On 30 May it was both parties' representatives' position that they were unable to provide up to date details to the Tribunal in respect of the claimants' schedules of loss, including pension loss. Given that evidence had been heard on loss, that the identified issues for determination by the Tribunal included remedy and that parties' representatives' position (at that time) was that there was not a great deal of difference between their up-to-date calculations of loss, parties' representatives were directed to agree a schedule of loss in respect of each claimant, to be submitted to the Tribunal by 12 noon on 8 June 2018. The respondent's representative's email to the Tribunal office of 8 June informed that the respondent was not able to agree the figures for losses, for the reasons set out in that email. There was no comment on this email to the Tribunal from the claimants' representatives. The Tribunal took into account that it was the respondent's representative's position in that email that an explanation for delay in providing information on loss from in particular the first and second claimants should be provided and that there may be an application on expenses from the respondent in respect of that matter.

6. Parties' representatives had helpfully liaised to prepare a Joint Bundle. This was set out in one volume with numbered pages. The numbers in brackets in this decision refer to the page numbers in that bundle. Not all documents were referred to in evidence. The Tribunal was asked to take into account all documents from production number 114 - 168 in the Bundle.

7. Evidence was heard on oath from all claimants and witnesses. Parties representatives had agreed at the outset of the healing that the respondent's case

would be presented first. For the respondent, evidence was heard from Mr Richard Marshall (Operation Programme Manager) ; Mr Derek Harris (Group Programme Director) and Mr John Davies (Group Health and Safety Director). For the claimants, evidence was heard from each claimant and from Chris Haigh (National Convenor for Unite within the respondent's organisation).

8. During the course of the hearing, parties' representatives were asked whether any section 50 issue arose, given that a written decision would be issued and later published, and that it was the Tribunal's intention to attach representatives' written submissions as appendices to the decision. It was agreed that a particular individual, who was not a witness in these proceedings, would be referenced in this decision as 'the appropriate manager' rather by name.

9. There were preliminary discussions at the outset of the hearing in relation to disclosure of documents by the respondent. Further to these discussions, additional documents were disclosed by the respondent and inserted into the bundle as productions 238.1 - 238.10. As a result of these discussions, the respondent also disclosed the fact that a particular individual, referenced herein as 'the appropriate manager' did receive a disciplinary sanction from the respondent as a result of the claimants and others having raised a grievance about that managers conduct in December 2014.

10. These were fact-heavy cases, with a significant extent of history relied upon by the claimants and the Tribunal considered it appropriate to comment on the position of the witnesses before the Tribunal. For these reasons, and because the decisions include consideration of the issues in respect of both unfair dismissal and constructive unfair dismissal, this decision is a lengthy one. The Tribunal restated the substantive content of the disciplinary hearing invitation letters (which were in the same terms to all claimants) because the first and second claimants particularly relied on this invitation in their claims of constructive unfair dismissal.

Issues for Determination

11. The issues determined by the Tribunal are those agreed by parties' representatives as being the issues for determination. These are as follows:-

(1) Unfair Dismissal

(1.1) What was the reason for the respondent's dismissal of the Third claimant?

(1.2) Did the respondent have a genuine belief in the Third claimant's misconduct?

(1.3) Was that belief formed on reasonable grounds?

(1.4) Did the respondent carry out a reasonable investigation?

(1.5) Was a fair process followed?

(1.6) Was it fair to dismiss for that reason in all the circumstances?

(2) Constructive Dismissal

(2.1) What was the most recent act or omission of the employer which the first and second claimants say caused, or triggered, their resignation?

(2.2) Has each of the first and second claimants affirmed his contract since that act?

(2.3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(i) (2.4) If not, was it nevertheless a part (applying the approach explained in *Omilaju)* of a course of conduct comprising several acts

and omissions which, viewed cumulatively, amounted to a repudiatory breach of the *Malik* term (if it was, there is no need for any separate consideration of a possible previous affirmation).

(2.5) Did the first and second claimants resign in response (or partly in response) to that breach?

(3) Compensation

(3.1) If any of the claimants' claims are successful, what financial award/compensation is due to each successful claimant?

(3.2) In respect of each claimant, did that claimant's conduct contribute significantly to his dismissal, meaning any compensatory and/or basic award made to that claimant should be reduced?

(3.3) In respect of each claimant, has that claimant mitigated his losses arising from the termination of his employment with the respondent?

Findings in Fact

12. The Tribunal made findings in respect of facts which were material to the issues for determination by this Tribunal. The following material facts were admitted or found by the Tribunal to be proven:

(a) The respondent is a manufacturer and supplier of building products for commercial and domestic use such as paving and drainage, producing 'concrete block paving' ('CBP') and 'flag and kerb' paving for commercial and domestic use. It employs approximately 2,500 employees across 12 sites in the UK, including Halifax, Eaglescliffe, Falkirk, Kent and Newport. The respondent employs approximately 80 employees at their Falkirk site. At Falkirk, manufacturing in the two main production processes (CBP and 'flag and kerb') is carried out and the site is also a distribution hub for the respondent's products which are not manufactured in Scotland. Most of the

respondent's manufacturing sites have continuous 24 hour production. At the Falkirk site there are two shifts when manufacturing takes place, being a morning shift and an afternoon shift, with a night shift when most maintenance work is carried out. The two manufacturing shifts run consecutively from 5am until 8pm. All three claimants were employed as mechanical engineers in the CBP process. They were known as 'CBP Fitters'. The CBP fitters generally worked on a four week rotating pattern between day, night and afternoon shifts. Maintenance work was mainly carried out in the night shift, when the plant was not running and there was no production. When working morning or afternoon shifts, the fitters carried out repair work and some maintenance work. The first claimant's employment with the respondent began on 5 September 1994. The second claimant's employment with the respondent began on 5 January 1999. The third claimant's employment with the respondent began on 2 June 2013. At the time of the dates of termination of their respective contracts of employment with the respondent, the first claimant had 22 years complete years of service, the second claimant had 18 complete years of service and the third claimant had 4 complete years of service. Management at the Falkirk site comprised the manager referred to herein as 'the appropriate manager' and a Senior Management Team comprising the Engineering Manager and two Production Managers. Those working on the site were allocated to teams, with an appointed team leader. The manufacturing process involves raw materials such as sand, limestone and cement being mixed and going through a hydraulic process, either wet place or semi-dry.

(b) On 8 December 2014, a meeting took place between the claimants and others and the appropriate manager to discuss payments for working over the Christmas period. During that meeting the appropriate manager made a number of offensive statements to the claimants, including stating 'You sucked my cock for a contract'. The claimants raised a collective grievance about that manager's conduct at the meeting. That collective grievance

was raised on their behalf by their on-site Unite Union representative (Jim Aire) in an email dated 15 December 2014. That email is at Production 112.8b. There is no reference in that email to the particular offensive statements said to have been made by the appropriate manager. That email states that the men felt that the conduct of that manager towards them at the meeting was 'confrontational, degrading and bullying behaviour'.

(c) Following that collective grievance being raised, an investigation was conducted by Richard Marshall (at that time Business Unit Manager, based at Halifax). He was previously Site Operations Manager of two sites in Halifax. Richard Marshall was appointed by Simon Bourne. Richard Marshall had a history of resolving workplace by 'nipping them in the bud'. In January 2015 Richard Marshall was asked to investigate the grievance raised by the CBP fitters at the Falkirk site. The outcome of Richard Marshall's investigation is set out in his letter to Jim Aire of 28 January 2015 (production 238.7 – 238.8). This letter sets out:-

> "In our initial meeting with engineers/electrician, other aspects of the grievance were also raised and summarised as follows:
>
> (i) A history of shifts, rates of pay/allowances and recent discussions on Christmas holiday working resulting in the need for the meeting held on 8 December 2014.
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> (ii) A feeling of additional management scrutiny since the collective grievance was submitted.
>
> (iii) Some concerns on the handling of the grievance."

(d) Richard Marshall's conclusions are set out in that letter to Jim Aire and included the following:-

"Whilst there are differences in statements of what exactly was said, it is clear that some form of inappropriate language was used by (the manager referred to in these proceedings as 'the appropriate manager').

and

"It was evident to me that 'colourful language' and straight talking at Falkirk may be common. This unconventional transparency and honesty is clearly how the site 'ticks' and on the whole there is no malicious intent by it. That said, boundaries are unknown and as a result there is the potential to upset individuals. Essentially, conduct at meetings and within the style in which people interact on site seems liable to have future circumstances where disrespect could occur. I am suggesting that a Falkirk specific 'Dignity at Work' document be created and agreed by consultation on site. This is the framework for what behaviours are acceptable from managers and from employees, and how unacceptable behaviour can be challenged. I will provide a blueprint of another site's version of a 'Dignity at Work' policy for you to start from. It may also be appropriate for 'Dignity at Work' training to be considered. This has been provided previously within the business by ACAS and I feel that this will be helpful moving forward.

Finally, there has been a feeling of vulnerability expressed in interviews at this grievance hearing. The word 'assurance' has been used a lot. I feel that there are two strands to helping improve this situation. Firstly, all sites conduct Personal Development Reviews which lead to Individual Development Plans. These should provide meaningful discussion and opportunity for you, so that you may feel valued and understand what your progression plans may be. But I also feel that another aspect of assurance is the general understanding of the business requirements and challenges for

Falkirk site and the role that each of you play in the site's success. I can assure you that you add great value and are an important part of Falkirk site's success. Communication and understanding are vital to the site's progression in an expanding market. Site business briefs would go a long way to improving this communication and provide greater understanding of what the site is trying to achieve. I will provide this feedback to the senior team at Falkirk and also to Group HR.

Whilst I am unable to justify a finding of bullying, I have made recommendations which I believe will assist in resolving this grievance and, hopefully, the above points will help to rebuild one of Marshalls' values – trust.

If you are dissatisfied with this outcome and wish to pursue the matter then you should state this in writing. Consequently, in conjunction with HR, I will then arrange for you to see a more senior manager to hold a second stage hearing.'

(e) The claimants were not satisfied with this outcome and the collective grievance was taken to the second stage. One of the issues which the claimants had with the outcome was Richard Marshall's use of the phrase 'colourful language'. The letter initiating the second stage of the grievance of the process in respect of this collective grievance is (in part) at production 238.6. This letter gives some detail in respect of the claimant's allegations as to what was said by 'the appropriate manager' at the meeting on 8 December 2014. , The outcome of this second stage is set out in letter from Jim McGilloway (Director of Planning and Service) to Jim Aire of 7 April 2015 (production 238.9 - 238.11).

(f) A claim of 'victimisation' was raised with the respondent by the first claimant and the second claimant in respect of the manager referred herein as 'the appropriate manager'. This was not a claim of victimisation within the meaning of that word in terms of the Equality Act 2010. Part of this complaint of the first and second claimants was that they were being investigated for (i) 'use of the on-site gym during a normal shift for an extended period (ii) non-use of designated walkways (iii) leaving the site to get a hot takeaway meal ('the Thursday carry-out'). Part of the first and second claimants' issue in respect of the investigation of them was that the time spent by them in the gym had been identified by CCTV. It was the claimants' position that the CCTV camera which had so identified the issue was one which ought properly have been directed at the respondent's main gate for security purposes. The claimants' position was that this camera had been turned to point to the gym and that this use was unauthorised and inappropriate. An investigation in respect of their 'victimisation' claim was carried out by Paul Thomas (Group IS Director). His report following that investigation is at production 238.2 - 238.5. Paul Thomas made findings in respect of there being 'a history of poor relations' between the first and second claimants and 'the appropriate manager'. He made findings in relation to other employees not adhering to designated walkways and not always 'swiping' in and out when leaving the Falkirk site. This report states that as part of his investigations, he discovered the first and second claimants' positions in respect of why they were in the gym at the times alleged to have been excessive use, (which was not time spent using the gym equipment) and that because of these explanations, 'any disciplinary action should be reviewed (lessened)'. The claimants' position was that time had been spent in the gym because one of the claimants was 'experiencing a personal breakdown' and another was consoling him. The claimants felt very aggrieved that the time spent in the gym had been identified by use of a CCTV camera which they understood should properly have been directed at the factory gates for security reasons but which was

pointed at the doorway to the gym. The claimants believed that the manager referred to in this decision as 'the appropriate manager' had turned the CCTV camera to identify the fitters' movements during the night shift. This issue was the main cause of what was later referred to by the CBP fitters, including the claimants, as 'trust issues'.

(g) Paul Thomas' report includes the following paragraphs in its 'Conclusions and Recommendations' section:-

> "As acknowledged in Richard Marshall's investigation report (letter to Jim Aire dated 28 January), in response to the grievance raised: 'a feeling of additional management scrutiny since the collective grievance was submitted', he stated that 'the simple explanation is that first line management have felt responsible for the escalation of this situation and need to manage more consistently in line with their responsibilities and other departments at Falkirk.' I find no additional evidence to contradict this view.
>
> Having reviewed the case history and completed my investigation it is easy to see why the plaintiffs believe they are being victimised. There are conflicting accounts of events given by both parties which were difficult to substantiate and therefore impossible to draw any conclusions from. This isn't to say that the plaintiffs' account of events weren't correct, but they were just difficult to prove. The recommendation to introduce a Dignity at Work policy (and put that into practice) at Falkirk is quite evident from my investigation. I am happy that the process followed for the initial grievance and subsequent investigations that have taken place have been performed in accordance with company guidelines and I see no reason to contradict their outcomes."
>
> And

> "I would also recommend that a full review of site management practices be undertaken in conjunction with another independent Works Manager, with the view to bringing Falkirk in line with other sites e.g. the use of the company pickup (which is the cause of some grievance), movement of CCTV cameras, the future of the gymnasium. The outcome of this review should be shared with employees on site prior to implementation.
>
> These recommendations are in addition to those already stated by Richard Marshall regarding the use of ACAS to support the introduction of a Dignity at Work policy at Falkirk."

(h) Paul Thomas sent this report to Neil Etherington (HR Manager) by email on 27 April 2015 (production 238.1). It was clear from these findings of Richard Marshall and Paul Thomas that there was at least an issue of poor communication between the claimants and the appropriate manager at the Falkirk site. No Dignity at Work policy was in place at the respondent's Falkirk site by the times of termination of the claimants' employment (or by the time of the hearing in these claims). Following his investigation, Richard Marshall recommended that disciplinary proceedings be taken against 'the appropriate manager' in respect of his conduct at the meeting on 8 December 2014. A disciplinary sanction was later applied to 'the appropriate manager' in respect of his conduct at that meeting.

(i) The second claimant was absent from work for a three - four month period from March until June 2015. He was referred by the respondent to their occupational health provider and a report provided to the respondent on 23 June 2015 (production 112.19 – 112.20), stating that 'In summary, Mr Nisbet has been off work due to an adjustment disorder, secondary to perceived workplace situational issues.' And '… this does not primarily

appear to be a medical issue and the solution is not therefore likely to be a medical but a management one.'

(j) On 27 August 2015 a meeting took place at the respondent's Falkirk site between the three claimants, Iain Ivory, Iain Dixon, Jim Aire, 'the appropriate manager', John Anderson, Ron Short and Scott Foley (Regional Unite Trade Union Representative). Following this meeting, Neil Etherington wrote to Jim Aire by letter dated 11 September 2015 (production 112.21 – 112.22). This letter purports to 'summarise the main aspects of the processes which took place following the raising of a collective grievance in December 2014.' This summary included (at point (8) a statement of six proposals put forward by a meeting with Unite union representatives Andy Rafferty, Jim Aire and Chris Haigh at Eaglescliffe on 18 May 2015. These were:-

13. "In order to attempt to bring the relevant parties together and with a view to identifying a more positive form, mediation is proposed. This could be via ACAS or other independent body and we would be more than open to suggestions to engage with any body which is known to have a proven track record working in similar circumstances.

14. Consider bringing in independent body to work with the site to carry out a third-party review of policies and procedures and if appropriate, ensure they are in line with such arrangements across other areas of Marshalls. Part of this would be to ensure effective communication of such policies and procedures across the site and that implementation takes place in a fair and consistent manner.

15. To look to introduce a Dignity at Work policy at Falkirk and implement a programme of training in support of this. Discussions have already taken place with ACAS in this respect and if it is agreed that it is appropriate to continue discussions with ACAS, to work to their recommendations on how this best be taken forward. Chris

Haigh has already agreed to provide support, as requested by Tom Poole, based on the experience of introducing a Dignity at Work policy at Brookfoot works.

16. Based on Paul Thomas's findings and recommendations, the concerns under investigation relating to the 'gym incident' involving the Peter and William (the first and second claimants) would not be progressed to a formal disciplinary hearing. This decision has been taken in the interests of enabling more positive progress to be made and to assist in enabling both Peter and William to return to work.

17. To commit to ensuring that, should any potential disciplinary issues arise relating to an individual has been party to the collective grievance raised in December 2014 (to include Jim Aire), any formal disciplinary hearing necessary be conducted by an appropriate manager, who is not based at Falkirk.

18. To arrange for Simon Bourne, the new Manufacturing Director commencing in June, to oversee the Falkirk site and ensure the site is maintaining momentum in progressing to a more positive footing, based around the proposals noted above.'

19. This letter also records that 'On 22 June (2015) a Serious Concern was raised by Chris Haigh to Cathy Baxendale (Company Secretary and General Counsel) as a consequence of concern during the period from the raising of the original issue in December 2014, including most recently an issue having arisen with William Allison and Alec Kerr'. This 'Serious Concern' procedure is the Respondent's Whistleblowing Policy. The letter goes on to state that a joint meeting took place on 7 July 2015, chaired by ACAS that 'some progress was made in re-establishing a dialogue between the parties and meetings were arranged to discuss site based policies and procedures and how they can be operated more consistently.' The letter goes on to state (at point 14):-

> 'At the meeting, (named person – being referred to herein as 'the appropriate manager') indicated that he would meet with employees who were party to the collective grievance, in order to provide reassurance that they would not be targeted. This resulted in the meeting taking place on 27th August, having been delayed due to holidays.'
>
> And
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> 'In relation to the meeting on 27 August, (named person - being referred to herein as 'the appropriate manager') gave a commitment that none of the individuals, including yourself, would be 'targeted' as a consequence of raising a collective grievance. I reiterated the business commitment, as noted in (8) above in support of this. I am currently looking to agree with the ACAS the programme and timescales for Dignity at Work support across the site.
>
> I thank you for your participation. It was apparent to me that everyone involved in the issues which have taken place over the last eight months wanted to see something better going forward and I very much hope that the planned regular meetings provide opportunity for a more constructive dialogue.'

20. There is no mention in the letter of 11 September 2015 (production 112.21 – 112.23) of any discussion or agreement in relation to CCTV cameras. In particular. there is no mention in that letter of any discussion between Neil Etherington, the claimants and their trade union representatives after the management representatives had left that meeting in respect of an agreement that CCTV cameras at the Falkirk could be switched off during the night shift. The claimants later relied on there having been such discussion and agreement, referred to in the course of the hearing in these claims as 'the Neil Etherington Agreement'. All three claimants considered after 27 August 2015 that previous matters had been put

behind them. In the period from September 2015 until August 2016 the CCTV cameras at the respondent's site in Falkirk were regularly switched off during the night shift by the claimants and other employees. The claimant's line managers in this period (being Alex Kerr the Gordon McInlay) were aware that the CCTV cameras were being switched off at night in this period. The claimants did not receive any instruction within this period that such conduct would be regarded as misconduct.

21. In August 2016 a new initiative was put in place at the respondent's Falkirk site, being an auto start up of certain machinery at the end of the night shift. This initiative was put in place because approximately 20 to 30 minutes per day were being lost at the start of the morning shift while the plant machinery 'warmed up'. A CBP Team briefing was given to the day shifts by John Anderson (CBP Department Production Manager) on 29 August 2016. None of the claimants were present at these day shifts' briefings. The note relating to this team briefing is at production number 112.27. This was not issued to any of the claimants or put on any notice board. This note includes the following:-

> "Auto Start and Dynamic batching projects, after several meeting this week between AK JA SB CH and (initials of 'the appropriate manager') it has been agreed to support the project work by carrying out the following –
>
> We would like the early morning start-up guys to start using the ASB and recording any issues found. We will run with the manual start button for a couple of weeks then progress to the timer being pre-set the night before.
>
> Cuber area is going to have a timer set to start cuber and grab movements in the morning automatically to warm up hydraulic systems, only up, down, open and close functions not lifting any product. It has been requested by the project team that the camera system is left running to monitor the cuber start-up procedure and in the near future the auto batching as well."

22. On 14 February 2017, 'the appropriate manager' put a sheet of A4 paper on the notice board of the Respondent's Falkirk site. This noticeboard was not the usual means of communication between management and employees. Important notifications were usually conveyed by way of a 'toolbox talk' which all employees were required to attend. The notice put up by 'the appropriate manager' is at production 113. It is headed 'CBP Process Camera System', and is substantively in these terms :-

> 'The process camera system in CBP is like any other part of the site process and is not to be used or interfered with. Each night Monday to Thursday for some reason it is being switched off by the removal of a spur fuse. I have no idea why this fuse has been fitted. The cameras can clearly be seen below to be monitoring the process and nothing else. This can only be to hide something. In the absence of any explanation that conduct will be considered to be Gross misconduct.'

23. The 'notice' then shows a picture of a screen showing four CCTV camera images, said to be 'Photo of Process Camera locations.'

24. The claimants saw this notice and were concerned because they believed that it had been agreed that these CCTV cameras could be switched off during the night shift. The claimants were also concerned that the CBP fitters were identified in this notice, because they were the only ones working nights Monday to Thursday. In the period prior to 14 February 2017, the claimants and others had been switching off these CCTV cameras. The second claimant contacted Chris Haigh (National Unite Convenor). Chris Haigh was surprised at what he was told were the terms of the notice (at 113) because he had understood from his discussions with Jim Aire at the time that there had been an agreement with Neil Etherington that the CCTV cameras could be switched off during the night shift. Chris Haigh tried to contact Neil Etherington but he was not available. The following day Chris Haigh

was visiting the respondent's Halifax site because of another matter and he happened to meet Susie Fehr (then HR Director). She asked him what he was doing there. Chris Haigh said that he was looking to speak to Neil Etherington. Susie Fehr asked what it was about. Chris Haigh said he would rather not say. Susie Fehr replied words to the effect of 'is it about the cameras at Falkirk?' Chris Haigh was surprised that Susie Fehr would know about any issue with the cameras at Falkirk. Chris Hay then phoned Jim Aire and told him 'tell the lads do not touch them cameras'.

25. Ben Hope obtained the notice which is at production 113 from 'the appropriate manager'. Ben Hope showed that notice (113) to Simon Bourne. Simon Bourne considered that this was a serious matter and asked Richard Marshall to investigate. Ben Hope showed the notice which is at 113 to Richard Marshall and said 'this is what needed investigating'. The investigation in respect of the claimants was initiated because 'the appropriate manager' had put up the notice which is at production 113.

