



EMPLOYMENT TRIBUNALS

Claimant: Mr C McKenzie
Respondent: Gentoo Group Ltd
Heard at: Newcastle Employment Tribunal
On: 2nd and 3rd October and
4th and 5th December 2023
By: Cloud Video Platform (CVP)

Before: Employment Judge Martin

Representation

Claimant: In person
Respondent: Ms Ahari (Counsel)

RESERVED JUDGMENT

1. The claimant's complaint of unfair dismissal is not well founded and is hereby dismissed.
2. The claimant's complaint of breach of contract (notice pay) is also not well founded and is hereby dismissed.

REASONS

Introduction

1. Mr Anthony Longford, Neighbourhood Estates Manager, Mr Marc Edwards, Director of Asset and Sustainability and Mr Paul Wright, Finance Director gave evidence on behalf of the respondents. The claimant gave evidence on his own behalf. The Tribunal were provided with a bundle of documents marked Appendix 1 together with a number of additional documents largely consisting of photographs and a poster.
2. The law which the Tribunal considered was as follows:-
Section 98(1) Employment Rights Act 1996

“(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,

(2) A reason falls within this subsection if it —

(b) relates to the conduct of the employee,

(4) 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.”

3. The well known case of **British Home Stores Limited v Burchell** [1978] IRLR 379, where the EAT held that, in cases of misconduct, the Tribunal has to consider three elements: - Firstly, whether the employer believed that the employee had committed an act of misconduct, secondly, whether that was based on reasonable grounds and thirdly, whether the employer had undertaken a reasonable investigation into the circumstances of the case.
4. The case of **Iceland Frozen Foods Limited v Jones** [1982] IRLR page 439 where the EAT held that the function of the Employment Tribunal is to determine whether, in the particular circumstances of each case, the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair. If the dismissal falls outside the band it is unfair.
5. The case of **Sainsbury’s Supermarket Limited v Hitt** [2003] IRLR page 23 where the Court of Appeal held that the range of reasonable responses test applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedures and the substantive aspects of the decision to dismiss.
6. The case of **Taylor v OCS Group Limited** [2006] IRLR 613 where the Court of Appeal held that the Tribunal must look at the disciplinary process as a whole to determine whether the fairness or unfairness of the procedures adopted, the thoroughness or lack of it for the whole process, was fair notwithstanding any deficiencies at any early stage.
7. The case of **Hadjoannou v Coral Casinos Limited** [1981] IRLR 352 where the EAT held that issues are raised about disparity of treatment could be relevant in three sets of circumstances. Firstly an employee has been led to believe by the employer that certain categories of conduct will be overlooked and that the sanction will not be dismissal; secondly, where there is an inference that the purported reason for dismissal is not the real or genuine reason for dismissal and, thirdly, circumstances where decisions by an employer in truly circumstances may be sufficient to support an argument in a particular case that it was not reasonable on the part of the employer to dismiss an employee. It held that those cases must be truly similar and should only be truly comparable cases.

The Issues

8. The issues which the Tribunal had to consider was the reason for dismissal. The respondent asserted that it related to the conduct of the claimant. The Tribunal therefore had to consider whether the respondent reasonably believed that the claimant had committed an act of misconduct, whether that was based on reasonable grounds and whether they had undertaken a reasonable investigation.
9. The Tribunal also had to consider whether the respondent followed a fair procedure and whether dismissal was a reasonable response in the circumstances of the case, including considering the treatment of any other employee and whether their circumstances were truly similar.
10. In relation to the complaint of wrongful dismissal the Tribunal had to consider whether the conduct amounted to a fundamental breach of contract, which would entitle the respondent to dismiss the claimant without notice.

Findings of Fact

11. The claimant was employed by the respondent as a janitor. His employment with the respondent commenced in 2017. In around April 2022, the claimant was moved as janitor to the Lakeside area. He took on the responsibility for one tower block being Australia Tower and was responsible for three floors in the Altrincham Tower block.
12. The respondent is a social housing organisation, which owns and manages social housing homes, principally in the Sunderland region.
13. The claimant's role as a janitor involved cleaning the internal and external areas of the property, removing rubbish and furniture as is set out in his job description at page 103-105.
14. The tenants of the properties paid the janitor's services by way of a service fee.
15. The claimant sustained a back injury following a road traffic incident. The respondents referred him on several occasions to their occupational health advisors. The most recent report from occupational health was in August 2022. It suggested that the claimant should avoid heavy lifting, carrying, pulling, or pushing. The respondent said they had made arrangements for the claimant's duties relating to the bin collection on a weekly basis to be undertaken by one of his colleagues and for him to then undertake light duties for that colleague instead. The occupational health report also indicated that the claimant should have the opportunity to stretch and have rest breaks as required, which should be discussed locally. Mr Longford stated that he had agreed that the claimant could take rest breaks of up to about 10 minutes. The claimant said that no such agreement had been reached.
16. The claimant has a clean disciplinary record.
17. The respondent's disciplinary policy is at pages 122-131 of the bundle. At page 125 it sets out examples of gross misconduct which include: unauthorised absence and gross negligence of duties.
18. The respondent had in place a customer promise with regard to the services to be provided in the various towers in which they lived. That document is at page 38 of the bundle. It sets out the cleaning commitments of the janitor team. It talks about daily cleaning of communal areas and the residents' room.

