THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		*Respondent*
Mr S J Maffin	**AND**	**Newcastle City Council**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

Held at:	**North Shields**	**On:**	**22 & 23 June 2017**
		Deliberations:	**2 August 2017**
Before:	**Employment Judge Hargrove**	**Members:**	**Ms S Don** **Mr G Gallagher**

Appearances

For the Claimant: **Mr P Morgan of Counsel**
For the Respondent: **Mr A Crammond of Counsel**

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:-

1. The claimant was fairly dismissed for reasons related to conduct. His complaint that he was dismissed for Trade Union Reasons contrary to Section 152 of the Trade Union and Labour Relations Consolidation Act 1992 is not well-founded.

2. His complaint of wrongful dismissal is not well-founded and is dismissed.

REASONS

1 By an ET1 received on **21 February 2017** the claimant claimed that he had been unfairly and wrongfully summarily dismissed from his employment as a Maintenance Joiner/Fencer on **11 November 2016**, he having been employed by

the respondent since **August 1995**. The claimant's case was that the dismissal was automatically unfair because the reason or principal reason was because he "*had taken part, or proposed to take part, in the activities of an independent trade union at an appropriate time*", contrary to section 152(1)(b) of the Trade Union & Labour Relations (Consolidation) Act 1992. It is common ground that the claimant had been an elected trade union representative for UCATT since 1999 and had represented members at grievance and disciplinary hearings since that time. It is not claimed by the respondent that the claimant had undertaken any such duties other than at an appropriate time. The claimant claims alternatively and in any event that his dismissal was not for gross misconduct but for other reasons including a dislike of him particularly by Mr Mulvanna, a Senior Manager in the Division. In the further alternative if the reason for dismissal was gross misconduct, was substantially and procedurally unfair.

2 The respondent's ET3 asserted that the claimant had been fairly dismissed for gross misconduct namely the misappropriation of materials from the Building and Commercial Enterprise Division stores in Byker over a period of time, said in effect to amount to theft. The respondent denied that his trade union activities or any difficulties in the claimant's relationship with Mr Mulvanna played any part in the decision to dismiss. It was further contended that the claimant was guilty of gross misconduct such that the respondent was entitled to dismiss him without notice.

3 Dismissal being admitted, the Tribunal heard first from the following witnesses for the respondent:-

3.1 Mr Mark Reardon, Contracts Manager who became the claimant's Line Manager on **26 August 2016** and was asked by Mr Mulvanna to investigate the amount of materials the claimant had been withdrawing from the stores, and prepared an investigation report;

3.2 Mr Mark Preston, Service Manager within BCE who undertook the first disciplinary hearing on **3 November**; and the resumed hearing on 11 November at which he made the decision to dismiss;

3.3 Ms Kate Watson, HR Lead with the respondent's Operations Team who attended and advised the appeal panel consisting of two Councillors and the Direct of Highways and Localised Services, which sat on **23 April 2017**, and made the decision by a majority to reject the claimant's appeal against dismissal.

The claimant gave evidence on his own behalf.

All witnesses relied upon witness statements and were cross-examined. There was a joint bundle of document exceeding 520 pages.

It was agreed that the Tribunal should not deal with quantification of remedies issues save insofar as there is a **Polkey** issue in the event of a finding of unfair dismissal; and a further issue of whether the claimant was guilty of any

contributory blameworthy conduct whereby the basic and compensatory awards should be reduced or extinguished.

4 **The issues**

4.1 Has the claimant supplied some evidential basis for the contention that the respondent had some other reason for dismissal, namely the claimant's trade union activities, or that Mr J Mulvanna wanted rid of him?

4.2 Has the respondent proved that, at the disciplinary hearing before Mr Preston, and up to and including the appeal stage, the reason or principal reason for dismissal was belief in misconduct and was not because of the claimant's trade union activities or that Mr J Mulvanna wanted rid of him?

4.3 If the respondent succeeds on issue 2 was the dismissal for that reason fair or unfair, applying the **Burchell** test?

4.4 Was there an investigation which was reasonably thorough in all of the circumstances?

4.5 Did the dismissers, both at the first stage and at the appeal, entertain a reasonable belief in the misconduct alleged?

4.6 Did dismissal fall within a band of reasonable responses in the circumstances?

4.7 If the dismissal was to any extent unfair what are the chances that if a fair procedure had been carried out by this employer the claimant would have dismissed and if so when?

4.8 Was the claimant guilty of any blameworthy conduct which contributed to his dismissal and which would make it just and equitable to reduce the basic or compensatory awards to any extent, or not to award any compensation?

4.9 Had the respondent proved on the balance of probabilities that the claimant was guilty of gross misconduct such that the respondent was entitled to dismiss without notice?

