



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S K Betham

**Respondent:** Northern Joinery Limited

**Heard at:** Manchester (by CVP)

**On:** 2 October 2023

**Before:** Employment Judge Dilks

## **Representation**

**Claimant:** Mr L Murdin, Counsel

**Respondent:** Miss A Akers, Counsel

## **RESERVED JUDGMENT**

1. The complaint of unfair dismissal is not well-founded and is dismissed. The claimant was not unfairly dismissed.
2. The complaint of breach of contract in relation to notice pay is not well-founded and is dismissed.

## **REASONS**

### **Introduction**

1. The claimant brought claims for unfair dismissal and wrongful dismissal following his dismissal on 16 December 2022. ACAS was notified under the early conciliation procedure on 9 March 2023 and the certificate was issued on 14 April 2023. The ET1 was presented on 5 May 2023 and the ET3 was received by the tribunal on 19 June 2023.

### **Claims and issues**

2. The issues to be determined by the Tribunal in relation to the unfair dismissal claim were agreed at the outset of the hearing as follows;

- i. Has the respondent proved the reason for dismissal?
- ii. Did the respondent genuinely believe the claimant had committed misconduct?
- iii. Did the respondent act reasonably or unreasonably in all the circumstances in treating the misconduct as a sufficient reason to dismiss the claimant, in particular?
- iv. Where there reasonable grounds for that belief?
- v. At the time the belief was formed had the respondent carried out a reasonable investigation?
- vi. Did the respondent act in a procedurally fair manner?
- vii. Was the dismissal within the range of reasonable responses?

In relation to the claim for wrongful dismissal the issues to be determined by the Tribunal are;

- viii. What was the claimant's notice period?
- ix. Was the claimant paid for that notice period?
- x. If not, can the respondent prove that the claimant was guilty of gross misconduct which meant that the respondent was entitled to dismiss without notice?

### **The Evidence**

3. At the hearing, Mr Murdin, Counsel, represented the Claimant who gave sworn evidence.
4. The Respondent was represented by Counsel, Miss Akers, who called sworn evidence from Paul Smith, the Production Director at the Respondent company, Angela Broadbent, one of the Directors at the Respondent company and Peter Linton, Finance Director at the Respondent company.
5. I was also referred to, and considered, documents contained in a hearing bundle comprising 441 pages. References to page numbers are to pages of this bundle. I also had witness statements from each witness who gave oral evidence.
6. The respondent had uploaded various sections of CCTV footage which I confirmed at the outset of the hearing that I was unable to view other than the CCTV footage uploaded with the title 'SB folding money'. Mr Murdin stated that he was in the same position and Miss Akers confirmed that she was content to rely on the still photographs of the CCTV footage in the hearing bundle rather than the footage itself.
7. At the conclusion of the evidence, the representatives made oral submissions which I will address in my conclusions.

### **Relevant Legal Principles**

8. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996.
9. The primary provision is section 98 which, so far as relevant, provides as follows:
  - (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 principal reason) for the dismissal, and
    - (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an

employee holding the position which the employee held.

(2) A reason falls within this subsection if it .... Relates to the conduct of the employee...

(3) .....

(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.

10. The reason or principal reason for dismissal is derived from considering the factors that operate on the employer's mind so as to cause him to dismiss the employee. In **Abernethy v Mott, Hay and Anderson [1974] ICR 323**, Cairns LJ said, at p. 330 B-C:

"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

11. If the employer fails to show a potentially fair reason for dismissal (in this case, conduct), dismissal is unfair. If a potentially fair reason is shown, the general test of fairness in section 98(4) must be applied.

12. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. Conduct dismissals can be analysed using the test which originated in **British Home Stores v Burchell [1980] ICR 303**, a decision of the Employment Appeal Tribunal which was subsequently approved in a number of decisions of the Court of Appeal. The "**Burchell test**" involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief?

13. Since **Burchell** was decided the burden on the employer to show fairness has been removed by legislation. There is now no burden on either party to prove fairness or unfairness respectively.

14. A fair investigation requires the employer to follow a reasonably fair procedure. By section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 Tribunals must take into account any relevant parts of the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

15. If the three parts of the **Burchell** test are met, the Employment Tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, or whether that band fell short of encompassing termination of employment.

16. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate: **Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23**. The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice. The Tribunal must not substitute its own decision for that of the employer but instead ask whether

- the employer's actions and decisions fell within that band.
17. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613**.
  18. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer acted reasonably in characterising the misconduct as gross misconduct, and also whether it acted reasonably in going on to decide that dismissal was the appropriate punishment. An assumption that gross misconduct must always mean dismissal is not appropriate as there may be mitigating factors: **Britobabapulle v Ealing Hospital NHS Trust [2013] IRLR 854** (paragraph 38).

### **Relevant Findings of Fact**

19. The Respondent company manufactures staircases and has five directors. The company employs around 57 employees on one site.
20. The Claimant started work for the Respondent in 2000 and was the Production Manager at the time of his dismissal.
21. In his role as Production Manager the Claimant had to ensure deadlines and targets were met and also assist other employees on the shop floor, carry out administrative duties, train staff on how to operate machinery, make site visits, fit staircases if required and to rectify any problems.
22. In April 2022 the Respondent undertook an investigation and disciplinary hearing and the Claimant received a first written warning to remain on his personnel file for a period of 6 months following which it would lapse (page 82-83). It was found that the claimant directed an inappropriate and disrespectful comment when speaking about the Respondent's Health and Safety Consultant and that using foul language towards others in the company whether in general or casual terms was inappropriate.
23. On the 13 July 2022 the Claimant received a letter asking him to attend a disciplinary hearing on 18 July 2022 with regard to the allegations that he had breached health and safety regulations by storing highly flammable materials (acetone) in the home of an employee of the company and that the Claimant had induced the employee, for whom the Claimant was responsible as manager, to hide this fact from the company (page 85-86). A copy of a witness statement from Scott Hatherley, employee of the Respondent company, dated 13 July 2022 was enclosed with the letter. Following the hearing on 18 July 2022 chaired by Angela Broadbent, taking into account the Claimant's work record and the contrition he expressed during the hearing, the Respondent issued the Claimant with a final written warning which was to remain on his file for a period of six months, expiring on 26 January 2023. The letter dated 26 July 2022 confirming the outcome of this disciplinary hearing states that it was delivered by hand (page 87). It was the Claimant's evidence that he did not see this letter until it was included in the investigation pack for his next disciplinary hearing and that he was told that it would just stay on his file and the Claimant said in his oral evidence that he trusted the Respondent. The Claimant did not appeal this decision.
24. A biproduct of the manufacture of staircases is scrap wood which was sold by the Respondent. When the Claimant became Production Manager around 10 years ago this role passed to him. The Respondent had no policy

