Case Number: 3314504/2019 (V)

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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondents**
Mr A Mavin	and	(1) The Hain Daniels Group Limited (2) Mr M Lilley (3) Mr A Faulkner (4) Mr G White (5) Mr P Gledhill

Held by CVP on 26 to 30 October and, in Chambers, 9 November 2020

Representation	**Claimant:**	In Person
	Respondents:	Mr D Flood, Counsel
	Members	Ms A Carvell
		Ms H Gunnell

Employment Judge Kurrein

JUDGMENT

1 The First Respondent has unfairly and wrongfully dismissed the Claimant.

2 The First Respondent is ordered to pay the Claimant:-

2.1 A basic award in the sum of £3,150.00

2.2 A compensatory award in the sum of £300.00

2.3 Damages for breach of contract in the sum of £9,509.54.

3 The Claimant's claims alleging disability discrimination against all Respondents, and entitlement to a redundancy payment, failure to pay holiday pay and unauthorised deductions against the First Respondent, are not well founded and are dismissed.

REASONS

1 On 5 May 2019 the Claimant, having completed early conciliation, presented claims alleging unfair dismissal, disability discrimination, entitlement to a redundancy payment, breach of contract and a failure to make payment in respect of holiday pay. On 6 August 2019 the Respondents presented responses in which they denied those claims.

2 On 2 December 2019 a preliminary hearing took place before EJ Ord, who gave directions for the further conduct of the matter.

The Evidence

3 We heard the evidence of the Claimant on his own behalf and took account of the statement, in an email, of Mr Watson, the Claimants former line manager. We also took account of the evidence in identical statements from Mr A Mavin, Mr P Godding, Ms J Corby, Mr D Fish, Mr C Raven and Mr D Ring, who also attended to give evidence.

4 We heard the evidence of Ms J Cawsey, former Group Procurement Director; Mr A Faulkner, Operations Manager; Mr G White, Group Financial Controller; Mr M Liilley (or Lilley, his statement saying the former and his signature the latter), General Manager; and Mr P Gledhill, former Operations Director for Chilled and Frozen.

5 We considered the documents to which we were referred in a bundle of over 500 pages.

6 We are, of course, aware that in considering the issue of whether or not the Claimant was unfairly dismissed we should only consider evidence that was available to the employer at the time the decision was taken: Devis v. Atkins [1977] AC 931. However, there is also a claim for wrongful dismissal, and the Respondent has adduced a substantial volume of evidence to show that the Claimant was in fact guilty of gross misconduct.

7 In those circumstances we have endeavoured to ensure that we have not considered the latter evidence when considering the issue of whether or not the Claimant was unfairly dismissed.

8 We considered the parties' submissions and the authorities cited to us. We make the following findings of fact.

Findings of Fact

9 The Claimant was born on 21 March 1957 and has worked in the food processing industry as a senior engineer for many years. Following a selection process, during which he completed a health questionnaire and was provided with a copy of the First Respondent's ethics code of conduct, he started working for the First Respondent as its Chief Engineer at the Respondent's site known as "Westwood", but also referred to as "NCG".

10 The First Respondent is a wholly owned subsidiary of an American Corporation in the food processing industry. The First Respondent owns many brands that are household

names, and also produces “own label” products for major British supermarkets and others. It has a turnover in excess of £500M pounds a year.

11 At the time the Claimant started his employment the First Respondent had a number of UK sites, including one at Fakenham and one near Grimsby known as ”Lakeside”.

12 Mr Lilley, the Second Respondent, was the General Manager of another of the Respondent’s sites at Clitheroe. He had a great deal of experience as an engineer in the food sector, and had moved into general management. He conducted the Claimants disciplinary hearing.

13 Mr Faulkner, the Third Respondent, was the Site Operations Manager for the Westwood site at the time of the events with which we are concerned.

14 Mr White, the Fourth Respondent, was the Head of Finance for the First Respondent's fruit division at the time of these events. He was based at the Corby site. He dealt with the grievances raised by the Claimant.

15 Mr Gledhill, the Fifth Respondent, was the Operations Director for chilled and frozen at the time of these events. He took the decision that the Claimant should be suspended on 19 November 2018 and commissioned the investigation carried out by Mr Russell Nearn.

Claimant’s duties

16 The Claimant started his employment on 20 December 2014. He appears to have been very good at his job and effected substantial savings at the Westwood site. As a consequence he was asked to also take on the Fakenham site as Chief Engineer In 2015.

17 In that position the Claimant was responsible for clearing out redundant equipment stored in the Fakenham yard and removing all plant that was stored off site so as to reduce substantial storage costs. We accepted his evidence that he did so in accordance with instructions from his line manager.

18 We also accepted that he was involved in the procurement and disposal of plant and equipment at both sites and did so in accordance with the instructions he received from his line managers, including Mr Faulkner, and with the full knowledge off the then CEO, Mr J Hudson.

19 Some equipment was stored, free of charge initially, at the site of a specialist catering/food production equipment business, Clarke Fussells Limited (“Fussells”)

20 Both those sites operated shifts. Every morning there was a management meeting involving shift and other senior managers at which issues that had arisen overnight, or matters that needed to be dealt with in the future, were discussed and actioned.

21 One of the issues that might be the subject of discussion was the results of audits carried out on the site by major customers, such as supermarkets. We accepted that any issues raised by those audits had to be dealt with as a matter of priority.

Closure of Westwood

22 In early 2018 the First Respondent announced that it would be closing the Westwood site, and there would be 150 redundancies. The Claimant attended a first consultation meeting on 18 May 2018. He decided to accept redundancy, but was never actually given notice.

Redundant equipment

23 The Westwood site contained three soup production lines. One line, number two, was to be scrapped. Numbers one and three were to be decommissioned, disconnected, dismantled, transported to Lakeside and reconnected and recommissioned.

24 On 22 May 2018 a meeting took place at Westwood concerning that process. Those present for the First Respondent were Mr R Bidder, the Site Operations Manager at Lakeside, who led the meeting, Mr R Stemp, Engineering Manager at Lakeside, the Claimant, one of his senior engineers, Mr C Fish, and the Health and Safety Manager at Fakenham, Mr R Down.

