



EMPLOYMENT TRIBUNALS

Claimant: Mr M R Barlow

Respondent: Cheshire Peaks and Plains Housing Trust Limited

HELD AT: Manchester

ON: 27-29 November 2018

BEFORE: Employment Judge Slater

REPRESENTATION:

Claimant: Mr C Breen, counsel

Respondent: Mr J Boyd, counsel

JUDGMENT having been sent to the parties on 6 December 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Claims and issues

1. The claimant claimed unfair dismissal and breach of contract in relation to a failure to give notice of termination.
2. The parties agreed a list of issues to be determined by the tribunal as follows:

Unfair dismissal

- 2.1. What was the principal reason for the dismissal and was it a potentially fair one in accordance with section 98 (1) and (2) of the Employment Rights Act 1996 (ERA 1996)?
- 2.2. The respondent asserts that the reason was for misconduct as set out in section 98(2)(b) of the ERA 1996.

2.3. If so, was the dismissal fair or unfair in accordance with section 98(4) ERA and, in particular, did the respondent in all respects act within the band of reasonable responses?

2.4. In respect of the misconduct, in accordance with *British Home Stores v Burchell* [1978] IRLR 379, has the respondent showed:

2.4.1. a genuine belief in the claimant's guilt of the misconduct alleged

2.4.2. that there were reasonable grounds for such a belief and

2.4.3. that a reasonable investigation was carried out in the circumstances.

2.4.4. That dismissal was an appropriate sanction.

2.5. Was the misconduct so serious that a reasonable employer could have dismissed the employee for it?

Procedural fairness

2.6. Was the claimant's dismissal substantially and procedurally fair?

Breach of contract

2.7. Was the claimant's summary dismissal a breach of contract by the respondent?

2.8. If so, what notice payment was the claimant entitled to?

Remedy for unfair dismissal

2.9. In the event that the claimant is successful in his claims, what order is it appropriate to make?

2.10. If the claimant was unfairly dismissed and the remedy is compensation is the claimant entitled to a basic award in accordance with section 118 ERA 1996?

2.11. If the claimant is found to have been unfairly dismissed, has he suffered any financial loss as a result of this dismissal?

2.12. If the respondent was found to be in breach of contract, what is the claimant's loss?

2.13. Has the claimant taken reasonable steps to mitigate his loss?

2.14. Would it be appropriate to make any deductions for the claimant's contributory conduct and/or in accordance with *Polkey v Dayton Services Ltd* CA [1987] 1 All ER 984?

Facts relevant to the complaint of unfair dismissal

3. I must apply different approaches to reaching a decision on the claimant's unfair dismissal complaint and on the claimant's complaint of breach of contract. I, therefore, make findings initially which are relevant to the complaint of unfair dismissal. I will make additional separate findings relevant to the complaint of breach of contract or wrongful dismissal.

4. The claimant was employed by Macclesfield Borough Council as a joiner from 2001 to 2006 when his employment was transferred to the respondent by operation of the Transfer of Undertakings (Protection of Employment) Regulations (TUPE). The respondent is a not for profit organisation with charitable status which owns and manages 5000 affordable homes for people in housing need.

5. The claimant remained employed by the respondent until he was dismissed with effect from 18 September 2017 for gross misconduct. The disciplinary hearing officer was Chris Twomey. The claimant appealed unsuccessfully against his dismissal. The appeal was heard by Jamie Hutchinson.

6. The claimant was part of a team of tradespeople who carried out remedial works on empty properties between lets (known as "voids"). Properties can be empty between 1 working day and 2 weeks before new tenants move in. A team of 12 people employed by the respondent work on voids, plus some contractors. When a property becomes empty, a key safe is fitted to the property so that respondent employees and contractors working on that property can get access to it. Until the events relating to a particular property, which led to the claimant's dismissal, the key code had remained the same for some years, with the same key code being used for all empty properties.

7. When a property becomes empty, the first tradespeople in are the plumbers and electricians. The plumber conducts a test and caps off the gas. Plumbers and electricians are not given a specific job list. Joiners and other tradespeople are sent in to do specific jobs on a job list given to them.

8. The events which led to the claimant's dismissal began with the discovery on 12 January 2017 that a pipe had been removed from under floor boards at a property, which I will refer to as 37, causing a gas leak. The claimant's evidence sought to cast some doubt as to whether there had been a failure on a gas test and whether the gas check on 10 January 2017 had been carried out correctly. However, he did not put forward any positive evidence which cast doubt on these matters and said, in cross examination, that he did not know what had gone on at this property in relation to the gas checks. I find, on a balance of probabilities, that the gas had been capped off and tested and a certificate issued on 10 January 2017 but, on 12 January 2017, when the gas was tested again, there was found to be a leak. The problem was, fortunately, rectified without there being any accident. However, the consequences could have been extremely serious, potentially causing significant damage to property and injury or even death to people. I find that this discovery caused the respondent to carry out an investigation which led to disciplinary proceedings and the dismissal of the claimant.

9. The claimant maintained throughout the internal proceedings and these employment tribunal proceedings that he had nothing to do with the removal of the pipe at this property and at another property, property 44. The allegation about removal of a pipe in property 44 came to light during the course of the investigation about property 37.

10. Prior to the disciplinary proceedings leading to his dismissal, the claimant had a clean disciplinary record. He had been promoted to a Deputy position around April 2015.

11. There was evidence that the claimant had, in the past, raised concerns relating to health and safety. In October 2016, he raised an issue about live sockets in a dangerous position. The electrician responsible verbally abused the claimant after he raised this matter. The claimant does not allege that the response of any of the respondent managers to him raising this concern was inappropriate.

12. On 24 January 2017, the claimant was given a letter requiring him to attend an investigatory interview with Nigel Johnson, Repairs Team Leader, on 25 July 2017 to investigate the following allegations:

“Removal of a copper pipe on 12th January 2017, which caused a serious gas leak to a tenant’s property.

“Breach of the Trust’s Health & Safety Policy”.

13. The letter informed the claimant that the purpose of the interview was to establish the facts and provide an opportunity for the claimant to supply answers. It stated that, dependent upon the result of the investigation, disciplinary action may or may not be invoked. The claimant was informed that he could have his trade union representative or work colleague present, if he wished.

14. The claimant understood, from what he was told by Alan Johns, his workplace TU rep, that he was the only employee to receive a letter in those terms. He understood that other employees and a contractor had received emails or phone calls asking them to attend interviews.

15. The claimant has suggested in evidence that Nigel Johnson was motivated to act against him because the claimant had raised a health and safety matter with Nigel Johnson about ladders on vans and had then gone to the Chief Executive about this, telling the Chief Executive that Nigel Johnson had done nothing.