- regarding the sale of the scrap wood. Receipts were not issued for the sale of the scrap wood and there were no other records kept regarding this. The director of the Respondent, David Broadbent, told the Claimant how much to charge for the scrap wood and the Claimant told the other employees.
25. Customers who provided their own tonne bags were charged a different price to customers who did not provide their own tonne bags. A lady called Pam from a charity paid nothing for the wood as did a tree surgeon who agreed to accept scrap wood in lieu of payment for his work felling trees on the Respondent's premises. A customer called Jeff who bought the most scrap wood paid half price.
  26. Paul Smith commenced work at the Respondent company as Production Director on 18 July 2022. As a result of conversations with the Claimant about the scrap wood and at one point noticing money lying on the Claimant's desk, Paul Smith's suspicions were raised about what was happening with the monies from the sale of the scrap wood.
  27. Paul Smith discussed his concerns with Angela Broadbent on 7 November 2022 as a result of which covert monitoring of the scrap wood sales began. On 11 November 2022 Paul Smith introduced a signing in book to ensure that all visitors had to be signed in to ensure that the Company had a log of visitors. The initial investigation consisted of monitoring the sale of scrap wood through the use of CCTV alongside an excel spreadsheet which contained a still image of a customer collecting the wood and then the expected monies to be received from the sale based on Paul Smith's understanding of the sale prices used.
  28. The spreadsheet produced by Paul Smith showed there was a difference estimated at £805 between the money expected in sales and the money received (page 101-103) over the period from 7 November 2022 to Friday 9 December 2022 and as it appeared that there had been theft of Company monies, the Claimant along with another employee were suspended under investigation for potential gross misconduct on 7 December 2022.
  29. Following the suspension, Paul Smith and Nicola Chaplin, an employee in Finance of the Respondent company, held interviews with a number of employees and the customer called Jeff to try to ascertain their understanding of what took place. From these interviews Paul Smith understood that the 2 employees who mainly dealt with the sale of the scrap wood from the timber yard handed the money they received to the Claimant who then passed the money to David Broadbent.
  30. In addition to taking witness statements Paul Smith and Nicola Chaplin obtained still images from the CCTV footage from the works office for 25 November 2022 (pages 104 to 105) and the 2 December 2022 (page 126-128). In Paul Smith's opinion there were concerning images on 25 November 2022 and 2 December 2022 when the Claimant could be seen dividing a small pile of bank notes and pocketing a number of those notes. They also reviewed the bank statements of David Broadbent as well as the wood collection spreadsheets.
  31. During the interview with Scott Hatherley as part of the investigation, Paul Smith asked Scott Hatherley whether there was anything else to which Scott Hatherley said that he had some staircase products made for which he transferred £500 to the Claimant by bank transfer as that was how much the Claimant told him Northern Joinery wanted for it. David Broadbent's bank statements showed that £300 was transferred to the Respondent by the Claimant for these products.
  32. Once they had concluded the investigation, Paul Smith and Nicola Chaplin produced an investigation report dated 12 December 2022 (page 96-100)

- in which it was concluded that there was a case to answer and they recommended that the Respondent proceed to a formal disciplinary hearing
33. On 12 December 2022 Angela Broadbent sent the Claimant a letter by email from Scott Smith, HR and Quality Manager, dated 12 December 2022 requiring the Claimant to attend a disciplinary hearing and enclosing copies of the various documents and witness statements obtained as part of the investigation including stills from the CCTV footage of the timber shed enclosed within the wood collection spreadsheet, and stills from the CCTV footage of the works office of which it said full footage would be provided to the Claimant by email.
  34. This letter stated that the purpose of the hearing was for the claimant to answer the following allegations as set out in the investigation report; Allegation 1 - an allegation of theft from the Respondent by failing to pass on all monies received from customers purchasing scrap wood to David Broadbent; Allegation 2 – an allegation of theft from the Respondent by charging Scott Hatherley £500 for products from the Respondent for which the Claimant paid £300 to the respondent; Allegation 3 - Further theft from the Respondent, by having various items manufactured for his home without the knowledge of a director or an order for said items. The Claimant was made aware in this letter that if found proven, these allegations would amount to gross misconduct , could constitute a breach of the implied term of trust and confidence within his contract of employment and therefore a potential sanction could be dismissal.
  35. On 16 December the Claimant attended the disciplinary hearing which was conducted by Scott Smith, HR and Quality Manager at the Respondent company with Nicola Chaplin taking notes. The Claimant was accompanied by a friend who Angela Broadbent had agreed may attend with the Claimant even though the Claimant’s friend was not a trade union official or a fellow employee.
  36. The transcript of the disciplinary hearing confirms that during the hearing, the Claimant was given the opportunity to challenge the findings of the investigation and the evidence presented to him. During the disciplinary hearing it was acknowledged that there were a number of mistakes in the spreadsheet prepared by Paul Smith.
  37. Towards the end of the hearing although Nicola Chaplin was due to finish work in 15 minutes, Angela Broadbent confirmed that Scott Smith was not. Angela Broadbent also confirmed that the shopfloor workers were due to go out to a local pub for a Christmas drink and that her husband David Broadbent went with them and when he returned to the office told her he had one pint. Angela Broadbent confirmed that Paul Smith also went to the pub before driving home.
  38. Angela Broadbent was not involved in the disciplinary hearing but listened to the recording of the disciplinary hearing twice that afternoon, the first time on her own and the second time with David Broadbent after he returned from Christmas drinks and the decision to dismiss the Claimant was made in the evening. Angela Broadbent said in oral evidence that she and David Broadbent made the decision to dismiss the claimant although it was her decision more so.
  39. The letter confirming the outcome of the disciplinary hearing signed by Scott Smith dated 16 December was sent to the Claimant by email at 20:13 later that evening (page 149-153). The letter confirmed that the Respondent considered that all 3 allegations were proven other than the words ‘during working hours’ were removed from allegation 3 and that the Respondent considered that the allegations constituted gross misconduct . The

Claimant's employment was terminated without notice for gross misconduct.

