# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
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| Mr D Timberlake | **v** | Gov Facility Services Limited |

**Heard at:** Norwich **On:** 23 & 24 November 2021

**Before:** Employment Judge S Moore

**Appearances**
**For the Claimant:** Mr G Dean, solicitor
**For the Respondent:** Mr L Dilaimi, counsel

## JUDGMENT

**(1) The claim of unfair dismissal succeeds.**

**(2) The claim of wrongful dismissal succeeds.**

**(3) The Respondent's counterclaim for breach of contract in respect of payment of notice pay is dismissed.**

**(4) The Respondent's counterclaim for breach of contract in respect of overpayment of annual leave succeeds.**

## REASONS

1. This is a claim for unfair dismissal and wrongful dismissal, namely dismissal in breach of contract pursuant to article 3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. There is also before me a respondent's counterclaim for breach of contract pursuant to article 4 of the same order.

2. I heard evidence from the Claimant and, in support of his claim, was also referred to a statement from Mr Kevin Stringer (KS), formerly a manager working at HMP The Mount. For the Respondent, I heard evidence from Mr Richard Lummis (RL), Site Manager at HM Prison Hollesley Bay Suffolk, Mr Tony Ives-Keeler (TIK), the Respondent's Cluster Manager for the East of England, Mr Scott Whiffing (SW), the Respondent's Regional Account Director for the East of England, and Ms Roxanne Talbot (RT), the Respondent's Payroll Manager. I was also referred to a bundle of documents.

3. On the basis of that evidence I make the following findings of fact.

**The Facts**

4. The Claimant is a carpenter and locksmith by trade. He was employed by the Crown Prison Service from 20 August 2007 as a Grade 3 Industrial Carpenter, working at HMP The Mount. On 1 June 2015 his employment transferred under the TUPE Regulations to Carillion Plc, although the location of his work did not change. On 12 February 2018 his employment transferred under TUPE again, this time to the Respondent, and in or about May 2018 he moved location to HMP Norwich.

5. The Claimant worked an average of 40 hours per week on a split shift pattern and his day to day tasks included the general maintenance of properties, lock smithing, reglazing windows and working on the prison fences.

6. On 6 June 2020, a Saturday, the Claimant was observed loading a blue bag into the boot of his car and was approached by security, namely PSO Darren Minshull (DM) and PSO Heath Broughton (HB), who saw that the bag contained timber. The Claimant said he had been given permission to take scrap wood home by his manager, Mr Colin Webb (CW), and on being asked if he had a 'pink slip' said he did not need one because paperwork in the form of a 'pink slip' was only needed for items belonging to, and being taken from, the prison. HB spoke to the Duty Supervisor, Mr Marion Hultoana (MH) who sent the Claimant home and told him not to come into work until Monday 8 June 2020. On that Monday, CW suspended the Claimant pending an investigation.

7. On 10 June 2020, RL was commissioned to conduct a disciplinary investigation. In the meantime, it appears that DM, HB, and MH had written short statements setting out the above events, although these original statements were not in the bundle and appear to have been lost. However, they were said to be the same statements that were emailed to RL for the purposes of his investigation, repeats of which form part of his investigation report.

8. The statements in that investigation report are all typed and unsigned.

9. Notably, the statement of HB refers to the wood in the Claimant's car as "scrap wood". The statement of DM refers to the timber as being "a mixture of old and freshly cut wood". The statement of MH refers to the timber as being "new timber that had been freshly cut". The statement of MH also stated that he had told the security guards that the Claimant was not entitled to take the wood, a matter which, at the hearing, the Claimant strongly refuted had been said in his presence, asserting that MH had only been concerned about whether he would get into trouble for the fact of the Claimant having been found by security taking the wood (see further below at paragraph 37).

