EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4106982/2019

Held in Glasgow on 2 and 3 December 2019

Employment Judge L Wiseman

Mr S Carroll	**Claimant** **Represented by:** **Mr P Santoni - Solicitor**
J B Bennett (Contracts) Ltd	**Respondent** **Represented by:** **Mr R Eadie - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The tribunal decided:-

(i) the claimant was unfairly dismissed by the respondent;

(ii) no award of compensation is made because the basic and compensatory awards were reduced by 100%; and

(iii) the claimant's application for expenses was refused.

REASONS

1. The claimant presented a claim to the Employment Tribunal on the 14 May 2019 alleging he had been unfairly dismissed.

2. The respondent entered a response admitting they had dismissed the claimant for reasons of gross misconduct but denying the dismissal was unfair.

3. I heard evidence from Ms Charman, Director and from the claimant. I was also referred to a number of documents from a jointly produced folder of documents. I, on the basis of the evidence before me, made the following material findings of fact.

Findings of fact

4. The respondent company is a family owned building company which undertakes a range of modernisation, refurbishment and new build projects. The respondent employs approximately 50 employees.

5. The claimant commenced employment with the respondent on the 23 February 1993 as a Joiner. He subsequently became a Site Manager and was employed in that position at the time of his dismissal.

6. The Site Manager is responsible for the project being built on a particular site. The responsibilities include ensuring the project is built to the specifications set out in the drawings; day to day health and safety and managing/overseeing the employees and sub-contractors on site.

7. The respondent secured a contract from Balfour Beatty to build 17 new homes. This work started in April 2017 and concluded in September 2018. The claimant was the Site Manager responsible for this project.

8. The respondent also employed a Contracts Manager (Charlie Barrie) who will visit 4 or 5 sites each week to ensure the smooth running of the project.

9. Balfour Beatty employ a Clerk of Works who visits the site to ensure work is being done correctly.

10. The claimant was provided with the drawings and specification for the 17 new build kit houses. The claimant was responsible for “take offs”, that is, measuring how much material was required for the job and ordering it. The claimant provided his “take offs” to Mr Ian Forrester, at company headquarters, in order for him to price the job for the sub-contractors. The claimant retained a copy of his “take offs” in his book, which he kept with him on site.

11. Mr Stewart Borthwick, Commercial Director, received an email from Balfour Beatty on the 27 March 2019 (page 63) regarding two houses in the project which the claimant had been managing. The email notified Mr Borthwick that an issue had been identified whereby they believed the respondent had used the wrong plasterboard on the lower ceilings of these properties. A number of photographs were attached to show that 12.5mm plasterboard had been used instead of 15mm which had been stated on the design. The email noted that 15mm was in line with building regulations and achieved the required 30 minute fire protection.

12. Mr Borthwick copied the email, and attachments, to the claimant and Mr Barrie, Contracts Manager, and to Ms Charman (page 63). Mr Borthwick noted Balfour Beatty were saying 12.5mm plasterboard had been used instead of 15mm, and he referred to the photographs and drawings he had attached to the email which included images of the joist.

13. The claimant responded the same day (page 21) to say *"there were two sizes required I'm sure it was 15mm on the top ceiling and 12.5mm in the lower I would need to check the drawings and spec …."*

14. The claimant had, by the time of this email, moved on to site manage a new project. The claimant retained his book/diary noting the "take offs" but he did not check this either before responding to the email or before attending the meeting with Ms Charman.

15. Mr Borthwick replied the following day (page 21) to say *"Scott, what BBH are saying has potential pretty serious consequences for not only plot 45 + 46 but all other plots also and JBB as a whole. Can you review and advise".*

16. Mr Borthwick followed this with a further email to the claimant (page 21) saying: *"Scott, the drawings I have say 15mm GF (ground floor) Ceiling – see attached details. NBS extract below: …. Linings: 15mm plasterboard …"*

17. The specification provided at page 27 (Title: Superstructure Details First Floor Party Wall) stated: 15mm Gyproc Wallboard ceiling with all joints taped and filled as finish to provide short period of fire resistance (30 minutes) …"

18. The claimant emailed Mr Borthwick on the 28 March (page 71) to inform him that he had *"spoken to two joiners that were roughing and they confirmed that they fitted 15mm downstairs and also the garages were 15mm the names of them were Nicky and Paul. Also spoke to John Thomson's joiners who started 59 and 58 again 15mm downstairs also Nick O'Mally and again 15mm all downstairs".*

19. Mr Borthwick decided it would be appropriate to have the claimant contact Building Control to clarify if 15mm was required and the consequences if it had not been used. The claimant emailed Mr Borthwick on the 4 April (page 74) to confirm he had spoken with the Building Control Officer regarding the 12.5mm sheeting, and there was no requirement for 15mm on the lower ceilings as it was a two storey building.

