Case Number: 2204924/2020

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS:

BETWEEN:

Mr W Morley

Claimant

AND

Wheelers of Turnham Green Ltd

Respondent

ON: **6 and 7 May 2021**
Appearances:
For the Claimant: **In person**
For the Respondent: **Mr A Francis, counsel**

JUDGMENT

The Judgment of the Tribunal is that:

a. The claims for unfair dismissal and unlawful deductions from wages fail and are dismissed.
b. The claim for holiday pay is dismissed upon withdrawal.

REASONS

1. This decision was given orally on 7 May 2021. The claimant requested written reasons.

2. By a claim form presented on 14 August 2020 the claimant Mr Wayne Morley claims unfair dismissal and unlawful deductions from wages. A claim for holiday pay was added by way of amendment on day 1.

The issues

3. The issues for this hearing were clarified at the outset of this hearing. As

the claimant had not presented a discrimination claim there had been no prior case management hearing.

4. What was the reason for the dismissal? The respondent asserts that it was a reason related to conduct which is a potentially fair reason for dismissal under section 98(2)(b) of the Employment Rights Act 1996. It must prove that it had a genuine belief in the misconduct and that this was the reason for dismissal.

    a. Did the respondent hold that belief in the claimant's misconduct on reasonable grounds?

    b. Was the decision to dismiss a fair sanction, that is, was it within the reasonable range of responses for a reasonable employer?

    c. If the dismissal was unfair, did the claimant contribute to the dismissal by culpable conduct? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged.

    d. Does the respondent prove that if it had adopted a fair procedure the claimant would have been fairly dismissed in any event? And/or to what extent and when?

5. Did the respondent make an unlawful deduction from the claimant's wages contrary to section 13 Employment Rights Act 1996. The claim is for the cost of the deduction from wages for a deduction in respect the cost of a hedge cutter in the sum of £225.

6. The claimant had submitted a Schedule of Loss claiming an award for injury to feelings. I explained to the claimant that this was not a discrimination claim so that it would not give rise to an award for injury to feelings if he succeeded in the claim.

7. The claimant had also referred to a generic claim of "harassment". I explained that this tribunal did not have jurisdiction to decide a general claim for "*harassment*" outside of a discrimination claim and to the extent that he claimed he had been assaulted, this was a matter for the police and not this tribunal. It was also not a health and safety claim as there was also some reference to this in the documents.

8. The claimant had claimed holiday pay in his Schedule of Loss but this was not a claim included in his claim form. I asked the respondent, whether if the claimant made an application to amend, they could deal with it? A break was taken for the respondent to take instructions and this was not opposed by the respondent. The holiday pay claim was for £2,700. After hearing evidence from Mr Earl and on day 2, the claimant withdrew the holiday pay claim.

9. I also explained to the claimant that this tribunal did not have the power to order the respondent to return any of his personal tools as he said that

they had failed to do so. This was not a matter within this Tribunal's jurisdiction and no findings were made on it.

10. The hearing was also to determine remedy if the claim succeeded.

Witnesses and documents

11. The tribunal heard from the claimant.

12. For the respondent the tribunal heard from three witnesses (i) Mr Jason Wheeler, Managing Director (ii) Mr Jason Earl, the claimant's line manager and (iii) Mr Tom Lincoln, Office Manager and dismissing officer. There was a statement from Mr Alex Withrow, from the gardening team, but he was not called.

13. There was an electronic bundle of documents of 170 pages, inclusive of the index.

This remote hearing

14. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The tribunal considered it as just and equitable to conduct the hearing in this way.

15. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net. No members of the public attended.

16. The parties were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no difficulties of any substance.

17. The participants were told that is was an offence to record the proceedings.

18. The tribunal ensured that each of the witnesses, who were all in different locations, had access to the relevant written materials which were unmarked. I was satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence. Arrangements were made for two of the respondent's witnesses, who were originally in the same office, to give their evidence from separate offices.

Findings of fact

19. The claimant worked for the respondent as a landscaper/gardener from 1 April 2014 until his dismissal on 24 March 2020. The respondent provides gardening services, floristry and runs a garden centre in Chiswick. It is a small company employing about 25 people (ET3 box 2.8). The claimant provided garden maintenance for residential and commercial customers.

20. In terms of the management of the respondent, it is a family run business. The owners of the company are Mr Jason Wheeler and his brother Spencer. Mr Jason Wheeler runs the side of the business in which the claimant worked, which is the garden centre, landscaping and garden maintenance side. His brother deals with the cut flowers side of the business. The cut flowers side of the business has managers who buy the flowers and are then out on the road taking flowers out to the flower stalls.

21. There is an office administrative assistant who in February 2020 was named Ellice, who left very shortly after the incident in question and was replaced by Ms Nadine Charles.