5 **Chronology of main events**

Here the Tribunal sets out the principal background facts and matters identifying areas of dispute capable of being relevant to the Employment Tribunal's decision on the issues set out above:-

5.1 At least **since 1999** the claimant has been employed as a Fencer with particular responsibility for the maintenance and repair of fencing, particularly for premises owned and managed by the respondent's housing offshoot, Your Homes Newcastle. There is a general job description for the post of Joiner contained at page 34 of the bundle which

sets out in 15 paragraphs what are said to be typical of the duties the post holder will be expected to perform but it was not necessarily exhaustive of other duties of a similar nature which may be required from time to time.

5.2 The claimant usually, but not always, worked on his own. There were only rare occasions however in which he could work as part of a team of two or more Joiners although the evidence tended to show that the claimant worked less frequently as part of a team than other Joiners in the same employment.

5.3 Although not specifically identified in the list of duties in the job description, it is also common ground that the claimant's duties included a requirement to fill out a requisition form for consumables or other materials required to perform his fencing duties and to submit it to the hatch of the stores depot at Allendale Road, Byker to a Manager to check, sign and return to the Fencer to enable him to go to the stores counter to retrieve the items. There were essentially two types of requisitions; first requisitions for consumables which could be used for a variety of jobs at different sites; and specific requisitions for particular jobs in which event the requisition would identify the address.

5.4 The claimant has had shoulder problems at work which appear to have first arisen between **2005 and 2007**. In particular from **February 2013** onwards he was referred to occupational health and there are occupation health reports dating in particular from **February 2013** onwards (pages 100-103). He was assessed for hand arm vibration syndrome in that year and it was noted that he reported the use of handheld vibrating tools. The Consultant Occupational Health Physician stated that he was fit to continue being exposed to hand transmitted vibration although the council had a duty to ensure exposure was monitored and reduced as far as reasonable practicable.

On **8 January 2014** the claimant alleges that he sustained injury in an accident at work whilst lifting a heavy bench top. The claimant subsequently brought a personal injury claim via the union's solicitors some time in **2015**, and the respondent's insurers obtained a witness statement from Mr Mulvanna, then the Principal Contracts Manager at the Allendale Road depot, in the course of which he claimed that the claimant was a very experienced operative who had received manual handling training on two occasions in **January 2005** and refresher training in **2013** in respect of which certificates were produced. Mr Mulvanna asserted that the claimant was fully aware that he should not have tried to lift the bench top himself if it was too heavy for him. There is an accident record at page 161 and an accident report form at page 162. An occupational health report of **June 2014** (page 44) indicated that the claimant had been absent from work from **15 April 2014** after undergoing surgery to repair a severed tendon in the right shoulder. He returned to work on **13 October 2014** on which date he was again seen by the Occupational Health Nurse who indicated that the claimant should avoid using impact tools or breaking through concrete but could manage sawing, mixing, digging and

the use of a nail gun. A further report dated **9 December 2014** indicates that the respondent was asking for advice about what duties he was able to perform. It stated that he should "*avoid breaking through concrete unless he uses the mechanical breaker which he can manage. He is unable to use sledgehammers, pickaxes or wrecking bars because of the force required for these tools and should continue to avoid working with his right arm above shoulder heights*". It was reported that he was "*capable of doing fencing duties within his limitations and finds working alone acceptable as he can moderate his own pace*".

5.5 On **29 July 2016** the claimant completed a formal grievance form principally against Mr Mulvenna for "*bullying, harassment, discrimination, failing to ensure my wellbeing at work and denying me dignity at work*". In summary the issues raised by him included Mr Mulvenna's refusal to allow him to use vibratory tools such as breakers at work; and having his council van taken off him at 24 hours notice, which he had used for over 12 years and to pick up and deliver home other operatives, and once a month to attend union branch meetings. He had been allowed the use of the van again but only subject to instructions that he should not transport any other operatives to or from work and did not use it to attend branch meetings. He also complained that he had been constantly monitored through the vehicle tracking system; that he had been harassed every week on his productivity on instruction from Mr Mulvenna; that he had not been given the opportunity to reduce his working hours on the step down programme. Finally, and perhaps of particular relevance to the case, he said that recently he had been subjected to a vehicle inspection midway through a working day and that he had been instructed to return materials within the van back to the stores which his Line Manager had previously agreed he could book out, "*This makes me appear either incompetent or dishonest*". This a reference to the search which had been carried out on **20 July** described in the next paragraph.