10. The terms of reference of the investigation stated:

    'Based upon the evidence from the witness statements and the CCTV footage, Mr Timberlake was clearly removing items that were not his property. Did he have permission to remove those items from a person who was not on site that day? Was the timber new wood that had been cut up to look like offcuts? It is possible that this is not the first time this has happened but it is the first time it has been the result of an establishment action. Marion was the duty supervisor that day but it is possible Mr Timberlake was acting with the approval of the Site Manager. Saturday 6 June was a normal working day for Mr Timberlake, was this act being carried out in GFSL time when he should have been working.'

11. RL had never carried out a disciplinary investigation before. As well as the statements of DM, HB and MH he was also emailed a statement by CW which stated.

    "I have been made aware of the incident on Saturday 6 July 2020 at approximately 13.40, where Mr Timberlake was found loading his car with timber.
    Our policy with regards to removing scrap materials from the skips is to request permission from the site manager or duty supervisor of the day.
    I can confirm that at no point did Mr Timberlake request any permission from myself or my Supervisor, Mr Marion Hultoana, to remove any timber or logs from site.'

12. This statement was also typed and unsigned.

13. On 26 June 2020 RL took a statement from the Claimant over the phone. The phone call had not been scheduled, and it took the Claimant by surprise. He stated that "he had collected combustible material from the waste skip and old pallets left on site. Most of the ply was timber the contractors had used for shuttering and some off cuts of sawn timber. The governor has had an area behind the workshops cleared. There were some logs that were being thrown away so I had some of these as well. Everybody knows that I have a wood burner. Even the prisoners leave timber by my workshop door for me…. I have always collected off cuts of timber even when I worked at HMP The Mount to use on my wood burner.

I cannot see any issue with this as I didn't take any timber from stock…It is common knowledge that I collect wood for my wood burner".

14. The Claimant was not sent a copy of his statement to check and sign and says that is omits relevant evidence, including having previous verbal permission from CW to remove waste wood (omissions he had referred to at the appeal hearing). In any event, it is clear the Claimant said on the day of the incident that he had permission from CW since that is recorded in the statements of DM, HB and MH, and it is clear from the statement taken by RL that, at the very least, the Claimant told RL that he had always collected off-cuts of timber and scrap wood and that this was common knowledge.

15. RL was sent the copy of the CCTV footage of the incident on 6 June, but he unable to view it. He requested a second copy but was unable to view that either. He said he was not allowed to go to Norwich Prison to look at the CCTV because of concerns about cross-contamination of Covid-19 infection between prisons. In course of requesting another copy of the CCTV footage he spoke to CW however he did not ask CW any questions about his statement other than to read it back and ask CW if he was happy with it.

16. Indeed, RL didn't ask any of the witnesses any questions about their statements at all. Notably:

    (1) RL didn't ask CW about the policy he had referred to. RL said in evidence he had assumed it was a local policy, however it was later accepted at the appeal that there was no such policy, at least in writing.

    (2) RL didn't ask CW whether, when CW said "I can confirm that at no point did Mr Timberlake request any permission from myself or my Supervisor, Mr Marion Hultoana, to remove any timber or logs from site", CW meant at no point on that day (6 June) or at no point ever. In evidence RL said he had understood CW's statement to mean that he had never on any occasion given such permission and therefore didn't ask CW if he had ever given the Claimant permission to remove timber. This assumption turned out to be misplaced (see below at paragraph 34).

    (3) RL didn't ask CW about the contents of the Claimant's statement. In particular, he didn't ask about the Claimant's statement that he had always collected offcuts of timber and that this was common knowledge to the extent that prisoners left offcuts of wood for him outside the workshop door.

    (4) RL didn't ask DM, HB or MH about the wood they saw in the Claimant's car, about the differing descriptions of that wood, or how DM and MH purported to distinguish between freshly cut wood and wood that was not freshly cut.

(5) RL didn't contact Mr Stringer from HMP The Mount to find out if what the Claimant had said about having permission to take off-cuts of timber for his wood burner while working there was true.

