



EMPLOYMENT TRIBUNALS

Claimant

Mr James Farrell

Respondent

v East of England Ambulance Service
NHS Trust

Heard at: Cambridge

On: 5, 6 and 7 July 2021

Before: Employment Judge Mr. A Spencer (sitting alone)

Appearances:

For the Claimant: Mr S Hoyle, Lay Representative

For the Respondent: Ms J Smeaton, Counsel

JUDGMENT having been sent to the parties on 5th August 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

BACKGROUND

1. The Respondent is East of England Ambulance Service NHS Trust. The Claimant, Mr. Farrell was employed by the Respondent as a Paramedic. He was dismissed on 28 February 2017 for alleged gross misconduct; specifically, he was found by the Respondent to have stolen items of equipment belonging to the Respondent.
2. The Claimant presented his claim form to the Tribunal on 21 April 2017 following a period of Acas Early Conciliation from 19 March 2017 to 19 April 2017. The Claimant brings complaints of unfair dismissal and breach of contract (wrongful dismissal). There was a third complaint regarding arrears of wages. However, that is no longer pursued.
3. I heard the case over the course of a three-day Final Hearing.
4. I heard two Applications from the Claimant at the outset of the Hearing. The Claimant sought permission to amend his claim to add new complaints and further Respondents. I refused the applications for the reasons given in a separate decision.

THE ISSUES

5. The issues for me to determine in this case are agreed by the parties and they are as follows:

UNFAIR DISMISSAL CLAIM

- (1) Was the Claimant dismissed for a potentially fair reason, in this case misconduct?
- (2) Did the Respondent genuinely believe that the Claimant was guilty of misconduct, in particular, theft?
- (3) Was that belief based on reasonable grounds following a reasonable investigation?
- (4) Did the Respondent follow a fair procedure?
- (5) Was the decision to dismiss within the range of reasonable responses?

WRONGFUL DISMISSAL CLAIM

- (6) Did the Claimant commit a fundamental breach of contract by the alleged theft and/or breach of the implied term of trust and confidence, such that the Respondent was entitled to dismiss the Claimant without notice?
6. The focus of the Claimant's complaint of unfair dismissal is that the Respondent failed to follow a fair procedure before dismissing him. The Claimant points to the fact that whilst the disciplinary investigation and disciplinary proceedings were conducted, he was also the subject of a criminal prosecution in the Crown Court. His case is that he was denied a fair opportunity to defend his position in the disciplinary proceedings because of the ongoing criminal case and his bail conditions. The specific complaints raised by the Claimant in the claim form are as follows:
- 6.1 the bail conditions in the criminal proceedings prevented him from having direct or indirect contact with certain third parties including a key witness in the disciplinary proceedings. Consequently, he could not have a fair disciplinary hearing given that he was unable to question that witness;
 - 6.2 he could not advance a positive case in the disciplinary procedure without undermining his case in the ongoing criminal proceedings as that would involve witnesses becoming aware of the challenge to their evidence;
 - 6.3 the Respondent was wrong to hold the disciplinary hearing in the Claimant's absence;

- 6.4 the Respondent was wrong to have failed to have made an application to the Crown Court to vary the Claimant's bail conditions to allow contact between him and one of the Respondent's witnesses; and
- 6.5 the Respondent should have delayed the disciplinary process until after the criminal trial.
7. All the above complaints are said to have denied the Claimant right to a fair hearing.
8. The Claimant also alleges that the investigation was, in the words of the claim form, "*fatally flawed and incompetently carried out*", although no particulars have been advanced to support this allegation.
9. The Claimant also asserted that the decision to dismiss was pre-determined, as at the time the Claimant had an unresolved grievance regarding his pay. However, that argument was not pursued by the time I came to closing submissions.
10. The Respondent's case is that:
 - 10.1 they had a genuine belief that the Claimant was guilty of gross misconduct; and
 - 10.2 they reached that conclusion upon reasonable grounds having followed a fair procedure; and
 - 10.3 the decision to dismiss was within the range of reasonable responses.
11. With regard to the wrongful dismissal claim, it is agreed that the Claimant was dismissed without notice or payment in lieu of notice. The Respondent asserts that the Claimant was guilty of gross misconduct and that they were therefore entitled to dismiss the Claimant without notice.
12. The Claimant asserts that he was not guilty of gross misconduct and that the Respondent was therefore in breach of contract by dismissing him without giving him his full notice period, or making a payment in lieu of notice.

DOCUMENTS

13. I was provided with a very substantial volume of documents in this case. They included a hearing bundle with more than 2,100 pages of documents. This was supplemented by an opening note and written closing submissions from the Respondent's Counsel, a cast list, a chronology and some supplementary documents which were added to the hearing bundle.
14. I expressed concern at the outset of this hearing over the sheer volume of documents that had been provided for a three-day case. I made it clear

that I would limit my reading to the documents that were referred to in the witness statements and the documents that I was either taken to when witnesses gave evidence, or in closing submissions. The parties' Representatives accepted this.

WITNESS EVIDENCE

15. I heard evidence from the following witnesses:

15.1 For the Respondent:

- Clare Chambers: employed as Head of Information Management and Technology at the relevant time. Ms. Chambers made the decision to dismiss the Claimant; and
- Robert Ashford: employed at the time as Deputy Director of Service Delivery within the Respondent. Mr. Ashford heard the Claimant's appeal against dismissal.