16. I note that Nigel Johnson began the investigatory interview stating that he had been asked to investigate the matter of what happened at the property 37. This suggests, on the face of it, that it was not his decision to investigate. However, even if it was his decision, I find that there was cause to begin the investigation; the claimant was one of two people who had been working inside the property on the relevant dates. The other person was RW, a contractor, who had been doing plastering. RW was also interviewed on 25 January. I have no information as to whether RW continued to be engaged as a contractor. Since he was not an

employee, the respondent's disciplinary process would not apply to him in the same way.

17. I find no evidence that Nigel Johnson was motivated to investigate the claimant because of the claimant having told the Chief Executive that Nigel Johnson had failed to act on health and safety concerns raised by the claimant. In any event, as we will see, Nigel Johnson was removed as investigating officer at a later stage, following a grievance presented by the claimant about another employee corrupting the investigation. Nigel Johnson was replaced by another investigating officer. There is no evidence to suggest that Nigel Johnson manipulated the decision making of the dismissing or appeal officers.

18. Nigel Johnson interviewed RW on 25 January 2017. RW confirmed that he had been working at property 37 at the same time as the claimant. He said he was plastering in the living room. He said he did not remove any copper pipe from under the floor in the bedroom. He said he did not work in the bedrooms; he only went in the living room and the kitchen. He confirmed that the claimant had gone to buy materials for him to use. He said he did not see anyone taking copper pipe at the property.

19. ZC was also interviewed on 25 January. ZC was a driver/labourer. The claimant confirmed that he had no issues with ZC. ZC confirmed he had visited property 37. He thought the claimant might have been taking floorboards up in the bedroom. He said he did not see any copper pipe in the bedroom. He was asked if he was aware of anybody taking or removing copper pipe from a property. He said he had heard rumours. After some prompting, he said he had heard that the claimant takes stuff.

20. SW, voids team leader, was interviewed on 25 January. He said that normally, with a void, the priority is to try and get the gas capped as soon as possible; the "gas lads" check the gas is sound and then cap off the meter. SW was asked about where he would expect waste copper pipe to go. He replied that: "probably what happens is whoever takes out the scrap I would imagine probably keeps it I would have thought. I would say the proper procedure is that it gets thrown away and discarded of but I wouldn't unfortunately be able to tell you for definite." He said he had never challenged anyone for removing copper. He said he had raised an issue in a team meeting about people moving stuff after an incident where an electrician thought wires had been cut shorter after the first fix.

21. LC, voids team leader, was interviewed on 25 January 2017. He said that he had had conversations with operatives who had said there were people within the team who would spend time "rummaging round" to find bits of scrap and knocking off pipe boxes, lifting floorboards to get to scrap, going in lofts lifting loft insulations, checking for tanks. He said no one was willing to put a name on record. LC said the gas escape at property 37 had been brought to his attention by an email from the gas administrator; there had been a full drop on the gas test. LC said he had spoken to SB, who had carried out the gas work, to find out if he could have punctured the gas pipe putting the floorboards back down. He said no, because he had put the floorboards down prior to doing the gas test, which was perfectly fine. LC said "so straight away we sort of eliminated [SB] from his gas cert". He said that gas operatives went round and found the leak and sorted it out. LC said he had gone

back with a joiner to the site on the Monday and lifted the floorboards to see where the pipe had been removed from and said the pipe had gone. He said the pipe had been snapped essentially and removed from the site. They referred to pictures which had been taken by the gas team. LC said they had unscrewed the floor board which had been countersunk with a screw. He did not think that was something a plumber would have done because they would not carry a countersink and they generally just hammer back in the old nails they took out.

22. GT, Gas Team Leader, and MH, Gas Engineer, were interviewed together on 25 January 2017. The claimant confirmed that he had no issues with these two employees. MH confirmed that he had discovered the open-ended gas pipe and did a repair. They were asked if they were aware of anybody removing floorboards or pipework in a void property. MH was not but GT said that he had been told that it was a regular occurrence with the claimant.

23. SB, plumber, was interviewed for the first time on 25 January 2017. He was shown pictures of the broken pipe and said he had not seen them. He said he was not aware of anyone taking up floorboards and removing copper pipe.

24. The claimant had an investigatory interview with Nigel Johnson, with Marie Kelly, Senior HR Business Partner, in attendance, on 25 January 2017. Nigel Johnson explained what they were investigating; that he needed to find out what went on in property 37 and why they had an open-end gas pipe in that property. He said he was at the property with the plasterer on the Tuesday, who was plastering downstairs. He said that the estates team came on Wednesday. The claimant was asked what happens to waste copper pipe lying around. He said it gets taken out and he turns a blind eye; that he knew the suspects but was not "grassing anybody up". He said they turn a blind eye to it; the scrap is classed as plumbers' perks. The claimant said he probably fixed floor boards in all the bedrooms and that he generally used screws and sometimes counter sinks them. He said he did not remove the pipe in property 37 and had never removed any copper pipe from voids. He said he knew it happened. He said it possibly happened that people took up floor boards and pipe boxing to take copper pipe off because he was the one who had to box things back in and repair all the floorboards. The claimant suggested that they might be trying to find a scapegoat because someone was incompetent and had not done the correct procedure on the gas test. It was put to him that the pipe had been removed recently. The claimant said there was only him and RW there.

25. ND, electrician, was interviewed on 27 January 2017. He said he was aware of a few people removing copper pipe from void properties. He said plumbers would take it, throw it or "whatever they do with it." He said he had seen people removing pipe boxing and floorboards which didn't need removing. He was asked if he had ever seen anybody taking copper pipe work from under the floor boards. He replied: "not really no, I probably have to be honest." He said plumbers would do this, mentioning SB specifically, but said "I have no problem with them doing it because they know what they are doing don't they. They know what pipes are...but I have seen other people doing it, Joe will take pipe work if it's redundant, probably Russ [the claimant] will take it, [LC] wouldn't, Michael wouldn't. I wouldn't go looking for it, but if it was sat on the side I would probably pick it up and take it if you know what I mean." He said, when SW was in charge, he gave a general warning that people should stop

being stupid about scrap. He said that someone had twice lifted boards and cut wires he had left on a first fix. He was asked if he had suspicions about who had done that. He said it was going to be the only people who worked on that job: Russell or Alan, but he was not saying it was Russell, because he did not have any idea who it was. He said he had seen people taking out pipe work. After prompting as to who, he said: "I have seen Russ doing it, I sent a video to [SB] once of him doing it because it was funny." He said he didn't still have the video because it was on his ipad and it got lost when they did updates. He said he did not want the claimant to get sacked but would like to see him warned or something that would make him think he would never do that again.

26. SB was interviewed again on 2 February. From the notes of the meeting, it is clear that Nigel Johnson and SB had had a conversation on 1 February about the video ND said he had sent SB. Nigel Johnson asked if he had managed to locate the video. SB said he had not had a proper look but he had not got it on his phone. He suggested it might be on his computer because he transferred photos to his computer when he got too many on his phone but he had not checked at that point. He said the video had been sent to him because, as soon as he had left the job, the claimant had been taking copper up. He said there was no picture of the claimant's face on the video; you could just see him cutting pipe. He said it was old dead pipe.

