EMPLOYMENT TRIBUNALS

Claimant: **Mr A Wroe**

Respondent: **The Carphone Warehouse Limited**

Heard at: **Leeds by CVP** **On: 28-30 June 2021**

Before: **Employment Judge Maidment (sitting alone)**

Representation
Claimant: **In person**
Respondent: **Mr B Williams, Counsel**

RESERVED JUDGMENT

1. The claimant's complaints of unfair dismissal fail and are dismissed.

2. The claimant's claim seeking damages for breach of contract fails and is dismissed.

3. The claimant's complaint in respect of holiday pay is dismissed upon the claimant's withdrawal of it.

REASONS

Issues

1. The claimant brings a complaint of automatic unfair dismissal where he says that the reason or principal reason for his dismissal was his having made protected disclosures. The first of these is an anonymous notification on 22 August 2019 that the claimant's wife (also employed by the respondent) had accessed his iPhone and distributed confidential information to others including work colleagues. The second disclosure relied upon was made on 13 September 2019 providing similar information, but where the claimant disclosed his name. The respondent disputes that these were made in the claimant's reasonable belief that they were in the public interest.

2. The respondent maintains that the claimant was dismissed for reason of misconduct only - the claimant's theft of a mobile telephone. The claimant

in any event, if such reason is accepted, brings a claim of ordinary unfair dismissal.

3. The claimant brings a separate complaint seeking damages for breach of contract referable to his notice period.

4. The claimant had also brought a claim alleging an unauthorised deduction from wages in respect of contractual sick pay. He, however, during the course of the hearing withdrew this complaint having advanced no evidence himself in support of it.

Evidence

5. The tribunal had before it an agreed bundle of documents numbering 1897 pages together with an additional bundle of documents of 103 pages containing documents which were termed confidential. Central to this case was also CCTV footage which was shown by means of a screen share to everyone prior to the tribunal hearing live evidence and again at various points through the witness evidence. The parties had a full opportunity to provide their respective explanations of what the footage showed and to examine and re-examine particular footage, including zooming in on specific sections. The tribunal also asked to see again particular parts of the footage taken.

6. The tribunal was referred to only a fraction of the documentation within the bundles provided in circumstances where the claimant had previously been bringing complaints of whistleblowing detriment which involved issues significantly wider than his dismissal, but which claims were withdrawn by him prior to this hearing. Furthermore, there was an extensive and complicated background to the claimant's disciplinary process which arose after some colleagues had made complaints about him. The claimant also raised complaints of his own which were dealt with under a separate process. A number of allegations of misconduct were pursued against the claimant, but only one ultimately found against him. The evidence considered by the tribunal and the concentration of the questions asked by the claimant and Mr Williams were rightly concentrated on the allegation of the stolen phone and, whilst mindful of the overall context of the dismissal, the tribunal has not made findings on matters not relevant to the claims before it.

7. Having briefly discussed the issues with the parties the tribunal spent time privately reading into the witness statements and relevant documentation. Having viewed CCTV footage, it then heard live evidence from the claimant followed, on behalf of the respondent, by Mr Kaine Gibbs, Regional Change Manager, Stuart Doherty, Regional Manager, Nicola Ainsworth, Regional Loss Prevention Manager and Samuel Giles, Employee Relations Partner. The time allowed for cross-examination of the witness had been timetabled during the case management process, but additional time was allowed to the claimant to complete his cross examination of the respondent's witnesses.

8. Mr Williams in submissions contended that the claimant in his evidence did not give straight answers, sought to distract and went off on tangents. He did not in his witness evidence address the central issue of what he was doing on the CCTV footage – his explanation that he did not have the

footage available to view when he wrote his statement is, the tribunal considers, inadequate. He put questions to some of the witnesses without any factual basis. The tribunal fully appreciates that the claimant is not legally represented and that the tribunal environment is clearly alien to him. The claimant appears garrulous by nature. Nevertheless, Mr William's characterisation of his evidence was not inaccurate and cannot be ignored in assessing credibility.

9. Having considered all relevant evidence, the tribunal makes the following factual findings.

Facts

10. The claimant was employed by the respondent from 4 May 2006, becoming a store manager in 2008, a position subsequently retitled to that of General Manager. At the time of his dismissal, he was the General Manager for the Doncaster Frenchgate store.

11. On 13 July 2019 an employee from the respondent's Doncaster Frenchgate store made a call to Expolink, a third-party service provider to the respondent for the receipt of whistleblowing complaints, to make an anonymous report of the theft of a sim card allegedly involving the claimant. On the same day another employee made a call to Expolink to report alleged discrimination by the claimant on the grounds of the caller's sexuality. A further anonymous call was made on 15 July alleging that the claimant had made allowances for a female colleague, who the caller suspected the claimant was having an affair with. Ms Sarah Hoskinson, Regional Manager, was appointed to conduct an investigation into these complaints.

12. On 8 August 2019 Ms Hoskinson interviewed the claimant. The claimant admitted being in a personal relationship with another member of staff. Ms Hoskinson went on to conduct a number of investigative interviews with members of the team at the Frenchgate store.

13. Ms Hoskinson interviewed Casey Bubb on 15 August 2019 regarding some complaints which had been made by staff about the claimant.

14. She was asked questions about the claimant's behaviour including his personal relationships. She referred to him purchasing a sim card and said that there was another incident which needed looking into. She said that an iPhone X and standby iPhone not recorded on the store's stock had been put by her into the lockbox. On the following Sunday she couldn't find the iPhone X in the cupboard. She said that she mentioned this to Scott, an assistant manager, but had not mentioned this to the claimant.

15. The claimant pointed out that she was wrong about anything improper occurring regarding the sim card and he would have expected Ms Bubb to tell him about the iPhone X. He accepted, however, that this was then a matter which he would expect Ms Hoskinson to look into.

16. On 22 August 2019 the claimant made a call to Expolink. At the time he wished to remain anonymous. He told the call handler that he wished to report an ongoing security issue regarding Sandra Wroe (the claimant's wife who was also employed by the respondent) hacking into his iPhone and

sharing information including emails, photographs, conversations and text messages with colleagues at the Doncaster store at which Mrs Wroe worked. He said that he believed that there was a data protection issue involving a company phone which needed to be formally investigated.