25 Also present were representatives of Blackrow Limited ("Blackrow"), who wished to tender for the work. Present on their behalf were Mr C Marfleet and Mrs R Robinson.

26 That meeting proposed that the Claimant and his team would disconnect power from lines one and three over a period of two weeks. Mr Down would be the principal designer and the, " CDM area is them established". This arises under the Construction (Design and Management) Regulations 2015, which provide that for health and safety reasons appropriate plans must be prepared and management of the works be defined. Blackrow were to plan and manage the movement and reinstallation of lines one and three.

27 It was further noted that Blackrow would need three weeks to perform their duties: one week to do the electrical disconnection work and two weeks to strip out. It was repeated in the notes that Mr Down would be the principal designer.

28 On 23 May 2018 Blackrow submitted a proposal for carrying out the works. It was sent to Mr Bidder c/o Westwood. The overview contain a specific provision that Blackrow would, 'Catalogue, mark up and take photos of all equipment prior to removal', and

- Carefully mark up all electrical cables
- Trace back each cable and coil up to each component (this must be done very carefully as many changes have been made over the years, and the as built drawings have not been kept up to date)

29 On 30 May 2018 the Claimant emailed Mr Bidder, Mr Down and Mr Stemp concerning the equipment that was going to be removed and attached documentation relating to it. He confirmed that he would be keeping a log of all the works they were involved in, to be posted against dilapidations for accounting purposes. He confirmed that he was compiling the disconnection plan, but indicated it was complex because power went to more production lines then simply those being removed, and it was important that production was not interrupted.

30 In early June one of the Claimants senior engineers on the Westwood site, Mr Hendry, carried out numerous tasks of power disconnection and isolation for lines one and three, which were all appropriately logged on the First Respondent's documentation.

31 On 12 June 2018 Blackrow submitted a contract for the supply of services to start on 18 June 2018 which were described as, "to act as principle *[sic]* contractor and provide services to deinstall" the various equipment and to transport and reinstall it at Lakeside. The contract had a Schedule 1, Scope of Works, and a schedule 2, Mandatory Policies. It had a value in excess of £120,000, for three weeks work, with extra weeks charged at almost £5,000.00 pw.

32 We accepted the Claimant's evidence that once Blackrow started work on the site, on 18 June 2018, it became subject to the CDM Regulations and Blackrow were in charge of the site until the work was completed. This was set out in the Statement of Compliance.

33 On 20 June 2018, SRS, a specialist refrigeration service sub-contractor, emailed Mr Stemp to inform him of the dubious disconnection of services at Westwood and asked him to inform Blackrow that, "these need looking after and returning to [Lakeside]" with the line. Mr Stemp asked Mr Bidder and the Claimant to relay these matters to Blackrow. This correspondence was passed to Mr Nearn by Mr Bidder on 7 December 2018.

34 The scope of the works excluded removal of any mains services and any electrical disconnections or reconnections other than the principle production line. It identified the Project Manager responsible for the works as Mr P Atkinson of Blackrow and, following details of safety and similar matters, included the following within the sequence/method of works

- Test for dead using GS38 test meter
- If supply is found isolate using Blackrow safe isolation procedure
- Test each individual item before disconnecting
- Identify all field items of equipment and junction boxes on upper level that have cables running through dairy pipes back to bottom level
- Mark up every field item with a cable marking and a tag on the field item itself with the same ID
- Marking up will be done by using white insulation tape and marker pen
- Gain access to isolator or solenoid plug using hand tools
- Test for dead at the item
- Write down cable ID and core numbers on a Blackrow disconnection sheet and the item and terminals the core came out from
- Remove cable from said items

35 It appeared to us obvious from the above provisions that they were necessary to ensure that when the time came to reinstall the equipment all the connections had

been carefully marked and logged so that it would be a relatively simple task to reconnect the cables on reinstallation.

36 The method statement also provided that Blackrow would report to the Project Supervisor on a daily basis and to the "Client Project Manager" on a daily basis. The latter person was not identified in that document, but it appeared to us that Mr Bidder was the most senior person involved in this exercise, which was intended to benefit the site at Lakeside.

37 Further method statements relating to other parts of the work Blackrow were to undertake were in similar terms.

38 The Claimant prepared a plan for disconnecting all power and other connections from line two and disconnecting the various pieces of equipment making up lines one and three from the main supply.

39 The work carried out by the Westwood engineers was logged on a daily basis from 31 May through to 21 June 2018. The Claimant also completed a detailed Gantt chart for the decommissioning and disconnection of line two, which included some of the main power disconnection work on lines one and three. The Claimant's team completed detailed paperwork setting out the safety precautions they would be taking for the disconnection work they intended to carry out

40 The decommissioning, disconnection and removal of these three production lines appears to have progressed as expected. No issues were raised by the First Respondent with Blackrow, other than that raised by SRS, and Blackrow raised no issues with the First Respondent.

Reinstallation

41 The reinstallation of lines one and three at Lakeside by Blackrow appears to have started in about October 2018. We received no evidence about the storage or later movement of these lines between June and October 2018.

42 It appears Blackrow ran into difficulties when reconnecting the cabling.

43 A series of emails were exchanged in early November 2018 as follows

- 1/11/18 at 08:42: Mr Down sent an email to the Claimant and Mr Fish enclosing pictures saying that they showed, "the Delford [one part of the production lines] upon arrival on site. I am rather concerned from a safety point of view that for some reason prior to this unit coming to LS [Lakeside] someone cut these live wires, could we please carry out a investigation to find out who did this."

  The actual photograph was not identified to us.

- 1/11/18 at 09:47: The Claimant replied to ask whether the picture was of line one or three and to state that there was no need to cut those wires because they are within the panel and part of the internal workings. He thought it didn't make sense to cut them.

