EMPLOYMENT TRIBUNALS

Claimant: Brian Taylor Wilson

First Respondent: Seighford Hall Nursing Home Ltd

Second Respondent: First Blue Propco 2 Limited

Third Respondent: Thomas Butler

Heard on: 19 and 20 April 2022 and Reserved to 12 May 2022

Before: Employment Judge Hindmarch

Appearances
For the Claimant: In person
For the First Respondent: Did not attend
For the Second Respondent: Mr Hignett – Counsel
For the Third Respondent: Did not attend

JUDGMENT

1. The employer of the Claimant was the first Respondent and consequently the claims against the second and Third Respondent are discussed.
2. The effective date of termination was 3 February 2020.
3. The complaint of unlawful deduction from wages is well founded and the sum of £2,511.27 is awarded.
4. The claim for accrued but untaken holiday pay is well founded and the sum of £1,554.55 is awarded.
5. The claim for notice pay is not well founded and is dismissed.
6. The claim of unfair dismissal is well founded and upheld. The compensatory award is reduced by 100% under the rule in Polkey. The Claimant contributed to his dismissal and the basic award is reduced by 100% to reflect this.

REASONS

1. This case came before me for a 2-day hearing by CVP on 19 and 20 April 2021. I reserved my decision to 12 May 2022.

2. The Claimant was a litigant in person. The First and Third Respondents were not present nor represented having both failed to file ET3's in the case. The Second Respondent was represented by Counsel Mr Hignett. There was an agreed bundle running to 261 pages. There were 4 Witness Statements for the Second Respondent but a witness Thomas Butler, in fact the Third Respondent, did not attend to give evidence. There was a Witness Statement for the Claimant and for his partner Miss Rhodes.

3. I also had a Chronology and Skeleton Argument from Mr Hignett and his instructing solicitor had sent in an additional document.

4. The Claimant had sent in an amended Schedule of Loss.

5. There had been a Case Management Preliminary Hearing on 8 July 2021 before Employment Judge Noons. The Case Management Summary set out the issues and at the outset of the hearing before me the parties confirmed these issues were still in play.

6. By an ET1 filed on 4 February 2021 the Claimant brought complaints of unfair and wrongful dismissal and claims for holiday pay and unlawful deduction from wages.

7. By an ET3 the Second Respondent indicated its intention to defend the claims, its primary defence being that it was not the employer of the Claimant, rather that was the First Respondent, and in the alternative the Claimant was fairly dismissed for gross misconduct in November 2020.

8. On the first day of the hearing, I heard evidence from the Second Respondent's 3 witnesses – Mr Christopher Smith, a director of the Second Respondent, Mr David Haynes, an owner of Lakeside Hire Co Holidays Ltd which owns shares in the Second Respondent, and Mr Richard Lever a director of Lever Turner Cowdell Ltd, a business offering architectural, planning, and building surveying services to clients, one of which is the Second Respondent.

9. As mentioned, I also had a Witness Statement from Mr Thomas Butler, but he did not attend to give evidence.

10. On the afternoon of the first day of the hearing the Claimant gave evidence. I had a Witness Statement from his partner Miss Rhodes however Mr Hignett had no questions for her, so she was not required to give evidence.

11. I decided to allow the Claimant further consideration of Mr Hignett's skeleton argument and his own arguments overnight, so we broke at just before 15:15 on the first day. I heard submissions on the morning of the second day. I asked Mr

Hignett to go first and to take the Claimant and myself through his submissions. I then heard from the Claimant. I decided to reserve my decision.

12. The Claimant began his employment with the First Respondent week commencing 16 February 1998. An offer letter dated 6 February 1998 was in the bundle at page 45. There does not appear to be any contract of employment. I am told Seighford Hall is a listed building which was, at the time the Claimant commenced employment, utilised as a nursing home and the offer letter is signed by a matron on behalf of the First Respondent. I will refer to Seighford Hall as "the Hall" throughout the rest of this Judgment. This is a reference is to the house and gardens rather than the First Respondent.

