EMPLOYMENT TRIBUNALS

Claimant: **Howell Wyn Christie**

Respondent: **Tai Tarian Limited**

Heard at: **Carmarthen** **On: 18th June 2018**

Before: **Employment Judge Howden-Evans**

Representation:

Claimant: Mr G Pollitt, counsel

Respondent: Mr G Probert, counsel

RESERVED JUDGMENT

Having considered written closing submissions and responses from both parties, the employment judge's decision is the Claimant was unfairly dismissed.

REASONS

1. The Respondent is a not-for-profit housing association based in the Neath Port Talbot area of South Wales. It has 9,000 social housing properties. The Claimant is a carpenter, who was employed for over 14 years by the Respondent. His continuous service with the Respondent started on 30th April 2003. He was summarily dismissed on 22nd September 2017.

2. On 7th November 2017 the Claimant notified ACAS in accordance with the early conciliation procedures. The period of ACAS early conciliation lasted until 22nd November 2017. On 19th December 2017 the Claimant issued these tribunal proceedings, alleging he had been unfairly and wrongfully dismissal. He is seeking compensation rather than reinstatement or reengagement.

3. This case was listed for a one-day hearing, on 18th June 2018 in Carmarthen, before an employment judge sitting alone. Both parties had been represented throughout these proceedings and had complied with standard case management directions. At the hearing, Mr Pollitt, counsel, represented the Claimant and Mr Probert, counsel, represented the Respondent.

4. On 18th June 2018, we heard evidence from:

    4.1. Ester Harris, the Respondent's Operations Manager, who conducted the investigation into the allegations made against the Claimant;
    4.2. Andrew Carey, the Respondent's Deputy Director of Assets, who took the decision to dismiss the Claimant;
    4.3. Linda Whittaker, the Respondent's Chief Executive, who considered the Claimant's appeal; and
    4.4. the Claimant.

5. I had the benefit of a written witness statement for each witness and a bundle of documents of approximately 203 pages. I read these in their entirety prior to starting the hearing. When it came to hearing evidence, I adopted the same procedure with each witness: having read their statement, I accepted their written statement as their evidence in chief, but did allow supplemental questions. Each witness was cross examined by the opposing counsel, before answering any questions that I had and finally being re-examined by their own counsel.

6. Whilst we were able to finish hearing evidence on the day, there was insufficient time for closing submissions. By agreement, I issued directions for counsel to exchange written closing submissions and subsequently to exchange any written response to closing submissions. Both counsel exchanged written closing submissions and responses to closing submissions. Unfortunately, shortly after these written submissions were received, the employment tribunal file for this case went missing from the employment judge's in-tray of work, when the employment judge's in-tray was accidentally used for a different employment judge's work. Despite numerous attempts, it took some time to find the file, as it transpired it had fallen behind the shelves within the cupboard used to secure employment judges' in-trays. The employment judge sincerely apologises for the delay in providing this judgment and for any inconvenience this has caused the parties.

7. As some time had elapsed before I was able to return to this judgment, I have taken time to reread all the documents, witness statements and my detailed typed notes of oral testimony from the hearing. I am grateful to both counsel and the legal teams that have supported them as this case has been well-prepared throughout. Both counsel have prepared well-considered closing submissions and responses. I appreciate the care with which these have been drafted as it has assisted me greatly in this task.

The Issues

8. Mr Probert had prepared a Draft List of Issues prior to the hearing, which we discussed at the outset. Both counsel agreed this was a classic *BHS v Burchell* [1980] ICR 303 case. As the Respondent had relied on evidence from a complainant whose identity had not been disclosed to the Claimant, both counsel agreed the case of *Linfood Cash & Carry Ltd v Thompson & others* [1989] was also pertinent.

9. In relation to the BHS v Burchell test, all three limbs of the test were in issue. In particular the Claimant asserts:

    9.1. The Respondent could not hold a genuine belief the Claimant had committed an act of gross misconduct;

    9.2. Any belief was not founded on reasonable grounds, as

        9.2.1. the Respondent only had a complaint by a Tenant;

        9.2.2. the Respondent did not have corroborating evidence to support the tenant's allegations;

        9.2.3. The tenant may have had other reasons to make the complaint;

        9.2.4. The appeal manager did not take into account the tenant's refusal to provide further evidence; and

    9.3. The investigation was not reasonable as

        9.3.1. the appeal manager did not speak to the tenant; and

        9.3.2. the tenant did not provide further evidence.

10. The Claimant also asserts dismissal was beyond the range of reasonable responses:

    10.1. given the claimant's length of service and clean disciplinary record; and

    10.2. given the claimant's character references provided at the appeal hearing.

11. The Claimant also asserts the Respondent's process was unfair because:

    11.1. There was a decision to keep the details of the tenant confidential;

11.2. The claimant did not have details of what he was alleged to have said; and

11.3. The claimant was not given details of the allegations against him when interviewed during the investigation.

12. The Respondent denies the Claimant was unfairly dismissed. In the alternative, the Respondent submits there was 100% likelihood the Claimant would have been dismissed in any event. The Respondent submits, in addition or in the alternative, the employment judge should make a 100% reduction to any award to reflect the Claimant's blameworthy conduct.

13. In the wrongful dismissal claim, it was agreed, the issue to be decided was whether the Claimant had committed a fundamental breach of his employment contract.

Findings of Fact

Extracts from relevant policies

14. The Respondent's Employee Handbook provides *"…Tai Tarian will not tolerate direct or indirect discrimination or harassment…against any person with a protected characteristic as described in the Equality Act 2010……It is the responsibility of all staff in their daily actions, decisions and behaviour to comply with all relevant legislation and to ensure that they do not discriminate against colleagues, customers, suppliers or any other person associated with Tai Tarian."*

15. The Respondent's Equality and Diversity Policy provides:

"6.7.1 We will challenge and address discriminatory behaviour or acts of harassment by or towards customers, staff, board members, service users or contractors. If such behaviour is encountered, we will take appropriate action which may include dismissal…."

16. The Claimant accepts he attended Equality and Diversity training on 20th June 2017.

17. The Respondent's Disciplinary Procedure provides:

"10.2. The employee will normally be given not less than 5 working days' notice of the hearing with full disclosure from the management side, including details of any witnesses to be called."

"10.11. An employee will not be dismissed or summarily dismissed for a first breach of discipline except in the event of gross misconduct.

10.12. In deciding what form of penalty shall be imposed, any unexpired warnings will be taken into account; along with any other relevant mitigating factors e.g. length of service"

18. In relation to the appeal procedure, the same policy provides:

"11.11 The manager may confirm, reject or 'amend' the disciplinary action previously decided upon. With regards to clarifying 'amend' as it is a complete rehearing the manager may also decide that the level of disciplinary action should be increased."