27. SB subsequently found the video and emailed it to Mr Johnson on 8 February 2017. The message line shows the date of the video as "20160211".

28. The claimant was suspended on full pay on 9 February 2017. His suspension was confirmed by letter of the same date. The letter stated that his suspension was pending an investigation into the following allegations:

"Removal of a copper pipe on 11th January 2017, which caused a serious gas leak on 12th January 2017 to a tenant's property putting colleagues and a customer at risk.

"By removing the copper pipe could have resulted in a serious gas explosion.

"Breach of the Trust's Health & Safety Policy in relation to putting others at serious risk of harm."

29. The letter also invited the claimant to a further investigatory interview on 15 February and told him he could have his trade union representative or a work colleague present. Nigel Johnson wrote that, dependent upon the result of the investigation, disciplinary action may or may not be invoked.

30. On 17 February 2017, ND sent an email to Nigel Johnson saying he wished to retract his statement. He wrote that he was not happy to be involved when it would appear that the investigation would end in someone losing their job. He wrote: "I do not regret giving you the information I did, however it will have an effect on me in the future with the likelihood of a colleague becoming jobless."

31. The second investigatory interview with the claimant, which had been arranged for 15 February, was postponed because the claimant felt unable to attend, due to

work related stress. The claimant also asked that, for meetings from then on, he be accompanied by Steve Power, Unite regional officer.

32. In a letter March 2017, the meeting was rearranged for 16 March 2017. The allegations were set out as follows:

“That you removed a fixed copper pipe from underneath the floorboards at [property 37] on 11 January 2017 for financial gain, which caused a serious gas leak on 12 January 2017 to a tenant’s property putting colleagues and a customer at serious risk.

“Risk of causing a serious gas explosion to trust [property 37] because the customer had a number of burning candles within the room where the gas leak was detected.

“That you breached the trust’s health and safety policy in relation to putting others at serious risk of harm.

“On 11 February 2016 you removed a fixed copper pipe from underneath the floorboards at [property 44] for financial gain.

“Removal of food items from a void property for personal and financial gain.”

33. The claimant was interviewed again by Nigel Johnson at a meeting on 16 March 2017. He was accompanied by two trade union representatives, Alan Jones and Steve Power.

34. Steve Power raised the issue at the beginning of the meeting that LC had been talking to operatives about the issue of the investigation. He said they believed that, as a result of this, the investigation was corrupted. Marie Kelly said they would look into this. This was subsequently the subject of a grievance.

35. The claimant was asked about his understanding of the procedure for the disposal of materials no longer in use in a property. The claimant said that it went in a skip. He was asked about pipework under a floor or running up a wall. The claimant said it just stayed where it was. He said he did not touch pipework. The claimant was asked if he realised that removing items from the trust for personal and financial gain could be deemed as an act of theft. The claimant said he presumed so but did not know enough about that. He confirmed that he knew that theft of trust property was a disciplinary issue.

36. The claimant was asked questions about property 37. He was then asked about property 44. Steve Power objected to the matter being raised over two months after the alleged incident. Nigel Jones said it had not been brought to their attention at the time. Nigel Jones referred to attendance records, a timesheet submission and a Tracker report confirming that the claimant was at property 44 on 11 February 2016. They played the video which Nigel Jones said had come from one of the claimant’s work colleagues. It was noted that the video did not show the claimant. The claimant denied cutting the piece of copper pipe. Nigel Jones referred to a date stamp on the video. No issue was taken on the claimant’s behalf in this meeting about there being

no date on the video. Nigel Jones confirmed there was no reference in the video to where this was taken. Nigel Jones said that there were two witness statements to support the video, one of them from the person to whom the video was sent. The claimant said it was not him on the video. When asked for his thoughts on his work colleagues sending the video, the claimant said he had no idea unless they had been coerced into doing something. Alan Jones said that lads on his team had told him that Nigel Jones had hinted to them that, when the claimant was interviewed, he said basically "if I go down I'm taking a lot of the voids team down with me". Nigel Jones said he had not said that. Steve Power suggested that there was collusion, either through Nigel Jones and his team leader; the people who had been interviewed had been coerced into giving their statements in the way that they had. He said he believed this was corrupt. He said they were going to bring a grievance on the claimant's behalf. Marie Kelly advised that they should adjourn the meeting because they wanted to lodge a grievance complaint about the investigation not being conducted fairly. She said they would assign a separate independent investigating officer to do this. The meeting was then adjourned.

37. On 7 April 2017, Steve Power submitted a grievance on the claimant's behalf. This related to LC approaching a number of the claimant's colleagues, attempting to elicit information from them concerning the subject of the claimant's suspension. He wrote that they believed that the only reason for doing this was to coerce the claimant's colleagues into painting him in a bad light and to use the information gathered in a subsequent disciplinary hearing in order to adversely influence the outcome. He also referred to Nigel Johnson making several site visits, meeting with the claimant's colleagues who had previously been interviewed and asking them if they would like to change or add anything to the statements they had previously made. He wrote that their understanding was that some members of the team did alter their statements following the visit by Nigel Jones. He wrote "our belief is that the actions of LC and Nigel Johnson in this matter amount to an attempt to conspire to bring this case against Russell for reasons known only to them and that the allegations that Russell has been subject to have not been made in good faith. As such our view is that the investigation and any subsequent disciplinary have been corrupted by their actions." Steve Power wrote that their desired outcome if the grievance was upheld was the matter of the alleged theft be dropped and that the claimant returned to work without being subject to any disciplinary sanction.

38. The grievance investigation was conducted by Gary Beard, maintenance contracts manager. A grievance outcome meeting was held on 3 May 2017. The outcome of the grievance was then confirmed in a letter dated 5 May 2017. Mr Beard found that LC did engage in conversation about the claimant but did not believe this to be an act of corruption because this act was done of his own accord and was not requested by Nigel Johnson. He considered that LC had acted inappropriately but concluded that this may have been as a result of his lack of experience in these matters due to only being in a team leader role for a short period of time. He concluded that it appeared there was no intent to influence the investigatory process as this was purely down to a lack of understanding of the expected practice in these matters. He did not believe there was a deliberate act to manipulate the witnesses. Mr Beard recommended that there was a case to answer in relation to inappropriate behaviour due to a lack of understanding of the expected standard around conducting investigations. He confirmed that appropriate action would be taken to

ensure that such an act did not happen again. He did not uphold the other grievances. He concluded that the only changes made to witness statements related to typing errors. He concluded that there was no evidence to support acts of dishonesty, deceit or manipulation. He advised the claimant of his right of appeal.

