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EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4112636/2018

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Held in Glasgow on 22, 23 and 24 July 2019

Employment Judge P O'Donnell

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Mr Brian Harvey

**Claimant
Represented by
Neil Stewart
Solicitor**

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Applecross Nursing Home Ltd

**Respondent
Represented by:
Mr R Bradley
Counsel**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the Claimant was not unfairly dismissed. Further, that the claim for breach of contract also fails as the Tribunal determined that the Respondent was entitled to dismiss the Claimant without notice.

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REASONS

Introduction

1. The Claimant has brought complaints of unfair dismissal and breach of contract (in relation to the fact that he was dismissed without notice). The claims are resisted by the Respondent.

Evidence

2. The Tribunal heard evidence from the following witnesses:-
- a. The Claimant
 - b. John Murray, the Respondent's General Manager, who carried out the disciplinary investigation.
 - c. Laura Jacobs, the Respondent's Deputy General Manager, who heard the disciplinary hearing.
 - d. Peter Kelly, the Respondent's Company Secretary, who heard the Claimant's appeal.
 - e. Jane Mullen, the former catering manager at the Respondent.
 - f. John Jones, a contractor who did work for the Respondent.
3. There was an agreed bundle of documents prepared by the parties and page references below are references to the pages within the joint bundle.
4. The joint bundle contained both hand-written and typed notes from the various meetings held throughout the dismissal process; the hand-written notes were made contemporaneously and the typed versions created after the meetings from the hand-written notes. The Claimant took no issue with either the accuracy of both versions or the fact that the typed version accurately reflected the hand-written notes. In these circumstances, the Tribunal was referred to the typed notes during the course of the hearing and it was these to which

witnesses spoke; the page references below to any record of the various meetings are, therefore, references to the typed notes.

Findings in fact

5. The Tribunal made the following relevant findings in fact.
- 5 6. The Respondent operates a nursing home which cares for a mixture of elderly residents and adults with disability. It has the capacity to care for 82 residents; 22 elderly residents housed in the original building; 60 adults with disability in two extensions built more recently. It has 115 employees.
7. The Claimant commenced employment with the Respondent in March 2002. He was employed to carry out maintenance work in the home and was at times described as the “handyman” although latterly he had a job description which gave his title as “Head of Maintenance”.
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8. John Murray (JM) started employment as the Respondent’s general manager in November 2017. He had a number of interactions with the Claimant prior to the events leading to the Claimant’s dismissal:-
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 - a. By letter dated 13 February 2018 (p50), he raised an issue with the Claimant that the fire alarm test had not been carried out the previous week and reminded the Claimant of his responsibility to carry this out.
 - b. JM had identified that none of the Respondent’s staff had job descriptions and started to issue these. The one issued to the Claimant can be found at pp51-54. The Claimant had an issue about the rules for getting hours back when called in to work out of hours so would not give his mobile phone number.
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 - c. The Claimant had asked about a pay rise in April 2018 after other staff had a rise. JM did not respond to him about this and so he approached one of the owners, Alex Kelly, directly and a 30p an hour raise was agreed.
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9. The basement area of the Respondent's buildings is described by staff as the "solum" and this judgment will use that phrase for reasons of consistency. The Claimant had a workshop in the solum of one of the new buildings where he kept equipment. Only the Claimant and one of the owners, Alex Kelly (AK), had keys to access the workshop.
10. At some point a few years ago (no precise date was identified in evidence and nothing turned on the date), AK had an idea to create a "memory lane" for the elderly residents which would look like a small street with shops, a telephone box and a post-box.
11. To this end, AK sourced a disused post-box from the Post Office. The "memory lane" was never actually made and so the post-box was stored in various places on the Respondent's premises; initially it was stored in a portacabin which sat on the Respondent's grounds. When the portacabin was being removed to allow for one of the extensions to be built, the post-box was moved to a green metal container which sat behind the Respondent's building; the container was described as being similar to a shipping container although smaller in size and was used to house a variety of items such as a cement mixer and a ride-on lawnmower.
12. On 19 March 2018, AK returned from holiday and, early on that day, he was informed by the Claimant that the post-box was missing from the green container and it was presumed to be stolen.
13. On 25 April 2018, JM was contacted by a member of staff, Claire Miller, to say that she had gone down to the solum area to get some equipment to deal with a flood in the home and had found a post-box in the Claimant's workshop. JM interviewed Ms Miller further and a record of the interview is at pages 72 & 73:-
- a. She reported that she had found the post-box as well as other items which may have related to other missing property such as hoovers and chainsaws.
 - b. She recalled that the Claimant had reported the post-box as missing some time in March; he came into the office where she was present

and told her and Laura Jacobs that he had informed AK that the post-box was missing.

c. She gave details about a missing hoover and that she thought that a chainsaw had been reported as missing the previous year.

5 d. She informed JM that she had said to another employee, Sandra Byrne, that she had found missing items in the solum and that Ms Byrne had replied that the Claimant had said on the Monday that the post-box was missing and that a white van had been seen on the premises at the weekend.

10 e. In response to a question from JM, Ms Miller stated that the items were not hidden.

14. Sandra Byrne completed a form described as a “witness statement” (pp67 & 68) and was also interviewed by JM (p69) on 25 April 2018:-

15 a. She described a discussion with the Claimant and another employee, Mary Welsh, on 23 April 2018 about a white van seen at the weekend and the possibility that it may have been someone trying to get access to the premises as items had gone missing in the past.

20 b. As part of that discussion, the Claimant raised the missing post-box and that he was amazed that someone could have removed such a heavy item.

25 15. Mary Walsh also completed a form described as a “witness statement” (pp65-66) in which she described a meeting on 23 April 2018 at the end of which she asked about the white van seen on the premises. She said that the Claimant commented that staff should call the police if this happened in the future. She then described a discussion about the possibility that someone may have been looking to steal scrap metal during which the Claimant mentioned that the post-box had been stolen some months ago.

16. On 25 April 2018, JM also interviewed AK (pp70 & 71) about these matters:-

- a. AK described the Claimant reporting the post-box being missing to him on 19 March when he had returned from leave. He said that the Claimant had suggested that someone must have come in a van with other people to take it away.
- 5 b. AK said that he had checked the container but it was not locked; he had a key for the lock, the Claimant had a key and there was one in the main office.
- c. There was also a brief discussion of the other missing items; AK reported that it was well known among staff that a Hoover and a chainsaw had gone missing but he could not remember when he had found out about these. He described going to B&Q with the Claimant to buy a new chainsaw.
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17. On 26 April 2018, JM met with the Claimant and interviewed him about the missing post-box and what was found in his workshop. A record of the interview is at pp79-82:-
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- a. The Claimant explained that Mary Welsh had told him about the white van seen in the car park and that he had told her that if this happened again then she should call the police.
- b. The Claimant stated that he was aware of items going missing over the last six months including a TV, a radio and the post-box.
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- c. In terms of the post-box, he described it as being cast-iron and very heavy. He believed that it must have been taken at night.
- d. He explained to JM that AK had got the post-box from the Post Office about ten years previously when AK had been looking to build a replica street.
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- e. He was not aware of a missing Hoover or a chainsaw. JM asked him if the chainsaw was a replacement and he said it was not.