15.2 The Claimant gave evidence himself and called no further witnesses.

16. All three witnesses gave evidence before me under Oath or Affirmation. The witnesses confirmed the truth and accuracy of their written statements. I had the benefit of seeing their evidence tested under cross examination and the opportunity to put questions to the witnesses myself.

FINDINGS OF FACT

17. The Respondent is a Regional Ambulance Service NHS Trust. It provides services across the East Anglian Region and employs approximately 4,000 members of staff. The Respondent is a large organisation with substantial resources. The Respondent has the benefit of a dedicated Human Resources Team providing HR support to members of their management who conduct Disciplinary Hearings and Appeals.

18. The Claimant was continuously employed by the Respondent from November 1999 until his dismissal on 28 February 2017. At the time of his dismissal the Claimant was employed as a Senior Paramedic based in the Respondent's Kempston Ambulance Station. The Claimant was assigned to one of the Respondent's Rapid Response Vehicles ("RRVs") which complement the work of traditional ambulances. RRVs are crewed by a single paramedic and are designed to provide a quicker response to certain types of incident.

19. The Claimant had a clean disciplinary record at the time of his dismissal.

20. The Respondent has a written policy and procedure for conduct and performance issues. It states that certain offences amount to gross misconduct and will normally be regarded as so serious that the usual sanction is dismissal. The Policy gives a non-exhaustive list of examples of such conduct, including theft and bringing the Respondent into serious disrepute.

21. The Claimant worked under the terms of a written Contract of Employment. The contract refers to the Respondent's Disciplinary Policy and Procedure and makes express reference to the list of examples of gross misconduct and the fact that they will normally result in summary dismissal.
22. On 4 January 2016, the Respondent received a complaint from a member of the public named Mark Wells-Pestell. Mr. Wells-Pestell raised serious allegations in respect of the Claimant. Mr. Wells-Pestell said that until recently he had worked for a company called Thames Valley Ambulance and Paramedic Service Limited ("TVAPS"). Mr. Wells-Pestell asserted that the Claimant ran the company with his wife and alleged that he had witnessed the Claimant putting equipment into stock at TVAPS which had been stolen from the Respondent. Mr. Wells-Pestell was contacted and gave a statement in which he provided further information. He alleged that the Claimant would return from his duties with the Respondent with items that he had taken without the Respondent's permission, usually from Kempston Ambulance Station. Mr. Wells-Pestell gave details of the items which included ECG paper and other everyday consumables. He also asserted that the stolen equipment included a Zoll defibrillator. He gave the specific serial number of the defibrillator and provided photographs of it at the premises of TVAPS. The serial number was checked by the Respondent and identified the defibrillator as belonging to the Respondent.
23. Clive Goodson, the Respondent's Senior Locality Manager reported the matter to the Police on 28 January 2016. The Police visited the premises of TVAPS in late March 2016. Mr Goodson was asked by the Police to attend the premises with them and to identify any equipment found that belonged to the Respondent. Mr Goodson identified a significant quantity of other items belonging to the Respondent and provided a witness statement to the Police to that effect. Mr Goodson's evidence was that the Respondent's equipment that was found at TVAPS's premises was valued at almost £20,000.
24. The equipment included a thermometer which was marked with a vehicle call sign that corresponded with the call sign of the RRV that the Claimant worked on. It also included an AED defibrillator which was registered to Kempston Ambulance Station where the Claimant worked. The Claimant was arrested under suspicion of theft.
25. The Respondent decided to conduct a disciplinary investigation into allegations that the Claimant had stolen items belonging to the Respondent which caused a fundamental breach of the implied duty of mutual trust and confidence and had brought the Respondent into disrepute as a result of his actions.
26. The Claimant was suspended pending the disciplinary investigation and was informed of this in writing. By this time the Claimant was also on Police bail.

27. The disciplinary investigation was conducted by Christina Hibbitt, the Respondent's Patient Safety Officer. Ms. Hibbitt interviewed Mr. Goodson who confirmed the evidence he had given previously. The Claimant was also interviewed as part of the investigation. He was accompanied by an experienced Union Representative. He was interviewed at home as he was on Police bail at the time and subject to a bail condition that he should not attend the Respondent's premises.
28. The Claimant accepted that TVAPS was his wife's family business and that he helped at the business. He accepted that the AED and thermometer belonging to the Respondent were found at TVAPS's premises. When asked how they might have got there, the Claimant suggested that he had been set up by Mr. Wells-Pestell. The Claimant produced a letter from Mr. Wells-Pestell that the Claimant describes as "a blackmail letter". The content of that letter is concerning. Mr. Wells-Pestell clearly has a grievance against the Claimant and / or TVAPS and threatened to take certain action, including reporting theft to the Police unless TVAPS took the action demanded by Mr. Wells-Pestell. The Claimant denied theft, although he clearly recognised the gravity of his situation by saying at the investigation meeting : *"I can understand how it looks"*.
29. Miss Hibbitt prepared an investigation report. It is a comprehensive document. The scope of the investigation included taking statements from Mr. Wells-Pestell and Mr. Clive Goodson. The Claimant was also interviewed. The evidence obtained by the end of the investigation stage included the following:
 - 29.1 a statement from Mr. Wells-Pestell in which he alleged the Claimant had stolen items from the Respondent;
 - 29.2 a photograph of the defibrillator at the Premises of TVAPS;
 - 29.3 the serial number identified the defibrillator as the Respondent's property;
 - 29.4 TVAPS was the family business of the Claimant's wife. Further, the Claimant having accepted that he had a role in the business;
 - 29.5 items of equipment belonging to the Respondent had been found by the Police at the premises of TVAPS. Some of which had been identified as originating from Kempston Ambulance Station at which the Claimant worked; and
 - 29.6 the Claimant had denied the allegations, asserting that Mr. Wells-Pestell had set him up.
30. In the light of that evidence, the Respondent decided to proceed with the disciplinary process. That was an entirely reasonable decision in view of the evidence available to them at the time.
31. The Respondent wrote to the Claimant to invite him to a disciplinary