20. The claimant's email was copied to the Building Control Officer, who emailed the claimant and Mr Borthwick 19 minutes later (page 75) to say *"The ceiling would require to achieve 30 minute (short fire resistance duration) in order to provide the required structural fire resistance to the floor. The old general rule of thumb for fixing plasterboard to solid joists was that a single layer of 12.5mm plasterboard will provide 30 minutes fire resistance duration and two layers of 12.5mm plasterboard would provide 1 hour fire resistance duration. You may wish to speak to the plasterboard manufacturer and/or the floor joist manufacturer to confirm if the single layer of 12.5mm will be suffice with their particular system. The extract below from British Gypsum suggests that 15mm plasterboard may be required where timber I joints have been used."*

21. Mr Borthwick and Ms Charman considered the situation to be extremely serious because 12.5mm plasterboard had been used in circumstances where 15mm should be have used. The seriousness of the issue related to the fact the 15mm provided 30 minutes of fire resistance duration whereas the 12.5mm did not provide that protection.

22. Ms Charman asked Mr Charlie Barrie, Contracts Manager, to visit the site and check the plasterboard where possible. Mr Barrie did this and reported to Ms Charman that in all of the testing he had done the measurement was 12.5mm.

23. Ms Charman phoned the claimant. She was very very angry about the claimant having told her the joiners confirmed the plasterboard was 15mm when Mr Barrie had carried out tests and confirmed it was 12.5mm. Ms Charman considered the claimant had lied about the plasterboard.

24. Ms Charman and Mr Borthwick reviewed all of the information they had which included delivery notes showing 15mm plasterboard had been delivered to the site. They concluded the claimant should attend the office to discuss two matters, being the fact the wrong plasterboard had been used and his deceit in maintaining 15mm had been used when in fact it had not.

25. Ms Charman phoned the claimant and asked him to attend at the office that afternoon to discuss the situation.

26. The claimant understood, from his phone call with Ms Charman earlier, that the matter was very serious and that it concerned the use of 12.5mm plasterboard instead of 15mm plasterboard. The claimant did not check his "take off" book prior to attending the meeting.

27. Ms Charman and Mr Borthwick reviewed all of the information they had with the claimant, and sought his explanation for what had happened. The claimant could offer no explanation beyond saying "I know I've fucked up".

28. Ms Charman confirmed 12.5mm plasterboard had been used and that it did not meet the fire regulations. There could potentially be a huge expense for the respondent to replace all of the plasterboard, and damage to their reputation. Ms Charman informed the claimant that he, as site manager, was responsible for the error, and that she no longer had trust in him to do his job because of his deceit in providing incorrect information. Ms Charman told the claimant that she had no other option but to dismiss him for gross negligence.

29. The claimant asked if he was to finish up immediately, and was told that he should attend site the following day in order to do a handover.

30. The following day the claimant attended on site and met with Mr Borthwick and Ms Charman. The claimant walked the site with Mr Barrie, and then handed his keys and the van to Ms Charman.

31. A letter dated 12 April 2019 (page 48) was sent to the claimant confirming his dismissal. The letter referred to incorrect plasterboard being used due to the claimant not working to the drawings and specification, and that he had been unable to provide an explanation for this. The claimant was informed of his right to appeal against the decision.

32. The claimant did not appeal against the decision to terminate his employment.

33. The claimant accepted he could not dispute that 12.5mm plasterboard had been used. He also accepted 12.5mm and 15mm plasterboard had been ordered, and delivered to the site; and that "I beams" rather than solid beams had been used in the kit houses.

34. The claimant was paid wages up until the end of April (page 49).

35. The claimant commenced alternative employment approximately five weeks after his dismissal. He is earning a similar level of salary, and has joined the new employer's pension scheme where the contribution rates are the same as previously.

Respondent's submissions

36. Mr Eadie's principal submission was that the claimant was fairly dismissed and that his claim should be rejected. He submitted the respondent had, in reaching the decision to dismiss the claimant, behaved fairly and reasonably and only dismissed the claimant after the situation had been investigated. The claimant was dismissed for the potentially fair reason of conduct, as referred to in the termination letter.

37. Mr Eadie referred to the ***Burchell*** test and submitted the respondent had a genuine belief in the claimant's guilt; that belief was formed on reasonable grounds after checking the plasterboard in the houses and discussing the matter with Building Control and after a reasonable investigation. Ms Charman was clear that the respondent genuinely believed the claimant was guilty of the conduct referred to, namely that the claimant had been negligent in allowing the 12.5mm plasterboard to be installed. It was submitted that a sanction of summary dismissal was appropriate given the seriousness of the

conduct and the huge financial implications for the business. The claimant was responsible for the site and responsible for supervising the build.

38. The respondent accepted the procedure followed on the 10 April was open to criticism insofar as the claimant was not formally invited to a disciplinary hearing or given the chance to be represented at that hearing. It was submitted that following such a procedure would not have changed the outcome and that the action was justified in the circumstances given the seriousness of the situation.

39. The claimant was invited to the meeting on the 10 April and given the chance to put forward an explanation for what happened. The claimant admitted in evidence that he realised, from his earlier phone call with Ms Charman, that the situation was serious. The claimant offered no explanation for what had happened. Mr Eadie invited the tribunal to prefer Ms Charman's evidence regarding the statement made by the claimant at that meeting.