39. The claimant appealed unsuccessfully against the outcome of the grievance. The outcome of the appeal against the grievance outcome was confirmed in a letter dated 3 July 2017. Although the appeal officer, Neil Bancroft, concluded that Nigel Johnson had not influenced any witness, in accordance with the suggestion made at the appeal meeting, he wrote that he intended to recommend that a new investigatory officer outside of the repairs team was assigned to the outstanding conduct investigation case as a precautionary measure in order to reach a conclusion.

40. Dianne Hutter was appointed as the new investigating officer. She wrote to the claimant on 12 July 2017 informing him that a further investigatory meeting was scheduled for 27 July 2017. The allegations to be investigated were set out in the same way as in the letter sent in March 2017.

41. At the meeting on 27 July, the claimant confirmed that access to empty properties was by using a key safe and the code had not changed for about three years so any previous employees, current employees and contractors could go in. The claimant denied that he had ever removed copper pipes from a property. The claimant was questioned about property 37. The claimant suggested that the pipe could have been removed by anybody in the time the property was empty because anyone had access. The claimant said he was away from the property getting supplies for the plasterer for half an hour to $\frac{3}{4}$ of an hour, maybe an hour. He confirmed that he left the plasterer in the property whilst he was out. The meeting adjourned for approximately 15 minutes and then reconvened. Alan Jones was asked to provide more information about a point he had previously made that staff had a grudge against the claimant, to try and understand if it had any relevance. The notes record "AJ confirmed some of the team don't get on with RB. RB concurred, however, after some discussion RB did reference disagreements from time to time but stated they weren't linked to this matter, so this point was disregarded as not being relevant." The claimant was asked if he took pipework that was scrapped and he replied that he did not. The claimant confirmed that he normally counter sinks floorboards. Property 44 was discussed. Steve Power denied it was the claimant on the video saying could not see who was in the video. No point was raised about there being no date on the video. Steve Powers said that some vehicles had no tracking so anyone could enter a void property and be "invisible" in view of this and the key safe numbers weren't regularly changed so anyone could access a property out of hours with the generic code. He said that RW was left in the property alone whilst the claimant went for supplies which placed further doubt on matters. He said that the window of opportunity for anyone entering property 37 was extensive. Steve Powers complimented Dianne Hutter on how she had handled the investigation, stating that it was professional. They agreed to meet again on 10 August for any further follow-up questions.

42. BB, estate operative, was interviewed on 10 August 2017. He confirmed he had worked in the garden at property 37 with another employee. He said that the

claimant was there, inside the property. He said there was nobody with the claimant. TN was also interviewed that day. He said he had seen SB and the claimant at property 37 but no one else.

43. By letter dated 22 August 2017, the claimant was required to attend a disciplinary hearing on 1 September 2017. The meeting was subsequently postponed to 18 September because the claimant's trade union representative could not attend the original date. The allegations were set out as follows:

"Theft of a fixed copper pipe from underneath the floorboards at [property 37] either on 10th or 11 January 2017 for financial gain, which caused a serious gas leak on 12 January 2017 to a tenant's property putting colleagues and a customer at serious risk of harm.

"Risk of causing a serious gas explosion to trust [property 37] because the customer had a number of burning candles within the room where the gas leak was detected.

"That you breached the trust's health and safety policy in relation to putting others at serious risk of harm.

"Theft of fixed copper pipe on 11 February 2016 from underneath the floorboards at 44 pocket Hayes Road, Macclesfield for financial gain.

"Breach of the trust's code of conduct and disciplinary policy by failing to fulfil your duties in the best interests of the trust and its customers."

44. The allegation relating to theft of food was no longer included in the list of allegations.

45. The claimant was warned in the letter that the hearing could result in termination of his employment. Copies of the relevant witness statements and other documents to be referred to at the disciplinary hearing were sent to the claimant. The claimant was asked to let them know if he wished to call any relevant witnesses to the hearing. He was asked to provide any copies of documents he wished to be considered at the hearing or, if he did not have these documents, to provide details so that they could be obtained. The claimant was informed that the hearing would be conducted by Chris Twomey. The claimant was informed that his work colleague, Alan Jones, a Unite representative and Steve Power, Unite regional officer, had been notified of the date and the claimant continued to have the right to be accompanied by them or another union representative or colleague if he wished.

46. The disciplinary hearing took place on 18 September 2017. It was conducted by Chris Twomey who was assisted by Marie Kelly. The claimant was accompanied by Steve Power and Alan Jones. The meeting was recorded and a transcript prepared afterwards. The meeting began at 11 a.m. The notes do not record the time the meeting ended. However, it is apparent from the transcript, which runs to 30 pages, that the meeting was not short and it covered matters in considerable detail. Steve Power's handwritten notes of the meeting were included in the bundle. However, I

was not referred to anything in these notes to suggest that the transcript prepared by the respondent was not accurate.

47. Prior to the hearing, Chris Twomey sought advice from Marie Kelly about ND's witness statement since he noted that ND had attempted to retract his statement. She informed him that Nigel Johnson had spoken to ND to tell him that the statement needed to be used and that ND had said this was fine. She also said that, even if there had been a retraction on the basis given in the email, it would still have been used due to the severity of the allegations. Mr Twomey understood from the email of retraction that it was not being retracted due to the statement being incorrect but considered it was due to ND feeling guilty.

48. Steve Power raised a concern that the previous week, the claimant's wife, who also worked for the respondent, had been told by a team leader that she could take the day off after the disciplinary hearing if she wanted to. Steve Power suggested that this indicated possibly that the decision had already been made to dismiss the claimant and his wife needed to be with him the next day to get over the dismissal. Mr Twomey confirmed that the decision had not been made. Ten days after the disciplinary hearing, the claimant's wife spoke to someone at the respondent saying that she had not known that this would be mentioned at the disciplinary hearing. The file note of the conversation records that, while she had fully expected the outcome to be dismissal, she had not implied that it was a foregone conclusion or that there was an ulterior motive for her. She said she understood that the offer had come from a good place of support and care and confirmed that she wanted to continue working for the respondent.

49. The claimant alleged that a lot of evidence and important information had been omitted from notes of the interviews. He asserted, in relation to the transcript of the meeting on 27 July, that he had said that he had more integrity as a man than to name anybody and that had been omitted. Steve Power commented that he did not think that particularly relevant.

50. Steve Power and the claimant referred to the claimant having taken a photograph sometime before the incident in question of the pile of pipes and shown it to Nigel Johnson to show the kind of thing that was going on with people piling stuff up and it been taken away and this was not acted on. They said the photo was on the claimant's iPad which was taken away from him when he was suspended and this photo did not form part of the pack for the disciplinary hearing. Mr Twomey asked them to explain how they thought this specifically impacted on the allegations. Steve Power said "well we are confused by why Nigel would want to raise it or use it as a piece of evidence in the investigatory hearing and it now doesn't form part of this pack which is the disciplinary hearing." Mr Twomey stated that it was simply a point of clarification then. Steve Power said it gave them some doubt about the validity and objectivity amongst other things of the investigation as a whole. Steve Power said that the element of the investigation done by Dianne Hutter had been done professionally but he had doubts about the parts dealt with by Nigel Johnson, the way some interviews were conducted and how they had arrived at the point where Nigel was able to focus in on one individual. Steve Power said that the photograph would not affect the overall outcome but it was another issue around the validity and the objectivity of the investigation.

