EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110061/2019 (V)

Held remotely on 27, 28 & 29 July 2020

Employment Judge S MacLean

Mr JR MacQuarrie	**Claimant** **Represented by:** **Mr C Reid -** **Lay Representative**
Oakminster Healthcare Limited	**Respondent** **Represented by:** **Mr R White -** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Employment Tribunal is that the application is dismissed.

REASONS

Background

1. In the claim form the claimant complains that the respondent unfairly dismissed him and failed to pay notice and holiday pay. The claimant seeks compensation.

2. In the response form the respondent admitted that the claimant was dismissed for a potentially fair reason: his conduct. The respondent denies that the claimant was unfairly dismissed as the respondent held a genuine belief that the misconduct had occurred; and had a genuine belief, having carried out a full and fair investigation, that the claimant was guilty of the misconduct. The respondent says that the decision was reasonable and within the band of reasonable responses.

3. Lissa Ameur, Chief Operating Officer; and Iain Ballantyne, former Operations Manager gave evidence for the respondent. The claimant gave evidence on

his own account. They provided witness statements which were treated as their evidence in chief. They were cross-examined and re-examined in the usual way.

4. The parties provided a joint set of documents and a joint statement of agreed facts.

5. The representatives made oral submissions and helpfully provided a written copy which has been summarised below.

Relevant Law

6. Section 98 of the Employment Rights Act 1996 (ERA) set outs how a tribunal should approach the question of whether a dismissal is fair. Section 98(1) and (2) provides that the employer must show the reason for the dismissal and it is one of the potentially fair reasons. If the employer is successful, the Tribunal must then determine whether the dismissal was fair or unfair under sections 98(3A) and (4).

7. The Tribunal was referred to *British Home Stores Limited v Burchell [1978] IRLR 379* where it was established that a dismissal on the grounds of conduct will be fair in the following circumstances: (i) at the time of dismissal, the employer believed the employee to be guilty of misconduct; (ii) at the time of dismissal, the employer had reasonable grounds for believing that the employee was guilty of that misconduct; and (iii) at the time that the employer formed that belief on those grounds, it had carried out as much investigation as was reasonable in the circumstances.

8. The Tribunal was also referred to:

Shrestha v Genesis Housing Association Ltd [2015] EWCA Civ 94 where the Court of Appeal said that what is important is the reasonableness of the investigation as a whole.

Uddin v Camden and Islington NHS Trust (UKEAT/0151/18)

Iceland Frozen Foods Limited v Jones [1982] IRLR 439); Foley v Post Office; Midland Bank plc v Madden [2000] IRLR 82 Sainsbury's Supermarkets Limited v Hitt [2003] IRLR 23). The Tribunal has to consider by the objective standards of the hypothetical reasonable employer, whether in dismissing the employee "the employer has acted within a 'band or range of reasonable responses' to the particular misconduct found of the particular employee". The Tribunal must not "substitute its view" for that of the employer. The band of reasonable responses test applies both to the decision to dismiss and to the investigation which led to that decision.]

Graham v Secretary of State for Work and Pensions [2012] IRLR 402 and Tayey v Bathgate Healthcare Ltd [2013] EWCA Civ 29 in reference to considering the actions of an employer in failing to suspend an employee during the disciplinary process.

Portsmouth Hospitals NHS Trust v Corbin UKEAT/0163/16/LA in relation to the requirement to apply relevant weight to mitigating circumstances.

Adama v Partnerships in Care Ltd UKEAT 0047/14/1206, requires a tribunal to make a determination as to reasonableness.

Newbound v Thames Water Utilities Ltd [2015] EWCA CIV 677, a Court of Appeal judgement, indicates that in assessing the reasonableness of a dismissal, a tribunal is not conducting a "tick box" exercise and that the band of reasonable responses is not infinitely wide

Strouthos v London Underground Ltd [2004] IRLR 636: there will be conduct so serious that, however long an employee has served, dismissal is an appropriate response. However, considering whether, upon a certain course of conduct, dismissal is an appropriate response, is a matter of judgment and length of service is a factor which can properly be taken into account.

The Issues

9. The issues to be determined by the Tribunal are:

   a. What was the reason for the claimant's dismissal?

b. Did the respondent have a genuine belief in the misconduct?

c. Did the respondent have reasonable grounds for the belief in the alleged misconduct?

d. At the time the respondent formed that belief had the respondent carried out as much investigation into the matter as was reasonable in the circumstances.

e. Was dismissal a fair sanction applying the "band of reasonable responses" test?

f. What, if any, remedy would be awarded to the claimant.

Findings in Fact

10. The Tribunal makes the following findings in fact.

11. The respondent is a limited company operating five care homes around Glasgow. Its head office is at Kinning Park, Glasgow where Lissa Ameur, Director and Chief Operating Officer is based. Each care home has a home manager. The respondent employs around 300 staff.

12. The respondent employed the claimant from 4 June 2000 as Assistant Chef. On 3 August 2001 the respondent issued the claimant with a Statement of Terms and Conditions of Employment which he signed. A further Statement of Terms and Conditions of Employment was issued and signed by the claimant on 7 February 2003.

13. The respondent has a staff handbook which forms part of the claimant's contract of employment. It provides that employment may be terminated summarily at any time for gross misconduct. The list of examples is not exhaustive but includes deliberate damage to company property. The respondent also has a disciplinary policy which lists deliberate damage to company property as an example of gross misconduct.

14. The disciplinary policy states that the purpose of the investigation stage is to establish a fair and balance view of the facts relating to any disciplinary

allegations against the employee before deciding whether to proceed with a disciplinary hearing. There is no right to be accompanied at the investigative meeting. An employee may be suspended.

15. If an employee is to attend a disciplinary hearing, they are to be informed in writing of the allegations; the basis of those allegations; and the likely range of consequences if the respondent decides that the allegations are true. The employee will be provided with a summary of the relevant information gathered during the investigation; relevant documents and witness statements. The disciplinary hearing will take place as soon as practicable and the employee will be given a reasonable amount of time – usually two to seven days to prepare. The employee has the right to be accompanied at the disciplinary hearing.

16. There is a right of appeal to a senior manager or director. The employee has the right to be accompanied at the appeal hearing.

17. Around 2018 Ms Ameur considered that the home managers were spending too much time dealing with disciplinary matters. Ms Ameur decided that investigations would be conducted in-house and if an employee was to attend a disciplinary hearing, she would conduct it.

18. If there is any significant damage to property in a care home the matter is reported to head office where John Simpson, Estates and Facilities Manager is based. Mr Simpson also looks after fire risk assessments in the care homes. The respondent also has policies on fire safety and health and safety at work.

19. The claimant was based at Florence House where Sarah MacAskill is Home Manager. The claimant reported to Martin Kelly, Head Chef. David McGrath undertakes maintenance work at Florence House where Elizabeth Stenton, Carer and Kamal, Kitchen Assistant also work.

20. For approximately eight months renovation work was undertaken on the ground floor of Florence House which included lifting the floor. It was completed in November 2018. During the renovations, kitchen staff continued to wheel food trolleys over the uneven floor to access the lift.

21. As part of the renovation works fire doors were replaced with penny farthing doors. Both doors may be unlocked to allow large items to pass through.

22. On 10 April 2019. the claimant was undertaking his routine duties. Around 2pm the claimant collected trolleys from the second floor. The food trolley was still plugged in and turned up to the highest temperature which was above that set by Mr Kelly. This happened from time to time to speed up service as it allowed the container lids to be removed without the food going cold. The claimant unplugged the food trolley. As it was hot, the claimant used the trolley handle to push it rather than positioning his hands at the side of the trolley as he usually did. The claimant pushed the food trolley into the lift. He then retrieved the dishes trolley. Once on the ground floor the claimant opened the security door using is fob. He left the dishes trolley by the security door and pushed the food trolley towards the kitchen. Both doors of the first fire door were open and the claimant passed through. The small door of the second fire door was closed. The claimant lined up the food trolley at the gap of the opened large door and pushed the food trolley by the handle hitting the fire door damaging it and the locking mechanism.