- 1/11/18 at 09:55: Mr Down replied the Claimant, copying in Mr Fish, to say he didn't know whether it was line one or 3, but agreed that it didn't make sense for anyone to cut the wires internally.
- 1/11/18 at 10.18: Mr Fish emailed Mr Down to confirm that the Westwood engineers had completed the power disconnection and nothing more. He also pointed out that other people had moved, loaded and transported the lines, "and the like", and finished by saying, "There are others in this equation." By this we understood him to be suggesting that the defects might have been caused by a disgruntled redundant employee.
- 1/11/18 at 10.02: The Claimant replied to say, "I have been through our decommissioning documentation, and we did NOT remove any cables whatsoever from any of the panels.

  All of the supplies were removed from the relevant distribution board with the cables identified, and coiled onto the machine.

  Blackrow electricians were then tasked with removing any further cables needed to be disconnected, and then their mechanical engineers made ready the equipment to be moved. The cables that have been cut are part of the internal controls and would not need to be touched in anyway as far as the safety of removal is concerned.

  If you remember we did a walk around everyday, and both machines were simply made safe from the distribution board.

  The Westwood engineers documented every piece of equipment that was disconnected, and this was then checked and signed off.

  Both line one and line three Delfords control panels were never worked on by our engineers as there was no need to.

  I can go through all the paperwork with you tomorrow so you can see for yourself."

44 Mr Down forwarded the Claimant's response to Mr Stemp and Mr Lilley, but did not comment on his own knowledge of what took place and/or what he saw on his daily walk arounds with the Claimant.

45 On 5 November 2018 Mr Faulkner emailed the Claimant . He referred to his recent visit to Westwood during which he was told that the Claimant owned a freezer and some eurobins. He asked, in terms of due diligence, whether the Claimant could provide supporting documentation for ownership of those items.

46 The Claimant replied the same day to attach an email from October 2016 from Fussells and said that he would be happy if Mr Faulkner just wanted to pay him for the equipment. The attached email, however, referred to tote bins, but not to a freezer.

47 Later that day the Claimant forwarded another email from Fussells to Mr Faulkner that did refer to the freezer.

48 On 15 November 2018 Mr Faulkner emailed the Claimant, with a copy to Mr Gledhill, asking that they go through it at a meeting on the following Monday.

49 On 18 November 2018, at 1901, Ms N Maggi, Managing Director of chilled and frozen, emailed Mr Faulkner and the Claimant, with copies to Mr Bidder and Mr Gledhill under the subject "Decommissioning at WW".

> "I am hearing some very disturbing news from Lakeside regarding the decommissioning of kit from Westwood
>
> This equipment is giving us no end of trouble and the main cause is how this was removed from Westwood. We are now three weeks behind plan and losing sales and profit
>
> I now need to ascertain immediately who was at fault for this as I may be making a claim if this is Blackrow
>
> If internal we will need to consider the options available to us
>
> Alex/Bob - I require a full report. By close of play tomorrow of what work was conducted by whom in detail, I can then review against the problems we have experienced with the new line if the kit was removed properly then I need to understand why we have a problem at Lakeside"

50 At about midday on 19 November 2018 Mr Faulkner attended Westwood, saw the Claimant, and suspended him from his duties. That suspension was confirmed in writing later that day, the reason given being,

> "An investigation into an allegation that you were grossly negligent in the decommissioning of company equipment, failure to follow company procedures with regard to sign off relating to procurement and a breach in trust and confidence."

51 The letter went on to set out the terms of the suspension and to remind the Claimant of his rights and obligations.

52 Shortly after his suspension the Claimant emailed Ms Maggi, Mr Bidder and Mr Gledhill and set out in detail the work his staff had carried out in disconnecting the mains power on lines one and three.

53 On the same day Mr Faulkner asked his accounts Department to search for any payments by or to the Respondent or any subsidiaries to or from Fussells. Their response was negative. Mr Faulkner asked them to dig deeper, but the response was also negative, no such payments were found. It was the Claimant's case that this was because he obtained the freezer for nothing and had paid for the eurobins from his own pocket. We thought it unfortunate that Mr Faulkner carried out this investigation when he had already told the Claimant that an Investigator would be appointed.

54 Mr Gledhill appointed Mr R Nearn to carry out an investigation into the Claimant. We understand that he was employed as "Soup Technical Controller" at Westwood. He did not provide a witness statement or give evidence. We are unaware when the appointment was made, and why he was considered suitable for this role. We do not know whether he was given terms of reference or in what terms, if he was. We did enquire of Counsel as to why we were not hearing from such a potentially important witness, but did not receive a substantive response.

55 On 21 November 2018 Mr Faulkner emailed Mr Nearn, on his understanding that Mr Nearn was investigating the Claimant, to inform him of the steps he had taken to investigate the Claimant's dealings with Fussells.

56 It appears Mr Nearn contacted a different dealer, one the Claimant had contacted with a view to selling the redundant line two to. He raised this with Mr Faulkner, who replied to say that he was fully aware of this and had been kept informed.

57 On 22 November 2018 Mr Marfleet, of Blackrow, emailed Mr Nearn in the following terms,

> "In answer to your question
>
> When we turned up on site to remove the SMBs from [Westwood] a lot of the wiring had been disconnected and pulled back.
>
> The only problem with this was they had not marked or tagged the cables so when it comes to dry commissioning what should have taken 2No days at the most ran into 9No days.
>
> Like I said site was trying to help move things along however in their rush they forgot to mark up the cables it was the same with the conveyers."

58 Unfortunately we have no knowledge of what question or questions Mr Nearn posed to Mr Marfleet then or at any other time. He does not appear to have been asked to identify what wiring he wa referring to as being "disconnected and pulled back". We are also unaware whether Blackrow were asked to produce copies of the documentation it had contracted to maintain, save as set out below, such as its catalogue, photos, disconnection sheets or daily reports.

59 On the same day Mr Nearn emailed Mr Faulkner to tell him that in the course of his investigation he had come across emails which suggested that the Claimant had been involved in selling food equipment.

60 We accepted the Claimants evidence, corroborated to some extent by that given by the Claimant's witnesses, that the Respondent's purchasing systems were not always adhered to, and that the Claimant had in the past, with the full knowledge of his line managers, traded redundant food equipment for goods or services that the Respondent's business required.

