EMPLOYMENT TRIBUNALS

Claimant: **Mr K Jarman**

Respondent: **United Learning**

Heard at: **Bristol (in public by CVP)** **On: 7 & 8 February 2022**

Before: Employment Judge Cuthbert

Appearances:

For the Claimant: Mr R Warren, lay representative
For the Respondent: Mr C Murray, counsel

JUDGMENT having been sent to the parties on 10 February 2022, following oral judgment and reasons on 8 February 2022, and written reasons having been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the written reasons set out further below are provided:

The judgment had determined as follows:

The claimant's claim for unfair dismissal failed and was dismissed.

REASONS

Introduction

1. The claimant brought a claim for unfair dismissal against the respondent following his dismissal for gross misconduct on 24 July 2020.

2. I heard the case on 7 and 8 February 2022, by way of a remote hearing, which was consented to by the parties. The form of remote hearing was fully remote, via CVP. A face-to-face hearing was not held because it was not practicable, no-one requested the same and all issues could be determined in a remote hearing. There were no material connection or technical issues brought to my attention during the hearing.

3. The claimant was represented by Mr Warren, a lay representative; the respondent was represented by Mr Murray, counsel.

4. At the conclusion of the hearing, I gave an oral judgment dismissing the claim. In the course of giving that judgment I did explain, both at the start and the end of giving the judgment, that either party may request written reasons and at the same time also (particularly for the benefit of the claimant) reminded the parties that if written reasons were requested, they would be published in full online on the tribunal judgments website.

5. The claimant subsequently requested written reasons.

The issues

6. At the start of the hearing, I discussed with both parties the issues on liability, which were agreed as follows.

7. Unfair dismissal was the only claim before me, by way of a claim form presented on 23 October 2020. This gave rise to the following issues.

    (1) What was the reason for the dismissal? The respondent asserted that the reason for dismissal was misconduct / gross misconduct. The claimant had asserted in the ET1 that the respondent had an ulterior motive of avoiding a redundancy situation. The burden was on the respondent to establish the reason for dismissal.

    (2) Was the dismissal fair? The burden of proof was neutral here.

        a) Did the respondent carry out a fair and reasonable investigation into the allegations of misconduct?

        b) Did the respondent hold a genuine belief in the claimant's misconduct on reasonable grounds following the investigation?

        c) Was the decision to dismiss within the range of reasonable responses open to a reasonable employer in all of the circumstances of this case?

    (Here, I explained to the claimant's representative, Mr Warren, who is not legally qualified, that these tests did not involve me stepping into the shoes of the respondent and deciding the disciplinary case against the claimant for myself. Rather my role was to determine whether or not, based on the evidence which was before the respondent at the time of the dismissal, the respondent's investigation and its decision to dismiss were within the range of reasonable responses open to a reasonable employer in the respondent's position).

    (3) If the respondent did not follow a fair procedure, would the claimant have been fairly dismissed in any event and / or to what extent and when?

    (4) If the claimant's unfair dismissal claim is successful, did the claimant contribute to the dismissal by culpable conduct? This required the

respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged.

Practicalities

8. I suggested, and it was agreed, that I would hear evidence and submissions on liability, including contributory conduct, only, and would hear evidence separately on remedy, if relevant, following my decision on liability.

9. There was passing reference to some "without prejudice" correspondence made at the outset of the hearing by the claimant's representative, Mr Warren, repeated on occasion during the witness evidence and again in closing submissions. I explained at the start of the hearing that such correspondence is typically to be expected in an employment dispute but should **not** be referred to during the hearing (and a previous case management order from the Regional Employment Judge had expressly directed the removal of reference to such correspondence from a previous draft of the claimant's witness statement and the bundle, so there could be no reasonable doubt on the claimant's side that such correspondence should not be raised at the hearing). Mr Warren appeared to accept that position each time I explained this to him.

10. I took no account of those partial and brief references to the said correspondence or its existence in making my decision.

11. I also discussed the question of reasonable adjustments at the start of the hearing with Mr Warren. This was because the claimant had some mental health issues, referenced in the case papers, and also mentioned were diagnoses of ADHD and dyslexia. Mr Warren explained that the claimant may need more frequent breaks and that he or the claimant would indicate when this was needed.

12. I agreed to such breaks, when requested on day 1, during the respondent's evidence, for example shortly before lunch and during the afternoon.

13. I also proposed, and it was agreed by the respondent, that the claimant's oral evidence should not start when it otherwise fell due to begin, at 3pm on day 1, such that he would likely remain under oath overnight and so be unable to discuss the case with anyone including Mr Warren. I instead directed that he could commence his evidence at 10am on day 2.

14. During day 2, when giving evidence for approximately two-and-a-half hours and particularly on issues relating to contributory fault, the claimant was clearly distressed and upset at times, and he requested and took several breaks, four in total, before being able to resume his evidence on each occasion.

The evidence and findings of fact

Introduction

15. I explained to the parties that I would only make findings of fact where those

were required for the proper determination of the issues in the unfair dismissal claim. I did not and have not therefore made findings on each and every area where the parties have been in dispute with each other where that was not necessary for the proper determination of the complaint which was before me.

16. I also pointed out that the case before me was not a claim for disability discrimination or race discrimination, or for dismissal on grounds of protected disclosures or health and safety. Those claims were not brought in the ET1 and no application to amend was made at any stage subsequent to that claim being presented and heard.