23. Mr Kelly, Ms Stenton and Ms Macaskill had been standing outside the dining room on the ground floor. They heard but did not see the incident.

24. After returning to the kitchen with both trolleys the claimant looked for Mr McGrath. When Mr McGrath was located the claimant reported the damage to him.

25. Mr McGrath told Mr Kelly and Ms Macaskill that the claimant had hit the fire door when taking the food trolley to the kitchen. Ms Macaskill and Ms Stenton looked at the damaged fire door. Ms Macaskill took photographs of the damaged fire door which could not be secured.

26. Around 4.30pm the claimant spoke to Ms Macaskill about the incident.

27. Mr Kelly, Ms Stenton and Ms Macaskill prepared and signed statements which along with photographs were sent to Mr Simpson.

28. In relation to the claimant reporting the incident to her, Ms Macaskill's statement recorded:

"About 16:30 hours Jim came to speak to me about the door and stated when he went through with the trolley the door bounced back, hitting off the trolley and the locking mechanism fell to the floor. He stated he was having trouble with one of the trolleys as he normally pushes the two together. He took one to the kitchen and came back for the other. He stated that he probably did push it a little harder than normal.

Jim was laughing when telling me about it and stated that he would need to be more careful."

29. Mr Simpson considered that the damage to the fire door compromised its fire integrity and it had to be repaired or replaced immediately. He reported this to Ms Ameur who asked him to investigate the matter.

30. Mr Simpson had an investigatory meeting with the clamant on 16 April 2019. Julie Coulter, Personal Assistant took notes. Mr Simpson explained that he was investigating the incident where the fire door was badly damaged by the trolley. The claimant explained that the food trolley was "roasting hot and it veered to the left and hit the door". The claimant realised the problem with the door and went to the kitchen to get Mr McGrath to come and look at the damage. Mr Simpson asked if the claimant had reported that the trolley was veering to the side. The claimant said that he had reported it to Mr Kelly who also had problems. The claimant was asked if he wrote issues in the maintenance book. The claimant said that he only ever reported issues to Mr Kelly. The claimant had not thought about unsnibbing the small door to make the space wider. He understood that the small door had to remain closed. The claimant said that the kitchen staff line up the trolley and go through the large door. Following the investigatory meeting the claimant signed the notes as being true and accurate.

31. Mr Simpson met with Mr Kelly on 17 April 2019 to clarify issues that had been raised by the claimant. A note was taken which they both signed. Mr Kelly confirmed that the claimant had said something about the trolley wheels. Mr

Kelly said that he asked Mr McGrath to look at them. Mr McGrath had oiled the castors. When asked if Mr Kelly had any issues with the manoeuvring the trolley through the fire doors he replied, “no”.

32. Mr Simpson prepared the investigation report in which he concluded that there was a case to answer and the matter should be referred to the disciplinary process. The investigation report included the witness statements; interview notes and photographs of the damaged fire door and locking mechanism.

33. The investigation report was passed to Ms Ameur. She suspected that the claimant had deliberately caused the damage to the fire door and the claimant should be invited to a disciplinary hearing to discuss the allegation.

34. Ms Ameur sent a letter dated 29 April 2019 (the 29 April Letter) by post to the claimant at his home address inviting him to a disciplinary hearing at Florence House on 2 May 2019 at 2pm. The purpose of the disciplinary hearing was to discuss damaging a corridor fire door with a food trolley thus compromising the fire strategy of the building and making fire compartmentation inadequate in the event of fire. Enclosed with the 29 April Letter were the witness statements; interview notes; photographs of the damaged fire door; and the respondent’s policies for health and safety at work; fire safety; and discipline. The claimant was advised of his right to be accompanied. If the chosen companion was unavailable the claimant could specify another date up to five working days later. If the claimant was unable to attend, he was to inform Ms Ameur as soon as possible. The 29 April letter also stated:

“Please be aware that your dismissal from the company is a possibility. As the above allegations are potentially classed as Gross Misconduct, your dismissal without notice is a possibility.”

35. The claimant received the 29 April Letter on 2 May 2019 at 11.39am. He telephoned head office explaining that he was on annual leave. The claimant was told that the disciplinary hearing would be rearranged.

36. Ms Ameur received a message that the claimant was on annual leave. Head office was unaware of that so Ms Ameur said that the disciplinary hearing

should be rescheduled to 6 May 2019 at 9.30am. A letter dated 2 May 2019 (the 2 May Letter) was sent to the claimant. It was in identical terms with the same enclosures as the 29 April Letter other the first paragraph which stated:

"As discussed today your disciplinary hearing has been rescheduled to 6 May 2019. This letter formally requests that you attend a disciplinary hearing at 9.30am on 6 May at Florence House. This hearing will be chaired by Mrs Lissa Ameur. A note taker may be in attendance."

37. The claimant did not receive the 2 May Letter by 6 May 2019. He returned to work on 6 May 2019. Ms Ameur was running late. She contacted Florence House to advise that she would be unable to attend the disciplinary hearing until 11am. Ms Macaskill spoke to the claimant around 9.30am to say that the meeting had been pushed back. Although he had not received the 2 May Letter the claimant did not ask Ms Macaskill for clarification about the nature or purpose of the meeting.

38. The disciplinary hearing started at 11.15am. Bency Sam took notes. The claimant was unaccompanied. In Ms Ameur's experience it was not unusual for employees to attend unaccompanied. Ms Ameur knew that the claimant had received the 29 April Letter. She assumed that he had time to prepare and had received the 2 May Letter. Ms Ameur asked if the claimant knew why he was there and if he received the letter and documents. The claimant said that to be honest he did know; he had explained everything to Mr Simpson and there was no change in the claimant's story. Ms Ameur said that it was the disciplinary hearing. She explained that Mr Simpson had been investigating the incident and she was conducting the disciplinary hearing. Ms Ameur assumed that the claimant had chosen to be unaccompanied and had read the documents that he received on 2 May 2019. The claimant did not say that he was unaware of the date of the rescheduled disciplinary hearing; that had not had an opportunity to ask someone to accompany him; and he had not read the documents that he received on 2 May 2019. Had Ms Ameur been aware of this she would have offered to adjourn the disciplinary hearing. The claimant did not ask for an adjournment.

39. At the disciplinary hearing the claimant said that he could not push the food trolley from the sides which was what he normally did as it was roasting hot. He said that the staff never switch the food trolley off. The kitchen staff do not open the small fire door; they guide the trolley through the gap of the opened large fire door. Ms Ameur asked if the claimant slowed down to glide the trolley carefully through the gap as the damage to the fire door suggested that it was hit with force. The claimant referred to his explanation to Mr Simpson and said that Mr Kelly had the same problem. Ms Ameur pointed out that Mr Kelly said that he did not have a problem with the trolley. The claimant said that most of the time they do not have a problem. This time the trolley was hot, and the wheels were damaged. The claimant accepted that this was not documented in the maintenance book. The claimant said that he reported the incident to Mr McGrath. He could not recall the time that he reported the incident to Ms Macaskill. He denied laughing when doing so. The claimant did not accept that he was moving too fast. He maintained that if the food trolley had not been hot, it would have been easier to push it from the sides. The claimant said that it was a genuine accident and Ms Ameur should ask why the trolley was not unplugged. The disciplinary hearing concluded.

