



# EMPLOYMENT TRIBUNALS

**SITTING AT:** LONDON SOUTH

**BEFORE:** EMPLOYMENT JUDGE FRANCES SPENCER

**BETWEEN:** MR P JENKINS CLAIMANT

AND  
CHEQUER MEAD ARTS & COMMUNITY TRUST RESPONDENT

**ON:** 30<sup>th</sup> October - 2<sup>nd</sup> November 2017

## **Appearances**

**For the Claimant:** In person  
**For the Respondent:** Ms Montaz, consultant, Peninsula

## **RESERVED JUDGMENT**

The Judgment of the Tribunal is that

- (i) The Claimant was not dismissed for making a protected interest disclosure and his claim under section 103A of the Employment Rights Act 1996 does not succeed;
- (ii) The Claimant was unfairly dismissed;
- (iii) The issue of remedy is adjourned to be heard on 21<sup>st</sup> February 2018.
- (iv) Issues of reductions to any award for contributory conduct and Polkey (what might have happened had the Respondent acted fairly) will be considered at the remedy hearing.

## **REASONS**

1. This is a case of unfair dismissal brought by Mr. Peter Jenkins against his former employers Chequer Mead Arts and Community Trust. The claim is one both for “ordinary” unfair dismissal and for automatically unfair dismissal by reason of making a protected disclosure. The Claimant clarified at an earlier case management hearing on 15<sup>th</sup> May 2017 that there was no freestanding

claim to being subjected to a detriment on the ground of making a protected disclosure.

Issues

2. The issues were set out in that case management hearing as follows: –

Ordinary unfair dismissal

- 2.1 What was the reason for the Claimant's dismissal; was he dismissed for misconduct as the Respondent alleges, namely for the matters listed at paragraph 3 (a) – (f) of the Respondent's Grounds? The Claimant alleges that he was dismissed because he made a protected disclosure.
- 2.2 If the reason for the dismissal was misconduct, was the decision to dismiss the Claimant fair and reasonable in all the circumstances and in particular:
  - 2.2.1 did the Respondent carry out a reasonable investigation before deciding to dismiss;
  - 2.2.2 was the belief in the misconduct based on reasonable grounds;
  - 2.2.3 was there procedural unfairness; and
  - 2.2.4 was a decision to dismiss within the range of reasonable responses open to an employer in those circumstances?
- 2.3 If the decision to dismiss was unfair, what is the likelihood that the Respondent would have dismissed the Claimant if it acted fairly?
- 2.4 If the dismissal was unfair, did the Claimant's conduct cause or contribute to his dismissal and, if so, to what extent? (The conduct relied on here by the Respondent is that referred to paragraph 2.1 above and that which led to the earlier final written warning.)

Automatically unfair dismissal

- 2.5 Did the Claimant tell Julia Holden and Nick Hodges after the all employee team meeting in April 2016 that Will Perkins was privately invoicing clients and thereby personally receiving money that should have been paid to the Respondent?
- 2.6 Did the Claimant make a similar disclosure to that described in paragraph 2.5 above at the fact-finding meeting he attended in October 2016?
- 2.7 If so on each occasion did this constitute information which the Claimant reasonably believed should be disclosed in the public interest as tending to show either (a) that a criminal offence had been committed, was being committed or was likely to be committed; and/or (b) that a person (Mr. Perkins) had failed, was failing or was likely to fail to comply with a legal obligation to which he was subject?

2.8 If so was the reason/principal reason for the Claimant's dismissal, the making of the protected disclosures?

Remedy

2.9 Insofar as the above claims succeed, assessment of compensation due to the Claimant.

Evidence

- 3 The Tribunal had a bundle of documents in excess of 500 pages. Further documents were produced during the course of the hearing
- 4 The Tribunal heard evidence on behalf of the Respondent from 3 of its trustees. Mr. Hodges, who took the decision to dismiss, Mr. Reeves, and from Mr. Whittaker who heard the Claimant's appeal. For the Claimant I heard from a 4<sup>th</sup> trustee Mr. Perks and from a former trustee Mr. Astley. I also heard from the Claimant himself.
- 5 Unfortunately the Respondent's representatives did not appear to have given sufficient attention to the preparation of the case for hearing. The Respondent's witness statements were short and provided insufficient detail as to the matters at issue, which was particularly difficult given that the Claimant was in person and not skilled in cross examination. Ms Holden had not been called I was not satisfied that the Respondent had properly understood its duties of disclosure. Information had to be mined from the Respondents through questions from the Employment Judge and from the documentation, not all of which had been properly identified by page number in the witness statements. This is not a criticism of Ms Montaz, who presented the case conscientiously but of those from her organisation who had taken short cuts in the preparation of the case for hearing.
- 6 I also did not consider that the Respondent's witnesses were being wholly forthcoming in their responses to the Tribunal and in cross examination. Many of their answers put an unhealthy reliance upon their advisers, Peninsula i.e. that they had done what they had been advised to do. Improper pressure had been put on Mr. Perks not to attend the hearing and he attended in the end as a result of a witness order from the Tribunal. I was also satisfied that the trustees had had many undocumented conversations about the Claimant that predated the decision to dismiss for reasons more fully set out below.

Findings of relevant fact

- 7 The Respondent is a charitable incorporated organisation which runs a theatre in East Grinstead. The theatre building is owned by East Grinstead Town Council. It is run by a board of 7 volunteer trustees, 5 Town Council representatives and two external trustees. The Claimant was appointed as full-time manager of the centre in 2013, managing 5 members of paid staff and some 120 volunteers. He reported to the trustees and was line managed by Ms Julie Holden, clerk to the trustees. Mr. Perkins was employed as technical

manager responsible for technical operations of the theatre including lighting. For most of his employment Mr. Perkins and the Claimant worked well together.

- 8 As well as live shows the Respondent also screens films to the public from time to time. In 2016 the Claimant showed 2 films without having obtained a licence to screen them. One of those (A Walk in the Woods) was screened before the UK DVD release date using a pirated video downloaded from a website called BitTorrent. When this came to light it was investigated (45) by Mr. Neale (head of finance at East Grinstead Town Council) and Ms Holden. (Their report is a careful and thorough piece of work although this was never shown or given to the Claimant.) Their recommendation was that the Claimant should be dismissed, but on 16<sup>th</sup> March 2016 the Claimant was issued with a final written warning to remain on his record for 12 months. The showing of a pirated video was a serious matter for the Respondent which could have been prosecuted and had their licence to show films revoked.
- 9 The letter given to the Claimant containing the outcome of the process contained the following:

“The final written warning is given on condition of the following steps

- Rewrite procedures to ensure that a separation of duties require two officers to ensure that all productions and shows follow a set down process and the appropriate licenses are in place prior to the showing. This revised procedure must be included in the procedure manual and shared with all appropriate staff and the Chairman of the Trustees by 30<sup>th</sup> April 2016.
- That films be sourced from Filmbank.
- That interim returns following a screening are made to Filmbank within 2 weeks of the showing.
- Contact Filmbank, advise of the two incidents where the showings without licence occurred, advise that Chequer Mead will make good the cost of the licence and the returns for the two showings immediately, advising that following an appropriate internal investigation procedures are being revised to ensure this cannot happen again.
- That there be no repeat of these incidents.