19. The respondent has produced some photographs of the residents' room. It appears to be relatively small with several tables, a kitchen and toilet area. There was a poster in the residents', which the claimant accepts was in the room. That poster states that it is for residents to keep the kitchen and communal room clean and tidy at all times and to wash and put away all dishes and place rubbish in the waste bin. Mr Longford said in his evidence that there was in effect a local agreement that the residents would clean the residents' room. The claimant said that he was not aware of a "local agreement" to that effect. He said he understood that the cleaning arrangements were as per customer promise.
20. Mr Rogers, the estates supervisor managed the estate and claimant on behalf of Mr Longford, who himself managed 26 tenanted tower blocks and a team of 24 janitors.
21. Mr Longford said that he had had a good working relationship with the claimant, which the claimant accepted in evidence.
22. Mr Longford said that it was brought to his attention in June/ July 2022, in a few 1 /1s with other janitors, that they had difficulties finding the claimant. He said that Mr Rogers, who was the claimant's supervisor, also indicated that he was not able to find the claimant when he visited the block. Mr Longford said that he decided to investigate the matter before discussing the same with the claimant.
23. Mr Longford said that he reviewed CCTV footage for a number of random days which were Monday 27 June, Monday 11 July, Tuesday 12 July, Tuesday 2 August and Thursday 4 August. He said it took several days to review all the CCTV footage over those dates. He stated that CCTV footage was automatically deleted after 28 days. Mr Longford produced a summary transcript of CCTV footage which is at pages 23 to 84 of the bundle. He notes the claimant's movements over those five days. He said he had concerns about the claimant appearing to be going into rooms and talking to residents for substantial periods over those days.
24. On 22 August 2022 Mr Longford undertook an investigatory meeting with the claimant and asked him about the CCTV footage which he had obtained for those dates. In that investigatory interview the claimant indicated that he was using the residents' room rather than the janitor's room because of the high temperatures. He also said that he would be doing a deep clean in the residents' room. When he was asked about what equipment he had taken into the room to undertake that clean at page 68, he indicated that he would mop the residents' room and the only equipment he would need to take in would be a Hoover. He also suggested he may have been checking emails, but that it was not his lunch break.
25. He did not suggest that he was using the room to stretch or for rest breaks for his back as he subsequently suggested during the course of his evidence to the Tribunal.
26. He indicated that he may use the room as a base and would plan his work in the room and was asked what that might entail. He was unable to provide any real details in that regard. He was also asked what jobs he may be doing during the week and again was unable to provide much detail. He indicated that he needed to clean the residents' room during the week depending on when it had been used. He would do the deep clean on a Monday.

27. The claimant said that he might talk to the tenants, but that would be between five minutes and half an hour. In the investigatory meeting the claimant said that he had always got good feedback from tenants.
28. When he was asked about 27 June 2022, he indicated that he had left early because he was taking time back from a flood a couple of weeks previously (page 70).
29. The claimant also said during the investigatory meeting that he would leave sometimes in his car to go to McDonalds to have his lunch.
30. He was asked about each of the dates in CCTV. He was unable to provide a great deal in the way of detail about what he might have been doing when he was leaving the premises. He suggested that he might have been using the washing machine or looking for vermin around the building.
31. He was also asked why he did not appear to go to the other building at Altrincham tower more than two out of the five days. He did not provide any explanation in that regard.
32. Mr Longford then undertook some further review of CCTV footage to look at a broader sample of random dates. This was because the claimant had suggested that this was during the summer, and he had gone to the residents' room because it was the coolest room and that he was doing deep cleans on a Monday.
33. Mr Longford noted that the residents' room was not being used a great deal over all of this period, bearing in mind that the person who was running the bingo was on leave for part of the period.
34. Mr Longford also looked at the data on the claimant's access fob which showed his entry and exit to the various towers. It showed that the claimant was not visiting Altrincham Tower on a regular basis. The details regarding the claimant's access of buildings through his fob are at pages 85 to 94 of the bundle. In his evidence to the Tribunal the claimant suggested that some of the discrepancies may relate to him tailgating someone into the building, so that he did not actually use his entry key. However, the CCTV footage produced on one occasion notes that the claimant has tailgated someone to get into the building.
35. Mr Longford produced an investigation report which is at pages 62 to 66 of the bundle. He sets out the concerns which were raised by colleagues about the claimant appearing to be unavailable; the investigation he has undertaken utilising several sample dates reviewing both the CCTV footage and the claimant's security fob and the investigation the claimant including the investigation meeting on 22 August. He sets out his findings identifying that there appears to be a significant proportion of the claimant's time which is unproductive whereby he is spending considerable time in the residents' room and substantial time off site without any reasonable explanation. He also notes that the claimant does not always appear to work his contractual hours and that he does not always, as required, attend Altrincham Tower on a daily basis. In the report he notes a total of 13.5 hours of unaccounted time over the random seven dates in June, July and August of seven days spent hours in the residents' room. He accepts that some of the time may have been for genuine reasons but is concerned the amount of time is excessive. He cites a number of occasions when the claimant spent more than an hour in the resident's room; other times when he spent in excess of two hours in the residents' room. (page 64 of the bundle). He also notes the periods when the claimant appears to be absence

