



EMPLOYMENT TRIBUNALS

Claimants:

- 1) Mr B Bylett
- 2) Mr P Brocklehurst
- 3) Mr L Blainey
- 4) Mr E Farrell
- 5) Mr B Beatty
- 6) Mr M Morris

Respondent: Eurotunnel Services Limited

Heard at: London South Employment Tribunals
On: 11, 12, 13, 15, 18, 19 and 20 November 2019, in chambers on 26 and 27
January 2020

Before: Employment Judge Freer

Representation

First, Second, Third and Fourth Claimants: Mr P Powlesland, Counsel
Fifth and Sixth Claimants: In person
Respondent: Mr J Mitchell, Counsel

RESERVED JUDGMENT

It is the judgment of the Tribunal that:

- 1) The claims of unfair dismissal by Mr Bylett, Mr Brocklehurst and Mr Blainey are successful;
- 2) Those cases will be listed for a remedy hearing;
- 3) The Claims of unfair dismissal by Mr Beatty, Mr Farrell, and Mr Morris are unsuccessful;
- 3) The claims of wrongful dismissal by Mr Bylett, Mr Brocklehurst, Mr Blainey, and Mr Farrell are unsuccessful.

REASONS.

1. By claims presented to the employment tribunals in September and October 2017 all the Claimants claimed unfair dismissal and the First, Second, Third and Fourth Claimants claimed wrongful dismissal.
2. The Respondent resists the claims.
3. The Claimants gave evidence on their own behalf together with Mr Mark Swain, Trade Union representative who gave evidence for the First, Second, Third and Fourth Claimants.
4. The Respondent gave evidence through Ms Stuart Griffiths, Customer Service Director; Mr Brett Barnes, Train Crew Manager; and Mr John Keefe, Director of Public Affairs.
5. The Tribunal was presented with a bundle of documents comprising 914 pages and additional documents during the course of the hearing as agreed by the Tribunal.
6. At the conclusion of the hearing the Respondent made an application under Rule 50 to anonymise any reference to the whistleblower in in these reasons on the ground of the potential detrimental effect for him in the future regarding applications for employment. Although there is statutory protection in place he would be in a position of being required to demonstrate that any difficulty was for this reason. That person was not a party to these proceedings, did not attend at the hearing, nor required to attend to give evidence. In his absence and without any confirmation to the Tribunal from him that he was making such an application, or that one was being made on his behalf, the Tribunal concludes no such order can formally be made in respect of that application.
7. However, the Tribunal has taken fully into account the effect of these reasons being published on the internet and readily searchable, particularly on individuals who are not a party to the proceedings and have not had the opportunity to give evidence and argue their account on matters that do not form part of the issues to be determined by the Tribunal and may have future negative consequences for them.
8. For example, a person referred to in the reasons appears from the evidence to have received a formal Caution from the Police. If correct, under the Rehabilitation of Offenders Act 1974 that would not be disclosed on any DBS search after six years yet, if named, would remain on the internet within these reasons for a longer period.
9. The Claimants were in a position to make a conscious decision about name disclosure before they pursued the matter.
10. Therefore the Tribunal considers it appropriate to refer to three individuals below by alphabetic reference, including the whistleblower.

11. If the Tribunal is wrong in this approach, it is easier to restore the names to the record as opposed to removing them once published.

The Issues

12. The list of issues was agreed at a Case Management Preliminary Hearing held on 01 December 2017 and is in the bundle at pages 244 to 249.
13. This hearing was listed to consider liability only.

A brief statement of the relevant law

Unfair dismissal

14. The legal provisions relating to unfair dismissal are contained in Part X of the Employment Rights Act 1996.
15. Section 98 provides that, where dismissal is not controversial, the Respondent must show that the reason for dismissal is one of a number of permissible reasons. The Respondent in this case contends that the reason for dismissal is related to the Claimants' conduct.
16. The Employment Tribunal will consider whether or not the dismissal was fair in all the circumstances in accordance with the provisions in section 98(4):

“The determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

 - (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
 - (b) shall be determined in accordance with equity and the substantial merits of the case”
17. The standard of fairness is achieved by applying the range of reasonable responses test. This test applies to procedural as well substantive aspects of the decision to dismiss. A Tribunal must adopt an objective standard and must not substitute its own view for that of the employer. (**Iceland Frozen Foods –v- Jones** [1982] IRLR 439, EAT as confirmed in **Post Office –v- Foley** [2000] IRLR 234, CA; and **Sainsbury's Supermarkets Ltd –v- Hitt** [2003] IRLR 23, CA).
18. It is established law that the guidelines contained in **British Home Stores Ltd – v- Burchell** [1980] ICR 303 apply to conduct dismissals, such as in the instant case. An employer must (i) establish the fact of its belief in the employee's misconduct, that the employer did believe it. There must also (ii) be reasonable grounds to sustain that belief, (iii) after a reasonable investigation. A conclusion reached by the employer on a balance of probabilities is enough. Point (i) goes to the employer's reason for dismissal (where the burden of proof is on the

Respondent) and points (ii) and (iii) go to the general test of fairness at section 98(4) (where there is a neutral burden of proof).

19. It is also established law that the **Burchell** guidelines are not necessarily determinative of the issues posed by section 98(4) and also that the guidelines can be supplemented by the additional criteria that dismissal as a sanction must also be within the range of reasonable responses (also a neutral burden of proof) (see **Boys and Girls Welfare Society –v- McDonald** [1997] ICR 693, EAT).
20. The Court of Appeal in **Taylor –v- OCS Group Ltd** [2006] IRLR 613 emphasised that tribunals should consider procedural issues together with the reason for the dismissal. The two impact upon each other. The tribunal's task is to decide whether, in all the circumstances of the case, the employer acted reasonably in treating the reason as a sufficient reason to dismiss.
21. This decision was echoed in **A –v- B** [2003] IRLR 405, EAT and the Court of Appeal in **Salford Royal NHS Foundation Trust –v- Roldan** [2010] ICR 1457 with regard to assessing reasonableness of the process and the decision to dismiss with the seriousness of the alleged conduct: “the relevant circumstances include the gravity of the charge and their potential effect upon the employee. So it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where, as on the facts of that case, the employee's reputation or ability to work in his or her chosen field of employment is potentially apposite”.
22. In **Burdett -v- Aviva Employment Services Ltd** [2014] UKEAT/0439/13 the EAT, confirming Supreme Court authority, held:

“What is meant by "*gross misconduct*" – has been considered in a number of cases. Most recently, the Supreme Court *Chhabra v West London Mental Health NHS Trust* [2014] ICR 194 reiterated that it should be conduct which would involve a repudiatory breach of contract (that is, conduct undermining the trust and confidence which is inherent in the particular contract of employment such that the employer should no longer be required to retain the employee in his employment. . . In *Chhabra*, it was found that the conduct would need to be so serious as to potentially make any further relationship and trust between the employer and employee impossible. . . The characterisation of an act as "*gross misconduct*" is thus not simply a matter of choice for the employer. Without falling into the substitution mindset . . . it will be for the Employment Tribunal to assess whether the conduct in question was such as to be capable of amounting to gross misconduct”.

Wrongful dismissal

23. The issues to be determined by the Tribunal are based in common law: whether or not the Claimant committed a repudiatory breach of contract, which was accepted by the Respondent and entitled it to dismiss the Claimant without payment of notice pay.
24. A repudiatory breach of contract is a deliberate flouting of the essential contractual conditions (see **Laws -v- London Chronicle (Indicator**

Newspapers) Ltd [1959] 1 WLR 698): Gross misconduct must be a deliberate and wilful contradiction of the contractual terms (see **Sandwell & West Birmingham Hospitals NHS Trust -v- Westwood** UKEAT/0032/09).

25. Conduct amounting to gross misconduct justifying dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in its employment (see **Briscoe -v- Lubrizol Ltd (No 2)** [2002] IRLR 607 approving **Neary -v- Dean of Westminster** [1999] IRLR 288).
26. In more recent times there has been the decision of the Court of Appeal in **Adesoken -v- Sainsbury's Supermarkets Ltd** [2017] IRLR 346 which cited with approval the decision in **Neary** (above). The nature of the employer's business and the position of the employee are clearly relevant circumstances to the assessment.
27. The decision of the Court of Appeal in **Boston Deep Sea Fishing -v- Ansell** [1888] 39 Ch D 339 confirmed the principle that an employer can defend a claim for damages for wrongful dismissal by using at trial, in its defence of justification, evidence of misconduct by the employee that was not known to the employer at the time of dismissal. That part of the principle was confirmed by the Court of Appeal in **Cavenagh -v- Williams Evans Ltd** [2012] EXCA Civ 697.
28. The Tribunal has also taken fully into account the additional authorities cited by the parties in submissions.

Facts and associated conclusions

Introduction

29. On 17 February 2017, T, a Power Supply Technician within the Respondent's Power Supply Team, disclosed to the Respondent that he had been offered a £50 note by a work colleague, C, as part of 'his share' in the proceeds of sale of batteries belonging to the Respondent and identified for disposal as scrap.
30. That disclosure led to an investigation into the surrounding circumstances by the Respondent.

Genuine belief in the conduct

31. The Tribunal concludes that the decision makers, Mr Barnes at the initial disciplinary and Mr Keefe on appeal, held a genuine belief in the conduct of the Claimants. There was no evidence from which the Tribunal could conclude that the process or decisions were a sham, vendetta or done for any other ulterior motive. This conclusion is very heavily supported by the amount of detail collated and considered with regard to the allegations.

The process adopted by the Respondent

32. On 11 February 2017 T sent an email to Mr Morris and Mr Granville Battersby that stated: "Hello Granville/Melvin, I was put in a very difficult position today as I was offered £50 for scrapped batteries by a technician. I do not think that taking scrap from site for personal gain can be right and I have declined taking the money. The technician left the money on the table in the mess room and went home, I therefore put it in an envelope and put it in his open locker. I am really angry at being put in a position of either keeping quiet or reporting this to you. This has been playing on my mind all day and I feel I have to say something even though I know I won't be popular for doing so. I value my position in the team and deciding to report this is difficult as the guys are my colleagues and friends, but I cannot be associated with anything of this nature and I feel duty bound in letting you know".
33. After a delay in the matter being reported by Mr Morris and Mr Battersby, Mr Griffiths was appointed by the Respondent to investigate the allegation. On 20 February 2017 he was provided with a 'Scoping Document entitled "Investigation into alleged theft and onward sale of Company property" from Mr Nick Hawley, UK HR Director.
34. That document set out the background: T reported the issue to his line manager Mr Granville Battersby. Mr Battersby, Group Leader of the Power Supply Team, sought to handle the issue locally in the first instance and subsequently referred the incident to the Senior HR Manager and also the mother of T. The Senior HR Manager immediately reported the incident to Mr Hawley and withdrew from the investigation. It was agreed that the incident should be investigated by an independent member of senior management at Eurotunnel and Mr Griffiths was approached.
35. The document advised Mr Griffiths that the investigation needed to establish the facts surrounding the allegation and the involvement of C. It should seek to establish, how C came by the money, why and to whom it was being distributed; for how long this practice had been going on and who else was aware and involved; which other employees within (or outside) the Power Supply Team were involved, who received money (if at all) and what is the extent of their knowledge of this practice.
36. Mr Griffiths was instructed that Interviews with members of the Power Supply Team should take place in order to maximise the potential for information gathering but also in a manner minimising the risk of collusion and to establish how widespread the practice was across other departments. Mr Griffiths was informed that the investigation should review how Mr Battersby handled the information when this matter was reported and the appropriateness of his subsequent actions.
37. Griffiths was supported in his investigation by Ms Louise Stoakes, HR Manager.
38. On 13 April 2017 Mr Griffiths produced a detailed Investigation Report which is at pages 259 to 628 of the bundle. It contains notes of 26 interviews. It also contains e-mail communications; CCTV recording reviews; work orders; access

pass data; and relevant documentation within 70 appendices. It has a summary of facts in relation to the potential conduct issues of money, theft, cover up and lies; intimidation and bullying; management control; and miscellaneous/other for each of the 15 people under review which spans over 48 pages. This is followed by conclusions and recommendations for each person over a further 20 pages. It is a very substantial piece of work.

