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EMPLOYMENT TRIBUNALS

Claimant: **Mr S Langridge**

Respondent: **Rye Street Braintree Ltd**

Heard at: **East London Hearing Centre**

On: **Tuesday to Thursday 31 July to 2 August 2018 and Tuesday to Thursday 2 to 4 October 2018**

Before: **Employment Judge Prichard**

Representation

Claimant: Mr M Harris (counsel, instructed by Homes & Hills LLP, Braintree)

Respondent: Mr J Buckle (consultant, Employment Law Advisory, Greater Manchester)

RESERVED JUDGMENT

It is the judgment of the Employment Tribunal that: -

(1) The claimant's claim of automatic unfair dismissal by reason of making a protected disclosure under section 103A of the Employment Rights Act 1996 is dismissed on withdrawal by the claimant.

(2) The claimant was fairly dismissed therefore his claim of unfair dismissal under section 94 of the Employment Rights Act is dismissed.

(3) The claimant's claim of breach of contract is dismissed.

(4) In those circumstances there can be no award under section 38 of the Employment Act 2002 in respect of the claimant not being given a statement of written particulars of employment under section 1 of the Employment Rights Act.

REASONS

1 The claimant, Mr Scott Langridge is now aged 42. He worked for the respondent accident repair centre for 3 complete years from 12 May 2014 to 2 August 2017 when he was dismissed with pay in lieu of notice following a disciplinary hearing.

2 The conduct for which he was dismissed had taken place during the currency of a first and final written warning given to him on 2 November 2016, with a live duration of 12 months.

3 The final dismissal was based upon the previous warning. This seems to be a case where the respondent would not have dismissed the claimant were it not for the presence of that previous warning. I have taken to heart the guidance provided by the Employment Appeal Tribunal in the case of *Wincanton Group plc v Stone* [2013] IRLR 178 EAT. It is a clear statement of principle as to how tribunals are to deal with previous warnings when hearing unfair dismissal cases. Tribunals are urged not to "go behind" previous warnings. Although they may take into account the factual circumstances leading to such warnings, they cannot reopen a challenge to the previous warning if it is unappealed or unsuccessfully appealed. The claimant's appeal against the warning was dismissed. I say that this at the outset because too much hearing time has been spent on challenges to the fairness of the previous warning.

4 The respondent is a sizeable accident repair business. Rye Street Group operates over 7 sites: Haverhill, Bishops Stortford, Stansted, Braintree, Broxbourne, Cheshunt and Boreham Wood. The largest of these is Bishops Stortford.

5 The claimant was a skilled paint technician within the business. That is his specialist skill. Much of the respondent's work is work for insurance companies. One in particular I heard of, Liverpool Victoria, is a major client. Over the whole group there are about 210 employees, there are 30 of those in Braintree including the administration. The pay structure is that all skilled workers are paid a basic hourly rate of pay but they can all (except valeters) receive efficiency bonuses.

6 The way this works is that insurance companies allow a certain number of hours for each operation. If a technician can complete that operation in less time he gets a bonus on the labour balance. That and that is a bonus to him and it also enhances the profits of the business.

7 The claimant had what is referred to as a "back stop". His basic rate was higher than nearly all other technicians barring Dan Philpott - the other paint technician. He is not a paid efficiency bonus until he reaches 140% efficiency but the claimant averaged an efficiency of 200% so it made a substantial difference to his take home pay which at its peak was roughly £35,000 net.

8 Following claimant's dismissal, he found another job as a paint technician in a BMW franchised body shop for approximately £7,000 less per annum than at his peak earning with the respondent.

9 The respondent's operation comprises 9 steps: (1) mechanical (e.g. steering); (2) strip; (3) panel beating; (4) prep; (5) oven loading; (6) paint; (7) fit; (8) polishing and (9) valeting. Target hours will be allocated to and paid by the clients for each of those 9 steps.

10 The claimant was highly regarded as a tidy workman and a good efficient painter.

11 The tribunal heard evidence from 3 witnesses for the respondent: Bill Duffy is the Managing Director of Rye Street Braintree Ltd; Vincent Tice was the Group Operations Manager, a role he has held since 2013. Coincidentally he used to be the claimant's manager at a previous employer. He thought highly of the claimant. Finally, Lee McNaughton is a Director and has been associated with the company for the past 22 years. It was started by his father Tom McNaughton.

12 Workers at Braintree had become aware that there seemed to be a private business developing at Braintree. Those who had seen anything at all identified the 3 individuals involved as Brian Clarkson the Manager of the Braintree shop; Keith Perry a relatively newly joined panel beater, and the claimant. Descriptions of what was happening centred around parts of cars which were due to be replaced; the old part would be retained, repaired, resprayed and apparently sold on. The respondent had strong suspicions. This had been notified to them sometime earlier, both to Nick Ferris the group estimator, and to Mr Tice. Nothing was done about it at first. It seemed that the scale of activity increased however. Something had to be done.

13 The claimant was invited to a disciplinary hearing. It should properly have been a disciplinary investigation at that stage because this had not been fully looked into.