- from the building when he does not appear to be working his full contractual hours (page 65). He recommends proceeding to a disciplinary hearing.
36. The invite to the disciplinary hearing is set out at page 60-61 of the bundle. The claimant is invited to a disciplinary hearing on 6 October 2022 by way of a letter of 28 September 2022. The invite outlines the allegations which are said to be gross neglect of his core janitor duties specifically: - that he has spent a significant amount of unproductive time both in the residents' room at Australia Tower and off site without reasonable explanation; noting that, over a seven-day sample period, he spent 13 hours in the residents' room undertaking his core duties. Secondly that he failed to attend Altrincham Tower on a daily basis as required. In the letter he was informed that the conduct could amount to gross misconduct and could result in his dismissal. He is provided with the investigation report and various appendices which include the summary of the CCTV findings, security pass details, the notes of the investigatory meeting and the disciplinary procedure and his job description. He is also informed that he can provide any additional information or documents which he wants the disciplinary panel to consider. He is advised that he can bring a colleague to the meeting.
 37. The disciplinary hearing is chaired by Mr Marc Edwards. The claimant attends with a colleague, who is a trade union representative but is not attending in his role as a trade union representative. The disciplinary hearing takes place on 17 October 2022. The notes of the disciplinary hearing are at pages 137-156 of the bundle.
 38. At the outset of the hearing Mr Longford presented his investigation report. The claimant then had the opportunity to comment on it and provide his comments. The claimant indicated that he was always available on his mobile.
 39. At the disciplinary hearing, the claimant was asked the claimant various questions about what he did on a daily basis and to account for his whereabouts on the occasions when he had left site early and what he was doing on those occasions. The claimant's responses were often generic as opposed to specific. In his evidence to the Tribunal, he conceded that he was unable to provide anything more than generic responses, as opposed to any specific response to any specific dates in question. He said the occasions occurred some two to three months early and he was unable to recall exactly what he was doing on those occasions.
 40. At the disciplinary hearing the claimant asked why there had been no complaints from tenants about his work if he was neglecting his duties. He said that if he was neglecting his duties there was no impact on his performance. He repeated this assertion during his evidence to the Tribunal.
 41. During In the disciplinary hearing the claimant indicated that he had left early on one occasion following a previous flood incident. However, he then subsequently said that he had a personal gas appointment and had to leave early on that occasion.
 42. He was asked about the time spent in the residents' room. He said the room was of standard size. He said that he had been wiping down benches and tables and using it as a base to check emails and workplace (the respondent's social media platform). He talked about the temperatures at the time in the summer, which is why he said he went into that room (page 142). He was unable to indicate what tasks he would be doing on those occasions. He indicated that he would be

planning his work but was not clear as to what he would have had planned on these occasions. He suggested it would be the bigger jobs.