5 f. The Claimant explained that the post-box was in the green container and that during the Christmas period the container had been used to store bottles of soft drinks that had been purchased; the door to the container was not locked to allow the kitchen staff access to get bottles and the Claimant speculated that someone must have noticed the open container and used the opportunity to steal the post-box.

g. He confirmed that the container is normally locked and that only he and AK had keys. He also confirmed that his workshop was secure and only he and AK had keys to it.

10 h. The Claimant described the post-box as 2.5-3 feet high and 1.5 feet wide, coloured red at the front and rusted at the back.

i. He went on to say that he also had a post-box; JM asked him if this meant there were two post-boxes which he did and also confirmed that it was the one sourced by AK which was missing.

15 j. The Claimant explained that he had found the other post-box at a scrap yard in Hillington when he knew AK was looking for one and that one from the Post Office was delivered about two weeks after the Claimant had found his box.

20 k. The Claimant explained that he got his post-box from the scrap yard using the Respondent's minibus to transport it.

18. JM carried out a second interview with the Claimant on 27 April 2019 which is recorded at pp87-90:-

a. The Claimant explained that only he and AK knew about the existence of the second post-box sourced by the Claimant.

25 b. He could not recall where in Hillington the scrap yard was located as it was a chance find when he was driving past. He suggested that if he drove around he could find it again.

- c. The Claimant explained that he had not paid for the post-box but had been given it by the scrap yard for free when he said it was for a nursing home.
- d. He stated that he had transported it using his car and that he had been helped by other employees to take it from his car to the green container; he believed that it was Alec McGuinness and "*Peter from the kitchen*" who helped.
- e. The second post-box sourced by AK arrived two years later. The Claimant described it as being similar to his but double in size. He said that this post-box was put in the portacabin and that the two boxes were there together for about 5-6 years.
- f. The Claimant explained that the boxes were removed from the portacabin when it was taken away and both of these were then moved to the green container. He described them being moved by him, Brian Kelly, AK, John Jones (JJ) and Alec Preston (AP).
- g. He went on to say that the two boxes were not moved at the same time and his box was moved two weeks later, this time by only him, JJ and AP. He initially stated that it was moved to the green container but when asked about how it got to his workshop, he changed his position to say that his box went to the solum and not the green container. He explained there were two solums and the smaller box initially went to another one then got moved to the workshop.
- h. At this point, JM stopped the interview and explained that he was suspending the Claimant because there was a lot of confusion and that he did not believe the Claimant. He stated that he believed there was only one post-box (that is, the one found in the Claimant's workshop) and that no-one else to whom he had spoken had mentioned a second post-box.
- i. JM explained that he was suspending the Claimant on full pay whilst he carried out further investigations. He asked the Claimant not to

contact any staff or contractors about the matter; the Claimant indicated that he intended to tell everyone what JM had done.

19. The Claimant's suspension was confirmed by letter dated 20 April 2018 (pp55-56). It stated two allegations that were being investigated; that the Claimant had told AK that a post-box had been stolen from the green container which was later found in his workshop; that he had reported to AK that a chainsaw had gone missing and that this was also found in his workshop.

20. JM went on to conduct a series of further interviews regarding this matter:-

a. On 3 May 2018, he interviewed John Jones (JJ) who was a contractor that did occasional work for the Respondent. The interview with JJ was recorded at pp93-94:-

i. JJ stated that there were two post-boxes stored in the portacabin which were then moved to the green container.

ii. He stated that he and Alec Preston helped the Claimant move the larger of the two post-boxes which he described as four feet high and on a frame.

iii. He described the Claimant and AP moving the smaller box; he said it was a two man job and so he was not needed.

iv. He was not sure if the smaller box went straight to the solum or was in the green container for a time before being moved.

v. He provided JM with a drawing of the larger post-box to assist in explaining how it appeared but this drawing was lost.

b. On 15 May 2018, JM interviewed an employee of the Respondent. Marie Duff. The interview is recorded at pp98-99:

i. Ms Duff informed JM that the Claimant had been in contact with her and told her that he had been suspended.

- ii. She did not know what it was about and had to find out from the “kitchen boys” in a roundabout way. They had talked about going into the container to get drinks during Christmas and could not recall seeing a post-box.
- 5 iii. Ms Duff could recall seeing a post-box some years ago but could not remember much about it or what it looked like. She did not know that there had been two post-boxes.
- c. On 15 May 2018, JM met with Alec McGuinness and the interview is recorded at page 102:-
 - 10 i. He could not recall helping the Claimant move a post-box and was not aware that the Claimant had a post-box.
- d. On 15 May 2018, JM interviewed Gerry Baird, one of the kitchen assistants, and this is recorded at pp105-106:-
 - 15 i. He confirmed that he had access to the green container over the Christmas period but could not recall seeing a post-box in it at that time.
 - ii. He could recall seeing a post-box on the premises some years ago which was a small one about three feet by one foot.
 - 20 iii. He had only ever seen one post-box and was not aware of a second box.
 - iv. He was shown a photograph of a post-box on JM’s phone which he confirmed was similar in shape and size to the post-box he had seen.
- e. On 15 May 2018, JM also interviewed another kitchen assistant, Carolanne Maneely, who had access to the green container over the Christmas period but could not recall seeing a post-box(p108).
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- f. On the same day, JM carried out a further interview with AK who stated that he did not know that there were two post-boxes. AK had seen the post-box found in the solum and confirmed it was the one which he had got from the Post Office (p110).
- 5 g. A third kitchen assistant, Kirsty Young, was also interviewed on 15 May 2018 and she confirmed that she had been in the green container over the Christmas period but had not seen a post-box in it (p112).
- h. On 16 May 2018, JM interviewed Martin Hudson, who was also a kitchen assistant and the interview was recorded at pp116-117:-
- 10 i. He could recall a post-box being in the green container in the past but had not seen it recently, in particular during the Christmas period when he had been in the container to get drinks.
- ii. JM took him to the solum and showed him the post-box found in the Claimant's workshop. Mr Hudson confirmed that this was the post-box which he had seen previously. He described it as having been at the front, right-hand side of the container.
- 15 iii. He stated that he had never seen two post-boxes at the same time; he had seen the one in the container and the one in the solum, both of which looked the same to him.
- 20 i. JM carried out a further interview with the Claimant on 17 May 2018 which is recorded at pp126-130:-
- i. The discussion started in relation to the chainsaw in which the Claimant described purchasing one with AK from B&Q but this was not a replacement for one which had gone missing; it was to replace one which had broken.
- 25 ii. The Claimant was asked about his conversation with AK about the missing post-box. The Claimant stated that he had been

on holiday in the first week of December and reported it as missing when he came back.

5 iii. He stated that the post-box was at the front of the green container and that this was open during the Christmas period to allow the kitchen staff to get access to the drinks stored in it.

iv. JM asked about the post-box found by AK and the Claimant explained that the one he had found was too small for AK so AK found the other one which came about two months later.

