**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4111876/2019**

**Final Hearing held in Inverness on 26 and 27 February 2020**

**Employment Judge a Kemp**

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| **Mr E Purtov** | **Claimant**<br>**Represented by**<br>**Mr J Holden**<br>**Representative** |
| **Suez Recycling & Recovery UK Ltd** | **Respondent**<br>**Represented by:**<br>**Mr K Wilson**<br>**Counsel** |

**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

**The claimant was not unfairly dismissed by the respondent and the Claim is dismissed.**

**REASONS**

**Introduction**

1. The claimant pursued a claim of unfair dismissal. It was defended by the respondent. The case called for a Final Hearing.

2. The claimant's representative Mr Holden had written to the Tribunal to make application for witness orders for a number of witnesses, which had been made two working days before the Final Hearing. Two of the witnesses were to be called in any event, and at the initial discussion prior to the commencement of the hearing Mr Wilson for the respondent confirmed that it had agreed to call a further witness, Mr Gardicki. After discussion with Mr Holden he confirmed that he did not seek a witness order for any other person. During the morning of the second day of evidence he indicated that he might wish to call the claimant's wife Mrs Irina Purtova, but later confirmed that that had not been possible to arrange and she did not give evidence.

3. There was also a discussion as to documents prior to the commencement of the hearing. The claimant had complained in correspondence that not all documents had been produced, and he had made reference to a freedom of information and data subject access request. I explained that an Employment Judge does not deal with requests under data protection provisions, that freedom of information is a matter only for public bodies, and that any application for a document order should be specific, as had been explained earlier in correspondence from EJ Hendry, and EJ Hosie. If a document had not been produced but was material to issues before the Tribunal, it was explained by EJ Hosie that the issue would be considered at that time. As it transpired, no such document was identified during the course of the hearing, and there was no further application for any order for a document to be produced.

4. There was however a discussion with the claimant when he gave evidence as to what his income had been with the respondent, gross and net, and what the respondent's contribution to pension had been. The claimant could not recall that, and no document in the Bundle addressed that. The respondent agreed to produce the records of those issues, and duly did so after the hearing of the evidence.

5. There was a single Bundle of Documents that had been prepared, and an additional smaller bundle was produced by Mr Holden. It was confirmed after checking by him that all of those in the latter were comprised in the former. A colour photograph was however substituted for a black and

white one. At the time of submissions the respondents provided wages records and pension details as had been requested at the conclusion of evidence.

6. There being no further issue either party wished to raise as preliminary issues, and before the evidence was heard, I explained to Mr Holden, a retired trade union representative, about the procedure in the Hearing, the rules for asking questions in examination in chief, cross examination and re-examination, and about making submissions. The hearing then commenced.

7. The hearing concluded late on the second day, and it was agreed that submissions would be made and exchanged in writing at 4pm on 12 March 2020. The parties duly did so.

**The Issues**

8. The issues before the Tribunal, which were agreed by the parties at the commencement of the hearing, were –

    1. What was the reason for the claimant's dismissal?
    2. If potentially fair, was the dismissal unfair under section 98(4) of the Employment Rights Act 1996?
    3. In the event of any finding in favour of the claimant what remedy, including reinstatement, re-engagement and financial award should be made?
    4. In regard to any financial award (i) would there have been a fair dismissal by a different procedure (ii) had the claimant contributed to his dismissal, and should any award be reduced, if so to what extent and (iii) had the claimant mitigated his loss?

**The evidence**

9. The parties had as indicated above prepared a single bundle of documents. Not all of the documents in the bundle were spoken to in evidence.

10. The Tribunal heard oral evidence from (i) Mr Craig MacDonald the dismissing officer (ii) Mr Colin Forshaw the appeal officer (iii) Mr Peter

Gardicki the investigating officer (iv) the claimant himself and (iv) the claimant's father, whose evidence was given through an interpreter.

**The facts**

11. I make the following findings in fact:

12. The claimant is Mr Ernest Purtov.

13. He was employed by the respondent Suez Recycling and Recovery Limited at its Inverness site as a Plant Operator.

14. The respondent operates about 650 sites in Great Britain that include the site at Inverness. The respondent provides waste disposal and recycling services. It has about 4,500 employees.

15. At the site at Inverness there are 6 employees, being 5 Plant Operators, and 1 Site Supervisor.

16. The nearest site to it is in Aberdeen, where there are about 95 employees.

17. The respondent has an HR Department with HR specialist staff employed within it.

18. The claimant's employment commenced on 26 April 2016.

19. He had no prior disciplinary record.

20. He had a contract of employment with the respondent, the first dated 22 and 23 April 2016 and the second dated 3 October 2017. Both referred to a non-contractual Disciplinary Policy.

21. The respondent's Disciplinary Policy includes as examples of gross misconduct "Theft of property or money from SUEZ recycling and recovery UK, other employees of the company, a customer or member of the public, including the removing of any items from any disposal site without prior written authority".

22. The reasons for that policy are to ensure health and safety of the items and their use, for example where they include electrical items, financial considerations to derive the most benefit from items in their possession,

and environmental issues both to recycle as much as can be, and to dispose of items appropriately, in a manner that does not harm the environment.

23. The respondent had a Theft Policy which stated that the respondent "strictly prohibits the removal of any item from its sites without authorisation", including items which have been deposited as "waste" by customers. Employees who remove items of "waste" from sites may be considered to have stolen" from the respondent.

24. The provisions as to theft set out above were the subject of a tool box talk attended by the claimant and others at the weighbridge of the Inverness site on 26 March 2019. The talk was given by Mr Gardicki the Site Supervisor and the claimant's line manager. The claimant signed a form to confirm his attendance at that talk. It was headed "Tool Box Talk - Prevention of Theft Policy" and included below that "[the respondent] strictly prohibits the removal of any items from its sites without authorisation including items which have been deposited as waste by customers. Employees who have remove[d] items of "waste" from sites may be considered to have stolen from [the respondent]."