17. On 23 August 2019 an employee with whom the claimant was in a relationship identified herself in her own call to Expolink and raised a complaint about Mrs Wroe. Ms Hoskinson was also charged with investigating these additional complaints given the potential overlap with the ones against the claimant which she was already investigating.

18. Ms Hoskinson spoke to Ms Bubb on 9 September to ask if she could remember the date when she believed the iPhone X had gone missing. Ms Bubb gave her the date of 27 July. Georgia Hinton, an Assistant Manager at the store, called her later that day to say that she had reviewed the CCTV footage and believed she had found footage of the claimant taking phone. Ms Hinton had recorded the footage from the CCTV on her own mobile phone and sent it to Ms Hoskinson. Nicola Ainsworth, Regional Loss Prevention Manager, was then charged with reviewing and securing the original CCTV footage. The tribunal has seen Ms Hoskinson's email to Ms Ainsworth and HR of 9 September, where the missing phone is said to be one identified with its unique IMEI number ending 812.

19. Ms Hoskinson indeed interviewed the claimant on 10 September 2019. One of the matters she said that she wished to discuss related to a missing iPhone X. Some way into the interview, this was raised with the claimant. She questioned the claimant regarding how to process insurance claims, it being understood (it appears from the interview notes) by Ms Hoskinson at that time that this was a defective phone returned from a customer on Friday 26 July. The store had no such phone on stock as a demonstration phone. She said that there was CCTV footage of Ms Bubb placing the phone in the cupboard and that she was saying that the claimant had told her to put the phone next to the lockbox. He said that he couldn't remember Ms Bubb telling him about the phone. He was then told that Ms Bubb was saying that she had come in on Sunday 28 July to find the iPhone had gone. Again, the claimant said he had no recollection of that phone or weekend. He said that he didn't remember going into the cupboard and taking the phone out.

20. He was then told that CCTV footage showed him going into the cabinet on 27 July and taking out an unboxed phone. The claimant was shown footage of him taking out, what the claimant accepts was an iPhone X and walking out of the back storeroom with it onto the shop floor. The claimant queried why would he take out a broken phone. He was told that Georgia Hinton had stated that the claimant had asked her to check for a missing iPhone. The claimant was also shown footage of him on 27 July taking an iPhone 7 out of the cabinet into which he inserted a sim card. This was to use, he said, as the store phone. In answer to a question, he confirmed that he had no idea where the iPhone X was. He denied taking the phone, saying it was not worth it.

21. At the conclusion of the interview, Ms Hoskinson informed the claimant of his suspension on full pay which was then confirmed by letter of 12 September.

22. Before the tribunal, the claimant said that he had taken the iPhone X onto the shopfloor that afternoon, but he had then put it back in the BER ("Beyond Economic Repair") cupboard, for items fitting that description. The BER cupboard was also in the back room, but was not an area caught by the CCTV cameras. He agreed that he had not referred to such a recollection when interviewed on 10 September.

23. On 12 September, the claimant emailed the respondent's Data Protection Office complaining about a breach arising from Mrs Wroe's "hacking" a company mobile phone. They said that the believed the matter was predominantly HR related, suggesting the claimant raise it with the relevant HR business partner. The claimant replied disagreeing and suggesting that he would let the ICO and FCA deal with the issue. The Data Protection Office then forwarded its correspondence with the claimant to HR who recorded this as a grievance raised by the claimant. Arrangements were made for Ms Hoskinson to hear this, albeit ultimately the grievances were reassigned to another manager following the claimant's objection to Ms Hoskinson. On 13 September. the claimant made a further call to Expolink raising again the aforementioned alleged behaviour of Mrs Wroe and, this time, giving his name.

24. Ms Bubb was interviewed again by Ms Hoskinson on 13 September. She confirmed seeing in the backroom cupboard on Friday 26 July an iPhone X and standby phone (the iPhone 7) neither of which were on the store's stock records. She said that she had checked the unique IMEI number of the iPhone X and noticed that it was the same one relating to an insurance claim she had handled. They were about to conduct an audit, she said, which is when the handset would have been recorded onto stock. In a follow-up question, Ms Hoskinson queried Ms Bubb not noticing the phone in the cupboard from June 2019 as it hadn't been on stock, she said, since 9 June.

25. Ms Bubb had not been in work on Saturday 27 July, but was back in the following day. On the Sunday morning she had gone into the cupboard and found the standby iPhone 7 but not the iPhone X. She had messaged Scott, an Assistant Manger, but not the claimant about the missing phone. There was then further discussion with Ms Bubb about the iPhone X and an email Ms Hoskinson had which suggested that the phone had been taken off the customer on 9 June. Ms Bubb, however, explained that the customer left the store on that day with the phone and only returned it to the store sometime later.

26. Georgia Hinton had first been interviewed by Ms Hoskinson on 16 August. She was not then asked about the iPhone X. Ms Hoskinson re-interviewed her on 13 September. Ms Hinton said that she had been told by either Scott or Ms Bubb about a missing iPhone. She said that she remembered herself, Scott and the claimant looking for the phone, referring to them turning the store upside down but not finding it. She said that Ms Bubb had told her that the phone was to do with an insurance claim customer. She said that the phone used as a store phone had been a silver iPhone 7 with a white front. In cross examination before the tribunal, the claimant said that he couldn't remember looking for an iPhone 10 on any specific day.

27. The claimant was interviewed by Ms Hoskinson again on 1 October. She said that during her fact-finding interviews with the team it had been

mentioned that there was a missing IPhone X. The claimant said that he was not aware of that until the previous interview with Ms Hoskinson on 10 September. She then showed the claimant CCTV footage which the claimant does not now dispute shows him taking an iPhone X and on another occasion an iPhone 7 out of the cupboard. The claimant said that the iPhone X should not have been in there but instead in the BER cupboard. In the interview, he told Ms Hoskinson that the only phone he had taken out was the iPhone 7, the standby phone. He maintained that he knew nothing about a missing iPhone. Ms Hinton's statement that he had her and Scott looking for it was put to the claimant. The claimant's response was that this would have been a stock iPhone X.