Failure to ensure that the steps are taken will result in further disciplinary action.”

Subsequent emails made it plain that any DVD to be shown to the public had to be sourced from Filmbank and not from elsewhere. (71E).

- 10 The Claimant was given the final written warning on 16<sup>th</sup> March 2016. On the same day he attended a meeting with various members of staff including Mr. Perkins, Ms Lynch-White (who was also Mr. Perkins' girlfriend) and Mr. Sumner. The meeting was led by Mr. Perkins and contained some very serious complaints about the Claimant's management and conduct, including allegations that he was not pulling his weight, failing to take responsibility, failing to answer phone calls and emails, shifting blame, bullying etc. (70) Mr. Perkins had originally taken his complaint to Ms Holden and the trustees but he had been told that such matters should be raised with the Claimant, as centre manager, in the first instance. The Claimant was aggrieved by these complaints which he believed were instigated by Mr. Perkins.

- 11 Mr. Perkins operated a private company called Show LX. The Claimant was aware of this and he would often hire equipment from Show LX on behalf of the Respondent. In March 2016 (it is not clear whether this was before or after the 16<sup>th</sup> March meeting) the Claimant saw Mr. Perkins in the theatre on his day off wearing a Show LX T-shirt and working with the school which had hired the theatre for its production. The Claimant spoke to the member of staff from the school who was there who said that they paid Show LX for “extras” in the theatre. The Claimant felt that this was underhand. The hire charge for the theatre included the services of a member of staff to assist with technical issues and the Claimant believed that Mr. Perkins was using the theatre’s assets privately and may have been charging for services that he was contracted to provide on behalf of the Trust.
- 12 On 22<sup>nd</sup> March 2016 there was a staff meeting the purpose of which was for Miss Holden and Mr. Hodges to inform staff about a proposed transfer of their employment from one legal entity to another (from an unincorporated association to a charitable incorporated association). After that meeting the Claimant told Mr. Hodges and Ms Holden that he had concerns that Mr. Perkins was carrying out, and invoicing for private work done through his own company (Show LX) while working in, and being paid by, the theatre and that he was personally receiving money that should be received by the theatre. Ms Holden then suggested that perhaps Mr. Perkins should be given a pay rise. I do not accept the Claimant’s evidence (which emerged only in cross examination) that the Claimant said that this was potentially fraud, although the implication was there. Mr. Hodges says that he cannot recall the exact nature of the conversation but that “it did not appear to be that serious”. The Claimant was asked to bring the matter to the board.
- 13 The Claimant did not raise the issue at the next trustee meeting in April or with Mr. Perkins directly. Instead he asked Mr. Perkins for his computer password. Mr. Perkins refused. On 17<sup>th</sup> May 2016 the Claimant conducted Mr. Perkins’ appraisal. The appraisal was critical. It suggested that Mr. Perkins had been over claiming for overtime hours, that casual staff were being hired unnecessarily, and warned him that failure to supply his computer password would result in disciplinary proceedings. Mr. Perkins was also told that working for Show LX gave rise to the possibility of a conflict of interest and, for the future, he could not supply any lighting extra to the Respondent’s own rig unless it went through the Respondent. He was also told that he could no longer work “within the theatre for Show LX”.
- 14 On 18<sup>th</sup> May the Claimant saw Mr. Reeves in the theatre and was aggrieved that he was “trying to see Will Perkins”. He complained to Ms Holden that Mr. Reeves was attempting to see a member of staff “behind my back”.
- 15 The Claimant raised the issue of Mr. Perkins at the trustee meeting on 23<sup>rd</sup> May 2016. He told the trustees that disciplinary procedures were warranted against Mr. Perkins for (i) invoicing for own work, (ii) failing to supply his computer password; and (iii) bringing casual staff in when not required against the centre manager’s suggestion. He said that Mr. Perkins had told him that he would not supply his password because he “would not be held responsible for anything

found on his computer” which was of itself a cause for concern. Other members of staff had provided their passwords. He also complained that Mr. Perkins had deliberately not zeroed his overtime so that, instead of being due overtime as he claimed, he had over claimed. It was resolved that Claimant, as manager of the centre, should deal with these issues in conjunction with two of the trustees, Mr. Cole and Mr. Reeves, and that he should speak to Peninsula, the Respondent’s employment consultants. The Claimant was to provide a report at the next Trustee’s meeting. (I do not accept, as the Claimant suggests, that he was not told to provide a full report (and the minutes are very brief) but, even if that had been the case, the Claimant, as manager, must have understood that a proper investigation report would be required.)

- 16 On 25<sup>th</sup> May Mr. Perkins sent an email to Mr. Hodges (copied to the Claimant and the other trustees) asking to meet with the trustees to discuss the concerns raised in his review. The Claimant responded that Mr. Perkins should not meet with the trustees as he (the Claimant) was the appropriate point of contact. (84A)
- 17 On 31<sup>st</sup> May 2016 Mr. Perkins was suspended pending an investigation. The suspension letter did not provide any information about the subject of the investigation. The Claimant was aggrieved that staff sought to speak to the Trustees and that two trustees had come to the office to speak to staff “undermining my position”.
- 18 The Claimant commissioned computer specialists (Alits) to look at Mr. Perkins computer. This was done by phone and there was no record of the precise instruction given to them and it is not clear what they had been asked to do. The Claimant then took the opportunity to conduct his own search of Mr. Perkins computer, in which he sought evidence of invoices from Show LX. He printed off numerous invoices issued by Show LX to (i) various production companies and (ii) to the Respondent. In evidence he told the Tribunal that on 1<sup>st</sup> June he had found “all private invoicing from Will Perkins to various companies, proving he has been receiving extra money, whilst working in Chequer Mead’s time, and using Chequer Mead assets and proving he has been operating his business from Chequer Mead.” He did not however disclose or reveal the existence of those documents to Mr. Cole and Mr. Reeves. (Those documents now appear in the bundle and they prove no such thing.)
- 19 On 1<sup>st</sup> June (the day after his suspension) Mr. Perkins contacted Mr. Hodges and Mr. Reeves again asking for a meeting and questioning the Claimant’s impartiality. “There have been recent conflicts between Pete and myself which started shortly after he was reprimanded for failing to licence a film showing correctly. As a result Pete’s attitude and behaviour towards me has been unreasonable and I’m writing to advise you that Pete is not suitable to carry out any meeting or hearing fairly.” He also wanted to discuss the concerns raised in his appraisal with the trustees. Mr. Reeves then spoke to Mr. Perkins directly.
- 20 Over the next few days Mr. Reeves sought to speak to the Claimant. The Claimant did not return his calls.

