EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 3314803/2019

Held via Cloud Video Platform (CVP) on 10, 11 and 12 November 2020

Employment Judge J D Young

Mr G Ramsey	**Claimant**
Novograf Ltd	**Respondent**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that:-

(1) The claimant was not unfairly dismissed in terms of s.98 of the Employment Rights Act 1996;

(2) The respondent shall pay to the claimant the sum of **One Hundred and Seven Pounds and Fifty-Eight Pence (£107.58)** being the amount of an unlawful deduction from his wages under s13 of the Employment Rights Act 1996;

(3) The respondent shall pay to the claimant the gross sum of **One Thousand Nine Hundred and Seventy-Five Pounds and Eighty Pence (£1975.80)** as pay due for holidays accrued to date of termination but untaken.

REASONS

Introduction

1. In this case, the claimant presented a claim to the employment tribunal complaining that he had been unfairly dismissed by the respondents; was due

redundancy pay, notice pay; holiday pay and that there had been a deduction from his wages. The respondent in their ET3 response dispute all these issues.

2. Previous preliminary hearings had made arrangements for this hearing to take place via CVP and orders had been made for the production of witness statements and documents.

Issues

3. The issues for the tribunal had been agreed by the parties as follows:

Unfair Dismissal

The claimant was summarily dismissed from the respondent's employment on 17 December 2018 for alleged gross misconduct. The respondent submits it was a fair dismissal, and for a conduct related reason. The claimant submits he was unfairly dismissed.

i. What was the respondent's reason, or principal reason, for dismissing the claimant?

ii. Was it a potentially fair reason for dismissal in terms of Section 98(1) and (2) of the Employment Rights Act 1996?

iii. Was the respondent's decision to dismiss the claimant fair, or unfair, having regard to the test in **British Home Stores Ltd v Burchell** 1980 ICR 303, EAT, and was his dismissal within the band of reasonable responses open to the respondent as employer?

iv. Was the claimant's dismissal substantively and/or procedurally unfair, in respect of any stage of the respondent's internal proceedings from investigation, disciplinary and appeal hearings, having regard to the test in Section 98(4) of the Employment Rights Act 1996?

v. If it was unfair, in any respect, what compensation, if any, is the claimant entitled to from the Tribunal, in terms of Section 118 to 124A of the Employment Rights Act 1996, taking into account any

contributory conduct by the claimant, and/or any statutory uplift, or downlift, in terms of Section 207 A of the Trade Union & Labour Relations (Consolidation) Act 1992, for unreasonable failure by either party to comply with any requirement of the ACAS Code of Practice on Disciplinary and Grievance Procedures?

Redundancy Pay

The claimant claims a redundancy payment from the respondents. They deny that he was made redundant, and deny he is entitled to any redundancy payment.

vi. Was the claimant made redundant (within the meaning of Section 136 of the Employment Rights Act 1996) by the respondent and, if so, from what date?

vii. If so, to what redundancy payment, if any, is the claimant entitled, in terms of Section 162 of the Employment Rights Act 1996?

Breach of Contract: Failure to Pay Notice Pay

The respondents dismissed the claimant for what they allege was his gross misconduct. As such, they did not pay him in lieu of notice, but summarily dismissed him. The claimant asserts he is due to be paid notice pay, and that the respondent's failure to do so is in breach of his contract.

viii. Did the claimant's misconduct, as relied upon by the respondent when dismissing him, on 17 December 2018, constitute gross misconduct?

ix. If not, to what notice pay, if any, is the claimant entitled from the respondent, having regard to his contract of employment with the respondent, or statutory minimum period of notice as per Section 86 of the Employment Rights Act 1996.

Failure to pay Holiday Pay

The claimant asserts he is still owed holiday pay – the respondents dispute that, saying he has been paid all sums due.

x. As at the effective date of termination of employment, on 17 December 2018, was the claimant due any payment for accrued, but untaken holiday pay, as per the Working Time Regulations 1998, or as per his contract of employment with the respondent?

xi. If so, what amount of unpaid holiday pay is the claimant due by the respondent, and how is that calculated?

Unlawful Deduction from Wages

The claimant asserts that wages were unlawfully deducted from him, and that the respondents deducted monies for a motoring fine, and alleged private use of the company credit card. The respondents dispute that, saying he has been paid all sums due.

xii. Has there been any unlawful deduction from the claimant's wages, contrary to Section 13 of the Employment Rights Act 1996?

xiii. If so, what is the amount of those deductions, and should the Tribunal order repayment to the claimant, in terms of Section 24 of the Employment Rights Act 1996, including an award for any financial loss suffered by the claimant and attributable to any unlawful deduction from his wages?

The hearing

4. For the hearing, the parties had helpfully liaised in providing a Joint Inventory of Productions which included witness statements

5. The Inventory was paginated 1-247 and reference in this judgment is to the paginated numbers. It was confirmed that the documents at 42a and 42b had been inserted at the request of the claimant.

6. There were also lodged Supplementary Productions being paginated 248 – 256.

7. At the hearing, I heard evidence from:-

(i) Alan Marshall, Operations Director for the respondent since January 2018. He adopted as true and accurate his witness statement dated 31 July 2019 extending to 13 pages (J223 – 235). He also answered supplementary questions and questions in cross examination.

(ii) Nigel Milward, National Installations Supervisor for the respondent for approximately five years to date of hearing. He had initially been employed as a technician within an installation team before being promoted to team leader and then Installations Supervisor. He adopted as true and accurate his witness statement extending to five pages (J236 – 240). He also answered supplementary questions and questions in cross examination.

(iii) Lee Drummond, who had been in the position of Installations Manager with the respondent for approximately three years. He adopted as true and accurate his witness statement dated 31 July 2019 extending to seven pages (J241 – 247). He also answered supplementary questions and questions in cross examination.

(iv) Jennifer Riddell-Dillet, Managing Director of the respondent since April 2017. She adopted as true and accurate her witness statement dated 31 July 2019 extending to 10 pages (J213 – 222). She also answered supplementary questions and questions in cross examination.

(v) The claimant. He adopted as true and accurate his witness statement dated 14 August 2019 extending to six pages (J207 -212). He also answered supplementary questions and questions in cross examination.

8. From the documents produced, relevant evidence led and admissions made, I was able to make findings in fact on the issues.

Findings in fact

9. The respondent is an employee-owned company involved in the fitting out of visible surfaces in accordance with a client's specification and design. They deal with food stores, banks, shops, hotels and other businesses that have

high customer throughput. Their design teams and graphic artists design the visible surface areas of client's premises in accordance with their 'brand concept'. Their installation teams then complete the contract by fitting out the product to the agreed customer plan which would normally involve covering walls, doors, counters and other surfaces with materials from the respondent's portfolio. As the end product is highly visible, the product and installation requires to be of high quality. They have several product installation teams working across the UK. A team consists of two operatives being a team leader and technician. The team leader leads the installation process and is the person who received (usually by email) the complete instructions for the allotted task which would include the schedule of works, areas to be installed; a time period within which installation is to be complete; any requirement of PPE; and any other significant characteristics. Instructions include the site contact and where and when materials are to be delivered.

10. A team leader will also require to sign off completed work. In that process, an email is sent to the immediate line manager declaring the job to be complete along with copying in the relevant project manager. A series of photographs of the completed task is to be included in that signoff. A team leader should report any snagging or other areas where the client may question the installation so that the client can be contacted and be aware of any further work required. The signoff is taken as validation of the quality of the work.

11. The claimant had continuous employment with the respondent in the period from 2 May 2006 until that employment was terminated with effect from 17 December 2018. He was employed as an Installation Team Leader. His work involved him travelling across the UK, fitting/installing/removing graphics to different surfaces for clients. Initially, he reported to Alan Marshall but in the course of time and latterly that changed to reporting to Lee Drummond.

12. During the course of his employment, he had never received any warning or been subject to any disciplinary action for any reason. In 2010, he had been invited to a meeting when the company indicated they were considering issuing him with a written warning but no action was taken subsequent to the

meeting. He had been complimented on his work. He had trained many of the respondent's employees as technicians.

13. He made a subject access request of the respondent seeking appraisal forms and the only one produced as a consequence of that access request was dated September 2018 and stated *'Gary's performance is steady'*.

14. During 2008, the claimant's hours reduced significantly and he along with others was told that there was a risk of redundancy.

