EMPLOYMENT TRIBUNALS

Claimant: Mr A Pestana

Respondent: West Hill Court Management Co. Limited

Heard at: Reading **On:** 20 and 21June 2018

Before: Employment Judge Finlay

Appearances
For the Claimant: Ms L Fitzgibbon (Counsel)
For the Respondent: Mr M Palmer (Counsel)

RESERVED JUDGMENT

1. The claimant's complaints of unfair dismissal are not well founded and are dismissed.

2. The respondent's complaint of breach of contract succeeds and the claimant is ordered to pay to the respondent the sum of £1,073.

REASONS

Introduction

1. The claimant brought complaints of unfair dismissal and breach of contract. The respondent had issued an employer's contract claim to which the claimant had not responded as required by Rule 25. Ms Fitzgibbon made an application to extend the time to respond which I refused.

2. The issues to be determined were as follows:

Unfair Dismissal

2.1. What was the reason (or principal reason) for the dismissal of the claimant? The respondent argued conduct or in the alternative, 'some other substantial reason'. The claimant suggested that the true reason was financial.

2.2. If the reason was a potentially fair reason, did the respondent act reasonably in accordance with section 98 (4) of the Employment Rights Act 1196 (ERA)? The claimant argued that a number of the allegations against him were untrue, that it was not fair to dismiss him in response to those allegations and that the respondent carried out a flawed procedure.

Breach of contract

2.3. Did the respondent breach the claimant's contractual rights by not paying for work undertaken by the claimant outside of his normal contractual duties or by failing to return to the claimant items belonging to him? If so, how much should the claimant receive by way of compensation? The respondent admitted that the work had been done by the claimant but denied liability to make payment. The respondent also denied that that it had retained any personal items belonging to the claimant.

Employer's contract claim

2.4. Did the claimant breach his contract of employment by damaging the respondent's property on his last day of employment? If so, how much should the respondent receive by way of compensation?

The hearing

3. The claimant gave evidence himself and also called his daughter, Rose Palumbo-Rodrigues to give evidence. From the respondent I heard evidence from Malcolm Glover, David Bogush and Paul Hulme. All had prepared witness statements which had been exchanged before the hearing took place. The respondent also produced a witness statement from John Jackson which was dated 29 June 2017 and which had been served on the claimant. Mr Palmer explained that Mr Jackson was unable to attend the hearing and invited me to attach whatever weight to his evidence as was deemed appropriate. Ms Fitzgibbon objected on the basis that she had no opportunity to challenge the evidence. In the event I did not attach any weight to Mr Jackson's evidence, which was not directly relevant to the issues to be determined.

4. I had the benefit of an agreed bundle of documents which exceeded 200 pages and both representatives produced helpful written submissions which they amplified in oral submissions

Findings of Fact

5. I make the following findings of fact based on the evidence I have heard and the documentation I have read.

6. West Hill Court is a block of flats containing eight residencies. The freehold to the block is owned by the respondent and the residents each own a share in the respondent and rent their flat on a long lease. One of the eight flats has remained unoccupied at all material times. West Hill Court is part of a larger estate containing 44 houses as well as the eight flats.

7. The respondent is a small company. Indeed, it has no executive directors and only one employee, the porter/caretaker. It has no HR function and no documented HR policies or procedures. It engages a management company for the management of West Hill Court. This was a company called Playfair Management Ltd from 2008 to 2015 and a company called Trent Park Properties LLP thereafter.

8. At the relevant times the respondent has had two or three directors. The three witnesses for the respondent are the current directors and Mr Jackson was a director until June 2016. All three current directors are residents. All three are retired from full time employment, having all amassed wide professional, management and business experience. They are, however, not employees and give their time voluntarily, although obviously they like the other residents have a personal interest in the respondent and its activities.

9. The salary of the porter/caretaker is paid from a service charge levied on the residents. It is a substantial part of that service charge.

10. The claimant became porter/caretaker in 2000 and he fulfilled this role until his dismissal in November 2016. His terms and conditions of employment are set out in a letter dated 12 August 2014, from Playfield, in which his job function is described as follows: “You are employed as a Porter/Caretaker. Your duties are, principally, the daytime security of Hill Court and to assist residents, within reason, as and when required. You should greet residents to Hill Court. I attach a Schedule giving further information regarding your job function and responsibilities.”