61 On 23 November 2018 Mr Stemp emailed Mr Nearn concerning the decommissioning, and attached some of the documentation provided by Blackrow. He confirmed that the Claimants Department was to carry out the phase one decommissioning and that Blackrow would be in charge of the CDM and removing the equipment. He also told Mr Nearn that once the equipment had been removed from Westwood it was put in storage until the Lakeside site was ready for it. He expressed the view that the equipment had been disconnected in an "unprofessional manner" and went on to give details of that.

62 As with the email Mr Nunn received from Mr Marfleet, we have no knowledge of how this email came into being.

63 On 25 November 2018 a Mr Flynn, the former general manager of Fussells sent an email to the Claimant addressed "to whom it may concern" explaining the circumstances in which that business had supplied the Claimant with a freezer, which was free of charge, and some eurobins which the Claimant had paid for in cash.

64 On 26 November 2018 Mr Nearn emailed Mr Marfleet to ask him whether he had any photographs of the condition of the lines and any of the electrical connections. Mr Nearn had noted that the proposal had excluded, "any electrical disconnection or reconnections", but we were unable to establish whether Mr Nearn had gone on to read the detailed provisions regarding Blackrow's obligations to take photos, make disconnections, mark them and make detailed records.

65 Mr Marfleet response simply stated that he had no photos of the situation when Blackrow arrived on site. That was clearly contrary to Blackrow's contractual obligations, however, Mr Nearn does not appear to have taken this issue further.

66 On 26 November 2018 the Claimant, accompanied by Mr Fish, was interviewed by Mr Nearn in the presence of Ms Judge, of HR. We have not seen the letter of invitation, but noted that the complaint made by the Claimant at the outset, that he had not been told what the interview was about in advance, went unanswered.

67 In the course of that interview the Claimant made it clear that his engineers had only removed electrical power connections for lines one and three, and that a full list of what they had done had been provided and signed off. He told Mr Nearn that all cables other than power cables had been dealt with by Blackrow. From the outset the Claimant made it clear that he had never been told what, precisely, the issue was.

68 When questioned about his ownership of the freezer and the eurobins the Claimant produced the email from Mr Flynn and explained the circumstances in which he had acquired them and why. Mr Fish confirmed that such transactions were not unusual.

69 In early December 2018 Mr Nearn was provided with reports from Mr Lilley and a J Donson on the state of the equipment. The date/s of their inspection were not given and the information was in general terms. Many cables had been cut inappropriately, and none were marked. Some were missing entirely. Among other things there was graffiti reading "good luck" and "not long till *[sic]* closure" on and inside panels.

70 At about this time Mr Faulkner made a statement about asset disposal and meter readings.

71 On 7 December Mr Nearn emailed Ms Spencer, Supply Chain Manager, and Ms Judge, about asset disposal issues, but also informed them that he had contacted Blackrow to ask them to provide the start and finish time for the CDM and "RAMS" (Risk Assessment and Method Statement, we assume) for the removal. We have not seen copies of this correspondence, do not know if Blackrow responded (and if so, how) and remain unclear whether Mr Nearn saw the detailed method statement in the bundle or not.

72 On 10 December 2018 the Claimant attended another interview conducted by Mr Nearn. He was again accompanied by Mr Fish, and Ms Judge was present to take notes. As before, we have not seen the letter of invitation to this interview and the

Claimant complained at the outset that he was not aware of what the subject of the interview was to be.

73 In the course of this interview the Claimant again confirmed the limited nature of the disconnections carried out by his team. When asked, he was unable to identify whose handwriting was used for the graffiti, and was unable to identify the various pieces of wiring shown in the photographs. When questioned about the freezer and eurobins, the Claimant repeated his earlier answers.

74 On 14 December 2018 Mr Nearn sought advice from Mr R Brodie, Group Health and Safety Manager, as to the effects of the CDM regulations and their applicability to contractors. Mr Brodie responded to tell Mr Nearn that Blackrow's responsibility would have been for the safe removal, transportation and relocation of the equipment and to ensure that power had been suitably isolated from the machines for their safety.

75 A document in the bundle at page 247 was described as a statement by Mr Marfleet. That was clearly incorrect. It appears to be a series of notes made by Mr Nearn in the course of his investigation concerning the evidence he had received and his thoughts on that evidence. He again appears to have fallen into error in only reading the introduction to Blackrow's proposal concerning the exclusion of electrical disconnections or reconnections, rather than the full document in which it was made clear that Blackrow would be responsible for a great many disconnections as well as taking photographs and marking cables and recording the disconnections.

76 Unfortunately, we did not hear from Mr Nearn, and were unable to clarify with him what documents he did receive and/or his understanding of them.

77 The next document in the bundle, page 249 onward, was described in the index as the Claimant's statement on disconnection, and as being undated. The circumstances in which that document came into existence and who received and considered it was unclear. It extended over 8 closely typed pages and gave a very full view of the Claimant's understanding of the position regarding disconnections and of what had taken place.

78 That detailed statement is not numbered or otherwise identified as having been included in the documents considered by Mr Nearn in his investigation, or Mr Lilley in disciplinary process or Miss Cawsey in the appeal process. In our view it should have been.

79 Whilst dealing with issues relating to documents we also note that the Gantt charts in our bundle, page 136 on, appear to relate principally to line two, and relate to periods 2, 11 and 25, from 25 May to 27 June 2018. They were included in the disciplinary bundle, as documents D10, 11 and 12. They included a line, "Decommission Line 1 and 3 Services", which was completed by 15 June 2018.

80 On 21 December 2018 the Claimant sent an email to Ms Judge raising a formal grievance concerning the manner in which he had been treated. From its content, in which he refers to a number of legal authorities, it would appear he had sought legal advice.

81 On 27 December 2018 Mr Nunn and Ms Judge prepared two documents, both headed "Summary of Investigation into Disposal and Acquisition of Haine Daniels Equipment ". The first, barely a single A4 page, concerned disposals and acquisition of equipment and the second, barely more than half an A4 page, concerned the decommissioning issue. We deal with each separately.