- 21 Mr. Reeves contacted Alits direct who on 3<sup>rd</sup> June reported that there was no evidence of any illegal downloads or pornography (98,105) on Mr. Perkins computer and that dropbox and google drive files appeared to contain “only information related to work and different business”.
- 22 Matters began to unravel at that point. It is apparent that the Claimant was highly distrustful of Mr. Reeves and felt that Mr. Reeves was taking Mr. Perkins side. He told the Tribunal that Mr. Reeves had contacted Alits “behind my back”. His email response to Mr. Reeves on 4<sup>th</sup> June (102-104) is, frankly, rude. The Claimant had been asked to conduct his investigation “in conjunction with” Mr. Reeves and Mr. Cole but when Mr. Reeves asked him for information about his investigation into Mr. Perkins the Claimant was uncooperative and responded that it was “a management issue”. He told Mr. Reeves that he “would not be divulging any findings from the investigation to any trustee as it is of a very sensitive nature” and that he was in contact with Peninsula. He did not share with Mr. Reeves or any other Trustee the discoveries that he now tells the tribunal he had made, namely that he had found invoices “proving he [Mr. Perkins] has been receiving extra money whilst working in Chequer Mead’s time, and using Chequer Mead assets and proving he has been operating his business from Chequer Mead”. He did not share the fact that Alits had not found anything untoward on Mr. Perkins’ computer. In evidence the Claimant told the tribunal that he had not done this because “I thought the documents might be valuable to me and I could use them in the future. However that opportunity never arose.” This approach was wholly at odds with his duties to the Respondent.
- 23 Mr. Cole became concerned that the Claimant would not give Mr. Perkins a fair hearing and was acting as judge and jury in the investigation. (104) He was right to be concerned. The way that the Claimant was behaving as set out above was suggestive of a campaign against Mr. Perkins. He had suspended Mr. Perkins without informing him of the allegations against him, which remained vague, or why suspension was necessary and he had failed to keep the trustees informed. His email correspondence does not suggest that the Claimant was behaving with the impartiality required for an investigation of this nature.
- 24 Unfortunately the Claimant suffered a heart attack on the evening of 4<sup>th</sup> June whilst at work. He was in hospital until 10<sup>th</sup> June. On 6<sup>th</sup> June Mr. Reeves spoke to Peninsula. By then Mr. Reeves was of the view, in relation to Show LX, (presumably after speaking to Mr. Perkins, but this was not clear) that “it had been custom and practice for WP to do his business and that CM had not objected to this for some years.” Peninsula advised that “it was fine for WP to continue working for his own business provided there was no conflict of interest and it did not affect his CM job”. The Alits report had concluded that there was no illegal material on Mr. Perkins PC.
- 25 An emergency board meeting on 7<sup>th</sup> June resolved to reinstate Mr. Perkins noting that that nothing untoward had been found in his computer and that if there were any other matters of concern they could be picked up by the Claimant on his return to work.

- 26 On 9<sup>th</sup> June Mr. Perkins emailed Mr. Reeves as follows: "Following our conversation, you asked me to inform you about a suite of software we have that is not legally licenced. As you know I flagged this up during my suspension is the one thing that might be found my computer. The software in question is the full Master Adobe suite, however the only 2 programs that I'm aware we use within the suite are Photoshop (image editing) and Dream Weaver (website editing). The suites were installed on Pete's computer as well as my own approximately 2 years ago. Pete wished to proceed with the install without the purchase of the relevant license codes." The last sentence is clearly an attempt to shift the blame to the Claimant.
- 27 In mid-June Ms Stavenden was appointed as interim centre manager during the Claimant's sick leave.
- 28 On 26 July the Claimant's attended a technical rehearsal of a show in the theatre. On 28<sup>th</sup> July the Claimant was in the audience for the evening show and during an interval an altercation took place between Mr. Perkins and the Claimant when the Claimant had accessed the backstage area. A West end producer had been in the audience and wanted to audition a member of the cast. He spoke to the Claimant about it and the Claimant went backstage to find the director but he couldn't find her. When Mr. Perkins saw the Claimant he became angry and distressed. (Ms Stavenden later reported that people thought he was having a panic attack). The Claimant was also upset. Ms Stavenden (who was not there at the time) was told about the incident the next day and called Mr. Reeves who in turn spoke to Peninsula.
- 29 The same day (29<sup>th</sup> July) Mr. Reeves hand-delivered a letter to the Claimant's home advising him that (i) he was only contractually entitled to SSP and would no longer be receiving full pay and that (ii) whilst off sick he should not engage in any work activities and/or enter any area of the Respondents premises that were not open to the public including backstage. This delivery method upset the Claimant because Mr. Reeves had not simply put the letter into the letterbox. He had knocked on the door and when the Claimant did not open, questioned the next door neighbour and then handed the letter to his wife when she arrived back in the car. It does appear that matters had become rather personal between the Claimant and Mr. Reeves.
- 30 On 29<sup>th</sup> July Mr. Perkins emailed Ms Holden to say that the Claimant had applied for licenses to show three films from Filmbank and the online order showed that the Claimant had ticked a box to "use own media" rather than Filmbank to supply. (130) A file note by Ms Holden dated 5<sup>th</sup> August also stated that it had been discovered that the Claimant had not ordered a DVD from Filmbank for a film to be shown on 8<sup>th</sup> June. When it was discovered that there was no DVD "it had to be sourced locally as there was no time to order it from Filmbank." (155) She also stated that the Claimant had not told Mr. Perkins about the change in process for ordering films and that no new procedure for securing a licence had been put in place as instructed by the Board.(155)
- 31 The Respondent wrote to the Claimant on 5<sup>th</sup> August requiring him to attend an investigation meeting on a date to be confirmed, relating to 3 matters