Background

19. The Claimant started employment as a carpenter with the local authority on 30th April 2003 and was subsequently TUPE transferred, firstly to NPT Homes Limited, and then subsequently, to the Respondent. The effect of these TUPE transfers is that at the time of his dismissal, the Claimant had 14 years' continuous service with the Respondent.

20. The claimant's role entailed undertaking maintenance work at the respondent's various properties, most of which were occupied by tenants.

21. On 27th June 2017 the claimant had an accident at work, when he fell off a stepladder whilst working at a particular property. He sustained a shoulder injury which caused him to be absent from work for a period of time.

The tenant's initial complaint

22. A 21-year-old tenant, ("T") who experiences anxiety, made a comment to Mike Cross (the Respondent's Works Inspector) which prompted him to arrange a meeting between the tenant, Jamie Grieg (Mike Cole's manager) and himself. We did not hear evidence from Mike Cross or Jamie Grieg, and the respondent's witnesses were confused as to when this comment had been made. According to the investigating officer, Esther Harris, she was quite clear this comment was made on 4th July 2017. According to the dismissing officer, Andrew Carey, he was clear this comment was made on 28th June 2017, which he believed to be the day after the incident.

23. p134-135 of the bundle were typed notes headed "Investigation into [the claimant]" that Jamie Grieg had made. The first 3 paragraphs were his note of what Mike Cole had told him about the initial comment. The rest of the document was his note of an interview he had undertaken with T (and possibly with her mother "M"), in the presence of Mike Cross, on 4th July 2017.

24. P134-135 has been heavily redacted. Any information that could reveal T or M's identity has been removed. In relation to the original comment, p134 details:

"Mike Cole [the claimant's supervisor] was discussing [the claimant's] activities with the customer…when she made a statement asking that [the claimant] never returns to her property again. Mike then asked the customer why? She then explained he had made comments about gay people (homosexual people) and how this was his pet hate….Mike was first shocked to hear this and asked if the customer was happy to elaborate on this and how [the claimant] had come to talk about this subject. This then lead to the customer unearthing further inappropriate behaviours and I was asked if I would attend the property to take a statement from the customer."

Jamie Grieg's interview with T on 4th July 2017

25. P134 records an *"Interview by Jamie Greig 4th July 2017"* during which someone gave the following account *"when [the claimant] first arrived at her property she felt he didn't really want to undertake the work….on the doorstep he made a comment "What am I going to do here then".*

    Jamie Grieg's note of this interview goes on to record, "*[Redacted – presumably T's] statement started by me asking a few questions on how [the claimant] had come to discuss with her is pet hate against homosexual people.*

    "[Redacted – presumably T] was very nervous but started to explain that [the claimant] started by asking her a number of questions and at the time it felt like a world wind of conversations. He asked her questions about who she knows in the area including people from school etc he made reference to his apprentice who was also from this area. He then made reference to the apprentice and a time they were working in a customer's home who was gay (homosexual), the work involved working on a bedroom door handle that became stuck in the locked position, that lead to apprentice becoming locked in the bedroom with the gay customer. [The claimant] went on to say that he did not rush to free the lock as he found it hilariously funny that the apprentice had to spend time in the bedroom with the gay person….[Redacted – presumably T] also stated that [the claimant] had made it clear that he was married and asked if she had a boyfriend. [Redacted – presumably T] said that he [sic] didn't and then [the claimant] asked if this was by choice or was she swinging the other way….[The claimant] went on to say that is a woman's world and if something was to happen then it would be likely the law would favour the woman….[Redacted – presumably T] told me that she felt very uncomfortable with him but she was so glad that her brother had not been downstairs to hear the way [the claimant] had spoken about gay people as he had not long come out to the family that he was gay and this would probably have affected him a lot more. She did however advise her brother and he felt confined to his room. She also felt that his safety may be in jeopardy and she felt very insecure. [Redacted – presumably T] was very clear that [the claimant] never returns to her home again to undertake work, she was also a little concerned that her details regarding this complaint are not disclosed to [the claimant] in case of any repercussions that may accrue."

26. P134-135 was considered by Ester Harris, the investigating officer and later by Linda Whittaker, when she considered the claimant's appeal. It is admitted that the claimant was not provided with a copy of p134-135 during the disciplinary and appeal proceedings; he became aware of this document through these tribunal proceedings. During his evidence, Andrew Carey, dismissing officer, confirmed he had not had sight of p134-135 either.

27. During cross examination, Ester Harris confirmed she had considered the file notes (on p134 & 135) during her investigation but chose not to send them to the claimant as part of the disclosure pack, as she felt the officers that had recorded the conversations were not experienced enough. Counsel for the claimant pointed out that T's account on p 135 was not wholly consistent with T's account on p136, in that during the meeting on 4th July (on p135), T is reported as saying the claimant had also asked her *"was she swinging the other way",* an allegation that is not repeated

in T's later account on p136 – 137. Ester Harris's response to this was that she felt T wasn't really changing her account.

The tenant's interview on 7th July

28. Sometime around 5th July 2017, Ester Harris was asked to interview the tenant. On 7th July 2017, she attended an interview with T and M that was conducted by Wayne Gwilym, the respondent's Head of Organisation Development. Ester Harris's notes from this meeting were p136 & 137 of the bundle. Wayne Gwilym started this interview by apologising for the employee's behaviour. When asked to explain in their own words what happened, Ester Harris records T gave the following account:

"the tradesman [the claimant] arrived at the property and just seemed to be talking a lot, much of which they cannot remember the specifics of. T said he was here for an hour waiting for an inspector to arrive….T said the tradesman was talking about who T knew from the area that he might know. [The claimant] talked about lone working and that sometimes he has someone with him but would normally work alone. He suggested that anything could happen because they were alone. He said it's a "woman's world' and T could say he was "coming on to them" and get away with it. If something were to happen it would be alright for the woman as things go in favour of the woman. Asked how T responded, T said she just laughed nervously and folded her arms.

T said the tradesman told her he was married with children and asked whether T was. When talking about his apprentice Junior, the tradesman relayed a story where they were renewing a handle on a door and Junior got locked in a bedroom with a person they thought was gay. The tradesman proceeded to say how he doesn't like gay people, they are a pet hate of his and that he felt it would be funny to leave Junior in the bedroom with him. T said that although Junior did ring him he did not rush to assist.

T explained that the tradesman continued to voice his negative opinion about gay people. T was then concerned about her brother as he is gay and T did not want him to feel uncomfortable so asked him to stay upstairs.

T explained they were due to leave for work and they were concerned leaving the tradesman there with T's brother so T asked their Nan to come. Their nan arrived as the inspector arrived.

Wayne apologised again and M explained that T was worried and T does suffer with anxiety. T said they did not want him to lose his job…..