43. At the disciplinary hearing, he was also asked about why he did not attend Altrincham Tower daily, but only on four out of the seven days. He said that he could not be specific. He referenced doing the rubbish runs in Altrincham Tower but did not suggest that he had any alternative duties on that occasion (page 144).
44. When he was asked about whether he took cleaning materials into the residents' room, he indicated that the materials were all in there. He said it might take him one to two hours to clean the room depending on how he was feeling. He said he might need time to support his back (page 145). He was asked about how long he might take for a break for his back and suggested between 15 to 30 minutes. (page 146).
45. He was then asked about the time away from the building for long periods. He said that he could not say why he might have been away. He referred to undertaking washing. He also said there might be issues with vermin.
46. During the disciplinary hearing, he indicated that, on one occasion he had helped a tenant to break down furniture. He confirmed he did not have the tools to do so and would have done it with his hands and feet.
47. During the disciplinary hearing the claimant indicated that he might have made a note of things in his diary. The meeting was then adjourned for the respondent to obtain the claimant's diary. However, when his diary was reviewed during the disciplinary hearing, it was noted that there were no entries for the period or the periods before or after the relevant dates.
48. The claimant was asked about specific times when he was seen talking to tenants for substantial periods. He confirmed that he thought he may have been speaking to one of the tenants who had learning difficulties. He said that he thought it was part of his job to support the tenants. He said he didn't check the time when he was having a conversation (page 151). He was also asked about the time when there was a period of two hours 40 minutes when he was talking to workmen. He suggested some of the time might have been spent in the pump room.
49. During the disciplinary hearing and in his evidence to the Tribunal, the claimant suggested that the allegations had arisen following concerns that he had raised at a recent meeting regarding Hylton Castle.
50. The disciplinary hearing was adjourned. The meeting was then reconvened when the claimant was informed of his dismissal and the reasons for his dismissal. When the decision was given orally, the claimant said he considered that the allegations were fabricated and that he was subject to a targeted attack by his colleagues.
51. Following the reconvened disciplinary hearing the respondents wrote to the claimant to dismiss him. The letter of dismissal is at pages 157-161 of the bundle.
52. In the letter, Mr Edwards noted that the explanations given by the claimant in the disciplinary hearing about what he was doing in the residents' room - undertaking deep cleans and other cleaning duties and due to the summer temperatures using it as a base. He also noted the claimant's explanations for the long discussions observed on CCTV with a tenant on one occasion and Gentoo operatives on another. He also noted the claimant's explanation for being off site

for long periods and why he said he had left work early on one occasion. He noted that the claimant acknowledged that he may not have attended Altrincham Tower every day. Mr Edwards acknowledged that the claimant had a clean disciplinary record and had not received no complaints since he had been working for the respondent. He also acknowledged that the claimant had a back injury and could require rest breaks of 15 to 30 minutes if required.

53. The respondents dismissed the claimant for gross misconduct. Mr Edwards' findings are set out at page 159 to 160 of the bundle. He concluded that there was no requirement for deep cleans in the residents' room on a regular basis. He concluded that there was no reasonable explanation given as to why the claimant was in the residents' room for those periods of time. It seemed implausible that the claimant was carrying out cleaning when no cleaning equipment was taken by him into the room. It was noted that the room as acknowledged by the claimant to be a relatively small room. He also did not consider it could take any substantial time to plan a day particularly when there was no information or little information in his diary. He found there could be no justification for talking to tenants for the periods indicated. Mr Edwards also concluded there was no plausible reason for the amount of time which the claimant spent away from his place of work. He noted the claimant had acknowledged that he had not been at Altrincham Towers as required every day during that seven-day period.
54. In his evidence, Mr Edwards indicated that he considered that he had lost trust and confidence in the claimant. He said that he did not accept the explanations given by the claimant and considered the claimant's responses inadequate and contradictory. He felt he had no alternative other than to dismiss him. The claimant was given a right to appeal against the decision.
55. In his evidence to the Tribunal, Mr Edwards said he was concerned that that he was not able to get any clear answers from the claimant. He said the claimant either was not able to answer the questions or his answers were contradictory and implausible.
56. The claimant appealed against the decision. His letter of appeal is at pages 162-163 of the bundle. In his appeal the claimant indicated he did not think that the investigation was either warranted or fair, that the sources who had raised the concerns had not provided witness statements and nor was any mobile call data produced. He said that the allegations were speculative and that nobody could be expected to provide an accurate account of what they were doing on a day-to-day basis. He also said he considered that the outcome was harsh. He referred to his clean disciplinary record and that he had never had any complaints about him or the standard of his work or his productivity. He asserted he should have been given a warning or final written warning instead of being dismissed.
57. An appeal hearing took place on 22 November 2022. It was chaired by Mr Wright, the finance director, who was supported by a colleague from HR. The claimant attended and was again accompanied by a colleague Mr Walker who is a trade union representative but was not working in that capacity at the appeal hearing. The notes of the appeal hearing are at pages 171-179 of the bundle.
58. At the appeal hearing the claimant was asked to talk through a typical day for him as a janitor and talk about the duties which he had to undertake, and timescales involved. At the appeal hearing, the claimant indicated that it would take him between 30 minutes to an hour and 15 minutes to clean the residents' room. He said that on Monday it would take an hour after the weekend. He said after that