17. At times during the hearing I had to remind the claimant's representative, Mr Warren, to keep his focus upon the issues to be decided by me in the unfair dismissal claim which was before me, both during witness evidence and during closing submissions; the issues had been identified and agreed at the outset and I offered to remind him what those issues were on several occasions. For the avoidance of doubt, I made no criticism of Mr Warren here, as I recognised that he was not legally qualified. This approach was in accordance with the overriding objective set out in Rule 2 of the Employment Tribunal Rules 2013 and my powers under Rule 41 in respect of the hearing and its scope.

18. The findings of fact that I made on the basis above, which were relevant to the issues which I needed to decide are set out below. References to pages in square brackets [ ] below are to the hearing bundle which was before me.

19. I received witness statements and heard oral evidence from the following witnesses for the respondent:

    (1) Tim Harkins – Business Director of Shoreham Academy, whose remit included the Premises Team amongst other things. He was the claimant's line manager and conducted the initial investigation.

    (2) Jim Coupe – Principal of Shoreham Academy. He chaired the disciplinary hearing.

    (3) Andrew Swayne – Governor at Shoreham Academy and the other member of the disciplinary hearing panel in addition to Mr Coupe.

20. I also received a witness statement and heard oral evidence from the claimant.

21. In addition, the claimant's witness statement was accompanied by a number of other witness statements and character references, from various individuals who did not give oral evidence before me. Most of that evidence was not put before the respondent's disciplinary panel in July 2020; it was prepared subsequent to that panel's decision and concerned matters which were not raised during the disciplinary proceedings. So, in turn, the evidence was largely not relevant to my decision as to the fairness or otherwise of the claimant's dismissal, in view of the law summarised as above.

Facts

22. The claimant commenced his employment in 2002 or 2004 (the precise date was in dispute but this point was only potentially relevant to the issue of remedy, not liability).

23. At the relevant times, the claimant employed as Premises Manager at Shoreham Academy, a secondary academy for 11 – 18 year olds. Shoreham Academy is one of many schools which are part of the respondent group of schools.

24. The claimant managed the Premises Team and was in turn managed by Mr Harkins, the Business Director. Prior to the events leading to his dismissal, the claimant had no disciplinary issues with the respondent.

25. It was not in dispute that, on 19 June 2020, the claimant removed a sealed 10 litre pot of grey paint from the respondent's premises. The issue was brought to the respondent's attention (see below) by an employee in the claimant's Premises Team, Mustafa Bukleeb, who appears to have gone to some lengths to check CCTV and locate footage of the claimant leaving with the paint in hand.

26. The claimant indicated during the subsequent disciplinary proceedings and in evidence before me that he and Mr Bukleeb were not on good terms and so he questioned Mr Bukleeb's motivation for raising this issue with the respondent. In any event it was not in dispute that the claimant took the paint in question from the respondent's premises on that day (it was subsequently returned but in a condition which caused the respondent further concern – see below).

Initial investigation by Mr Harkins

27. Mr Harkins, the claimant's line manager, was approached on the morning of 23 June 2020 with information about the above, with Mr Bukleeb having initially approached the bursar and been directed to Mr Harkins. Mr Harkins in turn discussed the position with the Principal, Mr Coupe, who asked Mr Harkins to investigate the issues arising.

28. The scope of the investigation was broadened to examine other items than just the grey paint, as summarised further below. The gist of the investigation was that the claimant was alleged to have removed without authority from the school/stolen or improperly ordered a number of items (set out further later in the judgment).

29. The following fact-finding meetings took place, conducted by Mr Harkins (which were quite confusingly presented in the bundle as they were not in chronological order), and were as follows chronologically:

    (1) 23 June 2020, 13.45 – first meeting with Mr Bukleeb [pages 46 - 47].

    (2) 23 June 2020,14.15 - meeting with Wendy Bukleeb, the wife of Mr

Bukleeb, also employed at Shoreham Academy [page 43].

(3) 24 June 2020, 14.30 – first initial investigatory meeting with the claimant [page 54]. The respondent accepted that the notes of this meeting and others at this time with the claimant were incorrectly headed *"disciplinary investigation meeting"* when in reality this was merely a fact-finding meeting.

(4) 24 June 2020, 15.30 - meeting with Jeanette Salter, Student Services Manager [page 42].

(5) 24 June 2020, 17.55 – second meeting with Mr Bukleeb [pages 47 - 48].

(6) 25 June 2020 - second initial investigatory meeting with the claimant and follow up meeting [pages 49 - 52].

(7) 26 June 2020 - meeting with Mike Phillips, Deputy Premises Manager [pages 44 – 55].

(8) 26 June 2020 – final initial investigatory meeting between Mr Harkins and the claimant [pages 52 – 53].

30. Mr Harkins also spoke to the finance department at Shoreham Academy, obtained copies of various purchase orders, spoke to suppliers, reviewed CCTV and took some photographs of relevant evidence, all of which were provided in due course to the claimant during the disciplinary proceedings.

31. Mr Harkins then prepared an investigation report dated 29 June 2020 [pages 57 – 63]. I have not referred to the detail of Mr Harkins' report in these reasons, as it was superseded, as set out further below. In summary, of 10 allegations investigated, Mr Harkins found that there was a case to answer in respect of eight of them and a partial case to answer in one other.