29. Ester Harris's note of this meeting ends with *"I asked M if T was alright as I conveyed how upset I would be if I was T's mother. At this point M became visibly upset and also recalled how the tradesman's attitude was negative from the time he knocked the door saying that he didn't know what he was supposed to be doing."*

30. In oral evidence, Ms Harris confirmed that T did not know the claimant's name, but had identified the apprentice as being called Junior. She also confirmed that M had left the flat shortly after the tradesman had arrived – the only evidence M was able

to give was that set out in paragraph 29 of this judgment, ie her perception of the tradesman's attitude when he knocked the door.

31. When asked why she had not interviewed T's grandmother or brother or Mike Cole the inspector, Ms Harris said this was because they had not witnessed the actual conversation. When it was pointed out that they may have been able to confirm T's demeanour during or immediately after the alleged incident, Ms Harris explained T was very distressed and Ms Harris did not believe T wanted to make a complaint, so she accepted her account as being credible.

The claimant's suspension

32. On 10th July, Wayne Gwilym and Ms Harris met the claimant and confirmed he was being suspended pending an investigation into an allegation of gross misconduct. He was given a letter of the same date that provided the following information about the allegation:

"That you made offensive and discriminatory homophobic comments to a tenant whilst working on a job. The tenant has raised a formal complaint regarding your behaviour and comments."

The investigatory interview with the claimant

33. By letter dated 13th July 2017, Ms Harris invited the claimant to attend an investigation interview. That interview took place on 18th July 2017 and was attended by the claimant, Craig Parsons (the claimant's union representative), Ms Harris (who conducted the interview), Piers Tumeth (the respondent's HR officer) and John Taylor (the respondent's operations supervisor).

34. During oral evidence, Ms Harris confirmed the only information the claimant was provided prior to this interview was the allegation set out in the letter of suspension (and repeated in the invitation to interview) ie the 2 sentences quoted in para 32 above.

35. During the interview, Ms Harris explained that because the complaint was of a sensitive nature, the tenant had requested anonymity. She then asked the claimant to provide his response to the allegation set out in his suspension letter. The claimant explained he could not respond properly as he hadn't been given any details about the allegation. Ms Harris asked if he could recall ever saying anything inappropriate to a tenant recently. The claimant said he could not think of anything and he would never say anything like that being alleged and that he was an honest person.

36. Ms Harris asked if the claimant had ever expressed negative opinions about gay people to a tenant. The claimant replied he "*certainly had not*" and that he "*hadn't a clue where this had come from".* He repeated he would never do anything like this.

37. Ms Harris then asked the claimant to try to explain why he thought this complaint may have been received. The claimant explained he was a foster carer and that the parents of those children being fostered often blame the foster carers for losing their child. He said he had made NPT Homes aware of his foster caring responsibilities

and made sure he never visited a property that may have had the parent of a child he was fostering. He said it was possible that an allegation may have been made in revenge.

38. Ms Harris then asked the claimant about an incident when Junior was locked in a bedroom in a tenant's property. The claimant said this incident was several months ago. He explained Junior was fixing a door handle on the bedroom. The claimant had gone down to his van to get some screws when Junior phoned to say he was locked in the bedroom. The claimant had gone upstairs, unlocked the door and then they realised there was a tenant asleep in the bedroom.

39. Ms Harris asked whether the claimant had told this story to tenants. The claimant replied he never told this story to tenants.

40. Ms Harris asked if he ever discussed lone working with tenants. The claimant confirmed he could not recall having a conversation with tenants about lone working.

41. At the end of the interview, the claimant said he needed to know more about the specific allegations as he had only been able to give general answers. He said he would never say anything like what was being alleged and you never knew in Neath Port Talbot who knew who.

42. At the end of the interview, Craig Pearson said an anonymous allegation was inherently unfair as a person cannot be expected to answer questions about their behaviour unless they knew what was being alleged. The claimant mentioned he had been employed for 14 years and if he was bigoted or discriminatory it would have emerged by now.

The investigatory interview with Junior

43. On 19th July 2017, Esther Harris and Piers Tumeth conducted an interview with Junior. Junior explained the incident where he had been locked in a bedroom happened in February 2017. He confirmed he was working with the claimant at the time. Junior started the repair on the bedroom door handle, the spring was faulty, and Junior got locked in the room. Junior phoned the claimant and the claimant explained how to get the handle to release. Junior did not recall the claimant coming up the stairs; he felt the instruction over the phone had enabled him to work it out. When asked whether he had discussed this with anyone, particularly tenants, Junior explained there was a little joke going around with his colleagues, but he would not discuss this with tenants. He also confirmed he had never witnessed the claimant speak inappropriately or use homophobic language.

The Investigatory Report

44. Following the interview with Junior, Ms Harris prepared her investigatory report which appeared at p145 to 147 in the bundle. This document entitled "*Management Case – Esther Harris*", explained the initial complaint having been made to Mike Cole and there being a follow up interview with Jaime Gregg and Mike. Inaccurately, it records during this interview *"the tenant and family relayed conversations between the tradesman and them where the tradesman talked about gay people being his pet hate and referred to a story involving an apprentice that had got locked in a bedroom*

with a gay man" [tribunal emphasis]. As noted in paragraph 30 (above), M had not been a witness to the alleged conversations about gay people or the Junior story – only T gave an account of these alleged conversations, as by her account, she was alone with the tradesman during these conversations.

45. On p145, Ms Harris described her observations of T: *"The complainant appeared very nervous and worried about the situation. The complainant described a conversation that she felt uncomfortable with throughout as the tradesman did ask about mutual acquaintances and relationship statuses. The tradesman talked to her about the issues around lone working and how something could happen and again making the complainant feel very uneasy. During this element of the conversation I noticed how uncomfortable and self-conscious the complainant became. Support was then needed off a relative to continue. The complainant explained how the tradesman told a story about an apprentice who got locked in a bedroom with a gay man who was still in bed. The tradesman thought it was a funny situation. This led to the tradesman talking about his dislike for gay people. As the interviewed, I could see the distress that this was causing for the complainant as they made reference to a family member that was gay and their concerns about having these opinions voiced in their home."*

46. On p146, Ms Harris reports "*the planning system and property was checked and [the claimant] was confirmed as the tradesman the complainant was referring to. Quartix Tracking also confirmed [the claimant] as the driver of CV61 XWH which was parked at the property of the complainant."*

47. After setting out the claimant's account during his interview, Ms Harris concludes, *"After personally interviewing the complainant I am satisfied there is sufficient evidence to recommend a hearing for Gross Misconduct. [The claimant] denies the allegations however having interviewed both [the claimant] and the tenant, I find the tenant's version of events to be both credible and believable. Furthermore the statement from the complainant describes an incident involving Junior, which we know took place, as corroborated by the statement taken from Junior himself and [the claimant]. In his statement though, [the claimant] states he would never tell a tenant about this incident (as does Junior) yet the tenant was clearly aware of it. This leads me to question the honesty and credibility of [the claimant's] statement.*

Disciplinary Hearing

48. By letter of 28th July 2017 the claimant was invited to a disciplinary hearing on 9th August 2017. Subsequently this hearing was rescheduled to 6th September 2017 as the claimant had not received the original invitation due to issues with his computer.