13. It appears the First Respondent ceased operating as a nursing home in 1998 and the Hall was in effect out of use. For security and insurance purposes the Claimant was kept on to reside on site in a caravan and to deal with any security and maintenance issues. The Claimant resided in the caravan with his partner Miss Rhodes.

14. On 19 June 2020 the Second Respondent purchased the shares in the First Respondent. On 9 July 2020 the First Respondent sold the Hall to the Second Respondent. On 13 July 2020, the Second Respondent sold its shares in the First Respondent to Thomas Butler who at the time became a director of the First Respondent.

15. I had to consider initially who was the Claimant's employer as a result of these various transactions. I had detailed submissions from Mr Hignett on this point and his Skeleton Argument referred me to the legal principles. The Claimant told me he simply did not know who his employer was, although in submissions he referred to it being the Third Respondent, and he essentially said that he would leave the issue to me.

16. Mr Hignett in his skeleton argument referred me to the Acquired Rights Directive and the Transfer of Undertakings (Protection of Employment) Regulations 2006. Regulation 3 of the 2006 Regulations confirms that a relevant transfer involves a "transfer of an undertaking, business, or part of an undertaking of business…to another person where there is a transfer of an economic entity which retains its identity." Further an "economic entity" is said to mean an "organised grouping of resources which has the objective of pursing an economic activity, whether or not that activity is central or ancillary."

17. Mr Hignett was correct to point out that a share sale does not normally constitute a transfer for the purposes of the Regulations. This is because there is no change in the identity of the employer. So, when on 19 June 2022 the Second Respondent purchased the shares in the First Respondent, the First Respondent retained its identity as a legal company and would usually be taken to remain as the employer.

18. Mr Hignett rightly acknowledged that sometimes a transfer can occur in a share sale where there does appear to have been a business transfer and where the

purchaser of the shares starts to behave like the employer and/or assume its obligations.

19. It is not in dispute that Mr Smith, a director of the Second Respondent, became a director of the First Respondent when the Second Respondent purchased the shares in the First Respondent.

20. On 19 June 2020 the Second Respondent sent a letter to the First Respondent, page 95, explaining that "as of today your employer the First Respondent has been acquired by the First Blue Group of Companies." The same letter confirmed that Mr Shah, the man the Claimant had viewed as a representation of his employer for many years, was no longer an officer of the First Respondent and would no longer be involved in the running of that company.

21. On 22 June 2020 a letter was sent from the Second Respondent instructing the Claimant not to enter the Hall for health and safety reasons. It also served a notice to quit (page 97). I accept it took these actions as landlord rather than employer. It appears to be common ground that Mr Smith was on the site of the Hall after 19 June 2020. It appears he asked Mr Lever to inspect the site. On the evidence however there was nothing to demonstrate that Mr Smith was assuming the obligations of an employer and I do not find there was a transfer of the Claimant's employment to the Second Respondent.

22. It is the case that on 6 July 2020 Mr Smith sent a letter to the Claimant suspending him from duty. A copy of the letter is at pages 62-63. Mr Smith signed that letter on behalf of the First Respondent. There follows later correspondence inviting the Claimant to an investigation meeting – page 65 – also signed in the name of the First Respondent.

23. On 13 July 2020, the Second Respondent sold its shares to the Third Respondent. On the same day the Third Respondent conducted a disciplinary meeting with the Claimant. The outcome letter – page 127-128 – is signed by a Mr Kumani, described as an independent consultant on behalf of Seighford Nursing Home, the clear implication being that First Respondent was still acting as employer.

24. Further evidence pointing to the fact that the legal entity that is the First Respondent (despite any change of shareholders or directors) remained the Claimant's employer throughout his employment is that it was the First Respondent who continued to pay the Claimant's wages. We see an email exchange between Mr Butler and Miss Rhodes on 31/07/2020, page 133, regarding the sending of the payslip and payment to be made. There are wage slips for February 2020 to July 2020 at pages 134-135 which show the payslips continued to be generated by the First Respondent. On 23 February 2021, page 108, HMRC wrote to the First Respondent concerning the Statutory Sick Pay due to the Claimant.