hearing. The letter sets out the allegations the Claimant faced, made it clear that those allegations might amount to gross misconduct which would normally lead to dismissal. The Claimant was given the right to be accompanied to the disciplinary hearing by a work colleague or Union Representative. Further, the Respondent confirmed that the Police had advised them that he would not breach his bail conditions by attending the Respondents premises for the disciplinary hearing.

32. At this point in time it was envisaged that Mr Simon King, the Senior Locality Manager of the Respondent, would conduct the Disciplinary Hearing.
33. On 28 September 2016, the Solicitors representing the Claimant in the criminal prosecution wrote to the Respondent to ask for the disciplinary hearing to be postponed pending the outcome of the criminal trial. They confirmed that the Claimant had entered a 'not guilty' plea and that the case had been listed for Trial in the Crown Court on 14 March 2017 with a time estimate of six days. They confirmed that their advice was that the Claimant should not attend the disciplinary hearing as this would potentially prejudice his criminal trial. They confirmed that their advice to the Claimant was that he should not participate in the disciplinary process. Furthermore, the Claimant's Solicitors informed the Respondent that the Claimant was subject to a bail condition that he must not contact Mr Goodson directly or indirectly. They identified that this would be problematic given that Mr Goodson was likely to be a witness at the disciplinary hearing.
34. Ms Helena Adams, the Respondent's HR Locality Manager, made enquiries of the Police regarding the Claimant's bail conditions. She was informed by PC Fletcher that the Claimant's bail conditions included a prohibition on contacting Mr Goodson either directly or indirectly, including via a third party, and that the Claimant must not attend the Respondent's premises other than for medical reasons, or as directed by the Respondent for suspension or employment meetings. However, PC Fletcher confirmed to the Respondent that she was content for the Claimant to attend the disciplinary hearing and that the bail conditions would not be breached provided Mr Goodson and the Claimant were kept separate throughout the proceedings and questions were put to Mr Goodson through a third party. She confirmed that the rationale for the condition was to protect Mr Goodson from being subject to witness intimidation.
35. On 11 November 2016, the Claimant's Solicitors in the criminal proceedings made a further request to delay the disciplinary hearing. This time they asked for the hearing to be delayed until after 1 December 2016 rather than until after the trial. This was the date on which the Claimant was due to serve his defence statement in the Crown Court proceedings. The Solicitors explained that the rationale for this was that the Respondent would then see the nature of the Claimant's defence against the allegations and would be in a more informed position to consider whether the disciplinary hearing should proceed thereafter.
36. On 28 November 2016, the Claimant's current Representative Mr Hoyle,

wrote to the Respondent to confirm that he would be representing the Claimant in a forthcoming Employment Tribunal claim against the Respondent. In the email, Mr Hoyle asserted that PC Fletcher was “*an incompetent trainee*” and her advice regarding the bail conditions was wrong”.

37. Mr Hoyle suggested that only the Crown Court could vary the bail conditions as it was the Crown Court who by this stage had imposed the conditions and not the Police. He also informed the Respondent that the Claimant had a Health and Care Professions Council (“HCPC”) hearing on 9 December 2016 which was the same date scheduled by the Respondent for the Claimant’s disciplinary hearing. The HCPC is the professional regulator for paramedics.
38. In subsequent email exchanges, Mr Hoyle made it clear that the Claimant would not be attending a disciplinary hearing until after the conclusion of the Crown Court Trial in March 2017.
39. It was at this point that Ms Chambers was asked to conduct the disciplinary hearing, to replace Mr. King who was no longer available. Ms Chambers had not been involved prior to this. She had no reason to bear the Claimant any ill will, nor did she have any pre-existing reason or agenda to dismiss the Claimant.
40. The Respondent decided to postpone the Disciplinary Hearing that by this stage was re-scheduled for 9 December 2016. The reason for this was because the date clashed with the Claimant’s HCPC hearing. Ms Adams wrote to Mr Hoyle to confirm the decision.
41. Ms Chambers elected not to postpone the disciplinary hearing until after the criminal trial as initially requested by the Claimant’s Solicitors. In making her decision she relied upon the fact the two procedures were separate; the disciplinary procedure was already some nine months old and the Claimant had been suspended for a prolonged period. She considered the advice from the Police regarding the Claimant’s bail conditions and the email from the Claimant’s Solicitor which indicated that he would have notified the Crown of the basis for his defence by early December. She was aware that the criminal trial was about three months away and that it was not uncommon for such trials to be adjourned. She also considered the fact that in the Claimant’s absence, covering his duties required the Respondent to make payments for overtime or agency staff.
42. The Respondent wrote to Mr Hoyle on behalf of the Claimant on 23 December 2016 to inform him that the disciplinary hearing had been rescheduled for 9 January 2017. The issue of the Claimant’s bail conditions was addressed and copies of the emails containing the advice of PC Fletcher were provided. Ms Adams also suggested that if the Claimant was not going to attend the hearing, he could send a work colleague or Union Representative on his behalf to ask questions of the witnesses and to make representations on his behalf. Ms. Adams confirmed that the Respondent would permit Mr Hoyle to attend in this capacity notwithstanding the fact that he was not a work colleague or

Union Representative. She encouraged the Claimant to participate in the hearing and warned of the possibility of the hearing proceeding in the Claimant's absence.