26. Richard Marshall understood that he had been asked to investigate tampering of CCTV cameras at the Falkirk site. Richard Marshall understood that the notice which is at production 113 had been issued by 'the appropriate manager' on 14 February 2017. Richard Marshall understood that it was Simon Bourne's impression that a spur fuse was being removed to switch off CCTV cameras and that that he wanted it investigated. Richard Marshall was instructed to carry out his investigations in late February or early March 2017. When carrying out his investigations, Richard Marshall had sight of the John Anderson's briefing CBP team briefing note from August 2016 (production number 112.27) and the notice put up by 'the appropriate manager' headed 'CBP process camera system' on 14 February 2017 (production number 113). Richard Marshall took from John Anderson's briefing note that the auto start up project required the CCTV cameras to be 'left rolling'. Richard Marshall was based at the respondent's Halifax site. He

travelled to the Falkirk site for the purposes of his investigation and met with each of the claimants there on 7 March 2017. The notes of his first interview with the third claimant are at production 114 to 116. The notes of his first interview with the second claimant are at production 117 to 121. The notes of his first interview with the first claimant are at production 122 to 126. It was the position of all three claimants to Richard Marshall that there had been an agreement in August 2017 with Neil Etherington (HR Manager) that the CCTV cameras could be switched off during the night shift. It was the position of the third claimant that he had not received direct instructions from John Anderson or any other manager that CCTV cameras should not be switched off, although he had heard from other employees that John Anderson had told them that cameras needed to monitor the machinery at auto start-up. At that initial investigation meeting, it was the position of the third claimant that he had been working day shifts and so 'had nothing to do with the cameras on the night shift'. It was the position of the second claimant that he had continued to turn the CCTV cameras off after 29 August 2016 because 'nobody had communicated anything to him'. The second claimant's position was that he had not received any instruction from John Anderson about switching off the CCTV cameras and that his directions would have been from Gordon McKinley (Engineering Manager) who had never told him not to turn the CCTV cameras off or on. The second claimant's position at this initial investigating meeting was 'the camera had always been on for auto start-up and this was another example of a lack of trust'. At his initial investigatory meeting, the first claimant informed Richard Marshall that he kept personal records of events and asked if he could refer to these, which he was allowed to do so. The first claimant then referred to a particular note stating that the meeting with Neil Etherington took place on 27/8/2015 and that his minutes had recorded the purpose of the meeting to be 'ironing out previous difficulties', that part of that meeting discussed the use of cameras on site and as CBP did not run on nights it was agreed that the cameras should be turned off. He stated that there had been other issues discussed about the cameras, but this was the agreement. The notes of this investigating meeting at production number 123 go on to record that 'maintenance and production team

leaders had turned the cameras off. It was understood that was what to do and there had not been an issue regarding that from that point onwards.' Richard Marshall asked the first claimant (recorded at production 124) if anyone had challenged him or the other engineers regarding the continuation of the cameras being turned off on the night shift in the period between August 2016 and 'the appropriate manager's' briefing. The first claimant's response is recorded as being that nobody had been challenged that he was aware of and nobody had challenged him on the matter. Richard Marshal was then aware that there was a practice in place from the time of the alleged agreement with Neil Etherington which was in line with the terms of that alleged agreement and was not challenged by the claimants' managers. The first claimant's position was that he did not work day shifts and so would not have been present at a briefing by John Anderson in August 2017.

27. Richard Marshall also interviewed John Anderson on 7 March 2017. The notes of this investigating meeting are at production numbers 127 – 128. John Anderson's position at that initial meeting was that he had given a briefing relating to the auto start-up project as set out at production 112.27 personally to the 'whole shift'. His position at that initial meeting (as recorded at production 127) was that he briefed all the production team and had made sure that any individual not present at the briefing were 'briefed as individuals'. Richard Marshall understood John Anderson's position to be that in August 2016 he had briefed both day shifts in the CBP department on the terms of the note at 112.27 and that he had briefed the fitters individually. Richard Marshall proceeded on the basis that from August 2016 there was a requirement within the CBP plant to leave the CCTV cameras running in order to properly monitor the autostart process. His investigation did not address whether the CCTV cameras had actually monitored this auto start-up process. It was the position of the claimants during the investigation that the CCTV cameras had been turned on in time to monitor the autostart process. Richard Marshall drew a negative inference from the fact that at his initial investigating meeting, the third claimant had denied having a briefing from John Anderson before Mr Marshall had

shown him the briefing note (at production 112.27). Mr Marshall drew a negative inference from all three claimants asking him at their initial investigating meeting how the investigation had come about. Richard Marshall did not carry out investigations into how the investigation had come about and did not consider that to be significant.

28. Also on 7 March 2017, as part of his investigation, Mr Marshall interviewed a number of other employees of the respondent. The notes of his investigatory meeting with Bruce Small (CBP Maintenance Mechanic / Fitter) are at 129 – 131. The notes of his investigating meeting with Gordon McKinley (Maintenance Manager) are at 132-133. The notes of his investigating meeting with Alec Brown (CBP Team Leader) are at 134-135. The notes of his investigating meeting with Iain Ivory (CBP Maintenance Mechanic / Fitter) are at 136-138. Bruce Small's position was that he only worked night shifts and had no interaction with John Anderson. Bruce Small specifically denied having been briefed by John Anderson in relation to the CCTV cameras. His position was that he had not turned the CCTV cameras off since the notice put up by 'the appropriate manager' in February 2017 but that he had turned the CCTV cameras in the CBP department off on the night shift prior to that time because he was 'told that there was an agreement with Group HR about cameras'. Gordon McKinley's position was that he did not have a direct interest in the cameras and that he had been on holiday in August 2016 at the time of the John Anderson briefing. The notes of this investigatory meeting with Gordon McKinley show that Richard Marshall knew from his investigatory meeting with Gordon McKinley that Gordon McInlay was aware that the CCTV cameras on the CBP plant were been turned off during the night shift and that he did not discuss camera turn on or off with the CBP fitters (including the claimants). In this investigation meeting (recorded at 132) Gordon McKinley stated that he 'had some awareness of issues before he started between the management team and the fitters' and that he 'tended to have a softly softly approach to build bridges, which he believed had moved the team along to settle and work better. Fitters had asked GM about the cameras and he had checked verbally and confirmed back to fitters

that cameras were for security and purely for production purposes on site, which I checked with 'the appropriate manager''. These interview notes conclude with Gordon McKinley stating 'Did not have anything to add apart from feeling very disappointed that he did not act differently and didn't realise at the time the gravity of the issue. He suggested that the issue now has a greater importance than was generally realised at the time'. There was no investigation into Gordon McKinlay's reasons for this and those reasons were not established in the investigation.

29. It was the position of Alec Brown that he had turned the CCTV cameras off when the plant was not in production until the time of John Anderson's briefing in August 2016. Alec Brown was asked what time the footage shows the cameras turned off and on. His position was that the camera footage would start at 4:30 to 4:45 AM when no production personnel were in the Department, the manufacturing shifts starting at 5 PM and finishing at 8 PM. If correct, that timing would have captured the auto start up process. Iain Ivory's position was that he had only worked in the CBP plant for six months until October 2016 and thereafter had worked as a fitter in the flag and kerb plant. His position was that there had been an agreement with Neil Etherington that the CCTV cameras were turned off when the plant was not in production, which went 'back to previous issues that RM (Richard Marshall) may remember an involvement in, which led to meetings to discuss ways to move forward.' It was Iain Ivory's position that 'everybody' had turned the cameras off and on because of the long-standing agreement (noted at production 136).

30. Richard Marshall carried out further investigations on 8 March 2017. He interviewed Peter Hendry (CBP team leader). It was Peter Henry's position that the maintenance fitters had not been at John Anderson's briefing and that he thought the engineers turned the cameras off 'because they believed the cameras were used for spying on them' (recorded at production 141). His position was that he had not spoken to the engineers at any point about turning the cameras off or on and that he 'kept out of it'. Peter Henry's position was that it was common for both production and maintenance to turn the cameras off and on prior to John

Anderson's briefing in August 2016 but that he had not turned the cameras off after John Anderson's briefing. Also on 8 March 2017, Richard Marshall carried out a second investigatory interview with Iain Ivory, Alec Kerr and John Anderson. The notes of the second interview with Iain Ivory are at production 143. These record Iain Ivory's position as being 'he thought the whole thing was a joke and said that he was extremely anxious and close to breaking down because of the situation.' The notes record that Ian Ivory was asked if he had been aware that production employees were 'still turning the camera off 9 times out of 10' in the period between August to October and his reply as being 'as far as he could say that was the situation. That the situation was not a straightforward one and that from October onwards he worked in a different area.' It was put to Ian Ivory that John Anderson had spoken individually with each fitter relating to the briefing that he gave in late August. Iain Ivory's response was that he did not ever remember John Anderson having a conversation with him but that he did understand the cameras were needed to be turned on for production. When asked if he wanted to add anything, Iain Ivory's response is recorded at 143 as being 'Said that he felt picked on. That he didn't even work in that department and had never put a foot wrong in his time working for Marshalls. He felt that false information was being given out regarding this situation.'

31. The notes of Richard Marshall second interview with Alec Kerr are at production 144 – 145. These record at 145 him being asked if the cameras being turned on or off had been deemed an important issue on the site in the period between August and October and 2016. Alec Kerr's response is recorded as being 'Said that it wasn't a big issue, it got mentioned and then would crop up again at some other time. That is why we drew the conclusion to hardwire the recording unit.' This also records Alec Kerr as saying 'after the spur was fitted the fitters went to see GM about the cameras and that AK had become so weary and frustrated with the fitters' issues that he made the decision to resign his position in management and just now deal with the electricians.'

32. Richard Marshall had concluded from his investigating meetings on 7 March that those who worked in the day shifts had had a briefing from John Anderson in August 2016 in terms of the briefing note at production 112.27 Richard Marshall spoke to John Anderson on 8 March to question him further on his position in respect of having briefed the maintenance workers/fitters working on the night shift. The notes of the investigatory meeting at 146 record John Anderson's account of having spoken to each fitter separately over that period, including giving the location where he had spoken to some of them. The notes at 146 record Richard Marshall asking John Anderson 'where the issues were discussed when it became known that the cameras were being turned on and off' and John Anderson's response being that he had discussed it at the project focus meetings. The notes also record that John Anderson confirmed the CCTV camera was turned off and on between 7:50 and 7:55 PM and at 5:45 AM. There is no indication of any discussion with the fitters that turning the CCTV cameras off would be considered to be misconduct.

33. After these investigation meetings, the five maintenance fitters, being the three claimants, Iain Ivory and Bruce Small submitted information to Richard Marshall in relation to the respondent's 'Workload' IT system and in particular how entries in that system could be falsified (production 147.1 - 147.5). They alleged that certain entries in respect of briefings having been given to individuals by John Anderson where 'false data', having been made after the event and backdated. The first claimant has considerable knowledge of this IT system and demonstrated to Richard Marshall that the date of an entry could be altered. Richard Marshall had noted that the 'Workload' IT system had recorded that the briefing had been given by John Anderson but because of what the first claimant had shown him, Richard Marshall considered that he needed to investigate that matter further and check whether John Anderson's briefings had taken place or not.

34. As part of his investigations, Richard Marshall spoke with Neil Etherington on 13 March 2017. Th notes of that meeting / conversation are at production 147. These record that Neil Etherington was asked 'to recollect his views on the meeting held on 27/8/15 in the Transformation centre at Falkirk with the CBP fitters' and was asked 'What is your understanding of the discussion and any agreements on cameras at Falkirk during this meeting? Neil Etherington's reply is recorded at 147 as being 'Cannot specifically remember camera conversation but it was mentioned. I seem to remember the issue being the camera on the fitters' work area, but this was an operational issue and not one I would get involved with.' Neil Etherington was then asked 'Was there an agreement on the use of cameras?'. His reply is recorded at 147 as being not 'Not in this meeting. Going forward, it was agreed with SF (being Scott Foley – Regional Unite Trade Union representative) that the Falkirk management and maintenance would get together and deal with these sorts of issues. I'm unsure whether this was ever done but do have a letter stating this (copy of letter to J Aire later provided).'

35. At the time of these investigations, Richard Marshall had sight of the letter from Neil Etherington to Jim Aire dated 11 September 2015 (production 112.21-112.23, with a letter in the same terms to the second claimant with the same date at production 112.24-112.26). The letters refer to a meeting on 27 August 2015. Richard Marshall understood that meeting to be the 'culmination' of the fitters' grievance which he had investigated previously and had 'an attempt to put matters right at the Falkirk site, where there had been a lot of bad blood.' Richard Marshall understood that it was the position of the claimants and the other maintenance fitters that at the end of the meeting on 27 August 2015, once Scott Foley and others had left, that Neil Etherington, the fitters and (as Richard Marshall understood it) 'the appropriate manager' had had a discussion and Neil Etherington had agreed that CCTV cameras could be turned off with in the CBP department. Richard Marshall did not carry out any investigation with the appropriate manager in respect of his understanding of any such agreement. Richard Marshall's understanding from Neil Etherington was that when he was asked directly if there

was an agreement on the cameras that his position was 'not at this meeting' but that 'there was to be a meeting going forward' and that 'there had not been an agreement that cameras were to be turned off'. Richard Marshall concluded in respect of the letter at 112.21-112.23 ' in my mind that was what was agreed at that meeting.' Richard Marshall concluded that because there was no mention in that letter of an agreement that the CCTV cameras could be switched off during the night shift, that there had been no such agreement. Richard Marshall also concluded that in fact the practice was that the CCTV cameras were turned off during the night shift in the period from August 2015 until August 2016.

36. Richard Marshall went to the Falkirk site for the purpose of carrying out further investigating meetings on 22 March 2017. He spoke to Alec Kerr (notes of second interview meeting at 148-149), Iain Ivory (notes of third interview meeting at 150-152). Gibson Wilson (Maintenance Planner) (notes of interview meeting at 153), David Graham (Production Operative) (notes of interview meeting at 154), John Anderson (notes of third interview meeting at 155) and all three claimants (notes of interview with third claimant at 156-159, notes of interview with second claimant at 160-164 and notes of first interview with first claimant at 165-168). The notes of his meeting with the third claimant record at 156 that it was the third claimant's position that 'he believed that the maintenance fitters we are being 'set up''. Richard Marshall's position at this meeting (recorded at 157) was that 'he was certain that there was an understanding in production and management about the auto start up project and the cameras needing to be turned on all the time'. This third claimant's position was that not all of the production personnel where aware of this. He was asked to say who and named David Graham (Shift Production Operative). It was put to the third claimant by Richard Marshall (recorded at 157) that 'he must have had knowledge of the cameras needing to be turned on even if it was from discussions with other people as general chat.'. The third claimant's position is recorded as being said that 'he did know at some point, but that he was not on the night shift so would not be around to switch cameras on and off. He had only been on nights in November 2016. He continued to say that because of the

NE agreement though, had he been on the night shift he would have turned the cameras off at those times because nobody had told him otherwise.' Richard Marshall is then recorded as saying 'he couldn't foresee a reason to turn the cameras off and that surely turning them off was an action that wasn't even necessary as the cameras merely viewed production parts of machinery.' The third claimant's response is recorded as being 'it was believed that cameras on site were viewed from laptops and tablets even remote from site'. Richard Marshall's response is recorded as being 'Repeated that he had viewed the cameras in the CBP plant and was sure that the purpose was to view machinery. Richard Marshall did not carry out any investigations into the allegations that the CCTV footage was being said by 'the appropriate manager' to be viewed by him on his iPad. Richard Marshall's position when carrying out his investigations was that he 'did not see why the cameras were such an issue to fitters.' Richard Marshall concluded that the third claimant did know that the CCTV cameras had to be left on for the auto start up product project because he knew about the auto start up project and he had spoken with some employees who worked in production about the matter. Richard Marshall made no finding that the claimants had received direct management instructions in respect of any requirement for the CCTV cameras to be left on during the night shift.

37. In his third investigatory meeting with John Anderson, on 22 March 2017 (notes at 155), Richard Marshall asked John Anderson about entries on the 'Workload' IT database. The notes record Richard Marshall's position as follows:- 'Concluded that the input data regarding the briefings been given was then put in by JA on 29/08/2016 but stated that entries on Dashload [production and downtime reporting system] did not tally with the entry on Workload stating that the briefings have been given. Workload entries of downtime reasons for meetings recorded on the two shifts on 24/08/2016 and 01/09/2016' and that Richard Marshall 'invited JA to comment'. John Anderson's response is recorded as being 'said that the briefings were probably the dates stated as he did the briefings with each shift but confirmed that the entry onto Workload was merely a diary type entry to record that the

briefings had taken place given that the project was of importance to the auto start up project. He further stated that he did not use Workload that much, but that it was a good tool and should be used more as it was useful.' The notes record that Richard Marshall then asked if JA 'had specifically mentioned the cameras to be left on when he spoke individually to the maintenance fitters over the period of the following two weeks' and John Anderson's response as being 'he had told each fitter individually to leave the cameras on when he spoke to them regarding the auto start up project.' The notes then record Richard Marshall asking if John Anderson was sure about that and him confirming that he was.

38. Richard Marshall knew from his previous investigation in respect of the grievance raised by the claimants and others about 'the appropriate manager' that there were 'issues of trust' at the Falkirk site. Richard Marshall's view was that the CCTV cameras which were being switched off were 'not in emotive areas'. Richard Marshall asked the second claimant if the issue with the CCTV cameras was about trust and the second claimant confirmed that it was. The second claimant also confirmed to Richard Marshall that he had switched off the CCTV cameras. At the time of carrying out his investigations, Richard Marshall concluded that the second claimant believed there was an agreement in place from August 2015 that the CCTV cameras could be switched off during the night shift.

39. Richard Marshall understood that Alec Kerr had been the direct line manager of the Fitters and Gordon McKinley was the Engineering Manager. His understanding was that Alec Kerr had been responsible for a large part of the auto start up project, which was considered to be a good initiative for the site. Richard Marshall understood that Alec Kerr had effectively taken a demotion from a management position rather than to be in a position of managing the fitters because he found them to be difficult and that the fitters had then reported directly to Gordon McKinley rather than Alec Kerr. Alec Kerr's position to Richard Marshall was that the CCTV cameras were being switched off during the night shift and when the auto start up process was initiated the CCTV cameras needed to be on to record that process.

The interview notes at 144 record that Richard Marshall asked Alec Kerr 'if he had challenged any of the fitters when the cameras were been turned on and off after the project started in August'. Alec Kerr's response is recorded as being 'he had placed stickers on the unit and even on the monitor screen stating that the cameras were not to be turned off but that these were discarded. We discussed it in the project focus meetings and eventually decided to fit an electrical fixed spur to the unit. It still took a while to fit the fused spur, which had been frustrating, but then it was done.' Alec Kerr's position was that he had arranged for the 'spur' to be put in place to stop the CCTV cameras being turned off. Alec Kerr acknowledged to Richard Marshall that the CCTV cameras could be turned off merely by a switch. Richard Marshall also carried out investigations with Alec Kerr in respect of what he had been told by the claimants the 'Workload' IT system. Richard Marshall concluded that the old system of 'Workload' entries (which employees had access to) could be altered and changed, but a new system had been introduced by Alec Kerr where historic entries could not be altered. Richard Marshall told Alec Kerr that the old system 'needs locking down'. Richard Marshall concluded that the new system had been live and running for some months. Richard Marshall did not speak to the first claimant to find out his position on what Alec Kerr had said in respect of this. There is no mention in the investigatory report of these allegations in respect of false entries or summary of Richard Marshall's investigation or findings in respect of these allegations by the claimants. There is no mention in the investigation report that the only individual who his position it was that stickers had been placed on the CCTV cameras' screens was Alec Kerr.

40. Richard Marshall understood that Iain Ivory had worked as a CBP Fitter from August until October 2016, when he had moved to the Flag and Kerb Department. On 22 March 2017, Richard Marshall put to Iain Ivory (recorded at 150) that 'he had interviewed Neil Etherington to enquire about the agreement (re. the CCTV cameras being switched off) and that Neil Etherington had denied that an agreement was made at the Transformation meeting and that he had not said that

cameras had to be turned off.' Iain Ivory's position is recorded as being 'the agreement was at the Transformation centre on 27/8/2015. Neil Etherington (NE) and Jim Aire (JA) [previous site union representative] and the fitters (II, PN & WA) asked NE to stay behind after the meeting and that the agreement was reached at that point.' Iain Ivory is also there recorded as saying 'NE had said that cameras could be turned off and that had been the case for the last two years when production and maintenance had turned cameras off when not in production and it had never been challenged before.' Richard Marshall investigated whether Iain Ivory had been briefed by John Anderson in respect of the briefing note at 112.27 and whether he had turned the CCTV cameras off. Ian Ivory's position to Richard Marshall was that he had not been spoken to by John Anderson in respect of the briefings and that he had not turned the cameras off. In his interview with Iain Ivory on 22 March 2017, Richard Marshall was seeking to establish if Ian Ivory had turned off the CCTV cameras after August 2016, before he moved to the Flag and Kerb Department in October 2016. Richard Marshall concluded that Ian Ivory had not. Richard Marshall discussed the 'trust issue' with Ian Ivory on 22 March (recorded at 151). Here Richard Marshall is recorded as saying ' as II had mentioned the trust issues, it was clear that the cameras were an emotive subject and therefore why hadn't they been brought up by the fitters in relation to auto start up with the management?' Iain Ivory (II) is recorded as replying 'nobody had thought to bring up the subject of cameras because nobody had fully explained the camera situation directly to them. In fact hadn't the whole investigation come about because the fitters had made an enquiry about the cameras? Had there been an understanding earlier then the fitters may well have asked about the cameras earlier' and 'the issue could have been brought up and sorted in August 2017, when JA and AK were starting the project, but nothing was said, or the fitters would have mentioned the cameras earlier. Moreover if II was actually doing something wrong over the whole period then it was management duty to tell me that what I am doing is wrong. Nobody has done that.'

41. Bruce Small was a CBP Fitter working the same shift patterns as the claimants. Bruce Small's position to Richard Marshall was that he had not been briefed by John Anderson, either as part of a team briefing or individually. Richard Marshall understood from his first interview with Bruce Small that his position was that he had turned the CCTV cameras off for a period, and then had not done so.

42. It was then the position of all of the Fitters spoken to by Mr Marshall that in the period from August 2015 until February 2017 the CCTV cameras in the CBP department had been switched off during the night shift. Richard Marshall concluded that before John Anderson's briefing in August 2016 'everyone' was turning the CCTV cameras off for the night shift, including John Anderson. Richard Marshall understood that was 'acknowledged by everyone on site'. It was not established during the investigation that the CCTV cameras had at any time been switched off by any Fitter by the 'removal of a spur' as alleged in the note by the appropriate manager issued on 14 February 2017. The 'spur' had been fitted by Alec Kerr.

43. Richard Marshall's investigation report is at 169-171. This is headed 'Falkirk Investigation Report - William Allison, Iain Ivory, Peter Nisbet, Malcolm Nugent and Bruce Small (since left the company). Paragraph 1 outlines the allegations and states

> 'The concerns relate to incidents when it is alleged that William Allison, Iain Ivory, Peter Nisbet, Malcolm Nugent and Bruce Small were involved in the tampering of work cameras at the Falkirk manufacturing facility.'

44. This statement shows that Richard Marshall's investigations were in relation to this alleged misconduct by these individuals, rather than a general investigation as to why a spur had been fitted to the CCTV camera fuse box, or the issue of use of CCTV cameras at the Falkirk site in general. There is no mention in the report that

the investigation was instigated because of alleged 'tampering' in respect of the fitting of a fuse box, but that the fuse box had been fitted by management and the CCTV cameras had been put off using the switch. Richard Marshall's findings are set out at 170 as being that only the first and second claimants had turned the CCTV cameras off. There is reference to a 'chronology of events' (at 172). This chronology states as follows:-

> '27/08/15
> The Falkirk CBP maintenance fitters state an agreement in the 'Transformation centre' with Neil Etherington that cameras could be turned off when CBP not in use. From the interviews this was a shared and common view from production and maintenance personnel. There is evidence in the statements that this was a common view.
>
> 29/08/16
> CBP auto start-up project began. A briefing document was created (18/8/16) and amongst many actions, one such action was to leave the cameras running. A brief by J Anderson (CBP Manager) was given to CBP production personnel in separate shifts verbally from the written briefing document. There were no signatures and it was not placed on notice boards. It was however recorded in the production log on dashboard as having occurred on 29/8/16. Due to the nature of the fitters shifts, JA stated he spoke to them individually over the course of a few weeks to leave the cameras running. All five fitters strongly deny this and state they have never been informed to turn them off and were sticking to the original agreement. Both production TLs very clear on the directive and both confirmed they left them running. This supports comments that the times footage was missing was broadly between 8 PM and 5 AM.
>
> Sept 16 - Jan 17

It is stated that there were a number of occasions where cameras were switched off from 8 PM to 5 AM. It is unknown how many times as was only followed up when an issue occurred and the system only records circa seven days of footage. When it did occur it was raised in the DARM by JA following information from the CBP TL's. JA raised this with GM and AK. In following up, GM deemed this low priority against daily issues. This is in conjunction that GM wished to make progress on engineering team working, although adopting a sensitive approach. Consequently, fitters were not challenged on this although AK does state he mentioned it generally to the fitters but cannot remember to whom and when. Due to continuation of this, it was hardwired with a spur fuse. This was fitted in January 2017 and issues continued and 4/5 of the fitters stated they switched them off at the box because they were not told otherwise.