25. On 29 March 2019 the claimant's supervisor Mr Peter Gardicki noted that pallets were left at site, which were later removed. The claimant was suspected and the matter reported to Mr Gardicki's line manager Mr Craig MacDonald. Mr MacDonald is the respondent's Senior Site Manager, based at Glenfarg near Perth, but who visits the Inverness site about once per week. Mr MacDonald decided that there was insufficient evidence and no formal action was to be taken, but that the claimant was to be reminded of the terms of the policy as to theft, and a file note prepared.

26. Mr Gardicki spoke to the claimant in those terms on 2 April 2019. He prepared a file note which he finalised on 3 April 2019 in which he recorded that he told the claimant that "he must stop removing items from the site without authorisation and adhere to the rules described in the above TBT [tool box talk] which he signed. He was informed that this was his last chance because if caught again disciplinary action will be taken against him. He acknowledged this and said he would not do it again."

27. On 16 June 2019 the claimant and Mr Gardicki finished work at 18.00. They closed the gates to the property so that they were locked, and the claimant offered Mr Gardicki a lift as Mr Gardicki's wife had not yet attended to pick him off. Mr Gardicki declined the offer and the claimant drove off in his car.

28. The claimant returned to the site at around 18.10 that day. He opened the gate of the property and went inside to retrieve his wallet, and sign a book recording running of water.

29. Mr Gardicki was picked up by his wife shortly afterward, but decided to return to the site a few minutes later after noticing a van he understood to be owned by the claimant's father drive towards the site. He asked his wife to stop their vehicle so that he could drive it back.

30. When he arrived at the site, he noticed that the gate was open and that the van was within the site, moving towards the gate. He also saw the claimant's car parked outside the gate to the side. Mr Gardicki parked his car outside the gate, blocking it. The van, which was being driven by the claimant's father Mr Genadij Purtov, stopped. Mr Gardicki took photographs showing the van inside the gate, and the front of the claimant's car parked outside.

31. The claimant approached Mr Gardicki who remained in his car with the window wound down and said something to the effect that he was on site because he had dumped an old washing machine on the day before and was back to remove the motor from it. Mr Gardicki did not reply, but drove off. He later left a voicemail message for his manager Mr Craig MacDonald, to report that. Mr MacDonald spoke to him later that evening, which was not a working day for Mr MacDonald as it was a Sunday, and told him to suspend the claimant, and undertake an investigation. Mr Gardicki wrote out a statement of the events that had occurred that day, dated 16 June 2019.

32. Mr Gardicki had been trained in carrying out such an investigation by the respondent.

33. The claimant was suspended by Mr Gardicki on the morning of 17 June 2019. As the claimant was gathering some possessions he said to Mr Gardicki, in Polish, something to the effect that he would deny everything. The claimant then left the premises

34. Mr Gardicki wrote two letters to the claimant on 17 June 2019, one to confirm his suspension in respect of "allegations of gross misconduct, specifically the unauthorised removal of items from a SUEZ site", on full pay, confirming that it was not a disciplinary sanction and no decision had been reached, the other to call him to an investigation meeting on 19 June 2019.

35. Mr Gardicki conducted an investigation into the allegation of the unauthorised removal of items from the site amounting to theft under the policy. He interviewed the claimant on 19 June 2019. Mr Andrew Flavell of the respondent was present and kept a note of that. A written record of the same is reasonably accurate. The claimant signed the first page of it after having an opportunity to read the full note.

36. During the meeting the claimant was asked why his father was on site in his van. The claimant said "At first I did not know. Asked him. Issue knocking on the van. Said he drove into to use space to try hard turning the van. He done it by hissself whilst I was gathering my stuff". He said he had "no plans to meet anyone" when asked why he had not mentioned meeting anyone to Mr Gardicki when offering him a lift.

37. Mr Gardicki said that he stopped to change drivers, and saw the claimant's car at the football stadium, suggesting that the claimant was waiting for Mr Gardicki to leave. The claimant is noted as stating in reply "Really".

38. The claimant was asked why he did not meet his father at the football stadium, and said that he was not replying as "what I do after work it's irrelevant". The claimant was asked if he remembered approaching the car and speaking to him and replied "Naturally if you were there I would talk to you." When asked what he said he replied, "Don't know probably greeted you." He said that Mr Gardicki had said "No" many times. After further discussions the claimant said he was not willing to discuss matters

further. He referred to not incriminating himself. He asked "to see statements etc so I can prepare to defend myself".

39. Mr Gardicki provided photographs of the vehicles taken on 16 June 2019, and of an item of white goods he thought was a washing machine on 17 June 2019. The photographs showed that the item had been substantially damaged, and that internal components had been removed from it.

40. Mr Gardicki prepared an investigation report dated 20 June 2019. He sent that to Ms Bradley of HR and to Mr MacDonald with attachments by email, in which he also added comments which included that the claimant had acted suspiciously before the end of the shift on 16 June 2019, that Mr Gardicki was sure that on that day the claimant had not removed a motor from the washing machine, that that was an excuse to calm him down, and that he was to remove different items probably large pieces of wood or old furniture.

41. Mr MacDonald decided that the report warranted a disciplinary hearing. MS Bradley did not propose amendments to it.

42. The claimant was informed of that hearing by letter dated 26 June 2019. The letter referred to the "allegations of Gross Misconduct, specifically the unauthorised removal of items from a SUEZ site" that it was an allegation of a theft and if considered proven may lead to summary dismissal. It had attached the respondent's disciplinary policy, investigation report and attachments that included a minute of the investigation meeting and photographs, as well as the file note dated 2 April 2019 finalised the following day, the form in relation to the tool box talk on 26 March 2019 and the respondent's disciplinary policy. The enclosures did not include the email dated 20 June 2019 from Mr Gardicki.

43. The photographs included those of the site on 16 June 2019, taken shortly after 18.00, showing a blue van within open gates at the site of the respondent in Inverness, and a white car outside those gates. They also included the photographs of a white goods item taken the following day which had been damaged, with internal contents removed to an extent.

44. The motor of a washing machine is about 20cm in diameter, and about 1kg in weight. It can easily be fitted within an ordinary car.