- The first dealt with the Claimants bartering of equipment for goods and services and the fact that the Claimant had stored some of the Respondent's equipment with Fussells which was later lost when the business went into liquidation. It also called into question the Claimant's ownership of the freezer and eurobins and his payment for them not having been proved, and having been made in cash to avoid VAT.
- The second concerned the disconnections and set out the fact that the equipment that had been delivered to Lakeside was in an unsafe and unsuitable condition. It concluded that the likelihood was that was a consequence of the actions of the Westwood engineers for whom the Claimant was responsible.

82 In both cases there was a recommendation that the case merited a disciplinary hearing.

83 On the same day Ms Judge forwarded the Claimant's grievance to a colleague in HR, Ms Cull, who had agreed to manage the grievance within HR. She wrote to the Claimant the same day to invite him to a grievance meeting on 3 January 2019 to be conducted by Mr Thompson, Drinks Operations Manager, whom she would support.

84 On 28 January 2000 18 Mr Gledhill wrote to the Claimant to invite him to attend a disciplinary hearing on 4 January 2019. The letter set out the defects in the disconnections that had been detailed in earlier correspondence, and the alleged breaches of procedure in dealing with the Respondent's assets. The Claimant was told that these were considered to be matters that might amount to gross misconduct and gave examples:-

- Serious negligence and/or failure to follow procedure that could or does result in unacceptable loss, damage, injury or impacts Product Safety;
- Failure to carry out a reasonable and lawful direct instruction given by a superior during working hours;
- Gross insubordination;
- Acts of gross negligence;
- A breach of safety rules and or any action which seriously endangers the health or safety of an employee or any other person whilst at work
- Deliberately making a false entry in the written records of the company;
- Deliberate or reckless damage to property belonging to the company, its employees, customers or authorised visitors;
- Any action or behaviour which could seriously damage the company's reputation;

- Serious breach of company's policy; and
- Breach of trust and confidence

85 The letter enclosed investigation notes, procurement policies and decommissioning documentation, of which we were given a schedule. However, it was never clear to us in the course of the hearing whether, for instance, the decommissioning documentation described as document "D5", which started at page 88, contained all the following documents up to page 127. The Claimant was informed that Mr Gledhill would conduct the hearing with Ms Spencer as note taker, advisor and witness. The Claimant was informed of his right to be accompanied.

86 That bundle of documents included an undated statement from Mr Bidder, in which he answered eleven questions which we assume were put to him by Mr Nearn, but there was no evidence of this. The contents of that statement had not been put to the Claimant in the course of his interviews. In particular, the suggestion by Mr Bidder that the Claimant "owned the plan" was wholly at odds with Mr Bidder having been the lead at the meeting on 23 May 2018 and dealing with the appointment of Blackrow (the tender having been addressed to him), the Claimant's assertion that it was a CDM site, and the contractual responsibility of Blackrow from 18 June 2018.

87 A statement concerning the decommissioning made by Mr Stemp, dated 28 December 2018, was also in the bundle and was similarly not put to the Claimant in interview. We noted that Mr Stemp confirmed that he had received updates to the Gantt charts and was happy with them.

88 On 31 December 2018 the Claimant wrote to Mr Gledhill to complain that he was being discriminated against by reason of his disability of Crohn's disease. He alleged he had been treated unfavourably by the time limits imposed on him and being required to attend a disciplinary hearing in person, which he also alleged was an unlawful PCP.

89 On the 15 January 2019, Mr Lilley, who had taken over the role of Mr Gledhill to deal with the Claimant's disciplinary hearing because of the complaints made against Mr Gledhill by the Claimant, wrote to the Claimant to introduce himself and to inform the Claimant that he was happy to make such adjustments for the Claimant's disability as the Claimant reasonably required. He enclosed a list of questions which he asked the Claimant to respond to by 22 January 2019, and to provide any statements or questions he might have or wish to rely on by the same date. He also stated that he would give his outcome in writing, but would not do so until he had confirmed that the Claimant had nothing else to add.

90 The Claimant also indicated that he did not wish to attend a grievance hearing in person, and in those circumstances Mr White wrote to the Claimant to inform him that he had read the Claimant's grievance and asked him to provide written answers to questions by 23 January 2019. He unfortunately failed to enclose those questions.

91 The Claimant was sent those questions by email on 21 January 2019, and informed that the time frame would be extended for a short period.

92 The Claimant provided lengthy and detailed replies to the questions asked of him, but we were not taken to the correspondence that enclosed them, and they were not set

out as originally received by the Respondent: they appear to have been commented on and/or highlighted by one or more members of the Respondent's staff. See pages 359 to 391.

93 On 14 February 2019 Mr Lilley wrote to the Claimant to inform him that he had decided that the Claimant's employment should be terminated without notice for gross misconduct. He set out the allegations made against the Claimant in the letter of invitation to the original disciplinary hearing and then set out his findings.

- In respect of allegation 1, "failure to ensure the safe and appropriate decommissioning of machinery and failure in your duties as a manager" he went on to find
    - The Claimants role as Chief Engineer and responsibilities were set out in his job description.
    - Having reviewed that job description and from his own knowledge as a qualified engineer who had previously acted as a Chief Engineer he was satisfied that the Claimant had management responsibility for ensuring the safe and appropriate decommissioning of the Westwood equipment so that it could be properly recommissioned and for supervising the Westwood engineers and any contractors.

94 He was further satisfied that

- Westwood engineers had removed cables other than the main power cables (by reference to marks on a picture) that did not facilitate recommissioning.
- The manner in which the cables were cut off and disconnected without correct labelling created a serious health and safety issue for the reinstaller which the Claimant should have known about.
- Much of the wiring had been disconnected but had not been labelled so took much longer to recommission than it should have done.
- He found the Claimant's assertion that he had only being responsible for removal of the main power supply to be false . He relied on a document supplied by Mr Stemp which stated that Westwood engineers "were involved in the decommissioning of the machinery".
- Mr Stemp's evidence was supported by an email from Mr Bidder which included attached Gantt charts which included a line for Westwood engineers to decommission line one and three services and all conveyor services, that clearly showed Westwood engineers were involved in more than just disconnecting the power.
- The disconnection of the machinery was done in an unsafe way with live 240 Volt wires exposed. The cut cables were left with no labelling and created a serious health and safety risk.
- As an experienced manager and engineer who had performed the Claimants role in the past he was well aware of their position overseeing and managing decommissioning and re commissioning on a regular basis. The manner in which

the work was done can only have been to cause deliberate damage and frustrate recommissioning.