10 v. The Claimant described his post-box being moved from the portacabin to his workshop by him and Alec Preston.

j. On 18 May 2018, JM interviewed Alec Preston (AP) who was another contractor who worked with JJ. The interview is recorded at pp133-134:-

15 i. AP stated that he helped move two post-boxes from the portacabin; one to the green container and the other to the solum.

20 ii. He described one box as being two feet by 18 inches and the other being about the size of the printer in JM's office. He went on to describe one of the boxes as being on a frame and that it was four feet with the frame.

iii. He stated that the one with the frame was moved by him, JJ and the Claimant to the green container and the other one to the solum.

25 k. An interview was conducted by telephone with a further kitchen assistant, David Cooper. The date of the interview is not recorded on the note (pp137-138). He confirmed that he had been in the green container to get out drinks and had not seen a post-box in it.

21. JM then prepared a summary of his investigation (pp58-60). He concluded that there was a case to go to a disciplinary hearing in relation to the issue of the post-box because there were so many anomalies in what had been described in the various interviews. In particular, he was of the view that there had only ever been one post box and not two as described by the Claimant. However, the allegations relating to the chainsaw were dropped as JM was satisfied with the explanation given about this item.
22. The summary of the investigation was passed to the deputy general manager, Laura Jacobs (LJ) to take forward to disciplinary. LJ had been on holiday at the end of April 2018 when the issue has first arisen.
23. She wrote to the Claimant by letter dated 25 May 2018 inviting him to attend a disciplinary hearing on 31 May 2018. The allegation to be determined at the hearing was *“that you knowingly misled the company about the whereabouts of a vintage post-box which you reported as having been stolen, with the intent to steal”*. The letter went on to set out the basis for this and to warn the Claimant that if he was found guilty of gross misconduct then he may be dismissed without notice or pay in lieu of notice. A copy of the hand-written notes of the various interviews carried out by JM were included.
24. The disciplinary hearing took place on 31 May 2018 and a record of the hearing is at pp150-156:-
- a. LJ opened the meeting by confirming that the Claimant had received all the documents sent to him and had the chance to review these. She also confirmed that he had chosen not to be accompanied to the hearing which the Claimant said was on the advice of his lawyer.
 - b. In respect of the documents, the Claimant asked why “Jane’s” was not included. This was a reference to another employee, Jane Mullen, whom the Claimant said had been spoken to by Mr Murray. LJ replied that she was not aware there was any statement from Ms Mullen.

- c. LJ confirmed with the Claimant that there were two post-boxes and asked him to describe them. He declined to do so, stating that he had described them enough.
- d. LJ asked the Claimant about how he obtained the post-box and specifically the fact that he said he used the minibus but then said he used his car. The Claimant confirmed it was his car.
- e. LJ then asked about the period between the two post-boxes arriving which the Claimant had described as both two weeks and two years. The Claimant said it was a long time ago and he could not remember.
- f. There was a discussion about who moved the post-box from the portacabin and LJ explained that Brian Kelly had never met JJ and AP. The Claimant replied it may have been AK he helped.
- g. The Claimant asserted that no-one knew there were two post-boxes and LJ stated that she had a witness who said he had seen one. The Claimant responded that if he showed her a picture of a post-box then she would say that. He went on to say that he was not going to argue with her and that she should "*just do what you need to do*".
- h. At this point, LJ asked the Claimant if he was recording her and he confirmed that he was. LJ adjourned the meeting and spoke to JM for advice on being recorded. She resumed the meeting and stated that she did not want to be taped. When asked why by the Claimant, she responded that they had a note-taker to record the hearing. The Claimant then confirmed that he had turned his phone off.
- i. There was a discussion about the name of the scrap yard which the Claimant could not remember. LJ stated that she knew the owner of a scrap yard in Hillington, Sammie Madden, but the Claimant stated that that was not the name. LJ expressed some doubt as to why a scrap yard would just give something away for free; the Claimant responded by questioning why the Post Office gave a post-box to AK for free and said that LJ was calling him a liar.

- 5 j. There was then a discussion about the size of the two post-boxes and LJ questioned the fact that AP described the two as being the same size. It was the Claimant's position that AK's post-box was in a frame and when you took that into account, it was bigger. LJ responded by saying that Martin Hudson had said that the one he had seen was the same one as found in the solum.
- 10 k. LJ asked the Claimant about why AK only believed there was one post-box and the Claimant said that he could not explain that. He insisted that AK knew about the second post-box and stated that he knew what LJ was doing and that she should just get on with it.
- l. LJ suggested that there was an adjournment at this point. The Claimant stated that they should just get it over and done with because her mind was made up and *"we'll just let the lawyers deal with it"*.
- 15 m. After the adjournment, LJ asked the Claimant about when the post-box in the green container went missing and whether this was when he was on annual leave in December. He confirmed that this was correct.
- 20 n. LJ asked whether this was after the drink bottles were put in the container and the Claimant stated that he was sure that it was there when the drinks were put in. LJ stated that this confused her because his annual leave had been 4-10 December 2017 and the drinks were not bought until 22 December. The Claimant then corrected the date when he reported to AK to March 2018.
- 25 o. LJ moved on to ask a question about the movement of the post-box to the solum. The Claimant replied that he could not remember and that he was not answering any more questions.
- p. There was no further substantive discussions of the facts of the case for the remainder of the meeting. LJ stated several times that she was trying to clarify matters; the Claimant's responses clearly indicated that

he was not prepared to discuss matters further as he was of the view that LJ had already made her mind up.

25. LJ issued her decision to dismiss the Claimant for gross misconduct by letter
5 dated 4 June 2018 (pp157-160). She had concluded that the post-box found in the solum was the same one as the Claimant had reported stolen and that the second post-box was a fabrication. In reaching this conclusion, LJ had relied on a number of factors:-

10 a. No-one else was aware of the existence of a second post-box and no-one could recall seeing it.

b. There were a number of inconsistencies in the Claimant's statement about where the post-boxes had been stored, how his post-box had been transported, how the post-boxes had been moved to different locations and who did it.

15 c. LJ did note that JJ and AP supported the Claimant but that there were inconsistencies in their statements about the description of the two boxes as well as discrepancies between their statements and the Claimants as to the movements of the post-boxes.

20 d. Martin Hudson has identified the post-box in the solum as being the one he had seen in the green container. AK had also identified the post-box in the solum as being the one he obtained.

26. LJ considered that sanctions other than dismissal were not appropriate given the level of trust required in the Claimant; he had free access to all areas of the premises and dealing with vulnerable people meant that the Respondent
25 needed to trust him. She, therefore, concluded that dismissal was an appropriate outcome.

27. The Claimant appealed his dismissal by letter dated 6 June 2018 (pp161-162). The grounds of appeal were:-

5 a. LJ was the wrong person to hear the disciplinary as she was not impartial; she was mentioned in Claire Miller's statement as being involved in a conversation with the Claimant and Ms Miller. The Claimant also asserted that he believed that she was involved in the investigation but does not set out any basis for this. Similarly he asserted that she was clearly lying but gives no detail of this.