15. At the time of his dismissal, the technician in his team was John Paul Hudson for whom the claimant was responsible.

Contract documentation

16. There was some dispute over the contract documentation. The claimant's position was that he had been '*given a contract'* when he commenced employment in 2006. That contract was not produced.

17. There was produced to him in 2011 '*Terms and Conditions of Employment'* with various policies and procedures attached (J159 – 199). Those terms and conditions had not been signed by the claimant but he stated that he had been advised that even *'if it wasn't signed, he would be forced into it anyway'*. Given that the claimant worked on those terms and conditions thereafter without complaint, I find that he was bound by them.

18. In 2018, the claimant received further *'Terms of Conditions of Employment'* (J200 – 205). That document bears the claimant's signature and is dated 24 August 20189 (J205). In evidence the claimant disagreed signing the contract (page 205) or at least the signature may be his but did not recall signing it or *"may have signed a page"* and then saw the whole document after the event. This was not a critical document. There was uncertainty in the claimant's position on this but he did not dispute his signature and given he indicated he may have seen the whole document even after the event without dispute on any term accepted he was bound by it.

19. The Discipline Grievance and Appeals Policy for the respondent (J195 – 199) advised that if disciplinary action was necessary:-

- The employee would be given full written details of the nature of the complaint and a formal disciplinary hearing would be held at which time the employee would be given the opportunity to state his/her case before any decision is taken. At that time, the employee would be entitled to be accompanied by another employee of choice.

- The company had the option to suspend with or without pay while an investigation giving rise into the disciplinary action was conducted.

- Except in the case of gross misconduct, an employee would normally receive two written warnings.

- Gross misconduct would result in immediate dismissal without warning, notice or payment in lieu of notice.

- If dissatisfied with disciplinary action, an employee had the right of appeal to any of the directors. A director would then consider the appeal and carry out such investigation as was deemed appropriate. Again, the employee would be entitled to be accompanied by an employee of choice at that hearing.

20. Gross misconduct included:-

'Gross negligence which results in the company suffering any financial or other loss'

21. Given the length of employment of the claimant, his terms and conditions entitled him to 12 weeks' notice of termination of employment except where dismissal was by reason of gross misconduct.

22. The job description for the role of 'Installations Team Leader' (J194) set out the key responsibilities of a team leader. It indicated that it had been revised in October 2017 which would be consistent with the introduction of the Terms and Conditions of Employment signed by the claimant (J200 – 205). The

claimant denied that this document had been produced to him but accepted that the duties outlined were those of a team leader. These included:-

- *"Responsible for the overall performance of the installation crew.*
- *Responsible for the overall development of the technician.*
- *Job completion reporting, ensuring all elements are reported as fitted.*
- *Job problem reporting and self snagging are imperative to ensure any client issues are reported back to Installations Manager & Project Manager.*
- *Capture any site issues on the CVI book."*

Work at Travelodge – Kings Cross

23. The respondent has a significant contract to upgrade hotel rooms for the Travelodge hotel chain. Replacement of surfaces in terms of the Travelodge 'brand' was required at their hotel in Kings Cross, London. It is a busy hotel with a constant turnaround of residents and the work required to be carried out within an agreed timescale given that empty rooms were a revenue issue for the hotel company.

24. The claimant and technician John Hudson were the installation team who carried out the work. On 22 October 2018 at 16:03 the claimant emailed his project manager Andrew Morrison (now no longer an employee with the respondent) and his installation manager, Lee Drummond, with 15 photographs attached showing work completed in bathrooms (J28 – 42). In the email, he stated: '*fitted rooms, 123, 125, 127, 129, we had to finish at 2 o'clock…..".*

25. He received a response from Andrew Morrison at 16:05 that day stating: '*Looks cracking thanks Gary. Cheers.'*

26. The claimant then responded at 16:08 hours stating: '*Thanks. In the time allowed, 4 is about all you can do mate….'* (J42A).

27. Mr Morrison replied at 16:09 hours: *'You are back in on Sunday so we can see how many you get done in the same time. I will get three more days in. Cheers.'*

28. While the witness statement from Mr Marshall (paragraph 9) alleged that the claimant had bypassed his line manager in this report, the initiating email of 22 October 2018 from the claimant is addressed to both the Project Manager (Mr Morrison) and Installations Manager (Lee Drummond).

29. The claimant was to return to the hotel to perform further work on 28 October. On that day, he required to leave site early with chest pains and informed Mr Drummond and Mr Morrison. He returned home at the request of Mr Drummond who was concerned at this report of chest pains. In any event, the claimant was able to return to work on 1 November 2018 but was then instructed to attend another job. The claimant and his technician did not return to the Travelodge to carry out further work.

30. On 13 November 2018, a member of the hotel management approached the respondent's employees who were then working in the hotel to advise that the work carried out in three bedrooms was of poor standard. The complaint relating to substandard work was in respect of the bedrooms worked on by the claimant. That complaint was made known to Lee Drummond who in turn informed Alan Marshall who instructed an investigation.

31. Nigel Millward attended the hotel and viewed the rooms in question and found that there were several "*glaring faults"* with the work which had been carried out and that it was '*totally unacceptable'* and '*terrible'.* He took photographs and reported the matter to Lee Drummond. He was very disappointed with the standard of workmanship which had been carried out.

32. The photographs and report were sent to Lee Drummond (J84 – 92). This report was very critical of the work carried out within certain rooms. "Post-it notes" identifying the room number had been attached to various surfaces to show faults. Those notes identified the rooms 125, 127 and 128. In the opinion of Nigel Milward, the work would require to be redone. On sight of the report, Lee Drummond discussed matters with Mr Marshall and it was

agreed that the work within these rooms be redone. A new team was sent into do that and the work was completed within a few days.

33. Mr Drummond was also instructed to investigate with the Team the work which had been carried out and he emailed the claimant and his technician asking for their views on the work which was considered to be unacceptable. The pictures taken by Mr Millward were also sent. The claimant responded by email of 15 November 2018 as follows:-

"In response to your email we were very rushed on this job only having four hours to do as many of the units as possible. The primer has failed to keep the materials on the substrate so has come up in places by the looks of your photos. We were having to cut down master sheets to fit the panels I called Andrew Morrison to see if he could get kits made to fit which would speed up fitting and he said he would find out. But sadly he left the company without responding. So with the graphics coming away it makes the cutting look very bad. I should have checked the work much closer but I wasn't well over that weekend and on the Sunday I had to go home. That's no excuse for the way the job was left I can only apologise for it.

PS my photos don't reflect the photos you have." (J43 – 63)

34. In response to that email, Mr Drummond responded indicating that given the issues raised on quality of the installation, a formal disciplinary investigation was to be held on 17 December 2018. It was stated that the quality of work fell well below the standard that the respondent had set and that the investigation '*will focus on the performance of the team and not the individual at this moment in time, it will also highlight the overall performance of your team against the set KPI…'.* It was also indicated that as the team had fallen well below the quality of workmanship that the respondent expects, that this must be '*addressed immediately for any forthcoming works'*.(J64-65).

Co-operative Farnborough

35. On 29 November, Mr Millward attended the site of a contract being worked on by the respondent for the Co-operative organisation at Farnborough. The

respondent was one of a number of contractors engaged in an extensive refurbishment of the premises. This was another significant client for the respondent accounting for around 50% of turnover. The visit made by Mr Millward was unannounced and a spot-check of the work carried out at this site. On that day, members of the Co-operative management and the site foreman were inspecting progress of the whole project. The site foreman spoke to Mr Millward saying that he *'needed to see what my boys had done'.* He was angry with the quality of workmanship and indicated that the work that had been carried out by the respondent was unacceptable and that he was taking his complaint '*to the top of Novograf'*. Mr Milward was very embarrassed at this conversation, inspected the job and agreed it was unacceptable. Again, the team involved were the claimant and his technician. Mr Milward sought to appease the management on site and the site foreman and reported the matter to Lee Drummond.

36. Mr Drummond went to Farnborough the following day. He was met by the site foreman who was '*really angry'* and said *'you need to look at what your guys have done, it is crap'.* He visited the work and found there was *'no defence'* and that the work would require to be completely redone. He took the relevant photographs. He was aware that the property services manager for Co-Operative had been on site to see this work. He took pictures of the work and prepared a report (J76 – 83). That report detailed various concerns on the installation.