25. So, my conclusion on the issue of identity of the Claimant's employer is that the employer was the First Respondent. I dismiss any claims against the Second Respondent and the Third Respondent.

26. Turning now to the claim of unfair dismissal. As already stated on 13 July 2020 the Claimant was issued with a disciplinary outcome letter (a final written warning) for signing a document without authorisation. The outcome letter informed him the warning was for 12 months and would be disregarded for disciplinary purposes after that time. The Claimant was offered the right of appeal against the sanction, but it appears he did not appeal.

27. After the meeting on 13 July 2020 the Claimant consulted his GP and was given a fit note on the basis he was unfit to work. The previous day to 12 July 2020 he had decided to vacate the caravan but had not provided a forwarding address to the First Respondent. Nevertheless, the fit notes he provided stated his address to be that of the Hall.

28. I have already recorded that in June 2020 Mr Smith instructed Mr Lever to inspect the site. Mr Lever, who gave evidence, is a qualified architectural technologist and building surveyor. Mr Lever is independent of the Respondents, and I found him to be truthful in his account to me which was supported by a contemporaneous letter to which I will shortly refer. Mr Lever explained he attended the Hall on 22 June 2020 at the instruction of Mr Smith and met and spoke with the Claimant. He explained that the Claimant informed him there had been a break in at the Hall the previous night and items had been taken including a tractor, an oak over mantle which included the crest of Queen Anne and fire surrounds. The Claimant told Mr Lever he had reported this to the police. Mr Lever asked for the crime reference number, but the Claimant was unable to produce this. Mr Lever inspected the Hall but could see no signs of forced entry which caused him to be suspicious. He was also suspicious that the removal of the items which in the case of the tractor and over mantle were heavy items, had not attracted the Claimants attention given the proximity of his caravan to the location.

29. On 23 June 2020 Mr Lever wrote to Mr Smith explaining his conversation with the Claimant and his suspicions. A copy of the letter on Mr Lever's company headed paper is at page 161.

30. There appears to have been some social media interest around the Hall. At page 57 of the bundle was a social media post by a Sue Eld. I understand the Eld family previously owned the Hall. The post referred to 'dodgy dealings' at the Hall and her being 'informed by very reliable sources that most of the interior and exterior fittings, e.g. fire places, balustrades and fountains are being offered for sale!'. The Claimant accepted Miss Rhodes had shown him the post at the time.

31. I was told posts such as these led the local council to visit the Hall. At page 260-261 of the bundle is a letter from a Planning and Conservation Officer at Stafford Borough Council to the Second Respondents solicitor dated 2 March 2022 in which is it recorded that council officers visited the Hall on 12 February 2020 and met with the Claimant. Having checked the site no evidence was found of removal of fixtures and fittings. The letter records that the Claimant informed the officers that potential purchasers of the Hall had been on site and had been 'made aware that listed building consent would be required for the removal of fixtures and

fittings.' In cross-examination the Claimant denied saying this to the officers, but accepted he was aware permission would be required for anyone to remove artefacts given the listed building status of the Hall.

32. Mr Smith and Mr Lever gave evidence that in August/September 2020 the police carried out an unannounced visit to the Hall to check it was safe and secure. They spoke with the police and asked if there was any crime reference number for the alleged break in on the 21 June 2020. The police confirmed there were not so Mr Smith made a formal report of theft/break in.

33. Mr Smith understood the police would be investigating this potential crime. Whilst he was on holiday abroad in October 2020, he received a photograph of a fireplace located at Windmill Antiques. On his return from holiday, he went with Mr Butler and the police to Windmill Antiques to view the fireplace. Mr Smith and Mr Butler were able to confirm the fireplace as having been taken from the Hall. Ian Kettlewell of Windmill Antiques informed them he had been shown around the Hall on 10 June 2020 by the Claimant and had agreed to purchase the 2 fireplaces for £450. A statement from Mr Kettlewell was in the bundle at page 166 and dated 22 October 2020. The Claimant pointed out that it was unsigned.