40. The claimant was given the opportunity to appeal against the decision to dismiss, but he did not exercise that right. Mr Eadie suggested that if the claimant genuinely believed he had done nothing wrong and that others were to blame, he should have appealed and made all the points that he now seeks to rely upon.

41. Mr Eadie invited the tribunal to dismiss the claim. He submitted, however, that if the tribunal found the dismissal unfair, then both the basic and compensatory awards should be reduced to nil because of contributory conduct and ***Polkey***. Mr Eadie referred the tribunal to section 122(2) and section 123(6) Employment Rights Act. He submitted the claimant's failure to perform his role properly and ensure the correct plasterboard was fitted on all houses, and then to compound that by being deceitful when discussing the situation justified that conclusion. The consequences of what had happened were so serious that the respondent faced the real risk of going out of business. It was submitted that for the claimant to be awarded any money in those circumstances was unfair and unreasonable.

42. Mr Eadie submitted that if the dismissal was found to be unfair for procedural reasons, the tribunal should find the claimant would have been dismissed even if a fair procedure had been followed.

43. Mr Eadie concluded his submission by inviting the tribunal to dismiss the claim, failing which to reduce any award of compensation to nil.

44. Mr Eadie addressed the tribunal on the claimant's application of expenses. Mr Eadie confirmed the respondent had objected to the Order being granted and a Hearing had taken place on the 6 November to consider the respondent's objections. The Employment Judge decided the Order should be complied with. The respondent complied with the Order and produced the documents they had. Mr Eadie rejected the suggestion the respondent had deliberately withheld documents, and he questioned why the respondent would deliberately withhold documents helpful to their case. Mr Eadie invited the tribunal to reject the application for expenses.

Claimant's submissions

45. Mr Santoni submitted the dismissal of the claimant was unfair because of a lack of procedure; a lack of evidence of misconduct; no basis for a reasonable belief the claimant did what was alleged; the claimant was given no opportunity to be heard and no independent witnesses were investigated.

46. Mr Santoni reminded the tribunal that the claimant had moved on to the next project and, out of the blue, received the email from Mr Borthwick, regarding the plasterboard used in a project nine months earlier. The sum total of the respondent's contact with the claimant regarding this matter amounted to 4/5 emails, one phone call with Mr Borthwick, 2 phone calls with Ms Charman and a meeting on the 10 April. The claimant had had no time to prepare and was not presented with any documents or witness statements.

47. Mr Santoni submitted the respondent was adamant the claimant was liable for what had happened and nothing could move them from that view.

48. Ms Charman was adamant the joiners had lied, but she did not speak to them to test this view. In fact the claimant spoke to the joiners and reported to Ms

Charman that they had said 15mm had been used. Mr Santoni questioned how this could be dishonesty by the claimant.

49. Mr Santoni suggested there was an issue with regard to the type of joists used because 12.5mm plasterboard could be used with solid joists. The claimant had been unable to open the attachments sent to him by Mr Borthwick and therefore had been unable to check whether solid joists had been used.

50. Mr Santoni invited the tribunal to prefer the claimant's evidence that he had not said, at the meeting on the 10 April, that he had "fucked up". Mr Santoni noted this had not been referred to in the ET3 or the further particulars.

51. Mr Santoni acknowledged the claimant had not appealed but he questioned to whom the appeal would have been.

52. Mr Santoni submitted the ***Burchell*** test had not been met and he invited the tribunal to find the dismissal unfair. Mr Santoni further invited the tribunal to reject the respondent's submissions regarding contributory conduct because it was not clear the claimant had done anything wrong.

53. Mr Santoni referred to the lack of documentary evidence in this case: the drawings, specifications, delivery notes, orders and take offs had not been produced and he suggested this had been deliberate on the part of the respondent. Mr Santoni referred to the Order sought by the claimant and granted by the tribunal, and submitted there had been a deliberate and clear failure on the part of the respondent to comply with the Order. Mr Santoni made no criticism of the respondent's representative who had simply acted on what he had been told by the respondent.

54. Mr Santoni submitted every document was missing other than emails. Ms Charman had, during her evidence, referred to having considered those documents during the investigation. This suggested the documents were available and had not been produced. Mr Santoni sought expenses of £5000.

Credibility and notes on the evidence

55. I found Ms Charman to be a credible witness. The respondent company is a family owned business and Ms Charman's anger regarding the error which had been made, and her upset regarding the fact this error could lead to the demise of the respondent, governed her response to much of the cross examination. Ms Charman acknowledged the claimant was a long serving and diligent employee but against this background she could not understand why there had been no explanation for the error which had occurred.

56. There was one dispute regarding the evidence of Ms Charman and the claimant and that related to Ms Charman's position that the claimant, at the meeting on the 10 April, had said "I've fucked up". The claimant denied making this statement. I preferred the evidence of Ms Charman to that of the claimant and I found as a matter of fact the claimant did, at the meeting on the 10 April, make that statement.