14 The claimant was told in a stiff and formal way without any description that he was to face allegations as follows: (1) fighting with another technician, 2015; (2) taking a piece of equipment without permission, 19 May 2016; (3) entering the building in the middle of the night without permission, 19 May 2016; (4) leaving site without permission, 12 September 2016 and (5) theft from the company. He was given no description of that latter charge but it was in fact a reference to the suspicions that he was involved in a group moonlighting and making money on the side apparently using the firm's consumables, and possibly the firm's paid time too.

15 The claimant was invited to attend a meeting on 5 October which was to be chaired by Bill Duffy. Brian Clarkson would be in attendance also apparently. That did not happen because in the meantime Brian Clarkson himself became subject to a disciplinary investigation. Pete Sadler the group accountant attended instead.

16 At that meeting the claimant was presented with a copy of the company spend on paints. There was one paint in particular - White 1 litre 098. This item retails, as I accept, at £285. The company receives a substantial discount from the suppliers which I will not repeat in this judgment which is a public document. It is sensitive commercial information. The details supplied are apparently on an Excel sheet obtained from the suppliers who are Akzo-Nobel/Sikkens. That is clear because Rye

Street Braintree is referred to as the "Customer".

17 The comparative spends were shown for the first 9 months of the year i.e. just prior to the disciplinary investigation which was held on 5 October 2016. They show for that period that the consumption in Braintree was 85 litres and that in Bishops Stortford was 29 for the same period. In Bishops Stortford, a larger body shop, they turn out 280 cars per month compared to Braintree's 200 per month. It therefore meant the consumption was way out of line with what might be expected. Something was going on, thought the respondent, not unreasonably.

18 The fight charge referred to a previous altercation between the claimant and a less experienced painter, Mr Paul Salberg. The altercation had become physical; they both fell to the floor. The claimant claims that this was dealt with by Brian Clarkson the previous year but the respondent did not consider that it had ever been fully dealt with.

19 The second charge, taking a piece of equipment without permission and entering the building in the middle of the night without permission, refers to a Snap-on electronic diagnostic tool. This is one of those diagnostic tools which can interrogate the vehicle's engine management system to find out why a certain warning light may be showing on the dashboard. It is a useful and expensive piece of equipment. Technicians had used this in the past for their own cars or family cars -it was one of the perks of the job. Borrowing it was not disapproved of. However, one had to obtain permission from management to use it at any given time. The claimant had not obtained the permission. When its absence was noted Brian Clarkson called the claimant to ask him if he had it. The claimant made a bad judgment and decided to lie and say he did not have it, when he did. He has been open about it at this tribunal hearing. He had no choice. He says that Mr Clarkson was not around at the time he wanted to borrow the tool so he just took it anyway.

20 The claimant subsequently borrowed a key to the premises from someone else who was due to be working at the weekend and he let himself in at night when no-one would notice and, according to Mr Duffy, left the device. However he did not leave its connecting lead. Later he brought the connecting lead as well. He left this all by the workplace of a technician called Genarro, apparently in the hope that people would think that Genarro had taken the tool. That is what his intention seemed to be.

21 The claimant was caught out on this because the record of the key lock entry system identified him as having been the person who entered the building. When he realised that he was positively identified by irrefutable records he admitted that it had been him and that he had made a bad judgment and should not have denied having it.

22 The seriousness of this charge, in the respondent's view, was that it revealed that the claimant was prepared to lie. It had been his instinctive reaction.

23 The next charge number 4, refers to an occasion where the claimant had come in on Monday 12 September. He was angry that Dan Philpott had worked at the weekend and completed the cars he had prepared on the Friday, thus earning money at the claimant's expense, as the claimant saw it. The claimant apparently said he needed time to cool off and told Brian Clarkson so as he left site. Later, Mr Duffy took

this up with him and said that he could not do that. One can understand his concern, given a fully loaded workshop, and tight time schedules working towards the ECD (expected collection date) for each vehicle. The insurer Liverpool Victoria, had an exacting service level agreement with the respondent whereby if ECD's were missed financial substantial penalties were raised from the respondent. The claimant returned to the site once he had got over his anger.

24 The last charge was obviously the most serious. The value of the paint, even at cost price, was in the region of £20,000. It is true that the respondent never went into analysing "mix reports" to see how much white 098 had gone through legitimate booked jobs but the comparative body shop figures themselves suggested something was seriously anomalous at Braintree.

25 It remains a fact that to the end of this tribunal hearing, without any detail to go on, the claimant has stated that these figures have been manipulated by the respondent to create a case against him. If I have to make a finding on this I find that they were absolutely not fabricated. It would have been quite unnecessary for the respondent to do this. Circumstantially it might have been possible as they were sent in Excel format which is editable, unlike a pdf but there was the witness evidence too. I can see no motive at all, quite the opposite. None was suggested by the claimant.