45. A disciplinary hearing took place with the claimant in attendance, before Mr MacDonald and a representative of HR who was present by telephone and took notes, on 1 July 2019. The notes of that meeting are a reasonably accurate record of it. Mr MacDonald had been trained in such meetings by the respondent and had conducted several such meetings in the past.

46. At that hearing the claimant maintained at it that he had returned to site to collect his wallet, and that his father had attended there to test his van, unknown to him (the claimant). He was given an opportunity to comment further, as Mr MacDonald thought that he was on the point of saying something, but the claimant did not do so.

47. Mr MacDonald considered the evidence presented to him. He did not consider that the explanation given by the claimant was plausible. He believed the evidence by Mr Gardicki. He considered that the claimant had initially said to Mr Gardicki on 16 June 2019 that he had been on site to remove a motor from a washing machine, that the claimant had not answered questions candidly, and he believed that he had been present with his father who drove his own van in order to remove items from the site, and that under the Theft Policy that was deemed to be theft. He considered that there had been gross misconduct and that in view of its seriousness it warranted summary dismissal. He did not consider that a lesser sanction was appropriate. He confirmed that by letter dated 3 July 2019.

48. The claimant appealed that decision by letter which was not dated. It had attached to it two statements.

49. An appeal hearing was convened before Mr Colin Forshaw, the Production Operations Manager of the respondent who is based at the site in Aberdeen on 9 August 2019. Mr Forshaw had been trained on handling disciplinary and appeal meetings by the respondent, and had conducted about 40 disciplinary hearings and two or three appeal hearings previously.

50. The appeal hearing had originally been set for 2 August 2019 by letter dated 23 July 2019. It was re-arranged by letters dated 29 and 31 July 2019. The claimant sent the respondent further documents by letter dated 5 August 2019 including two further statements, one from the claimant's father which.

51. A note of the appeal hearing was taken by a member of HR staff present by telephone, and is a reasonably accurate record of the same.

52. At the appeal hearing, during the course of it and towards its conclusion, the claimant provided a letter from his wife, Mrs Irina Purtova, dated 1 August 2019, in which she alleged that she had been the subject of what amounted to a sexual assault by an attempt to kiss her and "manhandling" by Mr Gardicki on 2 March 2019.

53. Mr Forshaw considered the position as presented to him, and decided that the allegation by Mrs Purtova should be investigated. He concluded that he should determine the appeal on the basis of the information before him. He considered matters in the days following the appeal. He considered that there were inconsistencies in the accounts given by the claimant and his father, with the statement from Mr Purtov senior stating that he had turned round on site as that was easier and less dangerous because of the size of his van and not mentioning any hard turning because of a knocking noise, that there was no good reason put forward for their being on site out of hours in the circumstances, and he believed that the motor of what he believed to have been a washing machine had been removed by them from site, and that other items would have also have been removed had Mr Gardicki not appeared.

54. He dismissed the appeal and set out his reasons for doing so by letter dated 16 August 2019.

55. Mr MacDonald separately investigated the allegations by Mrs Purtova, interviewing her and Mr Gardicki. He considered that Mrs Purtova was credible, but that the allegations were denied, and there was nothing to substantiate matters either for or against the allegation.

56. When employed by the respondent the claimant had a net wage of £1467.41. That included pension contributions by the claimant under salary sacrifice of £71.70. The employer made pension contributions at 3% of gross salary amounting to £53.58 per month. The equivalent of that wage and pension is £367.85 per week.

**Respondent's submissions**

57. The following is a very basic summary of the written submission by Mr Wilson. The Tribunal should accept the respondent's evidence, and reject that of the claimant and his father. Reasons were given in detail for not accepting the claimant's evidence. The reason for dismissal was conduct, and there was compliance with the legal principles for issues of fairness. Dismissal fell within the band of reasonable responses. Whilst there were issues of procedure on which comments were made, they did not detract from the fairness of the dismissal. In the event that the dismissal was held to be unfair any compensation should be reduced to nil on the basis of ***Polkey*** and the contribution to the dismissal by the claimant. The Tribunal was invited to dismiss the claim.

**Claimant's submissions**

58. The following is again a very basic summary of the written submission made by Mr Holden. Mr MacDonald had been deeply involved in everything to do with the case and should have excused himself from the disciplinary hearing. He was not demonstrably independent. Mr Forshaw had not allowed the claimant to present his appeal properly. Mr Gardicki ought not to have been the investigator and had not been properly trained to do so. There had been collusion between those three witnesses, and later in the submission that was extended to Ms Bradley of HR. The case had been made on the basis of rumours and lies. The evidence of Mr Gardicki was not correct in relation to the incident with pallets, on which detailed comments were made. The investigation was contrary to natural justice as it was by the accuser, and was more of an interrogation. He had held a grudge against the claimant. No proof was submitted. The evidence of the claimant should be accepted and again detailed comments were made in relation to that. This was the worst case of collusion Mr Holden

had seen, with evidence in the bundle but without any data that had been requested under freedom of information.

**The law**

*(i) The reason*

59. It is for the respondent to prove the reason for a dismissal under section 98(1) and (2) of the Employment Rights Act 1996 ("the Act"). The reason for dismissal was considered in ***Royal Mail Group Ltd v Jhuti [2019] UKSC 55.***

60. If the reason proved by the employer is not one that is potentially fair under section 98(2) of the Act, the dismissal is unfair in law. Conduct is a potentially fair reason for dismissal.

*(ii) Fairness*

61. If the reason for dismissal is one that is potentially fair, the issue of whether it is fair or not is determined under section 98(4) of the Act which states that it

> "depends on whether in the circumstances…..the employer acted reasonably or unreasonably in treating [that reason] as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case."

62. That section was examined by the Supreme Court in ***Reilly v Sandwell Metropolitan Borough Council [2018] UKSC 16***. In particular the Supreme Court considered whether the test laid down in ***BHS v Burchell [1978] IRLR 379*** remained applicable. Lord Wilson considered that no harm had been done to the application of the test in section 98(4) by the principles in that case, although it had not concerned that provision. He concluded that the test was consistent with the statutory provision. Lady Hale concluded that that case was not the one to review that line of authority, and that Tribunals remained bound by it.