34. I also heard evidence from Mr Haynes. He told me that on 29 October 2020 he contacted a local car dealer, Robert Wagstaff, as he was looking to sell a vehicle. He asked Mr Wagstaff to view the vehicle at the Hall. When they met Mr Wagstaff informed Mr Lever he had purchased a tractor from the Claimant in May 2020 and that he had paid £1000 for it. Again, there was a statement from Mr Wagstaff at page 167 of the bundle. It was dated 29 October 2020 but also unsigned.

35. It appears that during the course of the police investigation the Claimant provided a handwritten letter dated 22 July 2020 – page 155. He told us in evidence that this was written by a Mrs Potter but signed by him. In it the Claimant confirms that on 26 April 2020 he met a Mr Potter at the Hall who was a prospective buyer. He says Mr Potter asked if he could rummage through the 'firepile' and that Mr Potter took away a 'decorative piece of wood…it was rotten. Riddled with wood worm and dry rot… I let him have it, as far as I was concerned it was less rubbish for me to get rid of.'

36. It is the case that no criminal proceedings were taken against the Claimant by the police.

37. It appears the item removed by Mr Potter was the over mantle which was the subject of a valuation/auction appraisal and the particulars including photographs are at pages 157-160. The over mantle is described as being in 'excellent condition for its 400+ years' with 'minimal damage.' I was told the over mantle had been valued at up to £5 million.

38. On 30 October 2020 Mr Butler, in his then role as Managing Director of the First Respondent wrote to the Claimant inviting him to an investigation meeting on 3 November 2020 concerning 3 matters:

1. "The sale of 2 fireplaces belonging to Seighford Hall without authorisation.

2. The sale of an orange KUBOTA tractor belonging to Seighford Hall without authorisation.
3. Handing over a historic artifact (sic) (Over Mantle) belonging to Seighford Hall without authorisation."

39. The letter, a copy of which is at page 140, was addressed to the Claimant at the caravan at the Hall. I have already noted the Claimant vacated that accommodation on 12 July 2020, had not provided a forwarding address and at this time remained on sick leave.

40. It appears Mr Butler therefore decided to leave the letter in a post box that the Second Respondents' witnesses said had been installed at the entrance to the Hall and for which the Claimant had a key and which they believed he was accessing for his post. The Claimant denied any knowledge of the post box and that he ever used it to access his post.

41. I did not hear from Mr Butler. It is clear that he had contacted the Claimant earlier in the year and had the Claimant's phone number and Miss Rhodes email address. There was no explanation as to why he did not make attempts to contact the Claimant other than by use of the post box.

42. The Claimant did not attend the investigation meeting on 3 November 2020. He says he never received the invitation.

43. On 3 November 2020 Mr Butler 'sent' another letter using the same method of delivery inviting the Claimant to an investigation meeting on 6 November 2020, page 141 of the bundle. Again, the Claimant did not attend as again he says he did not receive the letter. On 6 November 2020 Mr Butler sent a third invitation, page 142, and again the Claimant did not attend. On 9th November, a 4th invitation was sent (page 143), and again the Claimant did not attend.

44. On 12 November 2020 Mr Butler prepared an investigation report, pages 144-145. Having reviewed the evidence, albeit without the Claimant's input, he concluded matters should proceed to a Disciplinary Hearing.

45. On 12 November 2020, Mr Butler wrote to the Claimant inviting him to a Disciplinary Hearing on 17 November 2020, page 147. The letter set out the same allegations as were set out in the invitation to the investigation meetings. The letter warned the Claimant an outcome could be a finding of gross misconduct and summary dismissal. It advised him of his right to be accompanied.

46. Again, the letter was placed in the post box. The Claimant did not attend on 17 November 2020, so a further invitation was sent this time for 20 November 2020, page 148.

47. The Claimant did not attend on 20 November 2020 and the hearing went ahead in his absence. The minutes are at pages 149 and the outcome letter is at pages 150-151. Mr Butler concluded in the light of the evidence he had regarding the tractor and fireplaces, and in the absence of any explanation from the Claimant, that these items had been sold illegally when the Claimant had no authorisation

to sell them. Mr Butler referred to the statement the Claimant had made on 22 July 2020 that he had allowed a third party to remove the over mantle when he (the Claimant) had no permission to do so.