10 b. He disputed that AP's statement was inconsistent with JJ's statement in relation to the description of the two post-boxes and that if she had read the whole statement she would have seen that the descriptions matched. The Claimant asserted that LJ only read the parts of the statements which suited her needs.

28. The appeal was heard by Peter Kelly (PK), the son of AK and the legacy company secretary of the Respondent. He convened an appeal hearing on 19 June 2018 and the notes of the hearing are at pp172-176:-

15 a. The Claimant was again unaccompanied at the meeting.

b. The hearing started with a discussion with why the Claimant considered LJ had not been impartial which initially focussed on the issue with her being mentioned in Claire Miller's statement. PK could not see how this affected LJ's partiality.

20 c. The Claimant went on to set out the issue with the statements of AP and JJ; he believed that LJ only read the part of the statements which suited her.

25 d. PK asked whether there was some history between the Claimant and LJ which would explain why he felt she was being unfair. The Claimant responded that he had worked for the Respondent for 18 years and was suddenly a thief and a liar.

e. The Claimant raised the issue of Jane Mullen and the fact that there was no statement from her. PK was not aware who Ms Mullen was at

the time and stated that all statements which had been taken by JM had been passed to the Claimant.

5 f. When asked again why he believed LJ had not been impartial, the Claimant stated that if he wanted to bring it up at another time then he would do it. PK responded that this was the hearing and this was the time to bring it up.

g. The Claimant, in response, asserted that he did not think LJ made the decision but that JM made it.

10 h. There was then a discussion around the statements provided and, in particular, the fact that a number of those interviewed had only ever seen one post-box. The Claimant made the point that three people had said there were two post-boxes.

15 i. In response to the Claimant saying that he might turn up a receipt from the scrap yard, PK expressed doubt about a scrap yard giving something away for free and it was unlikely that the Claimant could produce a receipt from a scrap yard that he did not where it was located. The Claimant's response was to ask for the receipt for AK's post-box and PK asserted that he trusted his father.

20 j. At the end of the meeting, the Claimant asserted that there was bad will against him; he stated that he could give instances regarding JM but will keep these to himself. He stated that he recorded LJ because he knew she would lie from the start.

25 k. In response, PK asked the Claimant to provide him with any evidence to support these assertions. The Claimant declined to do so and stated that he knew PK would not change his view.

29. PK issued his decision by letter dated 21 June 2018 (pp177-179):-

a. He concluded that, on reading all the witness statements, there had only been one post-box. He reached this conclusion based on what he saw as inconsistencies in the statements of the Claimant, JJ and

AP as well as the statements from AK, Martin Hudson and others that they had only ever been aware of one post-box.

5 b. PK was not convinced by the Claimant's explanation of how he found the post-box given that the Claimant could not name the scrap yard or confirm its location. He also placed reliance on the lack of a receipt but he particularly relied on his belief that a scrap yard would not give this away for free.

10 c. He was concerned at what he described as the Claimant's "obdurate" position in not taking steps to provide evidence regarding the scrap yard.

15 d. He confirmed that LJ was not involved in the investigation; given their small management team and the fact that JM did the investigation, it was only LJ who could hear the disciplinary hearing. PK did not see how LJ being mentioned in Claire Miller's statement in any way impacted on her being impartial.

e. In all these circumstances, he upheld the decision to dismiss the Claimant.

20 30. Jane Mullen had been the catering manager at the nursing home for over eight years but does not work there anymore. She recalls a conversation in the office with JM (but cannot recall the exact date) when he asked her if she had ever seen a post-box in the home and she said she had. JM cannot recall this conversation. In evidence, Ms Mullen said that she had seen a post-box in the portacabin but had never seen it in the container. She described it as being square, shabby and that it came up to her chin so would be about five
25 feet high given she was five feet and four inches.

31. The Claimant started a new job on 23 June 2019 working for a renovations company earning £400 a month. He had also started his own business in September 2018 carrying out PAT testing but has made no money from this at the date of the hearing.

32. Details of nine jobs for which the Claimant applied after his dismissal are set out at p 253. A further six job applications are set out at p254.

33. The Respondent's agent sent a list of 27 potential job vacancies to the Claimant's agent by email dated 19 November 2018 (pp193-250). The Claimant did not apply for any of the 27 vacancies identified.

Respondent's submissions

34. The Respondent's agent produced written outline submissions and supplemented these orally.

35. He submitted that there were two questions for the Tribunal to answer; did the Respondent believe that the Claimant made up a story about there being two post-boxes after reporting one as missing; was the whole process a sham?

36. In relation to the second question, it was submitted that the answer was clearly "no"; JM had no influence on the process beyond his involvement in the investigation and there was certainly no evidence of influence on PK; LJ had endeavoured to make a fair decision.

37. The Tribunal's attention was drawn to the reason for dismissal being that the Claimant "*knowingly misled the respondent with the intent to steal a vintage post box that was reported as stolen*". This was the only allegation that was considered in the disciplinary process.

38. Mr Bradley set out a number of propositions as to the legal framework that applied in cases such as this:-

a. It was for the Respondent to show the reason for dismissal and that it was a potentially fair reason under s98 of the Employment Rights Act 1996. He submitted that reason relied on was conduct.

b. Reference was made to the case of *British Home Stores v Burchell* [1980] ICR 303 as setting out the test to be applied in cases of conduct dismissal:-

- i. The employer must establish the fact of belief in guilt of the alleged misconduct.
 - ii. The employer must have reasonable grounds to sustain this belief.
 - 5 iii. The employer must have carried out a reasonable investigation
- c. The Tribunal, in considering what is fair, must look at the whole of the disciplinary process including the appeal (*Taylor v OCS Group Ltd* [2006] ICR 1602).
- d. The Tribunal must not substitute its own decision for that of the
10 employer and its function is to determine whether dismissal fell within the band of reasonable responses which a reasonable employer would apply (*Iceland Frozen Foods v Jones* [1983] ICR 17).
- e. The band of reasonable responses test applies to the investigation as well as the decision to dismiss (*J Sainsbury Plc v Hitt* [2003] ICR 111).
- 15 f. The assessment of the employer's decision includes a consideration of those matters that might mitigate against dismissal (*Brito-Babapulle v Ealing Hospital NHS Trust* [2013] IRLR 854).

39. Turning to the Claimant's case, the Respondent's agent commented on the assertion that the Claimant was dismissed for reasons unrelated to the
20 allegations:-

- a. The Claimant had asserted that he believed JM had made the decision to dismiss and that he had no faith in LJ; this is what led to him recording the disciplinary hearing.
- b. This attitude had clearly influenced the Claimant's approach to the
25 disciplinary process in relation to selective approach to evidence and his general attitude as evidenced by his comments to the effect of "*just get on with it*" and "*get it to the lawyers*".