63. The ***Burchell*** test remains authoritative guidance for cases of dismissal on the ground of conduct in circumstances such as the present. It has three elements

(i) Did the respondent have in fact a belief as to conduct?
(ii) Was that belief reasonable?
(iii) Was it based on a reasonable investigation?

64. It is supplemented by ***Iceland Frozen Foods Ltd v Jones [1982] ICR 432*** which included the following summary:

> "in judging the reasonableness of the employer's conduct an Industrial Tribunal must not substitute its decision as to what the right course to adopt for that of the employer;
> in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;
> the function of the Industrial Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair."

65. The manner in which the Employment Tribunal should approach the determination of the fairness or otherwise of a dismissal under s 98(4) was considered and the law summarised by the Court of Appeal in ***Tayeh v Barchester Healthcare Ltd [2013] IRLR 387***.

66. Lord Bridge in ***Polkey v AE Dayton Services [1988] ICR 142***, a House of Lords decision, said this after referring to the employer establishing potentially fair reasons for dismissal, including that of misconduct:

> "in the case of misconduct, the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly and hears whatever the employee wishes to say in his defence or in explanation or mitigation."

67. Guidance on the extent of an investigation was given by the EAT in ***ILEA v Gravett 1988 IRLR 497,*** that "at one extreme there will be cases where the employee is virtually caught in the act and at the other there will be situations where the issue is one of pure inference. As the scale moves towards the latter end, so the amount of inquiry and investigation which may be required, including the questioning of the employee, is likely to increase."

68. The focus is on the evidence before the employer at the time of the decision to dismiss, rather than on the evidence before the Tribunal. In ***London Ambulance Service v Small [2009] IRLR 563*** Lord Justice Mummery in the Court of Appeal said this;

> "It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question – whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."

69. The band of reasonable responses has also been held in ***Sainsburys plc v Hitt [2003] IRLR 223*** to apply to all aspects of the disciplinary procedure.

70. Although there is an onus on the employer to prove the reason for dismissal, there is no onus on either party to prove fairness or unfairness.

71. The Tribunal is required to take into account the terms of the ACAS Code of Practice on Disciplinary and Grievance Procedures. It is not bound by it. The following provisions may be relevant:

> "4. Employers should carry out any necessary investigations to establish the facts of the case…..
> 9. If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should

> contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification…
>
> 23. Some acts, termed gross misconduct, are so serious in themselves or have such serious consequences that they may call for dismissal without notice for a first offence….

72. Whether or not a matter might be regarded as one of gross misconduct has been the subject of authority. It must be an act which is repudiatory conduct ***Wilson v Racher [1974] ICR 428.*** The question is whether it was reasonable for the employer to have regarded the acts as amounting to gross misconduct – ***Eastman Homes Partnership Ltd v Cunningham EAT/0272/13.*** If the employer's view was that the conduct was serious enough to be regarded as gross misconduct, and if that was objectively justifiable, that was a circumstance to consider in assessing whether or not it was reasonable for the employer to have treated the conduct as a sufficient reason to dismiss. But a finding that there was gross misconduct does not lead inevitably to a fair dismissal. In ***Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854*** the Tribunal suggested that where gross misconduct was found that is determinative, but the EAT held that that was in error, as it gave no scope for consideration of whether mitigating factors rendered the dismissal unfair, such as long service, the consequences of dismissal, and a previous unblemished record.

73. An appeal is a part of the process for considering the fairness of dismissal – ***West Midlands Co-operative Society Ltd v Tipton [1986] ICR 192*** in which it was held that employers must act fairly in relation to the whole of the dismissal procedures***.*** The importance of an appeal in the context of fairness was referred to in ***Taylor v OCS Group [2006] ICR 1602*** in which it was held that a fairly conducted appeal can cure defects at the stage of dismissal such as to render the dismissal fair overall.

*(iii) Remedy*

74. In the event of a finding of unfair dismissal, the tribunal requires to consider whether to make an order for re-instatement under section 113 of the Employment Rights Act 1996. The matter is further considered under section 116.

75. The tribunal requires also to consider a basic and compensatory award which may be made under sections 119 and 122 of the Employment Rights Act 1996, the latter reflecting the losses sustained by the claimant as a result of the dismissal. In respect of the latter it may be appropriate to make a deduction under the principle derived from the case of ***Polkey,*** if it is held that the dismissal was procedurally unfair but a fair dismissal would have taken place had the procedure followed been fair.

76. The Tribunal may separately reduce the basic and compensatory awards under sections 122(2) and 123(6) of the Act respectively in the event of contributory conduct by the claimant. The amount of the compensatory award is determined under section 123 and is "such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

**Observations on the evidence**

77. There were three witnesses for the respondent. The first was the dismissing officer Mr MacDonald. I considered him to be a credible and reliable witness. He answered questions candidly and directly, and made concessions on a number of points where that was approrpiate. He was clear that he considered only the incident on 16 June 2019, and I consider that his failure to take any formal action when an issue in relation to the claimant, on whom suspicion had fallen, arose in March 2019 showed a general fairness in his approach. He had had copied to him an email of 20 June 2019 from Mr Gardicki with comments that did not find their way into his own report. It is commented on below. I did not consider that there was evidence of him colluding as alleged.

78. The second witness was Mr Forshaw, the appeal officer. I also considered him to be a credible and reliable witness. He gave clear evidence on what he had done, and how he had done so. He considered all that was put before him, although that had not included the email of 20 June 2019 to which I shall refer below. He spent nearly three hours in the appeal hearing, and considered matters independently and carefully afterwards. I did not consider that there was evidence of him colluding as alleged.

79. The third witness was Mr Gardicki the investigating officer, called by the respondent in light of the request for witness order made by the claimant's representative. He gave evidence in a clear and candid manner. Whilst there were some points of detail on which I comment below, generally I considered him to be a credible and reliable witness. In his evidence, I asked him in some detail about the sequence of events that occurred on 16 June 2019, and that proved to be consistent with that of Mr Putrov senior as to the timing of events. I did not consider that there was evidence of him colluding as alleged.