48. Mr Butler concluded these actions amounted to gross misconduct and decided to dismiss the Claimant without notice. He confirmed the right of appeal.

49. Again, it appears this letter was placed in the post box. The Claimant says he did not receive it. There was no appeal.

50. The ET1 was presented on 4 February 2021. The Claimant 'ticked the box' for unfair dismissal. He went to ACAS early conciliation on 3 February 2020. He told me he had a number of telephone conversations with ACAS (he could not recall the dates) in which he learned of his dismissal. He then changed this saying he only learned of his dismissal after he was informed of this by the Second Respondents solicitors, presumably when the response/ET3 was filed.

51. As the Claimant did not engage with the disciplinary process, he offered in his witness evidence the evidence he would have offered had he engaged. As regards the tractor he says he scrapped it in January 2020 with the permission of Mr Shah. He says that tractor was 'absolutely rotten' and he received no payment on sending it for scrap. He said he had never met Mr Wagstaff and did not sell him the tractor. As regards the fireplaces he said he had never met Mr Kettlewell and did not sell him any fireplaces. He said the fireplaces were in situ when Mr Smith and Mr Lever arrived at the Hall on 22 June 2020. He said the evidence against him was all fabricated.

52. As regards the conversation with Mr Lever on 22 June 2020, the Claimant said he had reported a break in to him but no theft of items. He said he had not said the break in was on 21 June 2020 but rather on 15 June 2020.

53. Turning to the over mantle the Claimant said it was removed as it had fungal infection and was placed on the fire pile. He accepted it had been a fixture of the Hall but said Mr Shah had told him to remove it from the Hall in March 2020. Given its size and weight he did so with other of Mr Shah's employees. He accepted that his description of the over mantle as rotten was inconsistent with the photos and description of it by the auctioneers. He accepted he allowed Mr Potter to remove it and he 'took it for granted he had permission', presumably from Mr Shah.

54. In submissions on the issue of the dismissal Mr Hignett argued that reasonable steps had been taken to draw the attention of the Claimant to the disciplinary proceedings by use of the on-site post-box. He submitted the Claimant had received the correspondence but chosen not to engage. Mr Hignett did accept I could be against him on this point, and that I could find there had been procedural shortcuts namely that insufficient attempts were made to contact the Claimant and/or disciplinary hearing being conducted in the Claimant's absence. If this were the case. He argued that Polkey would come into play and the result (dismissal) would have been the same if the Claimant had engaged in the disciplinary process.

55. He addressed me on the evidence as to the missing items and submitted any disciplinary panel hearing the evidence, including the Claimant's explanations offered in the hearing before me, would have come to the same conclusions.

56. On the issue of holiday pay Mr Hignett submitted that by the date of dismissal the Claimant had worked several months of the holiday year but that his client had no record of holidays taken.

57. On the issue of unpaid wages, the Claimant was signed off as sick from 13 July 2020 until dismissal. Mr Hignett calculated some statutory sick pay was owed.

58. In his submissions the Claimant said he had taken no holiday leave for a number of years.

59. The Claimant told me he disputed the dismissal was fair, he believed Mr Butler could have made better efforts to contact him and he doubted that the disciplinary hearing had taken place. He argued the police had not found him guilty of any wrongdoing. He had wanted to call Mr Shah as a witness to support him but said he had been informed Mr Shah had signed a non-disclosure agreement preventing this.

60. I canvassed with the parties their views on what I might find to be the date of dismissal, if I were to find that the dismissal letter was never collected by the Claimant, and he was therefore not aware he had been dismissed. We know the Claimant went to ACAS for early conciliation on 3 February 2021. Mr Hignett said the Claimant must have reached the view he had been dismissed before this date. The Claimant firstly said ACAS told him he had been dismissed and then said he did not know until he received documents in the Tribunal Proceedings from the Second Respondent's solicitor, presumably the ET3/Grounds of Resistance.