26 After the disciplinary investigation on 5 October, the respondent set about gathering witness statements from all the employees at Braintree. Some of these were extremely damming and unequivocally named: Brian, Keith and the claimant Scott, all preparing, painting and selling damaged parts. Apparently, the deponents stated that they did not want the witness statements themselves to be given to the claimant. They felt it invidious and were wary of the claimant. That was Mr Duffy's account.

27 I accept his evidence. There is a considerable body of case law in unfair dismissal cases reflecting the need for an employer to afford an informant a degree of anonymity if requested, where it is possible. The statements have been disclosed in these tribunal proceedings and apparently they were summarised to the claimant by the respondent at his disciplinary hearing without actually showing him the written statements or giving him copies.

28 Max Miles is an estimator based at Braintree. His statement clearly identified those 3 and clearly identified distinct incidents and positively identified that company paints and materials were used for these jobs. At one stage Brian Clarkson had told Mr Miles that a job on a Fiesta bumper was for Keith's daughter's car. Mr Miles knew this was a lie because he knew that Keith's daughter drove a Fiat 500 and not a Fiesta therefore, it occurred to Mr Miles that Brian Clarkson was attempting to defend Keith. He and other witnesses described a number of items sent to Braintree deliveries addressed to Brian Clarkson personally. Again, that seemed highly suspicious.

29 Chris Turner who had since left Braintree to become the Assistant Manager at Haverhill body shop gave a detailed 5-page witness statement clearly identifying the same 3 individuals, clearly describing incidents, bonnets being left behind ovens and then disappearing somewhere. He clearly felt strongly about it. He also gave evidence that he talked to Dan Philpott, the other painter, about it. Dan told him that Brian

Clarkson had offered to take him into the fold and that he had declined.

30 Brian Clarkson was interviewed. He told the truth about his knowledge of the borrowing of the Snap-on diagnostic tool and it being returned to site in the night time and that the claimant did not have permission. As far as any of the moonlighting was concerned he stated:

> "I have not witnessed nor had any knowledge of any product/parts being removed from site without prior consent … I must say I am disappointed in the way this situation has been looked into."

That statement was made on 11 October. His knowledge of parts being removed from site would hardly have been admitted.

31 Sam Lepley is a prepper and he clearly describes seeing the claimant with various bumpers and wings behind the ovens which had been painted one day and were gone the next. He stated the claimant once acted shiftily when Mr Lepley watched him. He cleared the screen on the mixing scales before Mr Lepley could see what had been on the screen. (This is a sophisticated mixing technology). He clearly implicated Keith Perry as well.

32 Michael Kusel a panel beater, described a Mercedes bonnet coming and then going out but he gave no names of any individuals.

33 There were other witnesses who did not implicate the claimant.

34 Hannah Bass the receptionist, clearly implicated Brian Clarkson and Keith Perry. She did not mention the claimant. It was suggested by the respondent she might not have done because she was a friend of the claimant's young son at school.

35 Jonathan Smith said that there was nothing but hearsay at the workplace and believed that animosity was the worst problem.

36 Finally, Tom Baldwin the Parts Manager, stated that he had not seen anyone taking anything off site but in the nature of his role in the parts department that might well have been so.

37 Hannah Bass's evidence was of further interest because she, like the claimant, lives in Braintree and had seen unusual vehicles parked outside over the weekends but had not spotted any activity within the building, despite having looked for it.

38 It is not particularly meaningful to play a numbers game with these statements (as Mr Harris urged me to). Many employees were not interested. 4 out of 9 positively identified the claimant and the others and described disappearing parts in some detail. Michael Kusel identified the practice but did not name any individuals as associated with the practice. Hannah Bass certainly identified the practices but did not implicate the claimant specifically. She did implicate the other two.

39 The upshot of the investigations was that Keith Perry, alone, was dismissed. He had only six months service and according to Mr Duffy was a far less skilled worker

than Brian Clarkson or the claimant.

40 The claimant was subsequently invited to another disciplinary meeting on 24 October and this was to be the disciplinary hearing proper. The fact that the original hearing had been mis-described in the letter does not render this an unfair dismissal procedurally. Far from it. Any procedural error was in the claimant's favour. He was given a rough idea of the outline of the allegations and was given the right of accompaniment which would not strictly apply in an investigation meeting.

41 The respondent has failed to locate the minutes of the meeting of 24 October. Apparently, they have searched everywhere and they are nowhere to be found. I am sure they would have provided them if they could have.

42 In a remarkable passage of evidence later on in the second part of this hearing, the claimant stated that he had recorded all the meetings bar the 5 October meeting. He had done this covertly. He still has the recordings. Having stated throughout his cross-examination that the respondent's minutes were not accurate, this was a remarkable admission. Covert recordings of hearings in the workplace are regrettably becoming more common these days. People who do them must appreciate that an audio recording is a "document" and it is disclosable in legal proceedings. This has been a fundamental breach of the duty of disclosure in these proceedings. If the claimant has the fullest and most accurate record of the meetings, it suggests that his assertion that the respondent's minutes are inaccurate is an empty assertion without substance because he had it in his power to demonstrate such inaccuracy but did not choose to do so.