40. The Claimant submitted an appeal by letter dated 21 December 2022 (page 241-244). With regard to the first allegation, the Claimant disputed what it was said the CCTV on 25 November and 2 (sic) December showed and the Claimant stated that the spreadsheet was incorrect as acknowledged by the Respondent during the disciplinary hearing. Also, the Claimant did not consider that matters had been looked into adequately following the disciplinary hearing before the decision was made later the same day. With regard to allegation 2, the claimant maintained that he charged Scott Hatherley £200 for fitting the products which accounted for the difference in price. With regard to the third allegation, the Claimant stated that it was confirmed in David Broadbent's witness statement that he had the list of items as agreed between the Claimant and David Broadbent and with regard to allegation that he had doors sprayed, none of the spray booth operatives were interviewed.
41. In this appeal letter the Claimant stated that he had assumed that David Broadbent would not want Paul Smith to know about the sale of the scrap wood when Paul Smith joined the company because of an earlier conversation the Claimant said he had with David Broadbent when David Broadbent said not to tell Peter Linton, the Finance Director, about the sales of firewood when Peter Linton joined the company as it would then have to go through the books.
42. On 11 January 2023 the Claimant, accompanied again by his friend took part in an appeal hearing with Peter Linton, Finance Director, at the Respondent company (page 251-281). Peter Linton agreed with the Claimant that there were errors in the spreadsheet used as part of the investigation and following the appeal hearing, on 12 January 2023 Peter Linton sent the Claimant an email with Peter Linton's re-worked version of the wood collection spreadsheet with amended values for the sale of the scrap wood (page 293 – 294) which supported Peter Linton's opinion that it was more likely than not that there was a shortfall in the cash received from the scrap wood sales. The estimated shortfall on this amended spreadsheet was reduced from £805 to £431.
43. Following the appeal hearing Peter Linton also sent the CCTV footage to a Forensic Image consultant to be enhanced (pages 104-105, 320-379) and a report was received dated 19 January 2023 (pages 305-309) which Peter Linton considered supported the findings against the Claimant.
44. On 20 January 2023 Peter Linton wrote to the Claimant (page 310-313) enclosing a copy of this forensic image report and confirming the errors in the original spreadsheet namely that the customer Jeff pays half price due to the volume sold to him, and that whilst the original spreadsheet had taken into account that a lady called Pam does not pay anything for the scrap wood, in addition there was a tree surgeon who was allowed to collect offcuts for free in lieu of payment for work performed. The letter also confirmed that the amount of money received by David on 25 November in the original spreadsheet was understated by £100 in error.
45. Peter Linton concluded in this letter that the first two findings against the Claimant should be upheld and that those two allegations were sufficiently serious to warrant summary dismissal and so the finding of dismissal was upheld on the basis of allegations 1 and 2 but Peter Linton did not uphold the third allegation regarding spraying items at work because he considered that there was insufficient evidence against the Claimant in respect of this allegation.

46. Peter Linton also stated in this letter that from his own viewing of the video footage from 25 November, it appeared to him that there were at least 3 or 4 notes before the Claimant entered his office and only 2 in his hand as he left and that the CCTV footage on 2 December showed the Claimant carefully counting the money, splitting the notes into two and apparently placing them his pocket, slightly out of view of the camera whilst taking out an e-cigarette.