40. Ms Ameur believed that given the extent of the damage to the fire door and its locking mechanism the fire door was hit with great force; the claimant did not slow down and proceed with caution when pushing the food trolley through the narrow doorway. The damage could have been avoided if the claimant had slowed down before going through the fire doorway or had opened the small door. She believed that the claimant did not exercise care and attention; and he had a total disregard for company property. Ms Ameur knew that the claimant had a clear disciplinary history and had worked for the respondent for over 18 years. She therefore considered that he should have known better. He showed no remorse at the disciplinary hearing. The fire doors had been installed since November 2018 without any incident. The claimant denied that he was at fault; it was an accident because he said that the trolley wheels were damaged and as the trolley was too hot, he had to push the trolley using the handle rather than the sides. There were no incidents of problems with the trolley wheels recorded in the maintenance book. The trolley wheels had

been oiled by Mr McGrath after the claimant had spoken to Mr Kelly. Mr Kelly said that he had no issues manoeuvring the trolley through the fire doors. Even if this was an issue Ms Ameur believed that it would not cause the trolley to hit the door with such force to cause the damage that it did. Ms Ameur decided that in the circumstances the claimant should be dismissed without notice.

41. Ms Ameur set out her decision and reasoning in a letter to the claimant dated 6 May 2019 (6 May Letter). The 6 May Letter stated that the claimant had a right to appeal the decision in writing to Iain Ballantyne within seven working days of the date of the letter stating clearly the grounds of appeal.

42. The claimant continued working until 8 May 2019. On 8 May 2019 he received a card from the post office saying that that he had undelivered mail to collect. The claimant was off duty on 9 and 10 May 2019. As the claimant had a hospital appointment on 9 May 2019, he attended the post office on 10 May 2019 when he collected the 2 May Letter (rescheduling the disciplinary hearing) and the 6 May Letter (terminating his employment).

43. The claimant sent a written appeal to Mr Ballantyne on the following grounds:

    (i) The claimant was led to believe that he was going to a meeting about what had happened to the fire door.

    (ii) The claimant did not receive the 2 May Letter informing him that it was a disciplinary hearing.

    (iii) The claimant did not receive the 2 May Letter until 10 May 2019 as it was sent recorded delivery and the claimant had to attend the main post office to collect it and (i) the trolley was hot; (ii) he had not been given time to read the statements; and (iii) he was not asked if wanted a witness.

44. Mr Ballantyne sent a letter to the claimant dated 17 May 2019 inviting him to an appeal hearing on 24 May 2019. Mr Ballantyne confirmed that he would be conducting the appeal hearing and a note taker would be present. The claimant was advised of his right to be accompanied by a work colleague or

trade union representative. The letter stated that the decision at the appeal hearing would be final and there would be no further right of appeal.

45. Mr Ballantyne considered the investigation report, witness statements, interview notes, photographs, the paperwork associated with disciplinary hearing including the notes of the disciplinary hearing and the 6 May Letter.

46. The appeal hearing took place on 24 May 2019. Mr McGrath accompanied the claimant. Karima Ameur took notes. Mr Ballantyne said that he was not redoing the investigation or disciplinary hearing only evaluating the appeal and considering any new evidence. He confirmed that the outcome of the appeal would be final.

47. Mr Ballantyne went over each ground of appeal. The claimant's position was that he was on leave from 27 April 2019 and received the 29 April Letter on 2 May 2019. He contacted head office to reschedule the disciplinary hearing. Mr Ballantyne suggested that the wording of the 2 May Letter inferred that the rescheduled date of 6 May 2019 was discussed. The claimant said that when he attended Florence House for duty on 6 May 2019 Ms Macaskill told him that the meeting had been pushed back until 11am. He thought the meeting was about the fire door. The claimant accepted that he had received the 29 April Letter but said that he was not aware of the statements or his right to have a witness. The claimant had spoken to Mr Kelly who "pulls the trolleys the same way". The notes of the appeal hearing were signed by the claimant and Mr Ballantyne.

48. After the appeal hearing Mr Ballantyne spoke to Ms Ameur about the letters and the claimant being on annual leave. Mr Ballantyne obtained a postal receipt from Ms Coulter showing that a letter had been posted. He also obtained the post office delivery details from which Mr Ballantyne was satisfied that the claimant had received the 29 April Letter on 2 May 2019. It contained the witness statements; interview notes and policies. It also advised the claimant that a disciplinary hearing was to be conducted by Ms Ameur. Mr Ballantyne accepted that the claimant had not received the 2 May Letter by 6 May 2019.

49. Mr Ballantyne considered whether the claimant had received sufficient notice of the disciplinary hearing which took place on 6 May 2019. He concluded that while it was unfortunate that the claimant had not received the 2 May Letter before the disciplinary hearing, from the 29 April Letter the claimant knew on 2 May 2019: the outcome of the investigation; the allegation of misconduct; he had received the documentation that was to be considered; and he knew that a disciplinary hearing was to be conducted by Ms Ameur. The claimant raised no objection with Ms Ameur to the disciplinary hearing proceeding even when he became aware that it was a disciplinary hearing that was taking place. Mr Ballantyne considered that it was reasonable for Ms Ameur to have proceeded with the disciplinary hearing in these circumstances. While the grounds of appeal were based on process, Mr Ballantyne considered that there was a reasonable investigation and that Ms Ameur had genuine grounds for believing that the claimant was guilty of the alleged misconduct.

50. Mr Ballantyne wrote to the claimant advising him of his decision by letter dated 28 May 2019.

51. The effective date of termination of the claimant's employment was 10 May 2019. At the time of dismissal, the claimant was 63 years of age and had been continuously employed for 18 years. The claimant worked 40 hours per week at £8.21 an hour, earning £1,423.07 per month, or £17,076.84 per annum, before tax. The claimant has received Universal Credit. He has mitigated is loss of earning by seeking new employment. He found temporary employment on 9 September 2019 and has received wages of £8,282.17.

Observations on Witnesses and Conflict of Evidence

52. Ms Ameur gave her evidence in clear and candid manner. She readily conceded that she made assumptions about the claimant having received the 2 May Letter; and that he did not want to be accompanied at the disciplinary hearing. She stated that with the benefit of hindsight she would have clarified at the start of the disciplinary hearing that the claimant had received the 2 May Letter; if he wished to be accompanied; and if he needed more time to read the paperwork before it was discussed. The Tribunal was convinced that had

the claimant told Ms Ameur on 6 May 2019 that he was not prepared for the disciplinary hearing she would have adjourned it. The Tribunal's impression was that Ms Ameur was not in a rush to deal with the matter and the 2 May Letter envisaged a postponement if the claimant or his chosen companion was not available.

53. Mr Ballantyne's witness statement and oral evidence was vague. While he is no longer employed by the respondent and the appeal hearing was over a year ago the Tribunal considered that it was surprising that he did not have a better recollection given the claimant was a long serving employee who was dismissed summarily. The Tribunal was satisfied from his evidence that Mr Ballantyne approached the appeal hearing with an open mind and would have overturned the dismissal if he had considered it appropriate to have done so.

54. The claimant gave his evidence honestly and to the best of his recollection. The Tribunal had no doubt that he was a conscientious employee who enjoyed his job and was very caring towards the care home residents. The claimant was very straight forward in accepting that there was no reason for Mr Kelly or Ms Macaskill to "make up" what they wrote in their statements. The Tribunal considered that the claimant's position about the basis of his appeal was unconvincing and contrived. The claimant in the Tribunal's view lacked insight that he had any responsibility for the incident or for his part in the disciplinary process.

55. The Tribunal considered that there was little dispute on the material facts between the evidence of the respondent's witnesses and the claimant. However, the Tribunal felt it was appropriate to make the following observations on the evidence.