17. These omissions are surprising given that when RL was asked in cross-examination whether he accepted the Claimant believed he had permission to take the wood in question, he replied "Yes, possibly", and in re-examination he reiterated that he thought the Claimant believed he had permission to take the wood but said there was "no real evidence he had been given permission at HMP Norwich".

18. In the meantime, prior to the disciplinary investigation and as early as 14 June 2020, it appears an Exclusion Report Form had been compiled in respect of the Claimant. Such a form must be completed when a decision has been made to exclude any Not Directly Employed (NDE) worker from a Public Sector prison, NOMS HQ and any NPS location, attendance centre, Private Prison or Escort Contractor or a direct employee of a Private Prison or Escort Contractor. The form is used to notify the Security Group Approvals and Compliance Team based at Shared Services who must then withdraw the individual's security vetting status.

19. In this respect the bundle contains an unsigned Exclusion Report Form, in which under the heading 'Exclusion Meeting' the date given is 14 June 2020 and the name of the Investigating Manager is given as David Jeeves (DJ), the Governor of Norwich Prison. The other attendees of the meeting are not recorded but the reason for exclusion is stated to be as follows:

"Mr Timberlake was observed by Dog Handler Minshull placing a quantity of wood into his car boot. When challenged he stated this was authorised by his manager Colin Webb. This was incorrect and Mr Timberlake was committing theft from his employee SFSL and HMPPS namely HMP/YOI Norwich. The above was all captured on body worn video camera worn by Dog Handler Minshull. Due to the above actions, I recommend exclusion from all Prison Establishments and HMPPS property."

20. Although I was not told the identity of the person who, on 14 June 2020, had already reached the conclusion that the Claimant had committed theft and was recommending exclusion, TIK accepted in evidence that DJ would not have acted in isolation and would have spoken to the Respondent's managers.

21. Subsequently, on 10 July 2020, DJ sent an email to CW (and to Mr Kevin Clark, the Deputy Governor) stating "I have made the decision to permanently exclude Mr Timberlake from all HMPPS establishments and buildings", and attached the Exclusion Report Form. To finalise the attached form, he stated he needed the Investigating Officer's (RL's) signature and that of Mr Timberlake to confirm he had been informed of his exclusion. That email was immediately forwarded by CW to TIK with the comment "As expected."

22. TIK initially stated that he knew nothing about DJ's email, however when shown the forwarded email from CW he accepted that he must have done. He further accepted that the comment 'As expected' implied that he and CW had in fact discussed the Claimant's potential exclusion and anticipated that such a decision would be made, however he said he could not remember such a discussion.

23. The Exclusion Report Form was never signed by either RL or the Claimant. In evidence TIK said he thought that had been "overlooked".

24. By way of undated letter the Claimant was subsequently invited to a disciplinary hearing to consider the allegation of "removing materials from site without permission". The Claimant was informed that under the Respondent's disciplinary policy this constituted

> "Dishonesty… in the performance of duties including, but not limited to: -theft, misappropriation, or conversion of GFSL or client property…
> Obtaining goods, materials or services by deception."

25. The disciplinary hearing was conducted by TIK on 7 August 2020 by telephone because of the Covid-19 pandemic. The Claimant chose to represent himself. At the outset of the hearing, TIK stated "The allegation is that you were removing materials from site without permission, basically on Saturday 6th July at approximately 13.30 you were allegedly found loading your car with some timber in blue bags so under our policy that constitutes dishonesty…or obtaining goods, materials or services by deception. Do you want to state your case?"

26. The Claimant said that he didn't know that he needed permission on the day because he had been given previous permission to remove timber by CW and MH. The Claimant then gave several examples of specific times when he was given permission by CW and MH to remove, for example, pallets, items from the skip following a clear out of the workshop, and an old desk. He further stated that MH and CW were also aware he had always removed waste wood to use for firewood, that at times pallets and other timber were left for him by his workshop, that they had often been present whilst he had been loading his car and that they had never once said anything to stop him, required him to fill in any paperwork, or say he needed specific permission on the day. He said that MH had even brought materials from home to put in the skip and had been happy for the Claimant to pick through it and take what he wanted for firewood. Later in the hearing the Claimant repeated that both CW and MH were happy for him to take firewood and keep the site tidy and that at no time over a 2-year period was he informed of a policy that he needed permission on the day. He said he felt the position had changed because Security had got involved.