- 31.1 failing to comply with the requirements of a final written warning by failing to secure a DVD from the authorised supplier;
  - 31.2 breach of copyright namely installation of Adobe products without purchasing the copyright;
  - 31.3 failure to action correspondence on a savings investment costing the business £2000 in lost interest.
- 32 On 5<sup>th</sup> August Ms Stavenden provided Mr. Reeves and Mr. Hodges with a written account of what had happened backstage on 28<sup>th</sup> July, recounting that the Claimant had been looking for the director and had gone backstage. Mr. Perkins had asked the Claimant “very firmly to leave” saying he wasn’t authorised to be there, that the Claimant had become aggressive, that Mr. Perkins had tried to shut him out and that the Claimant had tried to push the door open and that they had both “squared up to each other”. Ms Scullin, the director had calmed everyone down. The atmosphere was hostile and threatening but there was no physical contact.
- 33 On 9<sup>th</sup> August the Claimant attended a meeting with Mr. Cole and Ms Holden which had been arranged, at the Claimant’s request, to discuss his sick pay. The Claimant was aggrieved that he had been reduced to SSP noting that another staff member (Terry Sumner) was still on full pay and asked why Mr. Sumner was able to access staff areas while off sick, while he was not. (The Respondent’s response was to say that the arrangements with Mr. Sumner would be changed).
- 34 Towards the end of the meeting Ms Holden then gave the Claimant a letter requiring him to attend a fact-finding meeting at 1 p.m. that same day to answer allegations that
- 34.1 he had failed to share “a procedure” with staff and the Chairman of the trust,
  - 34.2 he had failed to secure a DVD from the authorised supplier,
  - 34.3 he had failed to follow a board direction in relation to the investigation and suspension of Mr. Perkins,
  - 34.4 he had installed Adobe products without purchasing the copyright,
  - 34.5 He had conducted work whilst off sick “namely ordering, working on a brochure that was not authorised or signed off by the board” and posting on Facebook for Chequer Mead after receiving a letter telling him that he should not work during his leave, and
  - 34.6 He had had “unauthorised access to work during his sick leave” by attending a performance at the venue and accessing areas that were not open to the public. It was further alleged that he had engaged in a physical altercation with Mr. Perkins.

The allegation about failing to action correspondence on an investment did not feature and there was no explanation for its withdrawal.

- 35 No action was taken against Mr. Perkins for downloading the Adobe products and no action was taken against Mr. Sumner for accessing the workplace during sick leave.

- 36 On 15<sup>th</sup> August Ms Scullin, who had witnessed the altercation between the Claimant and Mr. Perkins on 28<sup>th</sup> July provided her witness account of the event. (164) Her account put a slightly different perspective on the incident and suggested that Mr. Perkins became extremely angry and agitated because the Claimant had been standing in the doorway to the backstage area asking to speak to her, saying something that included the words “F..ing” and “Pete” and had been aggressive and rude and had told them to speak outside as “I don’t want him back here”.
- 37 The Claimant did not attend the investigation meeting on 9<sup>th</sup> August saying he was entitled to 5 days’ notice. On 15<sup>th</sup> August the Claimant was invited to attend a rearranged “fact finding meeting” on 17<sup>th</sup> August. The Claimant responded that he could not attend due to ill health.
- 38 On 17<sup>th</sup> August the Claimant lodged a grievance against Ms Holden, Mr. Reeves and Mr. Perkins. In that grievance he referred again to the allegation that he had brought to the board that Mr. Perkins was profiting personally from jobs which should have gone through the theatre’s books, suggesting that the trustees had not supported him in his investigation. He complained about Mr. Perkins’ behaviour on 28<sup>th</sup> July and Mr. Reeves’ behaviour. He did not produce the invoices that he had found.
- 39 When Mr. Perkins was advised of the grievance his response was that he too had complained about the Claimant’s behaviour on 28<sup>th</sup> July and that the Claimant had a personal vendetta against him because he believed that he was the whistleblower which led to the final written warning. He said that he had “been carrying Pete for the past few years and without my hard work and support his time as a manager would have been a disaster for the centre.”
- 40 By 13<sup>th</sup> September the Claimant sought to return to work on a phased basis. He was then placed on paid leave pending the outcome of the grievance (199)
- 41 In mid-September the Claimant posted a comment on the Respondent’s facebook page referring to a film by Louis Theroux which painted a picture adverse to the church of Scientology. This was embarrassing to the Respondent who had accepted donation from them, and the Claimant was known to have been against the acceptance of the donation.
- 42 Mr. Coles undertook an investigation into the Claimant’s grievance and a grievance hearing took place on 27<sup>th</sup> September with Mr. Osborne and Mr. Perks. The Claimant complained about Mr. Perkins behaviour on 28<sup>th</sup> July. He said that there had been no previous history between them until he had been suspended and that Mr. Perkins was very good at his job. The Claimant accused Mr. Reeves of undermining his investigation into Mr. Perkins, and “hounding him” on a daily basis”. The Claimant said that the working relationship between him and Mr. Perkins was untenable and that he had “enough evidence to dismiss Mr. Perkins”, although he did not produce that evidence or say what it was. He wanted Mr. Reeves removed from the board.

- 43 On 28<sup>th</sup> September the Respondent suffered a virus attack on its work computers. Alits were asked to investigate. They identified pirated material on the Claimant's PC, downloaded via an application called BitTorrent, which was of dubious legality. Alits reported that the download of such software might have enabled the virus but that it was not possible to know as that was "simply one route it may have reached the network". Alits also found pirated or cracked software which did not appear to have been downloaded legally. The dates on the report indicate that no material had been downloaded after the Claimant had been given a final written warning.
- 44 On 3<sup>rd</sup> October the outcome of the grievance was sent to the Claimant (222). The grievance against Mr. Reeves was partially upheld. In relation to Mr. Perkins it concluded that the evidence of what happened or who was responsible for the altercation on 28<sup>th</sup> July was not clear. The recommendation was that no further action be taken in relation to that event. It also recommended that the other HR matters raised by the Claimant relating to Mr. Perkins should be dealt with by the Claimant on his return to work (235).
- 45 On 4<sup>th</sup> October (240) (although the letter is dated 3<sup>rd</sup>) the Claimant was invited to attend a fact-finding meeting on 11<sup>th</sup> October 2016 to consider (i) the matters set out in the 9<sup>th</sup> August letter and (ii) an additional matter namely "use of bitTorrent software"- although no further details are given at this stage. Despite the recommendation of the grievance panel those matters included the events of 28<sup>th</sup> July and the allegation that the Claimant had engaged in a physical altercation with Mr. Perkins.
- 46 On 9<sup>th</sup> October Ms Lynch-White sent an email to Mr. Hodges and Mr. Reeves to the effect that the hirers of the theatre had been making adverse comments about the Claimant's attitude to them.(248)
- 47 On 10<sup>th</sup> October 2016 the Claimant was suspended on full contractual pay while an investigation took place into a number of concerns as listed (256). This list differed from the 9<sup>th</sup> August list in that the allegations that he had "failed to secure a DVD from the authorized supplier" and had engaged in a physical altercation with Mr. Perkins were removed, but there appeared an additional charge of an "alleged text message which could bring the business into disrepute." (The Tribunal heard no evidence about this charge.) It also included allegations about the downloading of pirated software via bitTorrent, which were potentially new matters of concern which had come to light.
- 48 In the meantime the Claimant lodged an appeal against his grievance outcome and a further grievance against the board.
- 49 The Respondent instructed HR Face2Face (part of Peninsula) to investigate the allegations against the Claimant and the Claimant attended an investigation meeting with Mr. Leech on 11<sup>th</sup> October. Me Cole was in attendance. The Claimant said at that meeting that "he had evidence under the Public Disclosure Act against another employee and that action had not been taken against that employee but had instead been taken against him. However he did not elaborate further.