49. The disciplinary hearing on 6th September 2017 was chaired by Andrew Carey and attended by the claimant, Craig Parsons (his union representative), Esther Harris (investigating officer), Piers Tumeth (HR advisor), Wayne Gwilym (witness) and Junior Jenkins (witness).

50. In evidence, the claimant confirmed that ahead of the disciplinary hearing, he had received:

    50.1. a copy of the "Management Case" document (p145 to 147);

50.2. notes from the interview with Junior (p144)
50.3. anonymised notes from Ms Harris & Mr Gwilym's interview with T and M on 7th July 2017 (p136 & 137) and
50.4. copy of a register he had signed to confirm he had attended equality and diversity training (p133).

51. Andrew Carey, the dismissing officer, confirmed that ahead of the disciplinary hearing he had received:

51.1. a copy of the "Management Case" document (p145 to 147);
51.2. notes from the interview with Junior (p144)
51.3. anonymised notes from Ms Harris & Mr Gwilym's interview with T and M on 7th July 2017 (p136 & 137)
51.4. notes from the interview with the claimant (p141 to 143) and
51.5. copy of a register the claimant had signed to confirm he had attended equality and diversity training (p133).

52. Ms Harris made an opening statement, which was largely repeating the matters set out in her investigatory report. Mr Carey asked her what she thought T stood to gain from the complaint, to which she replied nothing she knew of.

53. The claimant asked for T's address – this was not provided to protect the identity of T. The claimant's union representative asked whether T had been asked if she knew the claimant. Ms Harris confirmed T had said she did not know the claimant.

54. The claimant's representative asked if Ms Harris had checked whether other tradesmen knew about the Junior incident. Ms Harris confirmed Junior had said he had told a few other tradesmen.

55. The claimant's representative objected he was not properly able to defend the claimant as he did not have full details of the allegation (time, date, location etc).

56. Mr Carey asked the claimant how he thought T could have known about the Junior incident. The claimant stated it could have come from another tradesman or someone who has heard the story. The valleys were close knit places where residents talk and share stories like this.

57. The claimant's representative explained he was concerned that Mr Gwilym had apologised to T before the company had investigated properly – it appeared to assume guilt before he had investigated. Ms Harris explained it was an attempt to calm a difficult situation. The claimant was concerned that Ms Harris had told M that she would be upset if she was T's mother – this appeared to be a leading comment. Ms Harris denied this and explained it felt appropriate in the circumstances.

58. The claimant pointed out that he does not have "children" (as referred to in T's account), he only has one adopted child. He also said he would never describe an apprentice as "Junior" he would only refer to someone as being an apprentice.

59. The claimant asked Ms Harris why she believe T's statement about the Junior incident not his. Ms Harris said their accounts matched, save for T making a reference to the sleeping tenant being gay. The claimant said he did not know the

sleeping tenant was gay, he didn't even know if the sleeping tenant had been male or female. He explained the story could have gone from Junior to another source to T.

60. When asked to state his case, the claimant said he was a foster carer and there was an issue currently going on with this but he could not disclose names for legal reasons. He said often foster carers are blamed by families when their child is taken away. The claimant talked about an incident before Christmas 2016 when a lady had given birth and he was asked to look after children who had been living in squalid conditions. Parents had refused to release the children, so social services had obtained an injunction which had placed 3 children all under the age of 5, in the claimant's care.

61. The claimant said he could not confirm whether this was a malicious complaint. He had not ever made negative statements about gay people. He has gay friends and had worked in the entertainment industry for many years were there were several gay people.

62. The claimant asked Ms Harris if she had ever received complaints about him. She confirmed she had not.

63. The claimant's union representative confirmed the claimant had enhanced DBS checks which were clear. The claimant confirmed he had been through numerous checks to be a foster carer.

64. The claimant confirmed he have never relayed the Junior story to a tenant.

65. Mr Tumeth asked why the claimant had not brought character witness statements. The claimant confirmed he did not think he was allowed to contact anyone (under the terms of the suspension letter). He confirmed he would be able to supply character statements.

66. When Junior gave evidence at the disciplinary hearing, he confirmed he was not aware of any gay persons being in the property that he was locked in the bedroom in. He confirmed the story about him being locked in the bedroom had been told numerous times by himself to colleagues. He described the claimant as being bubbly, takes his time with Junior, an all-round good bloke, good crack.

67. When Mr Gwilym gave evidence at the disciplinary hearing, he said his apology was said in the context of being sorry that T felt the need to complain. He described T and M as being distressed by sincere. He said he felt the complaint to be genuine, though he was not infallible, but the complaint was expressed in a non-malicious way. When Mr Gwilym confirmed T had referred to the claimant as the tradesman as she did not know his name, the claimant's representative asked how did Ms Harris know it was the claimant. Ms Harris said she had checked the tracker and booking system and was certain it was the claimant.

68. Towards the end of the hearing, the claimant's representative asked what Jamie Greig and Mike Cole's involvement had been. Mr Gwilym explained that when he knew of the seriousness of the allegations he and Ms Harris had taken over the investigation as senior managers.

69. The claimant asked if he had ever worked at T's property before. Ms Harris said she would check.

70. The claimant said his relationship with Mike Cole was not great, but his relationship with his previous manager, Dean Habberfield was much better and he would be able to vouch for him being his "number 1".

71. After the disciplinary hearing, the claimant gave Mr Carey more specific information about the children he had fostered to see whether this was linked to the complaint.

The dismissal letter

72. In his letter of 3rd October, Mr Carey concluded:

    72.1. he found the statements of Ms Harris and Mr Gwilym to be truthful and compelling;

    72.2. although the claimant was not given the date of the alleged conversation (he was told it was in the last few months) he had been provided with an anonymised copy of T's statement and failed to recall any conversation in which he had made remarks about his attitude towards gay people;

    72.3. Mr Carey concluded this left him with two options:

    a. Believe the conversation did take place and T is telling the truth and the claimant was not;
    b. Believe the conversation did not take place and the claimant was telling the truth and T was not.