57. I also found the claimant to be, on the whole, a credible witness. I say that because his evidence was very straightforward and he accepted he had not given any explanation at the meeting on the 10 April. The claimant told the tribunal that when Ms Charman phoned him she had been very angry and he had *"crapped it, really crapped it".* The claimant said that he knew Ms Charman's temperament, and that was why he had not said anything at the meeting on the 10 April.

58. The claimant also accepted he had not appealed against the decision to dismiss. He questioned to whom he would have appealed and the value of doing so.

59. The claimant challenged the fairness of the dismissal because of the lack of procedure followed by the respondent; the lack of documents produced during the process and his denial of any wrongdoing. The claimant did not, however, explain the way in which the documents would have assisted his case. This was particularly so in circumstances where the claimant had received drawings and specifications for the site at the time of the work being

undertaken as well as drawings and superstructure details subsequently when Mr Borthwick sent these as attachments to his first email.

60. Ms Charman told the tribunal that during the investigation she and Mr Borthwick had reviewed "everything" including the drawings and specification and the delivery notes. Ms Charman accepted none of those documents had been produced during the meeting with the claimant on the 10 April, or at this hearing. Ms Charman's position was that the documents had not been necessary during the meeting on the 10 April because there was no doubt 12.5mm plasterboard had been used in circumstances where it should have been 15mm. The only document produced in response to the order was page 17 (being a purchase order note for plasterboard)

61. One document referred to by the claimant was his book where he recorded "take offs". The claimant told the tribunal that if he had that book he would have been able to tell the respondent and the tribunal exactly what had been ordered and what his instructions to the joiners would have been. The claimant, when asked why he had not referred to, or produced, this book when the issue was being investigated, simply said he had been too busy to do so. I did not find this explanation satisfactory: the book belonged to the claimant, he knew where he kept it and he could have provided clarity regarding what had happened if he had looked at it.

62. There was no evidence to suggest the respondent knew of the claimant's book and, accordingly, I could not accept any criticism of the respondent for not producing it.

63. The issue of documents is dealt with in further detail below.

Discussion and Decision

Documents and the application for expenses

64. I decided to deal firstly with the issue of documents and the application for expenses. I noted the claimant's representative, by email of the 6 August 2019, made an application for an Order to be issued in respect of further information and documents. An Employment Judge decided that in the

absence of any objections from the respondent, the application should be granted. An Order to provide Information, dated 6 September, was sent to the respondent. (The Order in fact sought documents and further particulars).

65. The Order sought copies of correspondence between the respondent and Balfour Beatty showing the nature of any complaints or problems regarding the site in question; a copy of the plans and specification; a copy of the Take Offs prepared by the claimant; a copy of all workings and costings prepared by Ian Forrester and his calculation of rates for the joiners; copies of all purchase orders and details of the rates paid to the joiners.

66. Mr Eadie wrote to the tribunal by email of the 20 September requesting that the Order be set aside. Mr Eadie noted this was unusual but set out in detail the fact that as a consequence of the claimant's actions, the respondent was being pursued by Balfour Beatty to rectify the mistakes which were made. There was a very real risk the respondent may be forced to cease trading. Mr Eadie noted that against that background, and the respondent's time and resources being spent on working with Balfour Beatty to try to resolve matters, it was not reasonable or in the interests of justice for them to comply with the Order.

67. Mr Eadie set out objections and comments in respect of each request made by the claimant. This included:-

- correspondence between the respondent and Balfour Beatty was commercially sensitive and related to an on-going dispute: it was considered prejudicial to release the information. The respondent questioned the relevance of this to the claimant's case;
- the plans and specification had not been produced during the disciplinary process and producing that information now would be of no benefit to the claimant;
- take offs prepared by the client are commercially sensitive and could only be released with the consent of Balfour Beatty. In the circumstances it was not reasonable to expect the respondent to ask

Balfour Beatty for this consent. Further, the respondent was unsure what exactly the claimant was asking them to produce;

- Mr Forrester's costings were not relevant to the issue to be determined by the tribunal, and
- the purchase orders were not relevant in circumstances where there was no dispute regarding the fact the wrong plasterboard was used (that is, 12.5mm plasterboard).

68. A preliminary hearing took place on the 5 November, following which an Employment Judge confirmed the Order would stand and the compliance date was varied to the 12 November 2019.

69. The folder of documents produced for this Hearing ran to over 600 pages and included various photographs, plans, technical drawings and specifications. The vast majority of these documents were not referred to by either party.

70. Mr Santoni's position was that the respondent had deliberately failed to comply with the order to produce documents. I, in considering this, had regard to the following points:

(i) the only document produced in response to the order was a purchase order note (page 17); and

(ii) the only reference to documents during the evidence of Ms Charman was:

a. to the claimant having been provided with drawings and specifications for the site;

b. to Mr Borthwick's email of 27 March (page 63) to which photographs, drawings and superstructure details were attached (pages 24 – 38);

c. to the claimant's emailed response to Mr Borthwick where he referred to needing to 'check the drawings and spec…'; and

d. Ms Charman was asked the question 'where are the drawings' and replied "a full set was produced to the claimant."