<u>The Law</u>

61. S13 Employment Rights Act 1996 provides

'(1) An employer shall not make a deduction from wages of a worker unless

a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the workers contract, or
b) the worker has previously signified in writing his agreement or consent to the making of the deduction'

62. SS13 and 13A Working Time Regulations 1998 entitle the Claimant (who was a full-time worker) to 28 days annual leave in each holiday year. Given the lack of any written particulars of employment the leave year commenced on the anniversary of the commencement of the contract of employment.

63. S98 Employment Rights Act 1996 provides

1) "In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –

    a) the reason (or, if more than one, the principle reason) for the dismissal, and
    b) that it is either a reason falling within subsection (2) or…

2) A reason falls within this subsection if it –

    b) Relates to the conduct of the employee

4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

    a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in-treating it as a sufficient reason for dismissing the employee and,
    b) shall be determined in accordance with equity and the substantial merits of the case. "

64. A 'Polkey'; deduction may be made in an unfair dismissal case where a reduction to compensation for future loss is made to reflect the chance the individual would have been dismissed in any event – (Polkey v AE Dayton Services Ltd (1987) LRLR 50. A percentage reduction may be made or the Tribunal may find a fair dismissal would have occurred at some future point.

65. A basic award may be payable in accordance with S119 Employment Rights Act 1996. This can be reduced for contributory conduct under S122(2).

66. Where an employee is dismissed by written notice, that notice does not take effect until the employee has read, or has had a reasonable opportunity to read, the notice (Newcastle upon Tyne Hospitals NHS Foundation Trust v Haywood (2018) YK5C 22. The same applies to summary dismissal cases (Gisda CYF v Barratt (2010) UK5C 41.

Conclusions

67. Dealing firstly with the unfair dismissal claims, I accept the Claimant's evidence that he had no knowledge of the post-box. Given he fully engaged in the disciplinary process that led to the final written warning issued in July 2020, I find it difficult to believe he would not have engaged in a further disciplinary process that took place only a few months later. It is clear Mr Butler had access to Ms Rhodes (the Claimant's partners') email address and that he made no attempts to contact the Claimant via this method or by telephone to ascertain why he was not engaging in the disciplinary process that commenced in October 2020. I have formed the view that the Claimant did not have notice of the disciplinary process nor of the dismissal and that Mr Butler did not make sufficient attempts to bring

these to his attention. It follows that the dismissal letter did not come to the Claimant's attention in November 2020.

68. I then have to determine what was the date of dismissal. In my conclusion the Claimant must have known his employment had ended by the time he engaged with ACAS on 3 February 2020. On the following day he issued proceedings for (amongst other things) unfair dismissal.

69. It is my finding that the Claimant's effective date of termination was 3 February 2022 and that ACAS informed him on this date that he had been dismissed. He is therefore entitled to be paid to this date and that would be on the basis of statutory sick pay.

70. He began receiving statutory sick pay on 16 July 2020 and remained on sick leave until the effective start date of termination.

71. The weekly statutory sick pay rate was £95.85. He was paid on his last wage slip the sum of £171.53. He should have been paid £95.85 a week for up to 28 weeks. He is therefore owed in respect of his claim for unlawful deduction from wages the sum of 28 x £95.85 less the £172.53 paid to him as evidenced by the 31 July 2020 payslip at page 135 of the bundle, so the award is £2,511.27.

72. I now turn to the claim for accrued but untaken holiday pay. The start of the holiday year was 16 February and I accept the Claimant's unchallenged evidence that he took no holiday leave until dismissal on 3 February 2020. He is therefore entitled to 28 days holiday pay. The wage slips for May and June 2020 (pages 134) show normal monthly take home pay of £1202.93. £1202.93 a month x 12 = yearly take-home pay of £14,435.16 so ÷ 52 gives weekly take-home pay of £277.59. 5.6 weeks holiday pay (28 days) x £277.59 makes a total owed of £1554.55.