80. The claimant's father gave evidence, called first by agreement as the evidence was given through an interpreter arranged at very short notice as intimation of the need for that had been given late on 25 February 2020, who had travelled from Edinburgh to do so.

81. For both Mr Putrov senior, and the claimant when he came to give evidence, I informed them that they did not require to answer any question that might incriminate them. That was as the allegations against the claimant were that he, with his father, was involved in unauthorised removal of items from the respondent's site, or an attempt to do so, that may if true have been the basis of an allegation of theft, or attempted theft, and there was the possibility of art and part guilt on the part of Mr Purtov senior if the allegations made were true.

82. The evidence from Mr Purtov senior was that he had only driven his van in the respondent's premises to turn it round. He did not consider that there was any technical fault in the vehicle. He denied having been involved in an arrangement to remove items from the respondent's premises, and he described his arrival at the site, his using it to turn his van round as the

gate had been left open, which included reversing within the site, and then being stopped when seeking to exit it by another car, which was that of Mr Gardicki which had arrived as he was turning his van around within the site. Although it was alleged in cross examination that he was there to remove items as part of an arrangement with his son, he denied that entirely. He did so directly and in a straightforward way such that the more he was pressed on it, the more I considered that he was telling the truth about that. Overall, although there were some inconsistencies in the evidence given orally against that in the earlier written statement, I accepted his evidence as credible and generally reliable.

83. The claimant then gave evidence. His version of events had changed both from the time of his investigation meeting with Mr Gardicki, if Mr Gardicki is believed, to the disciplinary hearing before Mr MacDonald, and then to the appeal meeting before Mr Forshaw. He said that his wife had told him of the alleged incident involving Mr Gardicki on 2 March 2019, but he had not raised an issue about it at the investigation meeting with Mr Gardicki, nor at the disciplinary hearing at which Mr Gardicki was present. He said that in his culture matters were dealt with by the men involved. His failure to raise a matter at the disciplinary hearing when his job was in jeopardy at the disciplinary hearing, but doing so at the appeal, was very surprising indeed, and affected the assessment of credibility and reliability. He later said to Mr Forshaw that this was the reason why Mr Gardicki was giving wrong evidence about him, and not doing so before that stage is very hard indeed to understand. That sense is exacerbated by his not mentioning it in the grounds of appeal, but doing so towards the end of the appeal, which was surprising both as to timing and to it being done at all if the position culturally was that it was sorted out between those involved. His position was simply not a consistent one.

84. His failure to answer questions at the investigation stating that he did not wish to incriminate himself, was also of concern. He said in evidence that that was because having watched TV programmes where it is said to suspects that they have the right to remain silent and he did so, and was rather panicked by the questioning. He said that it was an “interrogation” meeting, and was a form of “torturing”. That was an exaggeration. The

investigation was called when clearly an explanation for events was required. When asked why his allegations about an improper questioning by Mr Gardicki at the investigation meeting had apparently not been raised at the disciplinary hearing, he said that he had, before it started. That had not been put to Mr MacDonald however in cross-examination. The claimant said that the investigation, disciplinary and appeal minutes were all incomplete or wrong, but they were all taken by someone from HR, the investigation note was signed by the claimant on the first page, and the three witnesses for the respondent gave evidence, which I accepted, that the various written records of those meetings were reasonably accurate. The claimant's evidence on such matters I did not regard as reliable.

85. During the disciplinary hearing he said that the reason he had referred to not incriminating himself was because he was not clear what was going on, what the evidence was and what the allegations were. He was not clear in evidence about whether he had received two letters dated 17 June 2019, one of which set the investigation meeting and the other confirming the suspension and setting out the allegation of removing items from the site. It was not raised in cross examination with Mr MacDonald, or Mr Gardicki, that those letters had not been sent or received, and Mr MacDonald spoke to the disciplinary meeting letter, and Mr Gardicki to the suspension and investigation meeting letters that had been sent. I considered it more likely that these letters had all been sent and received. The letter about suspension set the allegation out, albeit without stating when it was alleged, and what items were involved.

86. His explanation for the presence of his father's van in the site, after hours and after the gate had been locked, when he said that the reason for his being there himself was to collect his wallet and that his father had arrived without being invited by him to do so, was at the very least highly unusual. It would be a remarkable coincidence for events to take place as he said they had, in such a short space of time. The detail of why his father had arrived did however change. That lack of consistency was exacerbated when Mr Purtov senior said that there never had been anything wrong with his van at that time.

87. I took into account that the claimant's first language was not English, although he has a good command of it and spoke at length on detail when giving evidence. Had there been one or two issues that affected credibility and reliability that would have caused me to consider matters differently, but there were a large number of matters that concerned me, in addition to those set out above.

88. By way of example, he accepted that on 16 June 2019 when leaving the site at about 18.00 he had offered Mr Gardicki a lift as by then his (Mr Gardicki's) wife had not arrived. If there had been a sexual assault on Mrs Purtova as alleged which the claimant had known of and spoken to Mr Gardicki about some three months before, an offer of a lift which did not have to be made is a very surprising adminicle of evidence. Similarly, in the investigation meeting the note taker recorded that the claimant said that he and Mr Gardicki had a "good relationship" at work. That term, which I consider was used by him, is a surprising one to use if the allegation made of a sexual assault is accurate, and contradicts his evidence that their relationship had deteriorated after 2 March 2019.

89. I did not hear from Mrs Purtova, the claimant's wife, and the issue of the allegation of an assault on her by Mr Gardicki is I concluded one that I cannot determine one way or the other definitively. I have not therefore made a positive finding about the alleged assault. I note nevertheless that Mr Gardicki strongly denied it, and that the evidence I did hear from the claimant was not consistent in relation to it.

90. There were in addition a number of occasions when the claimant did not answer the question asked in cross examination, or answered in a long and somewhat rambling manner. That might be understandable on a few occasions, but it happened on so many occasions, and when asked pointed questions that could have been answered candidly with a yes or no, that I concluded that it was an attempt to avoid answering the question. I did not agree with all of Mr Wilson's submission with regard to this element, but with some of it.