11. There were therefore two elements to the role:

11.1. Portering functions, which included meeting and greeting, assistance to residents and visitors, liaising with contractors and generally being visible and available to residents and visitors; and
11.2. Caretaker functions, which included cleaning and maintenance duties.

12. Both elements are set out in more detail in the Schedule to the letter, particularly the caretaker functions. It is fair to say that the caretaker role involved primarily cleaning rather than maintenance, although it is the responsibility of the porter/caretaker to ensure that all equipment on site is in full working order.

13. There appear to have been no issues with the claimant’s performance or conduct prior to July 2008. At no point at all were there any issues with the

claimant's performance of his caretaker duties, for which the claimant was held in high esteem by the respondent.

14. There were, however, issues and concerns with the claimant's attitude to and performance of his portering duties. Between July 2008 and September 2016, there were occasions when the respondent felt that it had cause to write to the claimant about his attentiveness and dedication to the portering side of his role. In the period 2008 and 2009, examples are as follows:

14.1. A letter from Michel Fain of Playfield in July 2008 raising some seven concerns. The letter is couched in a positive and constructive terms, although there is a clear admonishment at the end: "I would ask you to appreciate that when instructions are given to you by a director then there are very good reasons for this and we insist that those instructions are followed".

14.2. A further letter from Mr Fain in April 2009, referring back to the previous letter, again in constructive terms and concluding as follows: "I also wish to stress that I am always ready to listen to any ideas/proposals that you might have to enable you better to carry out your duties and/or to improve your working conditions."

14.3. A stronger letter from Mr Fain in August 2009, in which he states that the company is of the view that the claimant was failing to carry out his duties and that if there is not an immediate improvement, then it would be necessary to bring his employment to an end.

14.4. A meeting in September 2009 to discuss the issues raised in the August letter, attended by Mr Glover, at which the claimant had legal representation. It is clear that the claimant was somewhat affronted by the allegations levelled against him, although the note of the meeting does not suggest that the meeting was concluded entirely in the claimant's favour as alleged by him in his claim form. The note does reflect, however, a desire by Mr Glover and Mr Fain to see the claimant carry out his duties to their satisfaction, as does Mr Fain's follow up letter to the claimant. Although not described as such, the meeting could be seen as a disciplinary meeting, but with no formal disciplinary action as a result.

14.5. There is then a gap until July 2012, when Mr Fain wrote to the claimant in similar terms to previous correspondence regarding the portering duties. The letter is balanced, praising the claimant as well as criticizing him and concluding: "Notwithstanding the points made in this letter, the residents I have spoken to have all said that you are helpful and obliging, when you are available, but they do get irritated when special deliveries go astray or cannot be delivered because no one is around to accept delivery. It does seem a shame that all the good works you do in so many other parts of your job are compromised by things which should be easy to resolve, as I am sure will be done going forward"

14.6. The AGM of the respondent takes place at the end of the calendar year. From 2013, steps were taken prior to the AGMs to canvass opinion from residents about the claimant. His performance was then discussed at the AGM and the managing agents then reported to him. The evidence available suggests a continued level of frustration with the claimant, expressed in stronger or weaker terms by residents. There is talk of dismissing the claimant, but rather than dismissing him or even subjecting him to formal disciplinary action, the respondent continued to try and improve his performance with constructive criticism and encouragement.

14.7. In January 2016, Paul Collis of Trent Park reported that in a conversation between them, the claimant had used foul language towards him and had said that he was getting 'P'd off'. A meeting then took place between the claimant, Mr Collis and Mr Jackson, followed up by a letter from Mr Collis confirming that foul and abusive language is completely unacceptable but accepting the claimant's apology and reassurance that it would not happen again. The letter asks for a general improvement in the claimant's attitude towards Trent Park and assistance to residents.

15. I have spent some time dealing with events between 2008 and September 2016, not only because a significant amount of evidence was given by both parties regarding this period, but also because it is important to understand the background to what happened in September 2016, when the events occurred which led to the claimant's dismissal. During this earlier period, there is a pattern of frustration with the claimant and his dedication (or lack of it) to his portering duties. The respondent met this frustration not by disciplinary action in any formal sense but by admonishments and attempts to encourage the claimant to better performance. The gaps in the timeline above may suggest that this strategy had some success for some periods, but it is clear that the respondent and its residents were never satisfied with the claimant for long. How long this would have carried on had the events of September 2016 not occurred is of course impossible to know. It may well have been that the respondent would have continued to tolerate indefinitely what it saw as the claimant's inadequate efforts to fulfil his portering duties, mindful no doubt of his good performance as a caretaker and not keen to risk the costs which could be involved in removing him from his post.