22. Mr Jason Earl is the maintenance manager; he was the claimant's line manager.

23. The business also employs Mr Paul Lincoln and Mr Tom Lincoln who are father and son (Mr Paul Lincoln is the father). Mr Wheeler said they are his distant cousins and not his brother in law and nephew as the claimant thought. I do not make any specific finding on their precise relationship other than to find that they are related. Mr Paul Lincoln deals with banking and accounts and works four days per week. Mr Tom Lincoln works on a more ad hoc basis, one to three days per week on the computer side, change management and modernisation of the business as well as working on the bookkeeping system. Mr Tom Lincoln has also helped with HR matters for the respondent and he has held disciplinary hearings with the claimant in the past. He does not have any specific job title.

24. Mr Jason Wheeler holds Mr Tom Lincoln in high regard and has a lot of respect for his views in the business. His evidence, which I accepted, was that Mr Tom Lincoln was free to point it out, if he thought Mr Wheeler had got something wrong.

25. The claimant had a chequered employment history with a number of disciplinary warnings which were in the bundle. This included in July 2017 a warning for leaving the company van unlocked resulting in a theft of tools to the value of £1,200. The claimant was also given a final written warning in December 2015 for threatening a colleague with physical violence (bundle page 65). The respondent accepts that the claimant had no live warnings in place at the date of the incident in question in these proceedings.

<u>The incident on 11 February 2020</u>

26. On 11 February 2020 the claimant was working at a client site in Chiswick, together with his colleague Mr Alex Withrow. The claimant had the use of a company van which he had parked on a yellow line outside the customer's house so he could keep an eye out for traffic wardens and/or for a parking space to become available. It was a term of the claimant's

employment that the van should be locked when not in use, (clause H3 on page 52). The respondent's employees were reminded of this at a morning meeting in January 2020 following a number of burglaries in the area. This was disputed by the claimant.

27. On 11 February 2020 a hedge cutter was stolen from the claimant's company van. The claimant's case during this hearing was that he had locked the van. The claimant saw the thief in the act of stealing the hedge cutter and confronted him by grabbing the hedge cutter to try to take it back. There was a physical altercation between them. The thief was not alone, there were two others with him. The claimant sustained an ankle injury and some other minor injuries including a slight cut to his hand.

28. The claimant called his manager Mr Jason Earl to tell him what had happened. He reported the theft of the hedge cutter and told Mr Earl that there had been a bit of a scuffle but he was OK. Mr Earl went straight to the site and got there within a few minutes. He checked that the claimant and Mr Withrow were OK and they said that they were and that they were happy to get on with their next job. Although the claimant was obviously shaken by what had happened, he was not so unwell as to require immediate medical treatment and he considered himself well enough to go on to another job and finish his day's work.

29. After the claimant and Mr Withrow finished their day's work they went to speak to the Managing Director Mr Jason Wheeler. Mr Wheeler told the claimant and his colleague that as they had not locked the van they would have to pay for the cost of a new hedge cutter under the terms of their contract of employment.

30. The disciplinary allegation was that in response to this the claimant swore aggressively at Mr Wheeler and called him offensive names. The claimant walked away and he accepts he slammed the door. The claimant's case is that Mr Wheeler grabbed him by his left forearm and poked him in the right side of his lower back and leaned into his face saying "*don't you f***ing talk to me like that again"* and *"don't you f***ing slam my door".*

31. Mr Wheeler accepts that he touched the claimant's elbow in order to speak to him and that he leaned towards the claimant to speak to him quietly. He said he did this because there were two to three customers present and he did not want them to overhear. The claimant objected to this very strongly and the disciplinary allegation was that he continued to swear offensively and aggressively at Mr Wheeler. Mr Wheeler said that the claimant took off his coat, leading Mr Wheeler to believe that he was about to be assaulted by the claimant who continued to shout and swear. It is not in dispute that the claimant took his coat off. The claimant's case is that he did so in order to be ready to defend himself.

<u>The text messages</u>

32. On 12 February 2020 the claimant sent the following text messages:

33. At 6.02am he sent a text to Mr Earl stating: "*Morning Jason I just wanted to let you know that as a result of trying to apprehend the man and hedge cutter in the robbery that took place yesterday while I was at work I've hurt my ankle while being dragged by the van. The cut on my hand I also got as a result of grabbing the blade to try and get it back from the thieving toe rag is fine luckily just a scratch, but I want to have my ankle looked at by a doctor so I won't be in today sorry to mess up your plans for the work you had planned for me. I'll let you know what's going on with my ankle asap*." (page 72).