50 The meeting focused on the allegations in the 4<sup>th</sup> October letter. The Claimant said that:

- 50.1 Failing to share a procedure with staff and the chairman of the Trust. The Claimant said that he was required to put the procedure in a procedure manual which the Trust did not have (and he was working on) but he had informed the staff verbally and all licences were put in a file.
- 50.2 Failure to secure “a DVD” from Filmbank. The Claimant said that he had obtained a licence from Filmbank for all prospective showings but they did not always have the DVD available to order when he secured the licence. If the DVD was not available to order at that point then he would select an option “to use own media”. The DVD could be then ordered nearer the date.
- 50.3 Failure to follow board direction in relation to the investigation suspension of Mr. Perkins. The Claimant said that he had not been given any direction by the board other than to report the end of the process. This allegation been considered in the grievance process and he had already been exonerated. It had not been appropriate for him to divulge his findings to Mr. Reeves prior to the finalisation of the investigation.
- 50.4 Installation of Adobe products without purchasing the copyright. The Claimant said that was unaware that the Adobe product was not licensed. Mr. Perkins had put it on his computer at his request. Mr. Perkins was the IT administrator and had not told the Claimant that there was no licence.
- 50.5 BitTorrent application. The Claimant accepted he had downloaded this. He was not aware of the risks of bitTorrent and relied on the administrator to ensure sufficient protections were in place. He did not recollect downloading any music tracks. The legality of bit Torrent was “a grey area” but their web site suggested it was legal.
- 50.6 Conducting work while signed off unfit to work namely ordering and working on a brochure that was not authorised or signed off by the board. The Claimant said that brochures would not normally be authorised or signed off by the board, that was not normal practice. The only work that the Claimant had done was to copy and paste pictures taken at a rehearsal into an already prepared file and sending it to the printer. That was not work that was very stressful and if he had done it the programs would not have been printed. He did not consider posting on Facebook to be work.
- 50.7 The events 28<sup>th</sup> of July. The Claimant explained why he had gone backstage (see above) Mr. Perkins had been aggressive and rude

and pushed him through the door. He was not going backstage in his capacity as a manager but simply to find the director.

- 51 Mr. Leach recommended that the allegations relating to (i) the failure to follow board direction into the investigation and suspension of Mr. Perkins (ii) conducting work whilst unfit (iii) posting on Facebook and (iii) engaging in a physical altercation on 28<sup>th</sup> July should not proceed but that the remaining allegations should proceed to a disciplinary hearing and that the allegations relating to downloading Adobe and BitTorrent could, if substantiated, constitute gross misconduct for which the sanction would be summary dismissal. The report is short of any real analysis of the Claimant's explanations. However, insofar as the allegation relating to the failure to secure a DVD was concerned Mr. Leach found that while The Claimant's explanation was credible "it did not reduce his responsibility to abide by the instruction and, if the solution was not workable, to raise it with the trustees."
- 52 On 9<sup>th</sup> November 2016 Mr. Perkins wrote to Mr. Hodges and Mr. Reeves explaining his private trading arrangements which he said had all been agreed with management when he started work at the Respondent. Mr. Perkins denied he had stolen business or revenue that could have been generated through the usual channels and said that he only worked for other companies when acting as a lighting designer and not simply as a technician. Lighting design was outside his normal job scope. (305). Although this documented the information given to the trustees in writing, I am satisfied that Mr. Perkins had already orally explained this to Mr. Reeves on or before 6<sup>th</sup> June (110) and that Mr. Reeves had in turn passed this onto the trustees.
- 53 Mr. Cole emailed Mr. Perks on 9<sup>th</sup> November (304A) as follows: "Peninsula's advice was do the disciplinary first then the grievance. Nick and I have discussed it and will do the grievance first and then have a break. During that break I'm hoping Nick (maybe depending on Pete's reaction) is to spell out clearly what is going to happen next. We are hoping he will have the sense to reach a compromise with us. None of us want to go the disciplinary route as that will end in dismissal and almost inevitably further action from PJ."
- 54 A second email dated 10<sup>th</sup> November refers to Peninsula offering 2 options "option 1 should end up with summarily dismiss PJ... Option 1 is the route that had been planned." It also says, inter alia, "During the evening of 8<sup>th</sup> November, Nick and I had a conversation to the effect that we would invite PJ into the ECM firstly for grievance hearing and then after a small break conduct the disciplinary hearing with its predicted outcome."
- 55 On 11<sup>th</sup> November the Claimant was invited to a disciplinary hearing and provided with the Face2Face investigation report and the independent report on downloaded software. The allegations that finally went to a disciplinary hearing were as follows;
- Alleged failure to comply with requirements of final written warning issued 16<sup>th</sup> March namely failing to secure a procedure with staff and chairman of the trust.
  - alleged failure to secure a DVD from the authorised supplier in direct violation of the requirements set out in the outcome letter;

- Alleged breach of external copyright; namely the installation of Adobe products without purchasing the required copyright.
- alleged unauthorised access to work during sick leave; namely on Tuesday 26<sup>th</sup> of July attending a performance at the venue and accessing areas, without invitation, that are not open to the public.
- Alleged downloading of pirated software material including music films and other software, probably downloaded via an application called bitTorrent.
- Alleged downloading of software from the bitTorrent application which could have led to severe virus download, possibly corrupting some computers within your organisation.

56 On 16<sup>th</sup> November 2016 there was a meeting of the board. It was Mr. Perks' evidence that up until then the Board had thought that they would have to offer a compromise agreement in order to effect the Claimant's termination. At that board meeting the issue was whether to offer a compromise agreement or to go straight to dismissal. Mr. Cole had been in favour of offering a compromise agreement but Mr. Reeves had not. In the end Mr. Reeves won the day and it was decided that no Compromise Agreement would be offered.