37. Mr Drummond again consulted with Mr Marshall. It was considered that the standard of work had the potential to threaten the contractual relationship with the Co-Operative. A new team was assembled and the work redone. Mr Milward along with Mr Drummond and Mr Marshall were satisfied that a new team was required to put the matter right. This was not the case of work requiring 'snagging'. The work needed to be done again. The total cost of redoing the work at Travelodge and Farnborough was put at around £5000 excluding any management time.

Invite to Disciplinary Hearing

38. In light of this further incident, Mr Marshall felt that he required to escalate the status of the previous investigation meeting which had been put in hand to a formal disciplinary hearing. There was a dispute as to the documents sent to the claimant in respect of the proposed disciplinary hearing.

39. There was no dispute that on 6 December 2018, Mr Marshall called both the claimant and Mr Hudson to advise of the issue raised at Farnborough and that both were being suspended on pay pending a hearing. The claimant indicated that a little later that day, he received an email from Mr Marshall with '*multiple attachments'*. In his witness statement, he states that he remembers seeing a letter *'which said I was suspended and some photos from Travelodge and Co-Op and a form with KPI on it but I have no recollection of the letter Alan is alleging was sent to me confirming I was invited to a disciplinary hearing that could result in my dismissal.'*

40. The position of Mr Marshall was that he sent an email to the claimant on 6 December 2018 (J66) stating:-

'Please note that I have concluded the internal investigation following the customer complaint at Farnborough. I have therefore attached the following in advance of our disciplinary meeting on December 17th.

- *Letter of invitation for disciplinary meeting*
- *Site report from Farnborough investigation*
- *Farnborough Park rectification costs*
- *Right First Time performance table*
- *Travelodge Kings Cross report*

Please take time to go through everything to ensure you are adequately prepared for this meeting.'

41. The letter of invitation to disciplinary hearing that Mr Marshall stated was enclosed (J67) advised that the respondent was considering *'dismissing OR taking disciplinary action against you'*. The circumstances concerned the

"poor installation work at Travelodge and Co-Op Farnborough" which led to "*clients very dissatisfied with the end result"* and *"high costs to replace defective elements".* It was also stated that there had been *"persistent error making - The 'Luton team have failed to meet the installation KPI of 96% RFT and have had more reported snags than any team'.* The letter concludes:-

'You are invited to attend a disciplinary hearing on 17/12/2018 at 11:30am which is to be held in the boardroom, where this will be discussed. In the meantime, and in accordance with the employer's disciplinary rules and procedures, I confirm that you are suspended on full pay.

I have enclosed copies of various documents to which I intend to refer at the hearing.

You are entitled, if you wish, to be accompanied by another work colleague or a trade union representative." (J67)

42. The *"various documents*" to be referred to at the proposed hearing were as listed on the email of 6 December 2018 (J66) and apart from the reports on Travelodge and Co-op Farnborough included (a) rectification order in respect of the work at Farnborough showing additional costs of rectifying the work in the sum of £2268.77 (J68).(b) a 'Right First Time Performance' table showing the claimant's team at 91.8% against the business target of 96%. That was the lowest 'performance ratio' of the respondent's teams (J69 – 71).

The hearing

43. The claimant attended the hearing on 17 December 2018. By that point, Mr Hudson had resigned from his employment. Mr Marshall chaired the meeting and minutes were taken by Lee Drummond. Those minutes were sent to the claimant who made '*amendments to minutes in red text'*. The minutes produced were as amended. (J72 – 74). The claimant was unaccompanied.

Mr Marshall stated that he was offered time to obtain someone to accompany him but he declined. The claimant accepted that he was offered representation at the time but that he was not aware beforehand that he could have been accompanied.

44. Mr Marshall advised that the claimant accepted the work at Travelodge was poor in accord with the photos shown but he did not consider these *'match the photos he took when he left the job'*. He indicated that he had problems with the materials on site and had contacted the project manager, Andy Morrison, who had told him to continue the work. Mr Morrison was no longer with the company at this point. In the view of Mr Marshall, such matters should have been raised with the Installation Manager and if Mr Morrison had not been helpful at the time then the claimant should have called Mr Drummond. The claimant agreed that he had not called Mr Drummond at that time.

45. The claimant identified that Mr Hudson had installed the windows at Farnborough. The claimant agreed that this had been a poor process and the quality was poor. However he also maintained that in relation to faults with *"internal frieze boards"* damage must have been caused after he had left the site and that the materials were not up to standard. He explained he had raised this with Mr Warwick, the project manager, for that particular site. The position of Mr Marshall was that on the application of product on the windows, various errors were apparent, including a failure to silicon the seal and exposed edges, thus allowing water ingress. If standard procedures had been adopted, that failure would not have occurred. He considered that the claimant had not checked the work carried out at that site.

46. The claimant was also advised of the comparative KPI table showing necessary rectification work compared with other teams. There is no note on this in the Minutes but in evidence the claimant advised that he had not seen these KPI document before or aware of them being used whereas the evidence of Mr Drummond was that he had discussed these with the claimant.

47. The disciplinary notes indicate that the claimant accepted that his *"quality had lowered"* but when the notes came back with the amendments made by the claimant, it was stated '*Gary did not say this'.*

48. Subsequent to the disciplinary meeting, Mr Marshall stated he took *" an hour out"* to consider matters in recess. He checked the disciplinary procedure. He considered that there had been unacceptable work and the claimant had not accepted his part in these faulty pieces of work. He considered that as team leader, there was a responsibility on the claimant to ensure work was completed satisfactorily and if there were any issues, raising them with the Installation Manager as snagging work which required to be completed. That had not been done in either case.

49. Mr Marshall prepared a letter of dismissal and advised the claimant that he was to be dismissed with immediate effect. He handed the letter which had been prepared in the recess to the claimant (J75). That letter advised that the reasons for dismissal were:-

- *"Financial Loss – Poor installation work at Travelodge & Co-op Farnborough, where multiple errors have been made left clients very dissatisfied with the end result. Both sites will now result in high costs to replace defective elements. On both occasions, there was no completion report to highlight any potential issues, pictures were taken from angles that did not highlight any finishing issues or material issues.*

- *Persistent error making – The Luton team have failed to meet the installation KPI of 96% RFT and have had more reported snags than any team.*

The situation is extremely grave, particularly as a Team Leader with years of experience you have delivered this quality of work.

I have no alternative but to dismiss you with immediate effect. You will receive a letter shortly with your P.45 and monies due to you.

If you are dissatisfied with any aspect of the disciplinary process taken against you, you have a right of appeal to Jennifer Riddell-Dillet. This appeal must be in writing within 5 days and must specify the grounds on which you seek to challenge the decision to dismiss you, Jennifer will contact you direct thereafter."

50. The claimant disputed that Mr Marshall took an hour or thereabouts to consider matters. He put the timescale at around 15 minutes which he did not consider would give him time to prepare the letter of dismissal which was given to him.

51. The respondent wrote to the claimant by letter of 19 December 2018 (J158) providing a payslip for December 2018 including basic pay *'unused holiday pay of 10 days'* together with a balance due on a shares saving scheme. Deductions were made of (a) £12.58 being *'private use of company credit card'*, (b) a '*motoring deduction'* of *"£95:Junction box, Pearly Way, 12 November 2018*"; and '*Float Deduction'* of £250. The claimant was advised that if he had any outstanding expenses to be paid, those should be forwarded to Mr Arbuckle as financial controller. There was also information provided to the claimant as regards '*Partnership shares'* and *'Free shares'* in the respondent. The payslip (J157) noted holiday pay of £1320.54 (gross) was due. The total amount of gross pay was £3780.46 giving a net pay of £2404.07 after deductions.

Appeal

52. The claimant intimated his intention to appeal by email of 21 December 2018 to Ms Riddell-Dillet. By email of 31 December 2018 he requested a copy of '*all emails relating to my dismissal as well as the email advising me of suspension'*. That material was sent to the claimant on 3 January 2019. The intended appeal hearing was then postponed from 10 January until 14 January 2019 with travel being booked for the claimant by the respondent. The claimant amended the minutes of the disciplinary hearing and returned them to Ms Riddell-Dillet on 9 January 2019 along with *'full grounds for an appeal'* (J98 and J94 – 96).