28. Further CCTV footage was shown to the claimant which included him putting a sim card into the standby iPhone 7. When put to him that the CCTV at around 13.31 also showed him taking out an unboxed iPhone X he said that he couldn't really tell from the footage. He then said it could have been a demo iPhone. Ms Hoskinson explained that the store had never had a demo iPhone X in silver.

29. CCTV footage at 16.31 was viewed which, it was put to him, showed him with an unboxed silver iPhone X In his hand. The footage showed him walking out of the backroom onto the shopfloor with it. It was said that this phone had not been seen since. The claimant was asked if he remembered that. He said that he didn't remember it, but a logical explanation was that he had been taking it out to check its IMEI number. The claimant said that he was then more likely to have put it back where it should have gone, "in its correct location."

30. He was then shown CCTV footage showing him leaving the shop at 16.47. He could not recall where he had gone. He could not say where he had left the phone.

31. He was then asked why he had gone into the cupboard in the early afternoon, taken the phone out and then later in the afternoon gone back into the cabinet to again take it out. He said that he would have put the handset into the BER location where it should have been, but he still couldn't remember. Ms Hoskinson said that he had said previously that he was checking the IMEI number, but that number wasn't working. The claimant queried why someone with 30 years' service would take a broken phone. Ms Hoskinson referred to the possibility of repair and it having a resale value. She said that she couldn't say why it was being suggested that he had taken it and that she was just showing him the CCTV.

32. Ms Hoskinson then told the claimant that she had been telephoned by Ms Hinton on 14 September to say that the iPhone X had been found behind a computer terminal in the office. She said that she wanted to show the claimant some CCTV footage at around 13.30 on 23 August.

33. The claimant accepted to Ms Hoskinson that this footage showed him picking up his personal iPad. He said that he was holding his own personal mobile phone underneath it. It was then suggested that the footage showed that, when he put his iPad down next to the computer terminal where the iPhone X had been found, something could be seen falling forward. The claimant said that that was a charging cable. It was explained that that was

where the iPhone X had been found on 14 September. The claimant said that he was charging his iPad and what moved was the scanner.

34. Ms Hoskinson suggested that the footage showed the item which had fallen forward behind the iPad being pushed back by the claimant into the same location as where the iPhone X had been found. The claimant said that nothing had fallen forward. Ms Hoskinson said that that was what the image showed, to which the claimant responded that, whatever it was, it was not something from his hand. He was asked if he was saying that the item was his own phone. He said that this was the same place where they put the standby phone and, if anything was falling forward, it was that. He said he didn't know where the phone was that had been in his hand. The claimant was then asked directly whether he had taken the missing iPhone X which he denied. When put to him that it was odd that the missing iPhone X was found in the location where he put something to the back of the terminal, he replied that he was getting a charging cable.

35. The claimant was told that the respondent had CCTV footage of Ms Hinton finding the phone which could be provided to him. The claimant said he found it strange that the phone had not been found in between 23 August and 14 September.

36. The claimant was challenged again regarding his lack of recollection as to what he did with the iPhone X, but said that this was three months ago and he was currently going through the most traumatic experience, as he was at that time. He could not be expected to remember everything.

37. At the conclusion of her investigation, Ms Hoskinson considered that the matter ought to be taken forward to a disciplinary hearing. She wrote to the claimant inviting him to such a hearing on 22 October 2019. She set out 2 allegations of gross misconduct, the first relating to the theft of the iPhone X on 27 July and replaced on 23 August and a second relating to 2 petty cash transactions. The meeting was also said to be to consider misconduct allegations involving threatening, abusive and inappropriate behaviour towards colleagues and third parties. The specific alleged instances were set out. The claimant was told that "this is a serious matter which the Company considers to be potential Gross Misconduct which may result in your dismissal without notice." He was given the right to be accompanied. A pack of information was sent with the letter which included a transcript of his own interviews and with witnesses including Ms Bubb and Ms Hinton. Ms Hoskinson emailed them and other employees with notes she had taken from her telephone interviews and asking each of them to reply confirming that the notes accurately reflected their conversations.

38. The claimant attended a disciplinary hearing before Mr Kaine Gibbs, Regional Manager, rearranged for 11 November. He was accompanied by his union representative, Kay Fletcher. When the discussion came to the missing iPhone X Mr Gibbs reviewed the CCTV footage together with the claimant. Firstly, they looked at the footage from 27 July. This included the footage of the claimant taking out of the cupboard the iPhone X and the iPhone 7. The footage was then shown of the claimant around 3 hours later taking the iPhone X out of the cupboard again. He was asked why he would do that. The claimant said that, if it was damaged, he would pick it back up

to have another look and would probably have connected to his computer to get the IMEI number.

39. The claimant was then shown the footage of 23 August. Mr Gibbs referred to something falling forward behind the monitor. The claimant said that was probably the iPhone 7 standby phone as it was put there on the charging dock.

40. The claimant was then shown the footage of the apparent discovery of the phone by Ms Hinton on 14 September. The claimant referred to loss prevention having been into the store and it being cleaned. He said that he found it hard to believe it wouldn't have been found earlier. Given how far Ms Hinton put her arm behind the computer monitor, he said she must have known it was there, as it would not have been in view.

41. Mr Gibbs described to the tribunal what he concluded that the CCTV footage showed. He described footage at 13.30 on 27 July showing the claimant in the back office going straight to the stock cupboard and taking the iPhone X out of the cupboard. He has a sim card in his hand which he then places on the table. He switches the iPhone X on, checks it and puts it back but makes no attempt to put the sim card into it. He then gets a small iPhone 7 out of the cupboard and puts the sim card into that phone.

42. A second section of footage from the back office at 16.31 shows the claimant taking the iPhone X out of the cupboard after switching it on. He then leaves the office with the iPhone X to go onto the shopfloor around 1 minute later. The claimant cannot be seen at first on the footage from the shopfloor but he is later observed leaving the store at 16.49 and returning at 16.53. Mr Gibbs did not think it coincidental that the claimant had stood at first, when entering the shopfloor, in a CCTV blind spot. His leaving the store was the last time he believed the phone was seen and he thought it strange that the claimant could not remember what had happened to the handset whilst able to remember a significant amount of detail about other things within the store.