43 The claimant has been legally represented throughout. He made out that his solicitor said they "need not bother" with the sound recordings. Instinctively I find that surprising advice coming from admitted solicitor whose professional duty surrounding disclosure is to be scrupulously open and honest about anything that has come to his attention.

44 The reason why the meeting of 5 October was not recorded is explained by the following passage I read from the company's minutes:

> "Bill Duffy — Are you recording"
> Scott Langridge — I was going to come to that.
> BD — You may not record as you were not going to tell us and I have not agreed."

The claimant describes how his bag, his phone and other personal items were removed from him, taken into a different room, not before the claimant had turned off the recording on his phone.

45 The recording of subsequent meetings was therefore not only covert but deceitful as he knew the respondent objected. His protesting during this hearing that the respondent's minutes are inaccurate where they do not record what he wants the tribunal to find that he said, is impertinence. He had it within his power to correct any of the errors and omissions. As it happens he had the only record of the meeting of 24 October. The respondent lost their minutes. There are minutes of all the other

meetings in these proceedings. They are all roughly in the same format, and they are all typed.

46 The claimant explained that he had not provided the recordings that he had because he had been waiting to see the respondent's typed-up version of the minutes. This is illogical and not a credible explanation. He claims at a later meeting that he was waiting for proper typed-up minutes before he would sign them as being an accurate record.

47 There was a disciplinary hearing on 31 July the following year where the notes were taken by Lee McNaughton. I have seen the handwritten notes, they are 100% legible and the typed version does not add anything to them. The foot of the last page Mr McNaughton recorded: "Refused to sign. I made him aware this fails part of our process that he is refusing to adhere to." The claimant's attempted explanation of this was nonsense. The handwriting was easily legible.

48 Episodes like this considerably damaged the claimant's credibility and reliability in the tribunal's eyes.

49 Remarkably the outcome of the disciplinary of 24 October that the claimant not dismissed, but was given a first and final written warning dated 2 November 2016. It stated as follows:

> "Accordingly, I am writing to confirm the decision taken that you receive a first and final warning in accordance with the company's disciplinary procedure due to the seriousness of the allegation.
>
> This warning will be placed on your personal file but will be disregarded for disciplinary purposes after a period of 12 months provided your performance/conduct reaches a satisfactory level.
>
> You are not permitted to mix colour or lacquer or paint vehicles for the time being. Your rate of pay will remain the same but rather than painting you will be prepping and polishing. We will review this arrangement in 6 months time."

The respondent uses employment consultants. Many of these formal letters are templates with the necessary case-specific detail added.

<u>Demotion / breach of contract</u>

50 The respondent's stance is unequivocally that the claimant was not demoted. (This refers to the claimant's breach of contract claim). The respondent is legally vulnerable because for a company employing 210 people, it is remarkable that they issue no written statements of terms and conditions under s 1 of the Employment Rights Act 1996. Had the claimant won on any aspect of his substantive claims the tribunal would have awarded him 2 or 4 weeks' pay. In the event, none of these claims has succeeded.

51 The company does have a company handbook in which it is clearly stated that demotion is an option open to the company. However, they state this was not a demotion. Some evidence arises from an offer letter to the claimant was sent in March 2014 which appoints him to a "paint shop position". In that position he is as much working

in a paint shop position as a prepper and polisher as he was as a painter.

52 The claimant states that his ability to earn in his altered role was inherently and inevitably less. There is authority to the effect that, if a company is contractually entitled to impose a change in role, if a loss of pay was only indirect and oblique consequence of exercising that entitlement then it does not constitute a breach of contract. See *Spafax v Harrison* [1980] IRLR, 442, CA.

53 There was no written contract or statement of terms and conditions. It is correct to say that the right to demote given in the handbook is not strictly contractual, because the handbook is not incorporated into a written contract. But it is the tribunal's task, in the absence of a written statement of terms and conditions, to construe what the claimant's contractual terms were in practice. I consider that the claimant was originally a paint shop technician. After his first and final written warning he was still a paint shop technician. I therefore consider the respondent was not in breach of contract. Alternatively, I find that the respondent was anyway entitled to demote by way of disciplinary sanction, as the terms of the company handbook can be incorporated.

54 In theory, and in practice, the claimant could have earned as much as before. I so find. The highest paid technician in the whole group was a prepper / polisher, as the respondent pointed out.

55 The claimant complained in practice that people were reluctant to give up their prepping work which was inherently more lucrative than polishing. He also complained that if painters have to polish their own work they make a better job of the paint in the first place so that they do not have to spend too long polishing it. If the polishing is done by someone different the painter does not have an investment in doing such a good paint job.

56 I can understand these arguments. I also studied a worksheet that indicated to me that there was clearly more money to be made prepping than polishing and that the claimant polished for 90% of the jobs on a sample week July 17. However, I have not been shown a larger picture to be able to make a judgment of the claimant's generalisation.

57 I was struck by the fact that the respondent was so keen to retain the claimant's skills that they did not dismiss him after his misconduct. It had cost the company money and had seriously undermined trust between them and the claimant.