53. In summary, his grounds of appeal were:-

(a) Procedural fault in that he had not received the letter formally inviting him to a disciplinary hearing and the only meeting he had been invited to was an investigation meeting. He was not then offered a companion. He also stated he wasn't provided with the email from Mr Drummond of 15 November 2018 discussed at the hearing (to which he had replied that day (J43)

(b) Evidence on Travelodge was spurious as the pictures did not reflect the rooms that he left as his photographs showed a different finish and he had no way of knowing if the photographs taken were of the rooms he had fitted or carried out by another team who went to complete the job. He said he left the site early on 28 October 2018 due to chest pains and was advised by Mr Morrison that there were three more visits available to the hotel. He indicated that they had only been allowed a four hour slot in the rooms albeit silicone needed four hours to dry. He stated he requested kits from Mr Morrison but was told to proceed without them and when contacting Mr Morrison regarding removal of old silicon was told to leave it as there was insufficient time allocated to complete the job properly. He stated he requested the handles be removed which the client refused.

(c) On the Farnborough site, he had not carried out the window graphics work but that was done by John Paul Hudson. He had not been informed by Mr Hudson that the windows were not sealed. Mr Hudson had completed this task before. He had not received a job description confirming that he was to be responsible for the work of others.

(d) He did report faults in the material to Chris Warwick. He stated he did complete a CVI of which a picture was shared at the disciplinary hearing and provided a copy (J93).

(e) He advised he had never been informed of KPI's for the Luton team or that they were underperforming and never had a formal appraisal.

(f) He did not consider that the allegations amounted to gross negligence and dismissal in any event was too severe.

(g) He did not consider that his answer to questions had been taken into account, his clean disciplinary record and length of service.

(h) The minutes of the disciplinary meeting were not recorded accurately and the amended version returned. If the notes were taken to him agreeing to poor quality of workmanship, this was a reference to poor quality of the photographs looking like poor quality.

(i) He was handed the outcome letter at the disciplinary hearing. This was pre-arranged. It was suggested this might be to avoid effecting a redundancy payment. He advised that during his sickness absence in early November, he was harassed at home to return to work.

(j) It was also reiterated by the claimant that he had not had sight of the letter of 6 December 2018 regarding the disciplinary hearing (J67).

54. Before holding the appeal hearing, Ms Riddell-Dillet made some investigation into the reasons given for dismissal and made notes of the enquiry made (J107 – 109).

55. Also prior to the appeal hearing of 14 January 2019, the claimant had prepared a statement which added some more detail to his letter of appeal of 9 January 2019 (J103 – 106).

56. At the appeal hearing, minutes were taken by David Arbuckle, the respondent's financial controller. The minutes of the appeal hearing (J110 – 112) note that the claimant was asked if he wished to be accompanied but declined.

57. The claimant indicated that he had a separate document prepared as part of the appeal (J103-106). However, Ms Riddell-Dillet advised that any document should have been provided in advance and it would be necessary to adjourn and set a new date if that further document was to be introduced. The

claimant was asked if he wished to proceed on the basis of his letter of 9 January 2019 and he confirmed that was the case.

58. The document the claimant wished to introduce had been prepared because he stated he struggled and became flustered explaining things verbally. In essence, the statement was as outlined in the claimant's letter of 9 January 2019. The claimant agreed that Ms Riddell-Dillet advised at the end of the meeting that he could email this written submission to her. He did so on 16 January 2019 for it to be read '*alongside my appeal letter'* and stated that there were '*no further grounds for appeal, just a little extra detail around the points I raised to assist you in making your decision'*.

59. The appeal proceeded by the claimant being taken through the grounds of appeal he had detailed in his letter of 9 January 2019.

60. The appeal notes confirm the claimant's position that he did not "*recall receiving or reading the letter"* of 6 December 2018 inviting him to a disciplinary meeting rather than an investigation meeting. Ms Riddell-Dillet advised that a check had been made on the respondent's IT server which showed that the required letter and documents were sent to the claimant on 6 December 2018. In evidence at Tribunal the claimant asserted that he had received a letter but not the one within the productions. He did not assert that at appeal.

61. In connection with the work at Travelodge, Ms Riddell-Dillet advised that it was only the rooms worked on by the claimant and Mr Hudson that were the subject of complaint. The claimant indicated that he believed another team from the respondent had worked on the Travelodge site on 29 October 2018 being '*Simon Lewis and his second man'.* Ms Riddell-Dillet advised that she would follow up on that point and ask for clarification. The claimant advised that Mr Morrison, the project manager, had told him there would be time to '*complete the work at Travelodge'*.

62. The claimant was asked if the window graphics work (Farnborough) were carried out by Mr Hudson and advised that was the case. He was asked if he accepted that as team leader he was responsible for the work carried out

by the second man and stated *"No. As team leader you should review the second man's work. The error was not visible when the job was completed.'* He did not accept that as team leader, he was responsible for the quality of the work of the second man as Mr Hudson worked '*with me and not for me. I do not believe that I should be disciplined for another employee's quality of work'.*

63. The claimant was asked whether he recalled a meeting with Lee Drummond in May 2018 to discuss his team's performance and stated he had no recollection of that meeting or a review with Mr Drummond in September 2018. He also indicated that most of the work at the Travelodge was done by Mr Hudson and not by himself. He believed that '*90% of the work shown in the pictures sent to me was not fitted by myself'.*

64. He was asked whether the letter of dismissal was handed to him after a period of about 40 minutes to an hour after the end of the meeting of 19 December 2018 and replied *'yes it was about 40 minutes'.*

65. He had alleged in his statement of appeal that he was harassed by Mr Drummond after he had fallen ill and Ms Riddell-Dillet undertook to consider telephone calls and text messages from Mr Drummond. He was asked if the content or manner of the calls were inappropriate and indicated *'no it was the frequency of the telephone calls. I cannot remember how many calls I received.'*

66. On conclusion of the meeting he indicated that he believed he had been dismissed '*for work I did not fit. I only did a small amount of work at Travelodge.'*

67. It was indicated that the notes of that appeal would be forwarded to the claimant once typed but there was no evidence that they had been sent to him.

68. Ms Riddell-Dillet did obtain telephone records and a summary was made of calls and texts to the claimant's mobile for the period before and after his sickness absence as well as calls from the respondent's landline telephone

between 11 October and 19 November 2018. She also read the submission intimated by the claimant prior to making her decision. and intimating that to the claimant.

69. In terms of telephone calls to the claimant, Ms Riddell-Dillet noted that calls and texts from Lee Drummond's mobile to the claimant's mobile telephone only showed one telephone call to the claimant on 2 November 2018. That was followed by a text to the claimant on 5 November 2018. On the day that the claimant fell ill and required to go home from work as arranged with Mr Drummond, there were text messages in the early evening. She did not consider this amounted to harassment rather than genuine enquiry about the claimant's health.

70. The appeal was unsuccessful for the reasons intimated in the letter sent to the claimant of 17 January 2019 (J149-156). That outcome letter addressed the various points made by the claimant in his letter containing the grounds of appeal of 9 January 2019.

71. An important matter for Ms Riddell-Dillet was that the claimant at no time claimed he should accept any responsibility for the poor workmanship at the Travelodge or Farnborough site and blamed it for the most part on his technician or another person. She found that to be particularly worrying given the claimant's length of service as a team leader and considered it was clear that his actions, or lack of actions, amounted to gross dereliction of duty on these occasions.

72. While reference was made in the outcome letter to an annual review signed by the claimant of 25 September 2018 undertaken by Lee Drummond, this was not produced (J153). The letter also confirmed that the CVI (Confirmation of Verbal Instruction) note provided as part of the Farnborough work related to the perimeter hanging signs that the contractor had installed and was separate to the complaint regarding the work carried out at the site.

73. While it was noted that the claimant had challenged the notes of the disciplinary meeting by making certain amendments, Ms Riddell-Dillet did not

consider that the comments made contributed to the *'core matters of poor workmanship and financial loss from the works'.*

Events subsequent to termination of employment

74. Various questions were asked of Ms Riddell-Dillet in cross examination regarding a "subject access request" which had been made of the respondent. There were complaints made regarding the way this was conducted. It was considered that the respondent had been obstructive in this process. She confirmed that she had dealt with this request. It was necessary to collate emails which contained reference to the claimant. That request had been referred to IT providers to obtain the relevant emails followed by a process of redaction which to preserve the privacy of others. She advised that David Arbuckle had sent out the information to the claimant on the subject access request. I did not consider that the response to the subject access request assisted in determining the issues.