32. At this point, on 30 June 2020, the respondent considered suspending the claimant, but preferred to have him work from home, pending further steps [emails at pages 64 – 65]. This was in part due to concerns on the part of his management about the effect that suspension would have upon the claimant's health/mental health.

Investigation by Mr Sacree

33. Mr Harkins explained in his evidence that he was advised by the respondent's HR team that the investigation should be concluded by another senior manager, given that Mr Harkins was the claimant's line manager. Martin Sacree, the Senior Vice Principal at Shoreham Academy then took over.

34. Mr Sacree (who was not a witness before the tribunal) then raised some questions of Mr Harkins about matters which had been investigated, seeking clarity on some points and received detailed responses from Mr Harkins on 1 July 2020 [pages 66 – 70].

35. Mr Sacree then interviewed the claimant himself, at a formal disciplinary investigation meeting on 2 July 2020 [pages 75 – 80], which was the fourth interview with the claimant during the investigation.

36. Mr Sacree produced a second investigation report [pages 105 – 112], which incorporated the earlier investigation by Mr Harkins. The report is not dated but it was self-evidently produced at some point between 2 and 8 July 2020. The report addressed two main allegations: (1) unauthorised removal of items of property by the claimant and (2) inappropriate ordering of items in breach of financial processes by the claimant. The items alleged to have been removed were numbered as follows:

- *1a - Removal of Dulux Weathershield paint on Friday 19 June at 3.05pm*
- *1b - Removal of twin packs of garage racking units ordered from Yess Electrical in two batches, collected by the claimant on 26 May and 27 May*
- *1c - Removal of 2 gang switch socket with wifi repeater*
- *1d - Removal of one Radius Edge Screen shower barrier.*
- *1e - Removal of Door Chime Set x 2*
- *1f - Removal of Zinsser Watertite paint for mould and mildew*
- *1g - Removal of forehead thermometer*
- *1h Removal of paint ordered on 23 June 2020*

37. The ordering without authority allegations broadly overlapped with the same items above. I accepted the respondent's case that it had in place an ordering process whereby the claimant was supposed to seek prior approval from Mr Harkins before making purchases, unless items cost less than £200 **and** were required urgently.

38. The findings in the investigation report on the key unauthorised removal allegations were set out as follows [at pages 107 – 108] (emphasis added):

> *1a - Removal of Dulux Weathershield paint on Friday 19th June at 3.05pm*
>
> *It is clear from CCTV that KJ removed a pot of paint on Friday 19th June and took it home in his car.*
>
> *He admitted to this straightaway in the first meeting with TH (see annex 1). KJ said that he took the paint home to show to his wife. KJ states that he has been at the school for 17 years, so could surely be trusted to borrow a tin of paint. If MP or MB had been in the office, then he would have told them he was borrowing a tin. In KJ's last*

meeting with TH he mentions that his wife has still not seen it despite it being a number of days since it was taken. KJ explained that he had spilt a large amount of this paint at home on his way to work. TH stated that the pot was dry when given to him at 11.30am that morning.

MB had stated that the paint that was reported missing from the service entrance is not the same one that KJ returned to the academy on 25th June (see annex 1). The paint that MB reported missing is also a Weathershield external masonry paint but is nearer to white with touch of grey/blue. MB said that it had a star sticker on the lid (see photo named Allegation 1 Front Wall Paint for colour of this paint). TH stated that the paint returned by KJ was 1/3 used and was the Weathershield wishing well grey colour (see picture Allegation 1 Paint 1e for colour wishing well grey paint). ***The paint pot shown on CCTV closeup is clean and appears to be unused, however the distinctive two marks on the lid do indicate that this coloured paint was the pot that KJ took to his car and returned in the used state. The paint pot looks like it has been used rather than just been spilt. There is paint all around the lid rather than down one side as would be consistent with a spill.***

KJ has returned the pot he is seen leaving with on the Friday. TH states that he also ordered another pot of this Wishing Well grey paint (see allegation 1.10) on Monday 22nd June, picking this up on Tuesday 23rd June.

The Weathershield light blue external masonry paint reported missing by MB can no longer be found at the academy. It cannot be proven that KJ removed the light blue Weathershield paint but is curious that another paint pot was removed on or around that day. CCTV has now gone past 7 days so cannot be checked. KJ said in his third meeting with TH when challenged about the colour of the wishing well grey paint returned that he had no knowledge of where the lighter Weathershield paint was and had not seen it since the front wall had last been painted ages ago.

1b - Removal of twin packs of garage racking units ordered from Yess Electrical in two batches, collected by KJ on 26th May and 27th May

KJ says he had ordered garage racking due to a H&S issue. KJ admits that he purchased these from Yess electrical but was unclear if he had picked them up unless this had happened with other supplies (see annex 1). MW highlights that when MW rang Yess Electrical on 24th June, the supplier is clear they were picked up by KJ on two separate days (see annex 1). KJ can remember seeing these units as he can recall them being flat-packed, but cannot recall when or where. ***The units have not ever been seen at the academy and KJ has been unable locate them.***