56. The claimant said that Mr Simpson told him on two occasions that he had nothing to worry about. The claimant also denied saying to Ms Macaskill that he probably did push the trolley a little harder than normal. The Tribunal considered while Mr Simpson may have initially told the claimant not to worry it was very unlikely that during an investigation Mr Simpson would have given any assurance about disciplinary action. The Tribunal also considered that Ms

Macaskill's statement was prepared on the day of the incident when her recollection would be clear and there was no reason for her attribute comments to the claimant if he had not made them at the time.

57. The claimant's evidence was that he was told by Mr Simpson when the fire doors were installed that the small door should not be opened. When Mr Simpson asked about the small door during the investigation the claimant reminded him of this. Ms Ameur said that opening the small door was an option that could have avoided the damage. The Tribunal considered that it was highly likely that the small door was to remain in the closed position. However, it is designed specifically to be opened to create a wider space for items to pass through and for it then to be closed. The Tribunal noted that in the claimant's witness statement at paragraph 43 he stated, "Whilst passing through the first fire door, the smaller door was open meaning both parts of the fire door were open and gave me more room from manoeuvre." The Tribunal thought that the claimant was well aware that this was an option. However, little turned on this point as it was accepted that the kitchen staff generally did not open the small door because the space was wide enough to allow the food trolley to pass through.

58. There was no dispute that from time to time the food trolley was not unplugged during food service. The trolleys had a handle which was used for pushing and pulling. The claimant preferred to push the food trolley from the sides. There was some evidence about whether this was appropriate. The Tribunal did not consider that much turned on this evidence as it was undisputed that when the incident occurred the claimant was using the handle to push the trolley.

59. While Ms Ameur was unaware at the time it was agreed that the claimant received the 6 May Letter on 10 May 2019. The claimant's evidence was that he did not know before the meeting on 6 May 2019 that it was a disciplinary hearing although he accepted that Ms Ameur told him so during it.

60. It was agreed that the "meeting" was pushed back until 11am. On being informed of this the claimant did not ask Ms Macaskill to clarify the purpose

of the meeting. The Tribunal considered that this was surprising especially as on his own evidence the claimant knew that it would be about the damage to the fire door. Had he done so it would have given the claimant an opportunity to tell Ms Macaskill that he did not know about the meeting; that he had not read the documentation and had made no arrangements to be accompanied.

61. There was a dispute about whether the claimant attended the disciplinary hearing with an envelope. There was no reference in the grounds of resistance to the claimant having attended the disciplinary hearing with any paperwork. While Ms Ameur accepted that the claimant did not look at any documents during the disciplinary hearing her witness statement states that *"he walked in with an envelope containing all the paperwork in hand that had been sent with the letter inviting him to the first disciplinary hearing"*. Later in the witness statement Ms Ameur says that she mentioned this to Mr Ballantyne to explain why she had no reason to doubt that the claimant had received both letters and had time to consider the paperwork. It was not put to her in cross examination that the claimant did not bring an envelope into the disciplinary hearing although that was the claimant's position in cross-examination. Mr Ballantyne's witness statement makes no reference to the discussion with Ms Ameur about the claimant bringing an envelope to the disciplinary hearing.

62. When deliberating the Tribunal did not consider that it was necessary to make a finding on this point. Even if the claimant brought an envelope to the disciplinary hearing Ms Ameur made an assumption about what it contained. She also assumed that the claimant had received the 2 May Letter and was aware of the rescheduled hearing. She considered that the claimant had had a reasonable time to read the witness statements and interview notes which he received on 2 May 2019. The claimant did not dispute that he had received the 29 April Letter on 2 May 2019. His position was that he had not read the witness statements because he was on holiday and did not know when the rescheduled disciplinary hearing was taking place. There was no evidence to suggest that having an envelope at the disciplinary hearing was a factor considered by Mr Ballantyne. His concern at the appeal hearing was whether

having received the paperwork on 2 May 2019 the claimant had a reasonable time to prepare for a disciplinary hearing on 6 May 2019.

63. In relation to the appeal the claimant accepted that his grounds of appeal related to the process. However, in cross examination he said that he thought if Mr Ballantyne decided that the procedure was unfair the claimant would have an opportunity to have a hearing where all the facts would be examined. The Tribunal was unconvinced about this evidence. The disciplinary procedure and the letter inviting the claimant to the appeal hearing state that the decision at the appeal stage is final. The disciplinary procedure also explains what might happen at an appeal hearing and the options available at appeal in relation to the decision made at a disciplinary hearing.

Submissions for the Respondent

64. The respondent denies that the claimant was unfairly dismissed. The respondent, through a fair disciplinary procedure, concluded that the claimant was guilty of an act which amounted to gross misconduct and that the respondent was entitled to dismiss the claimant for those acts.

65. The Tribunal was referred to the two-stage test to decide whether the claimant's dismissal was fair or unfair: (1) it is for the employer to show what the reason for dismissal was and that this was one of five potentially fair reasons; and (2) the Tribunal must then decide whether in all the circumstances the employer acted reasonably in treating the given reason as sufficient to justify the dismissal. In doing so, the Tribunal has to apply the statutory test of fairness as set out in section 98(4) of the ERA.

66. The respondent's evidence was that the claimant's dismissal was for gross misconduct following an investigation into the incident on 10 April 2019. This falls under section 98(2)(b) of the ERA in that the dismissal relates to the conduct of the employee.

67. The respondent's position is that before dismissing the claimant, a full and fair investigation into the allegations was carried out, followed by a full and fair disciplinary process. There was a genuine belief that the claimant was guilty

of the allegations, and that the respondent imposed a sanction which was reasonable and within the range of reasonable responses open to it in the circumstances. The respondent also complied with the ACAS Code of Practice.

68. In relation to stage one of the Burchell test, the respondent says that it had reasonable grounds to suspect that the claimant was guilty of misconduct. The evidence was that on 10 April 2019, when moving a food trolley along a corridor within Florence House, damage was caused to a fire door by the food trolley being moved by the claimant. This was admitted by the claimant to Ms Macaskill on 10 April 2019 and she noted in a statement that the claimant indicated that he probably did push the trolley a bit harder than normal. The claimant also admitted this in the investigatory meeting with Mr Simpson on 16 April 2019. The staff handbook and disciplinary policy both cite "Deliberate damage to company property or that of an employee, resident or third party" as examples of gross misconduct. The fact that damage had been caused and that the claimant had admitted to causing this damage, allegedly whilst pushing the trolley a bit harder than normal, in the respondent's opinion, gave them genuine grounds to suspect that the claimant was guilty of misconduct.

69. In relation to stage two of the Burchell test, did the respondent believe the claimant was guilty of the alleged misconduct? The evidence of Ms Ameur was that after considering all of the evidence from the investigatory meeting and the disciplinary hearing, that there was no doubt in her mind that the claimant had deliberately rammed the fire door with the hot trolley, in order to have caused the extensive damage that it did, and that his actions in not slowing the trolley down before it struck the door were in total disregard from company property. It is understood that the claimant denies this was a deliberate action, or one of recklessness. However, he has been unable either in the disciplinary process or within his evidence to provide a suitably alternative explanation as to how the extensive damage was caused. It is therefore the respondent's position that it did believe the claimant was guilty of the alleged misconduct.

70. Turning to the issue of whether at the point at which the respondent formed the belief that the claimant was guilty of the misconduct, had it carried out as much investigation into the matter as was reasonable in all the circumstances of the case. The respondent said it did and referred to the investigation by Mr Simpson. The Tribunal was reminded that when the claimant appealed the decision, he did not raise any issue about the investigation being unfair.

