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EMPLOYMENT TRIBUNALS

Claimant: Mr Steven Rose
Respondent: IEFS 17 Limited
Heard at: East London Hearing Centre
On: 4 and 30 January 2018 (in chambers) 31 January 2018
Before: Employment Judge Hallen

Representation:

Claimant: Mr J Heard (Counsel)
Respondent: Mr E Ryan (General Manager)

RESERVED JUDGMENT

The judgment of the Tribunal is that the Claimant's claims for unfair dismissal and wrongful dismissal are unfounded and are dismissed. The Claimant's claim in respect of the Respondent's failure to inform and consult with him contrary to Regulation 13 of the Transfer of Undertakings (Protection of Employment) Regulations 2006, ('The Regulations') is well-founded and the Claimant is awarded six weeks net pay as compensation in the sum of £2,071.62.

REASONS

Background and Issues

1 At the outset of the hearing, the parties agreed that the correct name for the Respondent was IEFS 17 Limited which was the Second Respondent in respect of the Claim Form. The Respondent's name was accordingly amended. With respect to the claims against the Respondent, it was agreed that they were unfair dismissal, wrongful dismissal and failure to consult with the Claimant pursuant to Regulation 13 of the Regulations. In relation to the claim for unfair dismissal, the Tribunal had to determine the reason for dismissal which in this case the Respondent said was gross misconduct. The

Respondent in its Response Form asserted that the Claimant was selling pallets that were commercially viable, for his own gain and doing so despite the fact that he had been instructed not to do so. This, the Respondent asserted was theft from the Respondent and was gross misconduct. The Tribunal had to determine if this reason put forward by the Respondent amounted to misconduct. Thereafter, the Tribunal had to determine whether the dismissal was fair or unfair within the meaning of Section 98(4) of the Employment Rights Act 1996 ('ERA'). In relation to the claim for wrongful dismissal, the Tribunal had to ascertain whether the Claimant was in fact guilty of the act which the employer stated entitled it to dismiss the employee summarily. In this case, the Tribunal had to decide on the balance of probabilities whether the Claimant was selling pallets which were commercially viable for his own gain despite having been instructed not to do so.

2 In relation to the duty to consult under the Regulations, the Tribunal had to ascertain whether the Respondent in this case being the transferee had long enough before the relevant transfer consulted with the Claimant in order to inform him of the fact that the transfer was to take place, the date or proposed date of the transfer and the reason for it pursuant to Regulation 13 of the Regulations.

3 The Tribunal had in front of it an agreed bundle of documents as well as a set of photographs numbered 1 – 12 provided by the Respondent. In addition, the Claimant prepared a written witness statement. The Respondent also produced two written witness statements, one in respect of Eddie Ryan the General Manager (Dismissing Officer) and the second in respect of Martyn Young (Appeal Officer), the principal shareholder and sole director of the Respondent. The Claimant, Mr Ryan and Mr Young gave oral evidence and were subject to cross-examination and questions from the Tribunal.

Facts

4 The Claimant commenced employment on 1 April 1986 and was employed as the Respondent's Senior Warehouse Operative having over 30 years service with the Respondent. The Claimant was dismissed on 16 June 2017 by reason of gross misconduct and this was the effective date of termination. The Claimant was the most senior employee employed by the Respondent in the warehouse and was responsible for loading and unloading pallets, as well as keeping the yard clear and also disposing of damaged pallets. Given the Claimant's lengthy experience, he was well aware of the quality of pallets that the Respondent dealt with and knew the difference between a scrap pallet and a good quality pallet. The Respondent gave evidence which was accepted by the Tribunal that used good quality pallets had a value and it was the Respondent's new practice to offer those good quality used pallets to their clients to retain their client's goodwill. On 17 November 2016, Mr Ryan discovered the Claimant and Tony Stein (subcontracted driver) loading pallets for sale. Mr Ryan instructed them not to do that and said that good quality used pallets should be returned to the Respondent's customers. Mr Ryan kept a note of that conversation dated 17 November 2016 which was at page 41 of the bundle of documents. The note stated:

"I have today found Tony Stein driving and Steve Rose loading out pallets for sale. I have told them both in no uncertain terms are they to do this, as they are our property. I have expressed that good pallets are to be returned to our customers and this promotes loyalty."