51. The claimant again raised the issue of transcripts being cherry picked. Marie Kelly said that, as far as she was aware, they were full transcripts. However, she said that, when the meeting reconvened on 27 July, it did not pick up the recording for some reason so the notes of the reconvened part were written as note form and not a transcript from a recording so may not be verbatim. She assured the claimant that the other transcripts were just typed up from the recording.

52. Chris Twomey confirmed that the claimant was making a point that the same code had been used for key safes for possibly a couple of years and that any member of staff who worked within the wider team could have access to any of the properties at any time. The claimant added that contractors could also access the properties.

53. The claimant said he had never taken any materials from any void properties for personal use or gain. He agreed that the removal of any materials within a void would constitute theft.

54. Chris Twomey referred to SB saying that he capped the gas off on 10 January 2017. Mr Twomey asked the claimant if he had any reason to doubt that this was true. The claimant said "no, it's probably true why would I doubt it." The claimant confirmed he was in property 37 on 10 and 11 January. He said RW, the contractor, was also there. The claimant's representatives said there were at least three other people, naming SB, ND, ZC, K, L, LC and the claimant. The claimant added that the trust fix operatives turned up as well. The claimant said he used the counter sinking method for reattaching floorboards but not every time. He said other joiners also use this method. Mr Twomey asked, of the other people named as being at the property, who would have reattached a floorboard. The claimant said they all have the capacity to, but they tended to leave them. He said none of the other people named were joiners. Alan John corrected this, saying that K was a joiner. The claimant said he had no understanding or explanation of how the gas leak could have happened in property 37.

55. Mr Twomey then asked questions about property 44. They played the video. They agreed that nothing in the video made any reference to property 44. The claimant commented that the video showed a window. The point was made on his behalf that this was not the style of property in the road containing property 44. Mr Johns said he was 99% sure there was no property like that on that road. The claimant said the video did not show him removing the pipe. The claimant said that the only reason ND had possibly put that in his statement was because, when he became a deputy, he thought ND was very jealous and very resentful because the claimant knew he had applied for it as well. He said he did not know why he would send it to SB but said that they are friends. Mr Twomey referred to tracker records and job records showing that the claimant and ND worked at property 44 on 11 February 2016. Steve Power said that the fact that the claimant and ND were there was not in doubt because the records showed that and the doubt they were casting was on the validity of the video because there was nothing in the video that suggested that it was property 44. The claimant's representatives then said there was no reference on the video as to the date and time it was taken. The claimant was asked if there were any incidents of animosity between him and ND. He said

that some days there could be a bit of altercation with people but he agreed that it was kind of forgotten, just part of the job. Steve Powers reiterated that the claimant's view was that ND did not take particularly well to the claimant getting the supervisor's job.

56. I find that the date of 11 February 2016 was on the video when it was provided to Mr Twomey.

57. Mr Twomey subsequently checked on the position relating to the supervisor job. He viewed an email trail which showed that, on 27 April 2015, the claimant had applied for the position but ND had not. Simon Worthington wrote that there were reasons for him not doing so.

58. Mr Twomey gave the claimant the opportunity to question Nigel Johnson and Dianne Hutter. In questioning Dianne Hutter, Steve Power referred to ND naming himself and other colleagues as removing scrap. Mr Powers suggested that the removal of scrap by operatives had become custom and practice so he asked what led them to focus in on the claimant when there were so many other people that could have been implicated. Dianne Hutter said that the focus was from the point of the gas certificate being written and that, at that point, everything was safe and checked and then the time after that, before the next person went in to do an internal test a day or so later. This was where she felt it was the likelihood of this happening. She referred also to a video of the claimant cutting pipe. Chris Twomey asked Nigel Johnson whether there was anyone else who accessed the property on 10 and 11 who could or may have used countersinking. Nigel Johnson said no. Nigel Johnson said that, in a conversation with SB or ND, they said the property in the video was on the road of property 44. He said he was told this when he was given the video but he did not ask the question during the course of the interview. In questioning Nigel Johnson, Steve Powers suggested the department had an issue with all of the staff because of lack of policy, lack of procedure and lack of direction, leading to a customer practice where their operatives thought it okay to take scrap metal.

59. In summing up, Steve Powers suggested that it had become so embedded in people's minds that when they went to a void to look out for scrap, that it had progressed to such an extent that people are now going looking for scrap and saying that, if there is no scrap, we will make our own. He said there was no clear evidence to show the claimant was guilty of removing or damaging and removing the pipe and there was no clear evidence that it was him on the video in property 44; he said the video did not show a date, time and an address.

60. The meeting adjourned for Mr Twomey to make a decision. Following an adjournment of just over an hour, Mr Twomey informed the claimant of his decision to dismiss him. He said:

“[ND] has made a statement confirming that he has seen you, Russ, taking pipework. You have stated that you have a professional working relationship with him. I have no reason to doubt his statement. From the date in the video we understand the property to be [property 44]. Both you Russ and [ND] are the only stated workmen to be at that property on 11 February 2016 which is

the date on the video and that's confirmed through job sheets and tracker information."

61. Mr Powers questioned whether the video was dated and Mr Twomey said the date was on the top of the video Steve Powers replied "okay I didn't notice that". Mr Twomey continued:

"In relation to [property 37] the gas was capped off on 10 January and the leak was identified on 12 January, it has therefore created an opportunity on the 10 and 11 for the pipework to have been tampered with and removed. Russ, you are working in the property in that room where the pipework was removed so you did have an opportunity to remove pipework. The implications of the removal could have been catastrophic for the individuals involved. In managing gas policies and procedures are designed to reduce the possibility of an issue arising to as close as zero as possible. The unskilled removal of this pipework had increased the probability of a catastrophic event to becoming very likely. It was only the skill of the operative that prevented the catastrophic incident from happening. In terms of our code of conduct you have confirmed you are familiar with the code of conduct and have signed in April 2016 to this effect. Our code of conduct covers health and safety expectations and expectations around funds and resources, that's the trust funds and resources. The investigation has brought out that the trust needs to provide clear guidance and policy on waste management. Now we will arrange for that to be happening. However, the purpose of this investigation was the brief outlined in the letter, the key points outlined at the start. Equally I believe it is a fundamentally different proposition to pick up a piece of waste from the front garden for example and then to move floorboards and potentially move life endangering property infrastructure and it's this we are investigating."