    72.4. Mr Carey chose to believe T for the following reasons:

    a. T had said the claimant had told her about the Junior incident. Junior and the claimant had accepted this incident had occurred. Mr Carey concluded the only way T would have been aware of the Junior incident was because the claimant had told her, which verifies the conversation had taken place. Mr Carey did not find the explanation that T had heard the story through word of mouth to be plausible.
    b. Mr Carey did not find the assertion that T's account was made up to be credible. He could not find any evidence to show T benefited in any way. He did not find any evidence to support the claim this could be linked to the claimant's foster care responsibilities.
    c. Mr Carey trusted Ms Harris and Mr Gwilym. Based on T's answers and demeanour they believed T was telling the truth.
    d. Mr Carey had spoken to Dean Habberfield and he did not support the view that the claimant was "his number 1". The claimant had not provided character references, which he said was because he thought he could not speak to anyone whilst being suspended. Mr Carey commented the claimant's union representative had mentioned a few weeks before the hearing he would be obtaining character references.

    72.5. Mr Carey concluded he felt the claimant's dismissal was the only option was open to him in the circumstances as he found the misconduct was so serious.

    72.6. He confirmed he was satisfied the decision to anonymise the complaint was appropriate. He believed the complainant's fear of retribution was genuine and reasonable.

73. At the time of dismissal, the claimant had 14 years' continuous service and a clean disciplinary record with the respondent. Mr Carey's dismissal letter confirmed he had taken this into account in his decision.

The Appeal

74. In a note to Mr Tumeth, the claimant confirmed he wished to appeal this decision, stating the following grounds:

"1. A full and thorough investigation has not been carried out;
2. I am unable to establish the where, when and who, therefore am unaware as to events surrounding the allegation;
3. No formal complaint was submitted;
4. I can categorically state that I am not prejudice towards anyone's sexual orientation I am not homophobic in any way.
5. A statement / interview taken by HR starts with an apology to the tenant before any conversation. This confirms to me that the organisation had already prejudged this situation."

75. By letter of 5th October, Mr Tumeth confirmed to the claimant that Linda Whittaker, Chief Executive would consider his appeal at a hearing on 12th October 2017.

76. Ahead of the appeal hearing, the claimant was provided with notes from the disciplinary hearing and a "Dismissal Appeal Hearing Report" that had been prepared (and appeared on pages 165 to 167 in the bundle).

77. Linda Whittaker, the appeal officer, confirmed that ahead of the appeal hearing she had received:

77.1. The dismissal appeal hearing report (p165 to 167);
77.2. a copy of the "Management Case" document (p145 to 147);
77.3. notes from the interview with Junior (p144)
77.4. anonymised notes from Ms Harris & Mr Gwilym's interview with T and M on 7th July 2017 (p136 & 137);
77.5. Jamie Grieg's initial tenant interview notes (p134 & 135);
77.6. notes from the interview with the claimant (p141 to 143);
77.7. copy of a register the claimant had signed to confirm he had attended equality and diversity training (p133);
77.8. notes recording matters discussed at the disciplinary meeting (p156-159);
77.9. the dismissal letter (p160-162);
77.10. the claimant's appeal note (p163); and
77.11. the claimant's character references (p168 to p176).

78. Amongst other matters, the Dismissal Appeal Hearing Report explained the evidence from the Vehicle Tracking and Planning Systems had not been provided to the claimant, as it would identify the address of T.

79. The claimant's character references were from 9 individuals. These included his neighbour (of 22 years), colleagues of 10 years, 10 years and 14 years, tenants on whose properties the claimant had worked for 5 years and 4 years and close family friends.

80. One of the claimant's character referees explained she had known the claimant as a friend since 1978. She explained that she was a lesbian and had been living with her partner for 16 years. She explained *"in all the time I have known [the claimant] I have never heard him say anything remotely homophobic and that is because he is NOT. [The claimant] is not at all judgmental, he takes people for who they are, not what they are. I cannot stress how shocked I was to hear that anyone could seriously accuse him of such a thing. If homophobia was not such a serious allegation it would be laughable. I am, along with my partner, very eager to help [the claimant] clear his name and are more than willing to do anything we can so if you have any further questions or queries please do not hesitate to contact us."*

81. The other referees had described the claimant as:

- *"a hard-working family man, polite, respectful and considerate to us and others"*;
- *"honest and caring, he often will put the feelings of others before his own…I believe [the claimant] embodies the Tai Tarian values of 'teamwork' 'honesty' 'professionalism' 'respect' and 'commitment' better than anyone"*
- *"I say without doubt you are dealing with a person of very good moral character…[the claimant] operates with integrity and never has a bad word to say to anyone"*
- *"[the claimant] has an excellent rapport with people of all ages from children to the elderly…having good communication skills with all people and staff."*
- *[the claimant] has carried out work in my home I found him to be friendly, polite, hardworking and clean and tidy…[he] presented himself to me on a professional level.*
- *[the claimant] has carried out work at my home…I found him to be very pleasant, polite, hardworking and his attention to detail was impeccable. I have absolutely no concerns over the quality of his workmanship or the way that he conducted himself"*
- *"after having [the claimant] work in my home on several occasions…I feel I have to state that [the claimant] was always well mannered and polite…some of their workers are for want of a better word pig ignorant…[the claimant] is certainly NOT one of them".*

82. On 12th October 2017, Linda Whittaker chaired the claimant's appeal hearing. This was attended by the claimant, Sarah Davies (his union representative), Andrew Carey and Piers Tumeth.

83. Andrew Carey explained his decision. He explained he had not been able to substantiate the claimant's fostering story; he could not see what the tenant sought to gain from the complaint and he had sought opinions from the claimant's manager and had not received a good opinion back.

84. Ms Davies said she did not feel an appropriate investigation had been carried out and the claimant had not been given enough details to be able to defend himself.

85. Ms Whittaker said it didn't make sense that T would link the claimant to the real event of Junior being locked in unless it was the claimant that had told her the story.

86. When Ms Davies stated the claimant had gone through numerous checks to become a foster carer, Mr Carey responded these checks did not verify a person's attitude towards gay people.

87. Ms Davies said she did not know where the complaint had originated, but perhaps if it were the property where the claimant had the accident, perhaps it was because of the accident. Ms Davies explained that the claimant did not have enough information about the accusation. The claimant explained he did not have dates and times therefore he could not defend himself. He said T's statement was wrong as he only had one child at the time of his accident.

88. Ms Davies asked whether other tradesmen had worked in T's house since the February incident with Junior. Mr Carey said he did not know but would check. The claimant explained if other workmen had worked in the house, it could have been them that relayed the Junior story to T.

89. Ms Davies asked what Mr Cole had said to T before the complaint was made. Ms Whittaker said T had launched straight into the complaint.

90. The claimant said, if the complaint was from the property where he had his accident, that particular tenant was hacked off because of a prior issue with the stairs not being able to be fixed because they were not made of wood.