27. The Claimant stated he agreed with the statements as to what had happened on 6 June 2020 apart from the freshly cut timber part and asked how DM and MH could identify the wood as having been freshly cut. He also pointed out the discrepancy between MH's statement and DM's statement on this point, went on to state in detail where the timber in the bag had come from, and said that it was all scrap.

28. When TIK was asked in cross-examination whether he accepted the Claimant believed he had permission to take the wood in question, he replied "Yes, he thought he had open-ended permission, but he didn't." In re-examination he then changed his evidence and stated that in fact he thought the Claimant knew he needed to seek permission before taking materials from site.

29. TIK stated that in making his decision he was influenced by the fact the Claimant was removing the timber on a Saturday, when there were less staff about, and that the Claimant was removing freshly cut wood which was not scrap wood. Despite the Claimant's detailed evidence, he did not consider it necessary to go back to any of the Respondent's witnesses and ask them further questions. In particular, he did not ask CW about the sentence in his statement concerning the existence of an alleged policy that removal of scrap materials from the skip required the permission of the site manager or duty supervisor on the day, or the sentence in which CW stated that "at no point" did Mr Timberlake request permission from himself or MH to remove any timber or logs from the site. Nor did he ask CW or MH about the Claimant's evidence that both managers been fully aware he regularly took away scrap timber and had never stopped him or told him he needed permission on the day. Nor did he ask MH and DM about the discrepancies in their statements concerning the supposed nature of the wood or how they could tell that any particular piece of timber had been freshly cut.

30. Based on the evidence from RL's investigation (that is the unsigned statements) TIK decided to dismiss the Claimant for gross misconduct, namely dishonesty in the performance of duties and obtaining goods, materials or services by deception. The dismissal letter of 11 August 2020 states:

    "By your own admission, you did take the timber from site without permission and therefore I consider this to be misappropriation of GFSL property. The mitigation put forward was not sufficient for me to conclude that you had a verbal agreement on this occasion and there was no evidence to support that an agreement had ever been in place.'

31. TIK further stated that the fact he knew DJ had already decided to permanently exclude the Claimant did not influence his thinking. If he had decided not to uphold the allegation of gross misconduct, and the Claimant had not been dismissed, he believed the Respondent could have made an appeal against any Exclusion Order which, if successful, would have meant the Respondent could still employ the Claimant.

32. The Claimant appealed his dismissal, and that appeal was heard by SW. Prior to the appeal, in view of the points that had been raised by the Claimant, SW had two short conversations with CW.

33. The first conversation took place on 18 September 2020 and was directed to verifying the identity of the statement CW had given to RL, (due to the statement having been incorrectly labelled). SW read CW's statement out loud to him, and CW said that he confirmed the statement was true and there was nothing he wanted to change. When asked if there was anything he wanted to add, CW said that the bags the Claimant had used to put the wood in looked like the bags used on the dust extraction machine in the Carpenters Workshop, and that the Claimant would not have had permission to remove them.

34. The second conversation took place on 23 September 2020. SW asked CW if he recollected previously giving the Claimant permission to remove materials from site. CW said simply, "Yes". Next CW was asked why he gave that permission and replied, "it was the removal of specific items in the skip taking up space that was needed." Next CW was asked, "Was this permission open-ended, ie did it extend beyond this specific instance?" He replied "No, I have always been very clear that on any occasion that any employee wishes to remove items they must seek permission for that specific day/time and items". Then CW was asked, 'Is there any other occasion that you have given permission for Mr Timberlake to remove items" and he stated, 'Not that I can recall". Finally, CW was asked, "Anything else you would like to add?" to which he said, "No".