5 The Claimant in his evidence disputed that this conversation took place. The Tribunal did not accept his evidence. The Tribunal found that this conversation did take place and that the Respondent clearly instructed the Claimant not to sell good quality pallets as these were to be returned to the Respondent's clients in order to promote good will for the business. This was supported by the investigation note taken as part of the disciplinary process against the Claimant at page 64 which was dated 16 June 2017. In this note, Mr Ryan asked Mr Stein whether he had remembered the conversation that took place on 17 November 2016 regarding the removal of pallets from the yard. Mr Stein confirmed that he did and confirmed that he was told not to take good quality pallets from the yard anymore confirming also that Mr Rose, the Claimant, was in attendance at that meeting. Mr Stein confirmed that he at that stage stopped selling good quality pallets. However he confirmed that the Claimant continued to sell pallets being both scrap pallets as well as good quality pallets contrary to Mr Ryan's instruction. This continued from January 2017 onwards. The Respondent is a business which is responsible for the delivery and collection of goods on behalf of clients around the country. At its yard based in Barking, London, it loads and delivers such goods on behalf of clients. These goods are loaded onto vehicles the majority of which are loaded on pallets. Some of these pallets are damaged in loading and removal and are scrap pallets for which the Respondent has to pay for disposal. However, a large number are good quality pallets which have a residual value to the Respondent. From November 2016, Mr Ryan, the General Manager instructed all staff including the Claimant that good quality pallets were to be retained and that they were the property of the Respondent.

6 During the course of the Tribunal hearing the Claimant alleged that in November and December 2014, Mr Ryan was abusive towards him. The Claimant maintained that Mr Ryan's behaviour towards him from 2014 until his dismissal was aggressive and 'brutal'. He asserted that this conduct on Mr Ryan's part was a factor which led him to be dismissed as Mr. Ryan retained a residual dislike of the Claimant and wanted him out of the business. The Tribunal reviewed the correspondence in the bundle at pages 27 – 40 and noted that the documents referred to were three years before the Claimant's dismissal as was the incident referred to in that documentation. It appeared to the Tribunal that the Claimant was not happy that Mr Ryan was appointed by the owner of the business at that time, Derek Best, as the General Manager and as such was given total control of all matters relating to the company's day-to-day management by Mr Best. This included all procedures relating to the company's business. Mr Best the owner of the business at the time in December 2014 arranged to have a meeting between the two individuals to deal with the Claimant's complaint but no such meeting took place. The Claimant referred to his own diary notes at page 86 and 87 of the bundle of documents but these again related to the incident which took place in 2014 and predated the dismissal by some three years. The Tribunal found that there was no evidence to support the Claimant's contention that he was being subjected to "brutal" treatment by Mr Ryan and that Mr. Ryan wanted the Claimant out of the business. In any event, the differences between the two as shown in the documents produced to the Tribunal concluded in 2014 well before the Claimants dismissal.

7 The Respondent and Mr Young who was the sole director was involved in the acquisition of the business of IEFS Limited during 2017. The original completion date for the sale was 1 April 2017 but did not take place until 1 June 2017. Derek Best, the previous owner of the business, the Respondent's legal advisers and Mr Young confirmed that they all decided not to consult with the employees until absolutely sure of the completion date and/or the acquisition was definitely going to happen. Between 16 – 18

May 2017, (shortly before 1 June 2017 being the sale date) Mr Young personally met with every employee in small groups of two to three with Mr Ryan to discuss the acquisition. His strategy for these meetings was to provide the employees with a platform for self representation. During these meetings the employees were told that the business of IEFS Limited was being sold to the Respondent and that the employees' employment would be transferring without any changes. It was further explained to the employees that there would be "business as usual" and that nothing was changing as far as the employees were concerned other than the name of the employer. At the time of these discussions, the Claimant was off sick and did not attend any of those meetings. However, a meeting was arranged with the Claimant, Mr Young and Mr Ryan on 14 June after his return from illness at which the Claimant was advised that the business had been sold, that his contract of employment had transferred and that it was business as usual with the name of the employer changing. The Claimant was provided with a copy of the contract of employment which was at pages 43 to 45 of the bundle of documents. Mr Young confirmed that there had been no prior consultation with the Claimant because he did not wish to trouble him while he was off sick and wanted to give him the benefit of the same personal approach as he had given to his colleagues between 16 and 18 May 2017.