58 It makes the premise of the claimant's case, that the respondent was out to dismiss him, implausible. The majority of employers would have taken the dismissal option with this degree of loss of trust. This employer did not. The respondent I find was purely motivated by wanting to remove the claimant from any temptation to use or take company materials - paint.

59 Following this, I accept the respondent's evidence that the claimant became disaffected, grumpy, and surly with colleagues and management. Mr Tice and Mr Duffy were clear and unanimous that the claimant's return to work as a polisher / prepper was not at all happy for anyone concerned.

60 By 10 November, he brought a grievance against Michael Keen, one of the preppers and other members of staff making derogatory and abusive comments. This was dealt with by Lee McNaughton the Managing Director. He talked to several other members of staff, in particular Michael Keen, Lee Williams and Michael Kusel. They all denied anything of the sort, and were surprised by the allegations.

61 By letter of 5 December, Mr McNaughton formally dismissed the grievance, giving the claimant a right of appeal.

62 Mr McNaughton had also heard the claimant's appeal against the disciplinary warning and he found no reason to uphold the claimant's appeal.

63 Throughout this hearing, as in the respondent's workplace hearings, the claimant has based his case on mere assertions rather than offering any detailed evidence to refute respondent's allegations. Mr McNaughton was given no material to consider in support of the disciplinary appeal.

64 For the respondent's side there was the record of the paint suppliers, and the witness statements from other employees at Braintree.

65 The claimant's warning and his removal from paint mixing was very much part of the background for the next disciplinary process.

66 The claimant had to remind the respondent by several emails that the sanction of being removed from paint duties was to be reviewed in 6 months' time. The respondent should have proactively taken this up sooner. But it is not a central issue in these tribunal proceedings, given that I do not find that there was any breach of contract involved in changing the claimant's duties (Para 50 above).

67 A review meeting took place on 18 July 2017 after 9 months. The claimant was determined to get back. He was also determined for his ATA certification to be renewed (Association of Technicians Accreditation). It is a certification that costs money. Not every technician in the business has ATA certification. Usually the lead painters, (which the claimant had been), will have ATA certification. Mr Duffy confirmed at the review meeting: "We will not be renewing at this moment in time as he wouldn't with anyone who is on a warning". The claimant had not asked Mr Tice about this. Mr Tice was in charge of qualifications and training. Nor did he previously ask Mr Duffy. He had raised it, he said, with Alan Bishop who had become the new manager at Braintree following the removal of Brian Clarkson.

68 At the review meeting, the claimant came across as surly. At one stage Mr Duffy said: "We've followed the correct process with your warning and subsequent hearings and we have moved on but you're constantly holding a grudge". The claimant said: "It's all a load of bullocks" to which Mr Duffy took exception. It proved the point he was making about the claimant being surly.

69 Later in the same meeting, the claimant stated, remarkably, that he had the spend reports showing how much White 098 was being used during 2017. Mr Duffy

responded:

> "Looks as though you have more information than us where did you get this information from?"
>
> Claimant: "It came from Pete Group Operations Manager" [Pete Sadler].
>
> Mr Duffy: "Pete wouldn't have sent you this information so where did you get it?".
>
> Claimant: "I was shown the information".
>
> Mr Duffy: "By whom?"
>
> Claimant: "Not saying"
>
> Mr Duffy: "I'm not happy about having my business data being shown to anyone. This goes into data protection. You need to tell me how you have gained access to our financial reports."

70 The claimant was deliberately evasive about this, as he was too at this tribunal hearing. In a second remarkable statement he said that he had written down the paint spends which he now says he was told by Craig Banks. Craig Banks apparently was told it by Alan Bishop. Again, I will not give the figures here but the claimant had a rough idea what the cost price of White 098 was and had calculated for the period in 2017 that Bishops Stortford had used 16 litres over a 4-month period; Broxbourne 23 litres over the same period and Braintree 61 litres in the same period. When I asked him where his written note of the spends was he said: "It's in my notebook". I said: "Where is your notebook?" He said: "It's in my bag there". I asked him to produce it and made photocopies of 3 of the pages just so as not to be selectiv, and so as to avoid later entries which might have been legally privileged.

71 Following that, I gave the respondent leave to adduce the spend for the year 2017 from the paint suppliers. They produced this on the penultimate day of the hearing. So far from revealing 61 litres for the 4-month period, the true figure is 10 according to the spend sheet. I absolutely reject the claimant's suggestion that the respondent has manipulated these figures for Braintree.

72 The claimant alleged at this hearing that Alan Bishop had said to him there were problems with the paint consumption and "it's the White again mate". I completely reject this allegation too. No detail was given earlier at the time in the course of disciplinary meetings. The claimant had no recordings of these. I accept the accuracy of all the minutes the respondent has put forward. I do not accept that the claimant said this and that it was omitted from the minutes. It would anyway be astonishing if such a striking statement from a manager would have been omitted from the minutes. It would certainly have been investigated too, with Mr Bishop. As a result of the claimant saying that he had seen spend reports, the respondent asked Mr Bishop if he had ever shown the claimant these. But that was all he was asked.