39. The recommendation arising from that report in respect of the six Claimants was that formal disciplinary action was appropriate.
40. Mr Griffiths also concluded that formal disciplinary action was appropriate for four further employees.
41. Mr Griffiths concluded that Mr Darren Lockyer had come forward and given an honest account, albeit late in the investigation and recommended that no formal action was taken in respect of his involvement.
42. C and G had by that stage resigned from the Company.
43. With regard to the approach to the Investigation Report produced by Mr Griffiths, he first spoke with T to understand the allegation in more detail. T mentioned that Mr Beatty had been in the room at the time and therefore Mr Griffiths spoke with him the following day. Mr Beatty denied the version of events given by T. He denied that he had been offered £50 by C
44. Mr Griffiths next spoke with Mr Battersby as he was T's line manager and the person to whom he had reported the event. Mr Battersby had tried to deal with the matter 'in-house'. He did not report the incident until nearly a week later.
45. Because Mr Griffiths encountered denial of the events, he decided to investigate whether there was any evidence of the batteries being stolen.
46. Mr Griffiths contacted the disposal company and was told the last date of disposal of batteries from the waste compound had been 05 January 2017. Mr Griffiths visited the waste compound and instead of the two tonnes of batteries that should have been present there was only a handful. This supported T's version of events.
47. Mr Griffiths obtained access to the CCTV recording of the battery change jobs and the swipe access data. Mr Griffiths observed what he considered to be two empty battery bins after the completion of two battery change jobs that would have produced the two tonnes of battery waste. He considered that, together with other physical evidence, the circumstances suggested that the batteries had been stolen.
48. Mr Griffiths then put the physical evidence to those working on the shifts at the time and asked whether they had an explanation.

49. Importantly Mr Griffiths interviewed C on 27 February 2017. C became very edgy during the interview. He confirmed that he wanted a break, did not return to the meeting and resigned on 03 March 2017. Mr Griffiths was not able to interview C further.
50. Mr Blainey and Mr Lockyer denied knowledge of events. At that stage Mr Griffiths discovered a further CCTV recording that he considered showed evidence of a possible further theft that may have occurred on 05 February 2017 that involved G. However, before Mr Griffiths could interview G, he too resigned.
51. Mr Griffiths interviewed Mr Bylett who had also been present on the 05 February 2017 CCTV recording with G. He denied being offered money by C. Mr Beatty, who was also present, also denied any knowledge.
52. Mr Griffiths was forming the view that what T had said was the truth and that there was a cover-up due to what he considered to be a 'wall of silence.
53. Mr Griffiths received a request from Mr Lockyer to speak with him on 10 March 2017, but as he was unavailable he asked Mr Hughes, Manager Works Train (UK), to speak with him. At that meeting Mr Lockyer stated that what T had said about the money and conversation was true. Mr Beatty then gave evidence on 13 March that corroborated T's version of events.
54. Mr Griffiths' investigation widened and he interviewed nearly all of the UK Power Supply Team.
55. The notes of all the meetings, which had been taken by an independent note taker, were typed up and each of the interviewees was invited to review and sign them with any comments on any area of dispute. Where it was obvious there was an error, the changes were incorporated into the notes. Mr Morris wished to make significant changes and his own version was attached to those that HR had taken.
56. Mr Griffiths did not interview Mr Cory and Mr Werrey because he considered that neither of them worked on the jobs under review when the batteries were stolen (27 and 29 January and 05 February 2017) and were absent from work when it was alleged the proceeds of sale were distributed (17 February 2017). Mr Cory was off work with sickness from 09 to 24 February 2017 and Mr Werrey was on rest days from 08 to 11 February and annual leave from 12 to 26 February 2017. However, Mr Griffiths did recommend formal action be taken against them because of their treatment of T.
57. Mr Griffiths produced his Investigation Report in which he set out a summary of facts, conclusions and recommendations.
58. The Tribunal concludes that the process adopted by Mr Griffiths fell comfortably within the range of objective reasonableness. He made all the investigations that were reasonably open to him and produced an extremely comprehensive report.

59. The Tribunal also concludes on balance after reviewing all of the evidence that it was reasonable for Mr Griffiths to believe that around 108 batteries had been stolen, sold and that the proceeds of sale were distributed amongst some of the UK Power Supply Team. It was also reasonable for him to believe that some members of the Team had treated T unfairly after he had raised the issue.
60. The Police were notified and conducted a separate investigation into the alleged theft, although it focussed on C and G. The Tribunal was shown a record of the Police outcome at page 874. That outcome post-dated the disciplinary process and therefore is not relevant to the liability issue in the unfair dismissal claims.
61. At the same time as the Police investigation, the matter was passed to Mr Barnes who was appointed to conduct the disciplinary hearing. He was assisted by Mr Hawley, HR Director.
62. On 20 April 2017 the Claimants were sent a letter inviting them to a disciplinary hearing
63. The individual letters set out the respective allegations, informed them that a sanction could be applied up to and including dismissal, provided the right to be represented by a member of the Company Council, trade union or a workplace colleague, and provided the opportunity to call witnesses. The Claimants were provided with copies of all the relevant documentation and the number for the Employee Assistance Scheme.
64. Each Claimant attended at the disciplinary hearing. They had the right to be represented. Notes were taken of the hearing by a designated note taker.
65. Three other employees also attend at their own disciplinary hearings.
66. By letters dated 19 May 2017 the Claimants were provided with the written outcome of their disciplinary hearing. The letter confirmed the allegations and the process that had been adopted, set out the overall findings, then the specific findings and the outcome, which in all six cases was dismissal for gross misconduct.
67. The Claimants were given a right of appeal, which they did by letters dated 23 May 2017. Mr John Keefe, Director Public Affairs UK, was appointed to conduct the appeal hearings together with Mr Rob Gregory, Security & Emergency Response Manager, and Mr Paul Bushell, M&E Manager.
68. Also on 23 May 2017 Mr Hawley sent an e-mail to Mr Keefe with the subject matter of 'Disciplinary Appeal'. In that e-mail Mr Hawley briefly explained the circumstances as he saw them and stated "It is a web of lies and dishonesty in which they all played a part". He also stated that Mr Keefe was independent and impartial which would : "serve our case well".

69. The Claimants were given the right to be represented and provided with a copy of the notes from the disciplinary and the clarification meeting with Mr Lockyer dated 16 May 2017.
70. The Claimants attended at the appeal hearing, were represented and notes taken.
71. Appeal outcome letters were provided that confirmed the decisions to dismiss as detailed in the disciplinary outcome letter were upheld. No further explanation was provided.
72. In all the circumstances the Tribunal concludes that the disciplinary process fell within the range of objective reasonableness, particularly having regard to the scale of the disciplinary issue.
73. However the e-mail from Mr Hawley to Mr Keefe was probably not the best decision he has made and displays a potential influence on Mr Keefe and introduced the very real prospect of the matter having been predetermined. However, whether or not it had any influence on Mr Keefe is best considered when looking at the appeal process and the rationale of the decision. If there is no objectively reasonable rationale the decision falls outside the range of reasonable responses irrespective of whether it is the product of influence from Mr Hawley. In addition, there was an appeal panel which reduces the potential for undue influence. The Tribunal has considered this matter carefully and concludes that the e-mail does not place the process outside the range of reasonable responses.
74. The issue over Mr Bylett and Mr Brocklehurst viewing the CCTV recording is addressed below. The contention that they were told that there had been three trips was factually inaccurate. Both had the opportunity to view the recording at the disciplinary stage and did not take it.

Reasonable belief

75. The Tribunal has received a good deal of witness evidence in this matter, but has been careful to assess the evidence that the decision makers had before them at the time those decisions were reached, rather than interpretive, different or new evidence adduced during the Tribunal hearing.
76. The Tribunal has carefully considered all of the evidence in detail and sets out below the main factors to inform the parties in sufficient terms why they have won or lost as the case may be.
77. The notes of the disciplinary meetings are not verbatim, but provide an accurate account of what was said.
78. Tribunal concludes that it was reasonable for Mr Barnes to believe that there had been a conversation amongst C and Mr Bradley and then subsequently between

Mr Bradley and members of the lighting team about the value of the recycled batteries. At that time it was noted that the value of 54 batteries was £450.

79. Tribunal concludes that on the evidence available it was also reasonable for Mr Barnes to hold a belief that batteries had been stolen by C on 27 and 29 January 2017. This belief was reasonably supported by the CCTV evidence, the badge swipe data, work order details, the absence of the expected amount of batteries at the waste compound and the accounts of C's own conduct.
80. The Tribunal concludes that it was also reasonable for Mr Barnes to believe T's account of the allegation of being offered £50 in respect of scrapped batteries and the immediately surrounding circumstances. He had been open and honest from the outset and was able to provide details of the account. The majority of the Claimants considered him to be an honest individual who had no motive to be untruthful on this occasion.
81. It was also reasonable for Mr Barnes to conclude that the disposal of batteries, particularly in the number identified, gave rise to significant health and safety implications for the Respondent. Safety is the most important consideration for the Respondent and so the work of the Power Supply Team also required trust in them to operate in a proper and safe manner.
82. The circumstances relating to the individual Claimants is outlined below, but it is important also to set out the accounts given during the disciplinary process by those who are not Claimants to this action.
83. T sent the e-mail of 11 February 2017 setting out the alleged outline circumstances, but no additional information.
84. On 17 February 2017, the Senior HR Manager received a telephone call from Mr Battersby informing her of the position. She made a written statement on the same date, which recounted that: "Granville was very apologetic at having to notify me of the problem and said there has been a delay in reporting the matter as his focus had been to protect T. He added that it was of course for the investigation to establish the facts, but that the batteries to which T was referring were in fact still on the floor somewhere". This information provided to the Senior HR Manager was not wholly accurate.
85. The Senior HR Manager advised Mr Battersby that she could not become involved and reported the matter to her Manager Mr Hawley.
86. T was interviewed as part of the investigation on 20 February 2017 (pages 351 to 345 of the bundle).
87. It is recorded that T stated: "T advised that it was his first shift back on Saturday 11 February after four days off. He entered the mess room where Barry Beatty (BB) and C were present. T said he saw C offer a £50 note to BB saying that it was from the sale of scrapped batteries, C then passed another £50 note to him. T said that he noticed C holding a roll of money in his hand. T stated he threw

the note back at C on the table in front of him saying that he didn't want it and wanted nothing to do with it. C replied that it was T's cut and that he didn't have to take it home he could just put it on his work card. T said that he then stood up and as he did so G entered the room commenting to C 'did he take it', to which C said 'no he doesn't want it', G said 'I told you he wouldn't take it'. C wouldn't take the note and moved away leaving the note on the table. T said he felt angry and didn't know what to do. He picked up the note and walked to the computer room. BB joined him in the computer room and T asked BB to take the money off him saying again that he didn't want any involvement with it. BB took the money and T carried on with the shift. Later in the shift T discussed it briefly with BB who expressed he was not happy about it and he didn't know what to do. Darren Lockyer (DL) joined them and T asked if he had been offered any money. DL replied he had already told C he didn't want anything to do with it. . . . T stated that a discussion was had between himself BB and DL about if the note was real. T said he had not seen a £50 note in ages. BB then went to his tool locker that he shared with T and took out a £50 note. T assumed it was his £50 note not BB's. DL rubbed the £50 on a piece of paper to see if it was real. Ink came off and he said he was real. T told him that he did not want anything to do with it and he asked DL to pass him an envelope. He put the £50 note in it and wrote 'no thanks Nath' on the front and placed it into C's open locker on top of clothes. It was the end of the shift and T left. . . . T advised that he was on the early shift on Sunday 12 February and BB was on the pm shift so they saw each other on the overlap. BB told him that he had been thinking about the situation at home and wanted to put his £50 note in the same envelope with T's". T confirmed that Mr Beatty was not aware of his email to Mr Battersby at that stage.