14/02/17
'The appropriate manager' posted brief to leave the cameras running and spelt out consequences for not doing so. Cameras now running continually and have not been switched off.'

45. This investigation report is initially dated 27 March 2017 (at 171). As at 27 March 2017 Richard Marshall's conclusion/recommendation was that there was a case to answer in respect of the second and third claimants and that a disciplinary hearing should be arranged. His conclusions are set out as:-

'Given the amount of people who knew about the briefing provided by John Anderson in Aug 16 and general conversations the fitters have had with production personnel over the period since this date regarding the auto start-up, there is evidence to suggest that they knew the cameras needed to be left on. Two fitters have indeed stated not to have turned them off, so this also leads me to believe that it was known about. With regards to the two fitters turning them

off, I believe this could be wrong and therefore recommend disciplinary proceedings occur with these two individuals.'

46. The investigation report does not clearly reflect the position in discovered by Richard Marshall in respect of lack of clarity of instructions in respect of the CCTV cameras and that it was previously 'not a big issue'. Richard Marshall took a negative inference from the first claimant's position to him that even if he had heard a briefing from John Anderson, then he would still have continued to turn the cameras off. Richard Marshall's view was that that he 'didn't think that was right'. Disciplinary proceedings were not recommended against Bruce Small because by the time of Richard Marshall's report Bruce Small had resigned and left his employment with the respondent. Richard Marshall did not recommend disciplinary proceedings to be taken in respect of Iain Ivory because he concluded that Iain Ivory had not turned the CCTV cameras off in the period from August 2016 until October 2016, when he had moved to the Flag and Kerb plant.

47. Richard Marshall made a finding in his investigation report that 'it has been established that the 'Neil Etherington agreement' did not happen at the meeting in 2015 at which Scott Foley was present. Richard Marshall made this conclusion because he believed Neil Etherington's denial of such an agreement. Richard Marshall believed Neil Etherington because he viewed Neil Etherington as 'a respected HR manager' who had been with the respondent for 24 years and because Neil Etherington's letter to Jim Aire (production 112.21) makes no mention of the CCTV cameras or of any agreement in respect of these cameras being switched off. Richard Marshall concluded that John Anderson had briefed the fitters because both the team leaders on the separate CBP shifts had confirmed that the briefings of the Day Shifts had taken place, because a production operative (Mr Graham) had confirmed that he had received the briefing from John Anderson and because John Anderson was specific about where he said he had spoken to the various fitters.

48. When carrying out his investigations, Richard Marshall knew from his involvement in investigating the grievance raised by the claimants and others in December 2015 that the claimants had raised a grievance about the appropriate manager's conduct. Richard Marshall knew that his recommendation had been that disciplinary proceedings be instigated against the appropriate manager in respect of conduct towards the claimants. At the time when he carried out his investigations in respect of the claimants' grievance, Richard Marshall was a peer of 'the appropriate manager'. At that time they both held the position of Site Manager with the respondent, at different sites. They met at monthly regional meetings after Simon Bourne joined the respondent, approximately from June 2015 until early 2018. There was a social aspect to these meetings as the participants would sometimes have a meal together. Richard Marshall knew from an informal private conversation with 'the appropriate manager' at one of these monthly meetings (in September or October 2015) that a disciplinary sanction had been applied against him in respect of those disciplinary proceedings. 'The appropriate manager' had volunteered that information to Richard Marshall when socialising together after a regional meeting. Richard Marshall knew that the claimant and others had taken that grievance through the three stages of the respondent's grievance process and that they considered the matter to be of such concern that the 'Serious Concerns' Policy had been invoked.

49. Richard Marshall did understand it to be the claimants' position that they were 'targeted' after having raised a grievance about 'the appropriate manager' by use of CCTV to monitor their movements in and out of the on-site gym, on designated walkways and their use of protective footwear. Richard Marshall discounted these concerns because he understood that the CCTV cameras which were being switched off were pointed at machinery in the production process. Richard Marshall made no mention of in his investigation report either of it being the claimant's position that they were targeted in this way or why he discounted that. The photographs of where the CCTV cameras were pointing as shown at 113 show parts of the machinery in the production process and walkways and doorways. As

part of his investigation, Richard Marshall looked at the CCTV camera screens in respect of the cameras which were being switched off. He did not inform the claimants that he was carrying out this investigation and it is not mentioned in his investigation report. Richard Marshall noticed that the doorway could be seen from where one of the CCTV cameras was pointing and considered that there was a possibility that this could be used to monitor entry and exit. He did not mention this in his investigation report. Richard Marshall did not consider reviewing any policy on use of CCTV cameras or check whether there were any signs in respect of the use of CCTV cameras. His understanding was that CCTV cameras can be used where there are signs on site informing of this. It was not the claimants' position during the internal disciplinary process that the respondent was acting in breach of any particular statutory provision or internal policy in respect of the use of CCTV. There was no evidence before the Tribunal of any policy in place at the respondent's Falkirk site in respect of the use of CCTV.

50. At the time of carrying out his investigations, Richard Marshall was aware that there had been a recommendation that a Dignity at Work policy be put in place at the Falkirk site, because he had initially made this recommendation. Richard Marshall was aware that that recommendation was not implemented. At that time Richard Marshall was also aware of the other recommendations as set out in letter from Neil Etherington to Jim Aire of 11 September 2015 at 112.22. He knew that commitment at (5) of numbered paragraph 8 in respect of any potential disciplinary issues being conducted by a manager not based at Falkirk was put in place to address the concern of the claimants that they were at risk of being targeted again. He knew that the notice at 113 had been put up by 'the appropriate manager'. He discovered in his investigations that the switching off of the CCTV camera during the night shift had not been considered by the claimants' line management to be a big issue prior to the notice at 113. Richard Marshall did not interview 'the appropriate manager' as part of his investigations. At the time of carrying out his investigations Richard Marshall was aware that a serious concern had been raised on behalf of the claimants by their trade union. Richard Marshall knew that his

investigations related to the same group of individuals who had been involved in the grievance raised against 'the appropriate manager'. Richard Marshall was aware that it was the position of all of the claimants and Iain Ivory at the investigatory meetings that the explanation for this matter becoming an issue was that 'the appropriate manager' was 'getting his own back' on the claimants. Richard Marshall knew that the claimants were alleging that they were being 'set up' by management at Falkirk. There is no mention of this proposed explanation or allegation in Richard Marshall's investigation report. When Richard Marshall first read the notice which had been put out by the appropriate manager (production 113) it had caused him concern that someone was removing a spur fuse from a camera. There is no mention in his investigation report of that allegation being set out in that notice, or of his finding that Alec Kerr had been the one to fit the spur fuse. There is no mention in his investigation report of the issue having arisen as a result of the 113 notice or that that notice had been placed by 'the appropriate manager'. There is no mention in the investigation report of the claimants having sought clarity on the position re the CCTV cameras once this notice was put up. Richard Marshall knew at the time of his investigation that the claimants 'clearly had an issue with the memo (113) of some description' that they had sought clarity on the memo from their trade union and that that was how the matter had come to the attention of Simon Bourne. There is no mention of that history in his investigation report.

51. Richard Marshall knew from his investigatory meetings with the first claimant that he had had kept contemporaneous notes of events for some considerable time. Richard Marshall knew that the first claimant had a lever arch file where he had kept his notes. Richard Marshall considered this to be in effect the first claimant's own diary and did not consider the contents to be relevant as part of the investigation because they were not 'agreed'. Richard Marshall took account these notes only in respect of information which the first claimant gave him from them in respect of the date of the spur being fitted. He considered that the other notes

were not relevant to his investigation. He did not read the notes before taking the decision that they were not relevant.

52. At the time of his conclusions on 12 April 2017, Richard Marshall understood the third claimant's position to be that he had not turned the CCTV cameras off since August 2016. Richard Marshall understood that the third claimant had not had worked in the CBP plant until November 2016. The investigation report was updated on 12 April 2017 (at 171). It is there recorded that on 5 April the third claimant sent an email to Richard Marshall as follows:-

> "While going through my notes and dates in the house, I have noticed that I did switch the cameras off and on after August as did some of our OPERATORS, sorry for the confusion on dates, again as I said in my interviews that this was done because I was under the impression that we had permission to do so from Neil Etherington and that we had never been told otherwise from any of our MANAGERS, I thought I better inform you of this as I didn't want you thinking that I was Lying at any of my interviews. Please could you notify me that you have received this email."

53. After receiving this email from the third claimant, Richard Marshall spoke to Ben Hope and told him that he had received this after he had concluded his investigation report. Ben Hope gave advice to Richard Marshall on what to do. Richard Marshall then arranged a telephone conference call with the third claimant, for seeking clarity that the third claimant was comfortable with proceeding by way of a telephone conversation rather than a meeting. The telephone call took place on 26/04/2017, with Richard Marshall using a speaker phone to enable notes to be taken (by B England and produced at 187.1-187.2). Richard Marshall wanted to know why the third claimant had changed his statement and if he had had any undue pressure put on him by anyone. Richard Marshall thought that it was 'odd' that the third claimant had changed his position in respect of this matter and that it

'didn't feel right'. The notes of that telephone interview record (at 187.2) the third claimant saying 'that he believed that [name and position of 'the appropriate manager] had been going around site saying 'I've won' and 'high-fiving everyone', which MN felt was massively disrespectful to the site employees involved.' Richard Marshall carried out no investigations after receiving that email from the third claimant other than in the telephone interview with the third claimant on 26 April 2017. In particular, Richard Marshall carried out no investigations in respect of the third claimant's allegations about what was being said by 'the appropriate manager' or that others had also turned off the CCTV cameras after August 2016. Richard Marshall did not amend or update his investigation report following the telephone interview with the third claimant on 26 April 2017. The third claimant was later invited to a disciplinary hearing. The notes of the telephone interview with the third claimant on 26 April 2017 at production 187.1-187.2 were not passed to the manager who heard the third claimant's disciplinary hearing (Derek Harris) and who made the decision at the disciplinary hearing.

54. In February 2017 Richard Marshall moved to the position of Operations Programme Manager and then reported directly to Simon Bourne, as did Derek Harris, who was at that time a peer of Richard Marshall. Subsequently, from the time when Simon Bourne moved to a position on the respondent's Executive Board, Derek Harris was promoted from Group Engineering Manager to Group Programme Director and Richard Marshall moved to what was essentially the role which had been carried out by Derek Harris, and he then reported to Derek Harris. At the time when Richard Marshall's investigations in respect of the claimants were passed to Derek Harris, Derek Harris and Richard Marshall were peers.

55. Prior to the third claimant sending his email to Richard Marshall on 5 April 2017, on 3 April 2017, the second and third claimants were first invited to a disciplinary hearing by a letter to each of them in the same terms, both dated 3 April 2017 (letter to the second claimant being at 173 - 175 and letter to first claimant being at 176 –

178). These letters are sent in the name of Derek Harris (then Group Engineering Development Manager). These letters were drafted by Ben Hope and approved by Derek Harris. These letters state:

> "The purpose of the interview will be to discuss the serious allegations against you as follows:-
>
> '1. **Unauthorised tampering with company equipment on numerous occasions**
>
> You have admitted switching cameras off and on again for your own reasons when no one within the management had authorised for you to do this, and there is no good reason to do so. This is considered to be unauthorised tampering with Company equipment which if proven is likely to be classed as gross misconduct.
>
> 2. **Wilful and repeated refusal to abide by management instructions/refusal to accept management's authority**
>
> You have admitted switching cameras off and on again for your own reasons and you have wilfully continued this behaviour despite knowing that this was expressly against the instructions of management at the site. This is considered to be an example of you deliberately flouting management instructions as part of a campaign you have conducted against the use of CCTV. If proven this is likely to be classed as gross misconduct.
>
> 3. **Dishonest conduct in that you have given a false account of an 'agreement' over cameras during the investigation into this matter, when there was no such agreement**
>
> During the investigation into this matter you have repeatedly insisted that the company via HR manager Neil Etherington

gave you permission to switch cameras off. We are concerned that this statement was not truthful and may have been a deliberate attempt to mislead the investigation if proven this is likely to be classed as gross misconduct.

4. **Dishonest conduct in that you have denied receiving an instruction/briefing by Production Manager John Anderson in August 2016.**
   During the investigation into this matter you have repeatedly denied receiving a briefing from John Anderson as to the importance of leaving cameras on in August 2016. These briefings took place on 24 August 2016 and 1 September 2016. Due to your shift pattern you were briefed between these dates. We are concerned that this statement was not truthful and may have been a deliberate attempt to mislead the investigation. If proven this is likely to be classed as gross misconduct.

The interview will be conducted by myself and Ben Hope, Group HR, will also be present to assist with note taking. You have the right to be accompanied at this hearing by an employee of your choice, trade union representative or an official employed by a trade union.

If you do wish to be accompanied, please advise me of the person who will be attending, in advance of the meeting. Also, I would be grateful if you could advise if you are unable to attend. I can be contacted on (mobile number stated).

Depending on the facts established at the interview, the outcome could result in disciplinary action being taken against you; however a decision on this will not be made until you have had a full

opportunity to put forward your version of events and the interview has been concluded.

Given the potentially serious nature of the concerns identified, you should note that there is the potential for a finding of gross misconduct. In such circumstances, the outcome may result in a decision to terminate your employment without notice or payment in lieu of notice.

You will also find attached evidence which will be referred to during the disciplinary interview:

- Notes from the investigatory meetings
- A copy of the company Disciplinary Policy
- Pictures of the cameras in Falkirk CBP plant
- A letter from Neil Etherington to Jim Aire dated 11 September 2015 summarising the meeting that took place on 27 August 2015.

Please confirm your attendance in writing to me as soon as possible."

56. The disciplinary hearing invitation letter was sent in the same substantive terms (as set out above) to all three claimants and on a number of occasions, because the disciplinary hearings were rescheduled on a number of occasions. A letter in these terms was first sent to each of the first and second claimants on 3 April 2017 (at production 173-175 in respect of the second claimant and at production 176-178 in respect of the first claimant), inviting each to a disciplinary hearing on 13 April 2017 (at 8:30 AM in respect of the second claimant and at 9:30 AM in respect of the first claimant). A letter in these same substantive terms was sent to the first and second claimants on 13 April 2017, with details of the disciplinary hearing being rescheduled to take place on 3 May 2017, (again at 8:30 AM in respect of the second claimant and at 9:30 AM in respect of the first claimant) (at production 179-181 in respect of the second claimant and production 182-184 in respect of the first claimant). A letter was sent to the third claimant on 26 April 2017 (at production

188-190) from Derek Harris in these same substantive terms and inviting him to disciplinary hearing on 3 May 2017, but with the first paragraph of that letter stating:- 'I write further to the investigation hearing that was conducted by Richard Marshall via a phone call with you on 26 April 2017.'

57. The allegations numbered 2, 3 and 4 in these invitation letters are conclusions on matters which were in dispute at the investigatory stage. Allegation 2 is made on the premise that there had been a clear management instruction given not to turn off the CCTV cameras. Allegation 3 is made on the premise that there was no agreement with Neil Etherington that the CCTV cameras could be turned off. Allegation 4 is made on the premise that John Anderson had briefed the claimants in line with the 'briefing note' and instructed them to leave the cameras running.

58. The disciplinary proceedings in respect of the claimants were postponed while occupational health reports were obtained on their fitness to attend a disciplinary hearing. The second claimant was assessed by occupational health providers for the respondent on 8 May 2017. Their report on the second claimant is at 190.1-190.2. The reason for the referral is stated within the report (at 190.1) as being 'in relation to ongoing absence from work identified as work stress on the GP fit note' and that 'Mr Nisbet explained that there is an ongoing investigation'. The report states 'The GP continues to see Mr Nisbet and has provided medication to help with the symptoms. Mr Nisbet also has sources to contact for help and support in managing the high levels of anxiety. However, my opinion would be that whilst these measures will help it is unlikely that Mr Nisbet will return to work until the investigation is complete.' The report (at 190.2) purports to answer 'Is the condition due to work-related matters? If so, what are they, how are they impacting and how can the organisation support the resolution' as follows:

> '" As reported to me, the anxiety is directly related to a disciplinary investigation. Whilst the investigation process is stressful for Mr Nisbet, I did advise this afternoon that I felt he should continue with

> the process. The normal advice is to provide representation during the process. It is often helpful to hold meetings off site and as you mention in the email to ensure that there are adequate breaks during any meeting. Completion of the process will lead to longer term reduction in anxiety levels.' (The Tribunal did not have sight of the email referred to here.) The report states (at 190.1) that Mr Nisbet had seen a copy of this report.

59. The third claimant was also assessed by occupational health providers for the respondent on 8 May 2017. Their report on the third claimant is at 190.3-190.4. The 'background' to the referral is stated within that report (at 190.3) as being ' that Mr Nugent is signed off work with stress and is going through a disciplinary process at work" and records the third claimant as 'displaying signs of ongoing anxiety'. It states 'These are in relation to ongoing absence from work identified as work stress on the GP fit note' and that 'Mr Nisbet explained that there is an ongoing investigation'. This report (at 190.4) purports to answer 'Is the condition due to work-related matters? If so, what are they, how are they impacting and how can the organisation support the resolution' as follows:

> 'The predominant source of pressure in Mr Nugent's life at this present time he reports as being related to work and the investigation process. Clearly completing the investigation process does cause increased short-term anxiety but in the longer term should lead to resolution of the symptoms. I would normally advise that employees going through such a process have access to representation. It is often helpful to hold meetings off site to reduce levels of anxiety and to ensure that employees have appropriate breaks throughout the disciplinary meetings. In summary with the above measures in place I would hope that Mr Nugent feels able to attend meetings." The report states at 190.3 that Mr Nugent had seen a copy of this report.

60. A letter inviting each of the second first and second claimants to a disciplinary hearing was subsequently sent in the same substantive terms to each claimant. An invitation letter was sent to the second claimant on 12 May 2017 (at 191 – 193), inviting him to a disciplinary hearing at 8:30 AM on 25 May 2017, off site, at the Best Western Hotel in Falkirk. That rescheduled hearing was then again changed and a letter was sent to the second claimant on 15 May 2017 (at 194 – 196), detailing the disciplinary hearing being scheduled to take place at 8:30 AM on 24 May 2017, again off-site at the Best Western Hotel in Falkirk.

61. The first claimant resigned from his employment with the respondent by resignation letter at 185. The first claimant left his employment with the respondent on 20 April 2017 and commenced employment with Fife Concrete Products without a break in employment. After around 2 weeks of working there, the first claimant secured employment at Marley's, having been told by the second claimant that there was an opportunity available there. The second claimant discovered this when he attended an interview at Marley's. The second claimant attended a job interview at Marley's and secured employment with that company before he resigned from his employment with the respondent.

62. A letter inviting the third claimant to a rescheduled disciplinary hearing was sent to him on 15 May 2017 (at 197-199). That disciplinary hearing was arranged to take place at 9:30 AM on 24 May 2017, off-site at the Best Western hotel in Falkirk. That letter was in the same substantive terms in respect of the allegations and possible consequences. The letters sent to the second claimant on 12 and 15 May and to the third claimant on 15 May also contained the following paragraph:-

> "Further to your appointment at IDC on 8 May 2017 with the occupational health physician I have attached the outcome report from this meeting which you have already received a copy of. In line with the physician's recommendations that you are fit to attend this meeting, we have scheduled this meeting for the earliest date available and at an off-site location. We

> will provide transport for you to and from the venue if you feel this is required. Please contact me on the phone number below should you require this."
>
> and state 'Failure to attend this disciplinary hearing without good reason may result in the disciplinary hearing being conducted in your absence and a decision being made based on the information that is available.'

63. At the time of inviting the claimants to the disciplinary hearings Derek Harris was aware of the terms of the respondent's Disciplinary Policy (Production 112.1 – 112.8), which was accessible to him 'online', and the 'non-exhaustive list of examples of the type of conduct categorised as gross misconduct' (at 112.6 – 112.7). In terms of this disciplinary policy (at section 1.2, production 112.2), 'the disciplinary officer' will normally be 'the employee's immediate manager'. At the time of conducting the disciplinary hearing, Derek Harris was aware that he had been appointed to hear the disciplinary hearing because there was 'so much mistrust between the management team and the engineers'. Derek Harris was aware of this history because shortly after he had begun his employment with the respondent he had visited the Falkirk site with Simon Bourne and had had a meeting there which Scott Foley had attended. Simon Bourne had told Derek Harris about 'the history between the engineers and 'the appropriate manager', and the 'issue of the gym'. Derek Harris understood from Simon Bourne that that 'issue of the gym' was that there had been 'over excessive use' of the on-site gym during the night shift and that there was 'mistrust' between 'the appropriate manager' and the engineers. Derek Harris understood that the engineers on night shift were allowed an amount of time for their breaks, during which they could use the gym, and if they exceeded that time then that was 'over excessive'. Derek Harris understood that the on-site gym had been closed and that 'the appropriate manager' had 'got a warning'. At the time of dealing with the disciplinary hearings Derek Harris was 'aware of the history of mistrust between the management team and engineers over excessive use of the gym on night shift which had been picked up on CCTV and resulted in the closure of the gym.' Derek Harris was not aware

that the claimants' position was that what had been labelled as excessive use of the gym was time when one of the claimants was there because they were experiencing a personal breakdown, and they were being comforted by another claimant. At the time of dealing with the disciplinary hearings, Derek Harris knew that 'the appropriate manager' was 'not trusted by the engineers and that the relationship was very poor at the Falkirk site'. Derek Harris took the view that that history had 'nothing to do' with the disciplinary hearings and regarded the issue at the disciplinary hearings as 'completely separate'. That position is confirmed in the notes of the third claimant's disciplinary hearing (at 204) where it is stated: 'I appreciate that there has been a lot of 'bad blood' at the Falkirk site but today we are here to talk about the disciplinary concerned; the points highlighted in the letter you received.' At the time, Derek Harris understood that with regard to that 'bad blood', 'the matter had been dealt with' and a 'disciplinary process had been applied against ('the appropriate manager')', that process being 'used consistently regardless of a person's position in the organisation'. At the time of dealing with the disciplinary hearings Derek Harris was not aware of the particular specific allegations by the claimant in respect of what had been said by 'the appropriate manager' in the 8 December 2015 meeting. At the time of dealing with these disciplinary matters, Derek Harris was aware that the fitters had had raised a grievance against the appropriate manager, had appealed that grievance and had escalated the matter to involve Tom Poole that Chris Haigh had submitted a report and that that had been followed by a complaint re-victimisation and Paul Thomas had carried out an investigation. He was aware that aware that Neil Etherington had met with ACAS in an attempt to progress he was aware that ACAS had been involved and that Paul Thomas had investigated the issues and discussed his findings with Tom Poole which had led to the recommendations at .8 of document of the letter which is at production 112.22 he was aware that there had been a recommendation to introduce a Dignity at Work policy and that this had not been implemented. He was aware that the investigation into the gym was dropped but that the cameras were not removed. He knew that a disciplinary sanction had been applied against 'the appropriate manager'. At the time of the disciplinary hearing

Derek Harris knew that four of the fitters had left their employment with the respondent.

64. The terms of the allegations as set out in the disciplinary hearing invitation letters go beyond the findings of Richard Marshall's investigation. The terms of these allegations do not take into account Richard Marshall's findings in respect of there being a common practice in the period from August 2015 until August 2016 which was in line with the agreement said to have been made with Neil Etherington in August 2015 i.e. that CCTV cameras in the CBP plant could be switched off during the night shift. The terms of these allegations do not take into account Richard Marshall's findings that the first and second claimants' line managers (Alex Kerr and Gordon McKinlay) were aware that the CCTV cameras where being switched off during the night shift and did not directly challenge them about this conduct.