34. At 4.36pm he sent a further text to Mr Earl stating: "*Hello Jason I've had my ankle looked at and its nothing major just a twisted ankle I've been told to keep off it for a while take strong pain killers and ice and I'll be fine in a couple of days so I won't be in tomorrow I'm afraid but hopefully I'll be back on Friday…thank you*."

35. On the same day at 08:54am he sent a text message to Mr Jason Wheeler saying: "*Good morning Jason Wheeler I just wanted to let you know that as a result of trying to apprehend the man and hedge cutter in the robbery that took place yesterday while I was at work I've hurt my ankle while being dragged by the van. The cut on my hand I also got as a result of grabbing the blade to try and get it back from the thieving toe rag is fine luckily just a scratch, but I want to have my ankle looked at by a doctor so I won't be in today sorry to mess up the days work plan...also when I do come back to work I'd like to have a chat and clear the air about yesterday's situation that happened in the garden centre...I know you said I have to pay for the hedge cutter to be replaced but I can't afford to have 500+ pounds taken from my wages like you said it would be. I literally couldn't pay my rent if you took that amount off my wage so can I pay in instalments to cover the cost*." (page 71).

36. Mr Wheeler considered the claimant's behaviour unacceptable and suspended him pending an investigation for gross insubordination and aggressive and threatening behaviour. This was confirmed in a letter sent by email on 12 February 2020 (bundle page 73).

<u>The disciplinary investigation</u>

37. Mr Wheeler prepared his own short witness statement related to the events of 11 February 2020 and he collected two short statements, one from Mr Earl and one from Mr Christian Minard (pages 76-70). He arranged for these to be sent to Mr Tom Lincoln who was to hear the disciplinary.

38. On 14 February 2020 Mr Lincoln wrote to the claimant inviting him to a disciplinary hearing on 19 February on the following disciplinary charges (page 74):

i) that having recently been requested by a Company director to

ensure that all times Company vans must be locked whilst unattended, on 11th February 2020 you failed to follow this reasonable instruction and left a Company van unlocked resulting in Company property, namely, a Sthil hedge cutter being stolen;

ii) that, by your negligent actions, loss was caused to the Company;

iii) that, on 11th February 2020, you used abusive language and aggressive and threatening behaviour towards Jason Wheeler, a Company Director, by repeatedly calling Mr Wheeler 'a fucking pussy', a fucking twat', telling Mr Wheeler to 'fuck off you prick', and stating that you were 'not fucking paying' for the stolen Hedge trimmer before slamming the office door and storming off;

iv) that on 11th February 2020 this threatening and abusive language was said in front of other junior members of staff;

v) that, on 11th February 2020, you used aggressive behaviour towards Jason Wheeler by taking off your coat giving Mr Wheeler reasonable belief that you were to assault Mr Wheeler;

vi) that your actions constitute gross insubordination towards a Company Director destroying the employer/employee relationship.

39. The claimant agreed in evidence that the allegations he was facing were clear to him.

40. With that letter Mr Lincoln sent the claimant the witness statements from Mr Wheeler, Mr Earl and Mr Minard. The statements were all prepared on 14 February 2020 and signed by each witness (pages 76-79). The claimant was told that the hearing could result in his summary dismissal. He was informed of his statutory right to be accompanied at the hearing.

41. The claimant asked Mr Wheeler in cross-examination whether CCTV had been examined of the incident on 11 February 2020. Mr Wheeler's evidence was that they have a "*fake*" CCTV camera which is not wired up. I find that there was no CCTV footage of the incident and therefore none to be considered within the investigation.

42. The claimant also asked Mr Wheeler in cross-examination why he did not call the police in relation to the theft of the hedge cutter. Mr Wheeler said in his experience the police do not have the time to deal with such matters, although they will provide a crime number for insurance purposes. He does not insure the tools because the cost is prohibitive so he could see no good reason to involve the police.

43. The claimant informed Mr Wheeler that he could not attend the disciplinary hearing on 19 February because he was unwell. He was signed off work for two weeks from 14 February to 27 February 2020 with a right ankle injury and stress related to a robbery at work – sick note page 83. The

hearing was rescheduled for 3 March 2020.

Contractual provisions

44. The claimant's contract of employment was at page 49 of the bundle, signed by him on 15 January 2015. It incorporates the terms of the Employee Handbook which includes the Rules for the use of Company Vehicles. Clause H3 of those Rules provides that "*The vehicle should be kept locked when not in use and the contents should be stored out of sight….".* Clause M1 says "*Where any damage to one of our vehicles is due to your negligence or lack of care, we reserve the right to insist on you rectifying the damage at your own expense or paying the excess part of any claim on the insurers".*

45. There was a separate contractual document titled *"Deductions from pay"* (page 54) which says at clause 6 "*Any loss to us that is the result of your failure to observe rules, procedures or instruction, or is as a result of your negligent behaviour or your unsatisfactory standards of work will render you liable to reimburse to us the full or part of the cost of the loss"* and that in the event of a failure to pay, such costs would be deducted from pay. This document was signed by the claimant, stating that he had read and understood it and agreed that it formed part of his contract of employment, on 15 January 2015. The claimant admitted in evidence that he signed this document.