57 The Claimant attended his disciplinary hearing on 24<sup>th</sup> November 2016. This was preceded by the hearing of the appeal against his grievance. Notes were taken by both Mr. Cole and Mr. Hodges, although both are brief given the number of allegations (343-349), and are not entirely consistent. The Claimant's response to the charges was that

57.1 Failure to comply with requirements of final written warning. The Claimant accepted that he had not put a written procedure in place for the ordering of films for public viewing. He couldn't put one in "the procedure manual" because there was no manual. He was going to look at putting one together on his return. It had been a difficult time for him personally - his workload was enormous. However he had spoken to staff and outlined the procedure orally.

57.2 Not always ordering DVDs from Filmbank. The Claimant said that he had obtained a licence from Filmbank for all prospective showings but they did not always have the DVD available to order when he secured the licence. If the DVD was not available then he would select an option "to use own media". The DVD could be then ordered nearer the date.

57.3 Adobe software download. The Claimant said that Mr. Perkins had installed this on his computer and on Mr. Perkins computer. The Claimant had wanted to view a PDF file and Mr. Perkins had offered to put it on the Claimant computer. It was not the Claimant's responsibility check whether it was licensed and he left that to Mr. Perkins.

57.4 BitTorrent. The Claimant accepted that he had downloaded some photo editing software from the bitTorrent site. He believed the software was legally obtained.

57.5 As for the incident on 28 July the Claimant said that he had gone to watch a show at the theatre. A London director had been invited to see the show. He had been impressed with one of the cast and wanted to offer him an audition for the London show. . The Claimant was delighted and went backstage to find the director to tell her. He did not know he was not supposed to go backstage. He was still theatre

manager, albeit on sick leave. He asked for the director and Mr. Perkins had been aggressive, “raging” and told him he was not welcome.

- 58 The Claimant said that there had been no complaints until he had his heart attack and since then there was a concerted attempt to remove him from post, which he felt was led by Adam Reeves and Mr. Perkins. There had been a fishing exercise. He loved the theatre and had increased ticket sales and revenue. In May he had had evidence of fraudulent activity by Mr. Perkins and yet no one had asked for his report or what he had found on his computer. Mr. Hodges asked the Claimant to provide him with this and the Claimant responded that he “was holding onto them for future use”.
- 59 Mr. Hodges reserved his decision and the matter was discussed again at a Board meeting on 10<sup>th</sup> December. Mr. Hodges told the Tribunal that he had determined that the Claimant would need to be dismissed - the only question was whether he would be dismissed with notice or summarily. He said that he “had to act under advice from Peninsula” and had been advised he could be dismissed summarily.
- 60 By letter dated 13<sup>th</sup> December 2016 the Claimant was dismissed without notice. Mr. Hodges findings were that:
- 60.1 The Claimant had not complied with the requirement of his final written warning to create a procedure regarding the obtaining of licenses. This was misconduct.
  - 60.2 The Claimant’s actions in not securing “a DVD” from Filmbank was unacceptable and a breach of the requirements of the final written warning. This was serious misconduct.
  - 60.3 Mr. Hodges did not believe that the Claimant was not aware of the copyright requirements for the downloading of the Adobe products. This was serious misconduct.
  - 60.4 The Claimant’s reason for going backstage was accepted but Mr. Hodges finding was that it was “not reasonable in the circumstances”. However no further action would be taken in relation to this charge.
  - 60.5 The Claimant had admitted to downloading material from an application called bitTorrent. The Claimant’s explanation that he believed that these were licensed was not accepted. The charge was made out and amounted to gross misconduct.
- 61 In evidence Mr. Hodges had difficulty explaining why he found that the installation of Adobe products on the Claimant’s computer amounted to serious misconduct when no action had been taken against Mr. Perkins for the same matter. He could also not explain why “going backstage when off sick” was a disciplinary matter or why he had concluded that it was not reasonable; especially in the light of the fact that the outcome of the grievance was that no further action should be taken in respect of this incident. At first he said that the theatre had not been “open to the public” but when he was corrected (and told that the performance was a public one) his reply was that he had in any event concluded that no disciplinary action should be taken about that matter.

- 62 In relation to the allegation that the Claimant had not secured a DVD from Filmbank Mr. Hodges made no attempt to investigate the Claimant's explanation that when he bought the licence the DVD was often not available from Filmbank requiring him in effect to tick that box. That explanation may or may not be true (and Mr. Leach had considered it was plausible) but Mr. Hodges took no steps to establish whether it was.
- 63 In relation to bitTorrent he did not explore whether there had been any downloading since the date of the final written warning (and it appeared that there had not) and if not, how this might have impacted his reasoning or his decision.
- 64 The Claimant appealed (383) and his disciplinary appeal, (as well as his grievance appeal), was heard on 18<sup>th</sup> January by 2 trustees, Mr. Whittaker and Ms Mockford. Mr. Cole took notes. Mr. Whittaker had only been appointed to the board in October 2016 (having previously assisted as a volunteer) and became chair on 22<sup>nd</sup> March 2017.
- 65 In relation to the disciplinary appeal Mr. Whittaker and Miss Mockford were given a copy of the Claimant's dismissal letter, his appeal letter, the letter inviting him to the appeal hearing and the grievance appeal. They were not provided with any other documents prior to the appeal hearing. The Claimant as asked if he wanted to produce other documents to assist his appeal. His response was that he had other documents but they would be used "at another time".
- 66 It was only after the hearing that Mr. Cole gave Mr. Whittaker and Ms Mockford lever arch file of correspondence between March 2016 and January 2017 including the Face2Face investigation report and the final written warning letter. The Tribunal did not have a list of those documents and I remain unclear exactly what documents were produced to Mr. Whittaker. I accept that Mr. Whittaker and Ms Mockford then read the remaining paperwork that had been provided to them and spoke to Ms Holden, Mr. Hodges and others.
- 67 On 23<sup>rd</sup> January 2017 (406) Mr. Perkins sent an email to all the trustees giving details of his private activities. He had traded privately to offer lighting services to groups/companies and this had been agreed with management as long ago as April 2010. He said he was never being "paid twice". He also supplied technical extras and acted as lighting designer to "That's Entertainment" which would had all been agreed by Mr. Jenkins. "I have suggested and maintain that I believe Pete decided to cause an issue of something he had previously agreed in an attempt to put me in a position of being dismissed" Mr. Whittaker then asked further questions about these matters which Mr. Perkins responded to on 27<sup>th</sup> January
- 68 The appeal outcome letter dated 8<sup>th</sup> February 2016 suggests a more comprehensive analysis of the matters in issue than was carried out prior to the dismissal. It was Mr. Whittaker's evidence that the Claimant had breached the conditions of his final written warning by not implementing a written procedure



for obtaining licenses and that his explanation that he had explained the process to staff had been denied by them. Secondly the Claimant had accepted that he had not always sourced his films from Filmbank and so was in breach of the final written warning. In relation to Adobe the letter notes Mr. Perkins statement that he had told the Claimant that the Adobe product he had was not licensed and thirdly the Claimant had accepted downloading pirated bitTorrent material which contravened the final written warning.