65. The second claimant resigned from his employment with the respondent by way of letter from the second claimant to Gordon McKinley dated 19 May 2017 (at production 200-203). In that letter the second claimant relied on matters including allegations of the CCTV site security cameras being turned to face the gym door and the investigation of himself and the first claimant with regard to time spent in the gym, deviating from designated walkways and leaving site on a Thursday night. The second claimant relied on the initiation of those disciplinary proceedings as being 'payback' for putting in the grievance against 'the appropriate manager'. The second claimant also relied on the notice at 113, the points made by the claimants in the investigation arising from that notice and the outcome of that investigation being that initially only the first and second claimants, and then also the third claimant were invited to a disciplinary hearing. The letter states "Over the past several weeks William Allison and myself recognised that this was a personal attack upon ourselves and with all the previous history have all been off work with stress. Malcolm is also off sick." And "I was advised by my GP that I am unfit to attend a disciplinary hearing I informed Mr Ben Hope HR manager of this fact via

a telephone conversation. I also informed him that if the company had an issue with this that they were to contact my GP. The company has chosen to ignore my health professional's advice and I have yet again been 'invited' to attend a disciplinary."

66. Derek Harris has had over 30 years of management experience and has been involved in dealing with around 50 disciplinary matters during his career, mainly before he commenced his comment his employment with the respondent, in 2015. Derek Harris worked with Simon Bourne previously to both of them joining the respondent. He is based at the respondent's office in Halifax and works across their network, including from home. Derek Harris heard the disciplinary hearing in respect of the third claimant and made the decision to dismiss the third claimant. He had no prior involvement with the third claimant prior to dealing with this disciplinary hearing. Derek Harris was asked to hear all three of the claimants' disciplinary hearings by his line manager, Simon Bourne. The disciplinary hearings in respect of the first and second claimants did not take place because the first and second claimants resigned from their employment with the respondent prior to the rescheduled date for their hearings.

67. The night before the third claimant's disciplinary hearing, Derek Harris went to the CBP department at the respondent's Falkirk site to see where the CCTV cameras were and where the monitor was. He did this because he 'wanted to see where they were switched on and off, if that was accessible and the point of the fuse spur'. Derek Harris concluded that the fuse spur was 'effectively pointless' because it was placed outwith the box and the cameras could be switched on and off from the switch inside the box if the box was not locked and the keys were next to the box.

68. At the time of the disciplinary hearing, Derek Harris' understanding was that 'John Anderson had briefed multiple shifts about the auto start-up project and that for the project to be successful they needed to leave the CCTV in operation so that if there were any issues during the start up, they could capture them and then follow up

with corrective action.'. Derek Harris understood that because of this auto start up project they 'needed the CCTV to be running' and that 'employees - operators and engineers, were asked to leave the CCTV running.' Derek Harris understood that none of the engineers were present at the group briefings by John Anderson because of their rotating shift patterns, but that John Anderson had 'spoken to the engineers individually on a one-to-one basis to tell them about the auto start project and tell them that the cameras had to remain on.' Derek Harris understood the third claimant's position at the disciplinary hearing to have initially been that he did not remember speaking to John Anderson, or that John Anderson had not spoken to him at the work station, but later to be that he had been spoken to by John Anderson, but only about the auto start-up project, and not in relation to any requirement for the CCTV cameras to be left running. Derek Harris found that position of the third claimant to be contradictory and so discounted that in his conclusion that John Anderson had briefed him. Derek Harris knew from the notes of the investigatory interviews which had been carried out by Richard Marshall (apart from the notes of the third interview with the third claimant, which were not passed to Derek Harris and which he did not see before in the course of the these Tribunal proceedings) that it was the position of all three claimants and others that there had been an agreement with Neil Etherington that the CCTV cameras in the CBP plant could be switched off during the night shift. Derek Harris knew from Richard Marshall's investigation report that there had been in place since August 2015 (the time of the alleged 'Neil Etherington agreement') a practice that the CBP CCTV cameras were switched off during the night shift, and that that practice had been applied by 'everyone'. Nonetheless, Derek Harris took the view that he 'couldn't find any evidence of an agreement' (between the fitters and Neil Etherington). Derek Harris considered it to be significant that there was no documentary evidence to support such an agreement that Neil Etherington had confirmed to Richard Marshall that no such agreement had been made. It was significant to Derek Harris that 'Neil Etherington was not in a position to make that agreement', because such an agreement would be a management decision, which was not for a member of HR to make. Derek Harris believed that Neil Etherington's

role was 'To support. Not to make agreements.', that 'any agreement would have to have been by the site manager or the management team' and that 'the suggestion that Neil Etherington had made such an agreement was 'at best a misunderstanding'.

69. The disciplinary hearing in respect of the third claimant took place on 24 May 2017. Present were the third claimant, with his trade union representative (Chris Haigh), Derek Harris (the disciplinary manager) and Ben Hope (as the note taker). The notes of this disciplinary hearing are at 204-210. The type written notes at 211-216 are notes prepared in advance of that disciplinary hearing, stating questions to be put and points of referral to documents. There are further type written notes with questions and comments for the third claimant at the disciplinary hearing at production 217-218. These notes were prepared by Derek Harris. These include at 213 the following:- 'You were briefed by John Anderson in August 2016 not to turn the cameras off. This was done with you on a one-to-one basis. So why did you turn the cameras off after this point.' This phrasing does not take into account the third claimant's position that he was not briefed by John Anderson in August 2016. The statement at 214 that 'Stickers / notices were put on the cameras by Alec Kerr (your team leader) asking you not to turn them off. So why did you turn them off?' does not take into account that there was no corroborating evidence supporting Alec Kerr's position that he put on such stickers.

70. At the disciplinary hearing, Derek Harris knew that it was the third claimant's position that 'the appropriate manager' 'was using cameras to spy on them while on night shift' and that he 'believed Alec Kerr (Team Leader)' was spying on them as well. Derek Harris dealt with this at the disciplinary hearing by stating that the respondent didn't have the software to facilitate that even if they wanted to, but the third claimant 'insisted he was spying'. At the time of the disciplinary hearing Derek Harris had concluded that there was a lack of clarity in the instructions from management in respect of the issues for the disciplinary hearing. The notes of the

disciplinary hearing record at 206 Chris Haigh stating 'you are making excuses for the management team' and Derek Harris's response being 'I'm not. I know there are issues with how they've managed it but John Anderson has no reason to lie.' Derek Harris is recorded as saying (at 207) 'I agree that the management team on site didn't manage this situation as effectively as they could have but once it was escalated to group HR it got passed on to Simon Bourne who requested a full investigation as this is serious matter and it will be dealt with professionally.' Derek Harris carried out no investigations with any member of management at the Falkirk site as to the reasons why there was a lack of clarity in their instructions. At the time of his decision to dismiss Derek Harris formed the view that this lack of clarity was because the managers found the engineers to be difficult to manage and were intimidated by them. Those conclusions where made without asking the managers for their reason(s) for their lack of clarity of instructions or (as far as Derek Harris was aware) any investigation with the third claimant in respect of intimidation, either of him by other fitters or of the management team by the fitters. Derek Harris is recorded at 209 as saying 'I don't know how direct John Anderson has been with the briefings but there is clearly a mistrust between the engineers and the management team and the engineers don't feel the need to follow management instructions. If I give someone an instruction, I'd expect them to follow it'. It is also recorded (at 207) that Derek Harris said 'Furthermore Alec Kerr has since resigned from his TL position because of the constant conflict with the fitters.' The third claimant's response to this is stated as being 'He didn't resign; he was demoted.' Derek Harris's response is then recorded as being 'His statement said he was so fed up with managing the fitters that he just wanted to work with the electricians. He states the fitters never respected him and he resigned.' The third claimant's response is again noted as being 'He didn't resign'. Derek Harris did not carry out any investigations with Alec Kerr as to whether he had resigned or not. The disciplinary hearing notes record (at 210) Derek Harris's position in relation to Gordon McKinley being 'he states that he was disappointed in himself for not treating the whole matter more seriously'. This shows that at the disciplinary hearing Derek Harris recognised that there was a lack of clarity in the instructions

from management. Derek Harris did not take then take into account this lack of clarity in reaching his decision to dismiss.

71. The notes of the disciplinary hearing record (at 207) that there was some discussion of the Falkirk site management team being aware that the CCTV cameras where being turned off during the night shift after August 2016 but this not becoming a disciplinary issue until after the fitters had sought clarification on the matter from their national trade union representative (Chris Haigh). In making his decision to dismiss, Derek Harris did not take into account that the claimant's line management were aware of the CCTV cameras were being switched off during the night shift, and that they did not then speak to or directly instruct the claimants that the CCTV cameras required to be left running during the night shift or that switching them off would be regarded as conduct which was likely to be considered to be gross misconduct, or that the claimants had sought clarity on the 113 notice.

72. At the disciplinary hearing Derek Harris knew it was the third claimant's position that he (and the other fitters / claimants) were being 'targeted'. The notes of the disciplinary hearing record the following (at 208 -209 - with 'DH' being Derek Harris, 'MN' being the third claimant and 'CH' being Chris Haigh).

> "DH Was this all a matter of principle since the previous incident in 2015? It's about trust isn't it?
>
> MN It's not about a principle but it is about trust. They don't trust us and we don't trust them. There were supposed to be meetings set up to get us all back working together but this never happened. We've been targeted.
>
> DH How were you targeted?
>
> MN Management were talking about us behind our backs
>
> DH How do you know that?
>
> MN They were picking on us for not using the walkways.

DH That is asking you to behave safely and is not targeting you. Can you give me a proper example?

MN It's happening but I've not got my notes. I've only got what I've got here.

CH 4 fitters have left the company. What does that tell you?

DH It tells me that there is a breakdown in trust and if Malcolm had a proper example he would not need to refer to notes that he has at home.

MN We have all been targeted.

DH If you were targeted then surely there would have been other disciplinaries that you and the other fitters would have gone through. But this hasn't happened has it?

MN No; other disciplinaries.

DH If I see people not sticking to the walkways I would tell them regardless of who they were. This is good safe practice.

DH I see that the fitters have been unable to move on since the initial incident in 2015.

MN It should have been followed up.

DH I can't see any evidence that you have been targeted and therefore do not accept that you have been.

73. Derek Harris made his conclusion that there had been no targeting without any investigation being carried out with 'the appropriate manager' who he understood was alleged to be targeting the third claimant and others.

74. Derek Harris was aware that the third claimant had been absent from work by because of stress workplace stress and anxiety issues and had sight of the occupational health assessment of the third claimant. The notes of the disciplinary hearing record Derek Harris's position after an adjournment being: 'OK Malcolm thanks firstly for coming in. This is a complex case with a lot of history and bad feeling between the staff and the management team which makes it very emotive.

Some points that have been raised by you today are relevant and some aren't. The reasons this has blown up is because it is a serious matter that the senior management team are now aware of. You have admitted to tampering with company equipment and there are questions over you following management instructions. You state that you have been targeted but you have provided no evidence whatsoever to substantiate this. As this case has a potential outcome of gross misconduct and dismissal I need more time to reflect on what has been covered today. I appreciate this is stressful for you therefore I will come back to you with my final decision in writing soon as I can. Thank you for attending. This concludes the meeting.'

75. At the time of making his decision to dismiss Derek Harris was aware that the history and bad feeling between the staff and the management team had an impact on the issues in this case he did not carry out any investigation in respect of the extent of that impact and formed his own conclusions based on misinformation such as that there had been over- excessive use of the gym by the claimants.

76. Derek Harris made the decision to dismiss the third claimant. He wrote to the third claimant on 31 May 2017 production 219-221 summarising his findings against each of the allegations made against the third claimant as follows:-

> **"1. Unauthorised tampering with company equipment on numerous occasions**
>
> You have admitted to turning the cameras off on two occasions post the briefing given to you by John Anderson in August 2016, despite being given a clear instruction by a member of the management team to keep them running. You admit to switching them off in the period up to the point when the fuse spur was fitted in January 2017. During our meeting I asked you whether you would switch cameras off in a public place or shop. You replied that you would, if you 'knew the shopkeeper and he asked me to do it'. No one at Marshalls

has asked you to switch the cameras off or interfere with them. In fact you were given an instruction to do the opposite, to keep them running, which you have chosen to ignore. It appears to me that you and a small number of your colleagues have become fixated on the cameras and have conducted a campaign in relation to them. This is not acceptable and I find the unauthorised tampering with company equipment to which you have admitted amounts to gross misconduct.

2. **Wilful and repeated refusal to abide by management instructions/refusal to accept management's authority.**

You have admitted switching cameras off for your own reasons and you have wilfully continued this behaviour despite knowing that this was expressly against the instructions of the management team at the Falkirk site. You have therefore deliberately flouted management instructions as part of a campaign you have conducted against the use of CCTV. It is a management decision to use cameras on site.

I further note that during the meeting your representative Chris Haigh stated that he had told you not to switch off the cameras post (name of the 'the appropriate manager')'s written communication letter on the subject and it was at this point that you left the cameras running. This suggests that you were willing to take instruction from your union representative but not from the management team. I feel that your actions in tampering with the cameras were deliberate and your sustained refusal to follow a reasonable management request was a serious act of insubordination. This conduct is prohibited under our disciplinary policy and amounts to gross misconduct.

3. Dishonest conduct in that you have given a false account of an 'agreement' over cameras during the investigation into this matter, when there was no such agreement.

There was no agreement to turn the cameras off. You state that there was an agreement with Neil Etherington. However, there is no evidence to support this. In fact, Neil Etherington was interviewed during the investigation and he states that he made no such agreement.

A letter sent from Neil Etherington to Jim Aire dated 11 September 2015 details a summary of the meetings where this agreement was allegedly made. However, there is no mention of an agreement to turn the cameras off. In addition, Scott Foley who attended this meeting has no recollection of an agreement. You stated that the discussion with Neil Etherington took place at the end of the meeting after Scott Foley had left.

I do not fully accept your explanation but I am prepared to accept that you believed there was an agreement and that this was a misunderstanding on your part rather than deliberate dishonesty.

4. Dishonest conduct in that you have denied receiving an instruction/briefing by a manager John Anderson in August 2016

I believe you were briefed at your workstation by John Anderson and were given the relevant instruction to leave the cameras running. The fact that you did not have to sign a document to confirm the instruction has no relevance. The management team have the authority to give verbal instructions in the workplace and do so on a daily basis. You have confirmed that you were briefed about the auto start-up

project by John Anderson and I believe that you were asked to leave the cameras running at this point. I do not believe that you have been entirely truthful during this investigation and you have given different accounts of events that have taken place to suit your argument. I find your actions in denying the briefing from John Anderson to amount to deliberate dishonesty and are an attempt to 'cover up' and excuse your misconduct and that of your colleagues.

It was clear during our discussion that the CCTV issues of 2015 at the Falkirk site still bother you and you have a grudge against the management team. You admitted this in the meeting stating that you do not trust them. I have considered whether these poor relationships mitigate your actions and I have concluded that they do not. Regardless of your poor view of the management team, you are expected to follow reasonable management instructions as a minimum. The instruction to you and your colleagues in August 2016 from John Anderson to leave the cameras running should have been followed.

In view of this, I believe you have breached the company disciplinary policy and that it is sufficiently serious to be gross misconduct.

Having considered what sanction is appropriate on this occasion I conclude that summary dismissal is the appropriate outcome. Therefore please note that your employment will terminate with immediate effect from Friday, 2 June 2017 and that this is without notice or play in lieu of notice.'"

77. The third claimant appealed against the decision to dismiss by letter to Ben Hope (at 222 – 225) in the following terms:-

> **"1. Unauthorised tampering with company equipment on numerous occasions**

Whilst it is correct that I have stated that I have turned CCTV cameras off on numerous occasions prior to and post August 2016, I did so in the knowledge that I have been authorised to do so by Neil Etherington at a meeting held on the 15 August 2015.

I dispute the assertion made by Mr Harris in his response that I had refused to comply with a direct verbal instruction from Mr John Anderson which it is alleged was conveyed to me at some point in August 2016.

As previously stated, I was not instructed at any point by Mr Anderson to refrain from switching the CCTV cameras off, or to ensure that the CCTV cameras were to be left running.

2. **Wilful and repeated refusal to abide by management instructions/refusal to accept management's authority.**

Contrary to the statement that I had switched cameras off for my own reasons, I can only repeat what others and I have stated repeatedly at our investigation meetings and which has been documented in full as a consequence of those investigations.

The sole reason that I and others switched the CCTV cameras off was directly as a consequence of the agreement reached following the meeting held between Neil Etherington and the following employees: Peter Nisbet, Willie Allison, Bruce Small, Iain Ivory and myself, which was witnessed by James Aire, who attended the meeting in his capacity as Unite shop steward.

It was at this meeting that the agreement was reached with Mr Etherington, which took place after the management team and Scott Foley, Regional Officer, had left the Innovation Centre.

All those aforementioned named individuals and myself were clearly authorised by Mr Etherington to switch off the CCTV cameras at the commencement of our shifts.

I also believe that it is a distortion of the facts to simply state that I was willing to abide by an instruction issued by Chris Haigh, Unite Convener, but not an instruction issued by management.

I was at no time instructed by any of the management team to refrain from switching any camera off.

The reason that the others and I contacted Mr Haigh in the first place was due to (name of 'the appropriate manager') issuing a notice on the 14 February 2017, in respect of the cameras, which appeared to contradict the authorisation we received from Mr Etherington on the 15 August 2015.

The reason that Mr Haigh advised that we refrain from switching the cameras off was due to this apparent change in the dynamics of the situation.

3. Dishonest conduct in that you have given a false account of an 'agreement' over cameras during the investigation into this matter, when there was no such agreement.

Contrary to what is stated by Mr Harris in his decision letter, there is ample evidence available in respect of both the context and the circumstances of the agreement reached by Mr Etherington.

As contained within the evidence bundle, there are numerous statements made by those present at the meeting, confirming that an agreement was reached with Mr Etherington along with a consistent description of the context under which the agreement and authorisation was reached.

The agreement made between the engineers and Mr Etherington was also witnessed by James Aire, Unite shop steward.

Numerous individuals have communicated this additional fact during the course of the investigations into this matter and yet despite this, the company has elected to disregard this evidence and has refused to meet with Mr Aire in order to obtain a statement.

4. Dishonest conduct in that you have denied receiving an instruction/briefing by a manager John Anderson in August 2016

I refute the statement made by Mr Harris and confirm again that I received no instruction or briefing from Mr Anderson, in August 2016 or afterwards, in connection with the switching off or otherwise, the CCTV camera system.

I also refute that I have given different accounts to simply suit my arguments.

It is a fact however, that my colleagues and I have been entirely consistent in our description of the events in respect of the switching off of the CCTV camera system and the lack of any instruction to do otherwise.

The only contradictory evidence in respect of any alleged briefing carried out by John Anderson was by himself, when he initially stated that he had team briefings with all the teams

and then when this was disputed by all the engineers, he changed his statement to suggest that he held individual, one-to-one meetings with each of the engineering team.

I would also state for the record, that despite management being fully aware that the CCTV cameras where being switched off between the dates of August 2015 up to February 2017, at no point did any of the management team communicate, either verbally or in writing, that the cameras were not to be switched off at any time, or under any circumstances until the date of the 14 February 2017, whereby (name of 'the appropriate manager') issued a works notice to that effect.

Indeed, members of the management team would habitually turn off the monitors to give the illusion that the system was turned off when it was actually switched on, and at some point appear to have decided to connect a spur to the camera system which they allege was done for the specific purpose of ensuring that the cameras could not be switched off.

I also believe that the company has acted in an inconsistent manner by alleging that I acted 'dishonestly' in stating that I was authorised to turn the cameras off by Mr Etherington, and that I acted 'dishonestly' by stating that I had not been instructed or briefed by Mr Anderson.

The company is fully aware that all my colleagues provided the same evidence on these two points during the course of their attendance at investigating meetings.

> I therefore believe that the decision taken to dismiss me was arbitrary, excessive and unfair and stepped outside the band of reasonable responses open to you as an employer."

78. It was the position of others aside from the claimants during the course of the investigatory hearings that the Neil Etherington agreement was in place and that they had not been instructed or briefed by Mr Anderson. No disciplinary action was taken by the respondent against any other employees in respect of those matters.

79. The appeal hearing in respect of the third claimant's dismissal was heard by John Davies (Group Health, Safety and Environment Director). John Davies commenced his employment with the respondent on 1 February 2017, in that role. In his previous roles, John Davies had dealt with 'numerous' disciplinary matters, including four appeal processes. Ben Hope asked John Davies to conduct the appeal, on the basis that Simon Bourne (Operations Director) had asked if he would hear the appeal, based on him 'not having been in the business long and having nothing to do with the original investigation or hearing'. John Davies was appointed by Simon Bourne to hear the third claimant's appeal as someone who had no previous involvement with the claimants. This appeal hearing took place on 30 June 2017. Present at the hearing were John Davies, Scott Foley (trade union representative), the third claimant and Lorraine Tenner (notetaker). John Davies had sight of the respondent's disciplinary policy at the time of the appeal hearing. The notes of the appeal hearing are at 227-235. These notes of the appeal hearing include the following in relation to the allegation of 'unauthorised tampering with company equipment on numerous occasions':-

> 'MN - states that this was authorised by Neil Etherington. MN explains he wasn't given an update on authorisation from John Anderson, after a meeting which had been taken by Mr Harris. Three other fitters were not present at the meeting, these being: David Graham, Andrew Moir, Brian Donohue.

JD - was this brought up at the original disciplinary meeting?

MN - I brought this up with Mr Marshall.

SF - There is a written statement from David Graham saying that he was never told by John Anderson to leave the cameras on.

MN - this wasn't true as David Graham had put the cameras off but had been told by his team leader Peter Henry that they had to be left on by John Anderson's instruction.

JD - why where the cameras being turned off?

SF - advised JB that he would need to go back to 2014 and revisit the original grievance which was due to how the engineers were being treated by (named 'the appropriate manager').

SF - explains the meetings took place in August 2014

MN - it was felt by the engineers that the cameras were used to spy on the men

JD - why would they be doing this?

MN - the cameras were meant to be used to watch the machinery

SF - goes through historical issues between the engineers and (named 'the appropriate manager')

JD - asks if a grievance had been raised with regard to the cameras?

SF - states that five engineers and three fitters had been told by Neil Etherington that the cameras could be switched off during non-production time

JD - if the fitters were doing nothing wrong, what is the problem of the cameras being left on?

SF - it was a trust issue, the engineers felt they weren't being trusted. Flippant comments were being made by (named 'the appropriate manager') "I can watch you on my iPad any time".

80. John Davies did not carry out any investigations into these allegations against 'the appropriate manager'. The appeal hearing notes record (at 229) Scott Foley stating 'the management knew from 2015 the cameras were being switched off'.

John Davies did not take into account this practice in coming to his decision to uphold the decision to dismiss. The appeal hearing notes also record at 229 it being the third claimant's position 'if John Anderson had put a directive out saying not to switch the cameras off, they would have been left alone.' John Davies did not take into account any lack of clarity of instructions when making his decision to uphold the decision to dismiss.

81. The appeal hearing notes record (at 230) Scott Foley saying that Jim Aire was never interviewed with regard to points. John Davies undertook no investigation on that. At the appeal hearing, Scott Foley's position in respect of the outcome of the claimant's grievance against the appropriate manager in 2014 was that the appropriate manager 'had been investigated but no one knew the outcome'. Following the appeal hearing John Davies spoke to Ben Hope about this and was told by Ben Hope words to the effect that there had been an investigation and it had been 'dealt with' and 'brought to a conclusion'. The notes of the disciplinary appeal hearing also record the following at 230:-

> "JD - why did John Anderson never pick up on the issue of the cameras?
> MN - the cameras were being switched off for two years
> JD - why was there nothing in writing about camera?
> SF - Neil Etherington was supposed to have regular meeting with Falkirk management but these were never set up.
> JD - why did this not happen?
> SF - management were supposed to set up dates but it never happened.

John Davies carried out no investigation with management at the respondent's Falkirk site in respect of these matters.

82. The notes of the appeal hearing record at 232 it being the third claimant's position that 'we were told by people that the management were trying to trick us but I never turned the cameras off after the fuse spur was fitted.' They also record at 232 the following:-

"SF - This basically all comes back to the original issues in 2014 which no one wanted to address.