5.6 On **4 August 2016** Christine Herriot, the respondent's Head of Facility Service and Civic Management, wrote to the claimant acknowledging receipt of the grievance and stating that she had been asked by the Assistant Director to investigate his concerns. Noting that the claimant was on annual leave for three weeks, - from **4 – 27 August** - she arranged a meeting with him on **1 September** at the Civic Centre. Although we have not heard from Christine Herriot, there are handwritten notes of what appears to be an investigation process which took place which are contained at pages 53-94. These are notes of interviews which took place inter alia with the claimant, Mulvenna, Rearden, Humble and Brannen. It appears to be the case that the claimant's van was inspected by Andrea Humble, the claimant's then Line Manager, and Mr Reardon, on **20 July**; that concerns had been expressed at about that time by Eric Wilson, the Stores Manager, at the amount of consumables (including No Nails adhesive, dust sheets and black rubble bags and saw blades he was ordering from stores – see page 55). On that day, **20 July**, saws, black bags and dust sheets were noted in the back of the van. On instruction from Ms Humble, the claimant returned them to stores the next day (see

page 61). Andrea Humble had apparently signed the requisition forms, and it was asserted by the claimant that after he had returned the items to the store she had told him that "*NFA*", no further action, would be taken (see page 63).

Also of relevance is a note apparently of an interview with Mr Reardon on **7 September 2016**. Mr Reardon had taken over as Line Manager of the claimant from Ann Humble on **26 August**. In the note at page 89 Mr Reardon is reported as having described the claimant as "*very complex individual, militant, rules and regulations, trade union viewpoint*". To complete the history of the grievance process, slightly out of order, on **26 October 2016** Ms Herriot wrote to notify the claimant of the outcome of his grievance – see pages 174-177. She described in some detail the investigations which she had undertaken and in effect rejected the substance of the grievances although she did make some recommendations.

5.7 In the meantime however an investigation had begun into the claimant's ordering of consumables and other materials from the store. According to Mr Reardon the issue had been specifically raised by Eric Wilson, the Stores Manager, at a weekly team meeting with Managers on **30 August 2016**, three days after the claimant had raised his grievance. Mr Wilson had advised that it appeared that there had been an excessive amount of materials being booked out by the claimant. According to Mr Reardon, he had recently taken over as the claimant's Manager (only four days before). He was asked by Mr Mulvenna to look into the concerns raised by Mr Wilson.

5.8 According to Mr Reardon, he first asked Mr Wilson to produce a printout of consumables ordered by the claimant from the stores over a two year period - Appendix B, pages 196-215. We note however that this document indicates in several places that it was not created until **20 September 2016**. Next, he sought copies of the requisition forms signed by the claimant between **17 June and 20 July 2016** – Appendix C, pages 216-223. The claimant was invited to an informal fact finding meeting on **19 September**. The claimant had been at work since apart from a holiday between **4 and 27 August**, but had not made <u>any</u> requisitions after, **20 July 2016**, the date when his van was searched. At the fact find the claimant was accompanied by Mr Conwell, another UCATT trade union representative – Appendix D, pages 225-227. The claimant was asked about the consumables he had booked out. In particular he was asked to explain why he had booked out 27 boxes of black rubble bags, 59 dust sheets, 19 cans of WD40, 59 tubes of No Nails and 28 tubs of wipes, all in the last eight months up to **20 July**. We conclude from the detailed list of items put to the claimant that Mr. Reardon must have had an earlier version of Appendix B which has not been produced to the Tribunal. The claimant has not disputed that he did book out these items. At the fact find he gave explanations for having ordered and used them. Mr Reardon then consulted with HR and, on the basis of the replies, decided to suspend the claimant. The claimant was escorted from the premises after

being allowed to retrieve tools from his van. Mr Reardon took photographs of the inside of the van on that day, they are to be found with others at Appendix I, pages 258-265. A suspension letter was issued to the claimant on **20 September** - Appendix E, pages 229-230. Mr Reardon also notified the Regional Officer of UCATT in writing as required (see page 232). Mr Reardon's investigation continued and he obtained copies of the claimant's goods requisition forms also between **15 January and 2 June** – Appendix G, pages 233-254 (preceding those in Appendix C above). He then compiled a list of jobs completed by the claimant in comparison with other Joiners – see Appendix H, page 236. he also carried out site inspections of the sites where the claimant had been identified as working to ascertain whether the work done could explain the use of the materials ordered. A second investigatory interview with the claimant took place on **29 September** – Appendix K, pages 295-299. The documents compiled during the course of the investigation run from page 193-437.

5.9 On **26 October 2016** Mr Preston wrote to the claimant informing him that the investigation had been concluded and that he was required to attend a formal disciplinary hearing at the Allendale Road Depot at 1:00pm on **3 November 2016**. The allegations against him were identified as:-

> "*You have booked and collected an excessive amount of consumable items from the council store department of which you cannot account for and therefore is classed as theft*".