43. The third section of footage from the back office at 13.28 on 23 August shows the claimant removing a number of phones from the safe. He then picks up an iPad, opens it and walks around the back of the cupboards. He turns around and reaches into his back pocket removing an item from it which is then placed behind the iPad. He walks back from around the cupboards at this point holding the iPad in front of himself which Mr Gibbs considered to be in an unnatural way as if it was covering or shielding something. The claimant then walks round to the PC computer terminal and places his iPad behind it. He then removes the iPad leaving something behind the computer which falls forward. He then pushes the item back when it falls. Mr Gibbs believed that item was the missing iPhone X.

44. The fourth section of footage from the back office on 14 September showed a small group of people in the office one of whom was Ms Hinton, sitting on a chair in front of the computer. She leans forward and Mr Gibbs considered that her whole body language said: "what's this?" She brings out a white envelope from behind the computer and takes the missing iPhone X out of it. He considered her to be visibly surprised. In his view her reaction was a natural one, one of genuine surprise and not exaggerated.

45. The claimant in cross examination before the tribunal was taken through CCTV footage a number of times and asked to explain what he was doing. He did not deny taking the iPhone X out of the cupboard 27 July. The said that the item in his back pocket on the 23 August footage was, he assumed, his own phone. He was asked why he had taken it from his pocket and put it behind his iPad. He said that the phone signal was terrible and this was the natural thing to do. It was easier for him to hold the phone if it was behind his iPad. In terms of his movements by the computer terminal, he said that he was going to put his own iPhone or iPad on charge. He, however, put neither on charge noticing that the standby iPhone 7 was in the charging dock. That was the item which is seen to move forward. He had dropped his own mobile phone from behind his iPad and had left it there to retrieve later. When put to him that he had not said this to Mr Gibbs he said that he thought that he had. He was shown how he had moved something further behind the computer terminal. The claimant said that he had not moved it far and, when the iPhone X was found, it was in a different location much further behind the terminal. He left his own phone behind the monitor because it was the safest place. When asked when he had retrieved it, he said probably at some point that day as he wouldn't have left without it.

46. Mr Gibbs was aware that a number of whistleblowing complaints had been made against the claimant, but told the tribunal to did not know that the claimant had made any whistleblowing complaints himself. He had had a brief telephone conversation with Ms Hoskinson prior to the disciplinary hearing, but Ms Hoskinson, he said, did not tell him. The claimant referred Mr Gibbs to a note of an interview in the pack provided to him, which Ms Hoskinson had held with the individual with whom the claimant was in a relationship. It was noted that at one point the employee said: "I would prefer my whistleblowing to be dealt separately from Andy's whistleblowing". Mr Gibbs said that he had not picked up on that comment, which in the context of the wide-ranging investigation, the tribunal finds to be entirely credible. Mr Gibbs had also prior to the hearing spoken briefly to Ms Ainsworth to make arrangements for him to be able to view a copy of the CCTV footage.

47. Mr Gibbs adjourned the meeting to consider his decision, which he then delivered to the claimant around 45 minutes later. He considered that there was a question mark over whether the phone had been broken but just because a phone is classified as Beyond Economic Repair did not mean it could not be repaired. Broken phones still had a value. Ultimately it made no difference because it was a company asset and in his view it had been stolen.

48. He established that the store had never had an iPhone X as a demonstration phone. He concluded this from information provided by Loss Prevention which, it is accepted, was not shown to the claimant.

49. Mr Gibbs noted that the claimant was saying that he had put the phone in a returns box to be returned and processed to the warehouse, but noted that the phone had been taken onto the shopfloor which was not where that box was located. He noted the claimant's comments that, given that the store had been cleaned and had had a loss prevention audit, it would have been impossible for the phone not to have been found if it was behind the computer terminal. Mr Gibbs, however, did not agree given the position the

phone was in when it was found. Loss prevention audits involve a review of paperwork rather than the carrying out of physical searches. He did not believe there to be any evidence of collusion between the claimant's colleagues. This was not suggested by the statements gathered and there was to his mind clear evidence that the claimant had put the phone behind the terminal, as shown by the CCTV footage. He felt that footage was very clear. In those circumstances he did not consider that he needed to re-interview any of the witnesses and did not regard the claimant's explanation as plausible. He upheld the allegation of the theft of the iPhone X. He did not however uphold any of the other allegations of either misconduct or gross misconduct. He considered the claimant to have provided reasonable explanations for those allegations which meant he could not be satisfied of the claimant's guilt.

50. Mr Gibbs noted theft as being an example of gross misconduct in the respondent's disciplinary policy and considered that dismissal was the appropriate sanction regardless of the claimant's length of service in circumstances where he felt that the claimant could not be trusted, especially in the position he held. He considered the case to be relatively straightforward notwithstanding the large volume of documents gathered and the detailed discussion he had with the claimant about the statements Ms Hoskinson had taken. On reconvening the hearing, he informed the claimant of his dismissal with immediate effect. The decision was confirmed in writing by letter of 26 November 2019. The claimant was informed of his right of appeal.

51. The claimant appealed the decision by email of 18 November. He referred to 5 out of 6 allegations against him being unfounded, which he believed indicated that he had been the victim of a witchhunt. The allegation of the stolen phone had been made by Ms Bubb alone and was not substantiated by any other witnesses. In addition, her statement was contradictory in that she had stated that she had told Scott about the missing phone but he had no recollection of this. The claimant disputed the validity of the CCTV footage and believed there was no clear evidence that he took a phone and later returned it. He considered Ms Hoskinson's investigation was biased and clouded by personal feelings arising out of the situation between himself and his then wife. He believed that the fact that he had made a whistleblowing complaint about a data breach had influenced the disciplinary process.

52. Mr Stuart Doherty was asked to hear the appeal by HR on 26 November. From the grounds of appeal, he was aware that the claimant had made a whistleblowing complaint. Mr Doherty received a pack of documents which included notes of the disciplinary hearing as well as notes taken during Ms Hoskinson's investigation. He also received, albeit only on the day of the hearing, the CCTV footage. He viewed this a number of times in advance of the hearing. On viewing the CCTV footage, he considered it clearer as to how Mr Gibbs had reached his decision.