91. The claimant asked how T could know Junior's name but not know the name of the tradesman, as he [the claimant] would always wear his name badge. The claimant also pointed out the statement from T was not signed and that it was not really a statement.

92. Ms Davies referred to T's allegation that the tradesman said he did not know what he was doing at the property, which she suggested could indicate a grudge. Ms Whittaker said this detail about the claimant's workmanship was supported by the claimant's supervisor.

93. The claimant referred to T's account of the Junior story having a factual error, namely that there had been gay people in that property. Ms Whittaker accepted the people in that property might not be gay, but this was what T alleged she was told.

94. When the claimant said he had never made inappropriate comments at work, Ms Whittaker said "anecdotally she had heard differently". The claimant accepted he had engaged in banter at times, which might have been considered inappropriate.

95. The claimant asked for the date of the alleged incident again. Ms Whittaker said it was after he had completed the equality training. The claimant said the only contentious time he could recall was the tenant grumbling in the house in which he had the accident.

96. Ms Davies asked if T's request that the tradesman never return was captured somewhere. Mr Tumeth said it had been verbally relayed. In fact it had been recorded in writing in the notes of Mr Grieg (p134 & 135) which Ms Whittaker had, but which had not been disclosed to the claimant or his representative.

97. Ms Davies queried the decision to anonymise the statement. She said if there really was a fear of reprisal shouldn't the police have been involved.

98. The claimant repeated that the only property where he had experienced any issue with a tenant was the property where he had his accident. The issue had been the delay in getting the work done. The claimant explained he had been to the property one month before his accident and had told his supervisor Mike the frame was steel and there was a potential asbestosis threat. Mike had attended and decided to delay the job by one month. When the claimant reattended the property one month later the materials that had been delivered were wrong. He had to go to get the correct materials. Then he had phoned Mike to ask for a second man to help with the job. Mike had said no, so the claimant had started alone and had fallen off the ladder injuring his shoulder.

99. Ms Whittaker asked the claimant to explain the demeanour of the tenant at the property at which he had his accident. The claimant explained during the original visit he had wanted the tenant to sign a disclaimer, which she would not. He then started to take up carpets and found asbestos. When he attended the property a month later he had waited in the van as the materials were delayed. He did have a subsequent conversation with the tenant and it had been friendly. Mike had told the claimant to go to LBS to get the materials, which he had done. The claimant had returned to the tenant's home. The tenant had to leave so her grandmother had arrived. The claimant had put a dust sheet on the floor for his ladder as the tenant had not signed the disclaimer form.

100. Mr Carey commented that the claimant had just described engaging with tenants when he had said previously he did not engage with tenants. Ms Davies thought Mr Carey was nit-picking and being unfair.

101. The claimant continued to describe the day of the accident. He said he had fallen off the ladder, phoned Mike and Mike dropped him home. He had later gone to the hospital. Ms Whittaker said that from this version of events it did not sound like this tenant was aggrieved.

102. The claimant again stated the only property where there had been any issue was where he had his accident. The daughter, who the claimant described as being 21, was hacked off "typical council".

103. In closing Ms Davies urged Ms Whittaker to look at the claimant's long service and see he had too much to risk to do something as was alleged.

104. Ms Whittaker said she was thinking of speaking to T herself and asked if Ms Davies had any objections. Ms Davies said she did have concerns about Ms Whittaker approaching T directly but it was Ms Whittaker's decision.

105. During cross examination, Ms Whittaker confirmed that at some point she had spoken to Mike Cole about the allegations against the claimant, to "confirm whether information the claimant had given in the appeal had been Mr Cole's understanding or not. She said Mr Cole's version of events had differed from the claimants. She admitted there was no reference to this discussion in her witness

statement, nor did she take notes of this discussion and give the claimant and opportunity to comment on them prior to her decision.

Appeal Outcome

106. By her letter of 30th October 2017 to the claimant, Ms Whittaker confirmed she had determined his appeal was unsuccessful and she was upholding the decision to dismiss him.

107. In this letter she explained she had tried to speak to T but *"unfortunately due to personal circumstances she was unable to see me".* She confirmed that T had signed a copy of the account of her interview with Ms Harris and Mr Gwilym.

108. She explained she had found the claimant was being disingenuous in saying he could not shed further light on the allegations without the date and address of the incident. She explained during the appeal hearing she had told the claimant it was sometime after the Equality training (20th June 2017) and the date of his accident (27th June 2017) and even with this information he had not been able to recall any conversation that might have accounted for the allegation. This led Ms Whittaker to conclude either the claimant was telling the truth and the incident did not occur or he was not telling the truth and the incident did occur.

109. Ms Whittaker said she had concluded the incident did occur for the following reasons:

    a. How the tenant came to know of the Junior story. She acknowledged the claimant's assertion that, as Junior admits to telling other tradesman, T could have been told by a different tradesman during a prior visit. Ms Whittaker said even with this possibility, she did not find it credible that T had been able to identify the claimant as the tradesman in the Junior story and use this to add an element of truth to her account. She noted T had referred to the claimant as "the tradesman" in her account and did not appear to know his name.

    b. She had spoken to everyone that had met T, including Mike Cole, and had heard nothing that indicated T was "out to get" the claimant. In T's statement she said she did not want the claimant to lose his job and there was no record of any other reason that might point to motivation for a false complaint. If the complaint is false T has convinced four different members of Tai Tarian management.

    c. She had concluded the claimant had not been consistent in his account of how being a foster carer could have been motivation for a false allegation. She found that at the appeal hearing the claimant had said the dispute with the foster parents had only arisen since the children had been returned to his care in August 2017, so this could not be the motivation for a false allegation. In cross examination, counsel for the claimant explained to Ms Whittaker, the claimant had been involved in fostering these children since December 2016, so he had been fair to assert they could have had a motivation to make a false allegation in July 2017.

110. In closing remarks, Ms Whittaker commented that she accepted the claimant's references (which stated he was not homophobic) at face value, but this did not automatically mean the allegation against him was false. She also accepted that Mr Gwilym did not demonstrate bias in any way in making the apology he did.

111. In cross examination, Ms Whittaker confirmed she had found out, prior to her decision, that T lived in the same house that the claimant had suffered an accident in. She stated she did not think there was any link between T's allegation and the claimant's accident. She did not think this was a matter that ought to have been disclosed to the claimant.

The Law

Unfair dismissal (liability)

112. The respondent bears the burden of proving, on a balance of probabilities, that the claimant was dismissed for one of the potentially fair reasons set out in Section 98(2) of the Employment Rights Act 1996 (ERA). The respondent states that the claimant was dismissed by reason of his misconduct; see Section 98(2)(b) ERA. If the respondent persuades me that it did have a genuine belief in the claimant's misconduct, and that the claimant was dismissed for that potentially fair reason, I must go on to consider the general reasonableness of that dismissal under Section 98(4) ERA.