### **Conclusions**

47. The claimant was dismissed by the respondent on 16 December 2022. I do not have to decide in relation to the unfair dismissal claim whether in fact, the Claimant committed allegation one and two and I make no findings in relation to this.
48. It is also immaterial how I would have handled events or what decisions I would have made. I must not substitute my view for that of the reasonable employer - **Iceland Frozen Foods Limited –v- Jones [1982] IRLR 439, Sainsbury's Supermarkets Limited –v- Hitt [200]3 IRLR 23, and London Ambulance Service NHS Trust –v- Small [2009] IRLR 563.**

### **Potentially Fair Reason for Dismissal**

49. In this case, it is not in dispute that the reason that the Respondent dismissed the Claimant was because it believed that the Claimant was guilty of gross misconduct by reason of theft. Misconduct is a potentially fair reason for dismissal – section 98(2)(b). The Respondent has therefore satisfied the requirements of section 98(2).

### **Genuineness of Belief**

50. Having heard the Respondent's witnesses orally, as well as receiving their written evidence, I find that all of the Respondent's witnesses and most importantly, Mrs Broadbent who made the decision to dismiss the Claimant, held a genuine belief that the Claimant was guilty of misconduct. As submitted by Mr Murdin, I found that Mrs Broadbent was a transparent, honest and credible witness. Mrs Broadbent accepted that the spreadsheet prepared by Paul Smith as part of the investigation had errors in it and that the evidence showed that there was no money missing on the two dates of the CCTV footage, namely the 25 November and 2 December.

### **Investigation**

51. I must also consider therefore whether, at the time the belief was formed, the Respondent had carried out as much investigation into the matter as was reasonable in the circumstances.
52. The allegation of theft was a serious one which amounts to gross misconduct justifying summary dismissal under the Respondent's disciplinary policy.
53. The Respondent in this case is a small business, employing around 57 employees at one site and it has 5 directors and a written disciplinary policy.
54. I have the band of reasonable responses and these factors in mind in reaching my decision as to whether the investigation was reasonable in the circumstances.



55. Taking all the circumstances into account, I find that the Respondent had carried out a reasonable investigation taking into account the nature of the allegations, the position of the Claimant and the size and resources of the Respondent.

**The independence of the investigation**

56. With regard to the independence of the investigations, as submitted by Mr Murdin, Paul Smith was the person who raised the suspicion and also carried out the investigation with Nicola Chaplin. However, as Angela Broadbent confirmed in her oral evidence, I find that this was reasonable because there was only a limited number of directors to conduct the investigation and other parts of the disciplinary process and if Paul Smith was not involved in the investigation stages then this would have been problematic for the Respondent in the later stages.
57. Whilst Mr Murdin submitted that Paul Smith was a defensive witness, denying in his oral evidence that he had suspicions against the Claimant before commencing the investigation, I consider that Paul Smith confirmed in his oral evidence that he was concerned and he acknowledged that it was his concerns that lead to the investigation that he and Nicola Chaplin undertook.
58. I reject that the investigation was used to confirm suspicions which was submitted by Mr Murdin. As submitted by Miss Akers, I find that there was no rushing to conclusions. Paul Smith introduced a signing in book to ensure that all visitors had to be signed in to ensure that the Company had a log of visitors and from the use of CCTV in the timber yard the sale of scrap was monitored and used to create a wood collection spreadsheet which contained a still image of a customer collecting the wood and then the expected monies to be received from the sale based on Paul Smith's understanding of the sale prices used.
59. Paul Smith and Nicola Chapin, held interviews with 8 employees, David Broadbent and the customer called Jeff. In addition to taking witness statements, they obtained still images from the CCTV footage in the works office on 25 November 2022 (pages 104 to 105) and the 2 December 2022 (page 126-128) and they also reviewed the bank statements of David Broadbent.

**The claimant only had to meet the allegations put to him**

60. Mr Murdin submitted that the claimant only had to meet the allegations put to him and that in the investigation report at page 99 there were only 3 specific examples including 25 November and 2 December and that on those two dates there was no shortfall in the money expected and the money received by David Broadbent. Mr Murdin submitted that if the Respondent had wanted to put an allegation that the Respondent had analysed the money in and out for a month then they should have said this.
61. I consider however, that it is clear from the allegations in the investigation report on page 99 and also the breakdown of allegation 1 on page 99 that allegation was that the wood collections spreadsheet shows more scrap/firewood going out than David Broadbent receives the money for and not just on those two dates. Allegation 1 references the wood collections spreadsheet which covers the period from 7 November 2022 to 9 December 2022 and which shows the difference in the estimated amount of sales and money received over that period (page 103).