5 c. It also created confusion in the mind of the Claimant as to the relevance of what was discussed with Jane Mullen, the sketch by JJ and the details of the scrap-yard. It was submitted that these were all issues of which the Claimant was aware before the disciplinary and appeal hearing but that he took no steps to find out what Ms Mullen had said or find details of the scrap-yard to support his story.

d. All of this, it was submitted, had a direct impact on the material the Respondent had before them in order to make their decision.

10 40. Turning to the *Burchell* test, Mr Bradley submitted that in relation to the issue of genuine belief, the evidence of both LJ and PK showed that they clearly had a belief that the Claimant had committed the misconduct in the allegation.

15 41. In relation to the issues of reasonable belief and investigation, it was submitted that the Respondent had a genuine belief and had carried out a reasonable investigation, the following submissions were made in support of this:-

a. It is the whole disciplinary process that has to be considered.

20 b. The Respondent had to resolve conflicting evidence which they did by taking account of all the evidence they had at time and not by looking at isolated or discrete pieces of evidence. It was not only the case that they were entitled to make their decision on the basis of the evidence they had but also the evidence they did not have such as the lack of detail about the scrap-yard.

25 c. The Claimant had accepted that there were discrepancies in his evidence (p156) and there were multiple discrepancies in the evidence he gave:-

i. Whether he used the minibus or his car

ii. When the two post-boxes arrived (that is, was it two weeks or two years between them)

iii. When he reported one being missing to AK

- iv. Who helped him move the post-boxes
 - v. Where the post-box went – particular reference was made to this issue as it was the point when the Claimant stopped answering questions.
- 5 d. It was submitted that the evidence of Martin Hudson and AK was significant and that the Respondent was entitled to take account of this.
- e. The investigation had been comprehensive and included statements that supported the Claimant.
- 10 42. In relation to sanction, it was submitted that once the Respondent lost trust in the Claimant then dismissal was within the band of reasonable responses especially given the nature of the Respondent's business dealing with vulnerable people.
- 15 43. In relation to any compensation which might be awarded in the event that the Tribunal made a finding of unfair dismissal, it was submitted that this should be reduced for a number of reasons:-
- a. It was submitted that the Claimant had failed to mitigate his loss.
 - 20 i. The test was for the Respondent to show that the Claimant had acted unreasonably in failing to mitigate (*Cooper Contract Ltd v Lindsey* UKEAT/0184/15/JOJ).
 - ii. There were 27 roles identified by the Respondent at p195, none of which the Claimant applied for.
 - iii. He applied for only nine roles and there was a lack of supporting documentation for these despite the Tribunal ordering this
 - 25 iv. It was submitted that the period of any compensatory award should be limited to three months as this was a reasonable

period in which the Claimant would have found alternative employment.

5 b. If the Tribunal were to find any procedural error arising from the issue of Jane Mullen or the sketch by JJ then compensatory award should be reduced under the *Polkey* principle to reflect the chance that the Claimant would have been dismissed in any event. It was submitted that this would be significant and a reduction of 50% should be applied.

10 c. It was also submitted that the Claimant's attitude in the disciplinary process had contributed to his dismissal; his conduct was obdurate and he failed to make any effort to provide evidence which might assist him. It was submitted that a reduction of 25% to both basic and compensatory award should be made to reflect this.

15 d. It was submitted that these reductions were cumulative and that any *Polkey* reduction should be made before any reduction for contributory fault.

44. In relation to the breach of contract claim, it was submitted that on the balance of probabilities, the Claimant had committed a fundamental breach of contract and so the Respondent was entitled to dismiss summarily.

20 45. In response to issues raised in the Claimant's submissions, the following points were made in rebuttal:-

a. In relation to the reference to the post-box being heavy and difficult to steal, it was the Claimant's case that it had been stolen.

25 b. It was clear at p117 that Martin Hudson had been taken to the workshop and shown the post-box that was there and that LJ placed reliance on what he said.

c. The Claimant has said nothing about how JM had influenced PK.

d. The Respondent's agent sought to distinguish this case from that of the EAT judgement in *Stuart* (below) on the basis that in *Stuart* the

claimant asked for further investigations to be done on certain points whereas the Claimant in this case had not.

- 5 e. The Claimant was inviting the Tribunal to look at things upside down in relation to alleged failings in the investigation; the Respondent could not investigate the scrap-yard given the paucity of information about it and the Claimant could have sourced further information.

Claimant's submissions

10 46. The Claimant's agent made the following submissions orally at the hearing. A written version were sent to the Tribunal subsequently and, there being no objection from the Respondent, these were added to the case papers.

47. Mr Stewart agreed with the legal framework as set out by the Respondent's agent in relation to the test to be applied under *Burchell* and that the band of reasonable responses applies to the whole process. He also accepted that conduct could be a potentially fair reason for dismissal.

15 48. However, he submitted that the Tribunal should find in the negative in relation to the questions it needs to answer; there was no genuine belief by the Respondent; they had no reasonable grounds for that belief; there had been no proper investigation.

20 49. In relation to the issue of genuine belief, the Claimant's agent made the following submissions in respect to the specific allegation as set out at p61:-

- a. There were other personal reasons why JM wanted the Claimant to be removed.
- b. Although LJ was the decision-maker, she is the deputy of JM and any decision she made was tainted by allegiance to him; she would not contradict his view. This is evidenced by her failure to properly consider the evidence before her.
- 25

50. In terms of whether the Respondent had a reasonable belief, it was submitted that they did not and the following submissions were made in support of that:-

- a. The Tribunal must not substitute its own view but assess whether the respondent had reasonable grounds to form a belief.
- 5 b. It was important to examine the various bases for LJ's findings.
- c. The first of these were the inconsistencies in the Claimant's evidence.
 - i. LJ would not accept that the Claimant might have been confused given the passage of time or that he had made honest mistakes.
 - 10 ii. The issue with the scrap-yard was something which the Respondent could have investigated further.
 - iii. The confusion over who assisted him in moving the post-box was inconclusive given that the Claimant had been less than certain and some of the people could not be contacted.
 - 15 iv. The movement of the post-boxes were complex over a period of years and so inconsistencies were not untoward.
 - v. The issue of the date the Claimant reported the post-box as missing was not controversial at the beginning of the investigation with the Claimant and AK being consistent.
20 Confusion did set in later but the Claimant clarified the date as March
 - vi. LJ could not identify what she said were the inconsistencies in the description of the post-box by JJ and AP.
- d. LJ also relied on the evidence of other staff particularly, the statements
25 from Martin Hudson and Gerry Baird but these did no more than confirm that they had seen a post-box on site and were not evidence

there was only one post-box. They had limited dealings with it and it was possible that they misidentified the post-box they were shown.

5 e. There was great reliance placed on the statement by AK which is the only evidence which contradicts the Claimant about there being a second post-box. However, AK had originally given a statement about a chainsaw but this allegation was dropped so no weight should have been given to what AK had said, particularly in light of the evidence from LJ that AK could get confused.

10 f. It was submitted that LJ refused to accept evidence that ran counter to the decision she wished to make:-

i. The Claimant was noted in his annual assessments as lacking in attention to detail.

ii. He had no previous blemish.