71. I also had regard to the fact Ms Charman said in her evidence that all documents had been considered prior to meeting with the claimant on 10 April. Ms Charman did not clarify what she meant by "all documents" but I considered it reasonable to infer it included some of the documents Mr Santoni wished to have produced.

72. I further had regard to the fact that the respondent is endeavouring to resolve, with Balfour Beatty, how to remedy the defective ceilings. In these circumstances, I considered it reasonable to infer that all paperwork will have been retained.

73. I concluded, having had regard to all of the above points, that the respondent did not produce all of the documents in their possession in terms of the order.

74. I next considered Mr Santoni's application for expenses based on the respondent's behaviour regarding the order for documents. I, in considering the application, had regard to Mr Eadie's email of 20 September, where he set out in detail objections to each call in the order. The key point of objection related to relevance and commercial sensitivity.

75. I also had regard to the fact the claimant did not dispute:

    (i) that both 12.5mm and 15mm plasterboard had been ordered and delivered to the site;

    (ii) "I beams/joists" would have been used in the kit houses; and

    (iii) 12.5mm plasterboard was used in the lower ceilings instead of 15mm.

76. I concluded, having had the benefit of hearing the evidence and noting the claimant did not dispute the above points, that the respondent's argument regarding relevance was well made.

77. The claimant attached significant weight to the "take offs" and told the tribunal that if he had had his take offs book, he would have been able to say exactly what instructions he had given the joiners. I accepted the take offs information would have been helpful to the claimant, but only to the extent that it would

have supported what he should have told the joiners: it would not and indeed could not show what instructions the claimant had actually given the joiners.

78. I accepted the respondent was not in a position to produce the claimant's book. There was no evidence before this tribunal to suggest the respondent knew of the claimant's book or where it was kept. There was, however, ample evidence regarding the fact the claimant had his book and could have referred to it or produced it. I noted the claimant was not asked why he did not take the book with him when he left site following the termination of his employment.

79. I, having had regard to Mr Eadie's email of the 20 September, noted there was reference to "take offs prepared by the client" (in this case, Balfour Beatty) and also a statement seeking clarification exactly what the claimant meant by using this term. I also noted this clarification had not been provided.

80. I concluded, having had regard to all of the above points, that notwithstanding the respondent had not complied with the order of the tribunal, that did not, in the circumstances of this case, amount to unreasonable conduct. I decided, for this reason, to refuse the application for expenses.

Unfair dismissal

81. I had regard to the terms of section 98 Employment Rights Act which sets out how a tribunal should approach the question of whether a dismissal is fair. There are two stages: first, the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in sections 98(1) and (2). If the employer is successful at the first stage, the tribunal must then determine whether the dismissal was fair or unfair under section 98(4). This requires the tribunal to consider whether the employer acted reasonably in dismissing the employee for the reason given.

82. The respondent in this case accepted it had dismissed the claimant and asserted the reason for dismissal was misconduct. The claimant's position was that he had not done what was alleged, but he offered no real argument that his dismissal had been for any other reason. The claimant hinted at some

atmosphere between Ms Charman and Mr Barrie, but it was no more than this and no suggestion it had involved him in any way. I was accordingly satisfied the respondent had shown the reason for dismissal was misconduct, which is a potentially fair reason for dismissal falling within section 98(2)(b) Employment Rights Act. I must now go on to consider whether the respondent acted fairly in dismissing the claimant for this reason.

83. I had regard to the case of **British Home Stores Ltd v Burchell 1980 ICR 303** where the EAT said it is the employer who must show that misconduct was the reason for the dismissal and a three-fold test applies. The employer must show:

- it believed the employee was guilty of misconduct;
- it had in mind reasonable grounds upon which to sustain that belief and
- at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances.

84. I turned to consider the investigation carried out by the respondent. There was no dispute regarding the fact that this whole issue started when Mr Borthwick received an email from Balfour Beatty suggesting the wrong plasterboard had been used on the ground floor ceilings. Balfour Beatty had attached photographs and structure details to the email. Mr Borthwick sent the email and attachments to the claimant for comment.

85. The claimant firstly responded to say two types of plasterboard had been required and he thought 15mm had been used upstairs and 12.5mm used downstairs, but he would need to check the drawings and specification. I noted the claimant did not indicate when he would check the drawings and specification, and in fact there was no suggestion he had subsequently done so.

86. Mr Borthwick emailed again the following day to advise the drawings he had, said it was 15mm to be used on the lower ceilings. He confirmed to the claimant this could have serious consequences and he asked the claimant to review the situation.

87. The claimant did not review this matter: he did not look up the information in his book or check the drawings and specification. The claimant was asked why he had not done this and replied that he had been busy.

88. The claimant did ask a number of joiners to carry out a check on the properties and was told 15mm had been used downstairs. The claimant reported this information back to Mr Borthwick.