62. Angela Broadbent in her oral evidence stated that it was not just those two dates and I consider that this is supported by the letter following the disciplinary hearing dated 16 December from which it is clear that the reason for dismissal in relation to allegation one is that not all monies received from customers in the timber shed for scrap wood is received by David Broadbent page 151, and not just in relation to those two specific dates.

**Errors in the wood collection spreadsheet prepared by Paul Smith**

63. There were errors in the wood collection spreadsheet prepared by Paul Smith in relation to how much was paid for the scrap timber. It had been taken into account that Pam collected scrap wood for free, but there was also a tree surgeon who did. Of most significance, the major customer Jeff paid half price than other customers. A witness statement was obtained from Jeff confirming this prior to the disciplinary hearing but the spreadsheet was not amended. I note that it is recorded in the transcript of the disciplinary hearing that Nicola Chaplin was unable to explain why the spreadsheet had not been corrected (page 166) but I consider as stated by Nicola Chaplin in the disciplinary hearing that there would still have been a difference (page 162) and I note that these errors were acknowledged during the disciplinary hearing.
64. It was also acknowledged during the disciplinary hearing that there was another error in the spreadsheet which showed £240 expected on 25 November but only £140 received by David Broadbent on that date whereas David Broadbent's diary showed that he had in fact received £240 on 25 November 2022 (page 143) and therefore there was no deficit on that date (page 163). It was also acknowledged during the disciplinary hearing that the spreadsheet showed that David Broadbent had received the correct expected money from the claimant on 2 December (page 103, 163) which is the second date highlighted by the Respondent in the stills of the office CCTV.
65. Angela Broadbent who made the decision to dismiss the Claimant confirmed in her oral evidence that she listened to the recording of the disciplinary hearing twice and that David Broadbent listened to the recording with her the second time she listened to it before the decision was made and I consider therefore Angela Broadbent was fully aware of these errors but that there would still be a shortfall before she made the decision to dismiss the Claimant.

**The CCTV for 25 November and 2 December**

66. With regard to the stills of the office CCTV for the 25 November 2022 and 2 December appended to the investigation report (pages 104-105 and pages 126-128) there was a description of what it was believed these CCTV stills showed in the investigation report. Namely that on 25 November 2022 the Claimant sits and plays with the money handed to him by a colleague and after his colleague has gone, the Claimant goes into his office and splits the money and when he comes out of his office the money on top of a clipboard he is carrying is less than what he was given. With regard to the 2 December, it is stated that the Claimant can be seen separating notes out from money given to him by the same colleague and the Claimant appears to put some in his pocket before exiting his office. I note that this CCTV footage was viewed during the disciplinary hearing and these observations

were put to the Claimant who had the opportunity to respond (page 155-158).

67. Angela Broadbent also gave the same account in her oral evidence of what she believed this footage showed from her viewing of it.
68. I consider that the fact that the money given to David Broadbent on these two dates was as expected does not undermine that there was a shortfall over the period.

### **The Appeal**

69. Mr Murdin submitted that at the appeal stage Peter Linton went beyond the remit of an appeal, carrying out a new investigation, correcting evidence, and introducing new evidence and that it was wrong for the Claimant to face a different case at appeal.
70. I consider however that at the appeal stage Peter Linton corrected the errors in the spreadsheet which had already been acknowledged at the disciplinary hearing and Peter Linton's spreadsheet confirmed that there was still a deficit which it had already been stated at the disciplinary hearing that there would still be a deficit even if these errors were taken into account. Peter Linton also obtained a report from a Forensic Image Consultant (pages 305-309) which supported what it was believed the CCTV footage of 25 November and 2 December showed and which was the same interpretation of the CCTV which had already been put to the Claimant in the investigation report and at the disciplinary hearing.
71. I therefore reject that the Claimant faced a different case at appeal. I did not consider that Peter Linton was a defensive witness as submitted by Mr Murdin but rather that Peter Linton carefully and in some detail explained in cross examination his role in the appeal and the steps he took which he clearly took seriously.