71. In answer to whether the claimant's dismissal can be considered a reasonable response to the misconduct, the Tribunal was referred to the staff handbook and disciplinary procedure. The respondent's position that in finding the claimant guilty of an act of gross misconduct, summary dismissal is well within the band of reasonable responses for this sort of misconduct. The Tribunal was reminded that in considering the reasonableness of the response by the respondent, it is not the Tribunal's role to substitute its own view as to the seriousness of the matter which the respondent's considered to justify the dismissal.

72. In terms of the steps the respondent took to satisfy the ACAS Code of Conduct through the disciplinary process, the respondent carried out an investigation; it notified the claimant in writing, of the allegation; a disciplinary hearing was held on 6 May 2019 to discuss the allegation at which it was confirmed to the claimant that it was a disciplinary hearing. The claimant was advised of his opportunity to be accompanied to his hearing. He did not raise any issue about being accompanied during the disciplinary hearing and Ms Ameur assumed that he did not want to be accompanied; the respondent decided on appropriate action, informed the claimant in writing of the action and provided the claimant with the opportunity to appeal the decision, which he did.

73. The appeal and the claim form mainly focus on the issue that the claimant was not aware that the meeting he attended with Ms Ameur on 6 May 2019 was a disciplinary hearing. The claimant accepted that he received the 29 April Letter on 2 May 2019 notifying him of a disciplinary hearing and contained the relevant paperwork for such a hearing. The clamant contacted the respondent on 2 May 2019 and was told this was to be rearranged because he was on annual leave. On returning to work on 6 May 2019, Ms

Macaskill told the claimant that his meeting was being pushed back to 11am on that morning. There was no indication from the claimant during the meeting on 6 May 2019 that he wished for the hearing to be adjourned, or that he wished further time to prepare, or that he did not have the paperwork, even after by his own admission, being told by Ms Ameur that it was a disciplinary hearing. He made no objection to the hearing continuing. Although the respondent accepts that the claimant did not receive the 2 May Letter until 10 May 2019, the respondent's position is that this did not affect the fairness of the disciplinary procedure. This was also the position of Mr Ballantyne at the appeal.

74. The Tribunal was invited to prefer the respondent's evidence where it conflicted with that of the claimant both in relation to the reason for the dismissal and the procedure.

75. The claim that the claimant was unfairly dismissed is denied by the respondent, a full and fair investigation was carried out, a full and fair disciplinary process was carried out, the claimant was afforded his full rights of appeal, the outcome of the disciplinary hearing was within the range of reasonable responses, and the respondent have complied with the ACAS code of conduct throughout. The claimant's claim of unfair dismissal should be dismissed by the Tribunal.

76. If the Tribunal finds that there was anything less than a fair procedure followed by the respondent given the amount of evidence against the claimant being guilty of the acts of misconduct, and the seriousness of those allegations, the claimant would have still been dismissed from his position, as Mr Ballantyne has confirmed in his evidence, and accordingly a 100% reduction should be applied to any potential award.

77. As regards the claims for notice pay and holiday pay, the claimant was summarily dismissed for gross misconduct, he was not entitled to notice pay or pay in lieu. No specification has been forthcoming for these heads of claim, and no evidence was led by the claimant whether in statement, cross or re-

examination. The respondent therefore calls upon the Tribunal to dismiss these heads of claim.

Submissions for the Claimant

78. The claimant claims that he was unfairly dismissed without notice. Gross misconduct cannot be justified. He seeks compensation. He also says that he was wrongfully dismissed.

79. The guidance set out by the respondent in relation to the Burchill test was agreed as the appropriate approach for the Tribunal to follow before establishing if the decision falls within the bands of reasonable responses.

80. Dealing with the belief of the misconduct it is difficult to establish what the claimant is accused of. The Tribunal should decide if the reason stated by the respondent is the real reason for the dismissal, and therefore whether it thinks the employer did believe the claimant guilty of this misconduct. What is in the mind of the dismissing officer is an important consideration for judging the reasonableness or otherwise of the decision to dismiss. As the appeal hearing has not attempted to review the dismissal as a whole, there is added importance on the investigation and initial decision to dismiss. The reasonableness test must also be applied to the investigation (see *Sainsbury's Supermarkets Ltd v Hitt [2003] ICR 111)*.

81. The claimant's case does not attempt to rely on the process being technically procedurally unfair. While there are a number of odd aspects (in regards to notification of hearing, the failure to ask the claimant if he wished a witness to attend, or had had an opportunity to read the paperwork he was sent) which undoubtedly put the claimant at a disadvantage, his case is more straightforwardly that the grounds for dismissal are illusory, and the investigation and decision contrived to dismiss him.

82. The claimant has been subject to summary dismissal for reasons of gross misconduct. The respondent's policies and procedure manual describe gross misconduct as behaviour which will "irreparably damage the working relationship of trust between the company and the employee". However, the

subsequent actions of the respondent to not support that they held this to have been the case, and it the position of the claimant that to take such a view on the single incident upon which this dismissal is based is unsustainable.

83. *Graham v Secretary of State for Work and Pensions [2012] IRLR 402 and Tayey v Bathgate Healthcare Ltd [2013] EWCA Civ 29* confirm the principle that the actions of an employer in failing to suspend an employee during the disciplinary process should rightly be considered by the tribunal. This claimant's case is particularly extraordinarily in that he was allowed to work on, in the same role and without re-training, even beyond the date on which the decision to dismiss was made. He only learnt of his dismissal four days later when he collected his disciplinary and dismissal letters from the post office. We can find no precedent where an employee has worked on for two days before receiving a letter that he had been summarily dismissed. Mr Ballantyne confirmed this version of events was 'rare'. There is only one potential reading of the respondent's actions: that this was not considered an event of sufficient seriousness to warrant suspension. However, this would leave the eventual decision to dismiss for gross misconduct (on the basis that the working relationship was irreparably damaged by the door collision) exposed as bunk. One cannot justify a determination that all trust is gone and immediate dismissal essential, while at the same time allowing that employee to work on without any amendment to his duties.

84. Nowhere is it contended that the damage to the door was anything other than an accident. The employee was carrying out his role as he had throughout his 18-year employment. The only difference on 10 April 2019 was that circumstances conspired for the claimant's trolley to strike a door. Should this be determined a gross misconduct offence this would be a terrible precedent for workers throughout the country. By reporting the incident as soon as he could to Mr McGrath who told the claimant it would be reported to Ms Macaskill, to thereafter report it as soon as he saw Mr Kelly, the claimant ensured that appropriate action could be taken and the safety of colleagues and residents be preserved. The claimant further contests that reporting the incident thereafter to Ms Macaskill within a two-hour time period is

reasonable, especially as he was told the incident would be reported on his behalf to the her.

85. Turning to the belief being held on reasonable grounds the claimant says that it was not. Had there been an assessment that the damage to the door did pose a Health and Safety risk (or to the fire integrity of the zone) this could have been mitigated by temporarily moving patients from this section of the building, and there was no need for those patients to be at risk. In practice. Ms Ameur confirmed that no such action was deemed necessary. This should either be taken as tacit acceptance by the respondent that the damage to the door did not endanger service users, or considered the only true act of gross negligence on the premises that day.

86. The respondent has included photographs of the fire door. The damage to the door does not appear extraordinary. The photographs do not show that the door would not prove an effective fire barrier. Ms Ameur confirmed the door could shut over as did the claimant. There is nothing in the paperwork from the respondent or arising from cross to indicate how the maintenance manager secured the door and when a joiner was called. It seems extraordinary that neither Ms Ameur nor Mr Ballantyne could recall when the door was replaced, given the fact the respondent's assert the fire integrity of the zone was so substantially compromised.