8 On the Claimant's return from sick leave at the beginning of June, the Claimant was suspended from work on full pay pending an investigation regarding the removal and sale of company property namely good quality pallets. The Respondent's investigation officer was, Jason Excell, Operations Manager. The Claimant was given by hand a letter of suspension dated 2 June 2017 in which he was informed that allegations had been received involving the Claimant's removal of company property without authorisation from its premises on Abbey Wharf, Barking. The allegations related to the removal and sale of pallets between the end of January 2017 till the middle of May 2017. It was confirmed to the Claimant that the allegation was deemed to be potentially theft and if found proven could amount to gross misconduct. The Claimant was invited to an investigation meeting on 8 June 2017 which would be conducted by Mr Excell. The Claimant was told of his right to be accompanied by a trade union representative or work colleague. The suspension letter was at page 48 of the bundle of documents. As part of the investigation conducted by Mr Excell, on 6 June 2017 a statement was taken from a subcontractor driver retained by the Respondent to deliver and collect goods. This individual's name was Suthakar Kunthasan ('Babu'). The statement was at pages 50 – 51 of the bundle of documents. Babu confirmed that the Claimant had loaded the pallets onto his vehicle during work time. He confirmed that the pallets were being taken from the Respondent's site from January 2017 and they were being removed at the instruction of the Claimant. Babu confirmed that some of the pallets were from a small operation ('Onion Man') also operating from the same yard, some were taken from the Respondent's own pallets and some were from deliveries that he had made. Babu confirmed that the pallets were loaded by the Claimant onto the vehicle and were sold by Babu. He confirmed that the pallets were sometimes broken and/or damaged and sometimes they were good quality pallets. He confirmed that he received money for the pallets and that he shared it with the Claimant. Babu confirmed that he believed he had permission from the Respondent to sell these pallets because the Claimant had indicated to him that it was okay to do so. As part of the investigation, Babu produced copies of his sales receipts in respect of the pallets sold which was at page 78 – 80 of the bundle of documents. During the course of the disciplinary process leading to the Claimant's dismissal the Respondent believed that the total value of the pallets sold by Babu was £1439.50 between January 2017 and mid May 2017 and that the Claimant received half this total value namely £719.75.

9 At the time that the Claimant was suspended by Mr Excell, Mr Excell took a file note which was at page 49 of the bundle of documents which the Tribunal concluded accurately reflected the events that occurred at the time of the Claimant's suspension. The note confirmed that at the time of the Claimant's suspension Mr Excell followed the Claimant through the warehouse. Upon seeing Tony Stein, he shouted over to him, "*you see what you've done, you going to get it too, you're involved*" to which Tony replied, "*what have I done?*" Steve Rose replied "*you've got to me the sack, you and your big mouth.*" It was put to the Claimant during cross examination that the use of the above words to Tony Stein indicated that the Claimant was guilty of taking the pallets and was seeking to deflect blame to others including Tony Stein. The Claimant said that he could not recollect using such language. The Tribunal preferred the details contained in the file note prepared by Mr Excell which appeared to be a contemporaneous document. In it, the Tribunal noted that the Claimant at the time of his suspension was upset with Mr Stein for what he believed was the revelation of his activities in selling company property. This in the Tribunal's view showed an early indication by the Claimant of his acceptance of wrongdoing.

10 The investigation meeting took place on 8 June with Mr Excell the investigating officer asking the questions. The notes were at pages 56 – 59 of the bundle of documents. During the course of this meeting the Claimant confirmed that he had been given permission to get rid of and sell pallets and that this permission had been given to him by Derek Best, the previous owner of the business. He confirmed that only bathroom pallets and damaged pallets were taken away and that if money was made for the sale of such pallets it was okay for the Claimant to "get a drink" out of it. He stated that the pallets that were disposed of were rubbish. He also confirmed that Mr Ryan had confirmed to him that he could not dispose of or sell good quality pallets which were to be given back to the customers although he gave the impression that the sale and disposal of bathroom pallets was in order. In response to the question relating to receiving money, the Claimant confirmed that Derek Best had authorised this and if he had received money (he phrased it as "a drink") this was in order. When he was asked whether Mr Ryan had told him not to remove good quality pallets for sale the Claimant confirmed that Mr Ryan had confirmed that good pallets could not be taken but that bathroom pallets could be taken. These he referred to as the defective "shit" pallets and bathroom pallets. The Claimant confirmed that the pallets were loaded onto Babu's truck by him and that these pallets were a selection of bathroom pallets, Euro pallets and pallets belonging to Onion Man. He also confirmed that the pallets were taken and disposed of during company time. When he was asked about the conversation that he had with Mr Stein at the time of his suspension stating "see what you've done, you got me the sack", the Claimant chose not to answer this question.