113. Section 98(4) ERA provides that the determination of the question of whether the dismissal is fair or unfair depends upon whether in the circumstances (including the respondent's size and administrative resources) the respondent acted reasonably or unreasonably in treating misconduct as a sufficient reason for dismissing the claimant. This should be determined in accordance with equity and the substantial merits of the case. The burden of proof in this regard is neutral.

114. In considering the question of reasonableness, I have had regard to the decisions in *British Home Stores Ltd v. Burchell* [1980] ICR 303 EAT; *Iceland Frozen Foods Ltd v. Jones* [1993] ICR 17 EAT; the joined appeals of *Foley v. Post Office and Midland Bank plc v. Madden* [2000] IRLR 82 CA; and *Sainsbury's Supermarkets Limited v. Hitt* [2003] IRLR 23 CA. In short:
    114.1. When considering Section 98(4) ERA, I should focus my enquiry on whether there was a reasonable basis for the respondent's belief and test the reasonableness of the investigation.
    114.2. However, I should not put myself in the position of the respondent and test the reasonableness of their actions by reference to what I myself would have done in the same or similar circumstances. This is of particular importance in a case such as this where the claimant is seeking, in effect, to "clear his name".
    114.3. In particular, it is not for me to weigh up the evidence that was before the respondent at the time of its decision to dismiss (or indeed the evidence that was before me at the Hearing) and substitute my own conclusions as if I was conducting the process myself. Employers have at their disposal a band of reasonable responses to the alleged misconduct of employees and it is instead my function to determine whether, in the circumstances, this respondent's decision to dismiss this claimant fell within that band.

114.4. The band of reasonable responses applies not only to the decision to dismiss but also to the procedure by which that decision is reached.

115. The Court of Appeal highlighted the dangers of the "acquittal mindset" in *London Ambulance Service NHS Trust v. Small* [2009] IRLR 563. According to Mummery LJ (at paragraph 43):

> *"It is all too easy, even for an experienced ET, to slip into the substitution mindset. In conduct cases the claimant often comes to the ET with more evidence and with an understandable determination to clear his name and to prove to the ET that he is innocent of the charges made against him by his employer. He has lost his job in circumstances that may make it difficult for him to get another job. He may well gain the sympathy of the ET so that it is carried along the acquittal route and away from the real question – whether the employer acted fairly and reasonably in all the circumstances at the time of the dismissal."*

116. The ACAS Code of Practice: Disciplinary and Grievance Procedures applies to misconduct dismissals and the Tribunal is required to have regard to this Code, when considering the range of procedures that a reasonable employer might adopt.

117. As this case involved an anonymous statement, both counsel have referred me to the case of *Linfood Cash & Carry Ltd v Thompson* [1989] IRLR 235, in which the Employment Appeal Tribunal gave the following guidance:

> *"…a careful balance must be maintained between the desirability to protect informants who are genuinely in fear, and providing a fair hearing of issues for employees who are accused of misconduct. We are told there is no clear guidance to be found from ACAS publications and the lay members of this appeal tribunal have given me the benefit of their wide experience.*
>
> *Every case must depend upon its own facts, and circumstances may vary widely – indeed with further experience other aspects may demonstrate themselves – but we hope that the following comments may prove to be of assistance:*
>
> *1. The information given by the informant should be reduced into writing in one or more statements. Initially these statements should be taken without regards to the fact that in those cases where anonymity is to be preserved, it may subsequently prove to be necessary to omit or erase certain parts of the statements before submission to others in order to prevent identification.*
>
> *2. In taking statements the following seem important: a. date, time and place of each or any observation or incident. b. The opportunity and ability to observe clearly and with accuracy. c. This circumstantial evidence such as knowledge of a system or arrangement, or the reason for the presence of the informer and why certain small details are memorable. d. Whether the informant has suffered at the hands of the accused or has any other reason to fabricate, whether from personal grudge or any other reason or principle.*

3. Further investigation can then take place either to confirm or undermine the information given. Corroboration is clearly desirable.

4. Tactful enquiries may well be thought suitable and advisable into the character and background of the informant or any other information which may tend to add to or detract from the value of the information.

5. If the informant is prepared to attend a disciplinary hearing, no problem will arise, but if, as in the present case, the employer is satisfied that the fear is genuine, then a decision will need to be made whether or not to continue with the disciplinary process.

6. If it is to continue, then it seems to us desirable that at each stage of those procedures the member of management responsible for that hearing should himself interview the informant and satisfy himself what weight is to be given to the information.

7. The written statement of the informant – if necessary with omissions to avoid identification – should be made available to the employee and his representatives.

8. If the employee or his representatives raise any particular and relevant issue which should be put to the informant, then it may be desirable to adjourn for the chairman to make further enquiries of that informant.

9. Although it is always desirable for notes to be taken during disciplinary procedures, it seems to us to be particularly important that full and careful notes should be taken in these cases.

10. Although not peculiar to cases where informants have been the cause for the initiation of an investigation, it seems to us important that if evidence from the investigating officer is to be taken at a hearing it should, where possible, be prepared in a written form.

Unfair dismissal (remedy)

118. When an employment judge decides that a dismissal is unfair, they must then go on to consider remedy. The claimant in this case seeks compensation only. I am empowered to make a “basic award” (see Sections 119 to 122 ERA) and a “compensatory award” (see Sections 123 and 124 ERA). In short, the basic award is calculated by reference to a statutory formula while the compensatory award is, subject to a statutory ceiling, such amount as I consider “just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer” (Section 123(1) ERA).

119. Deductions can be made from the compensatory award, for example by reference to the “Polkey principle” and/or a failure to mitigate losses. The principle of “contributory fault” allows, unusually, for a deduction from both the basic award (Section 122(2) ERA) and the compensatory award (Section 123(6) ERA).

120. I deal first with so-called "Polkey deductions". These are derived from the decision of the House of Lords in *Polkey v. A E Dayton Services Limited* [1988] ICR 142. This decision provides, in essence, that an employer who has acted unreasonably and in breach of procedures cannot contend that, since the dismissal would have occurred anyway even if proper procedures had been followed, the dismissal should be judged fair. It would only be in exceptional circumstances that an employer could act reasonably in taking the view that compliance with fair procedures was utterly futile. In most cases, therefore, the question of "what would have happened had proper procedures been followed?" is relevant only to the assessment of compensation: the Tribunal can reduce the employee's compensation by a percentage (up to 100%) representing the chance that he or she would still have lost his or her employment anyway.

121. In seeking such a Polkey deduction, employers bear the burden of persuading the employment judge that they would have dismissed the employee even if they had complied with a fair procedure. There must be a proper evidential basis for this finding; mere assertion is insufficient.