46. The claimant admits that he was given the contract of employment, which he signed, but denies that he was given the Employee Handbook.

47. Under the disciplinary procedure Section G (bundle page 58) it provides that "*The operation of the disciplinary procedure contained, in the previous section, is based on the following authority for the various levels of disciplinary action. [Authority was then set out for all levels of disciplinary penalty at Director level]. However, the list does not prevent a higher or lower level of seniority, in the event of the appropriate level not being available, or suitable, progressing any action at whatever stage of the disciplinary process".*

The hearing on 3 March 2020

48. The disciplinary hearing commenced on 3 March 2020 before Mr Tom Lincoln accompanied by Ms Nadine Charles as notetaker. The claimant was content to be unaccompanied but was made aware of his right to be accompanied. At that hearing the claimant read out a statement (page 86-88) which dealt with his disciplinary charges and also said he wanted to raise a grievance against Mr Wheeler, complaining that Mr Wheeler had been aggressive towards him and had assaulted him. The claimant also put forward his position in relation to the disciplinary allegations against him. Mr Lincoln took time to read the statement and after reading it, made the decision to pause the disciplinary hearing to investigate the grievance. The notes of that hearing were at pages 79-80.

49. At 5:19pm on 3 March 2020 the claimant sent an email to Mr Wheeler which was to stand as his statement for the grievance. He also said in that email that he wanted a copy of the "*thorough investigation*" so he could "*share it with my employment solicitor*" (page 91). This was the same document that he had read out at the hearing earlier in the day. The claimant was hoping to instruct a solicitor, but ultimately he did not do so.

50. On 4 March 2020 Mr Earl wrote to the claimant by letter sent by email, inviting the claimant to a grievance meeting to take place on 6 March 2020 (letter page 96). He understood the remit of the grievance to be that on 11 February 2020:

> *1. Mr Wheeler made 'aggressive demands' of you;*
> *2. Mr Wheeler assaulted you, "more than once, in front of junior members of staff, the wider staff group and customers";*
> *3. Mr Wheelers behaviour was "aggressive and threatening."*

51. Mr Earl asked the claimant to confirm that this was correct or whether there were any other points to be considered as part of his grievance. By email dated 5 March 2020 (page 98) the claimant confirmed that the scope of his grievance was that Mr Wheeler:

> *1. Made aggressive demands of me for money (payment) of a Sthil Hedge Cutter on 11/2/20*
> *2. Mr Wheelers behaviour was aggressive and threatening in that he 'leaned into me' giving me, Mr Morley the belief that I was going to be assaulted by Mr Wheeler.*
> *3. Mr Wheeler assaulted me, more than once by 'touching me', in front of Junior members of staff, the wider staff group and customers.*
> *4. That the investigation that has taken place in order to investigate me has not been thorough or fair.*

52. The first three points were the claimant's response to the disciplinary allegations and the issues he had with those disciplinary allegations. The claimant repeated his request for the investigation documentation. Mr Earl replied that it had been sent to him with the invitation to the disciplinary hearing (page 101). This was the three statements, of Mr Wheeler, Mr Earl and Mr Minard. The claimant thought that there should have been more documentation. I find that at that time, in early March 2020, this was all of the documentation that the respondent had. This is a small family run company that does not have a dedicated HR function. By the date of the final disciplinary hearing, further statements had been taken by Mr Paul Lincoln.

<u>The grievance process</u>

53. The grievance hearing took place on 6 March 2020 with Mr Earl as the grievance officer and Ms Charles attending as notetaker. Whilst Mr Earl

was a witness to the disciplinary issue, I find that it was not inappropriate for him to hear the grievance. The respondent needed to keep other personnel clear in order to deal with the disciplinary hearing and any possible appeal and there were very few senior people who were in a position to fulfil the role. Mr Earl was not hearing the disciplinary itself.

54. The claimant read out his statement set out in an email of 5 March 2020 timed at 14:53 (page 102). At this hearing the claimant did not want to go into any more detail with Mr Earl and declined to discuss the matter any further than what he had written in his statement (page 106).

55. On 9 March 2020 Mr Earl sent the claimant a grievance outcome letter; the grievance was not upheld. Dealing with the claimant's concerns as to Mr Earl hearing the grievance, he said in the letter that it was a small company and as the line manager he was the most appropriate person to deal with the grievance. He also said that there was no one else who could deal with it who had not provided evidence within the disciplinary process due to the size and resources of the business.