- it would be spot cleaning which he said would be about 20 to 30 minutes to wipe down and clean the toilet. He said he would clean it three times a week (page 172).
59. He outlined the bigger jobs which he would undertake. He explained that he would litter pick in and around the building (page 173).
 60. The appeal panel noted the request for mobile which was subsequently confirmed not to be available. The claimant was asked about the incident where he was talking to a tenant for a lengthy period. He indicated that he would always try and build relationships and chat to tenants. He indicated that the tenant had vulnerabilities but could not recall what was discussed on that occasion (page 176). A discussion then took place about the claimant's standard of work. The claimant said there were no issues about his standard of work or productivity. It was explained that the respondent was not concerned with performance issues. (page 176).
 61. A detailed discussion then took place about each element of the claimant's appeal. The respondents then went through each of the areas in turn.
 62. The claimant was asked why he suggested that the respondents were speculating about what he was doing. The claimant stated that he could not recall everything for every day. When he was asked to be specific, he confirmed that he could not be specific. (page 177).
 63. When he was asked about breaks for his back, he might stand and stretch for 10 to 15 minutes if he was having a problem with his back (page 177). The claimant raised issues about productivity and performance. He said, as he maintained in his evidence to the Tribunal, that it was relevant that he was productive and had no complaints.
 64. The claimant was then asked again about the 13 and a half hours which were spent in the residents' room. The claimant indicated that he would have been cleaning and having lunch and taking toilet breaks (page 178). He said that there was cleaning equipment in the room. He said he did not have to take the equipment and materials into the room. materials in. He said It would take about 20 minutes to clean the toilet area and that the kitchen area and tables would have to be cleaned down. He would take 30 minutes for breaks (page 178). At the end of the appeal hearing, the respondents indicated that they needed to do further investigation and will then come back to the claimant (page 179). The claimant's representative suggested that the witness statements should have been provided in the disciplinary hearing (page 179).
 65. Following the appeal hearing, Mr Wright said in evidence that he and Joanne Gordon of HR decided to interview all of the other janitors. He said in evidence that they attended unannounced at the Towers to undertake those interviews and arranged for each of the janitors to be interviewed separately and sequentially. He said they were all put in separate rooms and their statements were obtained independently.
 66. They had obtained details of the names of the various witnesses from Mr Longford having interviewed him (page 180-183). Mr Longford indicated that the janitors may have discussions with tenants, but that would normally be for about 10 to 15 minutes. He thought that was a matter of common sense (page 181). He also confirmed that the claimant had not approached him about anything more in terms of breaks from occupational health, but it was left a for as and when he

- required a break (page 182). Mr Longford did confirm that there was some conflict with the other janitors following an incident at Hylton Castle when the claimant had stood up and spoken about an issue and the other janitors did not back him up.
67. In his evidence to the Tribunal, Mr Wright said that he visited the tower block and viewed the residents' room which he said was a relatively small/medium sized room. He said he wanted to get some idea of the size of the room.
 68. Mr Wright said that he and Ms Gordon interviewed each of the janitors in turn.
 69. Mr Leonard was interviewed first on 7 December 2022. The notes of Mr Leonard's interview, another janitor, are at pages 184-185). He said that he had not been in the claimant's block before, but he knew there were instances when the claimant was missing for a while. He said that the supervisor had issues getting in touch with the claimant previously. He thought the claimant was apparently missing for a couple of hours. He also talked about him talking to some tenants outside but did not have any details. (page 184).
 70. Mr Gary Wallace, another janitor, was also interviewed on the same date 7 December 2022 - 15 minutes later. The notes of his interview are at pages 186. He said that he cannot see the claimant's block from his block. He referred to other janitors saying that they had witnessed the claimant leaving the site in a car. (page 186).
 71. Mr Wright and Ms Gordon then interviewed Ms Tina Scott, another janitor 15 minutes later. The notes of her interview are at pages 187. Ms Scott said that her tower block was next to the claimant's. She would see a white car arrive, which she thought was his girlfriend's car and the claimant would be gone for a period of time possibly approximately an hour. She said that she would see him walking up the hill and disappearing on occasions. She said that it would probably be a couple of times a week. She also said she saw him chatting at one stage to tenants for a long period. She also said that he would not clean Altrincham, but instead he would walk up the hill (page 187).
 72. Mr Wright and Ms Gordon then interviewed Mr Potts, another janitor, 15 minutes later. The notes of his interview are at page 188. He referred to the claimant talking to people a lot of the time. He described the claimant as lazy and also talked about him going off in a white car, taking an hour and a half or longer for lunch. He referred to the claimant leaving site (page 188).
 73. Mr Wright and Ms Gordon then interviewed Mr Rogers approximately 20 minutes later. Mr Rogers was the supervisor. The notes of his interview are at pages 189-190. Mr Rogers described not being able to find the claimant on occasions. He described a meeting with the neighbourhood co-ordinator, about the claimant being 10 minutes late (page 189). The claimant contested that in evidence indicating that the transcript from the CCTV showed he was two minutes late.
 74. On 16 December the respondents sent the various witness statements to the claimant. They asked for him to provide any comments on the same for review by the appeal panel (page 191).
 75. On 19 December 2022, the claimant sent his response to those interviews setting out his responses to each of the interviews in turn which are set out at pages 194-197.