1c - Removal of 2 gang switch socket with wifi repeater

MB states that these items were delivered and after they had opened the bag it was left on KJ's desk in the Yess bag. ***When questioned, KJ is unclear about what these are and alluded initially they may have been ordered in error.*** *KJ says that he thought he was ordering USB ports for health and safety reasons as he has been led to believe that the "charging plugs" are unsafe because they can overheat (although in 2d below KJ says that he might have ordered them for use on the roof). He can remember chasing these up with the supplier; the description of wi-fi repeater is clear on the invoice, but KJ cannot remember this registering when he was doing this chasing.* ***However, they have never been returned to the company and they are no longer in the Premise's office.*** *In the last interview with KJ states he would challenge if MB had put them on his desk. He thought he had ordered a single socket that would enable multiple USB chargers to be plugged in, a H&S issue to prevent a fire from overheated cables.*

1d - Removal of one Radius Edge Screen shower barrier

KJ ordered 3 Radius Edge Screen barriers and picked them up in the minibus. The delivery note which was found in the minibus by TH on 25th June shows ***that 3 were picked up by KJ, however there are only 2 on the school premises. KJ said that they should be in the minibus, however one cannot be found there.*** *(The delivery note is part of annex 1, second page with '5' in top right corner). KJ says that because there is so much to do he will often leave orders in the minibus rather than taking into the school for storage. KJ says he didn't load or unload them from the minibus as he had hurt his hands.*

1e - Removal of Door Chime Set x 2

These devices were ordered on the 30th April 2020 but cannot be found. KJ can remember that he picked up the order he thought contained the Chime set but admits that because he was very busy did not check the contents against the invoice. ***KJ said that he does not know where the items are, as items from orders can go missing when so much is being processed, but that he had not stolen them.***

1f - Removal of Zinsser Watertite paint for mould and mildew

In March 2020 KJ ordered 1 pot of Zinsser Watertite paint for mound and mildew which has not been seen on site by his team and cannot be located. ***KJ referred to a similar product that could be found on site, however TH states that this is different to the one ordered and now cannot be found.*** *KJ was also asked about a 5-litre paint purchased 6th March 2020 (£60.85p) KJ said it was for the Gateway toilets. KJ said it can be found in the safety container in school. This has been checked and cannot be found. MW has identified other purchases of paint in colours that do not match the*

school colour schemes (itemised in annex 1/7 and 1/8). KJ can remember their purchase (as long ago as 2 years) as try out variations, but that they were never used.

39. Mr Sacree concluded that there was a case to answer on the majority of the allegations. He noted that the claimant had offered to pay for any of the missing items. He also noted that Mr Harkins had harboured concerns about the claimant's ability to carry out his role for the previous four months and concerns specifically about the claimant's health since May 2020. The claimant had disclosed that he was having a difficult time outside of work and his life was a *"shambles"* and getting progressively worse.

40. Following receipt of the report, on 8 July 2020 [pages 82 – 83], the Principal, Jim Coupe invited the claimant to a disciplinary hearing to consider two broad allegations of misconduct, as follows:

(1) That you may have removed United Learning property from the school without authorisation.

(2) That you may have ordered items for the school without the necessary authorisation.

41. Relevant documents were provided with the letter to the claimant. The letter did not expressly refer to alleged *"theft"*, but the claimant accepted in cross examination that he was aware that the respondent's case was in effect that he had stolen items from the school.

42. The letter from the respondent informed the claimant that if the allegations were upheld, this may lead to a final written warning or dismissal, although it did not expressly refer to *"gross misconduct"*. The claimant accepted in cross examnation that he knew the allegations were very serious but that he did not think that he would in fact be dismissed by the respondent.

43. In his evidence, Mr Coupe said that the decision to proceed to a disciplinary hearing was taken by him in conjunction with HR, after considering the investigation report.

44. In addition, the letter from Mr Coupe dated 8 July 2020 stated expressly that the claimant was not entitled to legal representation at the hearing. Mr Coupe readily accepted that this was a mistake and in fact the claimant did, unusually have the right, pursuant to a disciplinary policy under his original terms and conditions of employment [page 148]. Mr Coupe pointed out that the claimant had been provided with a copy of the relevant disciplinary policy.

45. In cross examination, the claimant conceded that he had not instructed a legal representative at any stage of the disciplinary proceedings or the present tribunal proceedings and so I accepted the respojndent's case that he would be very unlikely to have done so, even had he been provided with the correct information by the respondent about his entitlement. I also noted that the claimant did seek, and was granted, permission for his cousin (who was also not permitted on the face of the letter) to accompany him to the

hearing. His cousin was not a work colleague or a trade union representative.

Disciplinary hearing 22 July 2020

46. The disciplinary hearing was fixed for 22 July 2020.

47. The claimant was informed in advance of, and did not object to, the make-up of the disciplinary panel – namely Jim Coupe as Principal and Andrew Swayne as the nominated governor.

48. There was some medical evidence put before the disciplinary panel by the claimant. The claimant sent an email [page 90] which set out details of medication which he had been taking for his mental health issues and described some of the effects of the same. He also disclosed a letter from his counsellor (which referred to effects on his ability to organise and self-regulate) and a letter from his wife (to the family GP) about the impact of his mental health issues upon him [pages 90 – 92].

49. The claimant attended the disciplinary hearing with his cousin and friend, Matthew Jarman.

50. Matthew Jarman's details, as the proposed companion, were provided to the respondent on 20 July and I understood that the bundle was provided the following day to Mr Jarman by the respondent. It was put to Mr Coupe in cross examination that Mr Jarman therefore had insufficient time to consider the paperwork, and the claimant was critical of the timing if this. Mr Coupe responded that Mr Jarman's details had only been provided to the respondent the day before the hearing (although in fact it was two days before) but in any event there was no request by either Matthew Jarman or the claimant for more time or for an adjournment at the hearing.