73 The respondent also started to have suspicions that the claimant was choosing jobs for the sake of maximising his earnings rather than the respondent's priority which was to meet the ECD's on individual cars. I will not go into the detail of the cars concerned. I was shown detailed photographs. The evidence is from the worklist drawn up at the start of Friday 28 July 2017. The sheet was printed off at the start of the day at 07:52. I can see the claimant's left-handed ticks down the side for jobs he had done.

74 The claimant's managers were getting fed up with the claimant's apparent lack of cooperation with them. It was Alan Bishop and Andrew Monrose the new assistant manager at Braintree. This lack of cooperation was witnessed not only by Alan Bishop and Andy Monrose but also by Bill Duffy. They had asked Mr Duffy to come in to see the sort of problems that they were having with the claimant. Andy Monrose pointed out a Fiesta van. The claimant had signed off the job but he had not finished polishing the door apparently. Mr Duffy saw this and described the door in question as "shocking". Mr Monrose put pink chalk on it indicating that it had to be redone. After it was pointed out, the claimant finished the job properly.

75 Mr Harris submitted repeatedly that this meant that the door had, in fact, been "polished" and therefore the respondent had no case against the claimant. As originally put, this contention was laughable and an insult to the intelligence. He later played it down in more refined way saying this was simply a matter of "quality checking". It was still a deeply unhelpful submission.

76 The point, as the respondent knew, was that the claimant had been a very competent technician with high standards and a great efficiency. That work was being turned out which was so poor indicated that the claimant had ceased to care. This was a serious problem.

77 Because of the claimant getting on to a job too late, because he was doing other less urgent jobs, a customer's ECD was missed and the customer had to come and collect the car on the following Monday. The customer was going away for the weekend and had to keep the courtesy car he had. It was not such a good car as his own. The valeters stopped working at 5pm. If the claimant finished polishing a car at 4.50pm then the car could not be valeted and the ECD would inevitably be missed. Mr Duffy stated that a valet might take up to 2 hours if it were done properly. He also reminded the tribunal that valeters do not receive efficiency incentive. They are simply paid by the hour.

78 Managers were reporting finding the claimant's attitude objectionable. Mr Monrose objected to the claimant saying: "I've DA'd the fuck out of it" referring to polishing bumper on a KIA. Taken all in all, one can regard all these as relatively low-level misconduct. However it portrayed a profile of the claimant being extraordinarily difficult to work with or manage. That was the problem the respondent had. It was a serious problem for them, inevitably affecting mutual trust and confidence.

79 Some 2 weeks after the review meeting the claimant was called into a disciplinary hearing again. He makes a criticism that there was no formal outcome to the painting review meeting. In my view that was not necessary. He knew enough from that meeting to know that his situation was not going to change at that stage.

80 He had incidentally been offered a painting job in Bishops Stortford prior to the review but he turned it down allegedly on the basis that it was a 22-mile drive rather than a 2-mile cycle ride to work. His family only had one car. I did not find this convincing. The claimant said this proved that his suspension from painting was all nonsense. The respondent disagreed and I can understand why.

81 There was a completely different management regime in Bishops Stortford. Although Brian Clarkson was there he was not in a management role. There would have been sufficient oversight. What had apparently happened at Braintree could not have happened in Bishops Stortford.

82 It seemed that the respondent thought the claimant was determined to play the martyr and not to accept any invitations to better his situation. In Mr Duffy's words, he was determined "to bear a grudge".

83 In August 2016, the claimant had had a 1-month family holiday in Florida. It is remarkable that for that 1 month the consumption of white 098 declined dramatically. It is also remarkable that in the last 3 months of 2016 and the next 12 months 2017, the consumption was completely within the normal parameters you would expect at Braintree.

84 The claimant's purported explanation about other branches making extensive use of acrylics instead of such paints as white 98 could not be accepted. Acrylics are essentially for commercial vehicles only.

85 In July 2016 the consumption was 12; in August it was 7; in September it was 12. The highest was in was May 2016 when 14 litres were delivered. For that year to date when the claimant was painting, it was 85. For the last 3 months of 2016, when the claimant was removed from painting the consumption was 11 litres only. That was well within expected parameters.

86 The claimant was taken to an investigatory meeting on 31 July. It was conducted by Phil Haywood the group Body Shop Manager. Lee McNaughton was there and took the handwritten notes, (legibly as mentioned above). The claimant was asked about where he got the paint spend reports from and he still refused to say where they had come from. Then he said he did not have any physical copies but had seen the data. It became clear to them that the claimant was bluffing, and once more lying, about having the reports themselves.

87 He flippantly said: "What if I have just said that to get a reaction" to which Mr Haywood replied: "Then I would say that anything further you have to say would be hard to believe" which was a fair comment, in context. The claimant made very non-specific comments when Mr Haywood said: "I can prove the Audi was ready for 9am to go out on 28th July". The claimant just said: "This is just a witch-hunt".