35. The appeal hearing took place by telephone on 30 September 2020. The Claimant repeated the points he made at the disciplinary hearing. He stated in particular, "Mr Webb said that he was happy for me to have materials and so you know I don't really see what the problem is…I did put materials in the back of my car. I am not denying that at all but the fact was that it was all waste materials out of the skip. None of it actually belong to GSFL, it was all just scrap wood and previous to that, both Mr Webb and his supervisor Mariam were quite happy for me to have all the waste materials. I mean as I pointed out in the beginning, you know there was an occasion that Mariam…actually bought rubbish in from home when he was ripping out his kitchen and he was quite happy for me to have said waste material. Also, when the yard was cleared over time periods, he would leave old wood outside the workshop for me to cut up. So, he was fully aware that I had all the waste wood that I used for kindling for my wood burner, which I pointed out in the beginning… [A]t no time was I informed that there was a day-to-day policy to remove materials … you actually had to ask permission on the day…Mr Webb stated in his statement that he couldn't remember when you asked him a specific question about me having the wood or whatever. They've both been there when I've been preparing wood to take home etc and this has gone on since I've been there. Obviously the matter has arisen because security have got involved and started jumping up and down…I did continue

collecting old waste, tidying up my yard and taking timber and old dunnage that the supervisor had left for me to cut up. So everyone was well aware and obviously happy for me to continue doing it."

36. By letter of 30 September 2020, SW dismissed the appeal. First, he concluded the Claimant knew the timber belonged to a third party. Secondly, he concluded that since the Claimant had cited instances of occasions when he had been given permission to remove materials, "it was clear" the Claimant understood permission was required on each occasion he wished to do so and was not "open-ended". Thirdly the Claimant did not claim to have received permission to remove the materials on 6 June 2020.

37. At the hearing the Claimant maintained in cross-examination the position he had taken during the disciplinary process. He said that he did have permission to take scrap wood from the site. He said that when he arrived at HMP Norwich he asked CW if could take timber from the skip and that CW was perfectly happy for him to do so, saying words to the effect of 'carry on'. It was put to the Claimant that CW gave him permission to remove items on one occasion and he said that CW gave him specific permission to remove various items on various occasions when the Claimant wasn't sure whether he could take them or not. He was allowed to take scrap wood but if he wasn't sure about an item or it wasn't scrap wood then he would ask CW if he could have it. He gave an example of a pair of iron gates that were in the skip that he asked to take. He also said that scrap timber was often left for him by the contractors, by CW and by MH. He further stated that on 6 June 2020 MH had not told the security guards that the Claimant was not entitled to take the wood in his (the Claimant's presence) and that MH had only been concerned about whether he would get into trouble for the fact of the Claimant having been found by Security taking the wood.

38. The Claimant also stated that all the timber in question on 6 June 2020 was scrap wood, and that neither MH or DM would have been able to tell from looking at the wood whether it was scrap or had been freshly cut. As regards it being a Saturday, he said that he took the wood away on a Saturday because he could come to work by car, rather than motorbike, because at the weekend his girlfriend didn't need their shared car to go to work.

39. The Claimant was also asked about differences between the descriptions of the timber he gave in his statement to RL and at the disciplinary hearing. The Claimant disputed that there was any inconsistency between his two accounts and said that his description at the disciplinary hearing was simply more detailed because he had, had more time to think whereas he had been taken by surprise by RL's telephone call of which he had had no warning. As regards the blue bags mentioned in SW's conversation with CW on 18 September 2020, the Claimant said that there had only been one bag on 6 June 2020, and that while it was the same

type of bag as that used for the dust extraction machine this particular one was a used bag that had been put in the skip.

40. The Claimant also relied on a statement from Mr Stringer (to which Mr Dilaimi did not object being put into evidence). Mr Stringer stated that whilst the Claimant had been employed at HMP The Mount he had been allowed to take waste wood from the skip as long it was done discretely, the wood had to be waste wood and not good wood used for carpentry.