88. T said that when he did tell Mr Beatty about his email to Mr Battersby, Mr Beatty replied that he was very concerned because of the impact in the team, but he had understood T's feelings and told him that it had been a brave thing to do.
89. T recounted that he had later been approached by Mr Battersby who said that he had not wanted to reply to T's email but instead "wanted to talk about it to try and resolve it". Mr Battersby said that he felt it would be difficult for T within the team if the matter was taken down a formal route. Mr Battersby said his main focus was to protect T's position in a team. Mr Battersby mentioned that he intended to speak with C about it and suggested to T that he put his money in the work 'charity box'.
90. T then recounted the circumstances of 14 February 2017 when he was left in a room with C. He stated that C was not angry and apologised to T for putting him in a difficult position: "He said everyone in the team had been offered the same and he did not want to leave him out". He told T that he should have talked to him before going to Mr Battersby and if he had a problem next time he should take him to one side.
91. Later that day C approached T to speak to him again. C confirmed that he had used the work's truck for the batteries. C told T that he had been asked by Mr Battersby to tell the technicians that this stops now and said that next time he would not involve T.

92. Mr Battersby then sent T an email asking if he felt happy with the conversation he had with C. T replied that he was not as C suggested that there would be “a next time”.
93. Mr Battersby mentioned to T about him “going a long way” in the Department with the possibility of running it in the future, but if this situation was to “go formal” it would make it harder for T to achieve that.
94. T also said that Mr Bylett seemed “offish” with him.
95. T was further interviewed on 14 March 2017 (pages 455 to 457 of the bundle), which mainly addressed details over a ‘switching schedule’.
96. Mr Lockyer was interviewed four times as part of the interview process, on 22 and 28 February and 10 and 21 March 2017. In the third meeting Mr Lockyer stated that everything he said during investigation interviews was true apart from the conversation with T about the money: “DL explained he came in on the afternoon shift and was present when T and Barry Beatty were talking about the money and that it was from C. DL advised up until this point he had no prior knowledge of the money. DL advised he could not remember the full conversation but does remember saying he is not interested in taking any money and did not want anything to do with it. DL commented in frustration I can't believe I've been dragged into this. It was a united team. No matter what I say in one way you are turning someone over or another you are turning someone else over”. Previously Mr Lockyer had denied any such conversation.
97. In the fourth meeting Mr Lockyer stated that T had explained to him how the Company had supported T for telling the truth and Mr Lockyer considered approaching the investigation officer, but was concerned about the possible consequences and reactions. Mr Lockyer was advised that he may be protected under the Whistleblowing Policy, but it depended on the details given.
98. Mr Lockyer then gave details which changed his account again, particularly to the extent that he knew about the battery sale in advance of the discussion with T and Mr Beatty. He stated that the money was to be put in the Christmas drinks fund, but the lighting team, Mr Beatty and T did not go and that is why they were given the money. Mr Lockyer stated that “the whole department knew what NC had done”. He stated that Mr Morris “knew what had happened, he knew about the batteries and the cover up”. He said that one team member was on holiday and the other off sick so they might not have known.
99. He also recounted that Mr Morris had called him into the office to complete some paperwork. When he arrived Mr Morris said that Mr Beatty was downstairs in a car and wanted a chat. Mr Lockyer said that he went down to the car and Mr Beatty detailed what he had said during his interview, specifically that he had denied everything. Mr Lockyer said that before this he had been approached by Mr Morris and asked whether he had spoken to Mr Beatty and sorted out “what is what”.

100. Mr Lockyer stated that C had told him that Mr Morris and Mr Battersby knew in advance about what he was going to do. Mr Lockyer expressed: "That's the way the department is and the culture is such that it does not allow anyone to have their views. The department has a real thing about snitches".
101. Mr Lockyer said that everyone now ignores T and that he had been made an outcast by the team.
102. After the Report was produced there was a clarification meeting on 16 May 2017 between Mr Lockyer and Mr Barnes. The notes are at pages 721 to 724. In that meeting Mr Lockyer stated that the lighting team "were 100% offered and 100% took the money".
103. With regard to the reasonable belief in the alleged conduct of the individual Claimants, the Tribunal makes the following findings and conclusions starting with Mr Beatty as he acknowledged that he lied during the internal process, which may have an impact on what it was reasonable to believe with regard to the other Claimants and also in light of the accounts given by T and Mr Lockyer:

Mr Beatty

104. Mr Beatty worked as a Level 3 Power Supply Technician. He had been employed by the Respondent since April 1993.
105. Mr Beatty was interviewed three times as part of the investigation. The Investigation Report set out its findings at pages 279 to 281 of the bundle and its conclusions at page 332.
106. The conclusion reached was: "BB is a senior member of the team by his service, experience and habilitation and he was assigned as T's mentor for some years. He was in the same position as T in being offered the money, and whilst he initially took it, he returned it the next day. However he supported the cover up because of his actions towards T and his failing to take any actions to report or prevent any future theft taking place. BB became aware of an incident which compromised the safety of his colleagues, in that they had removed from site a large amount of batteries outside the department's normal practices. He took no action to report the incident to prevent any subsequent unsafe act from occurring".
107. His disciplinary hearing took place on 05 May 2017. The notes of the hearing are at pages 676 to 682 of the bundle.
108. The allegations raised against Mr Beatty were:
 - "1) You accepted £50 from a work colleague for the sale of property stolen from company.
 - 2) You failed reported a criminal act.

- 3) During the investigation into the theft of waste batteries you acted dishonestly by taking part in a co-ordinated cover-up which attempted to prevent the Company from establishing the facts.
 - 4) During the investigation into the theft of waste batteries you took part in victimising an individual who reported certain facts to his line manager”.
109. In the outcome letter Mr Barnes set out his overall findings and then made specific findings from the evidence before him in respect of each of the four allegations:
- “1) I believe that you accepted £50 from a work colleague for the sale of property knowing it to have come from the sale of goods stolen from the company. I cannot determine your reasons for subsequently returning the money nor can I determine if you would have accepted the money had T not influenced your decision by his own actions.
 - 2) I concluded that it is clear that you failed to report a criminal act. I believe this to be the case given that you repeatedly lied at interviews on 21st February and again on 9th March 2017 during the investigation process.
 - 3) I believe that you, together with your power supply team colleagues decided to take part in a co-ordinated cover-up which attempted to prevent the Company from establishing the facts. Furthermore during interviews on 21st February 2017 and 9th March 2017 you were dishonest and chose to tell what you knew to be untruths repeatedly to mislead the company from establishing the facts.
 - 4) It is evident that, by your own admission voiced during your disciplinary interview, you blame T for the situation in which you and your power supply colleagues find yourselves, albeit that you accept that this view is wholly irrational. You have stated that not talking to T is a personal, individual decision you have taken for your own reasons therefore I consider it reasonable to believe that you are part of a coordinated campaign to ostracise and exclude T acts which I consider to constitute the harassment and bullying of an individual”.
110. The notes of the disciplinary hearing record that Mr Beatty admitted that he had lied to the investigation hearing. Mr Beatty had in two investigation interviews with Mr Griffiths denied the conversation where C had offered the £50 note. In the second interview, in response to T’s account of events, Mr Beatty shrugged his shoulders and said it “never happened”. He denied T’s entire account of events. At the third interview he maintained he had lied because he was worried about his job and then felt he had to maintain the lie.
111. Mr Beatty conceded during the disciplinary hearing that Mr Morris had contacted him and he had told Mr Morris that he had lied. When asked why he had not supported T from the beginning Mr Beatty stated that he was worried for his job and did not want C to get the sack. He said that he knew T was telling the truth

but he did not think it would go so far and acknowledged his lie had been a big mistake.

112. When asked if he knew where the money had come from Mr Beatty responded that a discussion had taken place between T and C about the fact that C had taken some batteries for scrap.
113. Mr Beatty said that he could see that T had been “distracted by [the conversation] and taken offence by it”.
114. Mr Beatty said that he had encouraged T to put the money in an envelope. When asked why he had not done the same he said he had not taken it home, but kept it in one of his lockers and the next day put it in an envelope.
115. Mr Beatty said he had been relieved when T had written the e-mail to Mr Battersby as it took the decision about what to do away from him. When asked why he denied the event if he was relieved, Mr Beatty replied that the investigation felt like an interrogation and he did not want to get anyone into trouble. Mr Beatty confirmed that if T had not reported it he probably would just have spoken to C and not reported it himself.
116. Mr Beatty blamed T for the situation and that it was human nature to do so because T had sent the e-mail to Mr Battersby.
117. Mr Beatty said that he had tried to defend T “with regard to the e-mail sent to Mr Battersby but that the technicians were not interested”. He confirmed that Mr Bylett had said he had been disappointed by T. Mr Beatty said that T took things to heart and had told him about the comments from Mr Bylett to tell him not to worry. He also confirmed that he had told Mr Bylett not to give T a hard time. He confirmed that he had not been speaking to T and that had been his decision.
118. Mr Beatty was asked whether if he saw someone stealing from the company now would he still lie, to which he responded “he didn’t know, probably not”. Mr Beatty was asked whether if T had taken the money he would have done too, to which he stated he didn’t know because it had not happened before.
119. Mr Beatty stated that he had a meeting with Mr Lockyer before his interview was due the following day, which had been arranged by Mr Morris. Mr Beatty thought he had told Mr Lockyer that he had lied and had said something like “I am not telling you what to do”. Mr Lockyer had asked questions about what had happened at the interview.
120. Mr Beatty said that Mr Lockyer had telephoned him after he had been suspended and told Mr Beatty that he had told the truth. Mr Beatty said he had no issue with Mr Lockyer coming forward but the comment regarding ‘everyone knowing’ had no relation to him.
121. The Tribunal concludes having regard to the information that was before Mr Barnes when he made the disciplinary decision, that it was reasonable for him to

believe that Mr Beatty accepted the £50 note from C knowing it had come from the sale of batteries stolen from the Company.