16. The claimant has alleged that the problems he had with the respondent are primarily due to Mr Glover's poor treatment of him and that in effect, Mr Glover 'had it in for him'. I reject this. I acknowledge that Mr Glover became a director in 2008 having moved to West Hill Court the previous year and that the evidence of frustration with the claimant commenced at about the same time. However, there is clear evidence of this frustration from a number of other residents as well as Mr Glover and the way in which the claimant was challenged about his attitude to his portering duties was generally on the gentle side. I also reject the claimant's allegation that Mr Glover behaved in and intimidating and threatening way towards the him. He has alleged that Mr Glover called him into meetings in his flat at least 10 times in 2015/2016. Mr Glover denies this and I accept his

evidence. The evidence available to me suggests that on the whole, management of the claimant was left to Trent Park (and Playfield before them) and it is notable that it was Mr Jackson not Mr Glover who attended the meeting with the claimant in February 2016. I also note that whilst Mr Glover was a director, the respondent took various steps to improve the claimant's working environment, creating an office for him on site.

17. In September 2016 two things occurred which ultimately led to the claimant's dismissal. Firstly, a resident named Frances Blane emailed Trent Park on 13 September making specific allegations regarding the claimant. In a nutshell, the allegations related to the claimant being on site scruffily dressed out of working hours, sitting around in working hours playing with his dog and chatting, never offering to help her, shouting and swearing on his phone and breaching security.

18. Then, immediately before departing on holiday for a fortnight on 26 September, the claimant stripped his office of virtually all equipment, removing the desk, chair, kettle and even the fuse for the refrigerator plug, rendering the office effectively unusable for the relief porter/caretaker during the claimant's absence. He had told Elliot Esterson of Trent Park on Friday 23 September that he would be locking the door to the office but was instructed by Mr Esterson not to do so. His response was to leave the office unlocked but make sure that it could not be used by the person who would be undertaking his duties during his absence.

19. On becoming aware of what the claimant had done, Mr Esterson telephoned the claimant on 26 September. The claimant stated that he owned all of the items removed and refused to return them telling Mr Esterson not to bother him whilst on holiday. He stated to Mr Esterson that Mr Glover and Mr Bogush 'think they own the place'.

20. On the claimant's return from holiday, Mr Esterson, Mr Bogush and Mr Glover met with the claimant. I accept Mr Glover's and Mr Bogush's evidence that Mr Glover put it to the claimant that what he had done was 'an act of defiance' and a 'V sign to the directors' and that the claimant agreed, going on to criticise the directors without apologising for his own actions.

21. On 18 October, Mr Esterson invited the claimant to a disciplinary hearing. His letter set out eight allegations of misconduct and warned the claimant that if found guilty of misconduct, the claimant could be dismissed. The allegations were:

21.1. The holiday incident related above;

21.2. Being rude to the directors and to Trent Park, using vulgar and abusive language;

21.3. Failing to respond to phone calls;

21.4. Refusing to take instructions from the respondent's directors;

21.5. Swearing and shouting on his phone and disturbing residents;

21.6. Wandering about the car park outside of working hours, whilst eating and not wearing his uniform;

21.7. Breaching security by disclosing information about residents; and

21.8. Consistently ignoring the respondent's instructions

(a) To wear clothes provided
(b) To protect the stair carpet and flooring when workmen are present
(c) To greet/approach/assist vehicles entering the site.

22. It is apparent that apart from the first allegations, some of these items relate to matters which had been raised with the claimant on a number of occasions in the past and some relate to the email from Mrs Blane.

23. The claimant responded by email refuting the allegations and seeking time to take legal advice. The hearing took place on 1 November and was conducted by Mr Glover with Mr Esterson in attendance. The claimant was accompanied by his daughter. The claimant continued to refute the allegations against him.