It was indicated that the hearing would be held under stage 3 of the formal disciplinary procedure and consideration would be given to the termination of his employment. The management case was to be presented by Mr Reardon. The claimant was provided with a copy of the management case which commenced with the statement of case. The management statement of case includes at page 187 a list of the materials booked out by the claimant in the six week period from **June to 20 July 2016** taken from the claimant's signed requisition forms; at page 189 a list of the same materials booked out in the previous nine months (Appendix G); and a third table which compared the bookings out by the claimant in respect of these five items with that of the total of that booked out by 12 other Fencers within the same period. That table contains an error: it records that the claimant had booked out 59 No Nails adhesive. The correct figure is 29, which is however shown on the same page above, and was detected during the disciplinary process. There was, however no supporting documentary evidence to confirm the amount of materials booked out by the 12 other fencers in the same period. There is also Appendix H, a table showing the number of hours worked by the claimant and 8 other fencers between February and August 2016, to show that the claimant was not working significantly higher hours than his colleagues (which might have explained his far larger amount of materials booked out). It also shows that the claimant performed 206 jobs in this period whereas the others completed 310 each on average.

5.10 The disciplinary hearing commenced on **3 November 2016** and was chaired by Mr Preston. Mr Conwell represented Mr Maffin. The respondent's notes of the hearing are handwritten but not typed and appear at pages 483-503 of the bundle. They are not easy to read. At the disciplinary hearing the claimant produced written comments on the contents of the management statement of case by Mr Reardon which are at pages 438-439 and page 450. He also produced his own bundle of documents which begin at page 440 and end at page 480. They include photographs of various addresses where he had performed work. Mr Preston adjourned the hearing to consider the matter and visited a number of the addresses to consider the points raised by Mr Maffin. He resumed the hearing on **11 November**. He announced his decision to dismiss for gross misconduct which was confirmed by him in a detailed letter (to be found at pages 505-508). The claimant was notified of his right to appeal within 10 days and did so on **24 November** (see pages 509-510). In a series of bullet points he set out 16 points of appeal.

5.11 A panel consisting of two elected members, Councillors Robinson and Stephenson, and Mr Peter Gray, Head of Highways and Localised Services. Councillor Robinson chaired the meeting. We have not heard from any of these witnesses but have heard evidence from Ms Kate Watson who was HR Lead within the operations team of the council, who attended the appeal and was present when the panel adjourned and reached its decision. The appeal hearing took place on **23 January 2017**. The management case was presented by Mr Preston. The appeal hearing notes are at page 511-525. The panel decided to reject the appeal by a majority. The dissenting member was Councillor Robinson. The outcome letter giving reasons was dated **6 February** and is at pages 526-528 of the bundle.

6 **Self directions on the law**

The list of issues at paragraph 4 was derived from the following relevant statutory provisions and cases thereon.

6.1 The respondent has the initial burden of proving the reason for dismissal, which must be one of the reasons specified in section 98 of the Employment Rights Act or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. One of the specific reasons for dismissal is a reason relating to the conduct of the employee under section 98(2)(b). The respondent relies upon conduct as being the reason for dismissal or alternatively some other substantial reason namely a breakdown of trust and confidence by the employer in the claimant.

In **Abernethy v Mott, Hay and Anderson [1974] IRLR page 214** Lord Justice Cairns said:-

> "*The reason for dismissal in any case is a set of facts known to the employer, or may be the beliefs held by him which caused him to*

dismiss the employee. The reason for the dismissal must be established as existing at the time of the initial decision to dismiss and at the conclusion of any appeal hearing".

The claimant's case is that misconduct was not the reason for dismissal. The real reason was either because of the claimant's trade union activities as a shop steward or in any event because for whatever reason Mr Mulvanna was out to get him. Section 152 of the Trade Union & Labour Relations (Consolidation) Act 1992 provides as follows:-

"*(1) For purposes of Part X of the Employment Rights Act 1996 (unfair dismissal) the dismissal of an employee shall be regarded as unfair if the reason for it (or if more than one the principal reason) was that the employee –*

(a) was or proposed to become a member of an independent trade union,

(b) had taken part or proposed to take part in the activities of an independent trade union at an appropriate time".