15 iii. The post-box was heavy and cumbersome, not conducive to being stolen.

iv. LJ discounted the evidence of JJ and AP, and could not explain why. Specific reference was made to the fact that their descriptions of the two post-boxes were said to be not inconsistent.

20 v. The post-box had been moved to the workshop which was a more difficult location to steal it from suggesting there was no intention to steal.

vi. Further, the workshop was accessible to staff and the post-box was not concealed.

25 vii. The explanation of there being two post-boxes was made before any allegations were raised against the Claimant.

51. In relation to the issue of investigation, Mr Stewart submitted that there had not been a reasonable investigation:-

- a. Reference was made to the case of *Stuart v London City Airport* UKEAT/0273/12/BA and, in particular, paragraph 38 of the judgment.
- 5 b. In this case, the Claimant did offer evidence regarding the location of the scrap-yard such as the fact that he could drive to it but no further enquiries were made by the Respondent.
- c. There was no evidential basis for the scepticism of LJ and PK about the scrap-yard donating the post-box.
- 10 d. The loss of the sketch made by JJ was a missed opportunity as JM could have shown this to other staff to see if they recognised it.
- e. If JM had spoken to Jane Mullen then this would have provided exculpatory evidence that she had seen the post-box on site and she could have provided confirmation of its size and height.

15 52. In relation to the issue of compensation, the Claimant's agent made reference to schedule of loss which had been lodged and made the following comments in response to the Respondent's submissions on discounts to be made:-

- a. It was accepted that documentary evidence had not been produced regarding mitigation but that the Claimant had given oral evidence.
20 This included the difficulties the Claimant had in relation to the electronic application processes.
- b. If the Tribunal was to find there had been a failure to mitigate then it was submitted that this should be from November 2018 when the Respondent's representative produced the list of jobs.
- 25 c. In relation to the comments about the Claimant's attitude, the various documents show that he tried to explain what had happened but LJ had adopted dismissive and confrontational attitude which lead him to be frustrated. However, the evidence was provided in previous

statements and it was not fair to say that he had not provided any explanation.

Relevant Law

53. The test for unfair dismissal can be found in s98 of the Employment Rights Act
5 1996 (ERA).

54. The initial burden of proof in such a claim is placed on the respondent under s98(1) to show that there is a potentially fair reason for dismissal. There are 5 reasons listed in s98 and, for the purposes of this claim, the relevant reason is conduct.

10 55. The test then turns to the requirements of s98(4) for the Tribunal to consider whether dismissal was fair in all the circumstances of the case. There is a neutral burden of proof in relation to this part of the test.

56. The test for whether a dismissal on the grounds of conduct (or misconduct) is set out in the well-known case of ***British Home Stores Ltd v Burchell [1978]***
15 **IRLR 379.**

57. The test effectively comprises 3 elements:-

- a. A genuine belief by the employer in the fact of the misconduct
- b. Reasonable grounds for that belief
- 20 c. A reasonable investigation

58. It is important to note that, due to changes in the burden of proof since *Burchell*, the employer only has the burden of proving the first element as this falls within the scope of s98(1) with the second and third elements falling within the scope of s98(4).

25 59. In order for there to be a reasonable belief, especially where there is a dispute as to whether or not the employee committed the misconduct in question, the employer must have some form of objective evidence on which to base their conclusion.

60. If the Tribunal is satisfied that the requirements of *Burchell* are met then they still need to consider whether dismissal was a fair sanction applying the “band of reasonable responses” test. The Tribunal must not substitute its own decision as to what sanction it would have applied and, rather, it must assess
5 whether the sanction applied by the employer fell within a reasonable band of options available to the employer.
61. Section 86 of the ERA provides for minimum periods of notice depending on the employee’s length of service; notice of dismissal of at least one week must be given by the employer for employees with more than one month’s service;
10 the length of notice then increases to two weeks after two years’ service with further increases of one week for each year worked up to a maximum of 12 weeks’ notice.
62. Where an employer does not give the correct notice of dismissal then an employee can recover damages for this breach of contract equivalent to the
15 salary they have lost for the relevant period. The Tribunal was given the power to hear breach of contract claims by the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994.
63. An employer is not required to give notice where an employee is dismissed in circumstances where the reason for dismissal is a fundamental breach of
20 contract by the employee. It is commonly the case that such reasons are described as “gross misconduct”.

Decision- Unfair Dismissal

Was there a potentially fair reason for dismissal?

64. The Tribunal held that the Respondent had shown that they had dismissed the
25 claimant for reasons which would fall within “conduct” for the purposes of s98(1) ERA and that there was, therefore, a potentially fair reason for dismissal.
65. The Claimant had not sought to argue that the reason for his dismissal could not fall within the description of “conduct” and, indeed, it was accepted in

submissions that the reason for dismissal was capable of being a potentially fair reason under the heading of “conduct”.

66. In these circumstances, the Tribunal was of the view that the reason given by the employer clearly fell within that category of potentially fair reason.

5 **Did the respondent have a genuine belief in that the claimant had committed the misconduct in question?**

67. The Claimant sought to argue that the Respondent, and in particular Mr Murray, wished to dismiss him for reasons other than that given and, in effect,
10 that that reason was a sham.

68. To support this, the Claimant relied on a small number of incidents where he had an issue with how Mr Murray had dealt with him, specifically the letter about the fire alarm, the issuing of the new job description and person specification, the failure to provide completion certificates for the online
15 courses and the issue around the Claimant being given a pay rise.

69. In the Tribunal’s view, none of these incidents taken either separately or as a whole, provided any real evidence that Mr Murray had any particular animosity towards the Claimant and certainly nothing that would suggest a deliberate course of conduct by not just Mr Murray but a number of others (such as AK, LJ and PK) to see the Claimant dismissed.
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70. The Tribunal noted that certain of the incidents relied on by the Claimant (that is, the issuing of job descriptions and the provision of the certificates) applied to other staff and not just the Claimant. There was certainly no evidence led by the Claimant to suggest that other employees were being treated differently
25 in respect of these issues.

71. Viewed objectively, the sequence of events which lead to the disciplinary action against the Claimant in which a post-box is reported missing and one is then found in the Claimant’s workshop is a sequence in which it is not surprising that an investigation was instigated.

72. For the Claimant's argument to succeed, the Tribunal would have to be persuaded that not only did Mr Murray wish to find a reason to dismiss the Claimant but that Ms Jacobs and Peter Kelly effectively agreed to go along with it.

5 73. In this context, the Tribunal has been conscious that the burden of proof in establishing genuine belief lies on the Respondent and it is not for the Claimant to prove that there was not a genuine reason.

74. The Tribunal found Ms Jacobs and Mr Kelly to be credible and reliable witnesses for reasons set out above and so was willing to accept that they both
10 had a genuine belief in the Claimant's alleged misconduct. There was nothing in the evidence which the Tribunal heard, either generally or in relation to the specific assertions by the Claimant about ulterior motives, that in any way cast doubt over the genuineness of the decision-makers' belief.