122. It was open to Mr Barnes on balance to prefer the evidence of T on the basis he had been honest from the start, had provided compelling detail of the event, T knew disclosing the event would put him in a difficult position, he had nothing to gain from disclosing the matter other than sensibly avoiding being implicated in the future should the matter have become known, and the majority of the Claimants considered him to be a honest individual. Indeed, Mr Beatty acknowledged that T was telling the truth.
123. Mr Beatty, by contrast, had been dishonest on multiple occasions in order to preserve at least his own position and maybe those of other team members. It was objectively reasonable on the evidence for Mr Barnes to prefer T's account of the money, conversations and the envelope.
124. Mr Barnes accepted that Mr Beatty did subsequently return the money but understandably could not determine his reasons for doing so, or whether he would have accepted the money had T not influenced his decision by his own actions.
125. The Tribunal concludes that Barnes clearly had a reasonable belief in the first allegation.
126. The Tribunal concludes that it was also reasonable for Mr Barnes to believe that Mr Beatty had failed to report a criminal act. Mr Beatty did not report the money obtained from stolen batteries at the time and was dishonest about the circumstances at the investigation meetings on 21 February and 09 March 2017 such that it concealed what had actually occurred.
127. It was reasonable for Mr Barnes to believe the second allegation. On the evidence it was likely to be true.
128. The Tribunal concludes that it was reasonable to believe that during the investigation into the theft of waste batteries Mr Beatty acted dishonestly. That is self-evident from the investigation meeting notes.
129. It was also reasonable for Mr Barnes to conclude that Mr Beatty took part in a co-ordinated cover-up which attempted to prevent the Company from establishing the facts. There was sufficient material from the accounts and timing of the conversations between Mr Morris, Mr Lockyer and Mr Beatty set out below to reach that belief with regard to those individuals.
130. The Tribunal concludes that it was objectively reasonable for Mr Barnes to believe that Mr Beatty blamed T for the situation in which he and the team found themselves. Mr Beatty had stated that in the disciplinary hearing and confirmed the technicians were not interested in any defence of T. Also, Mr Beatty stated that him not talking to T was an individual decision he had taken for his own reasons. He confirmed that Mr Bylett had said he had been disappointed by T.

131. The Tribunal concludes that it was objectively reasonable for Mr Barnes to come to the conclusion that Mr Beatty took part in victimising T because he had reported the events to Mr Battersby. Mr Beatty's evidence establishes the grounds for that belief. It was also reasonable to believe from all the evidence that T was ostracised and excluded by team members and that this was part of a general combined activity that constituted the harassment and bullying of T. Therefore it was reasonable to believe the third allegation.
132. The matter was considered on appeal and the decision to dismiss upheld. The Tribunal has considered the details of the appeal hearing and for the reasons given above the Tribunal concludes that such a conclusion was within the range of reasonable responses.

Mr Bylett

133. Mr Bylett was a Level 3 Power Supply Technician in the Power Supply Team. He had been employed by the Respondent since 01 August 2000.
134. Mr Bylett was interviewed once as part of the investigation process. The Investigation Report set out its findings at pages 315 to 317 of the bundle and its conclusions at page 341.
135. The conclusion reached was: "BBy is recognised as a senior member of the team by his service, experience and competence. On the balance of probabilities, based on the evidence, it is likely BBy did witness G moving Eurotunnel property (most likely batteries) from the pickup to his personal vehicle on Sunday 5th February with full knowledge of G intent to remove them from site. Considering the tasks set for the day and evidence viewed on CCTV, on balance it is likely that BBy was aware of G's intent before the pickup returned to the MISSUK. He has supported the cover up, turned on T, made T out to be a liar and been a party to the treatment of T since 11 February. PB became aware of an incident which compromised the safety of his colleagues, in that they had removed from site a large amount of batteries outside of the department's normal practices. He took no action to report the incident to prevent any subsequent unsafe act from occurring". MISSUK is an area within the Respondent's premises.
136. His disciplinary hearing took place on 28 April 2017. The notes of the hearing are at pages 673 to 675 of the bundle.
137. The allegations made against Mr Bylett were:
- 1) On 5 February 2017 you were working on the battery exchange at SVS North and, together with your colleagues on shift, were responsible for the correct disposal of the waste batteries. An investigation has found that the waste batteries from this job were taken by your colleague from site and sold for the financial gain of the UK Power Supply Team. It is alleged that you were aware of the theft which took place on this date and you failed to report a criminal act.

- 2) During the investigation into the theft of waste batteries you acted dishonestly by taking part in a coordinated cover up which attempted to prevent the Company from establishing the facts.
- 3) During investigation into the theft of waste batteries you took part in victimising an individual who reported certain facts to his line manager.
138. The CCTV recording for 05 February 2017 was reviewed by the Tribunal.
139. On that day it is not in dispute that nine batteries were changed. It is also not in dispute that each battery is heavy and weighs about 15kg.
140. My Bylett contended that the batteries are not carried by a handle (which is the method that the CCTV recording appears to show G was carrying the items between the van and his pick-up), but the Tribunal finds after reviewing photographic evidence that this is not always the case, see pages 598 and 599 of the bundle which show a mixture of batteries, some with and some without handles. The evidence demonstrated that not all the batteries that were changed were the yellow type in the photographs.
141. There was a third CCTV camera covering the area in question, but the Tribunal accepts the Respondent's evidence that the recording from the third camera had been written over as part of the Respondent's usual practice by the time of the disciplinary hearing and the Respondent reasonably considered two camera angles was sufficient material to capture the event. This matter had not been raised with Mr Griffiths by any of the relevant Claimants at the investigation stage.
142. The Tribunal has considered the evidence of Mr Barnes and what he considered the CCTV recording tended to show, as succinctly set out in his witness statement at paragraph 153.
143. The Tribunal viewed the recording a few times at a stage in the Tribunal hearing and concludes that it does not reflect Mr Barnes' view. G does not make enough journeys between vehicles to have moved nine batteries. The batteries are heavy to the extent that it is very unlikely that more than three can be moved by a single individual in any one transaction. The CCTV does not show that multiple batteries were being transferred in one trip from one vehicle to another. At most there could only have been a battery in each hand. There was no evidence of multiple trips from vehicle to vehicle. There was one trip. It is impossible that nine batteries were being moved on this occasion. The movement of Mr Beatty does not appear particularly suspicious. Mr Bylett's evidence during the disciplinary hearing was that he had turned to G to say he was not having a coffee. Without sound it is not possible to be certain. However, during the investigation interview, Mr Bylett had not been sure about what he had said, but did suggest he may have asked G if he "wanted a cup of tea or something" (page 418).
144. In the outcome letter Mr Barnes set out his overall findings and then made specific findings from the evidence before him in respect of each allegation:

1) I believe that, on the balance of probabilities, you would have been aware of G's intention to steal the batteries for the gain off the power supply team. I believe that you observed this act of theft when G was seen moving goods from the Company vehicle into his own vehicle and sought to mislead the Company from establishing the facts. This is shown in CCTV evidence.

2) I believe that you were aware of the intention amongst the team to undertake a co-ordinated cover up and have been motivated to take part in this coordinated cover up. Among my reasons for this belief is the fact that you observed G loading Company goods into his own personal vehicle and have chosen not to report this fact.

3) I believe that a co-ordinated agreement within the team to ostracise and exclude T was reached and I believe that you were supportive of and complicity in this action. I also consider it likely that you voiced your disappointment with T within the team thus choosing to ostracise T and to instead side with C who you knew to have taken the batteries. This and your behaviour constitutes the bullying and harassment of an individual and indeed sought to encourage others to do likewise”.

145. Mr Barnes stated in evidence that the first allegation was based upon what he had seen on the CCTV recording: “By observing G taking those items walking towards his personal vehicle, it was my view that [Mr Bylett] knew that G intended to steal the waste batteries or, if they were not waste batteries, other Eurotunnel property”.
146. The Tribunal concludes that the belief reached by Mr Barnes in this respect fell outside the range of reasonable responses. Having seen the CCTV footage, the items carried on that occasion by G were indistinct. There were nine batteries as part of that change and it is simply not possible to conclude from the CCTV recording that G moved them all, or even a main proportion of them, from the van to his pick-up at that time.
147. The fact that Mr Barnes postulated that the objects carried by G on that one occasion may not even have been the batteries but perhaps other Company property demonstrates his realisation of the considerable room for doubt. It also had not been raised before as an allegation or generally that it was other Eurotunnel property that G moved to his van, or that he intended to steal it, or that Mr Bylett knew about it. It was not suggested by Mr Barnes what the other Eurotunnel property may have been. Instead he invited Mr Bylett and Mr Brocklehurst to speculate on what the items were.
148. No other evidence was provided by Mr Barnes in his witness statement. In his oral evidence, Mr Barnes suggested that because Mr Bylett had been working with Mr Brocklehurst and G at the time of the theft, he must have “been privy to the intention to steal”.

149. Mr Barnes relied upon the fact of G resigning as indicative of his culpability of theft including on 05 February 2017. G had only been interviewed once on 27 February 2017. He had not been directly accused of theft on any particular date and only mentioned that he had been involved in battery change jobs in January 2017. The 05 February matter had not been discussed. Mr Griffiths then discovered the CCTV recording of 05 February 2017 and had arranged another interview with G, but he resigned the day it was due to take place, Mr Griffiths stated in his Report that he had arranged the meeting with G to discuss the 05 February CCTV, but there is no evidence that this intention was actually conveyed to G, such that his resignation was a reaction to that, rather than his alleged involvement in the January thefts in respect of which he had acknowledged he had some involvement in the battery change jobs, or some other reason.
150. Mr Bylett was shown the CCTV recording, but only up to the time when Mr Bylett turned toward the fence. It was paused at that stage and not commenced. Mr Bylett was expressly given the opportunity to watch the CCTV recording at the disciplinary hearing but chose not to.
151. The Tribunal concludes that, despite the thoroughness of the investigation, the belief that Mr Bylett was aware of the theft which took place on this 05 February 2017 and failed to report a criminal act falls outside the range of reasonable responses. It is not possible to draw that conclusion from the CCTV recording of itself, which was relied upon heavily by both Mr Griffiths and then Mr Barnes to reach their conclusions. Indeed, Mr Barnes confirmed that there was no evidence regarding 05 February apart from the CCTV recording.
152. The other material fact upon which Mr Barnes relied was that Mr Bylett worked on a job with someone that he considered was stealing batteries and therefore Mr Bylett himself would have known of it. The Tribunal concludes again that this is not sufficient for it to be objectively reasonable to believe Mr Bylett had been aware of the theft. It does not reasonably follow in the circumstances that simply working with a colleague on an occasion where that colleague chose to steal imputes the other with knowledge of that theft.
153. The Tribunal did not receive any material evidence of how Mr Bylett misled the Respondent on this matter save for denying it when Mr Barnes considered he knew of the theft.
154. For the same reasoning the Tribunal concludes that Mr Barnes' belief in the second allegation falls outside the range of reasonable responses. It is not objectively reasonable to rely on the CCTV recording of 05 February to conclude that Mr Bylett was aware of the intention amongst the team to undertake a co-ordinated cover up and also took part in it. The CCTV recording was the main plank in the belief held by Mr Barnes.
155. The Tribunal concludes that it was reasonable for Mr Barnes to believe that Mr Bylett voiced his disappointment to Mr Beatty that T had made his allegation. Mr Beatty confirmed as much. Also that T felt Mr Bylett was "offish" with him.