11 Following the investigation meeting, Mr Excell had decided that there was sufficient evidence to proceed with disciplinary action against the Claimant. Accordingly, by a letter dated 14 June 2017 the Claimant was invited to a disciplinary hearing. This letter was at page 61 of the bundle of documents. The letter was from Mr Eddie Ryan, the General Manager who would be the person conducting the disciplinary hearing. The letter confirmed that the investigation conducted by Mr Excell on 8 June relating to allegations that he had been involved in the instigation and the removal of company property during company time and for personal gain without authorisation was deemed sufficient to proceed with disciplinary action. Mr Ryan confirmed that the Respondent viewed the removal of the property as an act of theft and considered it to be gross misconduct and that the Claimant was invited to a disciplinary hearing on 16 June which would be

conducted by Mr Ryan, the General Manager. The Claimant was informed that he could attend with a work colleague and that he was suspended on full pay until the conclusion of the disciplinary action. He was also advised that if the allegations were found proven he could be dismissed by reason of gross misconduct without notice. At the hearing, there was a dispute as to the disciplinary pack that was provided to the Claimant who gave evidence to the effect that he did not receive the details of the investigation conducted by the Respondent before the disciplinary hearing. The Tribunal preferred the evidence of the Respondent and accepted that the Claimant was provided with the notes of his investigation meeting which was at pages 56 – 59, the statement of Babu which was at page 50 & 51 of the bundle of documents, the file note taken by Mr Ryan on 17 November 2016 which was at page 41 instructing the Claimant and Mr Stein not to sell or dispose of good quality pallets, Babu's diary notes confirming the payments received at pages 78 and 80 of the bundle, the photographs at pages 81 – 85, the interview note of Tony Stein on 16 June 2017 at pages 64 of the bundle of documents and email correspondence between himself and Mr Best contained at pages 52 and 53 of the bundle of documents.

12 The disciplinary meeting took place on 16 June 2017 at which Mr Ryan was the disciplinary officer. The Claimant attended with his work colleague John Glossop and notes of the meeting were taken by Sarah Staines. These notes were at pages 65 – 67 of the bundle of documents. At the outset of the meeting, Mr Ryan provided the Claimant with further copies of the investigation pack (as described earlier) and gave him an opportunity to consider this information. Mr Ryan outlined the allegation against the Claimant and confirmed that the Respondent had obtained confirmation from Babu that good quality pallets were sold by him and the proceeds split fifty fifty between Babu and the Claimant. This was despite the instruction given by Mr Ryan in November 2016 for such pallets not to be removed from the site and returned to customers as a sign of goodwill. The Claimant denied the allegation and reasserted that he had been given permission by Mr Best to dispose of all pallets being good quality pallets and damaged pallets. The Claimant was asked whether he had received any money from the sale of the pallets which he denied confirming he only received payment from the Onion Man pallets and not from the sale of the Respondent's pallets. He confirmed the amount received was £5 – £10 here and there. He could not confirm how many pallets were sold in respect of the Onion Man confirming that it was only the Onion Man pallets and the broken bathroom pallets that were ever taken. He denied that good quality pallets were sold asserting that only small amounts of money was received for the disposal and sale of damage scrap pallets. He maintained that he was given permission by the previous owner Derek Best to do this.

13 At the conclusion of the disciplinary meeting, Mr Ryan came to the conclusion that the Claimant was guilty of the charges against him namely the selling of useable pallets which were to be returned to customers contrary to the instruction that was given to him in November 2016. This Mr Ryan believed to be theft and constituted gross misconduct. Mr Ryan came to the conclusion that the Claimant was contrary to his instruction, selling good quality pallets which were commercially viable and should have been returned to the Respondent's customers as previously directed. The evidence showed that money made from the sales made by Babu were far greater than the value of scrap pallets that were disposed of between January 2017 to the middle of May 2017 and that if the Claimant was selling only scrap pallets as he asserted the yard would have been empty of scrap pallets which the photographs produced at pages 81 – 85 showed was not the case. In addition, Babu's statement confirmed that not all the pallets that were taken from the Respondent's site were damaged or broken and Mr Steins statement at page 64 confirmed that a