Had there been a reasonable investigation?

15 75. On the face of it, the Respondent has conducted an extensive investigation into the allegations. They interviewed a wide range of witnesses including witnesses who supported the Claimant's version of events. Further, they returned to the Claimant to interview him more than once as more information became available.

20 76. However, the Claimant makes a number of complaints about the investigation and the Tribunal has to consider whether those are legitimate and, if so, whether they are enough to say that the investigation which was conducted was not within the reasonable band.

25 77. The first criticism is the issue of Jane Mullen and the fact that she was spoken to by Mr Murray but no statement from her was included in the bundle sent to the Claimant.

- 5 78. It was clear from the evidence of Ms Mullen that she was not formally interviewed by Mr Murray in the same way as other staff were interviewed. Rather, he asked her a simple question while she was in the office for other reasons. In these circumstances, it is quite clear why no statement was provided.
- 10 79. It could be said that she should have been interviewed but the Tribunal cannot see that this would significantly assist the Claimant. Ms Mullen's evidence at the Tribunal was that she told Mr Murray that she had seen one post-box in the portacabin and had never seen one in the green container. This evidence contradicts the Claimant's version of events that both post-boxes were stored in the portacabin and that one was subsequently stored in the green container. If Ms Mullen had been interviewed then this information would have added more weight to the Respondent's decision to dismiss.
- 15 80. In these circumstances, the Tribunal does not consider that the failure to interview Ms Mullen means that the investigation was not a reasonable one.
- 20 81. Similarly, the Tribunal does not consider that the loss of the sketch made by John Jones was enough to render the investigation unreasonable. A number of witnesses could not recall seeing the post-box in the green container and so it is difficult to see how showing them a sketch would have made any difference. For those witnesses who did give evidence that they had seen a post-box such as Alex Kelly and Martin Hudson, they had sight of the actual post-box found in the workshop which, in the Tribunal's view, is a better visual aid than a hand-drawn sketch.
- 25 82. It is correct to say that the Respondent could have tried to locate the scrap-yard but the band of reasonableness test is not concerned with what could have been done but with whether what was done was reasonable. The Tribunal agrees with the submission from the Respondent's agent that an employer faced with no information at all about the name or location of the scrap-yard (other than it being somewhere in the Hillington area) would have a great deal of difficulty in tracking this down. It was within the Claimant's
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capability to provide more information that may have assisted with this but he did not do so.

5 83. Finally, there was the issue that neither Ms Jacobs nor Mr Kelly had any evidential basis for their scepticism about a scrap-yard giving away the post-box for free. This may well be correct but an employer dealing with an internal disciplinary matter is not held to same standards of evidence that a court might and there was nothing unreasonable in both of them relying on their life experience to question the veracity of the Claimant's version of events.

10 84. In all these circumstances, the Tribunal is satisfied that the investigation carried out by the Respondent was one which was reasonable in all the circumstances of the case.

Did the respondent have a reasonable belief?

15 85. In considering whether the Respondent held a reasonable belief that the Claimant had committed the misconduct in question, the Tribunal bore in mind that it was not a question of whether or not the Tribunal believed that he had done so.

86. The question for the Tribunal was whether there was objective evidence from which the Respondent could come to the view which they had.

20 87. In the Tribunal's view, the question of whether or not the Respondent reasonably believed there was only one post-box was central to this case. If they did then it was reasonable for them to believe that the Claimant had misled Alex Kelly about a post-box being stolen from the green container and the adverse inference that flowed from this.

25 88. The Respondent was faced with conflicting evidence in relation to this question; the Claimant, supported by Mr Jones and Mr Preston, said there had been two boxes whereas other witnesses such as Alex Kelly and Martin Hudson gave evidence that there had only ever been one box. A third group of witnesses were in a more neutral position that they had either only ever seen

one box or had not seen any at all; they certainly did not say there were two boxes.

5 89. The Respondent, specifically Ms Jacobs and to a lesser extent Peter Kelly, had to resolve this conflict and there is nothing inherently unreasonable in them resolving one way as against the other. The question is whether it was reasonable for them to resolve it against the Claimant.

10 90. There was a particular focus in the cross-examination of these witnesses on the alleged inconsistencies in the description of the post-boxes by the Claimant, Mr Jones and Mr Preston. In the Tribunal's view, the descriptions provided by the three of them were certainly unclear and confusing even within the same statement; for example, Mr Preston describes the dimensions of the one of the post-boxes initially without the frame and later with it.

91. It could be said that when examined forensically the descriptions were not inconsistent but there was certainly a degree of confusion about these.

15 92. However, it was quite clear from the evidence which the Tribunal heard that this particular issue was not the sole or even the most significant consideration for either Ms Jacobs or Peter Kelly. There were a range of other factors that affected their decision and the Tribunal agrees with the submission of Mr Bradley that the correct approach is not to look at discrete issues but the whole of the material before the Respondent at the time the decisions were made.

20 93. In those circumstances, it is quite clear that there were a significant range of factors which both Ms Jacobs and Peter Kelly took into account:-

a. There were a number of inconsistencies in the Claimant's version of events which affected their view of his story:-

25 i. The different means by which he alleged he transported the post-box;

ii. The periods of time between the two post-boxes arriving which were variously given as two weeks and two years;

- iii. Who assisted the Claimant in moving the post-boxes. In particular, Peter Kelly was dubious that his brother Brian had assisted as he took no involvement in the running of the home;
 - iv. The movement of the post-boxes
 - 5 v. The lack of detail about the scrap-yard
- b. The fact that no other employees could recall there being two post-boxes and that many of them could not recall ever seeing one in the green container.
 - c. The positive evidence of Mr Hudson and Alex Kelly that there had only
10 ever been one post-box and that this was the one in the Claimant's workshop.
 - i. In this regard, the Tribunal was not persuaded by the submission that the evidence of Mr Kelly should have been ignored because the allegation about the chainsaw had been
15 dropped. Ignoring the fact that this was not put to the Respondent in either the disciplinary or appeal hearing, the fact that Alex Kelly may have been mistaken about the purchase of the chainsaw does not mean that Mr Kelly was also mistaken about the post-boxes; both Ms Jacobs and Peter Kelly dealt
20 with Alex Kelly on a regular basis and were entitled to form a view about whether to believe him.
94. In the Tribunal's view, these factors taken as whole provided the Respondent with the basis for a reasonable belief that there had only been one post-box. In those circumstances, it is clear that the conclusions that flow from that (that
25 is, that the Claimant had misled Alex Kelly about the apparent theft of the post-box and that this was with the intention to take it himself) are also a reasonable belief.

95. The Tribunal has noted that in cross-examination and in submissions, there has been a number of criticisms of the Respondent's reasoning which were not part of the discussions at the disciplinary or appeal hearing such as the comments in the Claimant's annual assessment about his lack of attention to detail, his clean record (although Ms Jacobs did consider that when considering sanction) and the suggestions about the logic of the Claimant seeking to steal the post-box given its cumbersome nature and potential value.