88 The other charge put to the claimant was the mess around his workstation. This was supported by photographic evidence with polishing discs which appeared to be lying in a group just short of the bins.

89 Previously in 2016 Mr Duffy had commended him as being a tidy worker as well as being a productive one. That was pointed out to the tribunal by the claimant in an effort to refute what the respondent was saying. In fact, it proves the opposite, it showed that the respondent's suspicions that the claimant was not making any effort were correct. The claimant stated: "The wind must have blown the discs on the floor that is not how I left it" - an explanation which the respondent found unlikely. I cannot but agree

with them having looked at the photograph and the position of these polishing discs, some 6 inches in diameter. They appear to need a strong wind to shift them into a cluster just short of the bins.

90 By letter of 31 July which was handed to him, the claimant was invited to a formal disciplinary hearing on 2 August. He was entitled to be accompanied, and he was warned that he might be dismissed. The letter should have reminded him specifically of the effect of the current live final warning. However, that warning had been enclosed as a document for the information pack for the current disciplinary hearing.

91 On this occasion the witness statements were not anonymous as this was not such a sensitive issue as the theft of company stock and use of company time. Both managers give detailed evidence about the events of 28 September. The charges were: -

91.1 housekeeping;
91.2 failing to follow the job instructions;
91.3 failing to follow the job card instructions on previous day;
91.4 claiming hours for jobs which had not been completed;
91.5 accessing confidential company information – the spend reports;
91.6 lack of respect for management.

The claimant denied all 6.

92 The disciplinary hearing went ahead on 2 August. The claimant attended. He was accompanied by Dan Evans who was one of the company's drivers. Mr Duffy conducted the hearing and Holly Dacosta took minutes.

93 The claimant was very sparing in his explanation of the truth about the company records. He said: "No I won't tell you. I haven't access any confidential information on a computer. I do not have access to any paint information." Mr Duffy also pointed out: "You could not obtain the information you told me you have by looking over someone's shoulder". It turns out he was right because the claimant has since said it was Craig Banks, another painter, who informed him of it, or, as it turns out, misinformed him, (if he told him at all). The claimant was a long way out on the Braintree numbers. The claimant had a strong will to believe that the consumption was still high in Braintree after his removal from painting / mixing duties. He considered it had not solved the respondent's problems of over-consumption of White 098.

94 The claimant denied all charges. He further said: "Our working relationship has gone down the pan since the theft allegation". Mr Duffy found all charges proved to his satisfaction.

95 The quality of the evidence from the managers and the detail from photographic evidence was of a good standard. I could hardly find this unfair or unreasonable, given the context of damage to trust and confidence.

96 The dismissal letter was sent on 14 August confirming the claimant was to be

given pay in lieu of notice and that all monies would be forwarded to him in the next pay run. The claimant had a right of appeal, by writing within 5 working days, to Vince Tice.

97 The claimant stated that a junior manager is hardly likely to overturn the decision of a more senior manager. On the facts of this case I hold that this was not so. Mr Tice seemed to approach his task conscientiously. It was not made easier by the claimant who provided no material.

98 By email of 21 August to Bill Duffy, not to Mr Tice, the claimant appealed. It was in time.

99 As Mr Tice confirmed in his statement to this tribunal, the claimant offered literally no further evidence or arguments at all. Mr Tice seems to have wished the claimant would do, so that he would at least have something to consider. However, the claimant gave him no reason to doubt the evidence originally given to Mr Duffy.

100 The claimant's appeal consisted only of stark denial e.g.

"Housekeeping and Cleanliness - to my knowledge I left my work area tidy on 27 July"

…and

"**Accessing Company Information –** I have not accessed any company information as I don't even have access to any computers therefore no breach has been made".

[The claimant completely missed the point of this of the above charge]

… "**Lack of Respect for Management -** This is not the case I am always contentious [sic] to those who deserve respect [sic]"**.**

101 That last appeal point demonstrated exactly the point that the respondent was making about the claimant's attitude to management. The claimant seemed to struggle during this tribunal hearing with the idea that the most obvious reading of that statement would be that it is a snide dig at management. This apparent lack of insight did not commend the claimant as a credible or reliable witness.

102 By another extraordinary turn of events, the claimant declined to attend the appeal meeting. He says he was working at that stage so that may be a good reason. He had just started working at a BMW franchised body shop.

103 It was the claimant's right to appeal, and his right to have an appeal hearing. He seemed to turn the whole logic of that on its head by his email of 31 August:

> "At no point did I request another meeting. Therefore I will not be attending the appeal dismissal meeting you have scheduled as I am no longer contractually obliged to do so" [sic] as I have no email address for Vincent Tice once again I am addressing this to you [sc. Bill Duffy] you can give your response to my dismissal appeal via email within the next 5 working days."

He implied that the appeal was the respondent's right, not his.

104 The disciplinary appeal was dealt with by Vince Tice, conscientiously as I find, and in a restrained way. He went into a good deal of detail about the jobs on 27 and 28 of July.