43. Mr Hoyle responded to make it clear that he considered the advice of PC Fletcher was wrong. He also made it quite clear that the Claimant would not be attending the disciplinary hearing on 9 January 2017 and would not attend a disciplinary hearing until after the conclusion of the Crown Court proceedings.
44. Ms Chambers proceeded with the disciplinary hearing on 9 January 2017. She was accompanied by members of the Respondent's HR Team to provide advice regarding procedure. Ms. Hibbitt attended to confirm the findings of her disciplinary investigation. The Claimant did not attend and did not send a representative to attend on his behalf. Mr Goodson was present as a witness. I have seen minutes of the meeting.
45. Ms. Chambers took the opportunity to question Mr Goodson about his evidence. For example, she questioned him about security at Kempston Ambulance Station and whether there had been reports of unknown people visiting the Station. She also questioned Mr Goodson about Mr. Wells-Pestell; no doubt informed by the Claimant's allegation that he had been set up.
46. Ms. Chambers took full opportunity to question Mr Goodson about his evidence and to put to him some of the matters that might otherwise have been put to him by the Claimant or his Representative in his defence.
47. At the conclusion of the hearing, Ms Chambers adjourned the hearing. The purpose of the adjournment was for her to seek further information from Mr. Wells-Pestell and to give the Claimant an opportunity to provide written submissions before a decision was made.
48. Ms Chambers wrote to the Claimant on 9 January 2017 to confirm that the disciplinary hearing had taken place in his absence. She also confirmed her decision to adjourn and to give the Claimant the opportunity to make a written submission.
49. On 10 January 2017, Detective Inspector Brammer wrote to the Respondent's HR Team. It is clear from the email that he was aware of PC Fletcher's previous advice regarding the Claimant's bail conditions and that he agreed with her advice.
50. The Claimant was provided with minutes of the disciplinary hearing at his request. The Claimant declined to provide any written submissions. Ms. Chambers offered the Claimant the opportunity to put questions to Mr Goodson through her. This offer was also not taken up by the Claimant.
51. Ms Chambers wrote to the CPS with a view to securing an interview with Mr. Wells-Pestell. The CPS did not respond.
52. On 2 February 2017, Ms Chambers wrote to the Claimant to confirm that the disciplinary hearing would resume on 10 February 2017. She provided

the Claimant with an update, encouraged the Claimant to attend, offered him an opportunity to call witnesses and to provide written representations.

53. The disciplinary hearing reconvened on 10 February 2017. The Claimant did not attend, did not call any witnesses and did not make any written representations.
54. Ms. Chambers was supported by members of the Respondent's HR Team throughout. However, it was Ms. Chambers who made the decision to dismiss. Her decision was communicated to the Claimant by letter dated 24 February 2017. I am satisfied from Ms Chambers evidence, that the content of that letter reflects her decision. She concluded, on the balance of probabilities, that the only reasonable explanation for the Respondent's property being found on TVAPS's premises was because the Claimant had taken it from the Respondent for the benefit of his wife's business.
55. Ms Chambers considered the appropriate sanction taking into account the Claimant's length of service and his clean disciplinary record. She concluded that the appropriate sanction was summary dismissal as the Claimant's conduct amounted to gross misconduct. The date of termination of the Claimant's employment was confirmed as 28 February 2017 to allow time for the letter to arrive. The letter also confirmed the Claimant's right to appeal.
56. The Claimant exercised his right to appeal, submitting an appeal against dismissal by letter dated 3 March 2017. His grounds of appeal included the assertion that he had been denied a fair hearing. He said that he had been unable to participate in the disciplinary hearing because of his bail conditions and because it would prejudice his defence in the criminal proceedings to put his case to a witness during the disciplinary proceedings who would go on to be a witness in the criminal proceedings.
57. The Claimant's trial took place in the Crown Court in March 2017 as scheduled. The case collapsed after about three days when the Crown decided to offer no evidence. This resulted in the Trial Judge directing the acquittal of the Claimant. There is no Judgment confirming the reasons for the Trial collapsing. I was taken to relevant parts of the extensive transcript of the proceedings. It is of note, that the Trial Judge expressed concern at the outset of the Trial about the drafting of the indictment and the fact that it appeared to have been drafted in such a way as to require the Crown to prove that the Claimant had stolen all of the relevant items in order to secure a conviction. Further, Mr. Goodson's evidence before the Crown Court was unconvincing. He had made a note that suggested that an item of equipment was found in one vehicle at TVAPS's premises, when in fact the Police had found it in another vehicle at the premises. However, what appears to have been the death knell for the prosecution is the fact that when Mr Fleming, an employee of the Respondent, gave evidence, it became apparent that the Respondent's records suggested that one of the pieces of equipment that the Claimant was accused of stealing was shown in the Respondent's records as having been maintained by the Respondent on a date after it was found at TVAPS's premises. This suggested that the item had remained in the Respondent's

possession and could not have been stolen. After an adjournment, in which the prosecution sought to check the position without any satisfactory explanation, the Crown decided to offer no evidence and the Claimant was acquitted.