91. Taking all of the evidence I heard into account, I concluded from the weight of the evidence, the number of occasions where there appeared to be

inconsistencies or discrepancies in his evidence, and the likelihood of his evidence being accurate given all that I heard, that the claimant's evidence was generally not reliable, and was not to be preferred to that of the respondent.

## Discussion

*(a) Reason*

92. I am in no doubt that the respondent has established that the reason for the dismissal was conduct.

*(b) Reasonableness*

93. I will consider this issue firstly in respect of substantive matters, and secondly the procedure.

*(i) Fact of Belief*

94. I am satisfied that the respondent did in fact hold the belief that the claimant was guilty of gross misconduct. I have accepted the respondent's evidence to that effect. Both Mr MacDonald and Mr Forshaw were clear on that issue.

*(ii) Reasonableness of belief.*

95. The question for me is whether the respondent acted as a reasonable employer could do in believing that the claimant had acted as alleged. I have concluded that it did.

96. Taking all the evidence, as it was before Mr MacDonald, I consider that the respondent was entitled to hold a belief that the allegations were established, and that that belief was reasonable. It is necessary to consider matters from that perspective, not from the entirely different perspective of the evidence that I heard. I shall refer to this principle

several times in this Judgment as it is crucial to an understanding of it. This is a case where the words quoted from the ***Small*** case are particularly apt.

97. Whilst there was a debate as to whether the Theft Policy had been sent or shown to the claimant, and no direct evidence that it had been, there was no dispute that he had attended a tool box talk about it on 26 March 2019, signed the form for that, and that it referred to the policy that items must not be removed from the site without permission. The claimant tried to argue that there had not been much discussion I was satisfied that there was sufficient to make it clear that the rule was that items must not be removed without permission, and that a breach was regarded as theft. In addition, the Disciplinary Policy made it clear that that was regarded as an act of Gross Misconduct. There are good reasons for that policy, being financial, safety and environmental, and it is one that the respondent was entitled to have, I consider. Mr MacDonald said, and I accepted, that he did not consider the March 2019 incident save that there had been a reminder to the claimant about the rules on theft, or what was treated as that. That was reinforced by the file note from 2 April 2019, which (regardless of whether or not the claimant removed pallets, he denying that) was of relevance simply as the rule was re-stated, and it was said that breach would lead to disciplinary action. It was clear that the claimant was aware of the rule.

98. Mr MacDonald based the decision on a combination of the investigation report, which he believed, the inconsistency in the explanations given by the claimant as he saw it, and the inherent implausibility of the explanation the claimant gave for both he, and his father, being there, in his opinion. There were photographs which appeared to him to show a washing machine with its internal components removed. The presence of Mr Purtov senior's van on site after hours was, he inferred, so as to be able to remove both that and also other items. He had thought that Mr Purtov senior had arrived in his van before the claimant had returned in his car. He could not think why the van would be there for another reason given the circumstances referred to, and the inconsistent explanations relating to knocking sounds, hard turning, or otherwise he did not believe.

99. Mr MacDonald was I consider entitled to the view that he formed. He did not have the evidence that was before me from Mr Purtov senior nor the full detail of the evidence given by the claimant before me. He believed Mr Gardicki on the issue of what the claimant said to him on 16 June 2019. That was a matter for his judgment provided that he acted as a reasonable employer could.

100. On that issue, I also believe Mr Gardicki, although that is not directly relevant to my assessment as to fairness, but does tend to support the conclusion that for Mr MacDonald to believe that evidence was within the range of reasonable responses. It appears to me more likely that someone in the claimant's position would give some explanation for his being at the site after hours, with his father in a van also on site, rather than to say nothing which is what his position later was. That was also supported by the alleged comment by the claimant after being suspended that he would deny everything. The claimant said that he had not done so, when they were speaking in Polish. It is however clear both from the investigation meeting when he mentioned that he denied any wrongdoing, and in his own evidence when he said the same, that he was denying everything. Paradoxically to deny saying that he had said that he would deny everything, then denying everything, does add to the sense of unreliability of his evidence, and Mr MacDonald was entitled to take such a view himself.

101. Whilst the claimant denied that any conversation had taken place with Mr Gardicki on or about 2 April 2019, I consider that the file note which was made at or about the time was likely to be accurate. Whilst it had been in his personnel file he had not been given a copy at the time, and good practice indicates that that should have been done, but that does not detract from its evidential value. Mr MacDonald also stated that he had asked Mr Gardicki to have such a word, and prepare a file note, and that evidence was I consider consistent such that it is more likely to be accurate.

102. The claimant said in his evidence that he thought that to dismiss someone proof was needed, and he spoke as if the test for proof was the same as for a criminal offence. He did not appear to have appreciated that the issue

was belief that a reasonable employer could have held, having made a reasonable investigation. It is a lower standard than for a criminal trial, where the test is proof beyond reasonable doubt, and a lower standard than for a civil proof where the issue is proof on the balance of probabilities. The test that the tribunal applies is one with a neutral onus.

103. What I cannot do is consider matters purely from the perspective of the evidence before me. It was very different from the position as it was before Mr MacDonald. I must put myself in Mr MacDonald's shoes and consider whether, from the evidence that was before him, a reasonable employer could have believed that the claimant had acted as was alleged. I am driven to the conclusion that he was.

104. I make that comment however against the background that I did generally believe the evidence of Mr Purtov senior, and whilst at first glance it may have seemed suspicious that there was a van present out of hours, it was I concluded likely to have been simply coincidental.

105. A van is not needed to remove the motor of a washing machine. The claimant said that he was not there to do so, but to retrieve his wallet that he had left in the building. Despite my concerns at the evidence the claimant gave, and there are a number of them, I was struck by the fact that the evidence of Mr Purtov Senior and Mr Gardicki on the events that day did marry up as to timing. I was also of the view that it would be unusual if someone, aware of the rule against removing items, would take his own washing machine to site, but return out of hours the very next day to remove something from it. My assessment of the facts, which was made on the basis of all of the evidence before me, was not the same as that made by Mr MacDonald on the evidence before him. I did not consider that Mr Purtov senior had arrived first, but arrived after his son and very shortly indeed before Mr Gardicki.