51. The claimant also accepted in evidence that he could have forwarded his own copy of the hearing documents (sent to him by the respondent by email back on 8 July) to Mr Jarman, but that he had not done so.

52. The disciplinary hearing itself was relatively short with notes at pages [94 – 97] and a statement was adduced by the claimant [page 156] which stated as follows (insofar as is relevant):

> *I completely understand the allegations made against me and would like to make the panel aware that I will revisit my health and safety training immediately on my return and make sure I am fully reacquainted with all policies, procedures and processes relevant to my role.*
>
> *…*
>
> *If I may, I would like to put on record some extenuating circumstances, including lockdown which has made life more stressful at work and at home, and also the rise of the Black Lives Matter movement which have meant I have revisited some earlier*

trauma in my life. All of which has contributed to my recent behaviour. The panel will be aware of the evidence provided to Human Resources which;

1. *Outlines very similar behaviour patterns at home and in dealings with the local GP*

2. *Provides an overview of my medicinal changes which I take to help control my disability, the dates of which are closely linked to those of the alleged misdemeanours*

3. *Describes the sessions I have recently commenced with a therapist to try to address the huge trauma I experienced in my early life*

…

To sum up, I accept responsibility for my actions and I apologise for them. I will make changes in my working practises on return, including reviewing past training and attending other sessions which may be identified. I will work to rebuild your trust in me by ensuring that I receive the appropriate approvals before carrying out my duties in the future, but ask that you take my previous good record and loyalty to the school into account.

53. Mr Sacree's investigation report was presented by him at the hearing, and the claimant was also informed again that a potential outcome could be dismissal.

54. Matthew Jarman said that he and the claimant had no questions to ask of Mr Sacree and that the claimant had read the allegations, understood them and accepted responsibility. The notes of the hearing (which were not disputed) then record the following in respect of the claimant's case at the disciplinary hearing [pages 96 – 97]:

Kevin Jarman's evidence

MJ read a statement that KJ had prepared (copy attached). MJ said that KJ accepts full responsibility and wanted to put on record his extenuating circumstances.

JRC expressed his appreciation to KJ for him sharing personal information and asked if he had found the process to be fair and supportive. KJ confirmed he had and had appreciated the support offered to him.

JRC referred to KJ's statement saying he accepted full responsibility and asked if he was accepting that he had taken things from the school. KJ said he accepted he had placed the orders, that items were missing and that he borrowed the paint. MJ added that although KJ accepted what happened, he did not consider any were intentional or meant with any hard to the school or benefit to KJ, but

were a result of things KJ was going through.

JRC asked KJ if he had used the paint. KJ said he had not. He had painted the outside of his house grey a year ago, but not the same grey as the paint.

JRC asked why KJ took the paint home to show his wife instead of buying a sample. KJ said he didn't think.

JRC referred to an interview with KJ when he said that sometimes staff borrow things. KJ said lots of staff borrow items and return them and acknowledged that he should have told someone he was borrowing the paint. JRC said PE have a specific process for equipment borrowed and asked what the process was for premises items. KJ replied saying there was no formal process, but that he was supposed to be informed.

JRC asked KJ why he had ordered a number items that were not required by the academy? KJ explained he had been thinking ahead to work required during the summer holiday. He accepted he had not followed procedure, but believed that the items were either needed or would be needed.

AS asked KJ why, if not well enough to work, had he not gone on sick leave and given the nature of his role asked why he had not done this. KJ said he had been the last person to see he needed help and his pride had meant he soldiered on.

…

AS asked KJ if he had received an appropriate duty of care and support. KJ confirmed that JRC, TH and Hayley Hill had all been supportive once he had opened up to them and he apologised for the trouble caused.

JRC asked KJ why in a previous meeting he offered to pay for the missing items. KJ said he wanted to help solve the problem.

MJ added how much KJ loves working at Shoreham Academy and how much it means to him.

No further questions were asked and KJ confirmed he was satisfied with the process.

Letter of dismissal – 24 July 2020

55. The claimant was dismissed by way of a letter dated 24 July 2020 from Mr Coupe, which concluded as follows [page 102]:

It is clear from the evidence provided in the management case that you removed the pot of 'Wishing Well Grey' Dulux Weathershield paint (value £72) from the school premises without authorisation. The

explanation you have provided for taking this action is considered to be unreasonable. The panel believe that you had no intention to return the pot of paint to school and therefore it was taken for your own personal gain and considered to be theft. The panel conclude that this particular allegation constitutes an act of gross misconduct.

We considered the following items that you have ordered that cannot be located on the school premises;

- *Twin packs of garage racking*
- *2 gang switch sockets with wifi repeater*
- *1 Radius Edge Screen shower barriers*
- *2 door chime sets*
- *Zinsser Watertite paint for mould and mildew*

It was confirmed by you that all of these items had either been delivered to the school or collected by yourself. You were unable to provide any reasonable explanation as to why these items could not be found by yourself or your line manager.

It is important to note that the items that you ordered and now cannot be found are all items that the school does not require and two of the items are household items (2 gang switch sockets with wifi repeater and door chime sets). The value of these items totals £404.58.