- He accepted the Claimant had walked the machinery and inspected it everyday but could not accept that the Claimant did not see the graffiti and failed to action it or he failed to inspect the machinery thoroughly.

95 He was satisfied that the Claimant's conduct amounted to serious negligence and a failure to follow procedures that resulted in unacceptable loss for the company and that health and safety had been seriously endangered which amounted to gross misconduct

96 Allegations two, three and four, serious negligence and failure to follow company procedures that resulted in unacceptable loss to the company.

- Mr Lilley found that the Claimant failed to obtain appropriate paperwork relating to the disposal and purchase of machinery. That was supported by Mr Flynn's email which illustrated the Claimant had swapped machinery outside company processes.
- He further found that the Claimant had allowed machinery to be stored in circumstances where the Respondent was unable to prove title to it so that it had been lost to it.
- He found the Claimant's explanation concerning ownership of the freezer and eurobins not to be credible and did not accept therefore that the Claimant owned those items.

97 Mr Lilley concluded that there was a clear failure on the part of the Claimant to protect the Respondents assets and had acted in breach of their code of business conduct and ethics so that he was satisfied that the Claimant had committed allegation 2, which amounted to gross misconduct.

98 The letter concluded by the Claimant being informed of his right to appeal against that decision and the manner in which he should do so.

99 On 20 February 2019 the Claimant appealed against his dismissal by email to Ms Spencer and attached his grounds of appeal to it.

100 On 21st February 2019 Mr White wrote to the Claimant to inform the Claimant that his grievances had not been upheld. He set out his reasons over 5 closely typed pages. He concluded by advising the Claimant of his right to appeal and how he should do so.

101 On 23 February 2019 the Claimant wrote to the Respondent to appeal the outcome of his grievance .

102 On 25 February 2019 Ms Spencer informed the Claimant that Miss Cawsey had been appointed to consider his appeal and to inquire whether he wished to attend a meeting or to have the process dealt with in writing. The Claimant responded on 27 February 2019 to ask that it be dealt with in writing.

103 On 6 March 2019 Miss Cawsey wrote to the Claimant to inform him that in light of the substantial overlap between the matters raised by him by way of grievance and the disciplinary process the Respondent intended to deal with those in a single appeal process.

104 On 8 March 2019 the Claimant provided written grounds for his appeal against the grievance outcome. These were set out at great length, extending over 25 closely typed pages with 199 paragraphs.

105 Miss Cawsey carried out some investigation for the purpose of considering the Claimant's appeals. This included interviews with Mr Stemp end inquiries of other managers.

106 Miss Cawsey wrote to the Claimant on 30 April 2019 setting out her decision that his appeals should not be upheld. She too set out her reasons at great length over a total of 12 pages and concluded by informing him that her decision was final.

107 The Claimant obtained new work, earning more than with the Respondent, some 4 weeks after his dismissal took effect.

The Parties' Submissions

108 We received helpful written submissions from the Respondents and heard the Claimant's oral submissions. He declined the offer of an adjournment in order to have more time to gather his thoughts. It is neither necessary nor proportionate to set them out here.

The Law

Disability Discrimination

109 We are concerned with the provisions of the Equality Act 2010. The Claimant alleges a breach of sections 15 and 20. Those provisions, so far as relevant,are as follows

> **15 Discrimination arising from disability**
>
> (1) A person (A) discriminates against a disabled person (B) if–
>
> (a) A treats B unfavourably because of something arising in consequence of B´s disability, and
>
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
>
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.
>
> **20 Duty to make adjustments**
>
> (1) Where this Act imposes a duty to make reasonable adjustments on a person, this section, sections 21 and 22 and the applicable Schedule apply; and for those purposes, a person on whom the duty is imposed is referred to as A.
>
> (2) The duty comprises the following three requirements.
>
> (3) The first requirement is a requirement, where a provision, criterion or practice of A´s puts a disabled person at a substantial disadvantage in relation to a relevant

matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

Further Findings re Disability Discrimination

110 In order to establish liability the Claimant has to have proved, on the balance of probability, that the relevant Respondent had knowledge of the Claimant's disability.

111 We are unanimous that the Claimant has failed to establish such knowledge at any relevant time, that is, before his letter of 2 January 2019, because after that date the Respondent made every adjustment the Claimant could reasonably expect.

112 In particular, we did not accept the Claimant's evidence that his casual mention to a line manager, Mr T Thompson in about 2014, of his having Crohn's disease amounted to knowledge on the part of any of the Respondents that the Claimant was disabled within the Equality Act 2010.

113 In those circumstances we have concluded that these claims are not well founded and must be dismissed.

The Law

Unfair Dismissal

114 In this context we are principally concerned with section 98 Employment Rights Act 1996:-

> **98 General**
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
>
> (b) relates to the conduct of the employee,
>
> (c) …..
>
> (3) …..
>
> (4) Where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (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."

115 We have also had regard to the following authorities, to which we referred ourselves:-

British Home Stores Ltd v. Burchell [1978] IRLR 379

Iceland Frozen Foods v. Jones [1982] IRLR 439

Sainsbury's Supermarkets Ltd v. Hitt [2003] IRLR 23

Taylor v OCS Group Ltd. [2006] IRLR 163

Newbound v. Thames Water Utilities Ltd [2015] IRLR 734 S.98(4)(b)

Crawfod v. Suffolk Mental Health Partnership NHS Trust [2012] IRLR

116 The Respondent also referred us to passages from *Harvey* and to:-

London Ambulance Service NHS Trust v Small [2009] IRLR 563

117 We consider the guidance given by *Burchell* to be helpful, but it is not writ in stone. We have reminded ourselves, repeatedly, that we must not substitute our views for those of the First Respondent (hereafter "the Respondent"): *Iceland*. We must apply the words of the statute and consider whether the dismissal is fair or unfair in accordance with equity and the substantial merits of the case: *Newbound*.