mixture of pallets were taken “anything, blues, whites, Euros, anything stackable”. Mr Ryan concluded that the Claimant had been selling good quality pallets despite having been told not to do so. He concluded that this constituted theft of company property for material gain. At the time, his view was that the Claimant had received £719.75. Mr Ryan took into account other penalties that were open to him and noted the Claimant’s lengthy service of 30 years but considered his actions had destroyed all trust in him. Therefore he concluded that the appropriate penalty was dismissal for gross misconduct with effect from 16 June 2017. He wrote to the Claimant confirming this and this letter was at page 69 of the bundle of documents. In the letter, the Claimant was given the right of appeal which appeal would be determined by Mr Martyn Young, the new owner of the business.

14 The Claimant lodged a written letter of appeal which was at page 70 of the bundle of documents. In the appeal letter, he said that he admitted to loading bad pallets along with pallets from the Onion Man but all in good faith and with the permission and acknowledgement from Derek Best, the previous owner of the business. He confirmed that this was his understanding and he felt aggrieved that no one had mentioned that it was no longer acceptable. He asserted that Mr Ryan had cited a meeting which took place in November 2016 (page 41) which meeting he said never took place. A copy of the Claimant’s letter of appeal was sent by the appeal officer Mr Young to Derek Best, the former owner of the business and Mr. Best responded to the appeal letter with his own comments. A copy of this letter was at page 75 of the bundle of documents. Mr Best confirmed that it was company policy that all serviceable pallets were to be retained for redistribution back to the company’s client as a sign of goodwill. Mr Best also confirmed that he had never been consulted on the question of removal and/or sale of what was described as the “Onion Man’s” pallets which up until this point (4 July 2017) he remained unaware of. He confirmed that he had previously confirmed that the Claimant could dispose of bathroom pallets which were considered to be unfit to recycle and therefore of no commercial value with the Claimant. However, he also confirmed that in agreement with Mr Ryan, the General Manager, it was company policy that all serviceable good quality pallets were to be retained for distribution to the company’s clients for their own use. Mr Young sent a copy of Derek Best’s letter to Mr Rose on 5 July 2017 which was at page 76 of the bundle of documents.

15 Mr Young heard the Claimant’s appeal on 12 July 2017 and the notes of the meeting were at pages 88A – 88C of the bundle of documents. During the appeal, the Claimant argued that his dismissal was a culmination of an ongoing grievance with Mr Ryan. Mr Young noted that this grievance dated back to 30 November 2014 and that no other grievance had been submitted since that date. In any event, he approached the situation with an open mind and the key question was whether it was reasonable to conclude that the Claimant had been involved in selling good quality pallets after he had been instructed not to do so by both Mr Ryan in November 2016.

16 After hearing the appeal, Mr Young confirmed that the Claimant had been involved in selling good quality pallets that were commercially viable. The evidence for that was that the payments that the Claimant had received via Babu were far greater than the value of scrap pallets which he concluded had a negative value as the company in fact had to pay to have them disposed of. He also came to the conclusion that if the Claimant was only selling scrap pallets, the yard would have been empty of scrap but this was not the case as the photographs in the bundle of documents at pages 81 – 85 showed. In addition, the statement taken from Babu confirmed that not all of the pallets that were

disposed of were broken or damaged and Mr Stein in his statement confirmed that a mixture of pallets was being sold “anything, blues, whites, Euros anything stackable”. As a consequence Mr Young came to the conclusion that the Claimant was guilty of the charges that he was accused of and that this constituted gross misconduct as he was receiving financial reward for the sale of good quality without permission.

The Law

Unfair Dismissal

17 Section 98(1) ERA provides that it is for the employer to show the reason or principal reason for the dismissal of the employee and that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. If the Respondent failed to do so the dismissal will be unfair.

18 If the Tribunal decide that the reason for dismissal of the employee is a reason falling within Section 98(1) or (2) ERA it will consider whether the dismissal was fair or unfair within the meaning of Section 98(4) ERA. The burden of proof in considering Section 98(4) is neutral.