56. The claimant was given a right of appeal and he challenged the grievance outcome in an email of 13 March 2020 (pages 110-113). One of the claimant's complaints was that he had a lack of paperwork in relation to the investigation, although he acknowledged that he had received the three statements. He continued with his complaints against Mr Wheeler as to aggressive behaviour and touching him without consent. He also complained about the procedure – stating that he understood that it was a small business but he considered that Mr Earl should not have heard his grievance. The claimant said he thought that the grievance should have been heard by Mr Tom Lincoln, whom he thought was the best option (page 112). I have found that the respondent needed to keep other senior people, such as Mr Tom Lincoln, clear in order to hear the disciplinary itself.

57. The claimant was invited to a grievance appeal hearing on 18 March 2020 (letter page 114) to be chaired by Mr Paul Lincoln who is Mr Tom Lincoln's father together with Ms Charles as notetaker. The claimant agreed that he got on well with Mr Paul Lincoln and he had no concerns about Mr Paul Lincoln hearing his grievance appeal. He said if he was going to be given a choice of someone to do his disciplinary hearing he would have gone for Mr Paul Lincoln. He wanted someone who had not been involved in the incident at all. To the extent that the claimant had concerns about Mr Earl hearing the grievance, I find that this was corrected by Mr Paul Lincoln hearing the appeal.

58. The appeal hearing took place on 18 March. The claimant provided Mr Paul Lincoln with a further written statement dated 18 March 2020 (page 116 – 118).

59. The notes of the appeal hearing were at pages 119 to 122. The notes were disputed by the claimant because the hearing had been recorded,

this was not a full transcript and he had not been provided with the recording. For this reason I am unable find that the notes are a full record of what was said. The claimant does accept, as set out in the notes on page 121, that in a brief moment of doubt, he did briefly acknowledge to Mr Paul Lincoln that he "*didn't even know if he left the van open".* He said he had been asked so many times, that he had a brief moment of doubt, in the same way that a person might leave the house worrying whether they had left the iron on. These notes were in front of Mr Tom Lincoln at the disciplinary hearing.

60. Mr Paul Lincoln sent the claimant a grievance appeal outcome letter by email (page 129 – 131). He explained that following the appeal hearing he had undertaken further investigation by taking further witness statements. Those statements were in front of Mr Tom Lincoln at the reconvened disciplinary hearing as set out below. The appeal was not upheld.

The reconvened disciplinary hearing on 23 March 2020

61. On Friday 20 March 2020 at 15:44 Mr Tom Lincoln wrote to the claimant to invite him to a reconvened disciplinary hearing on 23 March 2020 at 2pm (page 132). The claimant complains about the length of time that he had to prepare for the hearing. He did not complain about this prior to the hearing or seek a postponement of the hearing although he had done so in relation to the hearing that was originally scheduled for 19 February 2020.

62. I find that if he considered that he did not have enough time to prepare, he knew he could ask for a postponement, as he had done so before and been granted a postponement. The claimant had part of Friday afternoon, all weekend and Monday morning to 2pm to prepare and the statements are not long. There were six statements sent to the claimant but only five were used, these were from Mr Minard, Mr Wheeler, Mr Earl, Mr Withrow and the employee from the garden centre named Max.

63. This was the start of the national lockdown due to the pandemic so the hearing took place via telephone. Mr Lincoln told the claimant he would be recording the call so that Ms Charles could make notes of the hearing. The claimant read from a prepared statement. The notes of the hearing were at pages 140 – 147. The claimant disputed that the notes were a full record. The claimant accepts that Mr Lincoln was not involved in the incident on 11 February 2020 but objected to him during this tribunal hearing, on the basis that he worked part time, he was not a manager and is related to Mr Wheeler.

64. During the disciplinary hearing the claimant told Mr Tom Lincoln that he had locked the van. Mr Lincoln gave the claimant an opportunity to comment on Mr Withrow's statement and on Mr Earl's statement stating that the claimant had admitted leaving the van unlocked – the claimant told Mr Lincoln he did not recall this conversation. Mr Lincoln went through

each of the six disciplinary allegations and gave the claimant an opportunity to answer those allegations and give his version of events.

65. Mr Lincoln picked up on the notes from the grievance appeal hearing where it said that the claimant had told Mr Paul Lincoln that he did not know whether he had left the van open. At the disciplinary hearing the claimant told Mr Tom Lincoln he had no doubts. He also told Mr Tom Lincoln that he could not remember what he had said to Mr Wheeler on 11 February.