**Conclusions**

*Unfair dismissal*

41. Pursuant to s. 98(1) Employment Rights Act 1996 (ERA), the employer must show the reason for the dismissal. In this case the reason relied upon is conduct, that is, dishonesty, namely theft or misappropriation, and/or obtaining goods or materials by deception, which is a potentially fair reason for dismissal under s. 98(2)(b).

42. The next question is the fairness of the dismissal for the purposes of s.98(4) ERA, which falls to be addressed pursuant to the Burchell test.

43. The first limb of that test is whether the Respondent genuinely believed in its stated reason for dismissal.

44. In this respect I find it concerning that DJ appears to have decided to permanently exclude the Claimant prior to the disciplinary hearing (indeed prior to the disciplinary investigation), that the fact of that decision was specifically emailed to TIK and that the accompanying message “As expected” implied the decision had both been anticipated by TIK and CW and the subject of discussion between them. To my mind this raises the question of whether TIK genuinely turned his mind to the question of whether the Claimant was guilty of the gross misconduct alleged or instead considered that since DJ had already decided to make an Exclusion Order he (TIK) had little option but to reach a conclusion of gross misconduct and effectively “row in” with that order. However, since that line of argument was not pursued, and the point not put to TIK, I am prepared to accept that TIK did genuinely believe the Claimant to be guilty of the gross misconduct alleged against him.

45. The second limb is whether the Respondent had in mind reasonable grounds upon which to sustain that belief, and the third, related limb, is whether at the stage at which the Respondent had formed its belief it had carried out as much investigation into the matter as was reasonable in the circumstances.

46. The essence of the allegation against the Claimant was dishonesty, the theft or misappropriation of timber.

47. In his statement and in his evidence to the Tribunal TIK stated that he was influenced by his belief there was a strong possibility that the wood was not scrap wood at all but wood that was new timber that had been freshly cut. However, TIK had seen no CCTV footage, there were no photographs of the timber, no consideration was given to the fact that the statements of DM, MH and HB all differed as to the nature of the timber, there was no evidence of any new timber missing from the workshop, and no explanation of how the relevant witnesses had purported to distinguish wood that was freshly cut from wood that was not freshly cut.

48. In this witness statement TIK stated that in any event, regardless of whether the wood was scrap wood, it was still not the Claimant's property to take away without express permission having been given, and he did not accept the Claimant's assertion that CW or MH had given him permission nor that he (the Claimant) was not aware he required separate permission on every occasion. However again the evidence relied on by TIK to reach this conclusion was minimal. By contrast with the Claimant's detailed evidence, TIK merely possessed an unsigned statement by CW that consisted of three sentences which had never been the subject of any exploratory questioning, and a short unsigned, unchallenged statement from MH. Neither of those statements came close to addressing the case put forward by the Claimant that he had been taking scrap timber since he arrived at HMP Norwich two years earlier with the knowledge and consent of both managers, and indeed as a matter of common knowledge.

49. I therefore find that TIK did not have in mind reasonable grounds upon which to sustain his belief the Claimant was guilty of the misconduct alleged, and the reason he did not was because the investigation carried out was utterly inadequate.

50. First, there was no investigation of what type of wood the Claimant had actually taken. Second, there was no attempt to clarify highly relevant evidence given in the Respondent's witness statements. In particular, there was no attempt to clarify what "policy" CW was referring to in his statement, whether, when he said "at no point did Mr Timberlake request permission" he meant *at no point ever* or *at no point on 6 June 2020*, and there was no attempt clarify from the witnesses what type wood they thought they had seen in the Claimant's car or why (in the case of MH and DM) they thought it was freshly cut wood. Thirdly, and most fundamentally, there was no meaningful attempt to find out from CW and/or MH and/or any other potentially relevant witnesses whether what the Claimant was saying – in some detail – was true. Instead, the patently inadequate (and unsigned) statement of CW was simply taken at face value.