96. The Tribunal does not consider that these assist the Claimant given that they were not within the material before either Ms Jacobs or Peter Kelly nor were they issues which were obvious on the face of the evidence they had to the extent that a reasonable employer would have been bound to take them into account.

97. In these circumstances, the Tribunal is of the view that the Respondent did have a reasonable belief in the guilt of the Claimant.

15 *Was the dismissal procedurally fair?*

98. The Tribunal has already addressed the conduct of the investigation above and, for the reasons set out previously as to why the investigation was reasonable, we have concluded that there was no procedural unfairness in that element of the process.

99. Overall, the Respondent conducted what the Tribunal considers to be a fair procedure, giving the Claimant every opportunity to answer the allegations and there was nothing in what had happened which the Tribunal considered to be unfair.

25 100. The only issue which the Tribunal considered needed some examination was the fact that Ms Jacobs was subordinate to Mr Murray but heard the disciplinary hearing based on his investigation. It is good employment practice for the disciplinary manager to be at a higher level in management than the investigator but that, in itself, does not mean a dismissal would be unfair if they were not.

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101. Section 98(4) requires the Tribunal to assess fairness based on the size and resources of the Respondent. The management team of the Respondent was very small, effectively comprised of Ms Jacobs and Mr Murray with Alex Kelly above them as the owner. Once Mr Murray began the investigation, it would
5 have been very difficult for him to then pass this to Ms Jacobs so that he could do the disciplinary hearing; there would no doubt have been a criticism that having done some of the investigation he had formed a view about the matters involved. Similarly, Alex Kelly was a witness so it would be inappropriate for him to hear the disciplinary and if Peter Kelly had done it then there would have
10 been no-one to hear the appeal.

102. In these circumstances, the Tribunal considered that having Ms Jacobs conducted the disciplinary hearing was within the band of reasonable responses given the limited number of people who could have dealt with it.

Was dismissal in the band of reasonable responses?

15 103. It was quite clear from the evidence before the Tribunal that the Respondent took issues around trust and integrity quite seriously. The nature of their business dealing with vulnerable adults and the elderly meant that they needed to trust their employees and any loss of trust was fatal to the relationship with their employees. Indeed, the Claimant accepted this proposition and there
20 was no submissions were made on his behalf that dismissal was not within the band of reasonable responses if the Tribunal found that the *Burchell* test was satisfied.

104. Taking account of the seriousness which the respondent placed on matters of trust and integrity for someone in the job held by the claimant, the Tribunal
25 concluded that dismissal was within the band of reasonable responses.

Conclusion

105. In these circumstances, the Tribunal has determined that the claimant's dismissal was not unfair, there being a potentially fair reason for dismissal which the respondent was entitled to rely on having come to a genuine and
30 reasonable belief, after a reasonable investigation, as to the claimant having

committed the misconduct in question. Dismissal was clearly within the band of reasonable responses in all the circumstances of the case and there was no procedural unfairness.

106. The claim of unfair dismissal; is, therefore, dismissed.

5 **Decision- Breach of Contract**

107. The Claimant's breach of contract claim relates to the fact that he was dismissed without notice.

108. There were no particular submissions made on behalf of the Claimant in respect of this claim.

10 109. The Tribunal agrees with the Respondent that if the Claimant was dismissed in circumstances where the Respondent was entitled to dismiss him summarily then there would be no breach of contract. It is commonly the case that such dismissals are described as "gross misconduct" although the legal principle is that where the Claimant has acted in a manner which would amount to a
15 fundamental breach of contract then the Respondent is not bound by the contractual requirement to give notice of dismissal.

110. The Tribunal must be satisfied that the Respondent has proven, on the balance of probabilities, that there was a repudiatory breach by the Claimant and that this was sufficiently serious so as to justify summary dismissal. This is a
20 different test from that of unfair dismissal and it is not simply a question of the Respondent establishing that they had reasonable grounds to believe the Claimant was guilty of the misconduct in question.

111. In the Tribunal's view, if the allegation of misconduct in this case is proven then this is certainly one which is serious enough to justify summary dismissal. Any
25 dishonesty goes to the root of the contract and, in particular, the mutual duty of trust and confidence.

112. The question then is whether or not the Respondent has proven that the Claimant was guilty of a repudiatory breach of contract. In particular, the Tribunal has to be satisfied that the Claimant had misled the Respondent.

5 113. The Tribunal has taken account of the fact that the only direct evidence as to the existence of two post-boxes were the Claimant and Mr Jones; the Respondent's witnesses could not speak to these matters first-hand and the only direct evidence came from the witness statements produced in the bundle.

10 114. The Tribunal found the Respondent's witnesses to be honest and open in the evidence which they gave, being willing to accept points being put to them that were not in their interests or in the interest of the Respondent's case. They were, in the Tribunal's view, reliable and credible witnesses as far their evidence could go where they could not speak to matters first-hand.

15 115. Similarly, the Tribunal found no issue in the manner in which the Claimant, Ms Mullen and Mr Jones gave evidence and considered them to be credible witnesses. However, where the evidence of the Claimant and Mr Jones was not consistent with the documentary evidence, the Tribunal preferred the documentary evidence and did not consider the Claimant and Mr Jones to be reliable witnesses. In coming to this view, the Tribunal did find Ms Mullen's evidence to be reliable in relation to the fact that she gave evidence consistent with that in the documents when she described only ever seeing one post-box.

20 116. The Tribunal has been very conscious of the fact that the documentary evidence (in particular, the various witness statements) cannot be subject to cross-examination in the same way that live witnesses can be. However, the witness statements contained such a weight of consistent evidence that pointed towards there being only one post-box that the Tribunal found that this tipped the balance in favour of preferring that evidence.

25 117. In particular, the Tribunal took account of the fact that no other employee had ever seen or been aware of two post-boxes, that two witnesses positively identified the post-box in the solum as being the one they had seen in the portacabin in the past and that a number of employees had said that they had

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not seen a post-box in the green container when, on the Claimant's own case, it was at the front and so would have been visible.

5 118. The Tribunal also took into account the inconsistencies in the various versions of events described by the Claimant. For example, the wide discrepancies in the time between the post-boxes arriving at the premises are such that they cannot be explained by the Claimant's memory fading over time.

10 119. Similarly, there is an inherent implausibility in the Claimant's version of events. He complains that it makes no sense for him to steal such a cumbersome item of potentially low value but this assertion is a "double-edged sword" as it equally makes no sense why someone else stole such an item from a container which also contained a cement mixer and a ride-on lawnmower, two items which are surely easier to move and potentially more valuable.

15 120. In these circumstances, the Tribunal concluded that, on the balance of probabilities, there had only ever been one post-box and that the Claimant had misled the Respondent when he reported this as missing, presumed stolen, when it was in his workshop.

20 121. The Tribunal, therefore, concludes that the Respondent was entitled to dismiss the Claimant summarily and so the breach of contract claim also fails and is dismissed.

25 **Employment Judge: P O'Donnell**
Date of Judgment: 15 August 2019
Date sent to parties: 21 August 2019

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