24. Immediately after the meeting, Mr Glover emailed his co-directors summarising the discussion and stating that he and Mr Esterson would report fully at the forthcoming board meeting on 7 November. His summary is brief and refers to the claimant doing a lot of shouting and 'mad rants' about how unreasonable the directors were. Mr Esterson had taken (hand written) notes at the meeting on 1 November. However, these notes were not made available to the claimant or to the directors of the respondent and were only produced part way through the hearing of this case.

25. The directors of the respondent met on 7 November to consider their decision. Mr Hulme was out of the country at the time but joined the meeting by telephone. They discussed each point in turn and Mr Glover's note of the meeting states that: "the Directors are satisfied that there has been misconduct by (the claimant), that relations have broken down, and that it is impossible for the Directors and residents to continue employing (the claimant) to work at, and look after, their home". It is also recorded that Mr Esterson and Mr Robert Bronson of Trent Park has also been present and had endorsed the decision to dismiss the claimant for misconduct.

26. Mr Esterson then wrote to the claimant on 8 November to advise him of the decision to dismiss him. The claimant was dismissed on notice and was told that he would receive a payment described as compensation but effectively in lieu of notice. The reason for dismissal given in the appeal was 'on grounds of your conduct and for some other substantial reason'. It

also refers to personality clashes and irreconcilable differences between the claimant and the flat owners, causing disruption and the breakdown in the working relationship between the claimant and the flat owners.

27. The letter also advised the claimant of his right to appeal, which the claimant did by letter dated 18 November 2018. The letter of appeal sets out the claimant's response to all eight allegations of misconduct against him and complains about Mr Glover and his 'belligerent' behaviour towards him.

28. The appeal hearing took place on 2 December and was conducted by Mr Hulme, accompanied by Mr Bronson. The claimant was accompanied by his son in law. The meeting lasted for some two hours and the claimant went through his response to the eight allegations.

29. I was referred to a document headed 'Transcription of Appeal Meeting' which was apparently prepared by the claimant's son in law from a recording he made, unbeknown to the respondent. The respondent cast doubt on the accuracy of the transcript and the claimant could not recall listening to the recording. Mr Hulme gave evidence that during the appeal hearing, the claimant referred to Frances Blane as being 'crazy and loopy in the head'. This does not appear in the transcript and I consider that the transcript document may not be an accurate reflection of the meeting.

30. Mr Hulme decided to uphold the decision to dismiss the claimant and Mr Esterson advised the claimant of the decision by letter dated 8 December, reciting the same reasons as in the dismissal letter.

31. On 9 November, which was the claimant's last day of work, the claimant had taken what he considered to be his personal belongings from the Porter's room. In doing so, he left the room as a bare shell, removing even electricity sockets and flooring. I was provided with photographs showing the condition of the room immediately afterwards. The respondent then spent some £1,175 to restore the room to a usable condition.

Applicable law

32. Section 94(1) of the ERA provides that "an employee has the right not to be unfairly dismissed by his employer." Dismissal is accepted in this case and it is then for the respondent to show the reason or principal reason for the dismissal and that it is either a reason falling within sub section (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." (section 98(1)).

33. Section 98(2) sets out five potentially fair reasons, one of which is conduct (section 98(2)(b)). A reason for dismissal is a set of facts known to the employer or beliefs held by the employer which cause it to dismiss the employee (*Abernethy v Mott Hay and Anderson [1974] IRLR 213 CA*).

34. Once the reason for the dismissal has been established, the Tribunal applies section 98(4) to the facts it has found, to determine the fairness or unfairness of the dismissal. The burden of proof is neutral. Section 98(4) provides:

"In any other case where the dismissal has fulfilled the requirement of sub section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) –

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

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

35. In considering section 98(4) the Tribunal should ask itself whether the decision to dismiss fell within the range of reasonable responses open to a reasonable employer. It is not for the Tribunal to substitute its own view for that of the decision makers in this case.

36. In the case of *Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT* it was established that the correct approach for a Tribunal to adopt in answering the questions posed by section 98(4) is as follows:

39.1 The starting point should always be the words of section 98(4).

39.2 In applying the section, a Tribunal must consider the reasonableness of the employer's conduct not whether the Tribunal consider the dismissal to be fair.

39.3 In judging the reasonableness of the employer's conduct, the Tribunal must not substitute its decision as to what the right course to adopt should have been.