53. Mr Doherty sent an email to HR on 16 December praising them for their support under the title of "wewintogether". This was referred to in the body of the email and the tribunal accepts is one of the respondent's motivational strap lines. The tribunal accepts Mr Doherty's evidence that this was not a reference to any predetermined outcome.

54. The appeal hearing took place on 17 December and the claimant was again accompanied by Ms Fletcher. The claimant pointed out inconsistencies in witness statements which Mr Doherty regarded as technicalities which did not undermine the evidence. He was also critical of Ms Hoskinson's investigation which again, Mr Doherty did not believe touched on the issue of what he had actually done with the phone. Mr Doherty felt that they CCTV footage was very clear. In particular, he considered that the footage from 23 August showed the claimant using an iPad to hide something and then concealing it behind a PC in the office. He believed that it showed that the item he was trying to conceal fell forward and he pushed it back behind the PC. For him, this aspect of the footage was particularly damning because of the strangeness of the claimant's actions and the fact that he, in Mr Doherty's view, clearly placed something behind the PC in the location where the missing iPhone X was subsequently found on 14 September.

55. Whilst returning home following the appeal hearing, Mr Doherty emailed Mr Gibbs to seek points of clarification regarding the reasoning for his decision, whether he had made his dismissal decision as quickly as appeared and whether he felt that was sufficient time to consider the issue. Mr Gibbs replied later that evening referring to what was shown on the CCTV footage and explaining that he had viewed this multiple times prior to the hearing to ensure he understood it. There had also been multiple adjournments during the disciplinary hearing, such that when he adjourned for the final time there was no new information for him to consider. Mr Doherty also then spoke to Mr Gibbs briefly by telephone on these issues.

56. In considering his decision, Mr Doherty believed that the witnesses had rectified any previous administrative failure in confirming the accuracy of the interview notes by email. He was not surprised that the phone had not been discovered previously given the obscurity of the location it was found in. He felt that Ms Hoskinson's investigation been thorough and fair and that the disciplinary case had been dealt with by another independent manager who had had no previous involvement. Her re-interviewing of Ms Bubb and Ms Hinton was appropriate. There was no prejudice to the claimant in him not finding out about the missing phone until 10 September. No inaccuracies in the statements provided to Ms Hoskinson impacted on the decision to dismiss as they were inconsequential when considered against the CCTV footage. He did not consider Mr Gibbs' decision to have been unreasonable or unfair. There were no grounds for challenging the validity of the CCTV footage. He considered that the claimant had returned the phone either because he knew that the fact it was missing would have come to light at some point or possibly because he had a change of heart and knew he had to return it, especially after he knew the matter was being investigated. The fact that 5 out of the 6 disciplinary allegations had being dismissed demonstrated fairness. He believed Mr Gibbs when he told him that he had no prior knowledge of the claimant's whistleblowing complaint. The matter had taken a long time to conclude, but there was nothing inappropriate in that it was necessary to follow the correct procedures. Mr Doherty wrote to the claimant by letter of 23 December confirming the rejection of his appeal.

57. Ms Ainsworth provided the tribunal with screenshots showing movements of the iPhone X which it was said the claimant had taken and then returned. She confirmed that she had not provided these to Mr Gibbs or ever spoken

to him. She had looked at the phone's IMEI history and had talked Ms Hoskinson through the phones movements but without providing the screenshots to her. The tribunal has seen an email from Ms Hoskinson to Ms Ainsworth of 9 September asking her to provide her understanding. She would normally have provided screenshots but hadn't in this case, she thought, probably because it was not her investigation and the Doncaster store not one she would ordinarily cover.

58. The movements of this device were complicated and difficult to follow, not least in circumstances where after the claimant's dismissal the phone had been disposed of to a third party company together with a number of other devices where, when that occurred, in part of the respondent's system the descriptions of the devices were all updated to reflect the last phone which was exited, in this case an iPhone SE.

59. Ms Ainsworth demonstrated that the iPhone came into the main warehouse on 23 May 2018 and was sent to the Newark store on 25 May 2018. It was sold by that store on 7 June 2018. It was, however, then returned to the store as faulty on 11 June 2000. The phone was then returned to the main warehouse and categorised as a phone under repair. It was then reclassified internally in the warehouse from "faulty" to "second-hand" on 16 June 2018. This meant that the phone could be used to provide to customers who had insurance and who made a claim if something went wrong with their phone. The phone's status was changed to an insurance phone after movement round repairs on 17 June 2018. It was issued as an insurance replacement phone on 26 June 2018 to a new customer. The transaction was processed by Casey Bubb.

60. The original customer who had bought the phone on 7 June 2018 returned to do a trade-in on 25 February 2019 but by that time did not have the phone because it had been returned as faulty. However, a customer assistant took the IMEI number from the system rather than the actual phone which the customer returned to trade-in. This meant that it appeared on the system that the customer had returned the original phone when that was not the case.

61. The Newark store then returned the phone which the customer had traded on 1 March 2019 to the warehouse at which point it was noted that an incorrect IMEI number had been given for it. As a result, the Newark store then had to write the IMEI number off on 26 March 2019.

62. The customer who held the iPhone X with the IMEI number ending in 812 then wanted to raise an insurance claim on the phone through the Doncaster store. However, because the IMEI number had been written off by the Newark store in March the system wouldn't allow them to do this. The difficulty started when the customer attended the Doncaster store on 6 June 2019. On 1 July 2019 that customer was issued with a voucher which was used to purchase a new phone. The iPhone X with the 812 number was not written on to stock at the Doncaster store until 26 March 2020 after the claimant's dismissal.

63. The claimant pointed out to Ms Ainsworth that references to the Doncaster store prior to around the middle of June were to a previous store in the Frenchgate centre which closed before the opening of the new Frenchgate

store he managed. It is accepted that, on the closure of a store, all stock is boxed up and returned to a central warehouse location. It was said therefore that if Ms Bubb took the phone off the customer on 9 June that was in the old store and it would never have been at the new Frenchgate store.