Events after termination of employment

75. The claimant has made various attempts to secure alternative employment and attended interviews with five companies but was unsuccessful. He made approaches to many other companies as listed in his witness statement. (paragraphs 24 and 25).

76. He managed to obtain some work with a company which was subsequently liquidated. This was a temporary contract offer which came his way. He was not paid for the work that he carried out which was worth approximately £900 and the liquidator had advised that there will be insufficient funds to make payment.

77. His family have also made unsuccessful enquires with companies to establish if there were any vacancies suitable for him.

78. He had managed to obtain some occasional courier driving work and some '*graphic work'.* An email of 28 November 2019 (J206) advises that this occasional work brought in a gross sum of £7,000 to that point.

79. He has sought to live off savings and secure as much work as he could on a self-employed basis prior to obtaining benefits as from March 2020. The "lockdown" which occurred in March 2020 as a result of COVID meant that there was no real possibility of obtaining work during lockdown and thereafter companies were not interested in recruitment.

80. He had registered on a job website and that had led to some 'callbacks' but as yet no employment. At the date of hearing, there had been a promising lead from a company in Manchester. He was hopeful of obtaining some employment from that source.

Claim for deduction from wages and holiday pay.

81. This formed (a) monies deducted for a motoring fine; (b) alleged private use of the company credit card; and (c) accrued holiday pay:-

(a) The motoring fine was deducted in the sum of £95 from the claimant's final payslip (J157 – 158). This was stated to be in respect of 'junction box, Purley Way, 12 November 2018'. The claimant did not recall any such incident. He had never been shown any evidence of this fine. If a fine had been imposed for any driving matters in the past, he had always received a letter and intimation of the matter. He did not agree this was a proper deduction.

(b) The amount of deduction from the final payslip for 'private use of credit card' amounts to £12.58. The claimant denied there was any private use which would entitle the respondent to make that deduction. No proof had ever been shown to him of any expenditure.

(c) His holiday entitlement was 31 days as he had more than 10 years continuous service (J202). The holiday year ran between 1 January and 31 December in each year and he stated that he had taken ten days in that period. He also maintained that he was entitled to 4 days in lieu of bank holidays worked and he had worked bank holidays in that period. That meant that his holiday entitlement was 25 days.

He was paid the sum of £1320.54 by way of pay for holidays accrued but untaken to date of termination (J157) which represented 10 days accrued holiday (J158).

The schedule of loss for the claimant (J250 – 251) made a claim for holiday pay of *'19 days owed'* in the sum of £2502.68 and an increase of 10% for the respondent's failure to follow the ACAS Code of Practice in that he requested confirmation of how many days he was owed and was told he was only entitled to ten days. That uplift was put at £250.27 making a total claim for holiday pay of £2752.95.

In the counter schedule of loss lodged by the respondent (J252 – 256), it was stated:-

'Holiday pay has already been paid in full (J157 and 158).

The claimant acknowledges receipt of ten days pay in the schedule of loss but has not deducted the payment received. These respondents will argue that the uplift is not applicable. The claimant has failed to provide any evidence that the respondent's calculation of holiday pay is incorrect. It is unclear what is meant by the alleged failure to follow the ACAS Code of Practice in this instancet.'

Submissions

For the respondent

82. It was submitted for the respondent that the dismissal in this case had been for conduct. The suggestion that redundancy was the true reason and the respondent chose to make a conduct case to avoid a redundancy payment` should be rejected. The respondent believed that the claimant was guilty of gross negligence which was defined as gross misconduct within the staff handbook. There was no dispute that these terms governed the employment.

83. It seemed to be suggested by the claimant that he had signed a blank page in respect of the Terms and Conditions of Employment (J200 – 205) but his

recollection of signing documents seemed to be patchy at best and it was submitted that it should be accepted that he had signed this document.

84. That assertion that a blank page had been signed seemed to be part of an alleged wider conspiracy. It was being suggested that photographs of the work undertaken by the claimant were not photographs of the rooms he had completed at the Travelodge site It was now being suggested that the letter produced indicating there was to be a disciplinary hearing was not the letter that he had received and there was deliberate replacement. That latter point had not been raised with Mr Marshall when he gave evidence. While it was put to Mr Marshall that the claimant had not received the letter inviting him to a disciplinary meeting, there was no suggestion that the letter sent had now been replaced by the company with another letter.

85. It was submitted that the company had made out the core issue namely that the standard of work went far beyond carelessness. Indeed, it had been acknowledged by the claimant on sight of the photographs as being very poor.

86. While the claimant had denied receipt of any job description, he accepted that the duties of a team leader were accurately set out within the job description document.

87. It would seem that the claimant had attempted to avoid responsibility for the poor workmanship but as team leader, he did carry that responsibility to ensure the work was done to a proper standard.

88. It was submitted the respondent had a genuine belief in this case of the misconduct by the claimant namely the very poor quality of work and had carried out adequate investigation to have reasonable grounds for that belief.

89. The investigation into the standard of workmanship had been conducted by Mr Milward and Mr Drummond. That was followed by enquiry by Mr Marshall and Ms Riddell-Dillet. The evidence all pointed to the misconduct by the claimant.

90. It was submitted that all attachments with the email of 6 December 2018 (J67) had been sent and there was no procedural mishap. The ACAS Code had

been followed. The minutes of the appeal should be taken to be accurate and disclosed no new grounds.

91. The subject access request had been made after the appeal was concluded and was not relevant in an assessment of whether or not there had been a fair or unfair dismissal.

92. It was not for the Tribunal to substitute its own decision. It was maintained by the claimant that the dismissal was harsh but it was submitted that dismissal was within the band of reasonable responses of a reasonable employer.

93. It was submitted that the dismissal was procedurally and substantively fair. If there was any fault in the procedure then that would not have made any difference to the outcome.

94. Separately, it was submitted that there was a failure to mitigate by the claimant in not focusing on contract work. No real evidence of a search for employment had been produced to substantiate loss.

95. So far as the claim for deduction of wages is concerned, it was lawful to make a deduction in terms of the contract. Neither was there satisfactory evidence available in respect of holiday pay and so those elements of the claim should be dismissed.

96. In any event, if there was an unfair dismissal, 100% contributory faults should be applied to reduce any compensatory award to nil.

For the claimant

97. It was submitted for the claimant that the grounds for dismissal were spurious and not procedurally fair.

98. There was no evidence that the pictures founded on were of the rooms upon which the claimant had worked. He had always stressed this in the hearings

that had taken place. The fact that the photographs included a room stated to be 128 where he had done no work gave that credence. While it was stated that the general standard of work was inconsistent by the claimant in the past, there was never any evidence of this being brought to his attention.

99. The photographs that the claimant had produced of the Travelodge rooms were not falsified in any way by him as Mr Marshall's statement inferred to make it look as if the workmanship was good. He had always taken photographs in this way of completed rooms.

100. No new information had come to light in the evidence produced over the hearing and the claimant stood by the grounds of complaint. The matter had not been properly investigated and the decision prejudiced.

101. There had only been 15-20 minutes consideration of the matter at conclusion of the hearing with Mr Marshall. Even if it had been 40 minutes, it was not long enough to have taken all these steps of considering this matter and then producing the letter of dismissal. That was in hand before the hearing.

Discussion

Relevant law

102. In the submissions made there was no dispute on the law and the tests that should be applied. Reference was made to Section 98 of the Employment Rights Act 1996 (ERA) which sets out how a Tribunal should approach the question of whether a dismissal is fair. There are two stages, namely, (1) the employer must show the reason for the dismissal and that is one of the potentially fair reasons set out in Section 98 (1) and (2) of ERA and (2) if the employer is successful at the first stage, the Tribunal must then determine whether the dismissal was unfair or fair under Section 98 (4). As is well known, the determination of that question:

> *"(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."

103. Of the six potentially fair reasons for dismissal set out at Section 98 of ERA one is a reason related to the conduct of the employee and it is the reason which is relied upon by the respondent in this case.

104. The employer does not have to prove that it actually did justify the dismissal because that is a matter for the Tribunal to assess when considering the question of reasonableness. At this stage the burden of proof is not a heavy one. 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.*

105. Once a potentially fair reason for dismissal is shown then the Tribunal must be satisfied that in all the circumstances the employer was actually justified in dismissing for that reason. In this regard, there is no burden of proof on either party and the issue of whether the dismissal was reasonable is a neutral one for the Tribunal to decide.