### **Allegation Two**

72. With regard to allegation 2, that the claimant facilitated the sale of staircase products to Scott Hatherley for £500 but only transferred £300 to David Broadbent, it was confirmed in the investigation report that this allegation was added on 7 December 2022 which was the date that Paul Smith and Nicola Chaplin interviewed the employee Scott Hatherley in relation to the investigation concerning the Claimant for potential theft. I do not consider, as submitted by Mr Murdin, that when interviewing Scott Hatherley Paul Smith was 'roughing around for dirt' and I note that Scott Hatherley mentioned the information regarding the staircase in response to a general question from Paul Smith whether there was anything else that Scott Hatherley wanted to mention (page 113) which I do not consider is an inappropriate question towards the end of an interview.
73. Whilst the Claimant was not asked about his response to allegation 2 as part of the investigation, this was put to the Claimant during the hearing when the Claimant said that he gave Scott Hatherley an 'all-in' price of £500 which included £200 for fitting the staircase and that maybe it was a misunderstanding with Scott Hatherley (page 178 – 179). I note however that Scott Hatherley had already been asked in his interview whether the £200 was a fitting fee and he had specifically said that it was not (page 113).
74. As submitted by Miss Akers, I consider that in this situation where there were two opposing views, it was open to the Respondent on the evidence they had to make the decision who they believed and that it was open to the

- Respondent on the evidence to prefer what Scott Hatherley stated.
75. As submitted, by Miss Akers, it is clear from paragraph 18 of Angela Broadbent's witness statement that Angela Broadbent had deemed the Claimant to have been untruthful in the disciplinary hearing when he said that he had not been involved in the sale of scrap wood or taken any money for over 12 months when this was contradicted by the evidence of a colleague during the disciplinary hearing when this colleague had explained that it was the Claimant who dealt with the sale of the pallets of oak which supported Angela Broadbent's understanding of what took place.
76. I note that the Claimant also confirmed in cross examination that he had been involved in the sale of the pallets of scrap wood in the 12 months prior to his dismissal which he would take photographs of for David Broadbent who would then tell the Claimant what price to charge for the pallet of wood based on the photograph, which was contrary to his evidence during the investigation hearing that he had nothing to do with the sale of scrap wood himself for the previous 12 months. By way of explanation, the Claimant stated in cross examination that the oak pallets had not been mentioned in the disciplinary hearing but in my view the appellant's evidence was inconsistent on this.
77. In my assessment I find that the investigation into allegation 1 and allegation 2 was not outside the band of reasonable responses.
78. In relation to allegation three, that the appellant had various items made for his home or sprayed at work without the knowledge of a director or an order for the process, this allegation was not upheld at appeal.

### **Reasonableness of the Process**

79. With regard to the reasonableness of the process, Mr Murdin submitted that the disciplinary was flawed and not reasonable because the Respondent relied on a flawed investigation.
80. As stated above, I note that the errors in the spreadsheet were acknowledged during the disciplinary hearing and as stated by Nicola Chaplin in the disciplinary hearing which was listened to twice by Angela Broadbent before making the dismissal decision, there would still have been a difference irrespective of the errors (page 162). Similarly, the Claimant had an opportunity to respond to allegation two in the disciplinary hearing which was listened to and taken into account by Angela Broadbent in making her decision.
81. The other criticism of the disciplinary hearing made by Mr Murdin was that the end of the hearing and the dismissal was hurried. Towards the end of the transcript of the disciplinary hearing Nicola Chaplin says that they finish work in 15 minutes and Scott Smith explains the process following the hearing including that the notes will be written and then they will make a decision including everything that the Claimant had said and that he doubted that it would be today (page 188.) However, following this, the outcome of the disciplinary hearing was sent to the Claimant by cover an email that same day on 16 December at 20:13 (page 149).
82. Angela Broadbent confirmed in cross examination that whilst Nicola Chaplin left the office at 12.30, Scot Smith who wrote the letter confirming the outcome of the disciplinary hearing did not. Angela Broadbent also confirmed in her oral evidence that whilst the transcript of the disciplinary hearing was not typed up on 16 December, she listened to the recording of the hearing twice before making her decision, the second time with David Broadbent.