MN - prior to me putting in my statement saying I switched the cameras off twice, I wasn't being disciplined. I think this was a vendetta against two men and the rest of us have been pulled into it.

SF - runs through details from 2014 to February 2017

SF - management knew the cameras were being switched off, important issues were not put in minutes of Willie Allison's second investigation meeting. John Anderson had said he could show on system where it looked like meetings had taken place but hadn't.

JD - I would like to see this system

MN – (named 'the appropriate manager') is going around high-fiving people saying I finally got them.

MN - I feel it's something personal because of 2014. Whatever happened to him is nothing compared to what happened to us. All the years I have worked I have never been sacked or told a liar and I find this hurtful.

JD - is there anything else that you would like to add?

SF - there was a derogatory notice put on the board about Jim Aire stating the shop steward was useless at his job, this was believed to have been done by (named 'the appropriate manager'). Chris Haigh asked for a copy of the CCTV footage. Apparently Neil Etherington asked for the footage. This went on for some considerable time until they were eventually told that the footage was not available.

JD - was a formal complaint made?

SF - I think there was."

83. The allegations about the recent conduct of 'the appropriate manager' as noted above were allegations of new evidence which was new to John Davies, because the notes of Richard Marshall's telephone interview with the third claimant were not before Derek Harris. John Davies carried out no investigatory steps in respect of any of these matters and erroneously found that no new evidence had been brought at the appeal.

84. At the appeal hearing John Davies considered it to be significant that the third claimant said that had 'said that he had been warned to be careful because although the screen was off, the cameras were still on'. John Davies took from that that the third claimant knew that the cameras shouldn't have been switched off. John Davies considered it to be significant that there is no mention in the letter from Neil Etherington to Jim Aire of any agreement in relation to the CCTV cameras being switched off during the night shift. Derek Harris understood it to be third claimant's position at the appeal hearing that the CCTV cameras had been turned off because the fitters felt they would be used against the employees. He asked the third claimant why he felt that and what the problem would be if they were doing nothing wrong. John Davies's view was that the cameras were 'primarily there to monitor the machinery and not people'. His view was that if the claimants were doing nothing wrong, then the cameras 'could not be used against them as they would clearly show that they were acting in the correct manner'. Derek Harris's view was that if the employees were doing nothing untoward then the CCTV cameras would be more of a benefit to the employees. At the appeal hearing there was reference to allegations of bullying by 'the appropriate manager'. Scott Foley said '(Name of 'the appropriate manager') likes to be portrayed as a lovable rogue, but because (named 'the appropriate manager') is the (position of 'the appropriate manager') and runs the place he believes he should be able to do what he wants and run things how he likes. If '(Name of 'the appropriate manager') doesn't get his own way he bullies until he does.' John Davies undertook no investigation into those allegations of 'the appropriate manager' bullying because he took the view that 'if they were doing nothing wrong then the cameras would show they were

doing nothing wrong and nothing would come from it' and 'the appropriate manager' 'couldn't take anything from it'.

85. Prior to making his decision to uphold the decision to dismiss, John Davies spoke to Neil Etherington and Richard Marshall. John Davies spoke to Neil Etherington to clarify that the statement he had given to Richard Marshall was right. Neil Etherington's position was that it was accurate. John Davies contacted Richard Marshall by email. The email records (at 234 – 235) John Davies's questions and Richard Marshall's responses as follows:-

> '1. I have been told by Malcolm that he admits turning the cameras off prior to the notice being put up by (named 'the appropriate manager') in February. But states that none of the supervisors informed him that he would be disciplined for turning the cameras off. Instead the supervisors just reported it to (named 'the appropriate manager'). Did your investigation agree with this?
>
> RM - Yes agreed. At no point did any of the supervisors or engineering management challenge Malcolm directly, it was merely reported at the daily action review meeting. However, as written in my conclusion document, given the auto start project and statements from production personnel /TLs I believe the fitters knew it was wrong to turn them off.
>
> 2.(named 'the appropriate manager') is mentioned a few times in the witness statement etc, did we take a statement off (named 'the appropriate manager')?
> RM – No. The only evidence I perhaps would have required from (initials of 'the appropriate manager') was what was agreed at 'the Neil Etherington meeting'. I spoke to NE first, Neil provided a

> statement on this and had a letter documented of the meeting actions to Jim Aire. Given this letter I deemed it unnecessary to speak to (initials of 'the appropriate manager').

86. No other investigation steps were carried out prior to John Davies making his decision. There are no typewritten notes of his telephone interview with Neil Etherington. John Davies concluded that the third claimant knew that he shouldn't have turned the CCTV cameras off and that he was aware that the cameras should not be turned off because 'employees/ fellow workers had informed him and warned him that the cameras were still running although the monitors were turned off'. John Davies concluded that the Neil Etherington agreement had not been made because he had formed the view that 'Neil Etherington was meticulous in his letters' and believed that on a 'sore topic' Neil Etherington would have 'put it in writing' and it was not. John Davies believed 'if the bullying was as great as portrayed by Nugent and Foley' he was 'certain Neil Etherington would have insisted it was put in writing'.

87. John Davies decided to uphold the dismissal because he found that the third claimant had 'tampered with machinery' and because he believed that the third claimant knew that he should not turn the CCTV cameras off. He considered that the claimant's concern about the use of cameras was not relevant because if they were not doing anything wrong then the CCTV cameras could not be used against them. He took his decision on the basis that there were no new evidence to give a reason to lower outcome. The third claimant was informed of the outcome of the appeal hearing by letter to him from John Davies dated 11 July 2017 (at 236-237) in the following substantive terms:-

> "The original disciplinary hearing was held on the 24 May by Derek Harris and was based on the conclusion of the investigation completed by an independent senior manager not working at Falkirk, Richard Marshall. The outcome of this hearing was that you were

found to have breached the company disciplinary policy on the following points:

1. Unauthorised tampering with company equipment on numerous occasions.
2. Wilful and repeated refusal to abide by management instructions/refusal to accept management's authority.
3. Dishonest conduct in that you have denied receiving an instruction/briefing by a manager.
4. It was sufficiently serious to be classed as gross misconduct and therefore you wear summary dismissed.
5. In your communication dated 5 June 2017 you exercised your right to an appeal, wishing to contest the decision to terminate your employment with the Company. In the appeal letter you raised numerous points but in summary these all directly linked to the following items:

ITEM 1 - You have admitted turning the CCTV cameras off on numerous occasions both prior to and post August 2016. However, did so in the knowledge that it had been authorised by Neil Etherington.

ITEM 2 - You dispute the assertion made by Derek Harris that he had refused to comply with a direct verbal instruction by John Anderson.

During the appeal hearing with myself, you did not present any new factual evidence and the appeal relied on information submitted at the original disciplinary hearing and further questioning of Richard Marshall who completed the original investigation.

During the appeal hearing, you mentioned that no one had told you not to turn the CCTV cameras off; this included not being told verbally by supervisors or production operatives. Yet during the appeal

hearing, you mention that you were told by production operatives to be aware that because the CCTV monitor was switched off the cameras were still recording on the hard drive, so you felt compelled to turn them off.

I also cannot understand why you would want to turn the CCTV cameras off. You state that you were worried that they would be used against you, why would this be a problem if you are doing nothing wrong? Also the CCTV cameras have been left on since the 14 February and we agreed that the cameras in question had not been used inappropriately by the management team as suggested they might.

In relation to both item 1 & 2 with the lack of any new evidence and on reviewing the facts used in the original hearing, I have no reason not to uphold the original decision that you are summary dismissed.

You have exercised your right of appeal under the company's disciplinary policy and procedure and as a result I am rejecting your appeal and confirming the original decision to dismiss you on the grounds of gross misconduct, effective from 2 June 2017.

There is no further right of appeal within the Company Disciplinary Policy and Procedure."

88. Derek Harris's use of the words 'unauthorised tampering' came from that wording having been used in Richard Marshall's investigation report, which in turn had come from the wording in 'the appropriate manager's' notice at 113.

89. Richard Marshall considers himself to have extensive experience in disciplinary hearings. When dealing with issues he proceeds on the basis that he always tries to avoid grievances and his priority is to first try to nip the issue in the bud. He has

conducted and been the decision maker in eight grievances, with 90% being resolved without going to further stages. He has conducted the investigatory stage of 'one or two' disciplinary matters since the initiation of the ACAS code of practice with regard to disciplinary and grievance procedures. He has received in-house training on the conduct of disciplinary and grievance matters with three refresher sessions since the initiation of that ACAS code of practice. He last attended refresher training on such matters five years ago. Derek Harris last attended training in respect of dealing with disciplinary matters when he 'sat in' on part of a training session which included training on disciplinary procedures which was given to the respondent's Business Unit Managers in 2016. The last time Derek Harris actively received training on dealing with disciplinary procedures was around 2008. John Davies last received training on dealing with disciplinary procedures, including appeal hearings, when he was with his former employer, approximately 18 months prior to him dealing with the appeal hearing in respect of the third claimant.

90. The first claimant's (William Allison) claimed Schedule of Loss is at 110 – 110.3. He commenced employment with Marley immediately on leaving his employment with the respondent. His contract of employment with his new employer (110.4 – 110.5) sets out an hourly rate of £10.63 per hour, which has since been increased. He has a monthly shift allowance and the opportunity for overtime with his new employer. He has had no loss in earnings.

91. The second claimant's (Peter Nisbet) claimed Schedule of Loss is at 73 -74.3. He commenced employment with Marley immediately on leaving his employment with the Respondent. He receives an hourly rate plus overtime payments and a monthly shift allowance. He has had no loss in earnings.

92. The effective date of termination of the third claimant's employment with the respondent was 2 June 2017. The third claimant was unemployed from 2 June 2017 to 3 July 2017. His loss of earnings for this period was £2,068 (one month's

net pay). He received £73.10 Job Seekers Allowance which is the prescribed element subject to recoupment provisions. He began his new role at Water & Pipeline Services Limited on 3 July 2017 at an initial hourly rate of £14.28 per hour, rising to £14.71 on completion of probation and was earning at this higher rate by October 2017 [39.5]. When employed by the Respondent, the third claimant paid a 3% employee pension contribution and this was matched by a 3% Employer contribution from Marshalls. The third claimant has similar pension arrangements in his new employment.

Representatives' Submissions

93. Both representatives spoke to their comprehensive written submissions. Having regard to Rule 62(5) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1, rather than seeking to summarise those submissions, both submissions are attached as Appendices to this Judgment. Both representatives were informed at the Hearing that this approach would be taken by the Tribunal and that if they considered that Section 50 should apply to any aspect of their submissions then that should be taken into account by them. Parties' representatives agreed to exchange submissions prior to speaking to them before the Tribunal on 30th May. In accordance with the order in which they were presented at the hearing, the respondent's representative's written submissions are at Appendix A and the claimants' representative's written submissions are at Appendix B. Both representatives spoke to their written submissions at the hearing on 30 May 2018. Both representatives were given the opportunity to address points made by the other party's representative in their submissions, and did so.

Relevant Law

Fairness of the Dismissal

94. The law relating to unfair dismissal is set out in the Employment Rights Act 1996 ('the ERA'), in particular Section 98 with regard to the fairness of the dismissal and Sections 118 – 122 with regard to compensation in terms of Section 98(1) for the purposes of determining whether the dismissal is fair or unfair it is for the employer to show –

(a) the reason (or if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

95. Section 98(2) sets out that a reason falls within this category if it –

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,[(ba) is retirement of the employee]

(c) is that the employee was redundant,

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

36. Where the dismissal is by reason of the employee's conduct, consideration requires to be made of the three stage test set out in *British Home Stores -v- Burchell* 1980 ICR 303, i.e. that in order for an employer to rely on misconduct as the reason for the dismissal there are three questions which the Tribunal must answer in the affirmative, namely, as at the time of the dismissal:-

i. Did the respondent believe that the claimant was guilty of the misconduct alleged?

ii. If so, were there reasonable grounds for that belief?

iii. At the time it formed that belief, had it carried out as much investigation into the matter as was reasonable in the circumstances?

96. Section 98(4) of the ERA sets out that where the employer has fulfilled the requirements of subsection 98(1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

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

97. This determination includes a consideration of the procedure carried out prior to the dismissal and an assessment as to whether or not that procedure was fair. Following *Polkey –v- AE Dayton Services Ltd* 1988 AC 344, an employer may be found to have acted unreasonably in terms of Section 98(4) on the grounds of an unfair procedure alone.

98. What has to be assessed is whether the employer acted reasonably in treating the misconduct that he believed to have taken place as a reason for dismissal. Tribunals must not substitute their own view for the view of the employer and must not consider an employer to have acted unreasonably merely because the Tribunal would not have acted in the same way. Following *Iceland Frozen Foods Ltd –v- Jones* 1983 ICR 17 the Tribunal should consider the 'band of reasonable

responses' to a situation and consider whether the respondent's decision to dismiss, including any procedure prior to the dismissal, falls within the band of reasonable responses for an employer to make.

Constructive Dismissal

99. Section 95(1)(c) of the ERA sets out that where the employee terminates the contract under which he is employed with or without notice in circumstances in which he is entitled to terminate without notice by reason of the employer's conduct, then that employee shall be taken as dismissed by his employer. This is known as constructive dismissal.

100. There is much case law which has developed in respect of constructive dismissal and which is relevant to the tribunal's determination of a claim under section 95(1)(c). The issues agreed by parties' representatives as being the issues for determination by the Tribunal in respect of the first and second claimants' claims of constructive dismissal were identified with reference to the recent decision of the England and Wales Court of Appeal in *Kaur -v- Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978.*

101. The authorities referred to by the representatives were as follows:-

Sainsbury's Supermarkets -v- Hitt [2002] EWCA Civ 1588
Malik -v- BCCI [1997] ICR 77
Omilaju -v- Waltham Forest LBC [2004] EWCA Civ 1493
Kaur -v- Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978
Morgan -v- Electrolux Ltd [1991] IRLR 89
Sandwell & West Birmingham Hospitals NHS Trust -v- Westwood [2009] UKEAT/0032/09
Stuart Peters Ltd v Bell 2009 ICR 1556, CA

Remedy

102. All claimants sought remedy in an award of compensation in terms of ERA Section 112(4), made up of a basic award and a compensatory award.

103. The basic award is calculated as set out in the ERA Section 119, with reference to the employee's number of complete years of service with the employer, the gross weekly wage and the appropriate amount with reference to the employee's age. Section 227 sets out the maximum amount of a week's pay to be used in this calculation. The basic award may be reduced in circumstances where the Tribunal considers that such a reduction would be just and equitable, in light of the claimant's conduct (ERA Section 122 (2)). In terms of the ERA Section 123(1) the compensatory award is such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer. In terms of Section 123(6) where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

104. It was confirmed by the claimants' representative that no uplift award was being sought by any of the claimants in terms of section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ('TULRA') in respect of any failure on the part of the respondent to comply with the ACAS Code of Practice entitled 'Disciplinary and Grievance Procedures' ('the ACAS Code')

Comments on evidence

105. There were a number of preliminary matters discussed at the outset of this hearing. This included discussion on disclosure of certain information sought by the claimants. Counsel who represented the claimants had been instructed shortly before the hearing (the claimants' previous adjournment request having been refused on the basis that alternative counsel could be instructed). After newly - instructed Counsel's consultation with the claimants, a request for information was

sought from the respondent on a voluntary basis. The respondent did not provide the requested information. There was no request made to the Tribunal for an Order to be made in respect of the requested disclosure. The information included disclosure of the outcome of any disciplinary proceedings against the manager at the respondent's Falkirk site known in the context of this written Judgment as 'the appropriate manager'. Following discussions between the parties' representatives and the Tribunal, the fact that a disciplinary sanction had been applied to the appropriate manager, following an investigation which had been initiated by a grievance having been raised by the claimants and others, was disclosed without the need for an Order.

106. It was apparent to the Tribunal that there was a history of tension between the claimants and at least some members of management at the respondent's Falkirk site. It was noted to the claimants by the Tribunal during the course of the hearing that that the purpose of this Tribunal was to determine the identified issues before it which were relevant to the decision in their claims. It was also made clear on a number of occasions that in respect of the unfair dismissal claim it would be an error of law for the Tribunal to substitute its own view for the view of the employer. It was on that basis that the Tribunal was concerned to hear evidence on matters which were before the decision makers at the time, rather than evidence being relied on before the Tribunal which was not relied on at the material times.

107. It was agreed by parties' representatives at the outset of the hearing that the respondent's case would be presented first. Parties' representatives were reminded at that stage of the importance of the claimants' case(s) being put to the respondent's witnesses and this was noted by both representatives. On a considerable number of occasions, a witness or, on some occasions some or all of the claimants, were required to leave the Tribunal room to enable frank discussions between parties' representatives and the Tribunal in respect of the relevancy or appropriateness of a particular question or line of questioning. Some of those discussions centred around whether or not a particular line of questioning had been

put to the respondent's witnesses. Parties' representatives addressed those points in their submissions.

108. The sequence in which the Tribunal heard evidence was Mr Marshall, Mr Harris and then Mr Davies for the respondent. Evidence was then heard from Mr Nugent (the first claimant), Mr Nisbet (the second claimant), Mr Alison (the third claimant) and Mr Haigh (UNITE). During Mr Allison's cross examination on mitigation of his loss, an issue arose in respect of which the respondent's representative sought to recall Mr Nesbitt. Following discussion with parties' representatives (during which Mr Nesbitt and Mr Alison were not in the Tribunal room) the Tribunal allowed Mr Nesbitt to be re-called for the purposes of further cross-examination specifically in relation to when he had secured alternative employment. It was agreed that it was appropriate in the circumstances to interpose Mr Alison's evidence to allow further cross examination of Mr Nesbit on that specific point and for any re-examination arising from that cross examination, as considered to be appropriate.

109. The parties were ably professionally represented. The point was made by the claimants' representative on a number of occasions that the respondent had chosen not to call Neil Etheringtom (HR Manger) as a witness before this Tribunal. There had been no request on behalf of the claimants for a Witness Order in respect of Neil Etherington. It was noted that Neil Etherington was present at the Tribunal during most of the proceedings. The question of whether or not they been an agreement between the claimant and others and Neil Etherington in this date of CCTV cameras being switched of at the Falkirk site during the night shift was an issue during the investigation against the claimants. The Tribunal was careful not to substitute its own view for the view taken by the employer in respect of whether or not such an agreement had taken place. The Tribunal considered the reasonableness of the extent of the investigation carried out by the respondent in respect of the fact and /or extent of that alleged agreement (referred to throughout the hearing as 'The Neil Etherington Agreement').

110. The claimants sought to rely on some historic matters in respect of their relationship with the respondent's management at the Falkirk site. In particular, the claimants sought to rely on an alleged incident of abusive language towards them by the manager referred to herein as 'the appropriate manager'. Evidence on what had occurred, or what had been said to have occurred, in respect of that incident was heard from each of the claimants and from Chris Haigh. There were some discrepancies in the accounts given to the Tribunal as to what had occurred, but all were consistent in their account that the former site manager had said to one or more of those at the meeting the words as set out in the findings in fact. The evidence in respect of what had occurred at that meeting was uncontested before the Tribunal by the respondent. There was notice in the ET1s that those previous events would be relied upon.

111. The productions inserted at production numbers 238.1 – 238.11 clearly point to a difficult workplace situation . Other than the evidence in respect of failure to put in place a Dignity at Work Policy, there was no evidence before the Tribunal in respect of whether or not the other proposals set out at .8 of the letter from Neil Etherington to Jim Aire of 11 September 2015 had been effected. Aside from in respect of the Dignity at Work policy, in evidence, the claimants did not seek to rely on any failures by the respondent in respect of the proposals set out in that letter. The position of Chris Haigh was that things 'settled down' after the 27 August meeting. It was suggested by the claimants' representative at the stage of submissions that there had been failures in respect of involvement of ACAS and the promise not to target the client the claimant's but it was not specifically put to any of the respondent's witnesses as there having been a failure or breach of contract in any failure by the respondent to implement the proposals set out at .8 of the letter from Neil Etherington to Jim Aire of 11 September 2015. Failure to implement the proposals set out in that letter was not relied upon as a breach of contract in the constructive dismissal claims. The claimants' representative's position was that the respondent had not called an appropriate witness to put those points to, and that

Neil Etherington would have been available, given his presence at the Tribunal for the majority of the hearing. It was noted by the Tribunal that neither the first nor second claimant sought in their evidence to rely on any failures in terms of those matters at that .8.

112. There was some conflicting evidence in respect of Richard Marshall's remit for his investigation. Richard Marshall's position in cross examination that he had 'gone in to investigate the use of cameras' was not consistent with the position set out in his investigation report in respect of the outline of allegations (at 169). Under cross examination, Richard Marshall's position was 'to be honest I thought the main problem was the fuse spur - that is what I focused on.' There is no indication in his investigatory report that that was the focus of his investigation. His position under cross examination was also that he had asked Ben Hope 'for what started it' and Ben Hope had showed him the notice which is at 113 and said 'this is what needed investigating'. The Tribunal considered it to be significant that the investigation had been instigated by the notice which had been put up by 'the appropriate manager', which Richard Marshall admitted was in an 'accusatory tone' and which identified the claimants, who where he knew where the same group of individuals who had previously raised a grievance against the appropriate manager which had resulted in the appropriate manager receiving a disciplinary sanction, and in respect of which a 'Serious Concern' had been raised by the claimants' trade union. The Tribunal considered it to be very significant that in all these circumstances there was no investigation with 'the appropriate manager' in respect of the reasons why he had put up the notice or made the communication in that way. The Tribunal also considered it to be significant that that notice (113) had made an accusation in relation to a spur fuse and that there is no indication from Richard Marshall's investigatory report that that was the initial focus of his investigation. The Tribunal considered it to be significant that the investigation report (169 – 172) is clearly worded as being an investigation in relation to alleged misconduct by the claimants and the other maintenance fitters. The Tribunal considered it to be significant that the issue was raised by the claimants with their trade union as a matter of seeking

clarity when the 113 notice was put up and that there is no mention of that fact in the investigation report. The Tribunal considered that to be relevant and significant particularly in relation to the allegations of dishonest conduct (as set out in the disciplinary hearing invitation letters). Richard Marshall admitted under cross-examination that the matter that prompted the investigation, being the allegation that a spur fuse was being removed by those working on the specified shifts i.e. the maintenance fitters, was untrue. There is no finding in respect of that in his investigation report although there is a finding in the chronology of events in respect of Alec Kerr being the one to have fitted the spur fuse.

113. Richard Marshall accepted under cross-examination that if the claimants were clear that they were not allowed to turn the CCTV cameras off during the night shift, then they would not have asked Chris Haigh for clarification on the position when the notice at 113 was issued by the appropriate manager. Richard Marshall admitted under cross examination that he had dealt with the previous grievance hearing and did understand the claimants' issue to be that of trust between the three claimants and 'the appropriate manager'. Richard Marshall position in cross examination was that although he understood those trust issues, he undertook no investigations on that because 'this was to do with turning the cameras on and off and not everything else'. Richard Marshall's position under cross examination was that he considered that it was appropriate to proceed with disciplinary proceedings against the claimants because the claimant knew about the autostart project and said that they had turned the cameras off and turned them on again for when the autostart was due to commence, but that from his investigation 'it was clear that the cameras did not always come back on', and 'that's where the stickers came in'. The investigation report does not indicate that Richard Marshall made such consideration at the time of drafting his report. The report is silent about whether the auto start up was captured on the CCTV cameras. Richard Marshall's position in cross examination was that he had not considered the first claimant's folder or notes because these were a 'diary of his thoughts' and his purpose was to investigate 'specifically' 'were cameras being turned off or not'. His position in

respect of the notes was that there was 'nothing else relevant to the investigation at the time'. He did not read the notes before taking the decision that they were not relevant. It was put to Richard Marshall in cross examination that if there was a misunderstanding or a failure in communication with regard to a change in practice (re switching off the CCTV cameras) then actions arising from that were not misconduct. Richard Marshall agreed that that would not be misconduct, but his position was that if the fitters knew about the auto start-up project, then they did know that the CCTV cameras should be left on. Richard Marshall did agree in cross examination that the 'message on what was required was not clear to everyone'. The Tribunal considered it to be significant that that was not highlighted in the investigation report. Richard Marshall also accepted that that lack of clarity was corroborated by Gordon McKinley not challenging the claimant's switching off the CCTV cameras and that if there were clear instructions then it would be reasonable to expect that the claimant's supervisors would challenge that conduct. When accepting this, Richard Marshall's position was that there were 'failings on site' Gordon McKinley was 'treading carefully because of the bad blood'. It was put to Richard Marshall in cross examination that but for 'the appropriate manager' putting up the notice at 113 nothing would have happened to the claimants, and he agreed with this.