156. It was reasonable for Mr Barnes to believe that it was likely that Mr Bylett voiced disappointment with T within the team. It was also objectively reasonable to believe that Mr Bylett chose to ostracise T and instead to side with C who at the investigation stage Mr Beatty knew had taken the batteries. It was therefore reasonable to believe that this behaviour constituted bullying and harassment.
157. Mr Bylett appealed against dismissal and his letter of appeal is at pages 758 to 760 of the bundle.
158. The CCTV issue was raised in the grounds of appeal. Mr Keefe confirmed in his evidence to the Tribunal that the appeal panel viewed the CCTV recording. He had to concede that the CCTV only showed one trip from the van to the Nissan vehicle, which is plain from the recording. Mr Keefe argued that the van from which G took the objects could only contain either batteries or company property and therefore it was either one or the other. The Tribunal concludes that it was not objectively reasonable to form this view. The nine batteries clearly were not moved between the vehicles. That is beyond any doubt from the CCTV. There was no material enquiry by the Respondent over what else was in the van. There was no evidence that even if it was company property what it was and that it had gone missing. However, most importantly, stealing company property was not an allegation put to Mr Bylett at the disciplinary stage. The Tribunal concludes that the flaw at the disciplinary stage was not remedied on appeal with regard to a reasonable belief in the first two allegations.
159. Mr Bylett appealed against the decision regarding the victimisation of T. That point is not addressed in Mr Keefe's very detailed witness statement, whereas the issue is addressed for the other individual Claimants. The matter is addressed in the overall conclusion section. The Tribunal concludes that the general conclusions section is sufficient to uphold a reasonable belief in the decision of Mr Barnes, particularly given the reliance on the evidence of T.

Mr Brocklehurst

160. Mr Brocklehurst was a Level 3 Engineer in the Power Supply Team. He had been employed by the Respondent since 02 January 2002.
161. He was interviewed as part of the investigation and the interview notes are at pages 409 to 413 of the bundle.
162. The Investigation Report set out its findings at pages 312 to 314 of the bundle and its conclusions at page 340.
163. The conclusion reached was: "PB is recognised as a senior member of the team by his service, experience and habilitation. On the balance of probabilities, based on the evidence, it is likely that he was aware that C was to take the batteries on 27 January, probably before the day, but certainly on it. He has therefore played an integral part in the theft as he knew that it was happening. He has supported the cover up, turned on T, made T out to be a liar and being a party to the

treatment of T since 11 February. PB became aware of an incident which compromised the safety of his colleagues, in that they had removed from site a large amount of batteries outside the department's normal practices. He took no action to report the incident to prevent any subsequent unsafe act from occurring".

164. His disciplinary hearing took place on 27 April 2017. The notes of the hearing are at pages 785 to 791 of the bundle.

165. The allegations against Mr Brocklehurst were:

1) On 27 January 2017 you were working on the battery exchange at SVS South and on 5 February 2017 at SVS North. Together with your colleagues on shift, were responsible for the correct disposal of the waste batteries. An investigation has found that the waste batteries from this job were taken by your colleague from site and sold for the financial gain of the UK Power Supply Team. It is alleged that you were aware of the theft which took place on this date and you failed to report a criminal act.

2) During the investigation into the theft of waste batteries you acted dishonestly by taking part in a coordinated cover up which attempted to prevent the Company from establishing the facts.

3) During investigation into the theft of waste batteries you took part in victimising an individual who reported certain facts to his line manager.

166. In the outcome letter Mr Barnes set out his overall findings and then made specific findings from the evidence before him in respect of each of the three allegations:

"1) I believe that, on the balance of probabilities, you would have been aware of C's intention to steal the batteries for the gain of the power supply team given that he, C, has made no attempt whatsoever to hide the fact from colleagues who were not present at the time of the offence, when he is proven to have been offering money from the sale of the stolen goods. I consider that C has acted in this way in the full knowledge and understanding that his act of theft would go unreported by yourself and others. I believe that you are equally aware of G's intention to steal from the Company and that he too has acted in this way in the full knowledge and understanding that this act of theft would go unreported by yourself and others.

2) I believe that you were aware of the intention among the team to undertake a co-ordinated cover-up and have been motivated to take part in this co-ordinated cover-up. I believe this because I do not consider it reasonable to believe that, having been present on two battery jobs when batteries were stolen you could not have known intentions of your colleagues on these jobs.

3) I conclude that a coordinated agreement within the team to exclude T was reached and that this in itself constitutes the harassment or bullying of an

individual and that you were supportive of and complicit in this action, stating during interview that you considered it to be 'human nature' and that it was best in the current situation to 'keep away from T'".

167. The notes of the disciplinary hearing record that Mr Brocklehurst was on shift and involved in the battery exchange on 27 January 2017. Mr Brocklehurst confirmed that they had used two vehicles. The batteries were loaded into the Nissan Navara vehicle. Mr Brocklehurst and G stayed to do the maintenance work whilst C was to dispose of the batteries at the waste compound. Mr Brocklehurst confirmed that it normally took ten minutes to unload the batteries at the waste compound. He had left the job around 15 minutes later with G. C was not back at site, but Mr Brocklehurst stated that "you have to trust colleagues" and that C may have visited his girlfriend at lunchtime.
168. Mr Brocklehurst's account of the 05 February 2017 was similar to that of Mr Bylett. The job was to change 9 batteries. It was put to Mr Brocklehurst that there was CCTV footage of G taking/putting things into his van. Mr Brocklehurst stated he had not witnessed it but it was reasonable to consider that they were not the batteries as they weighed 15kg each. Mr Brocklehurst confirmed that it was common practice for batteries to be left in the van when work was undertaken on a Sunday for it to be completed the following day.
169. The Tribunal also refers above to the position regarding Mr Bylett who was also working on the battery change job on 05 February 2017.
170. The Tribunal refers to the position adopted by Mr Barnes regarding the behaviour of Mr Bylett and Mr Brocklehurst. Mr Barnes considered that Mr Brocklehurst had "darted out of the vehicle and went straight into the building". With regard to Mr Bylett, Mr Barnes considered that his movement had been "so unnatural, like a monkey reaction that was almost comical". He stated that "It looked as though he walked to the fence on the compound, looked through and saw G walk away towards his own vehicle carrying property and turned away so quickly to try and get away".
171. The Tribunal has seen the CCTV recording and does not recognise those descriptions from the footage regarding both Mr Brocklehurst and Mr Bylett. It appears from the recording and Mr Barnes' reasoning that whatever Mr Brocklehurst or Mr Bylett did they would be open to criticism. Mr Brocklehurst left the vehicle and went straight to get food. He was accused of leaving the scene. Mr Bylett stopped and briefly looked back through the fence and he was accused of seeing what was happening and then leaving the scene. It is difficult to envisage how they could have left the vehicle without being accused of some type of suspicious behaviour.
172. Mr Brocklehurst denied the other main allegations put to him. There was a minor inconsistency over when Mr Brocklehurst knew of the allegations, it being placed two weeks earlier than he had stated in the investigation interview, but it was of little significance.

173. Mr Brocklehurst's Union Representative, Mr Swaine considered that Mr Lockyer would say anything to save his position.
174. The main conclusion reached by Mr Barnes was a general view that those employees who worked on a battery change job with C and G knew about the thefts because Mr Barnes did not believe that C would have gone to great lengths to keep the fact that he was stealing batteries secret from those whom he was working, only to be open and tell the lighting team and then Mr Beatty and T in the mess room where the money had come from.
175. To clarify, on 27 January 2017 C worked with Mr Brocklehurst and G. On 29 January C worked with Mr Lockyer and Mr Blainey On 05 February 2017 G worked with Mr Brocklehurst and Mr Bylett.
176. Mr Brocklehurst, Mr Bylett and Mr Blainey denied any knowledge of the theft or the intention of C to steal on those days.
177. Mr Barnes had the evidence of Mr Beatty and Mr Lockyer. Mr Beatty did not reveal that he or anyone else had any knowledge of the theft before the money incident on 11 February 2017, but it could reasonably be believed that he chose to lie about the existence of the conversation regarding the money that C was distributing because Mr Beatty knew of its provenance.
178. The evidence of Mr Lockyer in his fourth interview stated that the "team knew" about the scheme before the thefts occurred, save for Mr Werrey and Mr Cory.
179. However, what is not in dispute by anyone is that T did not know. So any co-ordinated scheme to steal the batteries and distribute the funds was achieved with his exclusion. Therefore a reading across by Mr Barnes that because C openly distributed the funds (with or without the support of Mr Lockyer's account on his fourth attempt at telling the truth) the *whole* of the team must have known, cannot be correct when considering T's position.
180. It must then be accepted that whole team did not know and it becomes equally possible that other members of the team were excluded in the same manner as T. Objectively it requires other supporting evidence for Mr Barnes reasonably to believe that each particular individual Claimant was part of that co-ordinated team, particularly given the nature and gravity of the allegation and the impact on the individual Claimant as anticipated by authorities such as **Roldan** (above).
181. Mr Barnes did not consider it reasonable to believe that, having been present on two battery jobs when batteries were stolen Mr Brocklehurst could not have known the intentions of C and G. The Tribunal concludes that in the case of Mr Brocklehurst it is unreasonable to rely upon the CCTV of 05 February 2017. The only other evidence of knowledge of the theft was the fact that Mr Brocklehurst had been on a battery change job with C. On 27 January 2017 Mr Brocklehurst thought C was going to the waste compound and did not think anything in his timing for doing so. Again given nature of the allegation and the impact on Mr Brocklehurst the Tribunal concludes that objectively it requires more cogent facts

to establish on balance that Mr Brocklehurst was aware of the theft and therefore failed to report a criminal act.

182. On the same basis it is not reasonable to believe that during the investigation into the theft of waste batteries Mr Brocklehurst acted dishonestly by taking part in a coordinated cover up which attempted to prevent the Company from establishing the facts. Mr Brocklehurst could only play a part in this cover up if it is reasonably believed that he knew about the thefts and failed to disclose them. There is no other material fact relied upon by Mr Barnes to make this accusation against Mr Brocklehurst, as demonstrated by the witness statement of Mr Barnes.
183. With regard to the third allegation, in the disciplinary hearing Mr Brocklehurst confirmed that he had been upset by T's email implicating the Team which had alleged he had compromised safety. As a consequence he had felt judged and so avoided talking to T as he considered it was human nature and best in the current situation to keep away from him. He felt T had been standoffish with him too.
184. The Tribunal concludes, that it was reasonable for Mr Barnes to believe that Mr Brocklehurst took part in victimising an individual who reported certain facts to his line manager to the extent referred to above. The Tribunal further concludes that this finding does not mean that it was reasonable to believe that Mr Brocklehurst was involved in or knew about the thefts. Mr Brocklehurst's evidence was clear that he was upset at being implicated.
185. Mr Brocklehurst appealed against dismissal and his letter of appeal is at page 757.
186. The Tribunal concludes the flaw at the disciplinary stage was not remedied on appeal with regard to a reasonable belief in the first two allegations. The Tribunal cross-refers to the conclusion above relating to Mr Bylett regarding 05 February 2017. Mr Keefe stated in his evidence that: "Indeed, the panel concluded that much of the evidence relied upon by Brett was physical evidence such as CCTV and documentary evidence and comments from PB during his disciplinary hearing". The explanation for the decision was non-existent in the appeal outcome letter and the explanation by Mr Keefe in his evidence did not provide any further detail sufficient for the decision to uphold the conclusions reached by Mr Barnes on the first two allegations when applying the test of objective reasonableness to fall within the range of reasonable responses.
187. However, there was sufficient material before the appeal panel to uphold the decision relating to the third allegation as referred to above in the disciplinary decision.