It is not sufficient for the claimant merely to assert that his trade union activities were the reason for dismissal in that context, there is at least an evidential burden on the claimant to show a basis for contending that the employer dismissed for the inadmissible reason. That principle derives from **ASLEF v Brady [2006] IRLR page 576**:-

"*Dismissal may be for an unfair reason even where misconduct has been committed. The question is whether the misconduct was the real reason for dismissal and it is for the employer to prove that. A tribunal is not obliged to reach a view about whether the conduct was in principle capable of amounting to a dismissible offence. It is open to a tribunal to find that whether or not the conduct in principle could amount to gross misconduct nevertheless in the circumstances of the case the employer had not satisfied it that it was the real reason for dismissal. It is not incumbent on the tribunal to make any findings as to the actual reason.*

It does not follow therefore that whenever there is misconduct which could justify dismissal a tribunal is bound to find that that was indeed the operative reason. Even a potentially fair reason may be the pretext for a dismissal for other reasons. For example, if the employer makes the misconduct an excuse to dismiss an employee in circumstances where he would not have treated others in a similar way, then the principal reason for the dismissal – the operative cause will not be the misconduct at all since that is not what brought about the dismissal even if the misconduct in fact merited dismissal.

> *Accordingly once the employee has put in issue with proper evidence a basis for contending that the employer dismissed out of pique or antagonism, it is for the employer to rebut this by showing that the principal reason is a statutory reason. If the tribunal is left in doubt it will not have done so …*".

In an unfair dismissal case relating to conduct, the Tribunal must determine with a neutral burden of proof whether the employer had reasonable grounds for that belief and had conducted as much investigation into the circumstances as was reasonable. If the employer reaches that stage, the third part of the **Burchell** test requires that the decision to dismiss for the particular misconduct must fall within a band of reasonable responses by a reasonable employer in circumstances relevant to the particular case. The _____ reasonable responses test in fact applies to all three of the tests namely as to the adequacy of the investigation, the reasonableness of the grounds for the belief and whether the decision to dismiss fell within a band of reasonable responses. See **British Home Stores Limited v Burchell [1978] IRLR page 279**, **Post Office v Foley [2000] IRLR page 827** and in particular **Sainsbury's Supermarkets Limited v Hitt [2002] IRLR page 23**. In connection with the band of reasonable responses test, the Tribunal must not substitute its own view for what would have been reasonable for that of the hypothetically reasonable employer. See the judgment of Lord Justice Mummery in **London Ambulance Service NHS Trust Limited v Small [2009] IRLR page 566, paragraph 43**:-

> "*It is all too easy even for an experienced employment tribunal to slip into the substitution mindset. In conduct cases the claimant often comes to the tribunal with more evidence with an understandable determination to clear his name and to prove to the employment tribunal that he was innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the employment tribunal so that it is carried along the acquittal route and away from the real question – whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal. This constitutes the application of the fairness test in section 98 of the Act to a misconduct dismissal. Section 98(4) provides that:-*
>
> *(4) Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*
>
> *(a) depends on whether in the circumstances including the size and administrative resources of the employer's undertaking the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

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

Mr Morgan of counsel h as reminded the Tribunal of the Employment Appeals Tribunal judgment in **A v B** as to assessing the reasonableness of the investigation in a conduct case – see **A v B [2003] IRLR page 405**:-

"*In determining whether an employer carried out such investigation as was reasonable in all the circumstances, the relevant circumstances include the gravity of the charges and their potential effect upon the employee. Serious allegations of criminal behaviour, where disputed, must always be the subject of the most careful and conscientious investigation and the investigator carrying out the enquiry should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as on the evidence directed towards proving the charges*".

7 Conclusions

7.1 We start by dealing with the first two issues set out in paragraphs 4.1 and 4.2. The claimant has not established that he was particularly active in conducting his trade union activities. He gave an example of only one case where he had represented a member at a disciplinary hearing, although there may have been others. There was no evidence of the claimant being a thorn in the side of the employers because of any trade union activities. He apparently used the works van provided to him to attend trade union branch meetings once a month, but that could hardly form the basis of a motive to dismiss him. The van was at one stage removed from him apparently because of his use of the van to attend the meetings but also because he used it to pick up other members of the workforce to take them to and from work. The van was subsequently returned. The remark attributed to Mr Reardon which he is recorded as having made in the course of the grievance investigation about the claimant being a very complex individual, militant, rules and regulations trade union viewpoint (see page 89), may be the view that Mr Reardon had formed of the claimant but it does not go anyway to establish that it provided a motive on Mr Reardon's part to engineer the dismissal of the claimant by the way he conducted the investigation. He was not the dismisser. The claimant gave no details whatsoever in his ET1 as to why he believed that he had been sacked for his trade union activities and such activities as he carried out cannot be described as of such character as would be likely to cause an employer to find an excuse for dismissing him. There was in any event in our view a much stronger motive to dismiss the claimant:- that being as we will explain a belief that he was guilty of misconduct. Furthermore, the claim of a trade union motive for dismissing him is not strengthened by the fact that he also asserted that Mr Mulvanna was responsible for a plan to get rid of him not less because he, the claimant, had raised a grievance against Mr Mulvanna. It is hightly

significant that he did not assert in the grievance document that he was being treated badly because of his performance of trade union activities, except that he refers only in passing to the fact that he had had the van temporarily removed from him for picking up other operators and attending a branch meeting once a month. It is in our view of some significance that the grievance was timed shortly after he had been ordered to return materials which he had booked from the stores, which, as he stated made him appear "either incompetent or dishonest".