39.4 In many (although not all) cases there is a band of reasonable responses within which one employer might reasonably take one view whilst another might quite reasonably take another. The function of the Tribunal is to determine whether in the particular circumstances of the case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band of reasonable responses, the dismissal is fair. If it falls outside the band, it is unfair.

37. In considering a dismissal on the grounds of alleged misconduct the Tribunal will have regard to the guidelines in the case of *British Homestores Limited v Burchell [1978] IRLR 379 EAT*. Those guidelines involve three elements. Firstly, there must be genuine belief on the part of the employer that the employee was guilty of the alleged misconduct.

Secondly the employer must have had reasonable grounds for that belief. Thirdly the employer must have carried out as much investigation as was reasonable in all the circumstances of the case.

38. In *Sainsbury's Supermarket Limited v Hitt [2003] IRLR 23 CA* the Court of Appeal held that the objective standards of a reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed, including the investigation.

39. The tribunal should undertake an overall assessment of the procedure, including any appeal, rather than looking at individual parts of the procedure in isolation (see, for example, *Taylor v OCS [2006] EWCA Civ 702*).

40. Where the reason for dismissal is conduct, the Tribunal must take into account the ACAS Code on Disciplinary and Grievance Procedures in deciding whether an employer has acted reasonably in relation to the procedure followed. The Code sets out a number of steps which the employer should normally follow (although it recognizes that it may sometimes not be possible for an employer to follow all of the steps set out). The steps are:

40.1. Carrying out an investigation to establish the facts of the case;

40.2. Informing the employee of the issue;

40.3. Holding a meeting with the employee to discuss the issue;

40.4. Allowing the employee to be accompanied at the meeting;

40.5. Deciding on appropriate action; and

40.6. Providing the employee with an opportunity to appeal.

Conclusions

41. Mr Palmer submitted that the reason for the claimant's dismissal was the claimant's conduct. As a fall-back position, he submitted that if the tribunal were not satisfied that this was the reason, then I was invited to find that the reason was 'some other substantial reason', namely the breakdown in relations between employer and employee.

42. In contrast, the claimant does not admit that the reason for his dismissal falls within sections 98 (1) or (2) ERA. Ms Fitzgibbon suggested that the true reason was financial or alternatively a desire by Mr Glover to dismiss the claimant, such that he wouldn't have to deal with him day to day.

43. I acknowledge that there were discussions between directors and residents regarding the claimant's salary over the years of his employment and that there were suggestions that he was underemployed at times. I

also acknowledge that salary was an issue brought up by Mr Hulme at the appeal hearing, albeit only by way of comparison. However, the respondent has continued to engage full time porter/caretakers since the dismissal of the claimant, both through an agency and as permanent employees and the current incumbent is employed at a slightly higher salary than was the claimant. I do not believe there is any credible evidence before me to the effect that the respondent was motivated by a desire to save costs.

44. As for the role of Mr Glover, I have rejected the assertion that he 'had it in' for the claimant, for the reasons set out in paragraph 16 above. Accordingly, and noting that it is not for the claimant to prove an alternative reason for his dismissal, I do not accept Ms Fitzgibbon's submissions.

45. My conclusion is that the reason, or principal reason, for the claimant's dismissal was a reason related to the claimant's conduct. The set of facts known to and beliefs held by the respondent were that the claimant had acted in such a way as to breach the implied term of trust and confidence between employer and employee and create what Mr Palmer described as an 'unassailable rift' between them. In particular, the claimant had stripped bare the Porter's room to render it unusable whilst he was on holiday (item 1 in the list of 8 allegations), the claimant had been rude to directors and to Trent Park employees, using vulgar and abusive language (item 2) and the claimant had consistently ignored the respondent's instructions (item 8). These are clearly matters of conduct.

46. Having established the reason for dismissal, I turn to whether the respondent acted reasonably in treating the claimant's conduct as a sufficient reason for dismissing him, in accordance with section 98 (4).

47. Firstly, and having heard the evidence of all three directors of the respondent, I consider that they genuinely believed that the claimant had committed the misconduct in question.

48. Secondly, I have considered the question of whether the respondent had reasonable grounds on which to sustain that belief, having carried out as much investigation into the matter as was reasonable in the circumstances of the case. In relation to the stripping of the porter's room, the claimant did not deny the allegation but sought to justify what he had done, on the basis that the items he removed were his and he had the right to remove them. In giving evidence at the Tribunal hearing, the claimant alleged that he had removed the refrigerator fuse because it was no longer working. Regardless of the credibility of this claim, it was not something which he had said at the time. From the perspective of a reasonable employer, the claimant's actions were clearly unacceptable. A reasonable employer would not tolerate such actions and would consider them to be misconduct.