89. The respondent was in the position where the client, Balfour Beatty, told them 12.5mm plasterboard had been used in the lower ceilings; the claimant's initial response had been that 12.5mm may have been used, but he then confirmed the joiners had told him 15mm had been used. The respondent, in investigating this matter, reviewed the drawings and specifications (this fact comes from reference in Mr Borthwick's email to the claimant where he stated "the drawings I have" and from Ms Charman's evidence where she stated "the drawing and specification was very clear). They also reviewed the delivery notes to confirm 12.5mm and 15mm plasterboard had been ordered and delivered to the site.

90. The respondent also received information from the Building Control Officer (page 75).

91. The respondent asked Mr Barrie, Contracts Manager, to attend at the properties in question and to test the plasterboard. Mr Barrie reported back that he had carried out random testing and it was all 12.5mm plasterboard in the lower ceilings.

92. Mr Santoni was critical of the respondent's investigation because neither Mr Borthwick nor Ms Charman spoke to the joiners who had carried out the work to install the plasterboard. Ms Charman accepted she had not spoken to the joiners, but relied on the fact the claimant had spoken to them and been told 15mm plasterboard had been used, when in fact this was incorrect. Ms Charman did not consider there was merit in speaking further with the joiners in those circumstances.

93. I, in considering Mr Santoni's submission, noted there are no hard-and-fast rules regarding the level of inquiry the employer should undertake, except that the more serious the allegation the more thorough the investigation ought to be. Ms Charman knew the joiners had told the claimant that 15mm plasterboard had been used and that this was incorrect. I accepted that in those circumstances Ms Charman did not err when she failed to speak to the joiners again. I say that because she knew they had already provided incorrect information.

94. The claimant, at the meeting on the 10 April, did not provide any explanation to Mr Borthwick and Ms Charman regarding what had happened or how it had happened. There was nothing further, arising from the meeting, to be investigated.

95. Mr Santoni was critical of the respondent for not having regard to the "take offs" information. I noted two material points in relation to this submission. Firstly, there was no evidence to suggest what information Ms Charman would have gained if she had had regard to the "take offs" information. This was particularly so in circumstances where there was no dispute regarding the fact that both 12.5mm and 15mm plasterboard were delivered to, and available on, site. Secondly, the claimant did not ever say to Mr Borthwick or Ms Charman that they should have regard to the "take offs" information or that he wanted to have regard to it. I, having had regard to both of these points, concluded Ms Charman did not err when she did not have regard to the "take offs" information.

96. I was satisfied the respondent did carry out as much investigation as was reasonable in the circumstances of this case. The respondent had regard to the drawings and specification and confirmed 15mm plasterboard should have been used for the lower ceilings. They had checks carried out on the plasterboard used and received confirmation from Mr Barrie that 12.5mm had been used. This accorded with what the respondent had been told by Balfour Beatty.

97. The respondent asked the claimant to review the situation and provide an explanation, and they met with him to discuss this. The respondent did not interview any other witnesses. It was suggested the respondent should have interviewed the joiners to ascertain what instructions they had been given. Ms Charman rejected that suggestion on the basis the joiners had told the claimant 15mm had been used, when this was incorrect. I accepted that in these circumstances, the failure to interview the joiners did not amount to a flaw in the investigation.

98. I next considered whether the respondent had reasonable grounds upon which to sustain the belief that the wrong plasterboard had been used due to the claimant not working to the drawings and specification. The respondent investigated this with the claimant. The claimant knew, from the time Mr Borthwick forwarded Balfour Beatty's email, that there was an issue concerning the plasterboard used in the kit houses. The claimant told Mr Borthwick he would check the drawings and specification, but he did not do so.

99. The claimant, at the meeting on the 10 April, was asked to give an explanation for what had happened. The claimant said nothing other than "I've fucked up".

100. I have stated above that the claimant had an opportunity, prior to the meeting, to review the information attached to Mr Borthwick's first email. He also had time to look at his "take offs" book. The claimant at no time suggested to the respondent that he had to get the "take offs" book, or that the respondent should access it. The claimant, when asked about this, stated he had been busy on the new site. I acknowledged the claimant had a busy job, but his failure to examine his "take offs" book seemed extraordinary in circumstances where, according to the claimant, it would have told him what instructions he would have issued to the joiners.

101. I concluded the claimant's lack of explanation, and his comment that he had "fucked up" left the respondent with no alternative but to conclude that the wrong plasterboard had been used because the claimant had not worked to the drawings and specification. The claimant was the Site Manager: he was

responsible for the project which included the work of the self-employed contractors and sub-contractors. He issued instructions to the joiners and ensured they had the materials for the work. The claimant was responsible for the fact the joiners fitted the wrong plasterboard.

102. The claimant, at this Hearing, suggested other people had visited the site and had an opportunity to spot the wrong plasterboard had been used. There was no dispute the Contracts Manager visited the site a couple of times each week, and the Clerk of Works, Building Control Officer and NHBC. However, the person with responsibility for the work was the claimant; it was the claimant's job to ensure the project was built to the specifications and to supervise the work of the employees and sub-contractors.