We accordingly completely reject the contention that his dismissal had anything to do with his trade union activities. Likewise, we do not consider that any of the points raised by the claimant concerning his contacts with Mr Mulvanna which are mentioned in paragraph 5.4 of the chronology provide any sort of motive for Mr Mulvenna wanting him to be dismissed.

It is true that Mr Mulvenna did play a part in the institution of the investigation into the claimant's booking out of materials, and thus the subsequent disciplinary process, in the sense that he asked Mr Reardon to investigate it. There was also the point that Mr Mulvenna and Mr Reardon appear to have been aware during the grievance investigation which began on **11 August**, from Mr Wilson that the claimant was booking out large amounts of materials from the store and was always at the store counter (see page 55); but Mr Mulvenna did not approach Mr Reardon to investigate it until it was apparently raised again by Mr Wilson at the meeting on **30 August**. This raises the question why an investigation was not launched at an earlier stage closer to the date of the original search on **20 July**. However we have noted that the claimant was on holiday and absent from work from **4 to 27 August**. It was not surprising that an investigation be delayed until his return. In short we do not accept that there is any proper evidential basis for the contention that either he was dismissed for trade union activities or because Mr Mulvenna simply wanted to get rid of him.

7.2 The next issue which we address is whether or not the respondent satisfied us that at the first disciplinary hearing in front of Mr Preston and the appeal hearing the decision maker's decision to dismiss was based on a belief in misconduct or some other _____ reason. No cogent evidence has been produced to show that either Mr Preston or the appeal panel were approached or in any way influenced by Mr Mulvenna to dismiss the claimant. There was, as we will indicate later in these reasons, ample evidence to support the contention that, at least, the claimant was booking out far larger quantities of materials than his colleagues; and there was scant explanation from the claimant as to why he was using such a larger quantity of materials. This provided a significant basis for the belief that he was guilty of misconduct. The claimant has not put to either Mr Preston or to Ms Watson, the HR lead who attended the appeal hearing and was present during the panel deliberations, that they had some other reason and belief in misconduct to dismiss the claimant.

7.3 We now turn to the elements of the **Burchell** test. We start with the adequacy of the investigation, which forms the main part of the claimant's case that his dismissal was unfair. The claimant makes detailed complaints about the inadequacy and bad faith of Mr Reardon's investigation which he claimed showed evidence of bias. These complaints are set out in some detail in paragraphs 15-21 of Mr Morgan's detailed written submissions. We have considered these in come detail.

The point raised in paragraph 15(a) refers to the date of Appendix B about which we have made some findings of fact at paragraph 5.8 above. Appendix B is dated **20 September 2016**, but there must have been an earlier version containing the same details covering the period six weeks from mid June to **20 July**.

As to point 15(b), it is a significant fact that the claimant did not book any materials out after the search of his van on **20 July**. It was never any part of the respondent's case that the claimant had booked anything out or even visited the stores after his return of the materials following the search, on **21 July**. The fact that the claimant did not book any materials out after **20 July** but was able to continue to work until **4 August** when he went on holiday and on his return from holiday to **20 September** raises all sorts of questions about where he was getting materials from but it is a most unlikely proposition that he was using materials retained in the back of his van after the search on **20 July** when he was ordered to return items to the stores. The fact that he did not order materials after **20 July** in no way demonstrates that he was not ordering excessively before **20 July**.

As to 15(c), the contention is that Mr Reardon said at the disciplinary hearing that the items booked out in the period **June/July 2016** were used over a three week period not six whereas Mr Reardon knew or ought to have known that the period the items would have been used was approximately eleven weeks. We regard that argument as being misconceived. The items listed on page 4 of the report, at page 187, were the items ordered by the claimant over the six week period between mid **June and 20 July**. This did not include the items booked back in on **21 July**. The answer given records that Mr Reardon acceded to the suggestion it was a period of three weeks because the claimant was on holiday in **August** for three weeks, but that was not during the six week period of the booking out. It was and is not accepted that the items were used over an eleven week period.