Considering that there is clear evidence to prove that you removed the wishing well grey paint from the premises for your own use, the fact that you had offered to pay for the missing items and provided no convincing explanation as to the whereabouts of the missing items, on the balance of probability, the panel conclude that these items were also ordered and taken home for your own personal gain and therefore is theft. The panel considers allegations Ib, Ic, Id, Ie and If to be proven and are acts of gross misconduct.

With regards to the items that you ordered without the correct authorisation from your line manager, you explained that some of these items had been ordered as you were concerned about the availability of them during the Covid-19 pandemic. The panel concludes that these items were not essential and were not required for an emergency situation and therefore you were in breach of the schools' financial processes. You also failed to seek authorisation for an order of sanitizer wipes. Although the need for these items is clear in the current climate, the order was over £800 and therefore also required authorisation from our line manager.

In summary, allegations 2a, 2b, 2d, 2f, 2g, 2i and 2j have been proven and constitute an act of misconduct.

In mitigation, you made reference to your declining mental health at the time that the orders were made and when you took the 'wishing well grey' paint home. You were asked if you felt supported by the school during what you describe as a difficult time for yourself and you said that you were.

When questioned if you were fit to carry out your duties, you explained you didn't recognise the severity of your poor mental health at the time.

You stated at the hearing that you accepted responsibility for the allegations within the management case.

Taking into consideration all of the available evidence, it has been concluded that your actions have resulted in a loss of trust and confidence in yourself as an employee at Shoreham Academy and a decision has been made to summarily dismiss you…

56. In their evidence, Mr Coupe and Mr Swayne stated that, in coming to the decision to dismiss the claimant, they had considered:

"i) The loss of trust and confidence [in the claimant].

ii) That it would have been difficult for him to return back to his role as his team members raised the complaint against him.

iii) The seniority of his role and that he was part of the management team.

iv) That he knew and understood the systems that he claimed were responsible for his mistakes with purchasing. There had not been a change to the process.

v) The Claimant's length of service and that he knew the role. There were no reasons to make shortcuts. The Claimant had a clean disciplinary record and this was considered.

vi) That he had purchased items that were not required. The items purchased were unusual and were not required at the school.

vii) That there had been multiple incidents over a period of time, this was not an isolated incident of small value.

…"

57. The claimant's representative sought to challenge that rationale during cross examination (particularly that of Mr Swayne) but the respondent's witnesses stood by what they said and I accepted that those were the matters they had in mind when deciding to dismiss the claimant.

58. Mr Coupe said during re-examination that he understood that the claimant had accepted responsibility for items going missing and, when asked what

attempts the claimant had made at the disciplinary hearing to try and disprove the suspicions of theft, he responded that this was the *"nub"* of it and he had not attempted to do so and offered no defence.

59. In terms of considering the sanction to impose upon the claimant, in addition to the good disciplinary record and long service and other matters mentioned above, Mr Coupe's evidence was that he took account of the claimant having a role on the Health and Safety Committee and being responsible for supporting the mental health of the workforce. He also took into account the claimant's own mental health, since he had participated in mental health support. This included a welfare meeting with Mr Coupe and Mr Harkins and the lead for staff welfare at the school. Mr Coupe also said that the claimant had also been signposted to the respondent's third party confidential care package. He said that the panel also took account of the fact that the claimant had remained at work at all times and therefore they considered that he was accountable for his decision-making when at work.

60. I asked Mr Coupe if the respondent had referred, or considered referring, the claimant to occupational health for advice prior to dismissal, given the claimant's health, as this was not apparent from the evidence before me. Mr Coupe's response was to the effect that they had not. He did say that he had been at pains to check the claimant was *"okay"* with the disciplinary process and that he felt supported with his mental health issues; Mr Coupe said that it was clear to him from the claimant's responses in the disciplinary hearing that the claimant did feel supported.

61. Ultimately, the decision made was to dismiss the claimant.

62. The claimant was advised of his right of appeal in the letter of dismissal but he did not appeal. He accepted in cross examination that he had the option to appeal but firmly denied that he had not appealed because he knew that he was guilty.

63. There was a suggestion raised on behalf of the claimant that, by virtue of the investigation and disciplinary process completing in around 30 days, this was unduly and unfairly quick. The respondent's witnesses, Mr Coupe and Mr Swayne, refuted that suggestion and indicated that the claimant had the option of requesting more time and, furthermore, pointed out that, at the disciplinary hearing, the claimant confirmed that he had been satisfied that the process had been a fair one.

64. The claimant accepted that, following his dismissal, the respondent recruited a replacement for him and was taken to page [104] which was a document from the relevant recruitment process.

65. He submitted his employment tribunal claim for unfair dismissal on 23 October 2020.

The law

66. Section 94 of the Employment Rights Act 1996 (ERA 1996) confers on employees the right not to be unfairly dismissed.

67. The employee must show that he was dismissed by the employer under section 95 ERA 1996, but in this case the respondent admits that it dismissed the claimant.

68. Section 98 ERA 1996 Act deals with the fairness of dismissals. There are two stages within section 98:

    (1) Firstly, the employer must show that it had a potentially fair reason for the dismissal within section 98(2).

    (2) Secondly, if the employer shows that it had a potentially fair reason for the dismissal, the tribunal must consider, without there being any burden of proof on either party, whether the employer acted fairly or unfairly in dismissing for that reason under section 98(4).

69. A 'reason for dismissal' has been described as *'a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee' — Abernethy v Mott, Hay and Anderson* [1974] ICR 323, CA. (Mis)conduct is a potentially fair reason for dismissal under section 98(2).

70. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and shall be determined in accordance with equity and the substantial merits of the case.

71. In misconduct dismissals, there is well-established guidance for tribunals on fairness within section 98(4) in the decisions in *BHS v Burchell* [1978] IRLR 379 and *Post Office v Foley* [2000] IRLR 827.

72. The tribunal must decide:

    (1) whether the employer had a genuine belief in the employee's guilt;

    (2) if so, whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation; and

    (3) if so, whether the decision to dismiss was reasonable.

73. In terms of the standard of investigation required, in *A v B* [2003] IRLR 405, it was stated that the employer's investigation should be particularly rigorous when the charges are particularly serious or the effect on the employee is far-reaching. It is unrealistic and quite inappropriate, however, to require the safeguards of a criminal trial. Careful and conscientious investigation of the facts is necessary.

74. The reasonableness or otherwise of the employer's approach with reference to the above guidance in *Burchell* and *Foley* is assessed with

reference to the *"range"* or *"band"* of reasonable responses test. In Iceland Frozen Foods Ltd v Jones [1983] ICR 17, EAT, Mr Justice Browne-Wilkinson summarised the law concisely as follows:

> *We consider that the authorities establish that in law the correct approach for the… tribunal to adopt in answering the question posed by [section 98(4)] is as follows:*
>
> *(2) the starting point should always be the words of [S.98(4)] themselves;*
>
> *(3) in applying the section [a] tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the… tribunal) consider the dismissal to be fair;*
>
> *(4) in judging the reasonableness of the employer's conduct [a] tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;*
>
> *(5) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;*
>
> *(6) the function of the… tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.*

75. The tribunal must not therefore substitute its own view for that of a reasonable employer (see also *Sainsbury's Supermarkets Ltd v Hitt* (2003)IRLR 23 and *London Ambulance Service NHS Trust v Small* [2009] IRLR 563).

76. Furthermore, in determining the reasonableness of a dismissal, the tribunal can only take account of those facts (or beliefs) that were known at the point of dismissal to those who took the actual decision to dismiss (after reasonable investigation). The Court of Appeal in *Orr v Milton Keynes Council* [2011] ICR 704, CA, held, in this context, that an employer cannot know everything known to its employees and so an employee was not unfairly dismissed when information that would have mitigated his misconduct was known to his line manager but not to the manager who decided on dismissal.

77. *Taylor v OCS Group Ltd* [2006] IRLR 613(CA) established that if there are procedural flaws in the process followed by the employer, they should be considered alongside the reason for dismissal, when the tribunal comes to assess whether in all the circumstances, the employer acted reasonably in

treating the reason as a sufficient one for dismissal.

Conclusions

78. I heard oral closing submissions from both representatives, which I considered in reaching my decision below. I did indicate to Mr Warren that I was not prepared to hear submission on matters which did not form part of the case before me and which had not been heard in evidence. I also explained that he could not use closing submissions to give evidence himself about his own knowledge of the claimant and his own opinions about the claimant's character.

79. On the first issue, namely whether or not there was a potentially fair reason for the claimant's dismissal, the respondent satisfied me that there was, and the disciplinary panel believed that the reason was on grounds of the claimant's conduct. The claimant had appeared to suggest that there was an ulterior motive of redundancy, and some of Mr Warren's questions alluded to motivation relating to alleged past health and safety issues at the school, but there was no credible evidence before me to suggest that the reason in the mind of the respondent's disciplinary panel was anything other than conduct. It was apparent that the claimant's role was filled after his dismissal [page 104] and so I found that there was not a potential redundancy situation.

80. I then turned to whether or not the dismissal was unfair. Given my conclusion below on this issue, I emphasised that I had made no findings as to whether or not the claimant had in fact committed the misconduct which was alleged i.e. as to whether or not he was guilty of theft, as this issue had not fallen to be determined. Rather I explained that my focus was on the actions of the respondent and whether it had acted reasonably in dismissing the claimant, and in this regard I had reminded myself that I must not substitute the respondent's decision with my own.

81. Mindful of the relevant legal tests set out above, I considered the investigation which was conducted by Mr Harkins initially and then by Mr Sacree. I was satisfied that there was a sufficiently careful and conscientious investigation on behalf of the respondent of the serious allegations which were raised. The claimant was informed of the case against him and knew he faced serious allegations and of the detail of those allegations. Relevant witnesses were spoken to and reasonable and sensible lines of enquiry (including CCTV and photographic evidence) explored. The evidence obtained was put to the claimant by the respondent during the investigation to provide explanations over the course of four separate investigatory meetings and those explanations were largely found wanting or absent. The claimant remained at work throughout the investigation and so had access to the school premises in order to seek to locate the various missing items which Mr Harkins' investigation had brought to light. The final investigation report by Mr Sacree balanced the evidence obtained in the investigation against the responses from the claimant and concluded that there was a case to answer.

82. There can be some possible criticism levelled at certain specific and narrow

aspects of the initial investigation, namely the apparent confusion on the part of Mr Harkins (based on the document headings) about whether he was conducting fact-finding or disciplinary interviews with the claimant. Mr Harkins was appointed to investigate initially, when he was closely involved in the management of the claimant and so could potentially be seen as not being independent; however, Mr Sacree was then asked to take over (although there was no apparent evidence of the closeness of Mr Harkins to events in fact having affected his approach). Mr Sacree scrutinised the earlier findings and evidence, met with the claimant himself for a further time and concluded the investigation with a detailed and thorough report. I found that, in all the circumstances of the case, the respondent's investigation overall was well within the range of reasonable responses of a reasonable employer with the size and administrative resources of the respondent.