87. Turning to the investigation, the respondent did not carry out a reasonable and proper investigation. It was not a fair and balanced view of the facts relating to any disciplinary allegations against the employee. On two occasions, immediately after the incident and at the investigatory meeting, Mr Simpson reassured the claimant that he had nothing to worry about. Was he put under pressure to change his report?

88. Mr Simpson's report opens with the assertion that the claimant's actions constituted a risk of harm to vulnerable adults because when the other door closed there would have been a gap which fire and smoke could have breached causing death. However, it is neither established that there was risk

to life due to the damage to the door, nor considered that any risk could not have been mitigated following the report of the incident made by the claimant.

89. The claimant received no training about the fire door and there was no risk assessment. Ms Ameur adopted an unreasonably constrained approach, which failed to allow for lesser sanctions and ignored mitigating factors. Similar circumstances are considered in the instructive case of *Portsmouth Hospitals NHS Trust v Corbin UKEAT/0163/16/LA*, where the judgement was that the dismissal was rendered unfair in these circumstances. For the avoidance of doubt the mitigating factors known to the respondent include: inability to transport the trolley using the preferred technique (used for 18 years) because the trolley was left hot; problems with the wheels caused by wheeling over uneven surface while flooring being re-laid; failure to communicate to kitchen staff that it was okay to open the smaller of the new "penny farthing" doors; and the claimant's clean disciplinary record and 18 years of service.

90. A number of Health and Safety directives are referenced in the Investigation Report. There is however no serious attempt to interpret the information contained in those documents or explain why the claimant might be thought to be in breach of same. The investigation report reads as though it were contrived to fit a narrative which does not exist. As a basis for disciplinary action and dismissal it is entirely unconvincing. Supporting this is the basis upon which both Ms Ameur and Mr Ballantyne confirmed that they did not know whether action was taken against the care assistants for leaving the trolley on and tampering with the temperature gauge. Given both their positions in the company at the time, it is reasonable to presume they would have known if disciplinary action was taken. This is relevant as it shows the underlying agenda to hold only the claimant to the unreasonably strict health and safety directives to fit their agenda. The claimant submits that there has been a wilful misinterpretation of the meaning of the policies quoted.

91. The build up to the disciplinary hearing was unfair because although the process ostensibly followed the re-sending of the letter, this was done incompetently. The claimant received a letter when he was off asking him to

a hearing that day. Why was he asked to attend a hearing when the respondent should have known he was on annual leave? Why did they set a new hearing without letting him know? He had no opportunity to read through the evidence against him and prepare his case as the meeting took place on the day of his return to work. This is contrary to the respondent's policy that the employee will be given a reasonable amount of time to prepare their case based on the information the company has provided. The investigation report was not included in the paperwork sent to the claimant when there was no sensitive information present. Ms Ameur confirmed that the investigation report was also not made available during the disciplinary hearing. In fact, it was confirmed that none of the documents she was to go on and refer to in the hearing were made available to him. Yet, she inconceivably remains of the position that he had all the necessary content to prepare.

92. It is a disputed fact that the claimant had these documents in an 'envelope'. The claimant is of the position he had no documents whatsoever. He attended only in person with the content of his chef whites. The claimant had no reason to presume the disciplinary hearing was to take place the first day back from annual leave, having not received the letter. He had no reason to presume on the morning before work on 6 May 2019 that he would have needed them during the ordinary course of his day, nor does it seem reasonable that he would have taken and stored some 31 pages of documents in a kitchen. Further Ms Ameur confirmed the claimant did not open this envelope during the disciplinary. It is hard to side with the view that she was positive this was in fact the envelope sent out on the 29 April 2019 when the contents were not revealed. It is further reasonable to expect, in speaking to the documents throughout the course of this unbeknown disciplinary hearing, that the claimant would have retrieved some of these documents that were made reference to if he was in possession of them. Yet, the 'envelope' remained untouched.

93. At the disciplinary hearing the claimant advised he was not sure why he was there. There was no proper explanation offered or option to postpone to allow to read the allegations against him. There was no opportunity to have a

witness attend and no confirmation as to whether the claimant decided to not take his right to be accompanied to the hearing. The claimant contests this is highly unusual, confirmed by Iain Ballantyne's account when stating 'Ms Ameur's investigations are usually very thorough and he had no doubt in his mind that she would have asked at the start of the hearing whether or not he decided to be accompanied. This did not happen. The claimant confirmed that if asked, and if he would have known it was a disciplinary, he would have brought a witness. This is corroborated as he had one in attendance during his appeal hearing.

94. Ms Ameur wilfully misinterpreted evidence in front of her. When asked if there was any potentially satisfactory explanation that would have changed her decision to dismiss. She indicates that there was no explanation that would have changed her decision to dismiss. This clearly indicates the decision to dismiss was preconceived and that the investigation and the disciplinary hearing were conducted as a matter of principle rather than serving their purpose. The letter inviting the claimant to a disciplinary hearing did not refer to alternative sanctions.

95. At the appeal hearing, there was a lack of focus on relevant problems because the claimant was aggrieved that he did not have the opportunity to prepare his case. This means the appeal hearing focussed on the procedural fairness of the case. Given the failures of the investigation, and lack of balance at the hearings, it is doubtful that even if the claimant had been able to prepare his case this would have made much difference. The decision to dismiss was absurd as it was.

96. The appeal, focusing on procedural unfairness, was nevertheless flawed. Mr Ballantyne confirmed that conclusions made at the appeal, without taking opportunity to reflect on the evidence put in front of him, could have been wrong conclusions to make.

97. The claimant contends that the employer could not have had reasonable grounds for the belief of misconduct as the employer did not conduct a reasonable investigation into the alleged misconduct.

98. In addition to the test set out in *Burchell*, if the dismissal is to be deemed fair it must have been reasonable for the respondent to have dismissed the claimant for the alleged misconduct in question.

99. Section 98(4) of the ERA, as confirmed in *Adama v* Partnerships in Care Ltd UKEAT 0047/14/1206, requires a tribunal to make a determination as to reasonableness. It is not for a party to concede or agree that a dismissal is fair or unfair. The tribunal must make its own assessment of whether the employer's decision to dismiss was reasonable or unreasonable, taking into account all of the circumstances of the case. Additionally, *Newbound v Thames Water Utilities Ltd* [2015] EWCA CIV 677, a Court of Appeal judgment, indicates that in assessing the reasonableness of a dismissal, a tribunal is not conducting a "tick box" exercise and that the band of reasonable responses is not infinitely wide. The tribunal in this case was entitled to find that no reasonable employer would have dismissed the employee in the particular circumstances of the case and that, in reaching that decision, the tribunal had not slipped into impermissibly substituting its view for that of the employer.

100. It is the claimant's position that the facts of this case are so far from any reasonable decision to dismiss, and therefore the tribunal should come to a similar conclusion in *Newbound*, otherwise the band of reasonable responses is at risk of being infinitely wide.

101. The claimant also asks that when considering this point, consideration is given for his length of service. Lord Justice Dyson in *Strouthos v London Underground Ltd [2004] IRLR 636* had the following to say on this point: "Certainly there will be conduct so serious that, however long an employee has served, dismissal is an appropriate response. However, considering whether, upon a certain course of conduct, dismissal is an appropriate response, is a matter of judgment and, in my judgment, length of service is a factor which can properly be taken into account, as it was by the Employment Tribunal when they decided that the response of the employers in this case was not an appropriate one."

102. *Polkey v A E Dayton Services Ltd 1987 IRLR 142* made clear that procedural fairness is part of the overall test of fairness. A dismissal may be rendered unfair because of procedural flaws. A respondent may, however, argue that compensation should be reduced to reflect the fact that even if a fair procedure had been followed, dismissal would still have occurred.