64. The tribunal refers to the notes of Ms Bubb's interview with Ms Hoskinson on 13 September 2019. There, Ms Bubb referred to the customer as leaving the store on 9 June still with the phone. The customer came back subsequently to replace the handset. The tribunal notes that when she had been interviewed initially on 15 August she had given Ms Hoskinson the IMEI number of the iPhone X as the one ending with the number 812. When the claimant had been interviewed by Ms Hoskinson on 10 September, she had put to the claimant that Ms Bubb had taken the phone off the customer on 26 July. In a preceding passage, it is noted that there was reference to an email Ms Bubb sent on 9 June saying that she was unable to trade-in the phone and the "phone was taken off the phone (sic)".

65. In his interview with Ms Hoskinson on 1 October, she had queried whether the claimant had on 27 July been checking the IME high number "as the IMEI number wasn't working". It is noted that the claimant's own account is that he may have been taking the phone into the shop floor area to connect to a device from which she could retrieve the IMEI number. Nevertheless, the claimant relies on Ms Hoskinson's statement to cast doubt on whether the phone discovered was the phone with the IMEI number ending in 812. Ms Ainsworth's records in an event show that a phone with that serial number was the phone ultimately disposed of by the respondent from its Doncaster Frenchgate store. There is no evidence to support the phone having been returned to the warehouse from the old Frenchgate store and therefore never being in the new Frenchgate store.

Applicable law

66. Section 43A of the Employment Right Act 1996 provides that a "protected disclosure" means a qualifying disclosure (as defined by Section 43B) which is made by a worker in accordance with any of the Sections 43C to 43H. Section 43B of the Employment Rights Act 1996 provides as follows:-

"(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is in the public interest and tends to show one or more of the following:-

(b) that a person has failed, is failing, or is likely to fail to comply with any legal obligation to which he is subject; ……

67. The case of **Cavendish Munro Professional Risk Management Ltd v Geduld 2010 ICR 325 EAT** referred to a need to convey facts. **Kilraine v London Borough of Wandsworth 2018 ICR 1850 CA** warned however of the dangers of applying a rigid dichotomy between facts and allegations and held that a disclosure of information covering statements which might be categorised as allegations was still capable of amounting to a relevant disclosure. Clearly, also, the context in which information is provided can be hugely relevant. The focus must be on the reasonable belief of the worker – a subjective test with perhaps a low hurdle to surmount, albeit the belief must be based upon some evidence. An objective standard is then applied

with reference to the personal circumstances of the discloser where, for instance a person's qualification and knowledge may be taken into account in assessing the reasonableness of belief. Similarly, it is not for the Tribunal to determine whether a disclosure was made in the public interest, but whether person making the disclosure had a reasonable belief of that.

68. As regards the public interest requirement, the Tribunal refers to the case of **Chesterton Global Limited v Nurmohamed [2017] IRLR 837** where Underhill LJ cited following factors as a useful tool in determining whether it might be reasonable to regard a disclosure as being in the public interest as well as in the personal interest of the worker:

> "*the numbers in the group whose interests the disclosure served…..; the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect;*
> *the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;*
> *the identity of the alleged wrongdoing –… "The larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest…"*

69. Section 103A of the Employment Rights Act provides that:

> *"An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."*

70. This requires a test of causation to be satisfied. This section only renders the employer's action unlawful where that action was done because the employee had made a protected disclosure. The issue of the burden of proof in whistleblowing cases was considered in the case of **Maund v Penwith District Council 1984 ICR 143**. There it was said that the employee acquires an evidential burden to show – without having to prove – that there is an issue which warrants investigation and which is capable of establishing the competing automatically unfair reason that he or she is advancing. However, once the employee satisfies the Tribunal that there is such an issue, the burden reverts to the employer who must prove on the balance of probabilities which one of the competing reasons was the principal reason for dismissal. If the employer does not show to the Tribunal's satisfaction that it was its asserted reason, then it is open to the Tribunal to find that the reason was as asserted by the employee. However, this is not to say that the Tribunal must accept the employee's reason. Establishing the reason for dismissal, requires the Tribunal to determine the decision making process in the mind of the dismissing officers which in turn requires the Tribunal to consider the employer's conscious and unconscious reason for acting as it did.

71. In a claim of ordinary unfair dismissal, it is for the employer to show the reason for dismissal and that it was a potentially fair reason. Conduct is a potentially fair reason for dismissal.

72. In cases of misconduct a Tribunal is normally looking to determine whether the employer genuinely believed in the employee's guilt of misconduct and that it had reasonable grounds after reasonable investigation for such belief. The burden of proof is neutral in this regard. The tribunal accepts the claimant's submission that evidence of innocence must be sought as well as evidence of potential guilt. The seriousness of the exercise the respondent undertook, given the nature of the allegations against him and the potential affect of an adverse finding, are understood.

73. This, however, is simply part of the Tribunal's fundamental application of Section 98(4) of the Employment Rights Act which provides:

"(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
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
shall be determined in accordance with equity and the substantial merits of the case."

74. The Tribunal must not substitute its own view as to what sanction it would have imposed in particular circumstances. A Tribunal has to determine whether the employer's decision to dismiss the employee fell within a band of reasonable responses that a reasonable employer in the circumstances might have adopted. It is recognised that this test applies both to the decision to dismiss and to the procedure by which that decision is reached including the investigation.

75. A dismissal, however, may be unfair if there has been a breach of procedure which the tribunal considers as sufficient to render the decision to dismiss unreasonable. In cases of dismissal for conduct or poor performance, the tribunal must have regard to the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

76. If there is such a defect sufficient to render dismissal unfair, the tribunal must then, pursuant to the case of **Polkey v A E Dayton Services Ltd [1998] ICR 142** determine whether and, if so, to want degree of likelihood the employee would still have dismissed in any event had a proper procedure been followed. If there was a 100% chance that the employee would have been dismissed fairly in any event had a fair procedure been followed then such reduction may be made to any compensatory award. The principle established in the case of **Polkey** applies widely and beyond purely procedural defects.

77. In addition, the tribunal shall reduce any compensation to the extent it is just and equitable to do so with reference to any blameworthy conduct of the claimant and its contribution to his dismissal – Section 123(6) of the Act.