83. In terms of the disciplinary hearing and the findings made at that hearing against the claimant, the test I applied was whether the respondent genuinely believed on reasonable grounds and following a reasonable investigation that the claimant had committed the misconduct alleged. The thrust of the challenges on behalf of the claimant during cross examination of the respondent's witnesses were as follows (in summary):

    (1) Mr Warren sought to challenge to the credibility of the case against the claimant and in particular raised issues about alleged bad character on the part of Mr Bukleeb and alleged that he was hostile towards the claimant.

    (2) Mr Warren referred the claimant's previous good record and long service and contended that the respondent gave insufficient weight to that.

    (3) He suggested that there were material procedural failings on the part of the respondent, such as advising the claimant incorrectly about legal representation and providing the disciplinary hearing pack to the claimant's companion only shortly before the disciplinary hearing.

    (4) Mr Warren raised the point that the letter inviting the claimant to a disciplinary hearing did not expressly mention *"gross misconduct"*.

    (5) He suggested that it was simply implausible that the claimant would have misappropriated items given his good previous record.

84. Various other lines of questioning by Mr Warren related to factual matters which were not before the disciplinary panel or were not relevant to the legal claim of unfair dismissal being pursued before me and as such were not relevant to my decision.

85. The position of the respondent's witnesses in evidence, and echoed in Mr Murray's closing, was to the effect that:

    (1) They said that the allegations against the claimant related to a number of items ordered by him during 2020, rather than just one or two in isolation - in effect there was a pattern of behaviour.

(2) They said that some of these items he had no place ordering and they appeared domestic in nature (doorbell chimes; wifi extenders, which would have fallen within the remit of the school's IT to order had they been required).

(3) They said that the claimant had not sought authority to order the items.

(4) They pointed out that many of the items could not be located during the investigation

(5) They said that claimant had plenty of opportunities during the investigations and at the final hearing to put forward evidence in his defence.

(6) They found that the claimant's account of his rationale and actions during the investigation was generally vague, inconsistent and not plausible

(7) They pointed out that, at the final disciplinary hearing, the claimant had confirmed that he understood the case against him and accepted responsibility for it.

(8) They observed that the claimant was clearly made aware before the hearing that he was suspected of serious misconduct and that dismissal was a possible outcome.

(9) They said that overall the process followed was a fair one, and the claimant had readily accepted this at the disciplinary hearing.

86. Weighing up the cases of each side, I found that, at the conclusion of the disciplinary hearing, the disciplinary panel did genuinely believe, after following a disciplinary process which was within the range of reasonable responses, that the claimant had committed the misconduct alleged.

87. Finally, I turned to the question of whether the decision to dismiss the claimant was within with range of reasonable responses.

88. Clearly the findings which were made against the claimant were very serious in nature, notwithstanding his long service. They amounted in effect to a finding of dishonesty against a manager in a position of trust and authority. The reasons for deciding to dismiss and the factors weighed up by the respondent in so deciding, as given in evidence by Mr Coupe and Mr Swayne, have been referred to above.

89. The respondent's approach to the arguments raised by the claimant in mitigation about his mental health at the elevant times was a potential concern. The respondent was aware that the claimant was struggling with his mental health and he had put those issues before the panel in mitigation of his actions. They formed a view on those health issues and how they had affected the claimant, based upon what he told them and upon the fact that

he had remained at work and had continued to carry out his job, without seeking any specialist input or medical advice.

90. I reminded myself that the approach I must take is one of considering whether or not the steps the respondent took were, and its decision to dismiss was, within the range of reasonable responses open to a reasonable employer in the circumstances. I reminded myself that I must not substitute my own decision for that of the respondent.

91. Whilst some employers may have considered it prudent to have referred an employee in the claimant's position to their occupational health advisers for advice prior to making any final decision on dismissal, on the facts of the case and in view of the information known to the respondent at the time, I did not consider that the failure by this respondent to do so took either its investigation or its decision to dismiss outside of the range of reasonable responses.

92. The disciplinary panel did give some consideration to the claimant's mental health issues in mitigation, as well as his long service, as is clear from the findings above and the reasons given by Mr Coupe and Mr Swayne. They balanced this against the seriousness of the allegations which had been upheld and the effect which those findings had on the respondent's trust and confidence in the claimant. Whilst some employers may possibly have responded and concluded differently in the scenario which this respondent faced, that did not mean that its actions fall outside the range of reasonable responses, and I found that they were **not** outside that range.

93. I therefore concluded that the respondent genuinely believed, following a reasonable investigation, that the claimant had committed the misconduct alleged. The decision to dismiss, for the reasons set out in the dismissal letter and explained in the evidence of Mr Coupe and Mr Swayne, was within the range of reasonable responses. The minor procedural failings and the failure to obtain occupational health advice were not sufficient to render the dismissal unfair in all of the circumstances.

94. The claimant's claim for unfair dismissal therefore failed and was dismissed.

Employment Judge Cuthbert
Date 15 March 2022

Reasons sent to parties: 30 March 2022

FOR THE TRIBUNAL OFFICE