114. Surprisingly, although he had carried out the investigation in relation to the collective grievance in 2015, it was Richard Marshall's position in evidence that he had not seen the letter from the claimants and the other fitters to Tom Poole dated 28 March 2015 (production 112.13-112.15) which is said within to be written 'to highlight the reasons as to why we submitted a collective grievance against the appropriate manager''. Similarly, it was also Richard Marshall's position in cross examination that he had not seen Tom Poole's investigation report into 'the appropriate manager' of 20 April 2015 production 238.2-238.5 (other than in the course of these proceedings). Richard Marshall's conclusion that before John Anderson's briefing in August 2016 'everyone' was turning the CCTV cameras off for the night shift, including John Anderson, is inconsistent with the allegations set

out in the invitation to the disciplinary hearings in respect of dishonest conduct, given that that practice of turning of the CCTV cameras is in line with what was said to be the terms of the Neil Etherington agreement made in August 2016.

56. Richard Marshall's finding in his investigation report that the Neil Etherington agreement 'did not happen' and the allegations in respect of dishonest conduct as set out in the invitation letters to the disciplinary hearing, are inconsistent with his findings that in the period from August 2016 until August 2017 there was a practice in place that the CCTV cameras be turned off during the night shift and Gordon McKinley's position at the investigatory meetings that there was a 'general understanding about the cameras in the CBP plant being turned off and on', as set out in the notes of the investigatory meeting with Gordon McKinley at 132. Richard Marshall's position under cross-examination was that he made the finding that the Neil Etherington agreement did not happen because there was 'nothing in writing', which he considered to be 'odd'. Richard Marshall's position under cross-examination was that the John Anderson memo which was the basis of the briefing (112.27) was unambiguous in its instruction to leave the cameras on. The Tribunal did not accept that that briefing note was a clear and unambiguous instruction to leave the CCTV cameras on during the night shift. It was not the respondent's position that the claimants had even ever been issued with or seen the terms of that briefing note. There was no evidence of any instruction to the claimants that the 'request' referred to it that briefing note must be adhered to or any indication that failure to leave the camera system running will be considered to be misconduct and / or will lead to any disciplinary action. That was significant in terms of the fairness of the dismissal for that conduct, which was known to have been the practice ie the CCTV cameras were being switched off in the period from August 2015 until August 2016. The Tribunal considered it to be significant that although Richard Marshall knew from his interviews with John Anderson that he was aware of the practice which had been in place from August 2015 that the CCTV cameras being switched off during the night shift, there is no specific reference to John Anderson's knowledge of this practice in the investigation report. The Tribunal

also considered to be significant that the briefing note at 112.27 was not explicit in respect of an instruction that cameras should be 'left running', in light of John Anderson's awareness of the practice of switching of the cameras during the night shift. The Tribunal considered it to be significant that there were no findings in respect of those matters in the investigation report. The Tribunal considered it to be significant that there is no findings in the investigation report in respect of none of the claimants being at the day shift briefings by John Anderson, nor any finding that the briefing was not put on the noticeboard, nor any finding that the paper copy of the briefing was not distributed.

115. The Tribunal considered it to be very significant that there is no mention in the investigation report of it being the claimants' position that they were being 'targeted'. The Tribunal considered it to be very significant that Richard Marshall had carried out no investigation in respect of the allegations made by the third claimant that 'the appropriate manager' had been 'going around site saying 'I've won' and 'high-fiving everyone''. This allegation was clearly significant in light of Richard Marshall's understanding that it was the claimants' position that they were being set up by the appropriate manager and that the notice at 113 had been put up to 'get back' at the claimants because of the grievance they had raised about his conduct. Richard Marshall's position under cross-examination was that he 'should have followed it up' but that these allegations in respect of what 'the appropriate manager' was saying 'came right at the end' when he had already written his report and conclusions and that was why he did not carry out any further investigations. In the circumstances of this allegation, and Richard Marshall's knowledge that it was the position of all three claimants that the appropriate manager was seeking to get back at them for having raised a grievance against him, the Tribunal considered it to be extremely significant in respect of the third claimant's unfair dismissal claim that there was no investigation with the appropriate manager with regard to these allegations, and that the information gained at the investigatory stage with regard to these allegations was not passed on to the decision maker at the disciplinary hearing. In these circumstances, the

Tribunal considered those failures to be so significant as to fatally flaw the reasonableness of the investigation carried out. That fatal flaw could have cured at the appeal stage in respect of the third claimant, but was not, because John Davies also failed to carry out any investigations in respect of these allegations, when they were again made to him. That was significant in terms of the appeal not remedying the failures at the investigatory stage.

116. The Tribunal appreciated that Derek Harris was candid in his evidence in respect of not having seen the notes of that interview prior to making his decision to dismiss. That fact called into question the fairness of the dismissal in respect of the third claimant. It was clear that Derek Harris did not have before him at the time of the decision to dismiss all of information which had been obtained in the investigatory stage. This was particularly significant because the findings of the investigation report relate to disciplinary proceedings being instigated against the first and second claimants and not the third claimant. There is only an addendum in respect of an email thereafter being sent by the third claimant and the content of that email. The Tribunal considered it to be very significant that at the time of his decision to dismiss the third claimant, Derek Harris was not aware that in the course of the investigation the third claimant had stated that 'the appropriate manager' had been saying 'I've won' and 'high-fiving employees' (and that there had been no investigation of that). The Tribunal also considered it to be significant that at the time of his decision to dismiss the third claimant Derek Harris was not aware of any investigation which had been carried out in respect of the third claimant's changed position that he had turned off the CCTV cameras in the period from August 2016, or that any attempt had been made to clarify the third claimant's position on receipt of his email. There was no explanation provided for why, in light of Derek Harris' position that he had not seen the notes of the telephone interview between Richard Marshall and the third claimant on 26 April 2017, the opening paragraph of the letter from Derek Harris to the third claimant of 26 April inviting the third claimant to an a disciplinary hearing (at 188) makes reference to the telephone call between

Richard Marshall and the third claimant on 26 April 2017. This point was not put to Derek Harris for an explanation.

117. There was some difference in the evidence of Richard Marshall and Derek Harris in respect of what had occurred in the transfer of the matter from Richard Marshall to Derek Harris. Richard Marshall's position in examination in chief and under cross examination was that on conclusion of his investigation report he had passed the file and his notes to Ben Hope (HR Business Partner for Manufacturing), who had 'dealt with it from then on'. Richard Marshall's position under cross examination was that he knew that the matter had been passed to Derek Harris because Derek Harris commented on the number of interviews and the order of the notes and mentioned to Richard Marshall that it had been a 'thorough investigation'. Richard Marshall described this as a 'passing comment' which took place face-to-face between him and Derek Harris at the respondent's Halifax site, where their offices were in the same corridor, two doors down from each other, and they saw each other on a daily basis. Richard Marshall's position in cross examination was that this 'passing conversation' took place before Derek Harris heard the disciplinary hearing in respect of the third claimant. His position was that the conversation had arisen when Derek Harris 'just said he was going to do the hearing and he'd got the notes'. Richard Marshall denied having any other discussion with Derek Harris in respect of the matter other than saying 'there's a lot of pages'. During his cross examination, Derek Harris' position was that Richard Marshall had given the notes of the investigation to him. He was asked if this was via Ben Hope and he denied this. Derek Harris's position was that Richard Marshall had given the notes to him, saying 'here's the pack. I believe is in the right order. If you've got anything you don't understand, ask me.' Derek Harris was then asked in cross examination whether he knew if Richard Marshall had an opinion in relation to the investigation, and whether he had expressed that opinion to him. Derek Harris' response was that Richard Marshall 'clearly thought there was something to answer to' and that Richard Marshall 'said he feels concerned enough for the three engineers to be invited to a disciplinary hearing.' and that 'the conclusion of

the investigation was that there was should be disciplinaries for unauthorised tampering and failure to obey reasonable instructions'. This was of note to the Tribunal particularly because at the conclusion of the investigation only two of the claimants had been invited to a disciplinary hearing. Derek Harris' evidence was that he had registered that Richard Marshall had done a 'thorough, chronologically, ordered investigation' and that he had then read through the papers over two or three days before phoning Ben Hope. Derek Harris's position was later that Ben had given him 'some information', perhaps the disciplinary policy, but that he did not have a clear recollection of that, but was sure that Richard Marshall had given him a 'complete and comprehensive pack with everything in it' and that he had not 'checked the dates' of the papers in this pack. The Tribunal preferred the evidence of Derek Harris in respect of the transfer of the file because he was candid and straightforward in his evidence, gave detail and maintained his position in respect of the time he had spent considering the papers before the invitation letters were sent. Derek Harris's position was that Ben Hope had drafted the invitation letters for the disciplinary hearings on Derek Harris's behalf, which Derek Harris had approved before them being sent out. Derek Harris's position was that he had read the papers over 2 to 3 days before taking the decision to increase the allegations as set in the disciplinary hearing invitation letters from two to four. The interview notes of the third claimant's telephone meeting with Robert Marshall on 26 April 2017 187.1 were put to Derek Harris. It was put to him that he could not have taken 2 to 3 days to read the investigation notes because the date when the first letters were sent to the first and second claimants inviting them to the disciplinary hearings were dated 26 April 2017. Derek Harris was adamant that he had read the notes over 2 to 3 days prior to asking Ben Hope to draft a letter to invite the third claimant to a disciplinary hearing. Derek Harris' position when later cross-examined on these notes was that on reading the notes while the hearing was adjourned for lunch, he was 'looking at the heading' and his position was 'I don't think I've had this'. Derek Harris' position was that he had then looked at the pack which Richard Marshall had given him, which he had with him, and found that it did not have a copy of Richard Marshall's third interview with the third claimant, but did have two

copies of Richard Marshall's second interview with third claimant. Derek Harris' conclusion was then that he had not received the notes of the investigatory meeting with the third claimant held by telephone on 27 April 2017. The Tribunal appreciated Derek Harris' candour in this regard and preferred his evidence in respect of how the papers had been transferred to him.

118. Derek Harris was consistent in his position that it was not for those in HR to make management decisions. He expressed this both in relation to his view on 'the Neil Etherington agreement' and in respect of Ben Hope's influence on the decision to dismiss. Derek Harris was absolutely clear that Ben Hope did not have an input into the process in terms of making the decisions, and that the decisions were 'not Ben Hope's to make', him being there 'to advise'. It was clear from his evidence that Mr Harris had a very strong view that decisions such as to an agreement that CCTV cameras could be switched off during night shift were management decisions and not decisions for a someone in HR to make. This was in line with Richard Marshall's position in cross examination that 'the company believes in training managers to deal with issues'. For these reasons, the Tribunal was satisfied that the decision to dismiss the third claimant was made by Derek Harris. The Tribunal found Derek Harris to be credible in his position that he had not been influenced by 'the appropriate manager' to reach his decision to dismiss.

119. Richard Marshall's position in cross examination was that he did not know who had made the decision to expand the allegations of misconduct from two to four and to include dishonest conduct. Derek Harris volunteered in his examination in chief that, 'after reading the bundle and discussing with Ben Hope' that he 'felt there was dishonest conduct as well with regard to the agreement with Neil Etherington and the denial of receiving instructions from John Anderson'. Derek Harris's position in examination in chief was that he felt that the third claimant was 'fixated with the cameras' and 'obsessed about the cameras and ('the appropriate manager') being on a crusade to spy on them'. Derek Harris approached the disciplinary hearing on the basis that 'you are not allowed to tamper with company equipment' and that

that is 'listed in the Policy as gross misconduct'. His position was that he believed that the third claimant deliberately flouted management instructions not to switch off the cameras' and that this was 'a sustained refusal to follow a reasonable management'. In forming this view, Derek Harris did not consider that neither Alec Kerr or Gordon McKinley (being the third claimant's direct line manager at various stages) had directly challenged the third claimant's conduct in turning off the cameras. Derek Harris concluded that a clear instruction had been given by John Anderson despite the denial from the claimant and did not take into account that the switching off the cameras was not directly challenged by the claimant's line management. Derek Harris drew a negative inference from his conclusion that the third claimant had accepted an instruction from his trade union national convener, Chris Haigh, not to turn the cameras off, but had not accepted an instruction from management on this. This conclusion does not take into account that the claimants had approached Chris Haigh to seek clarity on the notice at 113 because they thought that they were effectively allowed to switch off the CCTV cameras because of the Neil Etherington agreement and does not take into account the claimant's position that they did not receive such an instruction from management, or that both Alec Kerr and Gordon McKinlay accept that they did not directly challenge the claimant's conduct switching off the cameras in this regard. Derek Harris' failure to take these significant facts into account in coming to his decision to dismiss was significant and unreasonable.

120. Derek Harris' position in examination in chief was that he 'didn't fully accept' the third claimant's explanation about the Neil Etherington agreement, 'but I came to the conclusion he believed there was an agreement in place and I decided there was a misunderstanding rather than deliberate dishonesty'. His position was 'given that the management team could have been clearer and could have been more direct I felt he could have misunderstood about the agreement'. The Tribunal considered this statement to be very significant as it indicated Derek Harris's awareness at the time that there was a lack of clarity in the instructions from management in respect of the CCTV cameras, which he had not then taken into

account in his decision to dismiss. Derek Harris' position in examination in chief was that the third claimant had relied upon there being no 'written affirmation' that he had received the instruction. Derek Harris's position was that he was that he 'didn't think John Anderson had anything to lie about while Mr Nugent did – 'to mislead the investigation and to excuse his misconduct.'. It was clear from this explanation that Derek Harris did not take into account as significant in this regard the lack of clarity in the instructions from management re the CCTV cameras.

121. The Tribunal noted and considered Derek Harris' position in examination in chief as to why he made the decision to dismiss, which was that the decision was 'best for the business' and it was 'best for the business that Mr Nugent was not at the Falkirk site anymore, despite the hardship it would cause him.' Derek Harris' position was 'at the end of the day managers have got the right to manage'. The Tribunal also considered Derek Harris response to being asked whether 'the appropriate manager' had had any influence in the decision to dismiss, which was as follows: "No influence whatsoever. It was taken out of their hands. Mr Bourne wanted it dealt with with integrity and by someone who had no history with the site. He trusted me, as he has done on many occasions, in Marshalls and in Burtons where previously we worked together. I went to see the management team in Falkirk afterwards to express my concern about the handling of it and how they could have been clearer and it was very apparent that the management team were intimidated by the engineers.' This investigation and conclusion in respect of intimidation was made after the decision to dismiss and could have had an impact on that decision. This evidence was also very significant because it confirmed that Derek Harris held a view that the instructions from management were not clear, which was not reasonably taken into account in his decision to dismiss. This conclusion on lack of clarity and Derek Harris's conclusion that the third claimant had an understanding that there had been an agreement with Neil Etherington agreement was inconsistent with the finding in relation to dishonest conduct. The Tribunal considered it to be very significant that in reaching his decision to dismiss, Derek Harris did not reasonably take into account the practice which had been in

place re the CCTV cameras being switched off, the fact that the claimants' line managers were aware of this and there had been a lack of clarity of instructions from them & that the claimants had sought clarity from their Trade Union on the position after the notice at 113 was put up.

122. Although it was the position of Derek Harris in cross examination that at the disciplinary hearing he had given the third claimant 'the opportunity to 'say what he liked' and 'to take breaks when he liked' and that he 'didn't badger him', there was no evidence that Derek Harris had taken into account the conclusions of occupational health in respect of the third claimant when coming to his decision to dismiss, as distinct from his handling of the disciplinary hearing. Derek Harris's position was that there 'clearly was a breakdown in trust' and that 'it all sounded very much like paranoia' and 'because he (the third claimant) had been off with stress he didn't want to upset him and make him worse'. Derek Harris's position was that he concluded that John Anderson had given a briefing to the third claimant because he believed John Anderson statement and that he had formed the view that there had been stickers put on the CCTV cameras because he had believed Alec Kerr. His position was that he didn't know what they would have to gain by saying that.

123. The Tribunal considered it to be significant that Derek Harris' position in cross examination was that at the time of the disciplinary hearing he was aware that there were a number of issues in dispute, being (i) whether there was any agreement with Neil Etherington (ii) whether the third claimant had received a briefing from John Anderson after August 2016 (iii) whether the third claimant had been told by John Anderson not to turn the CCTV cameras off (iv) whether the engineers were being targeted by bringing disciplinary proceedings. It was of note that Derek Harris's response to it being put to him that one of the issues was whether the investigation was instigated by the appropriate manager was 'I'm not sure', although he did accept that there was reference to the fitters being 'set up' by 'the

appropriate manager'. The notes prepared in preparation for the disciplinary at 217-218 do not reflect an understanding that there was a decision to be made following the disciplinary hearing in respect of (i) whether there was any agreement with Neil Etherington (ii) whether the third claimant had received a briefing from John Anderson after August 2016 (iii) whether the third claimant had been told by John Anderson not to turn the CCTV cameras off. It is clear from the wording of the questions in these notes, as set out in the findings in fact that a conclusion had been made on these issues prior to the third claimant's disciplinary hearing. The wording of the invitations to the disciplinary hearing sent to all three claimants in respect of allegations three and four are made on the premise that a conclusion had been reached in respect of (i) whether there was any agreement with Neil Etherington (ii) whether the third claimant had received a briefing from John Anderson after August 2016 (iii) whether the third claimant had been told by John Anderson not to turn the CCTV cameras off. The wording of the invitation letters does however set out that there will be an opportunity to respond to these allegations at a disciplinary hearing. For this reason the Tribunal concluded that the invitations themselves did not breach the implied term of trust and confidence, as alleged.

124. The Tribunal considered it to be very significant that it was Derek Harris' position in cross examination that he didn't prepare any questions in respect of the claimants' allegations that they were being targeted because he 'didn't believe that they were being targeted'. His position was that there was no explanation on how they were targeted other than that they had walked where they shouldn't'. Derek Harris accepted that his preparation notes for the disciplinary hearing do not indicate that he had given any consideration to the allegations of 'targeting'. Derek Harris' position in cross examination was that it was the fitters 'perception' that they were being targeted, but that his preparation notes do not indicate his consideration of that as an issue. Derek Harris' explanation for that was because he didn't believe they had been targeted and that it was more a 'fixation or obsession'. Derek Harris considered it to be significant that there had been 'no investigations prior, no

disciplinary, the only thing was the walkway item, that doesn't suggest they are being targeted'. Derek Harris's approach was to 'look at the case in question and not go back to 2015'. His position on the relevance of the letter from Neil Etherington to Jim Aire 112.21 was that it 'demonstrates the history there' and that the claimants 'haven't been able to put the issues behind them'. Derek Harris considered that letter to be relevant only in respect of establishing in his mind that there was no agreement with Neil Etherington in respect of switching off the CCTV cameras, he did understand it to be the claimant's position that it was also relevant to the issue of 'targeting'. It was significant that in coming to his decision to dismiss the third claimant, Derek Harris had not taken into account Alec Kerr's position to Richard Marshall that in the period between August and October 2016 the cameras being turned on or off 'wasn't a big issue' (recorded at production 145). When that reference was put to him in cross examination, it was Derek Harris's position that 'clearly it was, otherwise ('the appropriate manager') would not have put up the notice'. It was put to Derek Harris that another explanation for 'the appropriate manager' putting up the notice was that he wanted to target the claimants. His position was that that was that he was 'not aware of that' and that it was 'possible'. The Tribunal considered it to be significant that in all the circumstances of the claimants' position there was no investigation with 'the appropriate manager' as to why he had put up the 113 notice.

125. The Tribunal considered it to be significant that Derek Harris's position in cross examination was 'It appeared to me that the gym was used excessively and the fitters were challenged on it and the evidence that they were found to have used the gym excessively was CCTV' and from this 'it looked like relations had broken down on site'. The Tribunal considered it to be significant that Derek Harris's position in cross examination was that 'the only two things they were challenged on was excessive use of the gym and walkways' and that he 'couldn't see where they were targeted'. There was no evidence that Derek Harris had any understanding of why some of the claimants were in the gym during the time when it had been initially alleged there had been had been excessive use. The previous

allegation of excessive use of the gym was clearly a factor in Derek Harris' perception of the claimants. His position was 'it appeared to me the gym had been used excessively and the reason it was captured was because of CCTV'. Derek Harris understood that that why turning off the cameras was a central issue to the claimants. His approach was that 'in previous business we use covert cameras and didn't need to consult' that CCTV is used extensively in the industry and that 'in some factories its used covertly for protection of equipment and employees'. His understanding appeared to be that the limitations on use of CCTV cameras was that it could not be used in in areas such as toilets. The Tribunal concluded that Derek Harris' approach was influenced by his belief that the claimant's had previously been caught using the gym over excessively i.e. acting in misconduct and that there would be no reason to switch off the CCTV cameras during the night shift other than because they had something to hide. Derek Harris's position in cross examination was that knew that the fitters were alleging that the appropriate manager had the intention of using the CCTV cameras to target them 'but the issue was whether they had turned the cameras off and they admitted that they had turned them off'. His position was that the cameras were 'Not there to watch the walkways. There to watch the process.' Derek Harris confirmed in cross examination that he did not know that in the 2015 grievance Alec Kerr had supported 'the appropriate manager's' view in respect of the language used.

126. It was significant to the Tribunal that Derek Harris's position in cross examination was 'my job was not to investigate but to do the disciplinary hearing' and that he 'didn't see anything to investigate'. His position was that at the time of his decision to dismiss he saw that the management team were 'finding it very difficult to manage the engineering team' and he 'wanted to express his concern about what could have been done differently'. These considerations were not taken into account in his decision to dismiss. It was significant that he did not carry out any investigations as to why there were such difficulties before coming to his decision to dismiss.

127. In respect of the decision to dismiss, the Tribunal considered it to be very significant that Derek Harris took the view that he 'couldn't find any evidence of an agreement', without taking into consideration the findings in the investigation report in respect of the practice which had been in place since the time of the alleged agreement that CCTV cameras would be switched off in the CBP plant during the night shift, and that that practice was applied by 'everyone'. That practice was evidence of the agreement. Derek Harris' view that such an agreement would require to be a decision for management and not an HR manager was a significant factor in Derek Harris's decision that there was no 'Neil Etherington agreement'. Derek Harris completely disregarded the fact of that practice having been in place, other than that no disciplinary proceedings were taken against anyone who had applied that practice in the period from August 2015 until the time of John Anderson's briefing in August 2016. The Tribunal also considered it to be significant that Derek Harris did not take into account that on the notice at 113 being put up the claimants had sought clarity on the position with regard to the CCTV cameras, and that it was this action which had initiated the investigation and disciplinary proceedings. The Tribunal considered that to be particularly relevant and significant with regard to the decision to include allegations of dishonesty.

128. The Tribunal considered it to be significant that Derek Harris accepted in cross examination that the allegation in 113 of removal of a spur fuse was a 'red herring' in that it was subsequently shown to be false, and accepted that that allegation had originated from 'the appropriate manager's' notice at 113 and he had no investigations were taken with the appropriate manager in respect of his reasons for putting up that notice. Derek Harris's position in evidence was to accept that his position at the disciplinary hearing had been that the the act of switching off the CCTV cameras during the night shift could only be to hide something.