49. The respondent also had reasonable grounds for their belief that the claimant had been rude to directors and to representatives of Trent Park.

The claimant had admitted vulgar and abusive language in February 2016 and a reasonable employer would accept what it was told by its managing agents, there being no obvious reason for them not to tell the truth. As for the consistent refusal to follow instructions, there was a long history of concerns and issues of this nature being raised by the respondent and the directors, as residents, themselves witnessed his behaviour on a regular basis.

50. The claimant points to the body language and attitude of Mr Glover at the disciplinary hearing. In this respect, he is supported by his daughter's first-hand evidence, in alleging that he behaved inappropriately and unprofessionally. Having heard the evidence of the claimant, his daughter but also of Mr Glover, I do not consider that his behaviour in that meeting impeded the claimant from making the points that he wanted to make or prejudiced the fairness of the disciplinary hearing. Indeed, Mr Glover immediately accepted the claimant's explanation for item 7 in the list of allegations and did not then take that allegation into account.

51. As to the procedure followed, Ms Fitzgibbon made a number of points on behalf of the claimant. She submitted that:

51.1. Although they made a joint decision to dismiss the claimant, the three directors attached different levels of weight to the eight allegations.

51.2. Not all of the allegations were investigated fully. The directors took the word of Ms Blane in her email of complaint at face value and did not challenge her about what she was saying.

51.3. Mr Glover did not make a full note of the disciplinary hearing and Mr Esterson's note was not put before the other directors. There may therefore have been a danger that the other directors would not hear the claimant's version of events in full.

51.4. Mr Hulme was not an appropriate person to hear the appeal, having participated in the decision to dismiss the claimant.

51.5. Even though he had been present at the disciplinary hearing (by telephone), Mr Hulme failed to realise that Mr Glover had accepted the claimant's explanation for item 7, which did not form part of the reason why Mr Glover and Mr Bogush decided to dismiss the claimant.

52. There is undoubtedly some merit to these points and they are all factors to be considered. A failure to keep adequate notes of a disciplinary meeting can amount to a procedural defect. In relation to the appeal against dismissal, another employer may have asked someone completely independent of the business to carry out the appeal and Mr Hulme's confusion over item 7 is regrettable, as he himself admitted. A company with only three directors could have kept one of them out of the disciplinary process, leaving him to conduct the appeal.

53. On the other hand, it is not in dispute that the claimant was made aware of the substance and detail of the allegations made against him and was given a number of opportunities both in the disciplinary and appeal meetings to put forward his version of events and his reasons for acting as he did. He was allowed a companion (who was neither a colleague nor a trade union official) at both the disciplinary and appeal hearings. Amongst the existing directors, Mr Hulme was the only realistic choice to hear the appeal, being the most recently appointed director and having had only limited contact with the claimant previously, because he had spent relatively little time living in his flat. Having heard his evidence, I consider that he did approach it with an open mind and was prepared to reconsider the decision to dismiss if persuaded to do so by the claimant. In the event, however, it was the claimant's continued verbal attacks on the other directors and negativity towards residents that convinced Mr Hulme that the working relationship was no longer sustainable.

54. I remind myself that I must consider the procedure adopted by the respondent (including the appeal) in all the circumstances including the size and administrative resources of the respondent and that this is a very small organization. I must also not substitute my own view but consider whether the actions and decisions taken by the respondent were within the band of reasonable responses open to a reasonable employer, determining the question in accordance with equity and the substantial merits of the case. Viewed as a whole, and viewed from the standpoint of a reasonable employer of the size and administrative resources of this employer, I find that they were, despite the flaws in the process which have been identified.

55. I must then consider whether the decision to dismiss the claimant was also within the band of reasonable responses. One factor is that the claimant had not previously received any formal warnings for his conduct. Ms Fitzgibbon argued that the relationship between the respondent and the claimant had not broken down irretrievably and merely because the respondent says that it had does not make it so. She submitted that there was more that the respondent could do to manage the claimant and that there was evidence that their management of him had led to improvements in his conduct and performance in the past. Furthermore, the claimant had worked for the respondent for 16 years during which he had carried out many aspects of his role consistently well. Indeed, the claimant produced a large number of character references from residents of the wider estate for whom he had carried out jobs and there is no doubt that he was liked, trusted and respected by a large number of people living on the wider estate. Crucially, however, none of those character references came from occupiers of the flats at West Hill Court.