76. In his response, the claimant indicated that he was not aware that others could not find him. He also suggested that the Hylton Castle incident had changed his colleagues opinions about him. He said that his colleagues would have been aware of what car he drove. He said that he would either go to McDonalds or Sainsburys or bring dinner to work. He referred to issues with a tenant suspected of throwing food out and a vermin problem. He also indicated that he would often walk around the block which would be up the bank (page 195). He questioned how, if he was off site for so much time or in the residents' room with unproductive time or always talking to tenants how he could maintain such a busy workload with no complaints (page 195). He also questioned how somebody could have timed how long he had been talking to a tenant. He suggested that there was some collusion in the responses from some of the interviewees to the questions (page 195). He referred to the meeting with Hannah Duncan the neighbourhood co-ordinator (page 196).
77. In his response, the claimant complained that the interviews were conducted on 7 December 2022 and not at the time of the investigation. He said the concerns would not warrant an investigation and that there is no proof about any of the allegations made in the statements. He states that there were no photographs, video evidence or specific times recorded which corroborate with the CCTV footage. He suggests that this was a witch hunt (page 197).
78. In his evidence to the Tribunal, Mr Wright said he then met with Ms Gordon on 20 December to discuss the additional evidence obtained, the witness statements and the claimant's response to those witness statements and to consider their response to the claimant's appeal.
79. In his evidence to the Tribunal, Mr Wright said that he concluded that the claimant was absent without authorisation for substantial periods and that he was unable to account for substantial periods of his time when he was in the residents' room. He considered the room to be a relatively small room and did not consider that it would take the amount of time which the claimant was suggesting to clean it. He did not find the claimant's evidence to be credible. He was concerned that the claimant could not be specific about what he was doing in the various periods when he appeared to be absent not undertaking any productive work.
80. Mr Wright stated that he did not consider that the evidence from the witnesses came from them colluding together. He said that the evidence was similar, but it supported the CCTV footage and key fob entries for the particular dates. It was consistent with the claimant going absent and not being available. He said that there was also additional evidence about the claimant going up the hill and getting into a car at times which was again consistent with the claimant leaving site.
81. Accordingly, Mr Wright concluded that there was evidence in the form of the CCTV footage, the key fob documentation, which was then supported by the witness evidence. This established that the claimant was in fact leaving site effectively unauthorised for extended periods and being unproductive for extended periods.
82. In his evidence to the Tribunal, Mr Wright said he did consider whether alternative sanctions were appropriate. He said that he spoke to his HR colleague to ascertain what sanctions had been applied and whether there were any similar type cases. He said that this was his first appeal hearing for this organisation, although he had undertaken appeals with other organisations. He said that he was informed of a number of other cases where written warnings were issued in

cases where the employee had effectively admitted the offence and was apologetic. He said that in one other case the employee had been dismissed. In that case the employee had denied the allegation.

83. Mr Wright said in evidence that there was no evidence that the claimant was apologetic, He had denied the allegations throughout the process. He said that he gave no other mitigation other than the fact he had a clean record. He gave no mitigation relating to any of the specific allegations or dates. He said that the claimant's back injury did not impact on the allegations, although he acknowledged that might account for some extended periods for stretching in the communal area, but it did not explain the extended times spent in those communal areas. Mr Wright said he had considered the information provided by occupational health and concluded that that was not a factor to take into account as to whether or not the claimant should be to the claimant's dismissal should be overturned as it was relevant to the allegations.
84. Mr Wright indicated that he effectively did not believe the claimant's account. He considered that the claimant's account was neither specific nor credible. He was concerned that the claimant was a lone worker and in a position of trust. He therefore concluded that the appeal should be dismissed.
85. An appeal summary report was then produced. It is at pages 194-202 of the bundle.
86. In his letter dismissing the appeal, Mr Wright said that dismissal was the appropriate sanction given the severity of the conduct, in particular the lack of trust and confidence, bearing in mind that the role of the janitor is lone worker role with little oversight management reflected in the report - page 202.
87. The respondents then wrote to the claimant to dismiss his appeal and uphold the decision to dismiss him for gross misconduct. The letter was sent to the claimant on 23 December 2022 (page 203-211). It sets out the grounds of appeal, the discussion at the appeal hearing, the further investigation and conclusions reached by the appeal panel. The respondents made it clear that they had taken into account the fact that the claimant had a clean disciplinary record (page 208).
88. During his evidence in Tribunal, the claimant raised an issue about another janitor whom he alleged had been playing bingo. The respondent say that they investigated that matter and that the janitor involved had been playing bingo during time off not during working hours.
89. In his evidence to the Tribunal, the claimant indicated that he was using the residents' room because it was a cool room and that he was required to clean the same. In his evidence he did not specify how long it would take for him to do so. He did not suggest at any stage when he was cross-examined that it would take longer for tasks to be undertaken because of his back or that he might require regular breaks because of his back. He suggested that should have been self-evident from the occupational health reports.
90. It remains unclear to the Tribunal from the claimant's evidence what he was doing in the residents' room for the periods in question. He accepted in evidence, as noted in the notes from the investigatory, disciplinary and appeal hearings that his answers about this were largely generic as opposed to specific.
91. On occasions, he gave different accounts of what he was doing, and the time taken during different parts of the disciplinary process. At one stage he