### The law

- 69 Section 103A of the ERA 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 The term “protected disclosure” is defined in Section 43A of the Act as a “qualifying disclosure” (as defined in Section 43B) which is made in accordance with sections 43C to 43H. A qualifying disclosure means “any disclosure of information which, in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following:-  
  
“(a) that a criminal offence had been committed, is being committed or is likely to be committed”,  
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which it subject; ...or  
(f) that information tending to show any matter falling within any of the above paragraphs has been, or is likely to be, concealed.
51. In considering the public interest test, the workers belief that the disclosure was made in the public interest must be objectively reasonable but the disclosure does not need to be in the public interest per se. in Chesterton Global Ltd and anor v Nurmohamed 2017 EWCA Civ 979 the Court of Appeal said that a worker’s reasons for making a protected disclosure are not strictly relevant to the legal issues. While the worker must have a genuine and reasonable belief that the disclosure is in the public interest, that does not have to be their predominant motive in making it.
52. A disclosure must involve the provision of information in the sense of conveying facts. It is not enough simply to make an allegation. Cavendish Munro Professional Risks Management Ltd v Geduld 2010 IRLR 38. However in Kikraine v London Borough of Wandsworth EAT/0260/15 Langstaff J said “I would caution some care in the application of the principle arising out of Cavendish Munro. The dichotomy between “information” and “allegation” is not one that is made by statute itself. It would be a pity if Tribunals were too easily seduced into asking whether it was one or the other, when reality and experience suggest that very often information and allegation are intertwined.”
53. Guidance on how to approach the question of whether a protected disclosure has been made was given in Blackbay Ventures Ltd v Gahir 2014 IRLR 416.

54. The burden of proof is on the employer (unless the employee does not have two years' service). In Kuzel v Roche Products Limited 2008 IRLR 530 the Court of Appeal said this:-

*"The employer knows better than anyone else in the world why he dismissed the complainant. Plus, it was clearly before Roche to show that it had a reason for the dismissal .....When Dr Kuzel contested the reasons put forward by Roche, there was no burden on her to disprove them, let alone positively prove a different reason.*

*I agree that when an employee positively asserts that there was a different and inadmissible reason his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that in order to succeed in an unfair dismissal claim the employee has to discharge the burden of proving that dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.*

*... it will then be for the Employment Tribunal to consider the evidence as a whole and to make findings of primary facts on the basis of direct evidence or by reasonable inferences ... the Employment Tribunal must then decide what was the reason, or principal reason, for the dismissal of the Claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the Tribunal that the reason was what he asserted it was, then it is open to the Tribunal to say that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the tribunal must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so.*

52. Following Kuzel the following analysis of the burden of proof applies:-
- a. Has the Claimant shown that there is a real issue as to whether the reason put forward by the employer was not the true reason?
  - b. If so, has the employer proved his reason for dismissal?
  - c. If not has the employer disproved the section103A reason advanced by the Claimant?
  - d. If not the dismissal is for the 103A reason.

#### Unfair dismissal

53. It is for the Respondent to show that the reason for the Claimant's dismissal is a potentially fair reason for dismissal within the terms of section 98(1). Misconduct is reason which may be found to be a potentially fair reason for dismissal.
54. If the Respondent can establish that the principal reason for the Claimant's

dismissal was a genuine belief in the Claimant's misconduct, then the Tribunal will go on to consider whether the dismissal was fair or unfair within the terms of section 98(4). The answer to this question "depends on whether in the circumstances (including the size and administrative resources of the employers undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal and shall be determined in accordance with equity and the substantial merits of the case."

55. In cases of misconduct employers are not required to ascertain beyond reasonable doubt that the employee is guilty of the misconduct charged. However the employer must establish its belief in that misconduct on reasonable grounds and after reasonable investigation and conclude on the basis of that investigation that dismissal is justified (British Home Stores v Burchell [1980] ICR 303.) The Claimant must also be given a fair hearing.
56. In London Ambulance Service NHS Trust v Small [2009] EWCA Civ 220, [2009] IRLR 563, [2009] ALL ER (D) 179 the Court of Appeal reaffirmed that in unfair dismissal claims, the function of a tribunal is to review the fairness of the employer's decision, not to substitute its own view for that of the employer. The question is whether the decision to dismiss fell within "the band of reasonable responses for an employer to take with regard to the misconduct in question". That is the test and the fact that another employer might have been more lenient is not the point. However, it is not the case that nothing short of a perverse decision to dismiss can be unfair within the section, simply that the process of considering the reasonableness of the decision to dismiss must be considered by reference to the objective standards of the hypothetical reasonable employer and not by reference to the tribunal's own subjective views of what it would have done in the circumstances. (see Post Office v Foley 2000 IRLR 827.) The band of reasonable responses test applies as much when considering the reasonableness of the employer's investigation as it does to the decision to dismiss (Sainsbury's Supermarkets Ltd v Hitt 2003 IRLR 23.)
57. The ACAS Code of Practice on disciplinary and grievance procedures provides guidance which tribunals must take into account in deciding whether a dismissal is fair or unfair. It sets out six steps that employers should normally follow when handling disciplinary matters. These are to
  - a. Establish the facts of each case
  - b. Inform the employee of the problem
  - c. Hold a meeting with the employee to discuss the problem
  - d. Allow the employee to be accompanied
  - e. Decide on appropriate action
  - f. Provide the employee the opportunity to appeal.

A failure to follow the code is relevant to the reasonableness of the decision to dismiss and will trigger an uplift in the compensation payable if the employee is successful (section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992.

Submissions and conclusions

Did the Claimant make a protected disclosure?