83. The disciplinary hearing was a lengthy hearing, recorded in the Claimant's transcript of the hearing to have started at 10:00 and finished at 12:15 (page 190) and I reject that the end of the hearing itself was rushed. It is clear from the transcripts that the hearing was coming to an end.
84. With regards to the decision being made later the same day, I found Angela Broadbent a straightforward witness and even though the transcript of the disciplinary hearing had not been prepared when she made the decision, I accept that Angela Broadbent listened to the recording of disciplinary hearing twice when reaching her decision which given the length of the disciplinary hearing was a major undertaking.
85. Angela Broadbent also confirmed in her witness statement that she had received the disciplinary investigation pack on the 12 December at the same time as the claimant and she had reviewed this upon receipt and therefore she was well versed in the allegations made and the supporting evidence before she listened to the recording from the disciplinary hearing (paragraph 17).
86. Whilst Mr Murdin submitted that it was inconceivable that David Broadbent and Paul Smith who went to the pub for the shopfloor workers Christmas drink did not discuss the disciplinary hearing which had taken place earlier that day, neither David Broadbent or Paul Smith were involved in the disciplinary hearing and I accept Angela Broadbent's evidence that Paul Smith did not return to the office and that David Broadbent, who she said had drunk one pint, listened to the recording of the disciplinary hearing with her the second time she listened to it but that it was Angela Broadbent who was the main one who made the decision. Mr Murdin pointed out that at the appeal hearing, another director, Duncan Edwards said that it was a few of them who made the decision (page 259) but again for the reasons given I am satisfied that the main decision maker was Angela Broadbent.
87. In examination in chief, Angela Broadbent confirmed that she wished to amend paragraph 7 and paragraph 8 of her witness statement to confirm that after Paul Smith raised his suspicions with her about the Claimant, following this a discussion between the five directors ensued which concluded that Mr Smith should conduct an investigation and not that it was concluded that the Claimant should be suspended pending an investigation by Paul Smith as stated in the witness statement. Also Angela Broadbent confirmed that she wished to amend paragraph 8 to state that the outcome of the initial investigation was that there was a case to answer and that the Claimant should be suspended pending further investigations and he should be invited to a disciplinary hearing. I accept that this was simply an error in drafting of Angela Broadbent's witness statement.
88. Looking at the evidence in the round, I am satisfied that the Respondent followed a reasonably fair procedure, taking into account the band of reasonable responses, the nature of the allegations, and the size and resources of the Respondent.

### **Reasonable Belief**

89. I find that at the time of the dismissal Angela Broadbent had reasonable grounds to believe, based on a reasonable investigation that the Claimant had failed to pass on all monies received from customers purchasing scrap wood to David Broadbent and that the Claimant charged Scott Hatherley £500 for products from the Respondent for which the Claimant paid £300 to the Respondent. I find that the view that there was misconduct was a view

- within the band of reasonable responses.
90. The Claimant was the sole person who passed money to David Broadbent from the sale of the scrap wood so any shortfall was his responsibility and it was open to the Respondent on the evidence they had to make the decision who they believed with regard to the second allegation.

**Was the dismissal within the range of reasonable responses**

91. On the basis of the genuinely held and reasonably held belief of Angela Broadbent that the Claimant had committed theft by failing to pass on all monies received from customers purchasing scrap wood to David Broadbent and that the Claimant charged Scott Hatherley £500 for products from the Respondent for which the Claimant paid £300 to the Respondent, I find that it was within the reasonable responses for the Respondent to characterise this as theft and as gross misconduct.
92. I also find that it was within the reasonable responses for the Respondent to decide that dismissal was the appropriate punishment for such an act. The Claimant had received a first written warning in April 2022 and a final written warning in July 2022 which was to remain on his file for a period of six months which he had not appealed.

**Conclusion on Fairness**

93. For the reasons set out above, I find that the Claimant was not unfairly dismissed by the Respondent within section 98 of the Employment Rights Act 1996.

Employment Judge Dilks  
Date: 18 October 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON  
24 October 2023

FOR THE TRIBUNAL OFFICE