122. Sections 122(2) and 123(6) ERA give the employment judge power to reduce both the basic and compensatory awards for unfair dismissal by such proportion as I consider just and equitable having regard to any finding that the claimant caused or contributed to the dismissal by his or her conduct. Normally in cases of unfair dismissal for alleged gross misconduct, employment judges do not make findings on whether the act of misconduct did or did not occur; we simply consider whether the respondent formed a genuine belief, based on reasonable grounds and after a reasonable investigation, that the act of misconduct occurred. However, when considering contributory fault, we need to go further: we must ask ourselves whether there was culpable or blameworthy conduct on the part of the employee, whether it caused or contributed to his dismissal.

Conclusions

123. Returning to the issues that were identified at the start of the hearing, I firstly considered whether the respondent held a genuine belief the claimant had committed an act of misconduct, namely made homophobic comments to a tenant. Whilst I was satisfied that Mr Carey genuinely held this belief, as he did not know of any reason for T to have embellished her account, I do not find that this genuine belief was shared by Ms Whittaker. By the time she was deciding Mr Christie's appeal, she was aware that Mr Christie had fallen off a ladder and was injured such that he was signed unfit to work, and this accident had occurred at T's property. She was also aware of the numerous character references, including one from a longstanding homosexual friend of Mr Christie. She accepted these were genuine references. In cross examination, she confirmed she did not believe Mr Christie was homophobic. As such, I do not find that at the time of making her decision, Ms Whittaker held a genuine belief Mr Christie had made homophobic comments such as saying gay people were his "pet hate".

124. Further and in the alternative, if the respondent had persuaded me that Ms Whittaker had held a genuine belief, this was not based on grounds on which a reasonable employer could form a genuine belief of misconduct. Whilst I accept the *Linford Cash & Carry* guidance is merely guidance, I have considered the

range of evidence that a reasonable employer might regard as being reasonable to establish misconduct in these circumstances. I am satisfied that it is beyond the range of reasonable responses of a reasonable employer to persist in relying on an anonymous complaint and prefer that evidence, when the complainant has refused to provide further evidence and neither the dismissing officer or appeal officer has actually met the anonymous complainant.

125. Further and in the alternative, when I asked myself whether a reasonable employer would regard this investigation as being reasonable, I came to the conclusion it would not. A reasonable employer might come to the same conclusion, that T's complaint should be kept anonymous. However, as the guidance in Linford suggests, a reasonable employer then has balance ensuring the employee has a fair hearing with keeping the complainant's identity anonymous. A fair hearing has to have some means of testing that informant's information. In this case, from the outset, the respondent plainly accepted the informant's account - there was no attempt to look for changes in her account and no real attempt to look at why she might have reasons to embellish her account. Instead the employer expected the employee to prove his innocence (eg by asking him to identify reasons why an anonymous person would make a complaint). The ACAS code of conduct makes it clear that a reasonable investigation must look for evidence that acquits the employee as well as evidence that establishes misconduct – this is even more important where the complainant is not willing to have their identity disclosed. In failing to look for evidence that supported the employee, such as the differences between T's accounts (the 'swinging both ways' comment) and in failing to investigate whether other tradespeople had been to T's house (and could have been the source of the Junior story) I am satisfied that this investigation was not extensive enough for a reasonable employer to regard it as being reasonable.

126. Further and in the alternative, the dismissal was not procedurally fair, as crucial evidence was not made available to the claimant. T's first account was considered by the investigating officer and the appeal officer but was not made available to the claimant until these proceedings. I accept Ms Harris was not familiar with the ACAS Code of Practice. I am satisfied that no reasonable employer would have denied the claimant the opportunity to consider this redacted initial account, in the circumstances of this investigation (ie where the complainant was anonymous). This document contained an account that was slightly different from T's account to Mr Gwilym and Ms Harris and would have given the claimant's representative evidence that T was not being consistent and was embellishing her account. Further, Ms Whittaker clearly made reference to and was influenced by comments Mr Cole had made to her when she spoke to him about the incident and about the claimant's performance. There was no written record of these discussions and the claimant was not told the detail of Mr Cole's account, so the claimant did not have an opportunity to challenge this account.

127. Further and in the alternative, as the claimant had 14 years' service with the respondent, I am satisfied that the respondents' decision to dismiss him, based solely upon the complaint of an anonymous tenant that was asking for him to not be dismissed, fell beyond the band of reasonable responses open to a reasonable employer of a similar size and with similar administrative resources.

128. The question quite properly arises as to what difference it would have made to the outcome, if any, if the claimant had been provided with a fair disciplinary procedure. Would he have still been dismissed? I am satisfied that if the claimant had been provided with T's first account he would have been able to highlight the fact T was embellishing her story. This was crucial, as both Mr Carey and Ms Whittaker felt that one party was lying and the other was telling the truth – if the claimant had evidence to demonstrate T was not being wholly consistent this could have tipped the balance in his favour. As such I am not persuaded that he would have been dismissed or that there was any likelihood of him being dismissed if he had been given a fair disciplinary procedure.

129. Next I considered whether the claimant's conduct before the dismissal was such that it would be just and equitable to reduce the amount of the basic award. Here I am allowed to substitute my opinion. As the claimant's counsel raised with the respondent's witnesses in cross examination, T should have been asked why she had delayed making this complaint. Enquiries should have been made with T's grandmother and T's brother, who could have corroborated (or not) T's account. Mike Cole should also have been asked to provide a written statement of the events he witnessed on the day of the alleged comments.

130. Having considered all the evidence, I find it is more likely than not that T did embellish her account of her conversation with the claimant. It is quite clear that T had every reason to make false allegations about the claimant's conduct. In the days prior to the allegation, the claimant had just had a serious accident in her property, after she had refused to sign the disclaimer which had meant he had used protective covering on the floor whilst working at height on a ladder. I have heard evidence from the claimant, which I accept that T was "hacked off" with him. I have heard evidence from the character witness statements that make it clear it is highly unlikely he would ever make homophobic comments. There is every reason to believe T had heard of the Junior story from a different tradesperson or even a different person, as the Junior story appeared to be common knowledge. If she had heard it from a different source, this would explain why her account referred to the tenant in the Junior story being gay, when neither the claimant or Junior were aware of that particular tenant's sexuality. I do not accept there is any evidence of blameworthy conduct on the part of the claimant. It is not just and equitable for there to be any reduction to the basic award, nor should there be any reduction to the compensatory award.

131. For the same reasons, I do not find the claimant had committed a repudiatory breach of contract. The respondent was not entitled to summarily dismiss him.

_____

Employment Judge Howden-Evans
Dated: 4th November 2018

JUDGMENT SENT TO THE PARTIES ON
6 November 2018

FOR THE SECRETARY TO EMPLOYMENT TRIBUNALS