73. Turning now to the unfair dismissal claim. I have identified procedural failings in that the First Respondent did not make sufficient attempts to notify the Claimant of the disciplinary process and therefore he was offered no opportunity to attend the disciplinary hearing and offer his explanation for the alleged misconduct.

74. Mr Hignett invited me to make a 100% Polkey deduction to any compensatory award on the basis, even had the Claimant participated, the outcome would have been the same – summary dismissal. I must assess any Polkey deduction in 2 stages

1) If a fair process had occurred, would it have affected when the Claimant would have been dismissed? and
2) What is the percentage chance that a fair process would still have resulted in the Claimant's dismissal.

75. It is somewhat unusual to hear a case where the dismissing offer does not give evidence. Nevertheless, I had the benefit of Mr Butler's witness statement and more importantly the evidence he had before him when he made the decision to

dismiss along with the explanations the Claimant would have proferred had he attended the disciplinary hearing.

76. On the issue of the tractor, I heard from Mr Haynes who said that Mr Wagstaff had told him he purchased it from the Claimant for £1000. Mr Butler would have had this information along with the statement of Mr Wagstaff at page 167.

77. Mr Smith said the tractor had been on site in May 2020 and Mr Lever stated the Claimant had told him it had been stolen. The Claimant's account was that it was scrapped in January 2020 and that Mr Shah had asked him to do this, but there was no evidence from Mr Shah. Any reasonable employer in my view would have weighed up these conflicting matters and been entitled to reach the reasonable conclusion that the Claimant had in fact disposed of the tractor to Mr Wagstaff.

78. On the issue of the fireplaces, the Claimant said they were on site at the Hall on 22 June 2020 but went missing over the next week or so. The Second Respondent's staff were on site at this time and did not notice anything untoward. In contrast Mr Lever gave evidence that the Claimant had told him the fireplace had been stolen and there was a statement from Mr Kettlewell of Windmill Antiques saying that he had purchased the fireplaces from the Claimant on 10 June 2020. Again I find the First Respondent faced with these accounts would be entitled to form a reasonable belief that the Claimant had sold the fireplaces, particularly in light of the independent (of the parties) account given by Mr Kettlewell.

79. As to the over mantle, the Claimant admitted he removed this historic artefact from the Hall and admitted letting a Mr Potter take it.

80. Again, we had no evidence from Mr Shah to say he had approved this and the statement the Claimant gave to the police did not mention such approval.

81. The Claimant suggests the over mantle was in very poor repair however he accepts as a listed building, proper consent needed to be given for removal of artefacts and that the condition of the over mantle revealed after its recovery (and its value) do not support a contention that it was in poor repair. I accept it would be open to a reasonable employer to conclude the artefact was removed without proper authorisation and given its historical significance and value that this was a very serious matter.

82. My conclusion is that, having regard to the British Home Stores v Burchell test, had the Claimant engaged in the process the outcome would have been the same. The First Respondent had carried out as much investigation as was reasonable, would have come to a reasonable belief and dismissal would have been a sanction well within the band of reasonable responses. I find therefore that a full (100%) Polkey deduction should be made for any compensatory award. The Claimant attending the disciplinary hearing would have made no difference to the outcome and he would have been dismissed at the same time and in the same manner. I take into account the fact that the Claimant had an existing and current final written warning in place at this time. The particular employer here would have dismissed the Claimant in any event had the unfairness not occurred.

83. Given the dismissal was procedurally unfair I must consider the basic award. I was not addressed on this in submissions however I have had regard to S122(2) which permits me to reduce the amount of the basic award 'to any extent' in circumstances where I consider 'that any conduct of the complainant before the dismissal was such that it would be just and equitable' to so reduce.

84. I have found the Claimant's actions were without permission and that he was not credible in his explanations. His behaviour was blameworthy, and I find the basic award should be nil.

85. Turning to the claim for notice pay/wrongful dismissal, I find the conduct of the Claimant was sufficiently serious to amount to a repudiatory breach warranting summary dismissal such that no damages are owed.

Employment Judge Hindmarch

13 May 2022

Sent to the parties on:
17 May 2022