Under Section 122(2) of the Act any basic award may also be reduced when it is just and equitable to do so on the ground of any kind conduct on the employee's part that occurred prior to the dismissal. This require the tribunal to come to its own conclusion as to the claimant's conduct which applies equally in the case of the claimant's complaint in respect of his dismissal being in breach of contract i.e. without notice.

78. Applying these principles to the facts as found, the tribunal reaches the conclusions set out below.

Conclusions

79. The tribunal accepts that the claimant's provision of information on 22 August and 13 September 2019 to Expolink were protected qualifying disclosures. Expolink was a designated receiver of whistleblowing complaint on behalf of the respondent. The claimant certainly provided information in respect of another employee's alleged activities and it was reasonable for him to believe that those activities tended to show a breach of a legal obligation in terms, for instance, of data protection regulations. Whilst the claimant certainly had a predominant private interest in making this disclosure, he also reasonably believed that the disclosure had wider ramifications in terms of the alleged activities he was raising involving a breach of confidentiality in respect certainly of another employee, the employee with whom he was in a relationship at the time, and in circumstances where there had been a wider disclosure to a group of employees. The claimant clearly considered that the matter ought to be elevated to other regulatory bodies.The tribunal, however, accepts that the sole reason for his dismissal was the respondent's belief that he had stolen a phone. The tribunal considered it to be clear from the witness evidence of Mr Gibbs and Mr Doherty that their entire focus was on what the claimant had done with the phone in question and that they genuinely believed that the CCTV footage particularly demonstrated that a theft had been committed.

80. The respondent received a report from Ms Bubb that an iPhone X which was not on the store's stock was missing on 15 August in circumstances where the claimant accepted that this was a matter which required and would be expected to result in an investigation. It is noted that Ms Hinton was interviewed shortly afterwards who did not make a similar suggestion in circumstances where there is no evidence of a group of employees seeking to collude against the claimant. These events predate the claimant's first anonymous disclosure. At the time that disclosure was made, the respondent had already determined that the matter would be investigated. The claimant had already been interviewed by Ms Hoskinson regarding the phone and suspended before he made his second disclosure when he gave his name (albeit the tribunal has referred to another employee being interviewed and referring to the claimant as having made a disclosure).

81. There is no evidence to suggest that the respondent was particularly concerned with the claimant's whistleblowing complaint in a sense which might provide a motivation for it to remove him from their employment. The claimant's complaints rather instead simply added to significant number of complaints and counter-complaints in respect of the claimant with which the respondent was having to deal.

82. The tribunal has accepted that Mr Gibbs was unaware of the claimant's status as a whistleblower, but in any event accepts his evidence that he considered the CCTV footage and claimant's own account in particular before arriving at a genuine belief that the claimant was responsible for the theft of the phone untainted by any consideration of the claimant's whistleblowing activities. At the appeal stage, Mr Doherty was aware of the claimant's whistleblowing but at that stage there is evidence of him considering the evidence with Mr Gibbs had considered and coming to his genuine conclusion that dismissal was reasonable in all the circumstances. Again, there is no basis for the tribunal being able to conclude that his decision was influenced in any way whatsoever by the claimant's whistleblowing.

83. The respondent came to a conclusion of the claimant's guilt in the theft of the phone on reasonable grounds and after reasonable investigation. There was a very detailed and wide-ranging investigation, not least in circumstances where there were multiple allegations raised against the claimant. The only allegation in respect of which the claimant was considered to be guilty was that relating to the taking of the iPhone X.

84. Ms Bubb's evidence was more by way of background and context rather than being central to the view taken of the claimant's activities. Ms Hinton's evidence was less important that it might have been given that the respondent had CCTV evidence of how the iPhone X was found. The most significant evidence in this case certainly was considered by Mr Gibbs and Mr Doherty on appeal to be the CCTV footage. This was, however, considered to be damning not just on its own but in conjunction with what was reasonably concluded to be a lack of a consistent and convincing explanation from the claimant as to his movements and activities.

85. The tribunal concludes that Mr Gibbs had a reasonable basis for considering the CCTV footage to show what he described it as showing.

86. There was evidence that a particular iPhone X in the store, but not recorded in its stock, had gone missing after Ms Bubb's report. This was precisely the phone interrogated later following it being found on 14 September and which was ultimately disposed of from the store to a third-party seller some months later after the claimant's dismissal.

87. The respondent reasonably narrowed down the window for the disappearance of the phone to be from 26 to 28 July. On 9 September CCTV footage, which is not alleged to have been corrupted in any way, was located which showed the claimant handling the phone on 27 July. There reasonably appeared to be no sighting of the phone after the claimant's final handling of it on that day.

88. When interviewed on 10 September, the claimant had no recollection of taking the iPhone X out of the cupboard on 27 July or indeed of Ms Bubb telling him anything about that phone. the claimant at first couldn't recall handling the phone and said that the iPhone he had taken out was an iPhone 7 or 8.

89. When re-interviewed on 1 October, he said that the phone should have been in the BER cupboard and then said he was not sure what phone it was and that it could have been a demonstration phone. He said that logical explanation for him taking the phone was to check its IMEI number and then he was likely to have put it "at the correct location". He then said he would have put in the BER cupboard, but couldn't remember. When shown the CCTV footage of him in the back room on 23 August, he said that the footage of him in the vicinity of the location where the iPhone was subsequently found showed a charging cable falling forward. He said he was going to charge his iPad and moved the scanner. When asked if it was his own phone which had fallen forward he said that, if anything, it was the standby iPhone 7 falling forward – there was a charging point in this vicinity which was sometimes used for that phone. The claimant then said he was getting a charging cable out.

90. At the disciplinary hearing on 11 November, he described taking the phone initially to obtain its IMEI number. As regards 23 August he said it was the standby iPhone 7 which fell forward.