51. In his valiant submissions Mr Dilaimi reminded me that the question of the reasonableness of the investigation has to be assessed by reference to the relevant circumstances and he relied on the fact that the Respondent's statements were at least contemporaneous, England was in lockdown, and the Respondent's concern about possible cross-contamination of prisons meant that RL and TIK were not allowed to travel to the HMP

Norwich to interview witnesses. Those points are true; however, I do not accept that any of them, taken together or individually, bring the investigation with the range of possible investigations that could be considered reasonable. There is no reason why photographs of the wood in question could not have been sent by email, clarification of the witness statements obtained, and further questions asked of MH, and particularly, CW, that made a proper attempt to find out if what the Claimant was saying was true (see further above at paragraphs 16 and 29).

52. It follows that the Respondent's belief in the Claimant's misconduct was not based on reasonable grounds and nor had the Respondent carried out as much investigation into the matter as was reasonable in the circumstances.

53. The next question is whether those defects were cured on appeal. In this respect, Mr Dilaimi relies on the fact that SW spoke twice to CW, and relies, in particular, on their conversation on 23 September 2020 (as set above at paragraph 34). However, that conversation was again exceptionally brief, CW's statements were unchallenged, and in fact what he did say raised further questions. Having said in his first statement that "at no point" had the Claimant requested permission to remove timber, on 23 September he said he *had* given the Claimant permission to remove items from the skip on one occasion and when asked if he had done so on any other occasion merely replied, "Not that I can recall". His previous reference to a policy concerning the removal of scrap materials from the skips morphed to a statement that he had "always been clear" that on any occasion an employee wished to remove material from the skip they had to seek permission for that day/time and item, and he didn't explain how he could remember that he had *always* been clear about this, when he could only remember giving the Claimant permission to remove items on one occasion (and it was not suggested anyone else had ever sought to remove items from the skip).

54. I therefore do not consider that the appeal process cured the many defects of the dismissal decision.

55. In the light of the above it follows that the Claimant was unfairly dismissed and the claim for unfair dismissal succeeds.

*Wrongful Dismissal*

56. The issue here is whether the Claimant is guilty of conduct so serious as to amount to a repudiatory breach of the contract entitling the Respondent to summarily terminate the contract. The conduct relied upon by the Respondent is the Claimant's theft or misappropriation of timber on 6 June 2020.

57. In this respect I was directed to **Ivey v Genting Casinos (UK) Ltd (t/a Crockfords Club) [2018] AC 391, SC**. In the light of that authority Mr Dilaimi submitted that where an issue arises as to whether conduct is in

fact dishonest, the tribunal must first ascertain the actual state of the individual's knowledge or belief as to the facts. The question whether the conduct was honest or dishonest should then be determined by applying the objective standards of ordinary decent people.

58. I accept that analysis of the law, but in this case the matter turns simply on the facts because the Claimant does not rely on mistaken belief as regards the issue of permission but relies on actual permission; he says he had 'open-ended' permission to remove scrap timber whereas the Respondent says that is not true and that the Claimant was told he had to get permission each day in question that he wished to remove timber. In this respect, Mr Dilaimi submitted that either the Claimant was lying or that both CW and MH must be lying. I accept that proposition must be right.

59. The evidence before me comprises, on the one hand, the brief unsigned statements CW and MH produced for the purposes of the investigation and the records of two short conversations between SW and CW, and, on the other hand, notes of the Claimant's detailed evidence at the disciplinary hearing, his detailed evidence at the appeal hearing, and his detailed evidence at this hearing when he was subject to lengthy cross-examination. Neither CW nor MH gave evidence at this hearing or made witness statements.

60. I prefer the Claimant's version of events. I accept the Claimant was told by CW soon after arriving at Norwich HMP that he could take scrap wood from the skip with words to the effect of "carry on", and that over the intervening two years he continued to take scrap wood with the knowledge and consent of CW and MH. Accordingly, by their words and actions CW and MH gave the Claimant "open-ended" consent to take scrap wood and when the Claimant wasn't sure whether he was allowed to take a particular item or not he would ask CW for specific permission.