66. The claimant agreed in evidence that he said the following to Mr Tom Lincoln as set out at the bottom of page 146, notes of the hearing:

> *"WM: I had left the office — I was leaving. Jason W was coming behind me shouting something. He pushed me in my back, spinning me round. Leaned into me — said don't you f**king slam my door again. Leaning into me — backing me up into a corner — I felt threatened beyond belief. So I dragged my hand off and I shrugged him off and I said 'don't f**king touch me get your fucking hands off me you p**sy' and he was going on at me and I said don't you f**king touch me again. I said it about four times. You can check Mr Wheeler's statement. This is me telling a man that put his hands on me. Because I'm using the word f**king I'm getting in trouble? He touched me unwanted — that's assault. What I did was not aggressive given the circumstances — I defended myself in a reasonable manner. I did not put my hands on him. Now I'm in trouble for that."*

67. At the disciplinary hearing, Mr Tom Lincoln had in front of him the five additional statements taken by Mr Paul Lincoln. These were a first statement from a garden centre employee named Max (page 127) and new statements from Mr Alex Withrow (page 128) and Mr Christian Minard, Mr Wheeler and Mr Earl. In Mr Wheeler's second statement, his account was that the claimant told him that he had left the van unlocked (page 123), Mr Earl's statement said that the claimant and Mr Withrow, when asked if the van was locked, said "*probably not*" (page 125).

68. At the start of the hearing the claimant read out a statement he had prepared and he emailed it to Mr Lincoln after the hearing (pages 134-138).

69. In that hearing the claimant denied that he had ever said that he had not locked the van. He maintained that he had checked the van door and made sure it was locked. He denied Mr Earl's version of events. He also told Mr Lincoln that he had never been told that he had to make sure that the company's vehicles were kept locked. Mr Lincoln did not accept this because he was aware that the claimant had been through a previous disciplinary process for leaving the van door unlocked leading to tools being stolen (see letter page 68 dated 13 July 2017). I find it was reasonable for Mr Lincoln to form the view that the claimant was under no misapprehension that the van had to be locked to protect the company's

property from theft.

70. The claimant told Mr Lincoln that he could not remember what he had said to Mr Wheeler on 11 February 2020 but admitted that he slammed the office door. He also admitted that he had sworn at Mr Wheeler while in the garden centre, in front of customers and other members of staff.

71. In his written response to the disciplinary allegations the claimant said he did not recall telling Mr Earl that he had left the van unlocked. He admitted that he had been angry with Mr Wheeler (page 93) and he did not deny in relation to allegations 3, 4 and 5 that he had used the language relied upon. He admitted slamming the door as he left the office. On allegation 6 he did not admit that his conduct amounted to gross insubordination.

72. After the hearing Mr Lincoln reflected on what he had heard and decided that on a balance of probabilities the claimant had left the van door unlocked leading to the hedge cutter being stolen and that he had behaved in an aggressive and threatening manner towards Mr Wheeler. He considered this amounted to gross misconduct and made the decision to dismiss. I asked Mr Lincoln if he had considered alternatives to dismissal. He said that due to the aggression and the language used by the claimant he considered that the employment relationship was beyond repair so he did not consider a lighter penalty to be suitable. I find that he gave the matter his consideration.

73. Mr Lincoln sent the claimant a dismissal letter dated 24 March 2020 (sent by email) (pages 148-151). On the first allegation, he found after a full consideration of the evidence, on a balance of probability that the claimant left the van unlocked. He formed this view on the statements of Mr Earl, Mr Withrow and Mr Wheeler, including that Mr Earl recalled the claimant saying he had "*probably not*" locked the van and Mr Withrow not remembering the claimant locking the van. Mr Tom Lincoln also found that the claimant knew and had been reminded of the need to lock company vans. He also took into account that there was no evidence of any forced entry to the van (page 149).

74. On the second allegation he found that given his finding that the claimant left the van unlocked, he had been negligent leading to loss to the company. This was the consequence of his finding on allegation 1.

75. On the third allegation, Mr Lincoln had the admissions of using abusive language to Mr Wheeler four times and he found the fourth allegation proven.

76. On the fourth allegation, being the allegation of using threatening and abusive language in front of other members of staff, He relied upon the statements of others – Mr Withrow, Mr Minard, Mr Earl and Max, who all said that they witnessed this. I find it was reasonable for Mr Lincoln to form this view based on the number of witness statements. The claimant complains that he believed pressure was put on Mr Withrow to give this

statement, but even without this, there were two other statements to this effect.

77. On the fifth allegation, the claimant taking off his coat leading Mr Wheeler to believe that he was going to be assaulted, Mr Lincoln took the view that as the claimant admitted taking off his coat and this put Mr Wheeler in fear. Mr Lincoln considered that this was a reasonable belief on the part of Mr Wheeler and he found this allegation proven.