Further Findings and Conclusions: Unfair Dismissal

118 We have taken into account all our above findings of fact in considering this issue.

Reason For Dismissal

119 We are satisfied that the Reason the Respondent didmissed the Claimant related to his conduct.

Investigation re disconnection

120 We thought Ms Maggi's initial reaction, that there should be an investigation to find out "who was at fault", as between Blackrow or internal workers, was absolutely appropriate. At that time Mr Stemp, the Claimant and Mr Fish had all been involved in correspondence on this issue, and the Claimant and Mr Fish gave clear succinct accounts of what work Westwood engineers had done.

121 We have already noted, and repeat, our concerns that Mr Nearn did not give evidence. Mr Gledhill's evidence was that he had appointed Mr Nearn to conduct "a full investigation". We regret to say we thought it far from "full".

122 We took the view, in light of the matters that were or ought to have been known to Mr Gledhill and the Respondent at that time, that any reasonable investigation should start at the point suggested by Ms Maggi: who was responsible? We took the view that a reasonable employer would have started at this point because it was so fundamental to the issue of blame.

123 Unfortunately, Mr Nearn did not provide an investigation report. He did not set out:-

- What documents he had sought, received or considered;
- How, if at all, he had resolved any conflict in the evidence he received;
- What, if any, inferences he thought it appropriate to draw from the evidence he received.

124 Instead, he simply recited the condition of the lines on their arrival at Lakeside as described to him (although no-one appears to have audited, far less recorded, precisely what that condition was) in late 2018 and concluded,

> "Although the machinery was moved and stored by a contractor, the likelihood is that the above actions would have been carried out by Engineers at the Westwood site for whom [the claimant] was responsible.

Based on that conclusion he considered it appropriate to recommend a disciplinary hearing.

125 The Respondent's submissions sought to fill the lacunae presented by the lack of any adequate investigation report or evidence from Mr Nearn, by setting out at considerable length why his conclusion was a reasonable one. We did not accept that was appropriate. We have to be satisfied that Mr Nearn carried out a reasonable investigation and reached appropriate conclusions, not whether they can be justified after the event by a legal practitioner.

126 We are particularly critical of Mr Nearn's failure to fully investigate Blackrow's involvement in this process. We do not know the full extent of what steps he took in this regard, because we have not seen all the relevant correspondence or heard evidence from him. However, we assume that he did receive full copies of the contractual documentation and had read and understood it. If he did not and had not that itself would be unreasonable.

127 Armed, as he should have been, with that information and knowledge he should have insisted on detailed responses from Blackrow concerning the documents they were contractually obliged to prepare and retain, such as catalogues, photos, disconnections sheets etc, as detailed above. The failure of Blackrow to create or provide these documents might also have led to an adverse inference concerning its involvement.

128 It is inherent in Mr Nearn's findings that the damage was done to the cables and connections before Blackrow came on site. That is also the suggestion in the one answer Blackrow provided, on 22 November 2018, when Mr Marfleet said that "a lot of the wiring had been disconnected and pulled back" without being marked or tagged (albeit without identifying what wiring). It does not appear to have occurred to Mr Nearn to question Mr Marfleet as to why, if he had known of this in mid-June 2018, he had not immediately raised the issue due to the inevitable difficulty that would arise for his business on reconnection.

129 It would be clear to any reasonable investigator that Blackrow would seek to avoid any liability for the problems that arose at Lakeside, as would Mr Bidder, but Mr Nearn does not even enquire whether Blackrow claimed payment for the seven extra days work on that site (about £7,000.00), or question, if they did not, why was that the case?

130 We took the view, as should any reasonable investigator, that these were basic, but extremely important, issues that should have been the subject of detailed investigation, consideration and careful analysis. There was no direct evidence of who had carried out these disconnections in a negligent or malicious manner. That went to the nub of the real issue, who was at fault?

131 We also thought it unfortunate no-one appear to have asked Mr Down any questions about his knowledge by anyone investigating the issue. The documents clearly indicated he had been present and to have gained contemporaneous knowledge of the state of the lines before they were moved, and whilst they were being worked on. He was also the first person to raise an issue about the apparently inappropriate manner of the disconnections with Westwood.

Investigation re equipment loss

132 The investigation report was largely based on what the Claimant had told Mr Nearn in the course of his interviews.

133 He accepted that:-

- some equipment had been stored with Fussells, initially free of charge, but had been lost when the business folded;
- he had bartered equipment in return for some offices at Fakenham being decorated free of charge:
- he had paid for the eurobins in cash to avoid VAT and been gifted the freezer.

134 It was the Claimant's case that all these transactions had been known to and approved by his former line managers, including Mr Faulkner, and known to his colleagues. In particular the equipment stored at Fussells had to be removed from the yard at Fakenham urgently as it was housing a population of rats and the plant was about to be inspected and audited by a major supermarket.

135 These matters were corroborated by the Claimant's witnesses, but they had never been asked about it before. Mr Ring was cross examined at some length on these issues, but was unmoved and gave detailed evidence quite spontaneously about the meetings that took place and who attended them. Mr Faulkner did not deny such events, but did not recall them. He did not even go so far as to suggest that he would not have approved of such matters if they had arisen.

136 We thought it remiss of Mr Nearn not to have taken any steps to ask more of those former managers and colleagues about these issues. It is surely not unknown to Mr Nearn that not all policies and procedures are adhered to by all managers.

Mr Lilley's decision

137 We accepted that at the time Mr Lilley was appointed the investigation, such as it was, had been completed and that, in accordance with the Claimant's wishes, he dealt with it in writing and on the papers.