103. I, in conclusion, was satisfied the respondent had reasonable grounds upon which to conclude the incorrect plasterboard had been used because the claimant had not worked to the drawings and specification.

104. Ms Charman, in her evidence, told the tribunal that the second allegation against the claimant related to "deceit". Ms Charman explained this concerned two matters: firstly the fact the claimant had told her the joiners had told him 15mm had been used, and secondly, the claimant's suggestion that he had been told by the Building Control Officer that 12.5mm was acceptable because it was a two storey building. This contrasted with the subsequent email from the Building Control Officer.

105. I noted the letter of termination of employment made no reference to the issue of "deceit". Further, this was not a matter which was discussed at the meeting on the 10 April. I concluded that in circumstances where (i) the claimant had not been made aware of this allegation, (ii) it had not been referred to during the meeting on the 10 April; (iii) the claimant had not been asked at any time about these matters and (iv) it had not been included in the letter of dismissal, that the respondent did not have reasonable grounds to sustain a belief that the claimant had acted as alleged.

106. I have concluded, above, that the respondent carried out as much investigation into the allegation concerning use of the wrong plasterboard as

was reasonable in the circumstances of the case. I further concluded the respondent had reasonable grounds upon which to sustain their belief that the claimant acted as alleged. I must now consider the fairness of the dismissal in those circumstances.

107. I had regard to the procedure followed by the respondent when dismissing the claimant. I noted the ACAS Code of Practice on Discipline and Grievance sets out basic requirements for fairness that will be applicable in most conduct cases. The section regarding handling of disciplinary issues states the basic steps employers must normally follow, namely:

- carry out an investigation to establish the facts of each case;
- inform the employee of the problem;
- hold a meeting with the employee to discuss the problem;
- allow the employee to be accompanied at the meeting;
- decide on appropriate action and
- provide employees with an opportunity to appeal.

108. I, as set out above, was satisfied the respondent had carried out an investigation to establish the facts of the case, and had informed the claimant of the problem. The respondent did not inform the claimant in writing of the nature of the charges he faced, or the possible consequences of the disciplinary action.

109. The respondent did not advise the claimant that the meeting on the 10 April was a disciplinary hearing and they did not give him the opportunity to be accompanied at that meeting.

110. Mr Santoni was critical of the respondent because there were no documents available at the meeting and the claimant was not made aware of what investigation had been carried out by the respondent. Ms Charman accepted no documents had been produced at the meeting on the 10 April, and she questioned what documents ought to have been produced in circumstances where there was no dispute an error with the plasterboard had occurred.

111. I noted that by the time of the meeting on the 10 April, the issue was not whether an error with the plasterboard had occurred, but how it had occurred. I accepted the respondent did not produce any documents at the meeting on the 10 April because they did not consider any were relevant to that issue. Further, the claimant did not, at that meeting, suggest he wanted to have sight of any particular documents or that the respondent should have regard to any particular documents.

112. The claimant did suggest at this hearing that the "take offs" book should have been made available. I accepted the claimant would have found this helpful but only to the extent that he would have been able to say what instructions he would have given the joiners. There was, as I understood, nothing in the book to note what instructions he had given the joiners. Accordingly, I was not persuaded that the "take offs" book would have assisted the claimant in explaining whether the error was with his instructions or with the joiners disregarding his instructions.

113. I concluded the respondent had not erred in failing to produce the documentary information to which they had had regard during the investigation in circumstances where there was no dispute regarding the fact 12.5mm and 15mm plasterboard had been ordered and delivered to the site and where 12.5 mm plasterboard had been used in error.

114. Mr Santoni further submitted the claimant had not been given an opportunity to state his case. I could not accept that submission because I accepted Ms Charman's evidence that at the meeting on the 10 April she went through the specification for the job, the details and Building Control, and asked the claimant if he knew what had gone wrong. The claimant offered no explanation other than to shake his head and say "I've fucked up".

115. The claimant, although denying he said "I've fucked up", agreed he had given no explanation. He told the tribunal that during the earlier phone call Ms Charman had "gone off like a rocket"; that he knew her temperament; that he was "crapping it" and "that's why I didn't say anything". The claimant agreed he had not provided any explanation for what had happened.

116. The claimant was given an opportunity to appeal against the decision to terminate his employment, but he did not do so. The claimant queried to whom he would have appealed, and the point of doing so, but I could not accept this excused or justified his failure to appeal.

117. I, in conclusion, decided the respondent had not followed a fair procedure when dismissing the claimant. I say that because the respondent did not make clear to the claimant that he was being invited to attend a disciplinary hearing and they did not inform him of the nature of the disciplinary charges prior to the meeting on the 10 April or of the possible consequences of the disciplinary process.

118. I next had regard to section 98(4) Employment Rights Act and the question of whether the dismissal of the claimant was fair or unfair in the circumstances. I also had regard to the case **of Iceland Frozen Foods Ltd v Jones 1983 ICR 17** where the EAT made clear that a tribunal must consider the reasonableness of the employer's conduct and not whether they (the members of the tribunal) would have dismissed. Further, the test to be applied is that of the band of reasonable responses: the tribunal must determine whether in the particular circumstances of each case the decision to dismiss fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band it is fair; if the dismissal falls outside the band it is unfair.