19 Section 98(4) ERA provides:-

“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 sufficient reason for dismissing the employee, and
- (b) shall be determined in accordance with equity and the substantial merits in the case.”

20 In the case of Iceland Frozen Foods Ltd v Jones[1982] IRLR 439 EAT, guidance was given that the function of the Tribunal was to decide whether in the particular circumstances in 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.

21 In the case of Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23CA, guidance was given that the band of reasonable responses apply to both the procedure adopted by the employer and to the sanction, or penalty of the dismissal.

22 The Tribunal should not substitute its own factual findings about events giving rise to the dismissal for those of the dismissing officer, nor should it impose its view of the appropriate sanction in exchange for that of the employer London Ambulance Service NHS Trust v Small [2009] IRLR 563.

23 In the case of British Home Stores Ltd v Burchell [1978] IRLR 379 EAT, guidance was given that in the case where an employee is dismissed because the employer suspects or believes that he has committed an act of misconduct, in determining whether dismissal was unfair, an Employment Tribunal was to decide whether the employer who discharged the employee on the grounds of misconduct in question had a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at the time. This involves three elements. First, there must be established by the employer the fact of that belief; that the employer did believe it. Second it must be shown that the employer had in its mind reasonable grounds upon which to sustain that belief. Third, the employer at the stage which he formed that belief on those grounds, must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

24 In the case of A v B [2003] IRLR 405 serious allegations of criminal misbehaviour, where disputed, must always be subject to the most careful and conscientious investigation and the investigator carrying out the enquiry should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as on the evidence directed towards proving the charges.

Wrongful Dismissal

25 When approaching wrongful dismissal claims, an Employment Tribunal must decide for itself, whether the employee has in fact done the acts which the employer says entitles it to dismiss the employee. The onus is on the Respondent to show on the balance of probabilities that the employees was guilty of the alleged misconduct.

Regulation 13 of the Regulations- duty to inform and consult

26 A transferor and/or a transferee must provide certain information to those employee representatives and in the absence of employee representatives the employees themselves in relation to a relevant transfer and long enough before a relevant transfer. That information is set out in Regulation 13(2) and includes the fact and proposed date of the transfer, the reasons for the transfer, the legal, economic and social implications of the transfer and any measures which the relevant employer envisages it will take in relation to employees. Where the complaint is well-founded, the Tribunal must make a declaration of that fact and award compensation to the affected employee the sum being up to a maximum of 13 weeks pay calculated on the net weekly pay.

27 Guidance was given in the case of Sweetin v Coral [2006] IRLR 252 confirming that Tribunals, when making such an award should start with the maximum award and reduce it in the event of mitigating circumstances. Exercising their discretion, the Tribunal should have the following matters in mind:-

- (1) the purpose of the award is to provide a sanction for breach by the employer of the obligations in Regulation 13;
- (2) the Tribunal have a wide discretion to do what is just and equitable in all the circumstances, the focus should be on the seriousness of the employer's default;

- (3) the default may vary in seriousness from the technical to a complete failure to provide any of the required information and to consult.
- (4) The deliberateness of the failure may be relevant as may the availability to the employer of legal advice;
- (5) The proper approach is to start where there has been no consultation and to award the maximum and to reduce it only if there are mitigating circumstances justifying the reduction to an extent which the Tribunal considers appropriate.