103. It is the claimant's position that the respondent made a number of errors during the disciplinary process, which is noted throughout this submission, including an appeal process which was flawed. The claimant indicates that the Tribunal should find to be entirely satisfied that if the respondent had carried out a fair procedure and had regard to the material and mitigating factors in this case, and if there had been a fair appeal process, there was a 100% chance the claimant would not have been dismissed.

104. Section 123(6) of the ERA provides that where a tribunal finds that a dismissal was to any extent caused or contributed to by any action of the employee, it shall reduce the compensatory award by such proportion as it considers just and equitable having regard to that finding. The Tribunal was referred to *Nelson v BBC (No 2) 1980 ICR 110,* the Court of Appeal said that three factors must be satisfied if the tribunal is to find contributory conduct. The claimant contends neither of these factors can be satisfied based on the facts and evidence produced throughout the course of the Tribunal.

Deliberations

105. The Tribunal had to decide whether the claimant had been unfairly dismissed and if he was unfairly dismissed, what remedy to award.

106. In reaching a judgment in this case, the critical question for the Tribunal was whether the claimant's dismissal was fair in terms of section 98 of the ERA.

107. The first issue the Tribunal considered was the reason for the claimant's dismissal. It is for the respondent to show the reason for the dismissal and that it was for one of the potentially fair reasons. The reason is a set of facts known to the employer or beliefs held by him which cause him to dismiss the

employee. At this stage, the Tribunal was not considering the question of reasonableness.

108. Ms Ameur confirmed in evidence that she believed that the claimant did not exercise care and attention and had total disregard for company property when he maneuvered a food trolley through a fire door causing damage to the door and its locking mechanism. She formed this belief based on information obtained during Mr Simpson's investigation and at the disciplinary hearing. Ms Ameur said that the claimant's conduct was the reason why she dismissed him. While in the claimant's submissions it was suggested there were other motivations there was no evidence of this. The Tribunal was satisfied that the respondent had shown the reason for dismissal was misconduct. The Tribunal had therefore concluded the respondent was successful in establishing that the dismissal was for a potentially fair reason.

109. The Tribunal then considered if the dismissal was fair or unfair in accordance with section 98(4) of the ERA. It noted that it had to determine whether the dismissal was fair or unfair, having regard to the reasons shown by the employer and the answer to that question depends upon whether, in the circumstances (including the size and administrative resources of the employer's undertaking), the respondent acted reasonably in treating the reason as a sufficient reason for dismissing the employee; and that this should be determined in accordance with equity and the substantial merits of the case.

110. The Tribunal considered the reasonableness of the respondent's conduct. The Tribunal noted that it must not substitute its own decision as to what the right cause to adopt for that of the respondent. The Tribunal applied the range of reasonable responses approach whether the respondent had carried out a reasonable investigation and had reasonable grounds for its belief that the claimant was guilty of misconduct.

111. The Tribunal asked if the respondent have a genuine belief in the misconduct. The Tribunal found that Ms Ameur believed that the claimant had hit the fire door great force and he could have avoided the damage to the fire door and

its locking mechanism. She believed that the claimant did not exercise care and attention; and he had a total disregard for company property. The Tribunal therefore concluded that the respondent did have a genuine belief in the misconduct.

112. Next the Tribunal asked if respondent had reasonable grounds for the belief in the alleged misconduct and at the time the respondent formed that belief had the respondent carried out as much investigation into the matter as was reasonable in the circumstances?

113. From the Tribunal's findings Mr Simpson looks after the fire risk assessments in the care homes. The incident came to his attention as the damage to the fire door was significant and compromised the integrity of the door. He spoke to Ms Ameur who asked him to investigate. There was no suggestion that Mr Simpson or any of the witnesses to whom he spoke had any animosity towards the claimant or that his investigation was predetermined. Ms Ameur only involvement was to ask Mr Simpson to investigate and then to consider the investigation report.

114. No one witnessed the incident. The Tribunal could understand why Mr Simpson obtained statements from Ms Macaskill and Mr Kelly; they heard the incident and the claimant spoke to them after the incident occurred. Ms Stenton also provided a statement; she heard the incident and subsequently saw the damage to the fire door. Ms Macaskill took photographs of the damage to the fire door which were produced.

115. Mr Simpson then interviewed the claimant. He admitted that the damage was caused when he pushed the food trolley through the gap in the fire door. The claimant said that the food trolley was hot and veered to the left and the food trolley hit the door. He said that he had reported the problem with the food trolley to Mr Kelly who also had had problems. The claimant confirmed that he did not write the issue in the maintenance book. The Tribunal considered that it was reasonable for Mr Simpson to interview Mr Kelly about the issues raised by the claimant. At the follow-up interview Mr Kelly confirmed that the claimant had said "something" about the trolley wheels as a result of which

Mr Kelly had asked Mr McGrath to have a look at them. Mr McGrath had oiled wheels. Mr Kelly said that he did not have any issues manoeuvring the trolley through the fire doors. While Mr Simpson could also have spoken to Kamal, given Mr Kelly's response the Tribunal considered that it was not unreasonable for Mr Simpson not to do so.

116. Mr Simpson did not interview Mr McGrath, the maintenance manager. The Tribunal considered that it was reasonable for him not to do so. The claimant said he had not written any issue in the maintenance book. The claimant had reported it to Mr Kelly. Mr Kelly confirmed that he had informed Mr McGrath to look at the trolley wheels and that Mr McGrath had done so.

117. The investigation did not stop with Mr Simpson, it continued through to the disciplinary hearing. The Tribunal turned to consider the investigation undertaken by Ms Ameur.

118. Ms Ameur had considered the witness statements, interview notes and the photographs taken of the damage to the fire door. The Tribunal was satisfied that before the disciplinary hearing, the claimant was aware of the allegation to which he was being asked to respond. He was aware of the potential outcome of the disciplinary hearing. The claimant had been provided with copies of the witness statements, interviews, notes and the relevant policies.

119. The claimant was given an opportunity to respond to the allegation at the disciplinary hearing. The claimant did not dispute that he caused the damage or the extent of it. There was no suggestion that the claimant disputed the witness statements provided by his colleagues.

120. Ms Ameur explored with the claimant why the fire door had been damaged to the extent that it was. She clarified that the claimant's position was that it was an accident because the food trolley wheels were damaged and that the food trolley was too hot so he had to push the food trolley using the handle rather than the sides of the food trolley which he preferred to do. The claimant accepted that there were no incidents of problems with the trolley wheels in the maintenance book and that the trolley wheels had been oiled by Mr McGrath after the claimant had spoken to Mr Kelly.

121. The Tribunal did not consider that there was any further reasonable investigation to be undertaken by Ms Ameur. The Tribunal acknowledged that while other employers may have acted differently, it could not conclude that the investigation carried out by the respondent up to and including the disciplinary hearing did not fall within a reasonable band of responses to the situation.

122. The Tribunal then applied the range of reasonable responses test to the decision to dismiss and the procedure by which that decision had been reached.

123. With regards to the investigation and the conduct at the disciplinary hearing, for the reasons previously indicated, the Tribunal was satisfied that there had been a reasonable investigation.

124. The Tribunal considered it was a reasonable response that the claimant was not suspended albeit he was accused of gross misconduct. The witness statements were supplied on the day of the incident and the claimant was interviewed shortly afterwards. There was no suggestion that the partiality of the investigation would be compromised by the claimant continuing to work.

125. The Tribunal referred to the 29 April Letter which referred to potential summary dismissal. The Tribunal felt that it was reasonable to mention this potential sanction so that the claimant was aware of the seriousness of the allegation and potential consequences. It did not in the Tribunal's view mean that the decision was in anyway predetermined or automatic.

126. The Tribunal considered that while other employers provide employees with the investigation report that was not the respondent's procedure. The respondent's procedure was to provide the evidence collated during that process along with relevant policies. The Tribunal's view was that in this case that fell within the band of reasonable responses.