119. I have set out above that I was satisfied the respondent had carried out as much investigation as was reasonable in the circumstances of this case, and that the respondent had reasonable grounds upon which to sustain their belief that the error with the plasterboard happened because the claimant did not have due regard to the drawings and specification. I have also set out my conclusion that the procedure followed by the respondent when dismissing the claimant was lacking in several respects. The case of **Polkey v A E Dayton Services Ltd 1988 ICR 142** established that procedural fairness was an integral part of the reasonableness of the test under section 98(4).

120. I decided the failure to follow a fair procedure in this case rendered the dismissal of the claimant unfair.

121. The claimant is entitled to an award of compensation. Mr Eadie invited the tribunal to reduce any award of compensation because of contributory conduct and the application of the ***Polkey*** principles. I considered each of these matters.

122. The ***Polkey*** case not only established that procedural fairness was an integral part of the reasonableness test, but also made clear a tribunal must go on to consider whether the employee would still have been dismissed even if a fair procedure had been followed. The answer to that question should be expressed as a percentage. I concluded (above) that the respondent failed to follow a fair procedure when they failed to notify the claimant of the disciplinary charges against him, failed to notify him that the meeting on the 10 April was a disciplinary hearing and failed to notify him of the possible consequences of the disciplinary process. I must now consider the percentage chance the claimant would still have been dismissed if the respondent had followed a fair procedure regarding those matters.

123. I decided there was a 100% chance the claimant would still have been dismissed even if the respondent had notified him of the disciplinary charges, notified him the meeting on the 10 April was a disciplinary hearing and notified him of the possible consequences of the disciplinary process. I say that primarily because there was no evidence to indicate the claimant would have given an explanation for what had occurred even if this procedure had been followed. There was nothing to suggest following a fair procedure would have made any difference to the approach the claimant took at the meeting on the 10 April. The claimant may not have known the charges against him, but he knew the situation was serious and he knew that as Site Manager, the buck stopped with him because he was responsible for the project.

124. The effect of this decision is that the compensatory award is reduced to nil.

125. I next had regard to section 123(6) Employment Rights Act which sets out that where a tribunal finds the dismissal was caused or contributed to by any

action of the claimant, the tribunal shall reduce the amount of the compensatory award by such proportion as it considers just and equitable. The Court of Appeal in the case of **Nelson v BBC (No 2) 1980 ICR 110** said that three factors must be satisfied if the tribunal is to find contributory conduct:

- the relevant action must be culpable or blameworthy;
- it must have actually caused or contributed to the dismissal and
- it must be just and equitable to reduce the award by the proportion specified.

126. I was satisfied the claimant did, by his actions, contribute to his dismissal. I say this because the claimant was initially asked by the respondent to review the situation and advise. The claimant's response to this was to say that 12.5mm and 15mm plasterboard had been required on site and that he thought 15mm had been used upstairs and 12.5mm downstairs, but that he would have to check the drawings and specification. The claimant did not ever check the drawings and specification and did not ever go back to the respondent to say whether his initial recollection was correct. I acknowledged the claimant's initial response was some nine months after the event and after the claimant had moved on to another project, but he must have realised the seriousness of the matter and failed to follow this up and clarify his understanding of what had been required.

127. The claimant, in the opinion of this tribunal, compounded matters by failing to check his "take offs" book. The claimant had this book on site with him at the new site. The claimant provided no explanation why he had not examined this book and provided information to the respondent.

128. The claimant then decided not to say anything at the meeting on the 10 April. He did not ask for documents or information to be provided: he did not offer any explanation other than to shake his head and say "I've fucked up".

129. I concluded the above failures on the part of the claimant were culpable and blameworthy conduct.

130. The respondent concluded the incorrect plasterboard had been used on the ground floor ceilings due to the claimant, as Site Manager, not working to the drawings and specifications. The claimant was dismissed for this reason. I was entirely satisfied the claimant's culpable and blameworthy conduct contributed to his dismissal by 100%.

131. I next had regard to the terms of section 122(2) Employment Rights Act which provide that a reduction to the basic award must be made where the tribunal considers that any conduct on the part of the complainant before the dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award.

132. I have set out above the conduct of the claimant on which I relied and, in considering section 122(2), I relied on the same conduct. I decided it would be just and equitable to also reduce the basic award by 100%. I reached that decision because the claimant could have provided information and an explanation to the respondent and he did not do so: he chose not to offer any explanation at the meeting on the 10 April.

133. I, in conclusion, decided the claimant was unfairly dismissed by the respondent. I make no award of compensation because the basic award is reduced by 100% due to the claimant's conduct, and the compensatory award is reduced by 100% due to the application of ***Polkey*** and by 100% due to contributory conduct.

Employment Judge: Lucy Wiseman
Date of Judgement: 13 January 2020

Entered in Register,
Copied to Parties: 14 January 2020