106. The Tribunal requires to be mindful of the fact that it must not substitute its own decision for that of the employer in this respect. Rather it must decide whether the employer's response fell within the range or band of reasonable responses open to a reasonable employer in the circumstances of the case (*Iceland Frozen Foods Limited v Jones [1982] IRLR 439*). In practice this means that in a given set of circumstances one employer may decide that dismissal is the appropriate response, while another employer may decide in the same circumstances that a lesser penalty is appropriate. Both of these decisions may be responses which fall within the band of reasonable responses in the circumstances of a case.

107. In a case where misconduct is relied upon as a reason for dismissal then it is necessary to bear in mind the test set out by the EAT in *British Home Stores v Burchell [1978] IRLR* 379 with regard to the approach to be taken in considering the terms of Section 98 (4) of ERA:

"What the Tribunal have to decide every time is broadly expressed, whether the employer who discharged the employee on the ground of misconduct in question (usually, though not necessarily dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief, that the employers did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. Thirdly, we think that the employer at the stage at which he formed that belief on those grounds at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. It is the employer who manages to discharge the onus of demonstrating these three matters we think who must not be examined further. It is not relevant as we think that the Tribunal would itself have shared that view that view in those circumstances."

108. The foregoing classic guidance has stood the test of time and was endorsed and helpfully summarised by Mummery LJ in *London Ambulance Service NHS Trust v Small [2009] IRLR 536* where he said that the essential terms of enquiry for Employment Tribunals in such cases are whether in all the circumstances the employer carried out a reasonable investigation and at the time of dismissal genuinely believed on reasonable grounds that the employee was guilty of misconduct. If satisfied of the employer's fair conduct of a dismissal in those respects, the Tribunal then had to decide whether the dismissal of the employee was a reasonable response to the misconduct.

109. Additionally, a Tribunal must not substitute their decision as to what was a right course to adopt for that of the employer not only in respect of the decision to dismiss but also in relation to the investigative process. The Tribunal are not conducting a re-hearing of the merits or an appeal against the decision to dismiss. The focus must therefore be on what the employers did and whether what they decided following an adequate investigation fell within the band of reasonable responses which a reasonable employer might have adopted.

The Tribunal should not "descend into the arena" – *Rhonda Cyon Taff County Borough Council v Close [2008] ICR 1283.*

110. Also in determining the reasonableness of an employer's decision to dismiss the Tribunal may only take account of those facts that were known to the employer at the time of the dismissal – *W Devis and Sons Limited v Atkins [1977] ICR 662.*

111. Both the ACAS Code of Practice on disciplinary and grievance issues as well as an employer's own internal policies and procedures would be considered by a Tribunal in considering the fairness of a dismissal. Again however when assessing whether a reasonable procedure had been adopted Tribunals should use the range of reasonable responses test – *J Sainsbury's Plc v Hitt [2003] ICR 111.*

112. Single breaches of a company rules may find a fair dismissal. This was the case in *The Post Office t/a Royal Mail v Gallagher EAT/21/99* where an employee was dismissed for a first offence after 12 years of blameless conduct and the dismissal held to be fair. Also in *A H Pharmaceuticals v Carmichael EAT/0325/03* the employee was found to have been fairly dismissed for breaching company rules and leaving drugs in his delivery van overnight. The EAT commented:

"In any particular case exceptions can be imagined where for example the penalty for dismissal might not be imposed, but equally in our judgment, where a breach of a necessarily strict rule has been properly proved, exceptional service, previous long service and/or previous good conduct, may properly not be considered sufficient to reduce the penalty of dismissal."

113. This all means that an employer need not have conclusive direct proof of an employee's misconduct. Only a genuine and reasonable belief reasonably tested.

Factual issues

114. An important factual issue was whether or not the claimant had received the letter of 6 December 2018 (J67) as an attachment to the email of the same

date from Mr Marshall (J66). The position of the claimant in evidence was that the attachment with the email of 6 December 2018 was not the same as the letter produced to the Tribunal. While the letter he read had indicated that he was suspended, it had not referred to the proposed meeting on 17 December 2018 as being a disciplinary meeting and so had approached that meeting as if it were to be investigative only.

115. The weight of evidence was that the letter from Mr Marshall of 6 December 2018 inviting the claimant to a disciplinary meeting was sent as an attachment. I came to that view for the following reasons:

(i) There was no dispute that the claimant had received the email of 6 December 2018 from Mr Marshall (J66). He states that in his witness statement (paragraph 11). He confirmed that in questioning at the Tribunal. That email indicates that the internal investigation was concluded following the customer complaint at Co-op Farnborough and Mr Marshall therefore attaches '*the following in advance of our disciplinary meeting on December 17th'*. One attachment is stated as '*letter of invitation for disciplinary meeting'*. If the claimant's position was accepted, that would mean that there was a disconnect between the terms of the email which clearly identified there was going to be a disciplinary meeting and the claimant's position that the letter only referred to *'suspension'* and that he approached the matter as if it were to be an investigative meeting. Given that the email refers to a disciplinary meeting which was not consistent with the claimant's belief made it unlikely that the letter that he did receive made no mention of a disciplinary hearing.

(ii) The terms of the email and the terms of the attachment entitled *'letter of invitation for disciplinary meeting'* are consistent with each other and suggest that the letter that was attached was the letter produced at J67.

(iii) The claimant's position was that he got a letter which indicated suspension. The email did not indicate any suspension of the

claimant. The letter of invitation as an attachment does confirm that the claimant is suspended on full pay. The claimant's recollection of a letter which indicated suspension is consistent with the letter at J67.

(iv) Ms Riddell-Dillet indicated that prior to the appeal hearing, she was aware there was some dispute of whether the claimant had received the letter at J67. She made enquiry of the company "server" and established that these items had been sent. I accepted that she had made that enquiry and found nothing untoward in the electronic transmission.

(v) The minutes of the hearing of 17 December 2018 (J72 – 74) were amended by the claimant with his comments for the appeal hearing but there were no comments which would suggest that he had been misled in not receiving the letter at J67 but some other letter and was unprepared for the hearing.

(vi) I did not find the recollection of the claimant convincing in respect of documentation. In respect of the letter at J67, he refers to this in paragraph 19 of his witness statement wherein he indicates that Ms Riddell-Dillet sent him documents for the appeal '*apart from the letter that I remembered seeing telling me I was suspended but there was a letter included dated 6 December, inviting me to the disciplinary, which I do not remember ever reading and has no mention of suspension.'* However, the letter of 6 December 2018 (J67) produced at the tribunal does refer to suspension wherein it states *'in the meantime and in accordance with the employer's disciplinary rules and procedures, I confirm that you are suspended on full pay'.*

(vii) Essentially the claimant was indicating that the company had never set up the meeting of 17 December 2018 as a disciplinary hearing but there was deliberate subterfuge in producing the letter of 6 December 2018 prior to the appeal to make it look as if they had invited him to a disciplinary hearing to consider dismissal rather than being investigative. I did not consider that proposition likely given the

circumstances. It was certainly the case that initially, after the Travelodge circumstance came to light., that there was to be an investigation. However, once the Co-op Farnborough matter came to light, the evidence from Mr Marshall was that matters were more serious and that the intended meeting of 17 December 2018 was converted to a disciplinary hearing. There is rational basis then for Mr Marshall to prepare and send a letter of 6 December 2018 (J67) with his email of the same date (J66). There was a sequence of events which would make that likely.

116. Thus, giving these factors, I find that the letter of 6 December 2018 inviting the claimant to a disciplinary hearing in plain terms was sent with the email of 6 December 2018 (J66).

117. Another issue regarding documentation which arose in course of the hearing was whether the claimant received the investigation report on Travelodge (together with the photographs) as well as the investigation report on the Co-op Farnborough (together with the photographs). These reports again were stated to be attachments to the email of 6 December 2018 sent by Mr Marshall to the claimant (J66). Again I considered that the weight of evidence was that the claimant had received these reports with the email of 6 December 2018. I came to that view because:

(i) Again, I accepted the evidence from Ms Riddell-Dillet that an enquiry had been made with the company server to identify whether there had been sent the attachments with the email of 6 December 2018 and there was no report of any failure of electronic transmission.