Tribunal's Conclusions

28 In this case, the Tribunal noted that the Claimant on his own admission was a long serving employee of the Respondent and was very well experienced in its processes and procedures. During the course of the hearing, the Claimant sought to give the impression that he was unaware of the difference between reusable good quality pallets and scrap pallets which had no intrinsic value to the Respondent. The Tribunal did not accept his ignorance on this issue and was of the view that he was deliberately misleading the Tribunal and for that matter the Respondent during the course of its disciplinary action against the Claimant. The Tribunal came to the view that the reason for the Claimant's ignorance was to confuse the Respondent as to his actions in relation to the sale of good quality and reusable pallets during the months from January 2017 to the middle of May 2017. The Tribunal was of the view that the Claimant was clearly informed by Mr Ryan on 17 November 2016 that he was not to sell good quality pallets which were to be returned to customers to promote loyalty. This was set out in file note at page 41 of the bundle of documents. Furthermore, the conversation was reported by the other attendee of the meeting who was Tony Stein who provided a statement in respect of the disciplinary investigation which was at page 64 of the bundle of documents. This statement was dated 16 June 2017 and confirmed that Mr Ryan had clearly informed both Mr Stein and Mr Rose that good quality pallets were not to be removed and sold from the Respondent's premises. As part of the disciplinary investigation and in relation to the appeal, a letter was also obtained from Derek Best the previous owner of the company who said at page 75 of the bundle *"I further confirm that it was company policy, implemented by my General Manager, Eddie Ryan, that all serviceable pallets were to be retained for distribution to our clients for their own use."* It was clear to the Tribunal that the Claimant being a long serving employee of the Respondent was quite well aware of the instruction given to him of the disposal of such pallets and during the course of the disciplinary hearing and during the course of the Tribunal hearing gave the impression that he was not so aware. Furthermore, he sought to give the impression that he was selling only scrap pallets and/or pallets belonging to a small operator on the Respondent site, the Onion Man. The reason for such obfuscation to the Tribunal's mind was that the Claimant was well aware that he should not have been involved in the sale of good quality pallets for a material gain. The Claimant maintained this stance not just during the disciplinary processes but in front of the Tribunal during the course of the Tribunal hearing. The Tribunal was not impressed by the Claimant's ignorance in this regard. The Claimant was well aware that he should not have been selling the good quality pallets. Furthermore, this was supported by the Claimant's outburst following his suspension on the charges of removal of company property on 2 June, at the time, he confronted Tony Stein as evidenced by Mr Excell's note at page 49 saying to Mr Stein *"you got me the sack, you and your big mouth"*. This to

the Tribunal appeared to be a clear indication of the Claimant's guilt when confronted with the nature of his wrongdoing.

29 The Tribunal did not accept the Claimant's evidence that what he was doing was somehow sanctioned by the Respondent and that the Claimant made an innocent mistake. The Tribunal was of the view that he knew quite well what he was doing and that he was making a material financial gain by selling company property which he was instructed not to do in November 2016 by Mr. Ryan. He continued regardless of this instruction from January 2017 to middle of May 2017 selling quality usable pallets and making at least £719.75. This the Tribunal did not consider was "a drink" as the Claimant confirmed during the course of the disciplinary process and at the Tribunal hearing. As a consequence, the Tribunal was of the view that there was sufficient evidence for the Respondent to conclude that the reason for dismissal was gross misconduct.

30 With regard to the process followed to establish the guilt of the Claimant, the Tribunal was of the view that the Respondent followed a fair procedure undertaking a reasonable investigation which fell within the band a reasonable investigations open to it. Such investigation included the interview of the Claimant prior to disciplinary action, the interview of Babu who was given permission by the Claimant to sell the Respondent's good quality pallets, the interview of Tony Stein who confirmed the nature of the discussion Mr Ryan had with both himself and the Claimant on 17 November 2016. Furthermore, as part of the appeal process, Mr Young obtained a letter dated 4 July 2017 from Derek Best the previous owner of the business who also confirmed the instruction given by Mr Ryan on 17 November 2016 that good quality pallets were to be returned to customers. All of this evidence showed that the Claimant was instructed not to dispose of and sell good quality pallets. It also showed that contrary to that instruction he continued to do so with the assistance of Babu between January 2017 and the middle of May 2017 for a material gain. Such gain was not disclosed to the Respondent and amounted to £719.75 which was greater than £5 - £10 which the Claimant admitted to gaining from the sale of such pallets.

31 During the course of the hearing at the Tribunal, the Claimant sought to give the impression that Mr Ryan, the General Manager, Babu and Mr Stein had all conspired to make up the evidence and that the Claimant was not guilty of the allegations against him. The Tribunal did not accept that this was a conspiracy against the Claimant nor did the Tribunal accept that Mr Ryan's difficulties with the Claimant in 2014 had any impact on Mr Ryan's actions as the dismissing officer in June 2017. The Tribunal's view was that this was another attempt by the Claimant to deflect blame from his actions and use issues that predated his dismissal by three years as a smokescreen. The Tribunal did not accept this and was impressed by how Mr Ryan handled the disciplinary hearing. The Tribunal noted the guidance given in the case of A v B [2003] IRLR 405. Specifically the Tribunal noted that these allegations against the Claimant were serious and related to criminal misbehaviour. However, the Tribunal was of the view that the Claimant during the disciplinary process went out of his way to deflect blame for his actions despite the strength of evidence against him. The Tribunal was also of the view that there appeared to be no gain to either Mr Stein or Babu in giving evidence against the Claimant. Specifically Babu had prepared a note of the sale of pallets from the Respondent's site which was at page 78 – 80 of the bundle of documents.