58. After the Trial collapsed, the Claimant submitted further grounds of appeal against his dismissal, including relying on the collapse of the prosecution in the Crown Court.
59. Mr Ashford was appointed to hear the Claimant's appeal against dismissal. He wrote to the Claimant in March 2017 to invite the Claimant to an appeal hearing on 21 April 2017. Mr Ashford had no history with the Claimant. He had no reason to bear him any ill will, or to want to see him dismissed.
60. The Claimant made it clear in his correspondence via Mr Hoyle that he would not be attending the appeal hearing. The Claimant has suggested in these proceedings that such correspondence had the effect of withdrawing the appeal. However, the correspondence does not state at any stage that the appeal was withdrawn. What was clear, is that the Claimant would not be participating in the appeal process as he had lost all trust and confidence in the Respondent as his employer and did not wish to be reinstated to his employment with the Respondent. However, the Claimant did not state in clear terms that he was withdrawing his appeal and the Respondent did not think to ask him to confirm if he was withdrawing his appeal. In the circumstances, the appeal continued.
61. The appeal hearing took place on 21 April 2017 in the Claimant's absence. As the Claimant's grounds of appeal raised complaints of procedural irregularities, Mr. Ashford conducted the appeal as a complete re-hearing in line with the Respondent's disciplinary policy. He also decided to adjourn the hearing to a later date. Mr Ashford sought to obtain the evidence and documents used in the criminal proceedings by requesting this from the Claimant, the Police and the CPS. He obtained a complete transcript of the Crown Court proceedings. All this caused significant delay, placing the timescale for the appeal well outside the Respondent's normal 28-day time limit in their disciplinary policy.
62. The management case for the appeal was sent to the Claimant in August 2017 and the appeal hearing reconvened on 23 August 2017. As previously indicated, the Claimant did not attend. Mr Ashford, however, decided to adjourn to give the Claimant one final opportunity to attend and the hearing was rescheduled for 27 and 28 September 2017.
63. The Claimant was invited to the adjourned appeal hearing and provided with all the relevant documents in advance. The hearing reconvened on 27 September 2017. Again, the Claimant did not attend. This time Mr Ashford proceeded with the appeal in the Claimant's absence. He heard evidence from three witnesses:
 - James Fleming;
 - Amanda Flute; and
 - Mark Wells-Pestell.

64. The notes of the appeal hearing were sent to the Claimant who was invited to make comments before the outcome was decided. Further evidence was received from Amanda Flute after the hearing which was also shared with the Claimant. All the new information was shared with the Claimant. Comments were invited from the Claimant, but none were received.
65. In the circumstances, Mr Ashford decided the appeal. I am satisfied from the evidence that the decision was his decision and free from undue influence by the Respondent's HR Team. The letter confirming the outcome and the reasons for his decisions were sent to the Claimant on 11 January 2018.
66. The letter confirms Mr. Ashford's decision and the reasons for his decision. It is clear from Mr Ashford's evidence and the letter that he undertook a careful review of all the available evidence. It is of note that Amanda Flute's evidence in the appeal proceedings explained the discrepancy in the Respondent's records which was one of the key reasons for the collapse of the criminal trial. She gave evidence to explain that she had greater access than Mr Fleming to the details on the Respondent's computer system and that the records that purported to show that equipment was still in the possession of the Respondent after the alleged theft, were not in fact records of the equipment having been serviced on the dates in question. She provided an explanation as to how the information on the system did in fact support the contention the item of equipment was last in the Respondent's possession before the alleged theft.
67. Notwithstanding the Claimant's decision not to engage, Mr Ashford considered the alternative explanations that had been advanced by the Claimant for the Respondent's property being found at the premises of TVAPS. The Claimant had suggested that equipment may have been inadvertently swapped at a public event in July 2015 which would explain why the Respondent's equipment was found at the premises of TVAPS. This was considered. Mr Goodson's evidence was that the vehicles from Kempston Ambulance Station had not attended the event so this could not have happened.
68. The Claimant had also suggested that TVAPS might have purchased the Respondent's equipment legitimately at a public auction. Mr. Ashford heard evidence from Amanda Flute that such equipment bore identifying markings, including labels and the marking of asset numbers which were removed before such equipment was sold. Further, there was a specific process for doing so with staff having to complete records to show that it had been done. Some of the equipment found at TVAPS' premises still bore such markings making it unlikely that TVAPS had bought the equipment at auction.
69. The Claimant had also suggested that medical equipment was often swapped inadvertently at Accident and Emergency departments and therefore moved between Ambulance organisations particularly when equipment was left with a patient. Mr. Ashford accepted that some items

of the type that had been found at TVAPS' premises might be swapped in this way, including items such as traction splints, head blocks and carry sheets. Such items were commonly left with patients when the patient was handed over. However, other items including thermometers and AEDs would not be left with patients and could not become swapped in the same way.

70. The Claimant had also asserted from the outset that Mr. Wells-Pestell had set him up. Mr. Ashford concluded, from the evidence, that Mr. Wells-Pestell had never been on the premises of Kempston Ambulance Station. He treated Mr. Wells-Pestell's evidence with due caution given the allegations of dishonesty raised against him by the Claimant. However, Mr. Goodson confirmed the security arrangements at the Respondent's premises and concluded that it was unlikely that Mr. Wells-Pestell or others could have set the Claimant up in the manner alleged.
71. In conclusion, Mr. Ashford accepted that there was sufficient evidence from which to conclude the Claimant had stolen some, but not all, of the items he was accused of stealing. In the circumstances the decision to dismiss was upheld.