62. Mr Twomey said he had taken into account the claimant's length of service, previous record and charitable contributions he had made. He said he had considered a final written warning. However, based on the evidence, his decision was to dismiss the claimant with immediate effect because the acts of theft, potential consequences of the act and being in a role of trust warranted action. He informed the claimant of his right of appeal.

63. Mr Twomey confirmed his decision to dismiss the claimant in a letter dated 20 September 2017. In relation to theft at property 44, he wrote:

"[ND] (electrician) has made a statement confirming that he had recorded you taking copper piping from a trust property on his phone for financial gain and [SB] supported this with his signed statement which supported the events at [property 44] on 11 February 2016.

"From the date on the video (i.e. 11 February 2016 recorded backwards), I understand the property to be [44] and I believe the person taking the copper pipe for financial gain to be you.

“The jobs sheets and tracker information provided for both you and [ND] confirmed that [property 44] was the only property that you both worked at on this day.”

64. In relation to theft at property 37, he wrote:

“The gas was capped off on 10 January and the leak was identified on the 12th when the tenant moved into the property. There was a window of opportunity for you to take the copper piping from underneath the floorboards on either the 10th or 11th as there is supporting information that confirms you were the only joiner working in this property on 10th and 11th which involved replacing the floorboards in the room where the theft of the pipe happened.

“Therefore, it is my belief and on the balance of probability, taking this into account and as a result of the theft of the copper piping from [property 44], I believe you again carried out a further act of theft by taking the copper piping from this property for financial gain.”

65. Mr Twomey recorded further his conclusions in relation to the risk of causing a serious gas explosion at property 37, breach of the trust’s health and safety policy and breach of the trust code of conduct and disciplinary policy. Mr Twomey reminded the claimant of his right of appeal.

66. I accept that the reasons given orally at the disciplinary hearing and recorded subsequently in writing, correctly reflected the thought processes of Mr Twomey in reaching his decision.

67. I accept Mr Twomey’s evidence that he saw no inconsistency in the dismissal of the claimant and not taking action against ND, who had admitted taking piping. Mr Twomey drew a distinction between the removal of something attached to the property and scrap which was not attached. He took the view that someone who was not a plumber could not be sure that the removal of a pipe which was still attached would not cause a gas leak.

68. I accept Mr Twomey’s evidence that he considered whether or not SB could have removed the pipe at property 37 but rejected this possibility on the basis that SB would have placed his reputation at risk, since he had done the gas certificate, and he did not think that anyone with experience of gas would have done this.

69. I accept that Mr Twomey did not consider it necessary to interview ND himself and considered that he had no reason to doubt ND’s statement.

70. By letter dated 29 September 2017, Steve Power appealed against the dismissal on behalf of the claimant. The grounds of appeal were stated to be as follows: that the sanction of dismissal was disproportionate in the circumstances and that Chris Twomey’s decision was based on flawed assumptions, having regard to the evidence provided.

71. Mr Power asserted that the quality of the evidence available to Chris Twomey was so unreliable that he could not have made the decision to dismiss out of any

sense of objectivity. In relation to the video, he wrote that they had viewed this on a number of occasions and it had no date or time recorded on it and could, therefore, have been made anywhere at any time. He wrote that there was no reference in the statements to SB being questioned about property 44.

72. The appeal hearing took place on 13 November 2017 and was conducted by Jamie Hutchinson, Director of Customers. Mr Hutchinson was accompanied by Helen Bailey, assistant director of human resources. The claimant was accompanied by his trade union representatives, Alan Jones and Steve Power. They discussed the issue of the date on the video. Mr Hutchinson said the video he had seen had got a date on the top left hand corner. The claimant said it had never had a date on it and Mr Power asserted that the date had been added at a later date. Helen Bailey showed the video with the date present at the top in reverse order. Claimant asserted that the date had been added and that Chris Twomey had said there was no date on the video. Helen Bailey said that the minutes record Chris as saying that the date was on the video. Steve Powers responded that it was a minor point, the date in itself was not a major point, it was the content of the video and what ND believed he had submitted and what Chris Twomey was taking from it. The claimant continued to assert that there had never been a date on the video and it was a made up dodgy video. The claimant asserted that the minutes were not a true reflection and a lot of things had been omitted. Steve Power commented that this was a dispute they were never going to resolve but that it was a real bee in the claimant's bonnet.

73. Mr Power set out in detail why they considered the claimant should not have been found guilty of the offences and also referred to there being an endemic problem within the department where it was acceptable to take scrap. Mr Power suggested that they would have been okay with a final written warning, although the claimant said in evidence to the tribunal that he did not agree with that point.

74. After an adjournment, Mr Hutchinson said:

“I think the severity of the situation about taking pipe out of situational scrap and the significance of that risk that I'm going to uphold on the balance of the evidence of the appeal.”

75. Mr Hutchinson confirmed his decision that the dismissal decision was appropriate and fair and that he did not uphold the appeal in a letter dated 15 November 2017. Mr Hutchinson concluded that dismissal as a sanction fell within the band of reasonableness. Mr Hutchinson wrote that Mr Twomey, at the disciplinary hearing, referred to the date on the video being visible, which they acknowledged and did not dispute at the time. He wrote that, in order to further clarify the matter, he had managed to establish that SB sent the video to Nigel Johnson on 8 February 2017 via email and the date appeared in the corner. He said there was supporting information from SB and Nigel Johnson confirming that the date had always appeared on the video and was not added afterwards as they had suggested. He wrote that the supporting information referred to the video recording been taken at property 44; this was based on the date of the video, tracking information and job sheets which confirmed that ND and the claimant were together all day on 11 February 2016 at the trust property. He confirmed that Chris Twomey was fully

aware of the order of events in relation to property 37 and property 44 and had a comprehensive understanding, which addressed the witness interviews, in order to reach a decision. He said there was enough doubt due to there being more than one incident of theft to support that the claimant was also responsible for stealing copper piping at property 37.

Submissions

76. Mr Breen, for the claimant, made oral submissions. The main points in his submissions were as follows. There was little to link the claimant with property 37. As conceded by Mr Twomey, had it not been for the video/statement, there was nothing to justify dismissing the claimant relating to property 37. It was a leap of faith to infer that the claimant was guilty of the theft at property 37. The inference drawn that the claimant was the culprit was manifestly unfair. It did not appear that Chris Twomey and Mr Hutchinson had given attention to the interviews. Neither chose to re-interview on crucial parts of the evidence, which was a flaw in the procedure. Any reasonable employer faced with a situation where there was no direct evidence with regard to property 37 would have decided to seek further evidence. It was clear others had access to the property; the key code was known to all and sundry. The fact that the claimant had worked in the bedroom was not conclusive. The respondent could not reasonably conclude that, because the claimant was in the house, he was guilty of theft.