Item 15(d) isolates a passage in Mr Reardon's report (at page 188) where he stated that the answers Mr Maffin gave for his use of the materials was "*not plausible*". He did not base that view solely on the basis that the claimant had used 43 skips during **2016** (which may or may not have been accurate) but also his doubts about the various explanations which the claimant was giving for the amount of bags he was using – Mr Reardon considered the density of the sacks meant that there was no requirement to double bag; the amount of No Nails that he had ordered when there did

not appear to Mr Reardon to be a necessity to use No Nails, and the number of dust sheets, cans of WD40 and tubs of wipes used in the eight month period of the wider investigation.

As to 15(e), we have referred above to the error in the table where the figure of 59 No Nails tubes is mentioned whereas the correct figure was 29. This was an error which was apparent on the face of the document on the same page, at page 189, where the figure of 29 is correctly noted. It is further to be noted that 12 other fencers had between them in the same period booked out no tubes of No Nails.

As to item 15(f) it is correct that no stock check was carried out on the claimant's van at the time of his suspension but a substantial number of photographs were taken and it defies belief that there could have been such a large quantity of materials left in the van which were undetected accounted for the amount the claimant had ordered.

Item 15(g) refers to a reference at page 190 to the fact that Mr Reardon stated that he had visited the sites of <u>all</u> the repairs the claimant had carried out from **February 2016** to date. It is accepted that Mr Reardon had himself visited around 60 of the sites and had recorded notes. His chargehand had visited other sites. In our view this was a sufficient number of sites to have visited to justify the attached comment that here was no visible evidence of the use of No Nails, subject of course to the claimant's argument that evidence of prior use of No Nails at any of those sites might have disappeared.

A more specific complaint is made in paragraph 15(h) of the claimant's submissions as to the following passage in Mr Reardon's report:-

> "*During the site visits I could only find three properties that would be deemed as landlocked. I spoke to two of the customers and they each stated that Mr Maffin did not enter their property and gained access to the fence via the side of the property*".

The significance of that comment needs to be put in context. It relates to the alleged overuse of dust sheets, 66 of which had been booked out by the claimant since the beginning of **January 2016 up to 20 July**, according to Appendix G. The explanation, or part of the explanation, put forward by the claimant for the use of such a large number of dust sheets was that he needed to use them in circumstances where it was not possible to access the rear of the property in question without entering the property and carrying the materials through rather than walking round the end of the terrace. In his report Mr Reardon referred to one of them, 13 Oxted Place, as being a property where he was unable to gain access, but took a photograph of the outside of the property which revealed there was access to the rear of the property via a side arch. In that respect he stated in his report, "*Therefore I would suggest that Mr Maffin did not go through this property. See Appendix R*". The one property in respect of which the claimant makes the complaint is number 38 Deepdale Crescent. In his

evidence to the Tribunal Mr Reardon explained that he had initially spoken to the woman at the property who had stated that the joiner had not carried items through the house or used dust sheets. However the next day there had been a telephone call from the male occupant of the house, Mr Wardle, who had confirmed at that stage that the joiner had used about two dust sheets. This explanation was not however recorded in Mr Reardon's report, at page 191. This failure it is submitted on behalf of the claimant was "*a blatant attempt to deliberately mislead those who were to consider the report during the disciplinary hearings*". We have examined carefully the notes of the disciplinary hearing before Mr Preston on **3 November**. The specific point was not raised at that hearing. The point was not raised by the claimant in his appeal letter of **24 November**. He did submit a number of documents and comments thereon which are to be found at pages 510AA onwards, including short witness statements from work colleagues McKinney, Main and Thompson. The specific issue does not appear to have been raised during the course of the disciplinary appeal, the notes of which are at pages 511-525.

Having considered this point, we do not accept that the failure to refer to the correction of the position with regard to the use of dust sheets at that property demonstrates an attempt to "*deliberately mislead*" the disciplinary panels. It is but one example of an inaccuracy amongst the dozens of inspections which we accept that Mr Reardon carried out. Furthermore, we note that there is an accurate record of Mr Reardon's dealings with the occupants of this property which is contained in Appendix P at page 388. Mr Reardon returned to the property, having received the telephone call from Mr Wardle, and recorded on the repair sheet or docket "*the joiner used about two dust sheets*" and the householder signed that record. It is correct however that when giving evidence to the Tribunal Mr Reardon suggested that Mr Wardle may have said that because he knew the claimant personally but the only evidence that he had that they knew him personally was because of the job he had done at their property.