THE LAW

UNFAIR DISMISSAL CLAIM

72. There is no dispute that the Claimant had the right not to be unfairly dismissed. That right arises under Section 94 of the Employment Rights Act 1996. The Respondent accepts that the Claimant had the requisite qualifying period of employment and that the claim was presented in time.
73. There is also no dispute that the Claimant was dismissed.
74. The burden of proof rests on the Respondent to satisfy the Tribunal on the balance of probabilities that the reason for dismissal was a potentially fair reason within the meaning of Section 98(1) and 98(2) of the Employment Rights Act 1996. Once that burden is discharged, the Tribunal must judge the fairness of the dismissal by reference to the statutory test of fairness in Section 98(4) of the Employment Rights Act 1996.
75. It is not enough for the employer to have a reason that is capable of justifying dismissal. The Tribunal must also be satisfied that in all the circumstances, the employer was justified in dismissing for that reason. In applying the test of fairness, the Tribunal must not substitute its own factual findings, nor impose its own view of the appropriate sanction. The law recognises that employers often have a range of reasonable responses open to them in a particular set of circumstances. The law recognises that different employers may reasonably make different decisions.
76. The test of fairness recognises this by the so called 'band of reasonable responses' approach. This requires the Tribunal to ask itself whether the employer's action fell within the band or the range of reasonable responses open to the employer in a particular set of circumstances. If the

employer's action falls within the range, dismissal will be fair. It is only where the employer's action falls outside that range that the dismissal will be found to be unfair.

77. In cases involving misconduct, the legal approach is well established and derives from the decision in British Homes Stores v Burchell [1978] IRLR 379 EAT. In particular, the Employment Tribunal must consider the following questions:
 - 77.1 Whether the Respondent had a genuine belief in the Claimant's misconduct;
 - 77.2 Whether that belief was reached on reasonable grounds;
 - 77.3 Whether the Respondent carried out as much investigation as was reasonable in the circumstances at the point at which that belief was formed on those grounds.
78. If all three questions are resolved in favour of a Respondent, the dismissal will be fair.
79. The band of reasonable responses test applies not only to the decision to dismiss, but also to the procedure followed by the employer.
80. In assessing the fairness of the procedure, the Tribunal should take into account the employer's own procedures and any applicable statutory procedures. In this case, the statutory procedure that applies is the Acas Code of Practice on Disciplinary and Grievance Procedures.
81. Furthermore, whilst it does not displace the Burchell test, the decisions in A v B [2003] IRLR 405, and Salford Royal NHS Foundation Trust v Roldan [2010] ICR 1457, recognise that in cases concerning criminal allegations, where the employee's reputation or their ability to work in their chosen field is at risk, the gravity of the charge and the consequences of an adverse decision require considerable care to be taken by an employer to conduct a most careful investigation but recognising that this will not demand the stringent safeguards that would be applicable in a criminal trial.
82. This case concerns concurrent criminal and internal disciplinary procedures. The fundamental issue raised by the Claimant in this case, is whether the Respondent should have awaited the outcome of the criminal proceedings before dismissing the Claimant. Employers need not wait until the outcome of a criminal trial before dismissing an employee. They must, however, obtain enough information to justify their decision to dismiss. The fact that a criminal Court later acquits an employee will not affect the fairness, or otherwise, of the employer's decision made at the time of the dismissal. This was established in the case of Harris (Ipswich) Limited v Harrison [1978] ICR 1256.
83. The Court of Appeal in the case of North West Anglia NHS Foundation Trust v Gregg [2019] EWCA Civ 387, conducted a review of the applicable Authorities. The case was not an unfair dismissal case, but the authorities

on the issue were reviewed and the principles that were derived from those authorities include:

- 83.1 An employer considering dismissing an employee does not usually need to wait for the conclusion of any criminal proceedings before doing so, although such a decision is clearly open to an employer; and
- 83.2 The Court will only usually intervene if the employee can show that the continuation of disciplinary proceedings will give rise to a real danger and not merely a notion of danger that there will be a miscarriage of justice in the criminal proceedings if the Court did not intervene.

WRONGFUL DISMISSAL CLAIM

- 84. There is no dispute in this case that the Claimant has the right to bring a complaint of breach of contract under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. There is no dispute that the Claimant was entitled to a period of notice under his contract of employment. There is no dispute that he was dismissed without notice or payment in lieu of notice.
- 85. It is for the Respondent to prove, on the balance of probabilities, that they were entitled to summarily dismiss the Claimant. The Respondent must demonstrate that the Claimant committed a fundamental breach of contract himself which entitled the Respondent to dismiss him without notice. There is no dispute that if the Respondent can demonstrate the Claimant stole items from them, that constitutes such a repudiatory or fundamental breach.