61. I further accept the Claimant's evidence that on 6 June 2020 he was taking scrap timber and that he was not taking timber from the workshop, "freshly cut" timber, or timber that was any different in nature to that which he had been allowed to take from the site during the previous two years.

62. It follows that the Claimant was not acting dishonestly, that his conduct did not amount to theft, or misappropriation, or deception, and accordingly that by dismissing him summarily the Respondent breached the terms of the Claimant's employment contract.

63. It follows the Claimant was wrongfully dismissed and that the claim for wrongful dismissal succeeds.

*Remedy*

<u>Unfair dismissal</u>

64. It was agreed at the outset of the hearing that this liability judgment would also address the issue of contributory fault and any *Polkey* reduction.

Contributory fault

65. In view of the findings above, I do not consider the Claimant's conduct to have been culpable or blameworthy and it is not just and equitable to reduce his basic or compensatory award.

*Polkey*

66. Mr Dilaimi submitted that I should find that even if the dismissal was unfair the Claimant's compensatory award should be minimal because it was likely that the Respondent would have dismissed the Claimant in any event for Some Other Substantial Reason, namely the fact that an Exclusion Order had been made against him by HMPPS which meant the Respondent could not have continued to employ him.

67. I do not accept this argument. While there is evidence that DJ had decided to make a permanent exclusion order against the Claimant, there is no evidence that such an order was ever completed. The Exclusion Order Form was never signed by RL (the investigating manager) or the Claimant as required by paragraphs 5 and 6 of Annex A (1) of the Guidance on the Exclusion of Staff and Not Directly Employed Workers ("the Guidance"). It follows that it is highly unlikely the form was ever sent to the Security Group, Approvals and Compliance Team as required by paragraph 8 or the exclusion logged on the Claimant's vetting record and his name added to the Exclusion List as required by paragraph 9, and indeed there was no evidence before me to suggest these steps had been taken. Further, if a fair disciplinary process had been followed, it follows, from the findings above, that it is likely RL and/or TIK would have come to the view that the Claimant did have permission to remove the timber in question and the allegation of gross misconduct would have been dismissed. Accordingly, there is no reason to believe the Exclusion Order Form would have been signed and completed. I note in this respect that paragraph 2.1 of the Operational Instructions of the Guidance provides (unsurprisingly) that "The decision to exclude someone must be a reasonable one".

68. Furthermore, even if an Exclusion Order had been made prior to the conclusion of the disciplinary process, had the allegation of gross misconduct been dismissed the Respondent could have appealed that decision pursuant to section 4 of the Guidance. It was suggested by the Respondent that such appeals are rarely successful, however in the absence of any evidence from HMPSS to the contrary (and in the light of the requirement of reasonableness referred to above) there is no reason to believe that a decision to exclude the Claimant would have been maintained in circumstances where the disciplinary charges against him had been dismissed.

69. It follows I am not satisfied that the Claimant's compensation should be reduced on the basis of *Polkey.*

**Counterclaim**

70. The Respondent's counterclaim is for alleged overpayment of notice pay, namely salary for the month of August 2020, and for overpayment of annual leave entitlement.

71. Since the claim for wrongful dismissal has succeeded, the claim for overpayment of notice pay is dismissed.

72. As regards the claim for overpayment of annual leave entitlement, the Claimant agreed at the hearing that even if his claim for wrongful dismissal succeeded, he was still overpaid a certain amount of holiday entitlement. The parties indicated that in these circumstances they would be able to calculate and agree on the amount owed by the Claimant to the Respondent themselves.

**Remedy Hearing**

73. If unable to reach agreement as regards the Claimant's compensation for unfair and wrongful dismissal, the parties should write to the Tribunal and request the matter to listed for a 1-day remedy hearing.

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Employment Judge S Moore

Date: 29 November 2021

Sent to the parties on: 13/12/2021

For the Tribunal Office