Wiring

138 However, whilst we accept that he honestly believed the Claimant to be guilty of maliciously damaging the wiring we thought the grounds on which he based that belief to be unsustainable. In particular:-

- He assumes from short entries in a Gantt chart and a list of work completed (page131), that he attributes to Mr Stemp, but we understood to be compiled by the Claimant, that because the Westwood engineers were involved in the

"decommissioning" they were responsible for the faulty work. In our view that is a wholly unjustified finding. No-one was asked what the "decommissioning" work was. There was no evidence that it involved disconnecting cables, other than the main power cables, which work was specifically provided for in the contractual documents.

- He also relies on the email from Mr Marfleet in November 2018, which is wholly unspecific, but makes no mention in his findings or statement that he has read or considered the detailed contractual provisions for the many disconnections to be photographed, recorded and made by Blackrow. He doesn't appear to have noticed, far less question, the absence of such documentation.
- He fails to identify any part of the decommissioning work the Westwood engineers are recorded as having performed in the documents he relies on as being defective in any way.
- He relies on the refrigeration engineer's report as evidence of Westwood engineers being at fault, but that email is dated 20 June 2018, after Blackrow started on site, and impliedly blames Blackrow for the fault.
- He, like Mr Nearn, ignores the issue of additional payments that may have been made to Blackrow, wrongly suggesting that it was a fixed price contract, and suggests they had no reason to make life difficult for themselves. That begs the question whether it might simply be a question of incompetence.
- His findings based on the supposed content of the Claimant's job description do not withstand scrutiny. No such document was in the disciplinary bundle or the papers before us. There was no evidence the Claimant had been issued one.
- We thought it unreasonable for Mr Lilley to rely on his own knowledge as to the Claimant's role without giving the Claimant notice of the nature and extent of that supposed knowledge. In reality Mr Lilley was acting as a witness without disclosing his evidence.
- In finding that the Claimant had "management responsibility' for the removal of lines one and three Mr Lilley failed to have regard to Mr Bidder's lead role as the most senior manager involved in the process, the CDM regulations, which Mr Bidder first recognised as applying in May 2018, or the terms of the contract with Blackrow. This again appears to be an assumption, rather than evidence based.

Asset issues

139 We were perturbed by Mr Lilley's findings on this issue in the following respects:-

- His letter alleged that the Claimant had been explicitly instructed not to store equipment with Fussells until appropriate documentation concerning ownership was in place, and this had been evidenced by Mr T Thompson and "an ex-director". The only evidence on this issue from Mr Thompson we have seen is an email dated 6 February 2019 from him to Ms Judge which simply said the issue was discussed and it was decided "not to proceed". That email does not appear to have been disclosed to the Claimant, in any event. We have not seen any

information provided by an ex-director on this issue, as far as we are aware, and that also does not seem to have been provided to the Claimant.

- He alleged that "the Claimant intended to take company property that did not belong to him" and carried out an unauthorised cash deal for the Respondent which was not acceptable. In our view this demonstrates a complete misunderstanding of the facts. There was no evidence that the Respondent owned the freezer or eurobins, or that the Claimant had paid cash for or on behalf of the Respondent. The Claimant had provided evidence from Mr Flynn of his ownership on the basis of a "cash deal". Mr Lilley may have been entitled to reject that evidence, but it did not amount to evidence that the items were owned by the Respondent, or that the Claimant had done the deal for or on behalf of the Respondent.

Appeal

140 Miss Cawsey's evidence was to the effect that the central point she discerned in considering this appeal was that the Claimant had been responsible for and overseen the process of removing the equipment from Westwood. That was the principal reason she dismissed the appeal, she thought the asset disposal issue to be less clear.

141 We found her reasoning on the issue of the cable disconnection to be just as deficient as that of Mr Lilley, she fell into many of the same traps:-

- There was no clear evidence that the Claimant was the Project Manager or similar, the CDM evidence was to the contrary: Blackrow were.
- She assumed that the faults lay with the disconnection from the mains supply, but that was not the evidence.
- She assumed that the contractors had "no motive", when only incompetence was sufficient, and appears to have wrongly assumed that this was a fixed price contract.
- She does not appear to have read or fully understood the detailed terms of the contract and the CDM issues.

142 In evidence before us she also accepted that had Blackrow taken photos and completed disconnection sheets that might have completely changed the picture.

Conclusion – Unfair Dismissal

143 We are unanimous in finding that the many defects that we have set out above have lead us to conclude that this was an unfair dismissal.

144 The evidence that was gathered was quite insufficient to establish who was responsible for the defective work, that the Claimant was personally at fault or that he had acted inappropriately in respect of any assets. The assumptions and/or misunderstandings made thereafter by Mr Lilley and Miss Cawsey only exacerbated the original failings by Mr Nearn.

145 In light of all our findings this dismissal was not simply procedurally unfair, and *Polkey* has no application.

146 We take a similar view on the issue of contribution. We did not accept that the Claimant had acted in such a way as to contribute to the decisions made.

Conclusion – Wrongful Dismissal

147 The onus lay with the Respondent to establish that the Claimant was in fact guilty of conduct repudiatory of the contract of employment that entitled them to summarily dismiss him.

148 We refer to all our above findings: they have failed to discharge that burden. The evidence was simply inadequate to make any findings to support the Respondent's case on this issue, principally because its investigation was wholly inadequate.

Conclusion – Holiday Pay and Unauthorised Deductions

149 The onus was on the Claimant to establish on the balance of probabilities that he had not been piad holiday he had accrued and/or that unauthorised deductions had been made from his pay.

150 He failed to adduce any evidence to either effect. These claims must be dismissed.

Conclusion – Redundancy Payment

151 The Claimant was not dismissed for redundancy and has not entitlement to such a payment.

Remedy

152 In light of the Claimant's mitigation of his loss we make the following awards for unfair dismissal:-

- A basic award based on 4 years' service over the age of 41 of 6 weeks pay, subject to the statutory cap of £525.00, in the sum of £3,150.00
- A compensatory award for loss of statutory rights in the sum of £300.00

153 Damages for breach of contract based on net earnings of £3,434 pcm for a period of 12 weeks in the sum of £9,509.54.

12.01.2021

Employment Judge Kurrein

Sent to the parties and

entered in the Register on : :

25.01.2021 J Moossavi

……..

For the Tribunal