Mr Blainey

188. Mr Blainey was a Level 3 in the Power Supply Team. He had been employed by the Respondent since 05 June 2000.

189. He was interviewed as part of the investigation and the interview notes are at pages 398 to 404 of the bundle.
190. The Investigation Report set out its findings at pages 308 to 311 of the bundle and its conclusions at page 339.
191. The conclusion reached was: "LB is recognised as a senior member of the team by his service, experience and habilitation. On the balance of probabilities, based on the evidence, it is likely that he was aware that C was to take the batteries on 29 January and has played an integral part in the theft as he knew that it was happening. He has supported the cover up, turned on T, made T out to be a liar and being party to the treatment of T since 11 February. LB became aware of an incident which compromised the safety of his colleagues, in that they had removed from site a large amount of batteries outside the department's normal practices. He took no action to report the incident to prevent any subsequent unsafe act from occurring".
192. His disciplinary hearing took place on 28 April 2017. The notes of the hearing are at pages 665 to 673 of the bundle.
193. The allegations against Mr Blainey were:
- 1) On 29 January 2017 you were working on the battery exchange at SVS South and, together with your colleagues on shift, were responsible for the correct disposal of the waste batteries. An investigation has found that the waste batteries from this job were taken by your colleague from site and sold for the financial gain of the UK Power Supply Team. It is alleged that you were aware of the theft which took place on this date and you failed to report a criminal act.
 - 2) During the investigation into the theft of waste batteries you acted dishonestly by taking part in a coordinated cover up which attempted to prevent the Company from establishing the facts.
 - 3) During investigation into the theft of waste batteries you took part in victimising an individual who reported certain facts to his line manager.
194. In the outcome letter Mr Barnes set out his overall findings and then made specific findings from the evidence before him in respect of each of the three allegations:
- 1) I believe that, on the balance of probabilities, you would have been aware of C's intention to steal the batteries when you worked with him on 29 January 2017. I cannot accept that C would have felt able to be absent from site for 66 minutes and for this to go unnoticed and without question, unless you were aware of it. C also made no attempt to hide the sale of batteries from colleagues and it has been admitted that money was offered from the sale of the stolen goods. I consider that C has acted in this way in the full knowledge and understanding that his act of theft would go unreported by yourself and others.

- 2) I conclude that it is reasonable to believe that you were involved in the co-ordinated cover-up by nature of the fact that you chose to seek to discredit T and justify why he would have made up the allegations that you must have known to have been true because you worked on the shift on 29 January
- 3) I believe that a co-ordinated agreement within the team to ostracise and exclude T was reached and I consider it reasonable to believe that you were supportive of and complicit in this action, given that during the disciplinary hearing, by your own admission, you felt that had you 'said anything, you could lose your job'.
195. The notes of the disciplinary hearing record that Mr Blainey recounted the events of 29 January 2017 when he was on a battery change job with C and Mr Lockyer. C and Mr Lockyer had driven the Nissan pick-up and Mr Blainey drove the Luton Van. Mr Blainey was the only one of the three who had a licence to drive the van. He stated that they do not normally spread the load between two vehicles. They usually use the Nissan but on this occasion they took the van as there were some oil drums that required moving, but everyone does jobs differently.
196. They changed six trays of nine batteries each, totalling 54 batteries. C drove the Nissan on his own with the removed batteries. Mr Blainey stated that the waste compound was not always locked at the weekends and they would check when they drove past.
197. C had gone on his own to drop off the batteries and had it not been for the oil drum job Mr Lockyer would have been with C as Mr Blainey often travelled on his own.
198. Mr Blainey was not surprised when he arrived at MISSUK and C was not there as it takes time to unload the batteries and often at a weekend C would go to the burger van at the local Wickes. He thought C returned about 20-30 minutes later but had not looked at the time.
199. Mr Blainey considered that two batteries could be carried at the same time if they were stacked one on top of another.
200. Mr Blainey was entrusted to deal with the appropriate paperwork relating to the job, but in his view this did not extend to checking that the batteries had been disposed of at the waste compound. He said the compound was closed on a Sunday and as far as he knew the batteries remained in the back of the Nissan.
201. Mr Blainey denied that he was offered or took any money and stated that he and Mr Beatty did not ever go to the Christmas 'bash', so they would always take the evening shift that day.
202. With regard to T, Mr Blainey stated how he felt about the e-mail by T and why he thought it was totally wrong to send it whilst the investigation was ongoing and also gave his opinion about Mr Lockyer.

203. In the investigation meeting Mr Blainey stated that T was vindictive and not a team player and “absolutely hates [Mr Battersby] and [Mr Morris]”.
204. The Tribunal reaches similar conclusions as above regarding Brocklehurst.
205. The Tribunal concludes that the belief held by Mr Barnes that Mr Blainey was aware of the theft which took place on 29 January 2017 and failed to report a criminal act was not objectively reasonable.
206. Again, the material facts upon which Mr Barnes relied were that Mr Blainey worked on a job with someone that was stealing batteries and therefore Mr Blainey himself would have known about it. The Tribunal concludes that it does not reasonably follow in the prevailing circumstances that simply working with a colleague on such an occasion attributes Mr Blainey with knowledge of the theft.
207. The belief that the whole of the team must have known of the theft and the intention to steal cannot be correct when considering T’s position. Given the nature of the allegation and the impact on Mr Blainey it is objectively reasonable to require other material supporting evidence for Mr Barnes reasonably to believe that Mr Blainey was part of any co-ordinated team.
208. On the same basis it is not reasonable to believe that during the investigation into the theft of waste batteries Mr Blainey acted dishonestly by taking part in a coordinated cover up which attempted to prevent the Company from establishing the facts. As with Mr Brocklehurst, Mr Blainey could only play a part in this cover up if it is reasonably believed that he knew about the thefts and failed to disclose them. There is no other material fact relied upon by Mr Barnes to make this accusation against Mr Brocklehurst, as demonstrated by the terms of the dismissal letter and the witness statement of Mr Barnes. Mr Barnes in his oral evidence considered that there was the possibility of Mr Blainey not having been expressly told by C that he was going to steal the batteries. He relied upon the single point that Mr Blainey would have known at the time C was absent from the site and therefore would have asked where he had been. However, Mr Blainey gave reasons for not being suspicious over the timing, given the time it would have taken to drop the batteries off at the waste compound and a lunch break. There was also no evidence to suggest that even if Mr Blainey had asked C where he had been the answer would have been that he had just been unlawfully selling 54 batteries that he had stolen. It is little more than supposition by Mr Barnes which, given the seriousness of the allegation and the effect on long serving employees, is insufficient to be objectively reasonable.
209. With regard to the third allegation, Mr Blainey considered T was totally wrong to send the e-mail whilst the investigation was ongoing and in the investigation meeting Mr Blainey stated that T was vindictive and not a team player.
210. Given that evidence and the evidence before Mr Barnes regarding the other employees in the team on this matter, the Tribunal concludes that it was

reasonable for Mr Barnes to conclude that during investigation into the theft of waste batteries Mr Blainey took part in victimising T.

211. Mr Blainey appealed against dismissal and his letter of appeal is at page 761 to 762.
212. The Tribunal concludes the flaw at the disciplinary stage was not remedied on appeal with regard to a reasonable belief in the first two allegations. The explanation for the decision was missing in the appeal outcome letter and the explanation by Mr Keefe in his evidence did not provide any further detail sufficient for the decision to uphold the conclusions to fall within the range of reasonable responses.
213. The Tribunal concludes that the appeal was by way of review and not a rehearing. Although Mr Keefe stated in cross-examination at one stage that the appeals were by way of a rehearing, that is inconsistent with his witness statement and the contemporaneous document. When considered by way of a review, the appeal panel did not have any further material detail to that considered by Mr Barnes.
214. As with Mr Blainey and Mr Brocklehurst, there was sufficient material for the appeal panel reasonably to support the finding of Mr Barnes regarding the third allegation.

Mr Farrell

215. Mr Farrell worked in the Lighting Team for the last three years of his employment and before that as a Senior Authorised HV Technician. He had been employed by the Respondent since 1996.
216. He was interviewed as part of the investigation and the interview notes are at pages 398 to 404 of the bundle.
217. The Investigation Report set out its findings at pages 321 to 323 of the bundle and its conclusions at page 343.
218. The conclusion reached was: "EF is a senior member of the team by his service and experience. He claimed that he was offered the money but rejected it as he knew that it was for the sale batteries. He did not report this to his manager and it is my belief that he did not do so because in fact he accepted the money. It is evident that he supported the cover up because of his actions towards T and his failing to take any actions to report or prevent any future theft taking place. EF became aware of an incident which compromised the safety of his colleagues, in that they had removed from site a large amount of batteries outside the department's normal practices. He took no action to report the incident to prevent any subsequent unsafe act from occurring".
219. His disciplinary hearing took place on 09 May 2017. The notes of the hearing are at pages 683 to 689 of the bundle.

220. The allegations raised against Mr Farrell were:

- 1) You accepted 50 pounds from a work colleague for the sale of property stolen from company.
- 2) You failed reported a criminal act.
- 3) During the investigation into the theft of waste batteries you acted dishonestly by taking part in a co-ordinated cover-up which attempted to prevent the Company from establishing the facts.
- 4) During the investigation into the theft of waste batteries you took part in victimising an individual who reported certain facts to his line manager.

221. In the outcome letter Mr Barnes set out his overall findings and then made specific findings from the evidence before him in respect of each of the four allegations:

1) I believe that you accepted 50 pounds from a work colleague for the sale of property knowing it to have come from the sale of goods stolen from the Company. I believe this because, had you and your colleagues refused the money as you contend, I do not believe that C would have had the confidence to continue distributing the monies the following morning to T and B Beatty as has been proven to be the case. I believe that you do not consider the sale of 'scrap' as theft and that in this way, you have justified your actions and those of C.

2) I conclude that is clear that you failed to report a criminal act. I believe that, having accepted the money from the sale of the stolen batteries, you took the decision, along with your power supply colleagues A Bradley and C Hills, not to report the criminal act from which the monies came. It is my belief that you knew the origins from where the money time as I do not believe it is reasonable (even if you did not accept the money and I do believe that you did) that anyone offered payment would not question what it was for.