(ii) More importantly, in paragraph 11 of his witness statement, the claimant states that he did receive an email from Mr Marshall *'with multiple attachments'* and that *'I remember seeing a letter which said I was suspended and some photos for Travelodge and Co-op and a form of KPI on it….'.* The photographs of the work carried out at Travelodge and Co-op Farnborough are an integral part of the investigative report (J84 – 92 and 76 – 83). The claimant accepted

he saw the photographs and given that the photographs go with the relevant reports, I consider that he did receive the reports in advance of the disciplinary hearing with the email of 6 December 2018.

(iii) In the ET1, he complains of non receipt of the letter inviting him to a disciplinary hearing but he does not complain that he never received the reports on the work at Travelodge or Co-op Farnborough.

(iv) The appeal minutes do not disclose the claimant making any protest that he had not received the investigation reports in his grounds of appeal. He states that the photographs did not reflect how he had left the Travelodge rooms but did not say he had not received the reports.

118. In light of the foregoing, I accepted that the claimant had received the Travelodge and Co-op Farnborough investigative reports and photographs with the email of 6 December 2018.

Conclusions

119. In the initiating claim lodged by the claimant, he maintained that the respondent had intimated and effected redundancies and that his dismissal was '*constructed to avoid the need to make my role redundant'.* The respondent's position was that the reason for dismissal was conduct.

120. I found no evidence that conduct had been used as a subterfuge for the real reason for dismissal namely redundancy. This was a matter that was raised within his grounds of appeal and was considered within the appeal process The appeal outcome letter advised that there was a total of 10 staff made redundant in the respondent's business in 2018 and this was '*advised to staff during the year at the company's AGM in June 2018 which you attended'* (J149 – 156). I could find no link between redundancy and the claimant's dismissal on the evidence. I accepted that there was a genuine concern as regards the conduct of the claimant in the work carried out at the Travelodge and Co-op Farnborough site and that this was the real reason for dismissal which is one of the potentially fair reasons.

121. I also accepted that the respondent believed that the claimant was guilty of misconduct. The issue was essentially whether they had carried out reasonable investigation so that they had reasonable grounds to come to that belief.

122. The investigation in this case commenced by complaint received at the Travelodge hotel in King Cross. It was reported that certain rooms which had been worked on were substandard. The claimant had completed work at the Travelodge site on Monday 22 October 2018 when he forwarded an email to the Project Manager and Installation Manager indicating that the team had '*fitted rooms 123, 125, 127 and 129. We had to finish at 2 o'clock…'.* Photographs of the completed work accompanied that email. This was an ordinary completion notification.

123. The completion of this work was unaffected by any expected return to the hotel on 28 October 2018. At various points in the material evidence (and in the ET1 claim), there was an inference that further work to these rooms was interrupted because the claimant went off ill when he returned there on 28 October 2018. However, it became clear from the claimant that in the report made on 22 October 2018 he was indicating that these rooms were complete as at the date and no further work was required to these areas attended to by him and Mr Hudson either on, or prior to 28 October 2018, or thereafter. Accordingly, the fact that the claimant had to leave early on 28 October 2018 had nothing to do with the workmanship in these rooms.

124. It also meant there was no need for any further teams to go into those rooms after 22 October 2018. That was in line with the evidence of Mr Drummond that while further work may have been done on the hotel, it was not to those rooms. A complaint was then made to a team who had been on site for a short period about the quality of work in rooms in the hotel and Mr Milward was sent to investigate. There were no issues between Mr Millward and the claimant and no reason for him not to inspect the rooms pointed out or to substitute photos of other rooms than those that had been worked on by the claimant and his colleague. He prepared the report on the work at the Travelodge hotel (J84 – 92) and was able to identify the photographs taken

by attaching 'Post it' notes with the room number. It was not clear why some of the images contained the identification 'room 128'. But it did cover rooms 125 and 127 showing various defects in the finish which were concerning.

125. The suggestion by the claimant was that these photographs were not of the rooms he had worked on and completed by 22 October 2018. But Mr Millward was clear that in his inspection, he had been in the right rooms and the identification by the stickers of rooms 125 and 127 would signify that he was not in other rooms and either deliberately or mistakenly took pictures of the wrong rooms as if they were rooms 125 and 127.

126. I accepted that the report identifying the rooms worked on by the claimant could be relied upon by the respondent in identifying poor workmanship in those rooms being the rooms the claimant had reported as being complete.

127. Having said that, I do not consider that the respondent (or indeed claimant) had noted that the photographs in respect of one of the rooms was signified as being '128'. That only appeared to be recognised by any party during the hearing rather than in the course of the disciplinary and appeals hearing. However, that did not affect the concern over certain rooms completed by the claimant. The work performed on the rooms attended to by the claimant was redone as it was below standard.

128. Mr Drummond had questioned the claimant about the matter and the claimant had provided a response in an email of 15 November 2018 (J43) saying that '*we were very rushed on this job'* and that he had called Andrew Morrison regarding obtaining '*kits made to fit which would speed up fitting'* but that did not happen. He states that with '*graphics coming away, it makes the cutting look very bad. I should have checked the work much closer but I wasn't well over that weekend and on the Sunday I had to go home'.* However as stated the claimant did not appear to be unwell when the work was done but on 28 October.

129. That led to the initial intimation to the claimant that he would require to attend an investigation meeting on the workmanship at Travelodge. That was

advised to him by the email from Mr Drummond of 16 November 2018 (J64 – 65).

130. There then arose the issue of workmanship at Co-op Farnborough. That was notified to the respondent by personnel on site and immediate steps were taken to investigate the complaint made about workmanship. There was no doubt that the claimant had worked on this particular job and was the subject of the investigation report prepared by Mr Drummond (J76 – 83). Again, the respondent considered that the workmanship was such that it required to be redone.

131. It was this report which made Mr Marshall substitute the hearing on 17 December 2018 from one that investigated the Travelodge issues to a disciplinary hearing on the conduct of the claimant.

132. To this point, the claimant had not had the opportunity to comment on the workmanship at C-op Farnborough. There was no evidence that prior to the call from Mr Marshall to the claimant on 6 December 2018 when he was suspended that he had the opportunity to comment.

133. However, the respondent disciplinary procedure (J195 – 200) does not require that to be done before the respondent can proceed to a disciplinary hearing. The statement in relation to disciplinary indicates that an employee would be given '*full written details of the nature of the complaint against you'* before a formal disciplinary hearing is held and at that point would be given the opportunity to '*state your case before any decision is taken'*.

134. Thus for the respondent to proceed to a disciplinary hearing after they have made an investigation to the circumstances and before the employee has had the opportunity to comment is within the disciplinary procedure they operated.

135. The email of 6 December 2018 was important in this context of the case. It was important for the claimant to be able to appreciate that there had been a change of status of the meeting of 17 December 2018 from one of investigation into Travelodge to a disciplinary hearing in relation to both the Travelodge and Farnborough workmanship. It was important that he received

detail of the allegations being made on workmanship. As set out previously, I was satisfied that the claimant had received the appropriate attachments to that email. The letter of 6 December 2018 (J67) clearly sets out that the company were considering '*dismissing or taking disciplinary action against'* the claimant and that the hearing on 17 December 2018 was to be a disciplinary hearing when the installation work at Travelodge and Co-op Farnborough would be discussed.

136. The hearing took the form of a disciplinary hearing and the claimant clearly had the opportunity to state his case. As also indicated, I was satisfied that he had received the reports on the Travelodge and Co-op Farnborough sites with the email of 6 December 2018 and so had time to consider their impact and make a response. To a large extent, he referred to his colleague Mr Hudson performing work which was not to standard with particular reference to the windows at the Co-op premises. He also indicated that he had brought to the attention of the Project Manager a lack of gaskets. However, there was no snagging report prepared for this site by the claimant. There was no dispute that he and his colleague Mr Hudson had carried out the work at this location and that the report on the workmanship did identify matters which were of concern with particular reference to the window work. The essence of the claimant's position appeared to be that he did not accept he was responsible for the work carried out by Mr Hudson and if that was defective then that was not his responsibility.

137. The claimant did complete a "confirmation of verbal instruction" (CVI) report but that did not appear to be part of the work being questioned as it referred to the perimeter hanging signs installed by the contractor had installed. It did not contain other items.