106. But the test is not what I would have done had I been the dismissing officer with the evidence before me. It is what Mr MacDonald did with the evidence before him, and I have concluded that he was acting reasonably in coming to the belief that he did that there had been a breach of the policy on theft, with removal of an item from site without permission.

*(c) Reasonableness of investigation*

107. I considered that there was a reasonable investigation. It was attacked on the basis that Mr Gardicki was both witness and investigator. It was however a small site, and he was the only supervisor there. It was clear that the decision on the issue would not be taken by him, but by his line manager Mr MacDonald. Whilst having an entirely separate investigation process might have had benefits, that is not the test. I consider that it was in the band of reasonable responses to proceed as was done, and the crucial aspect is that investigation and disciplinary hearing were by different people.

108. The investigation included gathering documents, and photographs. There were two key points, firstly why was the claimant on site after hours, and secondly why was his father on site after hours in a van? The investigation meeting did not provide clear answers to that. Mr Gardicki suggested that the claimant had changed his description for what happened. Whilst that was denied, it is clear that there was a change in what was said to be the reason for the claimant's father being present, which initially was to test the vehicle after hearing a knocking sound. Taking that with the failure to answer some questions referring to incrimination, photographs showing the vehicles, and photographs that were said to show a washing machine with a motor removed, there was clearly a sufficient basis to conduct the disciplinary hearing. At that hearing, the claimant did not provide an explanation that Mr MacDonald considered plausible. It did require something of an acceptance that there was a co-incidence in Mr Purtov senior attending without his son saying that he should, in a short time-frame. Taking all of the evidence before Mr MacDonald I consider that he had sufficient as a reasonable employer to take a decision, and that he had conducted, both at the disciplinary hearing and taking account of the earlier investigation, as much investigation into the allegations as a reasonable employer might. I also noted that he had given the claimant an opportunity to add anything else that he wished to towards the end of the hearing, which the claimant had not taken up. I comment below on the allegation of collusion.

*(d) Procedure*

109. In general terms I consider that the procedure followed did not breach the ACAS Code of Procedure. I do not consider that having as an investigator someone who was also a witness is a breach of the Code. What matters is that the disciplinary hearing was conducted by a person other than the investigator (see for example ***Jindhu v Docklands Buses Ltd EAT 0434/14***, on different facts). There are however three aspects that are worthy of particular consideration. The first is that on 20 June 2019 Mr Gardicki sent an email both to HR, and with a copy to Mr MacDonald, with his report and the attachments, but also additional comments on the circumstances. They did not feature in the report he compiled that same day. That is at best unusual. It was material that was not disclosed to the claimant at the time. It was not irrelevant for two reasons (i) it expressed (at least on its terms) his opinion that the motor of the washing machine, if that is what it was, had not been removed that day but (ii) the claimant and his father were to remove other items.

110. That failure to provide the email to the claimant, which had been copied to Mr MacDonald and included detail relating to the allegations, caused me initially substantial concern. I concluded however, looking at all the evidence overall, that it did not of itself render the dismissal unfair. That is as the evidence on which Mr MacDonald made his decision came from a number of other sources, particularly from the claimant himself both when before him at the disciplinary hearing, and his failure to answer questions candidly at the investigation interview. The explanation given for what happened was not, he considered, a plausible one. The incident had happened out of hours, and involved a van of his father inside the premises, which was not explained in any plausible way as he (Mr MacDonald) saw it, and had been explained in two different ways. Those circumstances did at the very least have the potential to be suspicious and call for an explanation. What the claimant provided was not candid, or complete. Mr MacDonald did not accept what he heard from the claimant, and I consider was entitled to come to that view. He said that he took that decision taking no account of the email of 20 June 2019 with additional comments, and I accepted that.

111. Much of the material that Mr MacDonald based his decision on came from the claimant himself. Whilst the reason for the claimant's not answering questions and referring to a desire not to incriminate himself was explained to some extent before me, it was not explained before Mr MacDonald. There is a right under criminal law not to incriminate oneself, but that is a matter of criminal law. Employment law and practice is different.

112. Taken at face value, not answering questions is highly suspicious where an explanation is called for. Similarly, not answering saying that that was so as not to incriminate oneself is, in the context of an investigation hearing, also something that can be considered to be suspicious. In addition to that, giving inconsistent explanations for the presence of his father's van adds to that feeling of suspicion, and fortifies the view that the evidence is not credible or reliable. That then can affect the question of there was a change of reason given to Mr Gardicki, as he claims, or not as the claimant claimed. It all made it more likely that Mr Gardicki was correct. The picture before Mr MacDonald was therefore a convincing one in his mind, and in that context the 20 June 2019 email with additional comments was not I consider likely to have been in his contemplation.

113. I also considered that, if Mr Gardicki had simply been out to get the claimant dismissed come what may, he would not have put the detail in a covering email, which he thought would be reviewed by others and then discussed with him. He would have put into either his statement or the report itself to provide as much detrimental material to the claimant as he could. That he did not do that is a factor that tends to suggest that he was seeking to carry out his role appropriately. In light of all of the circumstances, I consider that the dismissal was not unfair even although that email was not disclosed with the investigation report.

114. The second matter flows from that issue, and is the allegation as to collusion between all of the respondent's witnesses, and a member of the HR staff who did not give evidence. That was based primarily on the email from Mr Gardicki referred to in the paragraphs immediately above, but also on an alleged failure to provide all material sought by way of a subject data access request. I do not consider that there was such collusion. Working

backwards, Mr Forshaw was unaware of the email at all, and I accepted his evidence as to that. He was a convincing witness. He handled matters in a professional manner, and it would have been an extraordinary act for him to have colluded in such a dismissal. There would be no reason to take such a clearly wrong step. Mr MacDonald was also a convincing witness. Whilst he had seen the email, his evidence about it, as recounted above, was clear and I accepted it. He too would have been acting in an extraordinary way to collude as alleged. They are the two key decision makers. For completeness however I would state that I did not consider that Mr Gardicki had been colluding, nor separately that he had acted out of malice towards the claimant for other reasons. I also address for completeness the allegation of a failure to respond to the subject access request. That is a process not directly within the jurisdiction of the Tribunal, but is a matter that can be considered. If documents are not produced for Tribunal proceedings, an order for them can be sought under Rule 31. No application for such an order was made. It was not suggested that any particular document was known about which ought to have been produced during the course of evidence. What was suggested that all emails between those thought to be in collusion should be provided, so that they could be examined. That is known in Scottish court procedures as a "fishing diligence" and is not permitted. It is a wide trawl of documents made in the hope that something relevant might be found. What was however produced was the email of 20 July 2019, and that has been addressed within the Judgment.