77. The respondent seemed to be deviating away from theft, to health and safety. There was a free for all, with regard to scrap, and nothing done about it.

78. The respondent's investigation was focused and pointed at the claimant from the outset. There was disparity in treatment. ND was not a reliable witness. He admitted that he was party to theft; a reasonable employer would think hard about his credibility. ND needed to be spoken to again, particularly as the video showed nothing. In relation to property 44, ND's statement was not as reliable as the respondent said. The respondent should have re-interviewed ND. The retraction of the statement should have flagged up concerns.

79. Leaving aside ND's statement, the evidence on property 37 was not sufficient to dismiss for gross misconduct.

80. The respondent did not have a reasonable belief in misconduct in relation to both properties. There was a disparity of treatment. The respondent knew of multiple employees stealing but no action was taken.

81. In relation to wrongful dismissal, ND was not here to give evidence. The respondent was unable to establish that the claimant was guilty of a repudiatory breach of contract. It was not enough to rely on the evidence of Chris Twomey and Mr Hutchinson. There was no explanation as to why ND did not give evidence. There had to be a significant degree of doubt as to the claimant's guilt.

82. In relation to *Polkey*, Mr Breen submitted that, in many respects, this was an all or nothing case. If the judge accepted that the respondent had a practice in place where employees were not discouraged from thieving, the claimant did nothing more

than others did. There was no basis for a reduction in compensation. The claimant would not have been dismissed since others were not dismissed.

83. There was no evidence that, in the claimant's long and distinguished disciplinary record, he had engaged in any conduct which discredited him.

84. Mr Boyd, for the respondent, produced written submissions and made additional oral submissions. His main arguments were as follows. It was tolerably clear that the reason for dismissal was conduct; a potentially fair reason. A fair investigation was carried out and the respondent arrived at a reasonable view of culpability. It was appropriate to discount the theory that "any" operative could have come into property 37; only those asked to work on the property would realistically be aware it could be accessed. It was reasonable to narrow down the list of potential "culprits" to the claimant and RW. It was reasonable to discount RW who was working in a different room. The evidence in relation to property 44 demonstrated the claimant's culpability on the balance of probabilities with regard to property 44 but also provided strong supporting evidence regarding the allegation relating to property 37. It was a crude point to say that ND's evidence should not be believed because he was a thief. It stood to the credit of ND that he was forthcoming; he was particularly vexed by the fact that the claimant had crossed a line and that is what galvanised him to say what he did.

85. Dismissal of an operative for removing scrap from a pile of scrap in the garden might be problematic, given what seemed to be a reasonably permissive attitude towards the removal of material in those types of circumstances. However, removing piping fixed to the property in circumstances where doing so may or may not create a serious health and safety risk was a different matter. The claimant would not know when he removed pipe in either property that it was dead pipe.

86. The respondent reasonably found the charges against the claimant proven and dismissal was within the band of reasonable responses.

87. The tribunal did not have before it a comparator who had been treated more favourably than the claimant, who had been found, after an investigation, to have done what the claimant did. It was too simplistic to say they all did it and others were not dismissed. Mr Boyd referred to the case of *Hadjiannou v Coral Casinos Ltd [1981] IRLR 352*, demonstrating the caution with which tribunals should approach the argument that there has been an inconsistency of treatment between two employees. The comparison had to be of like with like.

88. If the tribunal found the dismissal to be unfair, the respondent contended that there was 100% chance that the claimant would have been dismissed fairly in any event. The respondent relied upon contributory conduct if appropriate.

89. In relation to wrongful dismissal, Mr Boyd submitted that the evidence demonstrated that, on the balance of probabilities, the claimant took the piping at both properties. The claimant was guilty of gross misconduct in relation to property 44 alone, regardless of the tribunal's view as to property 37. Given the nature of ND's statement and retraction, it was unrealistic to believe that ND would have had

some kind of Damascene experience at the witness table with regard to what the video showed, etc, if called to give evidence.

Law

90. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996. Section 94(1) of this Act provides that an employee has the right not to be unfairly dismissed by his employer. The fairness or unfairness of the dismissal is determined by application of Section 98 of the 1996 Act. Section 98(1) of this Act provides that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and, if more than one, the principal one, and that it is a reason falling within Section 98(2) of the 1996 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. Conduct is one of these potentially fair reasons for dismissal.

91. Section 98(4) provides that 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, 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 dismissal and this is to be determined in accordance with equity and the substantial merits of the case. In considering the reasonableness or unreasonableness of the dismissal the Tribunal must consider whether the procedure followed and the penalty of dismissal were within the band of reasonable responses. The burden of proof is neutral in deciding on reasonableness.

92. In relation to a conduct dismissal, the Tribunal is guided by the authority of *British Home Stores v Burchell* [1979] IRLR 379. When considering whether the respondent has shown a potentially fair reason for dismissal, the Tribunal must decide whether the respondent had a genuine belief in the claimant's guilt. In considering the fairness or otherwise of the dismissal, the tribunal must consider the other parts of the *Burchell* test: was this belief based on reasonable grounds and formed after a reasonable investigation?

93. If an employee commits an act of gross misconduct, this is a serious breach of contract and will entitle their employer to dismiss that employee without notice. If the employee is not seriously in breach of contract, the employer must give the employee the amount of notice of termination of the contract specified in the contract (subject to this being not less than statutory minimum notice). If the employer terminates the contract without this notice, where the employee is not seriously in breach of contract, the dismissal without due notice will be a breach of contract by the employer.

Conclusions on unfair dismissal

94. I conclude that the respondent has shown that the dismissal was for the potentially fair reason of conduct. Mr Twomey had a genuine belief that the claimant was guilty of the removal and theft of piping which was still attached, at properties 44 and 37, with potentially very serious consequences. There has been no suggestion

that Mr Twomey dismissed for any other reason or that he was not genuine in his belief.

95. The claimant has advanced theories as to motives that ND and Nigel Johnson might have had for wishing him ill. However, this does not affect the reason for the dismissal by Mr Twomey.

96. I conclude that a reasonable investigation was carried out in the circumstances. Appropriate people who might have relevant information were spoken to. Relevant documents were obtained. The claimant was advised of the allegations against him. The claimant was given an opportunity, over a number of investigatory meetings and the disciplinary hearing, to answer the allegations against him. The claimant was allowed to be accompanied by his trade union representative in not only the disciplinary hearing, as required by law, but also the investigatory meetings. In all but the first meeting, the claimant chose to be accompanied, and was allowed to be accompanied, by not just one union representative, but two, including Alan Jones who was allowed to provide information from his own knowledge as well as acting in the role of representative. The investigating officer was changed as a precautionary measure, when concerns had been expressed about Nigel Johnson, although the grievance investigation had found that Mr Johnson had done nothing wrong. Dianne Hutter was commended by the claimant's trade union representative for how she conducted the investigation from the point she took over. I find, on a balance of probabilities, that Mr Johnson did not improperly influence witnesses or otherwise conduct an improper investigation when he was in charge. Although the claimant voiced suspicions about Mr Johnson, there was no positive evidence to suggest any improper actions by Mr Johnson. The records of the interviews made during Mr Johnson's time in charge of the investigation suggest that Mr Johnson was making appropriate efforts to elicit relevant information.