78. On the sixth allegation of gross insubordination, Mr Lincoln found that the claimant did use threatening and abusive behaviour towards Mr Wheeler in front of other members of staff and that Mr Wheeler was a Director of the company. Mr Lincoln found this behaviour "*entirely unacceptable"* and found this allegation was proven.

79. He also addressed the claimant's concern that he had not had enough time to prepare for the hearing. He noted that the claimant had told him he had "*read Alex's statement several times"* and that he had all weekend and half of Monday to prepare.

<u>The appeal against dismissal</u>

80. On 28 March 2020 the claimant appealed the decision to dismiss in a lengthy email (pages 152-159).

81. Ms Charles emailed the claimant inviting him to an appeal hearing on 3 April 2020.

82. The appeal was heard by Mr Paul Lincoln on Friday 3 April 2020 at 4:30pm by telephone, due to the national lockdown at the start of the pandemic. The notes of the hearing were at page 162. It was a short hearing because the claimant said that everything that he wanted to say was in his appeal letter. The claimant told Mr Paul Lincoln that he did not really want to add to it, although he was given the opportunity to do so. Mr Lincoln said that he would adjourn the meeting and be in touch. The claimant did not complain at the time about Mr Paul Lincoln hearing his appeal against dismissal.

83. On 7 April 2020 Mr Paul Lincoln sent the claimant an appeal outcome letter (pages 163 – 165). He went through each of the points of appeal in turn. The appeal was not upheld. The tribunal did not hear evidence from Mr Paul Lincoln.

The relevant law

84. Misconduct is a potentially fair reason for dismissal under section 98(2)(b) of the Employment Rights Act 1996.

85. Section 98(4) of the Employment Rights Act 1996 provides that 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.

86. As is well known, the leading case of ***British Home Stores Ltd v Burchell 1978 IRLR 379*** sets out three elements for a fair conduct dismissal. First, there must be established by the employer the fact of the belief by the employer in the guilt of the employee in relation to that misconduct. Second, it must be shown that the employer had in its mind reasonable grounds upon which to sustain that belief. And third, the employer at the stage at which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case

87. A dismissal is fair if it falls within the band of reasonable responses - see ***Iceland Frozen Foods v Jones 1983 ICR 17***. The Tribunal is not entitled to substitute its view for the view of the employer, either in relation to the fairness of the sanction or the reasonableness of the investigation; the band of reasonable responses test applies equally to both – see ***Sainsbury's Supermarkets Ltd v Hitt 2003 ICR 111***.

88. In relation to a disciplinary investigation, the Court of Appeal in ***Shrestha v Genesis Housing Association Ltd 2015 IRLR 399*** said: "*To say that each line of defence must be investigated unless it is manifestly false or unarguable is to adopt too narrow an approach and to add an unwarranted gloss to the* Burchell *test. The investigation should be looked at as a whole when assessing the question of reasonableness*." (Judgment paragraph 23).

89. Paragraph 6 of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 provides that "*In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing."*

90. Paragraph 22 of the Code says "*A decision to dismiss should only be taken by a manager who has the authority to do so".*

91. Section 13(1) of the ERA 1996 provides an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or the worker has previously signified in writing his agreement or consent to the making of the deduction.

Conclusions

<u>Was there a reasonable investigation?</u>

92. There was no need on my finding for the respondent to involve the police in terms of conducting their own internal disciplinary investigation. The police deal with the criminal law to a different standard of proof. The respondent as an employer dealing with their own internal investigation, is required to establish the facts on a balance of probabilities and not beyond reasonable doubt. They were not required to involve the police.

93. The investigation consisted of collecting an initial three statements, which I agree was insufficient, but then Mr Paul Lincoln went on to collect six more statements, one of which was not used. There was no CCTV to be considered. It was not necessary to involve the police. There was no evidence put forward of any forced entry to the van.

94. The requirement on the part of the respondent is to carry out a reasonable investigation and not an exhaustive investigation (see ***Shrestha*** above) and I am also required to take into account the size and administrative resources of the respondent. This is a small business without a dedicated in-house HR function. I find that statements were taken from the key players and the respondent conducted such investigation as was reasonable in all the circumstances. I find that this was a reasonable investigation.

Did Mr Tom Lincoln have a reasonable belief in the claimant's misconduct?

95. I deal first of all with the claimant's challenge to Mr Tom Lincoln as the disciplinary officer. I find that there was no requirement for Mr Tom Lincoln to be a manager or to work full time. The disciplinary procedure at section G, set out above, specifically provides that a person of higher or lower authority than Director could deal with the disciplinary hearing if the person of appropriate level was either not available or suitable. It was clearly not suitable for Mr Jason Wheeler to hold the disciplinary as he was a witness of fact. His brother is the co-owner of the business, on the cut flower side, but given the complaints that the claimant made about Mr Tom Lincoln holding the disciplinary, I find on a balance of probabilities that he would have objected even more to Mr Jason Wheeler's brother conducting the hearing.