56. From the respondent's perspective, and as stated by Mr Glover, the actions of the claimant stripping the Porter's room whilst he was on holiday was of an entirely different order from the issues which had occurred in the past. The claimant acknowledged to Mr Glover, Mr Bogush and Mr Esterson that this was an act of defiance, a V sign to the directors, for

which he showed no contrition. All of the directors had heard the claimant's repeated criticisms and, in some cases, personal attacks against the respondent and many of the residents. The claimant's attitude to his employer is illustrated by his comment that 'Glover and Bogush' think they own the place'.

57. In a larger organisation it might have been feasible to move the claimant to another area or change his management line, but this would simply not have been possible in this case. There are, in effect, only 14 'stakeholders' (the occupiers of the seven flats) with whom the porter/caretaker had to maintain a working relationship. Once the claimant's conduct had caused the breakdown in many of those relationships, continued employment became unsustainable, unless the claimant was prepared to accept some responsibility for the situation and adapt his behaviour. In the event, the claimant showed no contrition and remained defiant to the last, maintaining his criticisms of the directors and residents even at his appeal meeting.

58. For these reasons, whilst another employer may have reprieved the claimant, it cannot be said that no reasonable employer would have dismissed him and from the perspective of a reasonable employer, the dismissal of the claimant was within the band of reasonable responses.

59. The claimant also made complaints of breach of contract. The first complaint was that he is owed money for work done for the respondent in addition to his contracted duties. The work in question is described in paragraphs 13 and 16 of the particulars of claim and the amount owed, according to the claimant, is £225.

60. The respondent does not deny that the claimant carried out this work but does deny that it is liable to make payment. The burden of proof is on the claimant. He asserted that he had always been paid in the past for these extra jobs whilst Playfair were the managing agents, yet the first amount owed, from the Summer of 2013, is two years before they were replaced by Trent Park. There is no evidence before me of how the sums claimed are calculated and the claimant does not appear to have chased payment before this claim was presented in 2017. In summary, the claimant has not proved on the balance of probabilities that a contract existed for payment of the sums claimed and the complaint therefore fails.

61. The second complaint of breach of contract is that the respondent has failed to return to the claimant some personal possessions, namely two door locks, a plywood door cover with air vents, floor tiles and a ladder set (see paragraph 31 of the particulars of claim). The claimant seeks damages but does not put a value on these items, nearly all of which are integrated into the property. The respondent's defence is that the claimant has collected all items of personal property from the respondent.

62. Again, the burden of proof is on the claimant and there are several reasons why this complaint fails. The claimant has provided no evidence of ownership of these items. He does not say when he purchased them, for

how much or how most became integrated into the property when they didn't belong to the respondent. By their nature and situation, they are unlikely to belong to the claimant personally and the claimant has provided no evidence to rebut such a presumption. There is no evidence that the claimant ever suggested to the respondent that they belonged to him, prior to complaining about their retention by the respondent in December 2016. In any event, any breach by the respondent must post-date the termination of the claimant's employment and this claim neither arose nor was outstanding on the termination of the claimant's employment.

63. Finally, the respondent brings an employer's contract claim for £1,160 as the cost of repairing damage to the Porter's room caused by the claimant on the last day of his employment. Having refused the claimant's application to extend time to defend this claim means that the claimant did not take part in the proceedings insofar as they related to the employer's counterclaim. Nevertheless, I heard evidence from the respondent and I am satisfied that damage was caused by the claimant for which he should recompense the respondent.

64. The employer's claim is based on four invoices which are at pages 154 – 157 in the bundle. The fourth of these is hardly legible but appears to be from a locksmith. It is not clear why that cost should be the responsibility of the claimant and I award compensation of £1,073 as the total of the first three invoices less the additional items in the second.

65. The provisional remedies hearing will now be vacated.

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Employment Judge Finlay

Date: 14 July 2018

26 July 2018

Sent to the parties on: .....

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For the Tribunal Office