91. Mr Gibbs had evidence of there being a missing iPhone X with the phone described and identified and an approximate time for its disappearance. There was then before him CCTV footage which shows the claimant removing the iPhone X within the window in which it was said to have gone missing. There is then CCTV footage showing the claimant acting in what, it was reasonably concluded to be, a strange manner and dropping something at the back of a computer terminal. There is then the footage showing a phone matching the description of the missing phone being found in that location. Certainly, it was found in that vicinity, whilst there may be some dispute as to whether it was found at a point some distance (albeit it a matter of the number of inches rather than feet) away from where claimant had been. Faced with a lack of a clear and convincing account from the claimant as to his movements, Mr Gibbs arrived at what was a reasonable belief that the claimant had stolen and then returned the phone. The evidence was such that it was reasonable to expect the claimant to give a clear account of his activities and Mr Gibbs reasonably concluded that he had not heard one.

92. The tribunal has noted and considered the various criticisms the claimant has levelled at the respondent. Some of these related to apparent inconsistencies in witness statements which the tribunal was reviewed but, even if inconsistency is accepted, does not consider that they reasonably ought to have been taken into account by the respondent such as to negate the validity of its conclusions. References to discrepancies in Ms Bubb's account and it being said to have been odd that she didn't mention the missing phone to him, ignores that the claimant accepted that he took the iPhone X from the cupboard on 27 July. The suggestion that the phone discovered on 14 September was not the same phone that appeared to be missing from 27 July is not reflected by the evidence and criticism of Mr Gibbs in not disclosing information about the IMEI number and phone movements at the disciplinary hearing is insufficient to render the process unfair, particularly given any lack of challenge on this point. This was reasonably concluded to be a phone which had not been recorded on the store's stock and in circumstances where there had never been an iPhone X of this type in the store as a demonstration model. There was no evidence

of any other unboxed iPhone X in the store. Whilst the claimant has referred to only seeing the CCTV footage at particular angles during the internal process, he did not say that he needed to view it further at the time. The claimant has referred to another employee looking shifty on the afternoon of 27 July, but did not raise this I then internal process or that anyone else was involved. The respondent's failure to ensure that interview statements were signed contemporaneously, whilst not in accordance with its own best practice, is not such as to render dismissal unfair, particularly when confirmation of the accuracy of the statements was later sought and in circumstances where Mr Gibbs' decision-making was not materially affected by what was in those statements and reasonably so.

93. Otherwise, the claimant benefited from a fair disciplinary and appeal process where he was represented and had a chance to make whichever representations he wished and to view all relevant evidence. No breach of the ACAS Procedure on Grievance and Disciplinary Hearings has been raised.

94. The tribunal finally considers that dismissal fell squarely within a band of reasonable responses open to an employer in the circumstances. It was concluded reasonably that the claimant was guilty of theft. Issues such as length of service or previous record reasonably were not considered to provide mitigation for such an act. Whilst the circumstances of the phone then being returned and a phone being taken which was damaged were curious, the phone remained the respondent's property and was an item with a residual value within and outside of the respondent's business. On the basis of the respondent's reasonable conclusions, it was not unreasonable for Mr Gibbs to conclude that the trust necessary in an employee in a position of seniority and responsibility such as the claimant had been irretrievably destroyed. The claimant was fairly dismissed.

95. The claimant also brings a complaint seeking damages for breach of contract. This necessitates the tribunal reaching its own conclusion on the evidence as to whether the claimant was guilty of gross misconduct. If the claimant removed the respondent's property, even damaged property with only a residual value, without authority then that clearly amounts to an act of gross misconduct, misconduct of such a fundamental nature as to destroy trust and confidence.

96. The question is then whether the tribunal concludes on the balance of probabilities that this is what the claimant did. The burden of proof lies with the respondent in this regard.

97. The tribunal doubts that it could have come to a conclusion that the claimant had taken the phone as alleged beyond all reasonable doubt. The standard of proof however is not so strict as it would be in criminal proceedings. Having considered all the evidence, the tribunal concludes that it is indeed more likely than not that the claimant took the iPhone X as was alleged and found problem by the respondent in its internal process.

98. The tribunal has commented generally on the claimant as a witness. It notes that the account given to the tribunal of his activities on 23 August 2019 was that, in the footage where he is said to have hidden the phone, in fact he had been looking to put his own mobile phone or iPad on charge but found

that he could not because the standby/store iPhone 7 was already in a charging dock. It is that iPhone 7 which then fell forward. The claimant's account was that he then dropped his own phone from behind the iPad onto the desk behind the computer terminal and left it there in a safe place so that he could collect it later – a collection which he would have thought he would have undertaken that day rather than leaving work without his own phone. That is not straightforwardly the account he gave in the internal process and, whilst the tribunal appreciates inevitable difficulties in memory which would have faced the claimant, his account during the internal process does vary.

99. The tribunal has studied at length the CCTV footage which was reviewed in the internal process. The footage of Ms Hinton finding the phone leads the tribunal to conclude that this discovery was a genuine surprise and Ms Hinton's expression is best characterised as one of disbelief or puzzlement rather than a signifier of any form of amusement as the claimant has maintained. The footage then of 23 August then cries out for some form of innocent explanation from the claimant. Otherwise, it does, on balance, show the claimant to be deliberately dropping an item down behind a computer terminal and pushing it behind the terminal as an act of concealment. The tribunal appreciates that there has been some movement of items around the desk from that date to the discovery of the phone on 14 September, but does not believe that ought to lead to a conclusion that the item found by Ms Hinton on that date is a different item to that left behind by the claimant or that it had been found at an earlier date and deliberately move to a different location. Mr Williams is correct that we are talking about the same general vicinity.

100. The claimant's movements on the 23 August footage are properly characterised as "odd" and unnatural. The way in which he says his own phone is held behind the iPad is awkward and unnatural even on the claimant's explanation regarding that being a comfortable way to hold it for himself. His movements into an area hidden from CCTV and back are unexplained. The claimant describes then a very strange way of putting one's own mobile phone down and an odd place to leave it following, on his account, the discovery that the iPhone charging dock he wished to use was already occupied by the standby iPhone 7. He does not take any steps to put his own phone or the iPad on charge. His account is not accepted.

101. The claimant was on the balance of probabilities guilty of an act of gross misconduct and the respondent was therefore entitled lawfully to terminate his contract of employment without notice.

Employment Judge Maidment

Date 16 July 2021