3) I believe that you, together with your power supply team colleagues decided to take part in a co-ordinated cover-up which attempted to prevent the Company from establishing the facts. I believe that you still consider this crime to have been 'acceptable' and that the matter could and should have been dealt with 'in house'. It is my belief that prior to interview on 27th March 2017, you had agreed with your power supply colleagues C and two others, to deny any knowledge of wrong doing and of having been offered money by C for the sale of stolen batteries. Only when it became apparent that both C Hills and A Bradley had in fact admitted to being offered money, did you choose to do likewise.

4) I conclude that co-ordinated agreement within the team to exclude T was reached and that this in itself constitutes the harassment and bullying of an individual and that you were supportive and complicit in this action. I believe that notwithstanding supporting such behaviour among the power supply team, you

took the leading role in this bullying in ostracizing of T by the power supply team in the writing of your quote from Shakespeare regarding the 'band of brothers'.

222. The notes of the disciplinary hearing record that Mr Farrell accepted that C had offered him a £50 note and had said something like "It's your cut from the scrap". Mr Farrell considered that C was "a Pikey" and up to something, so he refused it. Mr Farrell stated that the other Lighting Team members had come in, they had discussed it and a colleague had said something like "what's he up to now, there no way I'm getting involved?" Mr Farrell said that he did not know that the money was from the sale of the batteries (however he did mention batteries in the first interview). Mr Farrell said that had it been £5,000 then it would have got his attention. He had previously heard ideas from C regarding cabling: "shame it's being scrapped, it could be worth some money".
223. Mr Farrell said he had not said anything when the money was raised because he wanted to keep out of it. He considered that the best way of dealing with it was "to manage C with a firm hand".
224. Mr Farrell said during his career in an engineering environment it was quite common for certain items to be taken, such as scrap, but was horrified when he knew the scale of what C had done: "some theft was expected and didn't figure as Category 1". He stated that if C had stolen a PC or a wallet then that would have been different, but a few batteries probably was not so condemning.
225. He said he did not believe he had spoken to others about what had been said in the interviews. They had tried to keep out of it. Mr Farrell said that he "could see for himself that they had been telling porkies".
226. When asked whether the lighting team had agreed not to say anything he said: "no, all agreed that as we hadn't accepted it for moralistic reasons, self-preservation they hadn't wanted to get involved".
227. Mr Farrell considered when it was first reported that he did not think it was a good idea because "it wasn't being contained".
228. When it was put to him about T being given the "cold shoulder", Mr Farrell referred to somebody stepping outside the code of conduct/behaviour and he would say a lot of people getting disciplined was not good behaviour. He thought that there would have been a better way to deal with it.
229. Mr Farrell had written 'We few, we happy few, we band of brothers' from Henry V on the Power Supply Team whiteboard. Mr Farrell said that the 'band of brothers' quote was to motivate not intimidate as the team was going through a bad time and he could see an air of despair and despondency. He stated that he had earlier also used other Shakespeare quotes to the team and was able to state what they were during the interview.
230. Mr Farrell considered that if T had waited, sought advice on what to do, maybe spoken to C, then this may have been better. A "word to the wise" to C would

have been best along the lines of: “what do you think you’re doing?” When it was put to Mr Farrell that he had that opportunity when the money was offered to him, he said that he had been tired after working.

231. The Tribunal concludes on balance that it was reasonable for Mr Barnes to believe that Mr Farrell accepted £50 from a work colleague for the sale of property stolen from company. Although all three of the lighting team denied accepting the money, that was after two of that group had originally been dishonest about their knowledge and involvement in the matter. The Tribunal concludes that Mr Barnes reasonably formed the view that C would not have had the confidence to offer the money to T and Mr Beatty unless the earlier offer to the lighting team had been accepted, particularly as it is not disputed that G had said to C about T: “I told you he wouldn’t take it”. Although the allegation is based on Mr Barnes’ view of the likely actions of C, there is sufficient circumstantial evidence to make this particular belief on this occasion fall within the range of reasonable responses.
232. The Tribunal concludes that it was reasonable to believe that Mr Farrell failed to report a criminal act. Mr Farrell admitted that he was offered money and knew it was from the sale of stolen batteries or scrap, but did not disclose that to the Respondent.
233. The Tribunal concludes that it was reasonable for Mr Barnes to believe that during the investigation into the theft of waste batteries Mr Farrell acted dishonestly by taking part in a co-ordinated cover-up which attempted to prevent the Company from establishing the facts. In the interviews with the two other members of the lighting team, they had both initially denied knowledge of the theft and the offer of the money to them by C. Mr Farrell was interviewed three days later on 27 March 2017 and it was reasonable for Mr Barnes to believe that by that time Mr Farrell had discussed the matter with the other members of the lighting team. It was reasonable to believe that those two would not have attempted independently to tell a false version of events at which all three were present, without being reasonably sure the other two would corroborate that view.
234. The Tribunal concludes having regard to all the evidence Mr Barnes received from Mr Farrell and the other Claimants that it was reasonable to believe that during the investigation into the theft of waste batteries Mr Farrell took part in victimising T, for example through giving him the cold shoulder, being quiet towards him, that he “wouldn’t have run up and hugged and kissed him” and was annoyed. He felt in T reporting it ran a fine line between being brave and being foolish and that he personally would “have had a word to the wise”.
235. Mr Farrell appealed against dismissal and his letter of appeal is at page 770.
236. The matter was considered on appeal and the decision to dismiss upheld. The Tribunal has considered the details of the appeal hearing. For the reasons given above the Tribunal concludes that such a conclusion was within the range of reasonable responses.

Mr Morris

237. Mr Morris worked as a Senior Technician Power Supply. He had been employed by the Respondent since 22 February 1993.
238. The Investigation Report set out its findings at pages 301 to 307 of the bundle and its conclusions at page 338.
239. The conclusion reached was: "MM is a senior technician at management grade and as such has numerous responsibilities for the day to day management of the UK Power Supply Team. On the balance of probabilities and based on various witness statements MM has been part of and in some cases controlled the coverup and attempts to derail this investigation. On the balance of probabilities and from statements contained within this report, MM was aware that NC was planning to remove and sell the batteries. In doing so, MM was reinforcing the culture that would be happy to dismiss this theft, sale of stolen goods, distribution of proceeds persecution of T, as acceptable. MM was, with GB, responsible for delivering a productive and safe working environment. There is significant evidence that neither MM nor GB have any management control over the team. They work remotely, visiting the MISSUK occasionally. There is no audit on hours worked or recorded and the team effectively manages is itself. There is evidence that staff go off site without any fear of consequence and that they take work items and equipment for their personal use or gain. The matter of the switching schedule raised in this investigation as a diversion to the issue of theft, highlighted the lack of teamwork and spirit to work to professional standards. In particular this issue was about safe working practices. The difference of views on this matter and the influence of certain members of the team in respect of the need for a schedule to be in place raise serious concerns about the safety standards within the team".
240. His disciplinary hearing took place on 10 May 2017. The notes of the hearing are at pages 690 to 697 of the bundle.
241. The allegations raised against Mr Beatty were:
- 1) An investigation has found that waste batteries were stolen from the Company by one of your junior colleagues and sold for the financial gain of the UK Power Supply Team. It is alleged that you were made aware of their intention to undertake theft from the business.
 - 2) You failed to report a criminal act.
 - 3) Following receipt to the allegation you failed in your duty to protect a whistleblower.
 - 4) You breach confidentiality of the whistleblower by revealing his identity and sharing confidential communications.

- 5) During investigation into the theft of waste batteries you acted dishonestly by initiating and taking part in co-ordinating a cover-up which attempted to prevent the Company from establishing facts.
 - 6) During the investigation into the theft of waste batteries you took part in victimising the whistleblower and harassing another member of the team.
 - 7) You failed in your role as a Senior Technician with management responsibilities.
242. In the outcome letter Mr Barnes set out his overall findings and then made specific findings from the evidence before him in respect of each of the seven allegations:
- 1) From the evidence I have heard during the course of this investigation, I believe that you were aware of C's intention to undertake the theft of batteries from the business. Among the reasons for my belief are the fact that C appears to have had no concern whatsoever in openly offering a share of the money for the sale of the stolen goods among the power supply team. It is also apparent that B Beatty had no concerns in reporting to you that he had lied at interview and that he too feared no repercussions from you for this dishonesty.
 - 2) I believe that you have knowingly failed to report a criminal act. I believe this because you have failed to disclose what you knew to be untruths told by Barry Beatty during his interview on 21st February 2017 when questioned, and in respect to this failure, I consider that it is reasonable to believe that you were aware of C's intentions from the outset .
 - 3) I conclude that you were part of the coordinated cover and, in a bid to maintain this coordinated cover up you sought to intimidate and pressurise a whistleblower. Among my reasons for this belief is the fact that you sent what I considered to be veiled and threatening text messages as well as staging the meeting between D Lockyer and B Beatty following B Beatty's interview on 21st February 2017 which I consider was intended to coerce D Lockyer to lie during his interview.
 - 4) Based on the evidence presented during investigation I am not able, with any reasonable certainty, to draw any conclusions to this allegation.
 - 5) I believe that you have sought to keep valuable information of a crime from the investigation panel under the banner of confidentiality. You could not and should not have had any grounds to think this was in any way appropriate in the circumstances. I also have the belief that you have coerced and encouraged members of the team to make dishonest and evasive statements. Additionally you failed to disclose what you knew to be untruths about Barry Beatty during the interview on 21st February 2017 when questioned.

- 6) I believe that you allowed, if not positively encouraged, members of the power supply team to draw a conclusion that T had forced his line manager to report the incident to HR, a fact that you knew to be untrue. In this act, I consider you have knowingly promoted the policy of victimisation against an honest and blameless individual.
- 7) As an E Grade employee with the Company salary grading structure, considered to be a manager position, your duties within this investigation were to support the Company and I consider that your decision not to reveal the lie told by Barry Beatty underlines is failing.
243. The notes of the disciplinary hearing record that Mr Morris stated that when he received the e-mail from T, he discussed with Mr Battersby and agreed that due to the severity of the allegation it fell under Mr Battersby's level.
244. Mr Morris confirmed that some members of the team thought it was the wrong thing for T to do.
245. Mr Morris confirmed that Mr Beatty had told him after his first interview that he had told a lie because he "did not want to see anyone go down the line". Mr Morris said he did not know what to say and that he considered the conversation to be confidential. However, he had not told management about what Mr Beatty had said in confidence but had asked Mr Lockyer in a text 'is there anything I should know?' which was inviting him to break confidence.
246. Mr Morris confirmed that he had spoken to Mr Beatty between his second and third interview when Mr Beatty had phoned him at home.
247. It was put to Mr Morris that Mr Beatty had been the first one to be interviewed and the others that came later could have exposed it.
248. With regard to when Mr Beatty spoke with Mr Lockyer, Mr Morris said that Mr Beatty had asked for Mr Lockyer to speak to him. Mr Morris had told Mr Lockyer to go downstairs where Mr Beatty was waiting. This can be compared to the evidence of Mr Beatty.
249. Mr Morris confirmed that he had spoken with other technicians about the interviews.
250. When asked if the team had closed ranks he replied that it appeared that some had.
251. Mr Morris stated the reason why C appeared on a lot of the battery jobs was that he was fit and able to do the lifting and Mr Morris was simply trying to get the job done with the resources that he had.
252. The Tribunal concludes that it was objectively reasonable for Mr Barnes to believe that Mr Morris had been made aware of the intention to undertake theft from the business. Again Mr Barnes came to this conclusion because C had confidence to offer the proceeds of sale to other members of the Power Supply

Team and concluded that there was a culture in the team that stealing waste was “not a big deal”. However, Mr Barnes had support for this view regarding Mr Morris because of his central role in the team and because Mr Beatty had informed Mr Morris after his first interview that he had lied because he feared losing his job, but had clearly done so without fearing any reprisal or onward escalation by Mr Morris.