105 The overriding problem was, to quote the claimant's own words: "the working relationship has gone down the pan since the theft allegation". That was a clear statement of damage to mutual trust and confidence.

106 Finally, the claimant provided copies from Goldman & Fine Recruitment Agency in an attempt to indicate that his own job was advertised before the final decision to terminate his employment. Having heard Mr Duffy's explanation I do not consider that this evidence has any probative value at all. Apparently, the respondent is recruiting constantly. There is a skill shortage for technicians. With some of the advertisements, it could not be said for sure that they were actually for Rye Street Braintree. One of the nearest matches was for a dealership "near Braintree". However, the respondent's paintshop is actually in Braintree itself.

107 The claimant has been very ready to accuse the respondent of forgery. The respondent produced a set of minutes written by Mr Tice for 5 October 2016, apparently signed by the claimant. The only other specimen signature I have seen is on his witness statement for this tribunal hearing. He says that his signature had been forged on those minutes. Without more I cannot accept that, despite the admitted dissimilarity of his rather clumsy signature on his witness statement, and more fluent and probable signature on the disciplinary minutes. Because of the various episodes I have related in the course of this reasoning I have serious reservations about the claimant's credibility and reliability overall.

Unfair Dismissal

108 On this evidence I am asked whether the claimant's final dismissal is fair or not.

109 During evidence the claimant gave various answers in respect of the public interest disclosure which suggested that the automatically unfair dismissal under s 103A of the Employment Rights Act 1996 could not possibly proceed. Mr Harris during his submissions stated that that claim was no longer pursued. It was always looking most unlikely to succeed. The alleged protected disclosure was that the claimant reported having seen the paint reports and which could have prevented a miscarriage of justice if the respondent was contemplating reporting the theft of White 098 to police. At that stage a report to police was extraordinarily unlikely, one year after the event. The claimant did not seem to have a conceptual handle on it and it seemed predominantly to be a lawyer-derived complaint in these proceedings. It was always convoluted and far-fetched. It will be marked dismissed on withdrawal.

110 We have certainly wasted enough time on this. We lost most of the first morning of the hearing arguing with Mr Harris over whether I could hear a whistleblowing complaint of unfair dismissal without a full panel including lay members. Admittedly there was a fire evacuation here too. Mr Harris did finally agree that the tribunal was

properly constituted to hear a s 103A complaint. It is a matter of strict interpretation of s 4 of the Employment Tribunals Act 1996, and s 111 of the Employment Rights Act 1996.

111 On the unfair dismissal case I was referred to *Shrestha v Genesis Housing Association Ltd* [2015] IRLR 399 Court of Appeal. This is about a reasonable investigation, specifically about investigations of lines of defence i.e. lines of defence raised by employees who are accused of misconduct. Therefore, it is not on all fours. As a general principle I accept that an investigation must fall within the range of reasonable investigations. The usual case cited for that proposition is *Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23 CA.

112 The claimant's representative made a big point about there being "no evidence" for the allegation theft of white paint. If one looks at the evidence, that is demonstrably not so. There were some damning witness statements from 4 individuals who identified the claimant, and there was a remarkably high paint spend on that particular paint at this particular branch.

113 In any event, this whole point only related to the final written warning, not to the dismissal. I could not conceivably find that the final written warning was given in bad faith, let alone being unfair in the circumstances. I am not allowed to go behind it.

114 I also consider there was perfectly adequate investigation into the last charges for the second disciplinary for which the claimant was dismissed.

115 Mr Harris then relied upon the case of *Crawford v Suffolk Mental Health Partnership NHS Trust* [2012] IRLR 402. I consider this was a misconceived submission. He was referring to the fact that the claimant was suspended in respect of the theft of white paint. First, there was enough evidence to consider a suspension appropriate, particularly where fellow workers were being asked to give evidence against the claimant, which would implicate him in moonlighting and selling company property for personal profit together with Brian Clarkson and Keith Perry. This is a completely different situation from *Crawford* and the fellow case *of Gogay v Hertfordshire County Council* [2000] IRLR 703 CA. These were cases involving the loss of a career or profession; in the first case care workers, in the second, a teacher. They have no application on these facts.

116 In this case, too, the suspension was short. The respondent's timescales for dealing with the disciplinary process were admirably swift. It did not fester. The claimant has not lost a career. He was working once more in a body shop as a paint technician within 3 weeks of his dismissal by the respondent.

117 The contention that this somehow rendered the dismissal procedurally unfair is nonsense. I consider that the dismissal was well within the range of reasonable responses and the procedure adopted, whilst it was flawed in parts e.g. the first disciplinary investigation for the warning on 5 October easily within the range of reasonable procedures. The only technical error was in fact to the claimant's advantage - giving him the right to be accompanied to an investigation meeting.

118 I have already found and explained above that I do not find there to be a breach of contract (Para 50 ff.) in respect of the alleged demotion and for those reasons the claimant's claims are all dismissed.

Employment Judge Prichard

2 January 2019