129. The Tribunal considered it to be very significant that in making his decision to dismiss, Derek Harris did not take into account that the claimant's line management

were aware of that the CCTV cameras were being switched off during the night shift, and that they did not then speak to or directly instruct the claimants that the CCTV cameras required to be left running during the night shift or that switching them off would be regarded as conduct which was likely to be considered to be gross misconduct. The only evidence in relation to any such instruction from the claimants' line management i.e. Alec Kerr or Gordon McKinley was Alec Kerr's position that he had placed stickers on the screen which was not corroborated. In circumstances where Derek Harris knew that it was not disputed that the claimant's line management were aware that the the CCTV cameras were being switched off, the Tribunal considered it very significant that the Derek Harris did not take this into account in making his decision to dismiss the third claimant. The Tribunal also considered it to be very significant that Derek Harris did not take into account that the claimant had sought clarity from their trade union when the notice at 113 was put up.

130. The Tribunal considered it to be significant that Derek Harris's position in cross examination was 'It appeared to me that the gym was used excessively and the fitters were challenged on it and the evidence that they were found to have used the gym excessively was CCTV' and from this 'it looked like relations had broken down on site'. The Tribunal found that this perception influenced Derek Harris position in dealing with these disciplinary matters. The Tribunal considered it to be very significant that Derek Harris made his conclusion that the fitters were not being targeted without any investigation being carried out with 'the appropriate manager' who he understood was alleged to be targeting them. In the circumstances, the Tribunal considered that failure to be so significant as to fatally flaw the reasonableness of the investigation carried out prior to the decision to dismiss.

131. It was significant that Derek Harris's position in cross examination was that 'the appropriate manager' had said he wasn't going to target people' following from the

collective grievance and that 'he wanted to move on'. It was then clear that this impression formed part of Derek Harris's perception. This view was however formed without any investigation being carried out as part of this disciplinary process in respect 'the appropriate manager'. This view was an assumption of Derek Harris based on his understanding of the history of events, which was not a complete understanding because it did not include an appreciation of the reason why part of the time spent in the gym by the claimants had been because of one of the claimant's 'personal breakdown'.

132. The Tribunal appreciated that Derek Harris felt that he wanted to deal with the matter 'professionally'. The Tribunal was satisfied that it was Derek Harris's decision to dismiss the third claimant and that as had been Derek Harris's position in his examination in chief he felt that that decision was 'best for the business'. In all the circumstances however the Tribunal concluded that his failure to take into account the above significant matters before coming to his decision to dismiss were so serious as to take the decision to dismiss in these circumstances outwith the band of reasonable responses. There was no *esto* or alternative argument on behalf of the respondent that the dismissal was fair in terms of section 98 for 'some other substantial reason'.

133. It was put to Derek Harris in cross examination that without the finding of dishonesty he would not have come to the decision to dismiss the third claimant. His position was that he'd 'have to consider that', that 'that would be a different set of circumstances' and that he 'did believe he (the third claimant) had been switching off equipment' because the third claimant had 'admitted that'. Derek Harris' position was that 'the third point was the only one where he gave the third claimant the benefit of the doubt'. Derek Harris' position was that he 'probably' would still have made the decision to dismiss on the balance of probabilities. Derek Harris' position was that he had made the decision to dismiss because he 'believed he ('the third claimant') was wilfully disobeying management instructions and because

of the history and lack of trust he had and wilfully lied'. The Tribunal considered it to be significant that there was no evidence that in his decision to dismiss Derek Harris had taken into account the effect of his acceptance that there was at least a misunderstanding in respect of the Neil Etherington agreement in respect of the other allegations of misconduct. Derek Harris accepted under cross examination that it followed from an acceptance that there was a perceived agreement in place that there must be clear and unambiguous instructions in respect of a change in practice which was contrary to such perceived agreement. That was significant. He also accepted that the briefing at 112.27 referred to a 'request by the project team' and did not set out a specific instruction. Derek Harris also accepted that a finding of 'wilful and repeated refusal to abide by management instructions' requires there to have been clear instructions. The Tribunal considered this to be significant in terms of the question of whether Derek Harris's decision to dismiss was within the band of reasonable responses, in light of the evidence of Derek Harris's concerns at the time in respect of the lack of clarity of the management instructions. It was put to Derek Harris in cross examination that if he accepted that the management instructions were not clear then he could not properly conclude that the third claimant had been dishonest. Derek Harris's response to this was 'I think he changed his statement to corroborate Nisbet and Alison'. When it was put to Derek Harris that to deliberately put himself in line for disciplinary would be 'madness' Derek Harris's response was 'it depends if you feel intimidated or not' and he suggested that the third claimant was intimidated 'by his peer group'. When asked if he was suggesting that the third claimant was put under duress his response was 'it was a possibility I had to consider'. It was significant that there was then no suggestion of Derek Harris investigating this possibility which was in his mind at the time of his decision to dismiss with the third claimant. That possibility had been put to the third claimant in his telephone interview with Richard Marshall but the notes of that investigatory meeting were not passed to Derek Harris. There was no investigation by Derek Harris on what he considered at the time was the possibility that the third claimant was being put under pressure by his peer group to in respect of his position on the Neil Etherington agreement and when

he had turned the cameras off and as far as Derek Harris had been aware there was no prior investigation of that. This was significant in terms of the reasonableness of the investigation.

134. Derek Harris's position at the conclusion of cross examination was 'at the time of coming to my decision there were things I came across like the John Anderson notice that could have been clearer and at the back of my mind I felt there was something underlying'. His position was that he took into account that the Falkirk site was 'very effective in respect of output' and he 'couldn't understand how they could manage that side of the business but seemed to be struggling to manage engineering'. He took the view that Gordon McKinley 'had been trying to build bridges and move forward but had gone too far and should have been demonstrating leadership'. His position was it was 'challenging', 'but at the end of the day managers should have the right to manage the site'. He formed the view that 'management were either very bad or intimidated' and he 'didn't believe they were very bad because it was one of the better sites'. It was then significant that there was no investigation with 'the appropriate manager' in respect of the management at the site. Derek Harris made a conclusion himself, based on perceptions which were based on misinformation in respect of previous events (re the gym incident) on the reasons why management had not been clear about the instructions, rather than investigating why they had not given clear instructions and taking that lack of clarity into account in his decision. The Tribunal considered it to be very significant to the question of the reasonableness of the investigation and the reasonableness of the decision to dismiss, that in circumstances where Derek Harris had made a conclusion that there was a lack of clarity in the instructions from management, he had formed a view of the reason for that lack of clarity without investigation and nonetheless made a finding that there had been wilful and repeated refusal to abide by management instructions. When the Tribunal asked Derek Harris why he had not carried out any investigation with 'the appropriate manager' Derek Harris's position was that he didn't think it was appropriate to talk to him because I thought he was too close to it all and may have

presented a distorted view and I thought it best to go off the notes Richard produced from the investigation.' It was clear to the Tribunal from this response that Derek Harris's view was that 'the appropriate manager' had an impact on the situation, but he chose not to carry out any investigations with him. The Tribunal considered that to be significant in respect of the question of the reasonableness of the investigation prior to the decision to dismiss.

135. It was significant to the Tribunal that Derek Harris's position was that after the conclusion of the disciplinary matters he had spoken to the appropriate manager because he was concerned around the management team's lack of leadership which came across to him from reading the investigation notes. There was no indication that Derek Harris had taken these concerns into account when reaching his decision to dismiss. That was very significant to the Tribunal's assessment of whether the decision to dismiss was within the reasonable band of responses. It was Derek Harris's position in cross examination that 'things could have been done differently' and in particular that 'John Anderson could have asked for a signature that he had briefed the group' and that 'he didn't know why he didn't, given the history of mistrust' although 'that may be taken as an indication that trust was still not there'. It was significant that although Derek Harris had these thoughts at the time of dealing with the matter, Derek Harris did not carry out any investigation with John Anderson to find out why he had not given clear instructions to the fitters that the CCTV cameras should not be switched off during the night shift, with a signature from them in respect of their receipt of those clear instructions. Derek Harris' view in respect of Gordon McKinley was that he was 'trying to build bridges but he still needed to manage and he could have dealt with it better' and that he was 'disappointed in Gordon McKinley'. There is no indication that Derek Harris took that into consideration when reaching his decision to dismiss the third claimant. His position in cross examination was that he accepted that there was a lack of clarity and failure of the managers to communicate the expected standards of behaviour but that 'the reason he believed they acted the way they did was because they felt intimidated and aware that a collective grievance could be raised

against them and that this was a management team walking on egg shells'. Those conclusions were based on investigations after Derek Harris had decided to dismiss the third claimant. It was significant that these investigations in relation to the management team were conducted after the decision to dismiss. There was no evidence as to any reason why these investigations could not have been conducted prior to the decision to dismiss. Derek Harris' position was that when he 'met the management team and expressed concerns about how they had handled the situation and that they could have been more firm and clear, they had all acknowledged that fact and also explained that it was really difficult for them to manage the engineers.'

136. It was clear to the Tribunal that in his decision to dismiss Derek Harris had not taken into account the inconsistency in the third claimant having volunteered the information that he had switched off the CCTV cameras in the period after August 2016 after first saying that he had not with a finding that he had been dishonest. There was no evidence before the Tribunal of any consideration of there being any distinction in the allegations of misconduct made against the first and second claimant and the third claimant. Derek Harris accepted in cross examination that by his actions the third claimant was being honest about what had happened and had 'put himself in the frame for dismissal'.

137. Richard Marshall was proud of his reputation of having resolved 90% of grievances which he had investigated without them going to further stages and of his reputation of nipping issues in the bud. It was clear from his position in cross examination that he was disappointed that he had not been able to resolve the issues at the Falkirk site when appointed to deal with the claimant's grievance in 2015. His position was that he couldn't resolve it as a grievance and the only way to resolve was for disciplinary proceedings to be initiated against the appropriate manager, which he had recommended. During the proceedings, Richard Marshall was asked to leave the Tribunal hearing room while there was discussion between the parties'

representatives and the Tribunal in respect of the relevancy or his evidence on his knowledge of any disciplinary sanction which had been applied to the appropriate manager as a result of the grievance raised by the claimants and others in December 2015. Following this, Richard Marshall was directed by the Tribunal that it was the Tribunal's understanding that there was a disciplinary sanction taken against the appropriate manager but that for reasons of data protection it was considered that it was not appropriate for the precise nature of that sanction to be disclosed but that he may be asked questions about his knowledge of that sanction and its impact, if any, on his investigation in respect of the claimants. The appropriate manager had volunteered to him information that he had had a disciplinary sanction applied against him arising from the claimant's allegations about his conduct at the meeting in December 2015 Richard Marshall was put under some pressure during this cross examination his position was that the conversation with the appropriate manager had taken place two or three meetings in from the start of the regional monthly commenced in June or July 2015.

138. Richard Marshall's position in cross examination was that he did not interview 'the appropriate manager' as part of his investigations because he 'didn't see the need' and considered the issue was 'not about his memo'. It was clear from Richard Marshall's position under cross examination that he had a relationship with the appropriate manager at the time of his investigation reaching him at the monthly regional meetings and socialising afterwards. It was put to Richard Marshall that he was then not independent or an appropriate manager with reference to (5) of the points in paragraph 8 of the letter from Neil Etherington to Jim Aire of 11 September 2015 (at 112.22). Richard Marshall's response to this was 'it says disciplinary not investigation' but he could 'see the point'. Richard Marshall candidly admitted he felt 'uncomfortable' about recommending that disciplinary proceedings be instigated against 'the appropriate manager' because he was a 'peer' to him.

139. John Davies's evidence on why he had made the decision to uphold the decision to dismiss was because the first claimant had 'tampered with machinery which could have an adverse effect on the machinery itself if anything went wrong and was why the cameras had been put there' and because he 'felt the truth had been distorted' because the third claimant had changed his position in his statements and had said he was not informed by anyone that the cameras were not to be turned off, but later said he was told by employees 'don't be fooled by the screens being turned off' and that 'the cameras were still running'. John Davies's evidence was that he took from this that the third claimant knew that the cameras should not be turned off and that there was 'no new evidence to give a reason to lower the outcome'. His evidence was that he did consider other sanctions and that he took time to consider but that he 'chose to stick with the original decision based on the points brought forward'. The Tribunal found John Davies to be credible in his denial that anyone had influenced his decision. He was firm in his position that the decision was his own and that he was not influenced by any others and that he 'was not afraid to rock the boat'. The Tribunal considered it to be significant that John Davies's position was that there was no new evidence brought forward at the appeal hearing but that it was clear from the notes of the appeal hearing, as set out in the findings in fact, that there was new evidence and that there was no investigation of this. In particular the Tribunal considered it to be very significant that there was no investigation in respect of the allegations made at the appeal hearing that 'the appropriate manager' was 'high-fiving people saying I finally got them'. The Tribunal considered it to be very significant that although John Davies did ask Richard Marshall why he had not spoken to 'the appropriate manager' there was no discussion about why those particular allegations had not been put to 'the appropriate manager'. It was John Davies's initial position under cross examination that he 'didn't understand what was meant' by that allegation. He accepted that he did not ask the third claimant for clarification. His position was that he was 'in there to discuss did Nugent know the cameras were not to be switched' and 'not on hearsay what management had said'. John Davies consistently repeated that it was his position that if the third claimant was doing nothing wrong then the cameras

could not be used against him. When pressed in cross examination that he did know what the third claimant had meant by those allegations in respect of 'the appropriate manager', John Davies's position was 'I did, and I didn't think it was relevant as if the cameras were running they were not doing anything wrong then they couldn't be used against them.' That was a significant factor in John Davis' conclusion to uphold the decision to dismiss. It was of note that it was John Davies's position in cross examination that he was 'aware the cameras had been used for someone using the gym on site'. His position was that he based his decision on facts, being did the third claimant have knowledge i.e. did he turn the cameras off when he knew that he shouldn't do. John Davis' understanding at the time was that the third claimant had admitted that conduct in his third statement, on the basis that he was informed by Neil Etherington that he could do so. John Davies's position in cross examination was that 'someone had made a complaint' about the cameras being turned off. This was evidence which the Tribunal had not heard from any other witness. It was put to John Davies that it was 'the appropriate manager' who had made the complaint and his and he denied this, then saying 'I genuinely don't know the person's name'.

140. The Tribunal considered it to be significant that in cross examination John Davies accepted that an explanation for the appropriate manager high-fiving as alleged by the third claimant was that the appropriate manager had used the CCTV cameras against the fitters in the past and was doing so again. It was John Davies's position that he did not consider that explanation because it did not have a bearing on whether the third claimant knew that he should not turn the CCTV cameras off. His position was that he had spoken to Robert Marshall for the reason why the appropriate manager had not given a statement and that he felt he had a sufficient response from him. His position was that he had said to Scott Foley at the hearing that he would enquire why statement was not taken from the appropriate manager because he wanted to understand why the original investigation had not taken a statement from him, but that he then accepted Robert Marshall's position.

141. John Davies's position in cross examination was that he accepted Derek Harris's finding that there was not deliberate dishonesty on the part of the third claimant in respect of the there having been the Neil Etherington agreement. There was no evidence of any consideration by John Davies of the effect of that finding on the other allegations of misconduct. The Tribunal considered it to be significant that Mr Davies accepted under cross-examination that there was no suggestion that the third claimant was challenged by a manager over a period of two years in relation to his conduct in turning off the CCTV cameras. It was John Davies's position in cross examination that that factor had 'quite a big impact' on his consideration and was why his decision 'took so long'. The Tribunal did not find this to be credible because, as accepted by Mr Davies, there is nothing in his outcome letter which indicates such consideration. The Tribunal also found this position not to be credible because Mr Davies then immediately denied that if there was a misunderstanding on the Neil Etherington agreement and the employees were not challenged about their conduct in line with that agreement then at the very least that would have an impact on the level of sanction. The Tribunal therefore found that the Mr Davies had not taken these factors into consideration in coming to his decision to uphold the decision to dismiss and found that to be significant in terms of the appeal not remedying the failures at the disciplinary stage.

142. It was clear to the Tribunal that the claimants had an issue with the respondent's use of CCTV cameras. The point was made on a number of occasions during the hearing that the issues for the tribunal were as identified, and not in respect of whether the respondent's use of CCTV cameras was appropriate or otherwise. There was no evidence before the Tribunal of any policy in place in respect of the respondent's use of CCTV. It was put to the first claimant in cross examination that the issue of cameras is an operational site issue and his response was 'if it is put in place correctly with union involvement and feedback to employees'. It was clear that a significant factor in the background to this case was what the claimants at least perceived to be a lack of engagement with their trade union in respect of the use of CCTV cameras at the site.

143. It was significant in respect of the first and second claimant's constructive unfair dismissal claims and the issue of whether there had been affirmation of any prior breach of contract that it was the claimants' position that after the meeting on 27 August they and their colleagues believed that they had 'moved on' and they were 'putting things behind us'.

144. There were a number of occasions during the claimants' evidence in chief when matters arose in their evidence which had not been put to the respondent's witnesses. The Tribunal's position at the hearing was that with regard to the unfair dismissal claim, what was relevant was what was before the decision makers at the time of the decision to dismiss. Where there were controversial issues which were not put to the respondent's witnesses as being before them at the time of their dealing with the matter, the Tribunal did not make conclusions on matters in its findings in fact or take them into account in its consideration of the issues (except in respect of Chris Haigh's evidence re discussion with the HR Manager, only in respect of the chronology of events, as set out below). This was because the respondent had no prior notice of these matters on which to base a decision whether to call any witness to speak to them and the Tribunal had reminded parties' representatives at the outset that all material matters on which the claimants intended to rely must be put to the respondent's witnesses (given that it had been agreed that the respondent's witnesses would be heard first). The Tribunal considered that to take such controversial evidence into account in its determination of the issues, where no fair notice had been given in these proceedings and so without hearing the relevant respondent's witnesses position on the evidence would be to enter into a mindset of substitution, which the Tribunal was careful not to do.

145. In his examination in chief, the second claimant was referred to the terms of his resignation letter and confirmed that he relied on those terms in respect of his resignation. There was no further evidence taken from him, either in examination

in chief or in cross examination, directly as to the act or omission on the part of the respondent which he relied on as the reason for his resignation. The second claimant did not speak to the telephone conversation with Ben Hope, referred to in his resignation letter, in respect of his fitness to attend a disciplinary hearing. No evidence was heard in respect of the reason(s) why the second claimant's disciplinary hearing was rescheduled from 25 May 2017 to 24 May 2017. The Tribunal noted that it was the second claimant's position that 'the appropriate manager' found him to be 'quite challenging'.

146. It was the position of the claimant's representative that the first and second claimants resigned as a result of the invitation to a disciplinary hearing. Both the first and second claimants were in fact invited in substantively the same terms to a disciplinary hearing in in substantively the same terms on a number of occasions, due to their disciplinary hearings being rescheduled. These invitations spanned a considerable period. There was no discussion at the hearing, either in evidence or in submissions, as to which particular invitation was being relied on. The Tribunal noted the reference in the terms of the agreed issues for determination by the Tribunal to the 'most recent act or omission'.

147. It was the position of the second claimant in his examination in chief that Richard Marshall 'didn't want to hear what I was saying' and that he 'got the general impression he (Richard Marshall) was being naïve and blinkered' and that 'he was coming across that he wasn't interested in my point of view'. It was significant that the second claimant did not resign until some time after his investigating meetings with Richard Marshall. The Tribunal concluded that the second claimant could then not rely on this alleged behaviour as being a breach of contract and that any breach of contract from this behaviour was remedied by the fact of the second claimant being given a further opportunity to state his case in the invitations to the disciplinary hearing. The Tribunal took into account that the second claimant was absent from work because at this time because of anxiety and stress related

symptoms and took into account the terms of his resignation letter at 200-203. There was some controversy in respect of the second claimant's evidence on when he obtained alternative employment. His position in examination in chief was that he started with Marleys 'at the end of May sometime'. When questioned on this in cross examination the second claimant's position was when I resigned I put my CV onto a few agency websites. It's a good CV and I am well experienced, so within literally a few hours I received a few emails. One asked me to meet the engineering manager in Marley's. I attended interview there the next day. I walked around the plant. I was offered a job and I took it. I certainly didn't post my CV after resigning if that's what you're thinking. It was after I resigned.' The second claimant was then asked whether he had given any consideration to moving job before resigning and answered 'None at all. Hand on heart, Marshalls was the best job I had until all the carry on with (named 'the appropriate manager'). It was local, on my doorstep, working with a good bunch of guys. I had no intention of moving none at all.' The Tribunal noted that this was detailed evidence from the second claimant in respect of the timing of him seeking alternative employment after resigning from his employment with the respondent and how he had obtained this. This evidence was then called into question when evidence was heard from the first claimant.

148. The evidence of the first claimant was heard immediately after that of the second claimant. The first claimant's position was 'Before I started working with Marley I was working for another company for two weeks. I expressed to Peter that it was not the best job but it was an income. At Peter's interview, he had been told that there was more than one job available and Peter put me forward for the position'. The first claimant gave clear evidence that he left Marshalls on 20 April and went straight into employment with Fife Concrete Products and 'within a fortnight at Fife's I got a phone call from Peter that an opportunity had arisen at Marley for a similar role that I had in Marshalls'. The first claimant was absolutely clear in his evidence that he had been informed of the opportunity at Marley's from the second claimant within the two weeks from 20 April.

149. At the request of the respondent's representative, the Tribunal then allowed the second claimant to be recalled in respect of his position that he had resigned on 19 May and did not start looking for alternative employment until after that date . The second claimant was then recalled and he confirmed that the first claimant's evidence in relation to being told of the opportunity at Marley's was correct and that he had informed him that there was another position at Marley's. The second claimant's position in relation to why what he had previously said in evidence was wrong was 'It was a difficult time. I got my dates wrong. I apologise. It was not a deliberate attempt to mislead.' His position was then that he had been offered the job before he resigned from employment with the respondent but had started sometime at the end of May. When then asked to confirm if he had that job offer when he resigned, his position was he 'was not sure' and 'if that was the case I genuinely did not mean to mislead the Tribunal' and that he was 'under a lot of stress'. The second claimant's evidence under this cross examination was 'I was resigning whether I had a job or not. My position was completely untenable. Myself and Willie were the only two people proceeding to a disciplinary. Five of us all said the same thing. They only targeted myself and Willie. It was obvious we were going'. He was asked at what point he decided that the position was untenable and his position was 'the point I received the disciplinary invitation. That's when I realised my job at Marshalls was no longer viable in any way, shape or form'.

150. The first claimant's evidence then continued after this interjection from recalling the second claimant. When giving evidence in relation to the meeting in December 2014 which had led to the grievance against the appropriate manager being raised, the first claimant's position was 'I just saw my full career at Marshalls disappear'. Given the time which had elapsed since that meeting, the terms of the letter to from Neil Etherington to Jim Aire and without further issues being raised by or on behalf of the claimants subsequent to that letter in respect of the issues therein, the Tribunal concluded that there had been affirmation of any breach of contract since the that time by those events. It was of note that it was the evidence of all three

claimants that subsequent to the 2 August 2017 they had wanted to put all the bad blood behind them.

151. It was the position of the first claimant that on the morning when the notice at 113 was seen on the noticeboard he had spoken to Gibson Wilson, being the only manager on site, to try to get clarity. There was no indication of this within the investigatory notes and no notice of this to the respondent in the course of these proceedings and so no finding in fact was made in respect of that evidence. The first claimant's position in respect of Richard Marshall's investigation was that he 'generally thought it went pretty well' and that he had been 'asked a lot of questions about Workload'. His evidence was that on receipt of the invitation to the disciplinary meeting (the invitation letter dated 3 April 2017 at production 176 being put to him) was 'Marshalls was one of the best jobs I ever had until 2014. This was the icing on the cake that my time at Marshalls was over. I felt so good after the second interview with Richard Marshall. I didn't get the link between this and the second interview. I had no inkling that Richard was feeling that way towards me.' His position on being asked what he thought when he read the investigation report (which was included with the invitation to the disciplinary hearing) was 'targeted' and 'like a carbon copy of what happened in 2015.'. It was of note then that no disciplinary action had actually been taken against any of the claimants in respect of the disciplinary instigated in 2015. The Tribunal considered this to be a very significant factor in its consideration of whether the claimants could reasonably rely on the invitation letters as breach of contract because that was evidence that previously disciplinary action had not been taken due to the intervention of the trade union on the claimants' behalf and the points made at least in part being taken into consideration by the respondent on that previous occasion, to the extent that no disciplinary action was taken or sanction was applied. Given that history, the Tribunal concluded that where there was an opportunity to state their case at the disciplinary hearing the invitation itself could not be taken as a breach of contract. In reaching this conclusion, the Tribunal took into account the terms of the allegations of misconduct and that that were made on the premise of a conclusion

on contentious facts. There was though at least an opportunity at the disciplinary hearing for the claimants and their representatives to rebut the allegations.