127. The 29 April Letter also referred to the right to be accompanied and to the possibility of rescheduling the disciplinary hearing. Having taken this option on 2 May 2019 because he was on leave the Tribunal felt that although the

claimant had not received the 2 May Letter he must have been aware that he had the right to be accompanied and the disciplinary hearing could be postponed if his chose companion was not available.

128. The Tribunal then considered the procedure at the start of the disciplinary hearing. Ms Ameur assumed that the claimant had read the documentation. While other employers would have asked the employee if they had read the documents that the dismissing office was considering it was reasonable in the circumstances for Ms Ameur not to have done so. She was aware that the claimant had received the 29 April Letter on 2 May 2019, and he knew the revised meeting time as he had attended at 11am. The Tribunal considered that it was reasonable for Ms Ameur to assume that given the contents of the 29 April Letter the meeting with her was a disciplinary hearing and had the claimant any doubts or not have been in a position to read the documentation, that he would have alerted her to this so that she could allow him time to do so.

129. The 29 April Letter (and the 2 May Letter) referred to an allegation which the respondent considered was gross misconduct. While the respondent's policy allowed for summary dismissal on the grounds of gross misconduct the Tribunal considered what the reaction of a reasonable employer would have been in the circumstances.

130. The claimant felt that Ms Ameur's decision to dismiss him was predetermined or automatic. The Tribunal did not agree. The Tribunal's impression was that Ms Ameur approached the disciplinary hearing with an open mind, she made further enquiries and considered the information supplied by the claimant and his attitude at the disciplinary hearing.

131. The fire doors had been installed since November 2018 and until April 2019, staff, including the claimant, had been manoeuvring the food trolley through the fire doors without incident. The damage to the fire door and its locking mechanism was substantial; it causes the fire integrity to be compromised and had to be replaced. Ms Ameur believed the damage could have been avoided. The small door was not opened. In any event the space was large enough for

the food trolley to pass through. The Tribunal considered that as the extent of the damage was not disputed, and that the damage was caused when the claimant was manoeuvring the trolley through the door, Ms Ameur had reasonable grounds for concluding that the fire door had been hit with some force. The claimant referred to damage to the wheels of the food trolley but there were no reports of this in the maintenance book and to the extent that matters were drawn to the attention of Mr Kelly, he had asked that the wheels be oiled. Mr Kelly also maneuverer the trolleys through the fire door as part of his duties and did not have problems. There had been no further incidents. In the absence of anyone witnessing the incident, the Tribunal considered that there were reasonable grounds for Ms Ameur to consider that the fire door had been hit with force and that the claimant could have avoided the incident had he carried out the manoeuvre with caution or taking the precaution of the opening the small door.

132. While the Tribunal concluded that there were reasonable grounds for a finding of gross misconduct the Tribunal went onto consider whether it was within the band of reasonable responses for the respondent to dismiss the claimant for that gross misconduct.

133. The Tribunal asked if dismissal a fair sanction applying the “band of reasonable responses” test and if the respondent acted reasonably in treating the claimant’s conduct as gross misconduct.

134. The Tribunal was satisfied from Ms Ameur’s evidence that she did not automatically impose the sanction of dismissal; she knew that she was able to impose a lesser sanction; and did not take the decision to dismiss lightly.

135. The Tribunal observed that Ms Ameur was aware that the claimant had no history of misconduct. He was a longstanding employee and by all accounts was well regarded. The claimant denied that there was any fault on his part. He deflected responsibility to the care staff who did not unplug the food trolley during service and to poor maintenance of the trolley wheels despite having reported this to Mr Kelly. He did not concede that his manoeuvring of the food trolley was in any way inappropriate or that in retrospect he would or should

have acted differently. Ms Ameur believed that the claimant did not exercise due care and attention and had a disregard for the company property. She did not believe that it was an accident. Ms Ameur took into account the claimant's long service but considered that this was more reason for the claimant to know the care and attention required when manoeuvring the trolley around the care home. The Tribunal considered that in the absence of the claimant showing any regret, remorse or reflecting that in future he would do things differently, while other employers may have reached different decisions, it could not conclude that the decision to dismiss the claimant fell out with the band of reasonable responses which a reasonable employer might have adopted.

136. The Tribunal noted that a failure to carry out a reasonable and proper procedure at each stage of the dismissal process, including the appeal stage, is relevant to reasonableness of the whole dismissal process. The Tribunal then considered the appeal process.

137. The Tribunal found that before appealing, the claimant had received the 6 May Letter setting out Ms Ameur's reasoning for her decision. Despite having this letter, the 29 April Letter (and enclosures) and 2 May Letter (and enclosures) which included the claimant did not raise any grounds of appeal challenging the investigation or the reasonableness of the decision reached. His grounds of appeal focused on the process in that he had not received the 2 May Letter at the time of the disciplinary hearing.

138. The Tribunal also found that Mr Ballantyne considered the grounds of appeal and the relevant paperwork. He approached the appeal with an open mind. At the appeal hearing Mr Ballantyne asked the claimant to talk through his grounds of appeal. Afterwards Mr Ballantyne spoke to Ms Ameur and sought clarification about the letters. He accepted that the claimant had not received the 2 May Letter until 10 May 2019 and therefore had not received written notification of the rescheduled disciplinary hearing. The claimant had however received the documentation which Ms Ameur was considering as it was enclosed in the 29 April Letter. The claimant was aware of the allegation to which he was being asked to respond and he was aware of the documentation

that would be considered. The claimant knew that Ms Ameur was conducting the disciplinary hearing. The claimant was also aware that at 9.30am on 6 May 2019 that he was to attend a meeting later that morning. The issue which Mr Ballantyne considered was whether the claimant had reasonable time to prepare for the disciplinary hearing.

139. While Mr Ballantyne considered that it was unfortunate that the claimant had not received the 2 May Letter, Mr Ballantyne was satisfied that the claimant had sufficient time to prepare for the disciplinary hearing which he knew was being rescheduled. There was no indication during the appeal hearing or indeed during the tribunal hearing that the claimant took issue with what was said in the witness statements or that there was any reason for his colleagues not to be frank during the investigation. While Mr Ballantyne was not asked to consider an appeal on the thoroughness of the investigation or the decision-making process, in any event, he formed the view that a reasonable investigation had been undertaken and that Ms Ameur had grounds for reaching the decision that she did which he agreed with.

140. The Tribunal agreed that it was unfortunate that the claimant did not receive the 2 May Letter before the disciplinary hearing. While the respondent knew that the claimant was on annual leave the Tribunal did not consider that it was unreasonable for the respondent to have formed the view that having received the 29 April Letter on 2 May 2019; having acted upon it by telephoning head office to reschedule the disciplinary hearing the claimant had read the letter and the enclosures. While three policies were enclosed, the claimant was a long-standing employee and they were part of the staff handbook. The witness statements and Mr Kelly's interview note were very short, and the claimant was present and had signed the note of his own interview.

141. The Tribunal was satisfied that the respondent had carried out a reasonable and proper procedure at each stage of the dismissal process including the appeal stage.

142. The Tribunal concluded that the dismissal was fair. Having reached this conclusion, the Tribunal did not consider it necessary to go onto determine the question of remedy.

143. As the claimant was summarily dismissed, the Tribunal did not consider that he was entitled to notice pay or a payment in lieu.

144. While the claim form included a claim for holiday pay, no evidence was given in this regard and it was not addressed in the claimant's submissions.

145. The claimant's claims are dismissed.

Employment Judge: S MacLean
Date of Judgment: 27 Aug 2020
Entered in register: 01 Sept 2020
and copied to parties