115. The third matter that requires comment is that the allegation made against the claimant was not entirely clearly expressed, as it referred to removing items from the site without specifying what, and when, that was, or whether it was either successful or an attempt. I concluded that the claimant did however have sufficient notice of what was alleged. There was no point taken in cross examination about that issue, and the fact of suspension on the day after 16 June 2019, the letter confirming the suspension with the allegations, the letter arranging the disciplinary hearing with allegations and the report and attachments all were sufficient to make clear to the claimant what was alleged.

*(e) Reasonableness of Penalty*

116. In light of the findings made, I consider that it was at the least open to a reasonable employer to dismiss the claimant summarily. The belief was that he had removed, or was in the process of removing, items of property from the site without authorisation, that he was doing so out of hours and surreptitiously, involving his father in doing so. That could lead a reasonable employer to the view that that was gross misconduct of such magnitude as to justify summary dismissal.

117. I considered in this respect what the allegation was, and what the belief was. In this, there was said by Mr Gardicki to have been a word omitted from his email on 20 June 2019, and that it should have said that the claimant was not “just” removing the motor, but also other items such as large pieces of wood, and furniture. I was not satisfied that that made sense given the full terms of the sentence, but concluded that looking at the evidence as a whole there was sufficient before Mr MacDonald for him to believe, as a reasonable employer, that the claimant had been removing items when Mr Gardicki saw him on site after hours on 16 June 2019, and that other items would have been removed had he, Mr Gardicki, not attended when he did.

118. I accepted the evidence of Mr MacDonald that the item removed was, in his belief, the motor of a washing machine. I did then consider whether that, given the circumstances that included the possibility that this was from a machine left on site by the claimant the day before, was sufficient to lead to dismissal. The claimant alleged that that was not his machine, but a different one. Mr MacDonald believed however the terms of the report from Mr Gardicki that it was likely to be the claimant’s. Whilst it is odd to suggest that someone would remove the motor from their own washing machine a day after leaving it in knowledge of this being regarded as theft by the respondent, and that did cause me to question whether the penalty was within the range of reasonable responses, I concluded that it was. As I have found there are good reasons for the policy itself, they can include issues of safety particularly for electrical components, and in relation to environmental issues. The claimant had been informed about that rule at the toolbox talk, which was not particularly long before the

incident. Mr MacDonald was entitled to conclude that the rule was something known to the claimant.

119. I have concluded that the decision by Mr MacDonald to dismiss the claimant summarily was not unfair under section 98(4) of the Employment Rights Act 1996.

*(f) Appeal*

120. The appeal was held before Mr Forshaw, and took place for about three hours. It involved new evidence being submitted, and a number of grounds of appeal each of which were addressed individually. The allegation that the claimant could not properly understand the proceedings was dismissed on the basis of the hearing held before Mr Forshaw during which the claimant demonstrated a good grasp of English, and of what had happened at the earlier stages. The remaining grounds of appeal were rejected as not being sufficient. Mr Forshaw considered that the correct decision had been reached. He noted further inconsistencies in the evidence presented to him, for example Mr Purtov senior alleged that he had simply turned his vehicle round in the premises as it was less dangerous to do so, which contrasted with what the claimant had earlier stated that his father had conducted a test of the vehicle after hearing a noise.

121. It was suggested that the claimant had not been able fully to present his appeal, but I am satisfied that he did have a reasonable opportunity to do so. That included his submitting a number of new documents, and making a number of new arguments in his grounds of appeal that had not been made before Mr MacDonald.

122. I consider that even if there was a procedural defect in the disciplinary hearing, and for example that emanating from the 20 June 2019 email copied to Mr MacDonald, that was remedied by Mr Forshaw's appeal. He was not aware of that email, which had not been sent to him, as referred to above, but had he been he said in answer to a question from me that it would not have affected the decision he took. I consider that that evidence was both credible and reliable, and that it was open to a reasonable

employer to proceed as Mr Forshaw both did, and would have done, in those circumstances.

123. He did not delay his decision to undertake or have undertaken an investigation into the allegations in the letter from Mrs Purtova. He might have done so, but that is not the point I require to address. It is whether he was acting as a reasonable employer could do so in proceeding as he did. I have concluded that he was. The allegation was made very late in the process indeed. It did not address all of the points, but only sought to question the credibility and reliability of Mr Gardicki's evidence. What was undeniable however was that the claimant and his father, in a van, were on site out of hours on 16 June 2019. That, as indicated above, called for explanation. The explanations given by the claimant were not consistent, not candid, and not complete. Mr Forshaw was entitled to come to the view that nothing presented in the appeal to him was sufficient to lead him to a belief that was materially different to that held by Mr MacDonald. Essentially Mr Forshaw came to the same conclusion as Mr MacDonald for the same reasons. He did not believe the explanation given.

124. For that reason in addition, therefore, I would have held that the dismissal was not unfair. In any event, the appeal is a part of the dismissal process, and it was conducted as a reasonable employer could do, in my assessment.

**Conclusion**

125. The claimant was dismissed for the reason of his conduct. That is potentially a fair reason.

126. The claimant was not unfairly dismissed under the terms of section 98(4) of the 1996 Act having regard to all the circumstances.

127. I require therefore to dismiss the Claim.

**Employment Judge:** **Alexander Kemp**
**Date of Judgment:** **18 March 2020**
**Date sent to parties:** **19 March 2020**