152. The first claimant's position on the invitation to the disciplinary hearing of 3 April 2017 was 'for me that was genuinely the end of my employment with Marshalls from that time on I look for another job. I couldn't understand why just me and Peter had been singled out. Up to that point from 2014 I'd never had a conversation with (named 'the appropriate manager') at all, we never had a good relationship. he never spoke to me. It was game over when I read that'. His position was that he 'discussed with my wife in great detail in the run-up to this (being his resignation letter at 185) how things were going and all the rest of it' that it was an 'all-time low' for him, that he 'had plans to retire at Marshalls' and that 'it was a heavy letter to write' and he 'couldn't believe' he was writing it. The first claimant's position was 'I'd actually since receiving the disciplinary invite starting started looking for another source of employment. I knew the writing was on the wall. I applied like Peter on job sites. I was offered a job within a week with the company in Fife. On the week of the 21st I got a job offer. I discussed it with my wife over the weekend and decided to hand my notice in on the Monday'. The first claimant's position was that he had handed his letter of resignation in to Gordon McKinley on the Monday after Friday 21st but Gordon McKinley had refused this, but then during the course of that week 'the appropriate manager' had 'got wind' that he was going to leave and Gordon McKinlay said to him that 'the appropriate manager' 'wants your resignation and wants it in writing'. There was no notice of this to the respondent because there was no indication of this position in the ET1 or at any time prior to the first claimant giving his evidence on this. The position was not put to the respondent's witnesses (although those who appeared as witnesses for the respondent may not have been able to comment on this, being not based at the Falkirk site). The claimant's representative did not seek to rely in submissions on this evidence in respect of the first claimant's claim of constructive unfair dismissal. Given that the respondent was not in a position to contest the evidence because of lack of notice, the Tribunal did not make findings in fact in respect of that evidence.

153. There was also evidence from Chris Haigh which was not part of the claimants' case in the ET1s and which was not put to the respondent's witnesses. This was particularly in relation to evidence on Chris Haigh's comments to the claimants prior to the collective grievance being raised because of the alleged the appropriate manager's conduct on the likely consequences of them doing so. The Tribunal discounted that evidence because of lack of notice to the respondent. Similarly, the Tribunal did not take into account for these reasons Chris Haigh's evidence in relation to his dealings with the allegations of misconduct against the second and third claimants re-the gym incident. In so doing, the Tribunal also took into consideration the agreed issues for determination by the Tribunal in these claims. The Tribunal did make findings in fact based on Chris Haigh's evidence on meeting then HR director Susie Fehr. The Tribunal set out that chronology in its findings in fact because it was satisfied that that had led to Chris Haigh instructing Jim Aire to tell the claimants and the other CBP fitters not to touch the CCTV cameras, and that had then been taken by the respondent as indicating that the claimants had been prepared to accept an instruction from a trade union representative and not from management. The Tribunal considered it to be significant that the respondent relied on that and made those conclusions without investigating with Chris Haigh why he had said that to Jim Aire (in circumstances where Jim Aire was not available due to long term absence). The Tribunal did not take those findings in fact into account other than in relation to that chronology, which was then significant in terms of the respondent's failure to investigate why the claimants had sought clarity on the notice at 113 being put up.

154. Chris Haigh's evidence of his recollection of having spoken to Jim Aire about discussions with Neil Etherington that the CCTV cameras could be switched off during the night shift was 'I remember it well because I said to Jim Aire that I felt that was a massive step forward. A positive step forward.' There was evidence before the Tribunal that Jim Aire was absent on long-term sick leave at the time of the investigations in respect of the claimants. There was no suggestion to the

respondent's witnesses either during the internal procedure or before the Tribunal that investigations could have been carried out with Chris Haigh in respect of any feedback he may have received from Jim Aire about the Neil Etherington agreement.

155. Chris Haigh's evidence in relation to the Dignity at Work policy being introduced was 'it was supposed to be done by me but it never happened. We never got to it.' He was asked about the barriers for this and his evidence was 'I don't know. We were waiting for dates for it to start and it never ever came about.' The failure to implement the Dignity at Work policy was not substantively relied on in the constructive dismissal claims.

156. It was significant that all the claimants accepted in cross examination that in the investigation Richard Marshall's focus was on the switching off of the CCTV cameras, that he was concerned that the CCTV cameras had been switched off and considered that to be a serious matter. The third claimant accepted that he was called to a disciplinary hearing because he had admitted to switching the CCTV cameras off after August 2016.

Discussion and decision

157. It was noted during the hearing that there are different issues in respect of the determination of the Constructive Unfair Dismissal claims brought by the First and Second claimants and of the Unfair Dismissal claim brought by the Third Claimant. It was discussed before the Tribunal and confirmed by the claimants' representative on a number of occasions during the hearing that the First and Second claimants were seeking to rely on the 'last straw' principle and in particular that that 'last straw' was said by them to be the initiation of formal disciplinary proceedings against each of them (by way of each of them being invited to attend

a disciplinary hearing in respect of the allegations set out in their respective invitation letter).

158. The claimants' representative confirmed on a number of occasions during the hearing that it was not the claimants' position before this Tribunal that a claim was being made in respect of the respondent's use of CCTV cameras at the Falkirk site (although she did state that a future claim may be made in respect of that matter e.g. as a complaint to the Information Commissioner). It was the claimants' representatives position that the context of use of CCTV cameras by the respondent ought to have been investigated as part of a reasonable investigation against each of the claimants. It was noted by the Tribunal during the hearing that the respondent did not seek to rely on any documentary evidence such as a written policy in respect of its use of CCTV.

159. The Tribunal now addresses the identified issues in the order as set out in the agreed list of issues. The Tribunal attached weight to those matters set out as being significant in the 'Comments on Evidence' section above

Unfair Dismissal

160. (1.1) What was the reason for the respondent's dismissal of the third claimant?

In respect of the third claimant's claim of unfair dismissal, there was some discussion at the hearing in respect of the first stage of the assessment of the claim in terms of section 98(4) i.e. in terms of identification of the reason (or principal reason) for the third claimant's dismissal . The respondent relied on the third claimant's conduct as being the reason for the dismissal. At the outset of the hearing, the claimant's representative's position was that conduct was disputed as being the reason for dismissal and reliance was placed on the claimants having been targeted. At the stage of submissions, it was noted by the Tribunal that what had to be considered was the reason in the mind of the decision maker at the time

of their decision to dismiss. There was no evidence that the person who took the decision to dismiss the third claimant (Mr Harris) dismissed him for any other reason other than the third claimant's conduct. It was not put to Mr Harris that he had taken the decision to dismiss for any other reason e.g. targeting because of the claimant's involvement in a previous grievance against the appropriate manager. All witnesses before the Tribunal denied the involvement of the appropriate manager in their decision in respect of that the disciplinary process involving the claimant(s). The Tribunal accepted that the reason for the third claimant's dismissal by Mr Harris was a conduct reason. The Tribunal did note Mr Harris's evidence in respect of his decision being "I felt it was for the best for the company". There was no *esto* argument for the respondent that the third claimant's dismissal was a fair dismissal for 'some other substantial reason' in terms of section 98(2)(e). Mr Harris' further evidence on his reasons for the dismissal are set out in the Comments on Evidence section above. On its findings in fact and on its consideration of the evidence as set about above, the Tribunal concluded that the reason (or principal reason) for the third claimant's dismissal was a conduct reason.

161. (1.2) Did the respondent have a genuine belief in the third claimant's misconduct?

On its Findings in Fact, and with regard in particular to the matters set out as significant in the Comments on Evidence section above, the Tribunal found that Derek Harris did have a genuine belief in the third claimant's misconduct. He believed that that the third claimant had switched off the CCTV cameras when he knew he ought not to have.

162. (1.3) Was that belief formed on reasonable grounds?

On its Findings in Fact, and with regard in particular to the matters set out as significant in the Comments on Evidence section above, the Tribunal found that that belief in the third claimant's misconduct was not formed on reasonable grounds, because of the failures in investigation and the assumptions made. The respondent did not have reasonable grounds upon which to sustain their belief that

the third claimant was guilty of misconduct and dishonesty where they failed to have regard to material facts, including a belief that there had been lack of clarity in the instructions from management (without any prior investigation in respect of the real reasons for such lack of clarity), and where there was influence by premise that Neil Etherington did not have authority to make an agreement such as was being relied upon.

163. (1.4) Did the respondent carry out a reasonable investigation?

In respect of the third claimant's unfair dismissal claim, on its Findings in Fact, and with regard in particular to the matters set out as significant in the Comments on Evidence section above, the Tribunal found that the respondent did not carry out a reasonable investigation. This is in particular with regard to their failure in the circumstances to carry out any investigation with the appropriate manager with regard to his reasons for putting up the 113 notice, the failure to investigate the allegations of his comments and actions in 'high-fiving' re the claimants, the failure to investigate the reasons for the lack of clarity of instructions to the claimants and why the claimants had sought clarity on the 113 notice. The investigation report was flawed and tainted the subsequent disciplinary process by failing to make clear findings on significant matters, including that the matter had arisen because the claimants had sought clarity on the notice at 113, that there was no misconduct in the fitting of the spur fuse, that there had been a practice in place since August 2015 of the CCTV cameras being switched off during the night shift, that that practice was in line with the claimant's position with regard to the terms of the agreement with Neil Etherington, that after August 2017 the CCTV cameras had continued to be switched off during the night shift in the knowledge of the claimant's line managers and without any direct challenge from those line managers (the only evidence of such challenge from them being Alec Kerr's evidence that he had put stickers on the CCTV screens, which was disputed) and, most significantly that there was no investigation on the allegations in relation to the appropriate manager's behaviour in high-fiving and commenting on the position with regard to the claimants. That finally stated fatal flaw could have been remedied on appeal

but was not and indeed was compounded by John Davies's position that no new evidence had been presented at the appeal despite these allegations being made to him and not having been before Derek Harris.

164. (1.5) Was a fair process followed?

The process followed was in line with the ACAS Code of Practice on Disciplinary and Grievance Procedures and the respondent's internal disciplinary policy and was substantively fair. The decision makers were managers external to the Falkirk site, in line with the previous undertaking.

165. (1.6) Was it fair to dismiss for that reason in all the circumstances?

The Tribunal considered this question with regard to section 98(4) of the ERA and the guidance on that set out in *Iceland Frozen Foods -v- Jones* , confirmed by the Court of Appeal in *Foley -v- Post Office.* The question was whether the decision of the respondent to dismiss the third claimant fell within the band of reasonable responses which a reasonable employer would make. In answering that question, the Tribunal had regard to its findings in fact and to the matters set out as significant in the Comments on Evidence section above. The Tribunal concluded that the decision to dismiss fell out with the band of reasonable responses for the following reasons:- The findings in respect of dishonesty did not reasonably take into account the claimant's position that there had been an agreement that that could be done, the practice which had been in place since the time of the alleged agreement with regard to the CCTV cameras being switched off, or the respondent's acceptance that there was at least a perceived agreement with Neil Etherington. The conclusion that the third claimant was dishonest failed to have regard to the third claimant's explanations and the third claimant's his actions in emailing Richard Marshall to admit having switched off the cameras after August 2016. The decision to dismiss failed to reasonably take into account the lack of clarity of instructions re the CCTV cameras. Neither Mr Marshall, Mr Davies or Mr Harris took into account the position of the claimant's line manager Gordon McKinley at the investigating meeting, which was that he knew the cameras were

being turned off and did not challenge the Fitters about this. This is clearly an important factor. It is important for an employer to ensure that its employees are aware of what conduct will be considered by them to be gross misconduct and for them issue clear instructions. It is a relevant factor in disciplinary proceedings, at least with regard to sanction, if an employee's line manager was aware of the conduct and did not challenge this.

166. In all the facts and circumstances, and for the reasons set out above, the respondent did not carry out a reasonable investigation and at the time of the dismissal their belief in the third claimant's misconduct was not on reasonable grounds. For the reasons set out above, the decision to dismiss was not within the band of reasonable responses. For all these reasons, the Tribunal found that the dismissal of the third claimant was not a fair dismissal.

167. <u>Constructive Dismissal</u>

(2.1) What was the most recent act or omission of the employer which the first and second claimants say caused, or triggered, their resignation?

168. The first and second claimants rely upon the invitation to a disciplinary hearing. The most recent invitation was sent to the first claimant on 12 May 2017 and to the second claimant on 15 May 2017. It is material that invitations in largely the same terms were sent to each of the claimants on several previous occasions, being first sent to the first and second claimants on 3 April 2017, and that the claimants did not rely on the terms in which the most recent invitation letters varied from those sent previously.

(2.2) Has each of the first and second claimants affirmed his contract since that act?

169. After first and second claimants' receipt of the most recent invitation letter they each continued to be absent from work and receive sick pay.

(2.3) If not, was that act (or omission) by itself a repudiatory breach of contract?

170. The Tribunal considered the terms of the invitation to the disciplinary hearing to be important, because this invitation was particularly relied on as being a breach of contract. In circumstances where it is stated that there would be an opportunity for the claimants to state their case and that no conclusion has been reached, the Tribunal considered that that invitation could not be relied on of itself as a breach of contact. The claimants were given the opportunity to respond to the allegations made against them which had arisen in the course of the investigation. Some of the allegations were made on the basis of conclusions having been made on contentious issues but the Tribunal concluded that in all the material circumstances the invitation to a disciplinary hearing was not a breach of contract because the claimant had the opportunity to comment on the allegations at the disciplinary hearing. There was no evidence and it was not the position of any of the claimants that they had reason to believe that Derek Harris would not deal with the disciplinary matter in a fair way. On a previous occasion the respondent had not proceeded with disciplinary action which had been notified to the claimants. That was an indication of a prior situation where the respondent had taken on board what was being presented on behalf of the claimants and changed their mind in respect of disciplinary action. To resign prior to the disciplinary hearing was to pre-empt the decision of that hearing. The invitation to a disciplinary hearing was sent within the terms of the respondent's disciplinary policy and was not an action in material breach of contract. The invitation letter had taken cognizance of the content of the occupational health reports in arranging for the diciplinary hearings to be held off site.

171. In all the facts and circumstances, the Tribunal concluded that the invitation to a disciplinary hearing did not, either of itself or taken in conjunction with the history

of events in the employment relationship as set out in the findings in fact, constitute a repudiatory breach of contract. The invitation to a disciplinary hearing was not of itself a repudiatory breach of contract because the invitation letter set out that no final decision would be made before the claimants had been given a chance to state their case at a disciplinary hearing and it was not alleged by either the first or second claimant that they had reason to believe that the person making the decision to dismiss would not give them a fair hearing. The Tribunal did consider whether the fact that the allegations made findings on contentious issues meant that the invitation crossed a line such as to be of itself a repudiatory breach of contract. The Tribunal found that it did not because the claimants were being given an opportunity to state their position in respect of the allegations before a final decision was reached. The first and second claimants pre-empted that decision resigning but were not entitled to do so by the respondent's conduct, which was not of itself a repudiatory breach of contract. The Tribunal took into account the authorities elide upon by the parties' representatives in reaching this conclusion. There was no repudiatory breach of contract in terms of *Western Excavating -v Sharp.* In all the circumstances, the invitation letter did not breach the *Malik* term.

172. (2.4) If not, was it nevertheless a part (applying the approach explained in *Omilaju)* of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the *Malik* term (if it was, there is no need for any separate consideration of a possible previous affirmation).

The Tribunal considered this with regard to the following questions:-

(i) Was that conduct calculated and / or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee)

(ii) If so, did the respondent conduct himself lf in such a manner without reasonable and proper cause?

173. It significant that the evidence of the first and second claimants was that they had put the history of events up to August 2016 behind them. They had then continued to work for the respondent for a considerable period without any further substantive issue arising until the time of the notice at 113. No issue had been raised on their behalf in respect of failure to implement the terms of the letter at 112.21. The respondent had decided to take no disciplinary action against the first and second claimants in respect of 'the gym incident'. No action had been taken since the letter at 112.21 to seek to enforce its terms. In these circumstances the Tribunal concluded that the first and second claimants could not then rely on the conduct prior to August 2017. By their actions in continuing in employment with the respondent and not seeking any taking issue with any outstanding matters with regard to the points set out in the letter at 112.21, they had acted in affirmation of contract and cannot now rely on any such prior breach.

174. In circumstances where the claimants were being given the opportunity to rebut the allegations at the disciplinary hearing and no disciplinary action had been taken with regard to previous allegations, it could not be said that the respondent's conduct was calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. The Tribunal had regard to the conduct of the respondent as a whole in respect of the claimants, rather than with regard to the conduct of only 'the appropriate manager'. In all the material circumstances, the invitation letter did not meet the necessary quality of 'the last straw' in terms of *Omilaju*. It was not an act in a series whose cumulative effect is to amount to a breach of the implied term.

175. (2.5) Did the first and second claimants resign in response (or partly in response) to that breach?

Although there was some controversy in respect of the second claimant's evidence with regard to his resignation, as set out in the Comments on Evidence section, which did have some negative impact on the Tribunal's assessment of his credibility, the Tribunal accepted that given the first and second claimants'

considerable length of service with the respondent the claimant's resignations were at least partly in response to their being invited to a disciplinary hearing. The first and second claimants pre-empted the outcome of those disciplinary hearings and decided to resign rather than to proceed with the disciplinary process. That was their choice to do so. That decision was clearly impacted on by the relationship with management and in particular the appropriate manager at the respondent's Falkirk site. It was clear that they did not wish to continue to work at with the respondent because of the behaviour of the appropriate manager. It was however significant that they resigned before stating their case at the disciplinary hearing, when they were given the opportunity to do so. To resign in these circumstances without first at least gauging the position of the decision maker at the disciplinary hearing, where they had no indication that that decision maker would not consider matters fairly, was to 'jump the gun' and cannot be relied upon. The Tribunal took into account that the allegations had been extended to include matters which were contentious but the claimants had the opportunity to state their position on this at the disciplinary hearing and chose not to do so.

176. The reason for a person's resignation can be multifactorial. The claimants may have had legitimate concerns about income stream and ability to meet their financial obligations for them and their families. The Tribunal considered whether there had been a repudiatory breach of contract as at the dates of the claimant's resignations and concluded that there had not.

177. In reaching this conclusion, the Tribunal carefully considered the principles in Western Excavating (ECC) Ltd -v- Sharp [1978] ICR 221; [1978] QB 761, that approach being confirmed in the cases relied upon before it and by Langstaff J comments at paragraph 14 in *Wright -v North Ayrshire Council: - 'there has been a breach of contract by the employer that the breach is fundamental or is as it has been put more recently a breach which indicate that the employer altogether abandonments and refuses to perform its side of the contract that the employee*

has resigned in response to the breach and that before doing so she has not acted so as to affirm the contract notwithstanding the breach.'

178. At the time of the claimants' resignations the respondent had not acted in material breach of contract. The invitation letters do not indicate that the respondent was abandoning or refusing to perform its side of the contract. The claimants did not like or agree with being called to a disciplinary hearing but the respondent followed their own procedures in doing so. There is no breach of contract by an employer by following a fair disciplinary procedure. The disciplinary procedure followed was fair in terms of allowing an opportunity to respond to the allegations. The nature of the allegations set out in the disciplinary invitation letter did not either in itself or in conjunction with the history as set out in the findings in fact, constitute a material breach of contract entitling the claimants to resign. They claimants did not resign for a considerable period after first being notified of those allegations. The first two requirements for a claim for constructive dismissal have not been satisfied: there was no breach of contract and if there had been then the claimants by their inactions had affirmed their contracts.

194. **<u>Compensation</u>**

(3.1) If any of the claimants' claims are successful, what financial award/compensation is due to each successful claimant?

(3.2) In respect of each claimant, did that claimant's conduct contribute significantly to his dismissal, meaning any compensatory and/or basic award made to that claimant should be reduced?

(3.3) In respect of each claimant, has that claimant mitigated his losses arising from the termination of his employment with the respondent?

195. For the above reasons, only the third claimant is entitled to compensation in respect of his claim before the Tribunal.

196. The Tribunal had directed parties to agree the schedules of loss. They were unable to do so. In considering the extent of such award as would be just and equitable in terms of s123 ERA, the Tribunal considered the terms of the respondent's representative's email to the Tribunal of 8th June, and the fact that no comment was made on the content of that to the Tribunal by the claimants' representatives.

197. Taking into account its findings in fact and comments on the evidence, the Tribunal considered whether any deduction should be applied to reflect contributory fault under s123(6), where the dismissal was caused or contributed to by any extent by any action of the claimant. The Tribunal considered whether the claimant had engaged in culpable or blameworthy conduct which had actually caused or contributed to his dismissal and if so whether it was just and equitable to reduce the award under section 123(6) ERA. The Tribunal considered Derek Harris' acceptance at the time of dealing with the disciplinary that there had been a lack of clarity of instructions to be very significant in this regard. The Tribunal also considered it to be very significant that it was discovered during the course of the disciplinary proceedings that the claimants line management had been award that the CCTV camera were being switched off and did not challenge this behaviour. Because of this lack of clarity of instructions, awareness of the conduct and lack of challenge and because the third claimant had volunteered that he had switched the CCTV cameras off after August 2016, the Tribunal considered that it was not just and equitable to make any reduction for the third claimant's blameworthy conduct in switching off the CCTV cameras. Because of the respondent's finding that there was at least a 'perceived agreement' in respect switching off the CCTV cameras during the night shifts, the Tribunal considered that it was not just and equitable to make any reduction for blameworthy conduct in respect of the allegations of dishonesty. For these reasons, the Tribunal considered that it was just and equitable to make no deduction to both the unfair dismissal basic award and to the contributory

award, in reflection of blameworthy conduct. The third claimant had not engaged in blameworthy conduct such that in all the circumstances it was just and equitable to limit the extent of any award to him.

198. It was not argued that the third claimant had failed to reasonably mitigate his loss. The Tribunal took his earnings in mitigation into account in calculating the amount to be paid by the respondent under Section 123.

199. The third claimant is awarded an unfair dismissal basic award of £2,934, based on 4 years' service. The Tribunal accepted the claimant's oral evidence on his recollection of his termination date as being 'four years to the day from his start date' because he respondent did not provide any evidence to counter that position. No reduction is made to the basic award in terms of s122(2) ERA for the reasons as set out above in respect of s123.

200. In respect of the compensatory award, and in light of there being no comment from the claimants' representatives on the respondent's representative's email of 8th June 2018, the Tribunal accepted that the third claimant's wage loss was £2,068 for the period until he started is new employment, with an ongoing salary loss of £84 per month. The Tribunal accepted that a period of 11 months was a reasonable period on which to ascertain a just and equitable compensatory award, being (11x £84) £924. This equates to a total wage loss of £2992. The Tribunal accepted that it was not just and equitable to make an award to the third claimant in respect of pension loss, given his pension arrangements with his new employer.

201. The Tribunal accepted that an appropriate sum to compensate for loss of employment rights was £350. Given the obligation to mitigate loss and the principle of no 'double recovery' in respect of loss sustained over the same period, there would be no separate award in respect of breach of contract.

202. The third claimant's claim of unfair dismissal is successful and he is awarded a compensatory award of £3,342, together with an unfair dismissal basic award of £2,934, totalling £6,276.

203. The constructive unfair dismissal claims of the first and second claimants are not successful for the above reasons and therefore no award is made to either the first or second claimants.

Recoupment Regulations

204. The third claimant received £73.10 in respect of Job Seekers Allowance in the period from 2 June 2017 to 3 July 2017. His loss of earnings for this period was £2,068. This is the prescribed element which is subject to recoupment provisions in terms of the Recoupment Regulations.

Employment Judge: C McManus
Date of Judgment: 19 July 2018
Entered in Register: 19 July 2018
and copied to parties