97. The claimant was given the right of appeal.

98. I conclude that the process overall was a reasonable procedure in all the circumstances and compliant with the ACAS Code of Practice on Discipline and Grievance.

99. I conclude that Mr Twomey had reasonable grounds for his belief in the claimant's guilt. In relation to property 44, he had the witness evidence of ND, SB and the video. The date of 11 February 2016 was on the video when this was provided to Mr Twomey; he had no reason to believe that this was not a genuine date. Work records showed that, on that date, the claimant and ND were working at property 44. The combination of the date on the video and the work records showing the claimant and ND working at property 44 were sufficient for Mr Twomey to conclude that the video did relate to property 44, despite the claimant's belief that there were no properties of the style shown in the video, which indicated a window near the roof space, in the road where property 44 was located. ND's witness statement identified the unseen person on the video, who was sawing pipe, as the claimant and said he had sent the video to SB. SB was able to supply a copy of the video and confirm that this had been sent to him soon after it was taken. It was clearly within the range of reasonable responses for Mr Twomey to accept the evidence given by ND in his witness statement. The claimant has suggested that the

statement should not be believed because of some apparent inconsistencies in what ND is recorded as saying and because his evidence cannot be regarded as credible since he admits in his witness statement to taking material which does not belong to him i.e. theft. It does not automatically follow that someone who admits to wrongdoing cannot be believed on other matters; indeed, it could be argued, to the contrary, that admission of one's own guilt demonstrates candour rather than lack of credibility. I do not consider that the alleged inconsistencies are sufficient to indicate lack of reliability. The material available to Mr Twomey gave him reasonable grounds for concluding that the claimant had been guilty of theft of piping in relation to property 44.

100. The evidence in relation to property 37 was much more circumstantial. There was no witness evidence of anyone seeing the claimant disconnect and remove the pipe from under the floor board in one of the bedrooms. The evidence was that the claimant was the only person working in the relevant part of the house during the window of opportunity. The contractor had been alone in the house for possibly up to an hour when the claimant collected materials but had been working in the living room. It was possible that other people could get access to the property, since the respondent had been using the same key code for all vacant properties for some years by that time. I conclude that Mr Twomey had reasonable grounds for concluding that the most likely culprit was the claimant. The claimant had the most opportunity and Mr Twomey's conclusion in relation to property 44 indicated that the claimant had done an act of that type before.

101. Mr Twomey's other reasons for dismissal and his conclusions in relation to those reasons all stem from his conclusions in relation to theft of pipes fixed to properties 44 and 37.

102. Dismissal was clearly within the band of reasonable responses once the conclusion had been reached that the claimant was guilty of this misconduct. The offences were of a most serious nature, with potentially catastrophic consequences, as well as being offences of dishonesty.

103. Even though the claimant had a long and previously unblemished employment record, the seriousness of the offences is such that dismissal is within the band of reasonable responses.

104. There is no evidence of inconsistent treatment between the claimant and anyone else in the same material circumstances. There was a clear distinction to be made between the removal of pipes still fixed to the property, with the potential for gas leaks, as occurred with property 37, and the removal of scrap which was already detached from the building. The former was conduct which it should have been obvious to anyone, with reasonable thought, was not acceptable and a potential risk to health and safety. The latter was also theft but would not have the same health and safety implications. In circumstances where the respondent had not made it clear that the latter was not acceptable and it appeared to be a widespread practice, the respondent was in some difficulty in taking action against workers for removal of scrap already detached from the building until they had been clearly informed this was not acceptable.

105. I conclude, for these reasons, that the complaint of unfair dismissal is not well founded.

Breach of contract (wrongful dismissal)

106. In relation to wrongful dismissal, I must adopt a different approach. I must consider whether the respondent has satisfied me that the claimant did commit an act of gross misconduct, entitling them to dismiss him without notice. I must, therefore, decide, on the evidence before me, whether, on a balance of probabilities, the claimant is guilty of gross misconduct. This is a lower standard of proof than the criminal standard of proof, which is beyond reasonable doubt.

107. This consideration may require making findings of fact additional to those found for considering unfair dismissal.

108. I consider first the allegation in relation to property 44.

109. I make an additional finding of fact that the video was taken on the date shown at the top of the recording – 11 February 2016. When shown in various formats, the date is not visible, which is likely to have caused the claimant's suspicion. However, there is no evidence to suggest that the date is not correct; the claimant's mere assertion that this is a dodgy video is not enough.

110. I also find, on a balance of probabilities, that ND did not apply for the supervisor's job and, therefore, had no reason to have any ill will towards the claimant for getting that job. The emails indicate that ND was not intending to apply for the role as at the date of that email and there is no evidence that he subsequently changed his mind.

111. The respondent did not call ND to give evidence. In that respect, I am in the same position as was Mr Twomey, who did not hear evidence from ND but relied on his statement. I find, on a balance of probabilities, that the statement is reliable. ND identified the claimant as having removed pipework in the past, after, it appears from the transcript, the seriousness of the situation in relation to property 37 became clear to him. The fact that he admits to wrongdoing on his own part, I consider goes more towards establishing, rather than detracting from, his credibility. The later attempt to withdraw his statement was, from what he wrote, not because he had not given what he believed to be correct information but because he did not want the claimant to be dismissed. The video came up during the course of the interview. ND no longer had the video and could not have known whether SB would still have it. The video subsequently was found and was consistent with what ND had said.

112. The date on the video is 11 February 2016. It is common ground that the claimant and ND were working at property 44 on that date. I accept the claimant may genuinely believe that the property did not have a window as shown on the video, but the combination of the date on the video and the work records place the claimant at the property. The witness statement of ND identifies the claimant as being the person sawing the pipe.

113. I conclude, on the basis of this evidence, on a balance of probabilities, that the claimant did remove pipe which had still been attached at property 44 on 11 February 2016, to take away for his own gain. I conclude, therefore, that the claimant committed an act of gross misconduct. This, by itself, is sufficient to entitle the respondent to have dismissed the claimant without notice. I conclude, therefore, that the respondent was not in breach of contract by dismissing the claimant. The complaint of wrongful dismissal is not well founded.

114. Given that this, by itself, was gross misconduct, I do not consider it necessary to reach a conclusion as to whether the claimant removed the pipe at property 37 and I do not do so.

Employment Judge Slater
Date: 16 January 2019

REASONS SENT TO THE PARTIES ON

18 January 2019

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FOR THE TRIBUNAL OFFICE