CONCLUSIONS

- 86. Bringing all of that together, my conclusions on the various issues are as follows:

UNFAIR DISMISSAL CLAIM

- 87. The first question is whether the Claimant was dismissed for a potentially fair reason. There is no dispute about this. I accept the evidence of Ms Chambers that the reason for dismissal was her belief that the Claimant had stolen Trust property. The Claimant does not assert that there was any alternative reason. I accept Ms Chambers evidence that the dismissal was plainly for a reason related to the Claimant's conduct. As such, the Respondent has demonstrated a potentially fair reason to dismiss within the meaning of Section 98(1) and 98(2) of the Employment Rights Act 1996.
- 88. I must go on to consider the fairness of that dismissal applying the test of fairness in Section 98(4) of the Employment Rights Act 1996. The parties both accept that applying British Home Stores v Burchell requires me to consider a number of different subsidiary questions:

(a) Whether the Respondent genuinely believed that the Claimant was guilty of misconduct, i.e. theft?

89. I accept the evidence of Ms Chambers on this point. She plainly reached the conclusion that the Claimant had stolen Trust property. I accept this was a genuinely held belief on her part. The Claimant did not seek to argue otherwise. The Claimant's ET1 raised the potential argument that the dismissal was an act of retaliation for a grievance that he had raised concerning his pay. His representative confirmed in closing submissions that the argument was no longer pursued and indeed it was not a matter that was put to the Respondent's witnesses.

(b) Was that belief based on reasonable grounds?

90. This requires me to consider the evidence that was available to the Respondent when the decision to dismiss was made and to exclude evidence that became available thereafter. I accept that the conclusion that the Claimant had stolen Trust property, was one that was reasonably open to Ms Chambers from the evidence available to her. For example, the evidence available to her suggested the Claimant was involved in his wife's company, the nature of that company was such that the company had the need for medical equipment and supplies of the type used by the Respondent; medical equipment belonging to the Respondent had been found by the Police at the premises of the company, one such piece of equipment was identified as coming from the Ambulance Station at which the Claimant worked, another piece of equipment was identified as coming from the vehicle on which the Claimant worked; a witness Mr. Wells-Pestell who worked for TVAPS had confirmed that the Claimant had stolen items from the Respondent.
91. The Claimant had responded to the allegations by asserting that he had been set up by Mr. Wells-Pestell. However, other than making that assertion the Claimant had not engaged in the disciplinary process to defend his position.
92. Those facts taken together, gave Ms Chambers ample evidence on which to reasonably conclude, on the balance of probabilities, that the Claimant had stolen items of the Respondent's property. The Respondent's belief in the Claimant's misconduct was plainly based on reasonable grounds.

(c) did that belief follow a reasonable investigation and did the Respondent follow a fair procedure?

93. These questions raise similar issues; therefore, I will deal with both together.
94. The investigation and the procedure encompass both the disciplinary investigation and the disciplinary procedure, including the appeal.
95. The disciplinary investigation was plainly conducted reasonably. I refer to my earlier findings regarding the scope of the investigation and the steps taken by Ms. Hibbitt. Those steps were reasonable. Indeed, the Claimant does not identify any specific alleged failings or any further steps that Ms.

Hibbitt is said to have failed to take despite his assertion in his claim form that the investigation was fatally flawed and incompetently carried out.

96. The disciplinary process was also conducted reasonably. It was conducted in accordance with the Respondent's own procedure, save for one respect which I will come to, and in compliance with the Acas Code of Practice. The only breach was the time scale over which the procedure took place. There was a considerable delay, but I am satisfied there were compelling reasons for that given the issues in relation to the criminal prosecution and the lack of engagement by the Claimant.
97. The Claimant's main challenge to the procedure in this case is the Respondent's failure to postpone the disciplinary hearing pending the outcome of the criminal trial. The Claimant made it clear that he would not participate in the disciplinary process for fear of prejudicing his defence in the criminal proceedings. There were two reasons for that decision:
 - 97.1 Firstly, the Claimant was concerned about breaching his bail conditions by attending the Trust's premises; and
 - 97.2 Secondly, by cross examining Mr Goodson who was also a witness in the criminal prosecution.
98. I am not satisfied that those concerns were well founded. For example, the bail conditions plainly did not prevent the Claimant from attending Trust premises the purposes of the disciplinary process. Even if they did, the problem could easily have been overcome by holding the disciplinary hearing elsewhere in the same way as the investigatory meeting had been held elsewhere. Whilst it may have been argued that Mr Hoyle's cross examination of Mr Goodson would put the Claimant in breach of the bail conditions, the firm advice from the Police was that this would not constitute such a breach. It was the Police who were responsible for deciding, in the first instance, whether bail conditions had been breached. That view was confirmed by PC Fletcher who the Claimant and / or Mr Hoyle had taken a ferocious dislike to for reasons that have not been made apparent to me during these proceedings. However, her decision was backed up by a senior Officer, DI Brammer who clearly upheld that advice. Furthermore, it was open to the Claimant to make an application to the Crown Court for his bail conditions to be varied to facilitate his participation in the disciplinary proceedings.
99. I find that the more persuasive reason for the Claimant's non-participation in the disciplinary proceedings, was the perception that by cross examining Mr Goodson, it would effectively give Mr Goodson a dry run at giving evidence in the criminal proceedings and improve the quality of his evidence in the criminal proceedings. The Claimant was in an invidious position. Both his liberty and livelihood were on the line in the criminal and disciplinary proceedings respectively. It is entirely understandable that the Claimant prioritised the criminal proceedings as he viewed his liberty as the priority. He took the conscious decision not to take any action which might in any way prejudice the defence of those criminal proceedings.
100. Whilst I can understand the Claimant's decision, it is not the

reasonableness of his decision that is in issue here. The question is, did the Respondent act reasonably in refusing the request to postpone the disciplinary process?