suggested it would take him 30 minutes to clean the residents' room, however during the appeal hearing, he suggested it would take longer. He also gave different accounts in his evidence to the Tribunal to what he said during the various meetings during the disciplinary process. At one stage, he said all the equipment was in the residents room but when he was questioned about that in Tribunal, he said that he would have to take another hoover in there. He also said at one stage in evidence to the Tribunal that he may have been taking his lunch in there, yet that was different to what was said in the disciplinary and appeal hearing.

92. When he was questioned about what he was doing off site, he suggested he may have been litter picking, although it was not clear that he had taken either a bag or a litter picker with him to undertake that task. He did not dispute that evidence. He also suggested that he might have been undertaking pest control, but the respondent said contractors undertook that task, with which the claimant did not disagree. He could not explain in evidence what he was doing on days when he was off site. He seemed to be surmising as to what he might have been doing as opposed to what he was doing. His evidence was that he could not recall what he was two / three months earlier and he had no diary to record what he was doing, albeit having initially suggested in the disciplinary hearing that he might have entries in the diary, which was not the case.
93. The claimant also gave different version of events as to what happened on 22 June. He initially said that he left early because he had had to stay late previously due to a flood. However, he also that he had left early to deal with a gas appointment at home. He suggested that the discrepancy in relation to this was because of an error on the date.
94. This Tribunal finds that the evidence from the respondent's witnesses was more credible. It was consistent with the minutes of the meetings, which were not disputed. The claimant's evidence changed at various points during the disciplinary process and the Tribunal in terms of his explanations. The Tribunal also found that his evidence at times was inconsistent with what he had previously said. He also raised matters at times which were not referred to anywhere in the disciplinary process. For example, he raised an issue about CCTV footage in Altrincham tower which he had not specifically raised in the disciplinary process. He also suggested an arrangement to cover for another colleague for periods in Altrincham Tower although that was not raised specifically during the disciplinary process either.
95. The Tribunal note that the CCTV footage was not produced to the Tribunal nor did the disciplinary or appeal officers have sight of the CCTV footage. Furthermore, the claimant himself was not provided with a copy of the CCTV footage. However, he never requested it any point during the disciplinary process, nor specifically suggest in these proceedings that it should have been provided to him. The explanation given was that the footage was immediately deleted after 28 days. During these proceedings, the claimant suggested that the footage should have been downloaded. However he did not suggest that at any stage to the respondents during the disciplinary process, nor did he at any stage dispute the transcript of the CCTV footage. He even suggested in his witness statement that, where there was no CCTV footage in the residents' room, the respondents were being speculative about what was happening in the residents' room itself.

96. The claimant acknowledged during cross-examination that if these allegations could be proven that they could amount to gross misconduct.

Submissions

97. The respondent's representative submitted that the dismissal was for gross misconduct. She submitted that the respondents reasonably believed that the claimant had committed an act of gross misconduct and had reasonable grounds for doing so. She suggested that there was a reasonable investigation, and that the procedure was fair. She said that it was not necessary for the respondents to have interviewed the witnesses before the disciplinary hearing, but if the Tribunal did not accept that submission, any defects in effect were rectified by the appeal process, whereby the claimant was given the opportunity to comment. When the interviews were undertaken the claimant was given the opportunity to comment on the same. She further submitted that dismissal was a reasonable response in the circumstances of this case bearing in mind the claimant's role and the loss of trust and confidence in him by the respondents.
98. The claimant submitted that his dismissal was unfair. He said that the respondents had not followed a fair procedure. He indicated that they did not have sufficient evidence to dismiss him and that the process was not fair. He also said that a reasonable investigation was not undertaken.