138. The respondent did not accept that the claimant should not be responsible for the workmanship at a site as team leader. The evidence from Mr Millward, who had been a team leader for approximately six years with the respondent prior to taking up his role as Installations Supervisor, was that the claimant had '*full responsibility'* for workmanship at a particular site and that was not a matter he could avoid. A team leader was there to ensure the work was being

carried out properly which would include guiding and instructing a technician. If the work done by the technician was not satisfactory then it was the team leader's responsibility to ensure that it was corrected. A similar position was adopted by Mr Drummond and Mr Marshall.

139. The claimant did dispute receiving the produced job description of team leader but accepted the key responsibilities were as set out in the document (J194). That includes being responsible '*for the overall performance of the installation crew'* and the '*overall development of the technician'* as well as "*job completion reporting and ensuring all elements are reported as fitted*" and any "*self snagging"* items are reported.

140. That would support the view of the respondent that the team leader was responsible for the overall conduct and completion of work and ensure it was done to standard.

141. The 'KPIs' were also discussed at the disciplinary hearing to demonstrate that the claimant's team was not performing as well as other teams in relation to the workmanship. The claimant denied that he had been involved in any assessment of this kind. He had not seen prior to the disciplinary hearing the 'performance table' but the evidence from Mr Drummond was that this was an assessment that he had put in place and that the claimant was aware of such assessment. He indicated that teams had become *'quite competitive'* in relation to their position on this table.

142. In those circumstances, it is considered that the respondent did have reasonable grounds upon which to sustain the belief that the claimant had been guilty of misconduct namely substandard performance in relation to the work at Travelodge and Co-op Farnborough.

143. There had been sufficient investigation undertaken to identify the faults. There had been a hearing to elicit the claimant's position in these matters. At the hearing, it was not suggested by the claimant that further investigation was necessary or that there were other witnesses who should have been questioned. As indicated, I accepted the position put by the respondent that he had worked the rooms in the Travelodge where the work was carried out;

that both that work and the work at Farnborough had been substandard and that he had been responsible for the team.

144. I accepted therefore that the respondent had a genuine belief in the guilt of the claimant and that they had conducted such investigation as was reasonable to come to that belief.

145. The claimant lodged lengthy grounds of appeal. Ms Riddell-Dillet took time to go through each of the grounds at the appeal hearing and then narrate her response within the outcome letter.

146. The claimant had not been allowed to read out the statement he had prepared for the appeal hearing which is a valid criticism. At the same time, he had not intimated this in advance and the hearing was set up to consider the grounds of appeal which had been submitted. The claimant fairly accepted that the prepared statement contained a little more detail but in substance was the same information as in the grounds of appeal. It was emailed to Ms Riddell-Dillet after the appeal hearing and she did consider it at that point before the outcome letter was issued.

147. I was satisfied that not hearing the prepared statement at appeal was not a procedural defect which would render the dismissal unfair.

148. For completeness, it should be said that the appeal statement did seek to challenge the reason for dismissal in asserting that the matter had only commenced when the claimant had required to depart from site on 28 October 2018 through ill health. The suggestion seemed to be that the absence through ill health was then the real reason for dismissal rather than being misconduct. As indicated, there was no evidence that the respondent had pursued this matter for any other reason than that the work at Travelodge and Farnborough was defective.

149. The final issue was then whether or not the dismissal was a reasonable response to the misconduct.

150. It was certainly in the favour of the claimant that he had been employed for 12 years as a team leader and that there had been no previous instances

where his performance had been subject to any disciplinary procedures. There was no record of complaint about the standards achieved. In that respect, it was a puzzle why on these occasions, the standard of work had been substantially defective and required to be redone.

151. However, as indicated, the investigation conducted by the respondent had identified a belief reasonably held that the workmanship was indeed very poor. That had cost the respondent an estimated £5,000 to refit over the two contracts. In terms of the company procedure, gross misconduct included '*gross negligence which results in the company suffering any financial or other loss'.*

152. The time taken to come to a view of the severity of the claimant's misconduct was not lengthy. There was some dispute over how long it took for Mr Marshall to make up his mind and prepare the letter of dismissal. In the end the claimant seemed to accept that it was "*40 minutes or so"*. The criticism was that the matter was prejudged and that Mr Marshall could not have had the time to consider matters properly to include preparation of the letter of dismissal. The letter of dismissal is not lengthy and I considered that it could have been done within that timeframe. The question is whether proper consideration was given to the issue. Fundamentally, it could not be accepted by the respondent that the claimant had no responsibility for the work carried out. He had been in the Travelodge and the hotel rooms in question where the work had been shown to be defective. He had been responsible for the satisfactory completion of the work at Co-op Farnborough. I did not consider that the time taken reflected prejudgment or lack of consideration of the severity of the matter.

153. In any event, the appeal did take time to consider matters fully and any hasty view (if it was hasty) corrected.

154. A single act of misconduct can constitute gross misconduct despite a previous unblemished record. It is not for the Tribunal to substitute its own view of what sanction might be imposed. While another employer might have dealt with the matter with a final warning, it could not be said that dismissal was

outwith the band of reasonable responses of a reasonable employer. The works conducted were for customers which were significant to the respondent. The repercussions in possible loss of contract could not be ignored. The defective workmanship would affect the reputation of the respondent with these customers.

155. In all the circumstances the dismissal was not unfair under 298 of ERA.

Wrongful dismissal

156. In terms of the company disciplinary procedure, where gross misconduct is found, then dismissal can result *'without warning, notice or payment in lieu of notice'.*

157. A claim for wrongful dismissal is essentially a claim for notice which should have been provided but which was not. Given the terms of the contract and the finding of fair dismissal for gross misconduct then no payment can be made in terms of the contractual position between the claimant and the respondent.

158. In terms of the statutory provisions, employees are entitled to certain notice in terms of section 86 of ERA. Certain periods of notice are required to be given depending on the length of employment. However, those rights do not affect '*any right of either party to a contract of employment to treat the contract as terminable without notice by reason of the conduct of the other party'* (s86(6)). In this case, the respondent has made out gross misconduct which means that they can terminate the contract without notice.

159. Accordingly, the claim for notice payment must fail.

Deduction from wages

160. There were two deductions made from the final payment to the claimant namely £12.18 for alleged use of the respondent credit card for private purposes and payment of a motoring fine. The claimant disputed both these matters. There was no evidence produced by the respondent to show that there was any use of the company credit card for private purposes or that it

was the claimant who was responsible for the motoring fine. Given that the claimant had disputed these amounts and no evidence was produced to show that they were valid deductions, other than an assertion in the letter giving final payment, then it would not appear the company has shown that these deductions were valid (J158). Accordingly, I make an award in the sum of £107.58.

Holiday pay

161. The claimant maintained that he had an entitlement to 35 days holiday accrued to date of termination of employment. He stated he had taken 10 days holiday in the holiday year and so a balance was due of 25 days. He was paid for 10 days holiday accrued but untaken. That means that his claim would be 15 x £131.72 (day's pay) = £1975.80. That was a different amount to that claimed in the schedule of loss but I have taken this claim as based on the evidence at the hearing.

162. In terms of the contract relied upon by the respondent (J166), *'if at the effective date of termination of your employment there is still annual leave due to you, you will be paid accrued pay in respect of those days at the rate applicable to holiday pay at the time'.* Accordingly, there is a contractual right to accrued holiday pay in relation to those holidays provided for in the contract.

163. His contract also provided for 31 days of holidays after 10 full years of continuous service (being the position of the claimant) and I accepted that he had four days in lieu of holidays given that he had worked on bank holidays in the course of the year making the total days holiday for the year 35. The holiday year in terms of the employment terms is the calendar year and dismissal here was virtually at the end of the calendar year so the entitlement to holidays at termination was 35 days.

164. There was no evidence produced from the respondent as to the calculation of holiday pay due at termination. There was simply an assertion within the letter providing the claimant with final pay of '*unused holiday pay: 10 days'* with the payslip providing £1320.54 in that respect. I accepted the claimant's

evidence that he had only taken 10 days holiday within the year and so the balance due would be 25 days of which 10 had been paid leaving accrued holiday pay of 15 days outstanding.

165. Accordingly, I make an award in respect of the holiday pay claim in the sum of £1975.80. This is a gross amount and would be subject to tax and national insurance in the usual way. The schedule of loss makes reference to an uplift on the holiday pay claim for failure follow the ACAS Code but there is no relevant Code applicable to this claim.

J Young
Employment Judge

21 January 2021

Date of Judgment

Date sent to parties **27 January 2021**