96. It is not in dispute that Mr Tom Lincoln is related to Mr Wheeler, although there was a disagreement as to the closeness of that relationship, whether nephew or distant cousin. I have made no finding on the precise relationship but find that it is inevitable in a small family run business that those in authority are likely to be related. This is an internal disciplinary process and I do not agree with the claimant that the respondent should have engaged external HR personnel to deal with it. They can do so if they wish, but they are not under an obligation to do so. It is an internal process.

97. So far as paragraph 22 of the ACAS Code is concerned, the important issue is that the dismissing officer has to have the authority to dismiss. Mr Tom Lincoln was authorised by the Managing Director Mr Wheeler, to hear

the disciplinary so I find no procedural unfairness in Mr Tom Lincoln being the disciplinary officer. Mr Tom Lincoln was not "*under pressure*" from Mr Wheeler as the claimant submitted. I have found above that Mr Wheeler held Mr Tom Lincoln in high regard and respected his opinion.

98. So far as paragraph 6 of the ACAS Code is concerned, different people carried out the investigation and the disciplinary hearing so there was no breach of the Code in this respect

99. On the question of whether Mr Tom Lincoln had reasonable grounds for believing the claimant was guilty of misconduct, I have found first of all that his decision was based upon a reasonable investigation. He had in front of him the initial three statements from Mr Wheeler, Mr Earl and Mr Minard and then the additional five statements relied upon. If the respondent had only relied on the first three statements, I agree with the claimant that this would not have been reasonable as those statements did not deal with all of the issues. The respondent was right to collect the additional statements. Three of those statements said that the claimant had left the van unlocked and even though the claimant complains about Mr Withrow's statement, Mr Tom Lincoln also had the statements of Mr Earl and Mr Wheeler in which they say the claimant told them that he had not locked the van or had probably not locked the van.

100. Mr Lincoln had no evidence in front of him to suggest a forced entry to the van. He also had the notes of the grievance appeal where the claimant told Mr Paul Lincoln "*Paul I don't even know if I left the van open mate".* Although the claimant said in evidence at this hearing that this was a brief moment of doubt, it was still something that he said, which Mr Tom Lincoln was entitled to take account of when making his decision.

101. The claimant was given a proper opportunity to state his case at the disciplinary hearing on each of the disciplinary charges. I have found that he was given sufficient time to prepare.

102. Mr Tom Lincoln did not have to be satisfied that the disciplinary charges were proven beyond reasonable doubt. He had to decide on a balance of probabilities whether the charges were proven. He gave detailed consideration and gave his findings in his outcome letter. He found that the claimant had left the van open, this was negligent and that he had behaved in an insubordinate, threatening and offensive manner, including in front of customers and that this was unacceptable behaviour. I find that Mr Lincoln had a reasonable belief in the claimant's misconduct on a balance of probabilities.

<u>Was dismissal within the band of reasonable responses?</u>

103. I have found above that Mr Tom Lincoln did consider whether a lesser penalty should be imposed but took the view that the claimant had used threatening and abusive behaviour towards Mr Wheeler in front of other members of staff and that this behaviour was "*entirely unacceptable".* He

took the view that because of this the employment relationship was beyond repair. I remind myself that it is not for me to substitute my view for that of Mr Tom Lincoln and the question is not whether I would have made the same or a different decision. I find that given the seriousness of the conduct in question, with threatening and aggressive behaviour, the decision to dismiss fell within the band of reasonable responses open to this respondent as the employer.

104. In procedural terms, I find that the respondent followed a prompt and fair procedure by postponing the first scheduled disciplinary hearing due to the claimant not being well enough to attend, postponing the hearing that started on 3 March 2020 to allow for a grievance process to be conducted including an appeal and holding a disciplinary hearing on 23 March. The claimant understood the charges against him, had an opportunity to state his case, was given the right to be accompanied and a right of appeal which he exercised.

105. In all these circumstances I find that the dismissal was fair and the claim for unfair dismissal fails.

106. On the claim for unlawful deductions from wages there was an express contractual provision, signed by the claimant, titled "*Deductions from pay"* (page 54) which means that the deduction was not unlawful. Mr Lincoln was satisfied on a balance of probabilities that the claimant had not locked the van and therefore on his finding, this constituted negligence. The respondent was entitled to exercise the express contractual provision and the claim for unlawful deductions from wages in the sum of £225 therefore fails.

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Employment Judge Elliott
Date: 10 May 2021

Judgment sent to the parties and entered in the Register on: 10/05/2021

_____ for the Tribunal