253. Although Mr Barnes approached Mr Lockyer’s evidence with caution, it was reasonable to rely upon the comment made by Mr Lockyer that C had told him Mr Morris had said: “make sure a few batteries go to the compound”. It was reasonable for Mr Barnes to conclude on balance that this was detail Mr Lockyer would not have made up and was to the effect that he should take some batteries to the compound rather than stealing them all, thereby implying a way in which the theft would be less obvious.
254. Once the above conclusion had been reached it was reasonable for Mr Barnes to conclude that Mr Morris failed to report a criminal act.
255. The Tribunal also concludes that it was reasonable for Mr Barnes to believe that Mr Morris had failed to protect T following receipt of his allegation. He and Mr Battersby were the senior managers of the team. It was reasonable for Mr Barnes to conclude that there was victimisation of T by the team for having made the protected disclosure and it was reasonable to believe that the victimisation would have been clear to Mr Morris and that he did nothing to address it.
256. The Tribunal also concludes that during investigation into the theft of waste batteries Mr Morris acted dishonestly by initiating and taking part in co-ordinating a cover-up which attempted to prevent the Company from establishing facts.
257. Mr Beatty told Mr Morris that he had lied in the investigation and Mr Morris took no action to inform the Respondent. It was reasonable for Mr Barnes to discount the confidentiality point raised by Mr Morris, particularly as he made enquiries of Mr Lockyer about the process. Also that Mr Morris had been evasive over what evidence he wanted to disclose to the investigation team, particularly regarding the team meeting (demonstrated in both Mr Griffiths’ notes and Mr Morris’ own suggested amendments) and also during the disciplinary hearing.
258. On balance it was also reasonable for Mr Barnes to believe that Mr Morris had played a part in staging the meeting between Mr Beatty and Mr Lockyer where they discussed the interviews. It was therefore reasonable to rely on the evidence of Mr Lockyer to the extent that it indicated that Mr Morris had discussed interviews with some other members of staff.
259. The Tribunal does not consider it reasonable to believe that Mr Morris was the ‘ring leader’ to the events as alleged by the Respondent, but he did take a role where he was looked to by some members of the team for an indication on how to proceed.

260. The Tribunal concludes on balance that it was objectively reasonable to believe that during the investigation into the theft of waste batteries Mr Morris took part in victimising and harassing T. The Tribunal refers to the conclusions above regarding the third allegation of not protecting T.
261. Mr Barnes based part of his reasoning on the disciplinary meeting notes that stated: "MM added that the whole team are in turmoil and the fact that T raised the issue with HR and not speak to his boss where it might have been dealt with first", whereas Mr Morris would have known that the 11 February email was to him and Mr Battersby only. The disciplinary outcome letter stated that Mr Barnes believed that Mr Morris allowed/encouraged members of the power supply team to draw a conclusion that T had forced his line manager to report the incident to HR. It is difficult to see how that conclusion can be drawn from the meeting notes.
262. However, it was reasonable for Mr Barnes to conclude that Mr Morris orchestrated meetings between Mr Beatty and Mr Lockyer and took part in co-ordinating a cover-up which attempted to prevent the Company from establishing facts as addresses above. It was reasonable for Mr Barnes to believe that Mr Morris played a part in events whereby the account of T was presented as untrue. The Tribunal concludes, although borderline, given the narrow terms of the disciplinary outcome letter on this point, that it was objectively reasonable to consider that this amounted to victimisation of T.
263. It was objectively reasonable for Mr Barnes to believe that Mr Morris failed in his role as a Senior Technician with management responsibilities by failing to support the Company particularly by not disclosing that Mr Beatty had lied to the investigation. There was some debate over whether or not Mr Morris was an E Grade employee, but there is no doubt he undertook managerial responsibilities and was paid a management bonus which signifies that he had managerial responsibilities.
264. Mr Morris appealed against dismissal and his letter of appeal is at page 768.
265. The matter was considered on appeal and the decision to dismiss upheld. The Tribunal has considered the details of the appeal hearing and for the reasons given above the Tribunal concludes that conclusions in respect of all allegations fell within the range of reasonable responses.

Sanction

266. Mr Barnes confirmed in evidence that he reached his decision to dismiss based cumulatively on all his findings and on the basis that all the allegations were upheld. The Tribunal received no evidence from Mr Barnes on whether or not he would have dismissed those Claimants in respect of each individual allegation. The Tribunal concludes that it follows in the circumstances relating to Mr Bylett, Mr Brocklehurst and Mr Blainey, where the Tribunal has found above that conclusions on some allegations fell outside the range of reasonable responses, that the decision to dismiss also falls outside the range and is

objectively unreasonable. The Tribunal concludes that a sanction of dismissal based on those conclusions is not reasonable in the specific cases of Mr Bylett, Mr Brocklehurst and Mr Blainey, particularly as the Tribunal has found that in those cases it was not objectively reasonable to believe in the most serious allegations.

267. However, of course, when it comes to the issue of remedy, the *Polkey* principle will be considered, in particular whether or not the Respondent would have dismissed all or any of those Claimants in any event on the allegations on which it was objectively reasonable to hold a belief. Also the issue of whether those Claimants had contributed to any extent towards their dismissal.
268. Mr Barnes and Mr Keefe gave consideration to the relevant mitigating factors relating to Mr Beatty, Mr Farrell, and Mr Morris, in particular length of service and disciplinary record. The Tribunal concludes that it was objectively reasonable for dismissal to be an option available to the Respondent given the serious nature of the allegations that were upheld together with the Respondent's strong emphasis on health and safety and the inherent trust needed with the members of the Power Supply Team.
269. The Tribunal also concludes that if it is wrong with regard to its conclusion over allegation six relating to Mr Morris, which was borderline, it is inevitable that Mr Morris would have been reasonably dismissed by Mr Barnes with regard to allegations one, two, three, five and seven without the need for a separate remedy consideration on the point. The reasonable belief in allegations, one, two, three and five were the most serious and had resulted in the fair dismissal of other Claimants in respect of whom that belief was also reasonably held and had more weight in respect of Mr Morris who undertook managerial responsibilities.
270. The Tribunal concludes that there was no unfairness arising from Mr Battersby not being dismissed but being relieved of all managerial responsibilities and receiving a pay cut. The involvement, circumstances and conclusions reached with regard to Mr Battersby were not sufficiently similar to the other Claimants to argue successfully disparity of treatment. Indeed it was confirmed on behalf of the first four Claimants that disparity of treatment arguments were not being made in respect of any person who was not dismissed as part of this process including Mr Werrey and Mr Cory.
271. Therefore the Tribunal concludes that the dismissal of Mr Bylett, Mr Brocklehurst and Mr Blainey were unfair and those cases will be listed for a remedy hearing at which the *Polkey* principle and contributory fault will be considered together with general mitigation.
272. The dismissal of Mr Beatty, Mr Farrell, and Mr Morris were fair and those cases are unsuccessful.
273. With regard to the wrongful dismissal claims by the first four Claimants, the Tribunal received no reference to wrongful dismissal in the lengthy and detailed submissions from both sides. The single focus was on the unfair dismissal

claims. Although it was confirmed at the outset of the hearing that these claims were being pursued.

274. The Tribunal refers to the principle in **Boston Deep Sea Fishing** (above) and that the Respondent can rely upon evidence of misconduct by the employee not known to it at the time of dismissal.
275. After the dismissal of the Claimants there was a Police investigation outcome and a Police update is set out in an immediately contemporaneous document created by Mr Robert Gregory of the Respondent dated 31 July 2017 after being briefed by a Detective Constable involved in the matter (page 874). There is also a letter of apology from C who confirmed that he had been truthful to the Police and gave that confirmation so they could proceed with their investigations in a speedy manner (page 873). Those documents were not challenged in evidence.
276. The Police update records that no further action was taken with regard to G and that he resigned because he thought it would be discovered that he had been working on his own kit car project in company time. It also records that a full confession was made by C and a formal caution given on condition he paid £750 to the Respondent. It is recorded that C committed the offence on his own, that he handed £50 to two members of the lighting team Mr Blaney, Mr Farrell and Mr Beatty, who returned the money at a later date. It is recorded that the rest of the Power Supply Team “knew that they would get their share at the Christmas party”.
277. Although the Tribunal did not fully understand the money for the Christmas party when the thefts allegedly took place in January 2017, no issue was argued or evidence given by any Claimant on the point of timing, either during the internal process or during the Tribunal hearing, including submissions. It would have been an obvious point to make if anything turned on it.
278. The Tribunal considers that the Police investigation evidence obtained after the dismissals, in conjunction with the relevant evidence obtained during the disciplinary process set out above, is sufficient for it to conclude on balance that Mr Farrell knew of the arrangement to distribute the money and also where that money had come from. The Tribunal further concludes having regard to that evidence Mr Farrell had committed a repudiatory breach of contract by failing to report a criminal offence either at the time or during the disciplinary process. That actions undermines the trust and confidence which is inherent in his contract of employment, particularly given the position he held, such that the Respondent could elect not to retain him in its employment.
279. With regard to Mr Bylett, Mr Brocklehurst and Mr Blaney, C confirmed that he took the batteries on his own. G also confirmed that was not aware the batteries had been stolen until after the event. This supports the contention of the three Claimants that they were not aware of the intentions of C beforehand. The Police could not establish that G had any involvement in the theft, which further corroborates the evidence of Mr Bylett and Mr Brocklehurst regarding 05 February 2017 and the CCTV recording.

280. The only additional evidence arising from the Police debrief was that C stated that those in the Power Supply Team who had not been offered money “knew that they would get their share at the Christmas party”. The Tribunal concludes that this not enough to prove on balance that Mr Bylett, Mr Brocklehurst or Mr Blainey committed a repudiatory breach of contract. For example it was uncontested evidence of Mr Blainey that he did not attend at the Christmas party.
281. However, the Tribunal concludes that Mr Bylett, Mr Brocklehurst and Mr Blainey were not wrongfully dismissed given the evidence regarding their individual and combined treatment of T. T was a whistleblower and raised an issue regarding theft of company property and the distribution of the proceeds of sale. Further the theft of the batteries, particularly on such a scale, had health and safety implications which would have been obvious to the three Claimants. Therefore their subsequent actions regarding T was sufficient to undermine the trust and confidence inherent in their contracts of employment, particularly given the circumstances and their respective positions and experience, such that it amounts to a repudiatory breach of contract. Therefore the wrongful dismissal claims are unsuccessful.
282. This conclusion does not undermine the Tribunal’s conclusions on the unfair dismissal claims. A different test is applied. The unfair dismissal claim is decided on objective reasonableness on the material before the Respondent at the time, whereas the wrongful dismissal claim is decided on balance by the Tribunal on the evidence before it at the hearing.
283. The findings on the wrongful dismissal claims may be relevant to *Polkey* considerations in remedy.

Employment Judge Freer
Date: 08 May 2020