32 The Tribunal came to the conclusion that the Respondent undertook a reasonable investigation which was conducted by Mr Jason Excell the Respondent's Operations Manager. The details of that investigation were provided to the Claimant by the dismissing officer, Mr Ryan before the disciplinary hearing who also provided further copies of the investigation to the Claimant during the course of the disciplinary hearing on 16 June 2017. The Claimant was given an opportunity to respond to the allegations at the disciplinary hearing and at the subsequent appeal hearing. Given the inadequacy of the Claimant's responses and the fact that the Respondent came to the conclusion that the Claimant directly ignored a management instruction in November 2016 not to sell good quality pallets it was reasonable for the Respondent to come to the conclusion that the Claimant had stolen from the Respondent making a material financial gain from doing so. Given the serious nature of the Claimant's misdemeanour, it was reasonable for the Respondent via Mr Ryan to come to the conclusion that the Claimant should be dismissed for gross misconduct and this was despite the fact that the Claimant had lengthy service with the Respondent. However, his lack of contrition and attempt to deflect blame gave the Respondent's good reason to impose the ultimate sanction of dismissal for gross misconduct.

33 The Claimant was given an opportunity to appeal against his dismissal and maintained his stance that his actions were sanctioned by the company. This was despite the fact that Mr Best had provided a statement to the contrary. Even in the course of the appeal process the Claimant did not accept the nature of his wrong doing and ask for leniency. Rather, he maintained his previous position that he was doing nothing wrong. Given this attitude, Mr Young came to a legitimate conclusion open to him that the Claimant had been selling good quality pallets contrary to instruction that were commercially viable. His rationale for coming to that conclusion (which was similar to the conclusion reached by Mr Ryan) was that the payments the Claimant and Babu had received were far greater than the value of scrap pallets which had allegedly been sold. Furthermore, the statements from Babu and Tony Stein confirmed that the Claimant was selling good quality pallets contrary to the instructions given to him by Mr Ryan in November 2016. As a consequence, the Tribunal was of the view that the Respondent had a reasonable belief that the Claimant was guilty of misconduct for which he was charged and that such view was based upon reasonable grounds following a reasonable investigation. Furthermore, the Tribunal was of the view that the dismissal of the Claimant for gross misconduct fell within a band of reasonable penalties open to a reasonable employer. As a consequence the claim for unfair dismissal was dismissed.

34 Given the Tribunal's conclusions as cited above that the Claimant was well aware that he should not have been selling good quality pallets contrary to the instruction given to him in November 2016, and continued to do so, the Tribunal was of a view that the Claimant was guilty of the misconduct for which he was charged. Consequently the claim for wrongful dismissal was also dismissed.

35 In relation to the claim under Regulation 13 of the Regulations, the Tribunal noted that there was no consultation with the Claimant prior to the transfer of the business from IEFS Limited to IEFS 17 Limited on 1 June 2017. This was a breach of Regulation 17 as the Respondent failed to provide information to the Claimant as required by the Regulations prior to the transfer. The Tribunal noted that the Respondent said that the reason for failing to do this was because the Claimant was off sick. Furthermore, a consultation meeting did take place after the transfer on 14 June 2017 and the Claimant

was given the same information as all the other employees were given on 16 and 18 May. This information essentially confirmed the nature of the transfer which was due to a sale of business and that all the employees were being transferred pursuant to the Regulations on the same terms and conditions as before. The only change was the name of the employer.

36 The Tribunal noted that the breach was a complete breach of Regulation 17 in that no consultation had been adopted prior to the transfer. However, such consultation did occur with the Claimant after the transfer of 14 June and replicated the consultation that had occurred with the other employees prior to the transfer. The Tribunal also noted that apart from the name of the Respondent changing there was no material change following the transfer. The Tribunal was not of the view that the breach was serious on the part of the employer and in any event the employer attempted to rectify it by meeting with the Claimant shortly after his return from sick leave. The Tribunal's view was a just and equitable award of compensation in the sum of six weeks net pay should be awarded to the Claimant in the sum of £2,071.62.

Employment Judge Hallen

5 February 2018