We do not accept that the points raised in paragraph 15 of the written submissions, which we have dealt with individually, or more generally in paragraph 16 demonstrate or provide any support for the proposition that the investigation was not reasonably thorough or more particularly biased. We found Mr Reardon's evidence to be credible. The band of reasonable responses test in relation to the quality of the investigation does not require perfection. It will often be possible to suggest that there might have been other steps which an investigator could or might have taken, but an investigation is not required to follow up every available lead. It is correct that Mr Reardon did not speak to other fencers or any managers to seek to obtain confirmation of the claimant's account of his working methods – this was a point also made against Mr Preston. Nor did Mr Reardon or Mr Preston speak to the managers who could be identified as having signed the claimant's requisitions to see why they approved them. We regard it as unlikely that other joiners would have had any detailed knowledge of the way in which the claimant worked and it is an agreed fact that the claimant rarely worked with other joiners. The signed

statements which the claimant produced from his colleagues at the appeal hearing do not cast any serious doubt about the strength of the management case against the claimant. It was most unlikely that the management signatory on the requisition forms would have been able to make any comment on the validity of any particular order amongst the many that the claimant submitted for signature in 2016. The fact is that it is apparent that the managers relied upon the honesty and bona fides of the operatives submitting the requisition form that the goods were genuinely required either for a specific job or were generic consumables to be used on any number of jobs. This is a conclusion which is of considerable importance to the outcome of this case because the principal line of attack by the claimant as to the fairness of his dismissal was directed towards Mr Reardon and his conduct of the investigation. It is not for example being submitted that a dismisser could not have formed a genuine and reasonable belief in the claimant's guilt based on the investigation, the report and the documents accompanying it. Furthermore, we do not accept the criticisms of Mr Preston's decision making approach which are contained in paragraphs 22, 24 and in particular of the claimant's submissions. This is in effect a submission that Mr Preston had jumped from a finding that the claimant had booked and collected an excessive amount of consumables from the respondent's store to the conclusion that he must have been guilty of theft. This is said to be evident from the original dismissal letter. This is not a criticism however which is directed at the appeal panel, which found against the claimant only on a majority, thus indicating that the claimant's submissions were considered carefully and seriously. The outcome letter which Mr Preston sent out on **14 November**, at page 505, explains the basis of his conclusions in considerable detail and summarises in bullet points each side's arguments. His conclusions may be summarised as follows:-

(a) the claimant had booked out the quantities of goods in particular summarised in the management statement of case prepared by Mr Reardon and the tables at page 187 and 189, in the relevant periods;

(b) that quantity was obviously excessive both having regard to the actual work which was established the claimant had undertaken in that period; and in comparison with his colleagues who were performing similar tasks albeit that they may have employed slightly different methods;

(c) he rejected the claimant's various different explanations for the excessive use of the materials, which left unexplained as to what had happened to the materials except that they had been in the possession of the respondent and had passed into the possession of the claimant after which there was no acceptable explanation as to their whereabouts. Absent an acceptable explanation for what had happened to them, it was a reasonable inference that the claimant had misappropriate them for his own use even if the precise use to which they were in fact put could not be ascertained.

It is clear from the appeal outcome letter at page 526 onwards that the appeal panel, by a majority, supported Mr Preston's conclusions.

We consider that there was ample evidence to support those conclusions. The belief in them was clearly a reasonable belief. In addition, having regard to the belief, there was no real argument available to the claimant that dismissal based on that belief was not within a band of reasonable responses.

Insofar as there are criticisms of the overall fairness of the process, both at the initial stage and at the appeal, we reject them. The claimant may not have known of the precise nature of the allegations against him, nor did he have the documentary evidence at the initial meeting on **19 September**, the more detailed investigatory meeting on **29 November**, although specific quantities of goods he had booked out were put to him as early as **19 September**, was provided with the investigation pack and the supporting documentary evidence in time to prepare for the original disciplinary hearing and clearly at the appeal. He had the opportunity, which he took, to provide evidence in response. He was represented throughout the disciplinary process.

In these circumstances we find that the decision to dismiss was a fair decision.

8 **Breach of contract**

This is a different test from that of the fairness of the dismissal. It requires the respondent to prove on the balance of probabilities that the claimant was guilty of gross misconduct of a kind justifying summary dismissal without notice. We can state our conclusions shortly. Not only do we accept that the respondent entertain a reasonable belief in the misconduct of the claimant, we are satisfied on the balance of probabilities that the claimant was in fact guilty of gross misconduct. We likewise find the claimant's different explanations for the number of rubble sacks (equivalent to 86 bags per week or over 16 per five day working week); the use of No Nails in place of or more particularly in addition to nails or screws; the number of dust sheets; and the use of WD40 (apparently to assist in the removal of fence posts from the ground!) to be wholly incredible particularly having regard to the period over which they were consumed or otherwise disposed of by the claimant.

EMPLOYMENT JUDGE HARGROVE

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON
10 August 2017

Case Number: 2500252/2017

JUDGMENT SENT TO THE PARTIES ON

11 August 2017

AND ENTERED IN THE REGISTER

G Palmer

FOR THE TRIBUNAL