Conclusions

99. The claimant was dismissed for unauthorised absence and gross neglect of his core janitor duties, namely for spending a significant amount of unproductive time both in the residents' room and off site without explanation and for failing to attend at another tower on a daily basis as required. This could amount to misconduct.
100. Misconduct is a fair reason for dismissal under section 98(2) of the Employment Act 1996.
101. This Tribunal finds that the respondent did reasonably believe that the claimant had committed an act of misconduct. The Tribunal has heard evidence from the respondent's witnesses, who conducted the investigation, disciplinary and appeal processes. The Tribunal prefers the evidence of the respondents to that of the claimant. The respondent's evidence was largely consistent with documentary evidence produced, whereas the claimant's evidence was at times inconsistent with the documentary evidence and also at times unclear and lacking in consistency.
102. The respondent had reasonable grounds to believe that the claimant had committed an act of misconduct. They reviewed the CCTV footage of a sample of different days over a three-month period; with a transcript being produced of that footage. They also reviewed the claimant's key fob entries for a period of days. Latterly, they obtained witness statements from other janitors and the claimant's supervisor. The evidence from the CCTV footage, key fob entries and latterly from the witness statements, all supported the fact that the claimant was at times absent for extended periods of time without authorisation spending extended periods of time in the residents' room and off site. He was witnessed on at least two occasions of over an hour (/two hours on one occasion) talking to tenants/trades people when he should have been undertaking his role as a janitor.

103. The Tribunal had considered whether the investigation was a reasonable one and whether the respondents had followed a fair process. In that regard the Tribunal had to consider whether the claimant's colleagues who had initially raised the concerns should have been interviewed earlier and the claimant given the opportunity to respond as part of the initial investigation.
104. The Tribunal noted that it was that limited information which had led to the investigation in the first instance. The Tribunal noted that when the claimant raised concerns about that witness evidence as part of the appeal process, the respondent then proceeded to interview a number of those janitors. The claimant's suggestion of collusion is not accepted by the Tribunal, as it accepts Mr Wright's evidence that those interviews were conducted sequentially with none of the witnesses being able to collude to provide their evidence. Mr Wright's evidence is consistent with the documentary evidence namely the Tribunal notes that each of the witness interviews effectively follow on immediately after the other. These witnesses effectively all confirm the claimant was leaving site and in fact go further suggesting he was walking away from the site and getting into a car. All the witness statements are fairly similar. They also contain some hearsay evidence - one witness says they "did not actually see the claimant leaving site but had been told this". However, although they lack detail, they all tell the same story. They are all consistent and support the evidence that the claimant was leaving site for long periods of time without any explanation and talking to tenants outside for long periods of time as well.
105. The Tribunal finds that the steps taken by the respondent during the appeal process to undertake those investigations and give the claimant the opportunity to comment on that evidence (which he did in detail) rectify any defect in the original investigation and are sufficient to show that this was a fair process. It was not entirely clear to the Tribunal whether it was necessary for those interviews to be conducted as part of the initial investigation, but it seems to the Tribunal that it was likely to make it less fair. However the Tribunal has to look at the process as a whole. The claimant was given the opportunity to see and comment on all of the witness statements. The Tribunal find that there was a reasonable investigation and conclude that the process was a fair process.
106. The claimant did not specifically state what other investigation ought to have been undertaken or what other steps ought to have been taken, but the Tribunal reminds itself it has to be a reasonable investigation. Most of the allegations now raised by the claimant relate to steps that the claimant did not suggest should have been taken by the respondents at the time, for example reviewing CCTV footage from other towers, which in fact would not have been possible as CCTV footage was deleted within 28 days or interviewing any other people which he did not suggest at any stage during the process.
107. The Tribunal went on to consider whether dismissal was a reasonable response in the circumstances of this case. The Tribunal had to remind itself that this was not a case about the claimant's performance. The issues related to whether or not the claimant was neglecting his duties by being absent without authorisation, either whilst talking to tenants for extended periods; spending extended periods in the residents' room without explanation; and/or going off site without adequate explanation.
108. The Tribunal finds that dismissal was a reasonable response in the circumstances of this case. It had to consider whether a reasonable employer

would have dismissed in these circumstances. The claimant was a lone worker. His supervisor was managing a number of different Towers, and his senior manager was managing a large portfolio of residential Towers. Therefore, there was little direct management of his activities on a day-to-day basis. It was therefore necessary for the respondent to ensure that they had trust and confidence in the claimant. The claimant's response to this investigation and his failure to provide a reasonable explanation for his activities led the respondent to lose trust and confidence in him. Bearing in mind the role which he undertook, there was no alternative for them other than to dismiss him.

109. The Tribunal did not consider that the claimant was able to show that any other employee in truly parallel circumstances was treated more leniently than him. The Tribunal accepts the respondent's evidence that the employee to whom he refers was a janitor who was found to be playing bingo during the janitor's own time. Therefore, the circumstances were entirely different.
110. The Tribunal accepts that this conduct amounts to gross misconduct. The claimant himself acknowledged that, but more significantly it is clearly set out in the respondent's disciplinary procedure to be an act of gross misconduct. The Tribunal finds that this was an act of gross misconduct which would entitle the respondent to consider that the claimant was in repudiatory breach of contract. Accordingly, they were entitled to dismiss him without notice.
111. Accordingly for those reasons the claimant's complaints of unfair dismissal and wrongful dismissal are hereby dismissed.

Employment Judge Martin

Date 21 December 2023

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