101. I must consider whether Ms Chambers' decision was one that was outside the band or range of reasonable responses; i.e. was it a decision that no reasonable employer could have taken in the circumstances?
102. Were I in Ms Chambers' position, I may have reached a different decision to Ms Chambers. Particularly with the benefit of hindsight. However, I am not persuaded that her decision was unreasonable. Taking into account all the circumstances at the time including: the fact that the bail conditions were not the insurmountable obstacle asserted by the Claimant; the fact that the Claimant's own Solicitors had implicitly suggested when the original request to postpone was refused that real prejudice to the Claimant would be reduced once the defence statement was served in December 2016; the fact the Respondent made efforts to enable the Claimant to participate as fully as possible; the fact that the procedure had been ongoing for the best part of a year by the time it reached an end; the fact that the Claimant had been suspended throughout and the fact that the Respondent was no doubt incurring additional expense by covering the Claimant's duties through overtime and/or agency work.
103. On balance, while I accept the Claimant took an understandable decision to prioritise the criminal proceedings, he has not demonstrated the level of prejudice involved or envisaged in the Gregg case and taking into account all the circumstances, the Respondent's decision to proceed with the disciplinary hearing was not outside the range of reasonable responses.
104. I find the disciplinary hearing was conducted fairly. The Claimant was given every opportunity to participate. His defence was carefully considered notwithstanding his lack of engagement. The resulting decision was carefully reached and properly reasoned.
105. I find that the appeal was also conducted fairly. It was conducted as a full re-hearing. Again, it was conducted in compliance with the Acas Code of Practice and the Respondent's own disciplinary procedures (except for the considerable period of delay). I am satisfied that the Claimant was given every opportunity to participate. Again, the approach taken was to carefully consider the Claimant's grounds of appeal, to obtain and interrogate evidence and witnesses. The resulting decision was fairly reached and properly considered.
106. The Claimant urges me to find that the involvement of the Respondent's HR Team was so substantial as to render the dismissal unfair. Following the decision in Ramphal v Department for Transport [2015] ICR D23, I do not accept that submission.
107. I accept that much of the correspondence, particularly regarding the bail conditions was conducted between the Respondent's HR Team and third parties and was not shown to Ms Chambers who was instead informed of the outcome. However, the facts of this case are far removed from the facts of the Ramphal case. Ms Chambers was entitled to delegate such

procedural matters to the Respondent's HR Team. What is crucial is that there is no evidence in this case to suggest interference in the decision-making process by the Respondent's HR Team and certainly not to the extent that would render the decision unfair. I am satisfied that it was Ms. Chambers and Mr. Ashford who made the decisions free from undue interference from the Respondent's HR Team.

108. Finally, I have considered whether the decision to dismiss was within the range of reasonable responses. It clearly was. The Claimant had long service and a clean disciplinary record. However, the Respondent concluded that he had stolen items of equipment belonging to them. Electing to summarily dismiss in those circumstances was plainly within the range of reasonable responses.

WRONGFUL DISMISSAL CLAIM

109. I am required to make my own decision on the facts and the evidence available to me as to whether it is more likely than not the Claimant stole items from the Respondent. That decision must be based on all the evidence before me, not just the evidence that the Respondent considered in the disciplinary and appeal process. That said, very little new evidence has been advanced. The Claimant's witness statement, whilst lengthy, largely challenges the respondent rather than advancing any positive case or much positive evidence.
110. I have asked myself, on the available evidence, is it more likely than not that the Claimant stole items of property belonging to the Respondent? I remind myself that the standard of proof is the civil standard. That standard that is considerably below the stringent standard required in criminal proceedings.
111. I have concluded on the evidence that it is more likely than not, that the Claimant did steal items of Trust property from the Respondent.
112. I have reached that conclusion on substantially the same basis as the Respondent did. For example, the Claimant clearly had a motive to take the items for the benefit of his wife's business, he had both the means and the opportunity to take them as he had access to the items in the course of his employment with the Respondent. It is accepted that items belonging to the Respondent were found in the possession of TVAPS. The Claimant accepted that he had a role in that business. A witness, Mr. Wells-Pestell had reported the theft, although I must say I approach Mr. Wells-Pestell's evidence with a degree of caution given the Claimant's concerns which appear to be validly based and the fact Mr. Wells-Pestell did not give evidence before me. I place little weight as a result on Mr. Wells-Pestell's complaint, but some weight, nevertheless. The items found at the premises of TVAPS also included items that could be traced back to the Claimant's Ambulance Station and in one incident the very vehicle in which he worked.
113. Those facts, taken together, plainly demonstrate, on the balance of probabilities that the Claimant took items belonging to the Respondent.

114. However, I have not stopped there. I have also considered the positive case that the Claimant did advance, such as it was advanced before me, as to how the items might have ended up legitimately in TVAPS's possession without the Claimant stealing them. After considering the evidence I have come to the same conclusions as the Respondent at the appeal stage in relation to the explanations advanced by the Claimant. I will not repeat the same points again.
115. In short, I have concluded that the Respondent has demonstrated the Claimant was guilty of a fundamental breach of contract and that they were, in the circumstances, entitled to summarily dismiss the Claimant.
116. In those circumstances both the complaint of unfair dismissal and the complaint of breach of contract fail, for those reasons.

Employment Judge Spencer

Date: 22nd August 2021

Judgment sent to the parties on
31st August 2021

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THY

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For the Tribunal office