- 71 For the Respondent, Ms Montaz submitted that the Claimant had not made a protected disclosure either on 22<sup>nd</sup> March 2016 or in October. He had not disclosed “information” in the Cavendish Munro sense, as what he had disclosed was very vague and he was not suggesting that the Claimant was taking money from the charity. She also submitted that the Claimant did not have a reasonable belief that Mr. Perkins had failed, was failing was likely to fail to comply with any legal obligation and the disclosure was not made in the public interest.
- 72 The Claimant disclosed on 22<sup>nd</sup> March, on 23<sup>rd</sup> May and again on 17<sup>th</sup> August that he had concerns that Mr. Perkins was carrying out, and invoicing for private work done through his own company (Show LX) while working in, and being paid by, the theatre and that he was personally receiving money that should be received by the theatre. I am satisfied that this was “information” rather than a mere allegation. There was however no disclosure of information in October (during the Investigation meeting) as alleged by the Claimant – see paragraph 49 above.
- 73 Was that a disclosure of information which the Claimant reasonably believed was in the public interest and tended to show that Mr. Perkins might be in breach of a legal obligation (i.e. his contractual obligation to the Respondent) and/or that a fraud might have been committed?
- 74 It was the Claimant’s evidence that he arrived at the belief that there was wrongdoing by Mr. Perkins because (i) Mr. Perkins was working on his day off in the theatre wearing a Show LX T-shirt and (ii) a member of staff from the school concerned told him that the Claimant was charging the school for “extras in the theatre”. It appeared to me that the Claimant had arrived at that belief on slim evidence and I questioned whether his belief was genuine (and therefore reasonably held) given its proximity to the complaints meeting on 16<sup>th</sup> March. Was he in fact aware that Mr. Perkins had permission to work for Show LX and that he only provided services which were not provided by the theatre?
- 75 This question was not put to the Claimant and on balance I accept that he did genuinely hold a belief that this information *tended* to show that a criminal offence had been committed or that Mr. Perkins had failed to comply with a legal obligation to which he was subject. I also find that it was in the public interest to disclose it. (This was not a case where the disclosure related only to a breach of the Claimant’s contract but which potentially related to a crime.) It may well have been that the Claimant was at this stage motivated by a desire to get Mr. Perkins dismissed but, as was said in Chesterton Global Ltd the worker’s reasons for making a protected disclosure are not strictly relevant to the legal issues at this stage (but would be relevant to remedy-sections 49(6A) and 123(6A).)

What was the principal reason for the Claimant’s dismissal?

- 76 Having found that there was a protected disclosure the next question was what was the principal reason for the Claimant's dismissal? Applying the analysis in Kuzel I am satisfied that the Claimant has shown that there is a real issue as to whether the reason put forward by the employer was the true reason. Accordingly it is for the employer to prove the reason for the dismissal and to disprove the section 103A reason advanced by the Claimant.
- 77 The Claimant's case was that he was dismissed because he had blown the whistle on Mr. Perkins and also in part because he spoken out against the acceptance of a donation to the Respondent from the Church of Scientology. It is the Respondent's case that the Claimant was dismissed for gross misconduct namely the matters that were the subject of the disciplinary hearing.
- 78 Was the principal reason for the Claimant's dismissal that he had blown the whistle on Mr. Perkins? This has been a difficult case not least because the Respondents witnesses (with the exception of Mr. Whittaker) were less than forthcoming in evidence. Nonetheless, having regard to all the evidence, I do not find that the Claimant was dismissed for blowing the whistle on Mr. Perkins. When the allegations were first raised the Claimant was told to investigate. In his absence Mr. Reeves and the trustees concluded that Mr. Perkins had permission to carry out additional work for customers of the theatre and that the allegations were groundless (110).
- 79 I do not accept that the Claimant was dismissed because of his expressed disapproval of the donation given to the Respondent by the Church of Scientology. The trustees had resolved to accept that donation in a board meeting of 28<sup>th</sup> June 2016 and although the Claimant was known to be against it, it was not a matter on which he had any particular say or influence.
- 80 Mr. Whittaker's evidence was that the Claimant's enforced absence on sick leave in June 2016 highlighted shortcomings in his performance after Mr. Perkins and Ms Holden and then Ms Stavenden took charge. I accept that evidence. It is supported by the evidence of the 16<sup>th</sup> March meeting between the Claimant, Mr. Perkins Ms Lynch White and Mr. Sumner. The staff had been trying to contact the trustees to further their complaints about the Claimant but had been prevented from doing so by the Claimant. Once the Claimant was off sick I have no doubt that Mr. Perkins (and possibly other staff) had the ear of Mr. Reeves and the trustees and made those criticisms plain. As Mr. Whittaker said in evidence "Mr. Jenkins lost the dressing room with the staff, Mr. Perkins, the hirers and the trustees."
- 81 I find that the principal reason for the Claimant's dismissal was conduct and that this is a potentially fair reason for dismissal.

Was the dismissal fair?

- 82 The Burchell test requires the employer to establish its belief in an employee's misconduct on reasonable grounds and after reasonable investigation and to afford the Claimant a fair hearing and a chance to state his case. In this case

there were difficulties with the enquiry undertaken once the Claimant had provided his explanation. Mr. Hodges did not determine if the Claimant's explanation for ticking the "use own media" box was correct, consider the Claimant's explanation that Mr. Perkins was the IT administrator or consider the dates of the bitTorrent downloads.

83 However, and more fundamentally, I have also concluded that the Claimant did not have a fair hearing and that as early as 5<sup>th</sup> August, when the first letter was sent to the Claimant asking him to attend an investigation meeting, the Board had decided that the Claimant's employment could not continue and that thereafter they were looking for reasons to justify the decision that had already been made. The incident that occurred on 28<sup>th</sup> July made it clear that the relationship between the Claimant and Mr. Perkins had broken down irretrievably and, given the issues that had emerged, the Respondent opted to back Mr. Perkins.

84 There are a number of reasons why I have concluded on the evidence that this was the case. First there was the constantly shifting nature of the allegations against the Claimant. The first letter sent to the Claimant on 5<sup>th</sup> August made an allegation about the installation of Adobe products without purchasing the required copyright. However no action was taken in relation to this against Mr. Perkins until March 2017 (when he was given a written warning to be disregarded after 3 months.) This is particularly surprising given that Mr. Perkins was the administrator for IT purposes at the Respondent. The 3<sup>rd</sup> allegation about the failure to action correspondence on an investment was never taken further and on that basis I have concluded was unlikely to amount to misconduct.

85 A 2<sup>nd</sup> letter sent on 9<sup>th</sup> August included new charges (all of which related to matters which would have been known about on 5<sup>th</sup> August).

85.1 An allegation that the Claimant was conducting work whilst signed off sick, specifically that he had (i) ordered and worked on a brochure and (ii) had posted on Facebook for Chequer Mead. When I asked Mr. Hodges what was the difficulty with this he was unable to give me a satisfactory answer. Although this allegation did not proceed to a disciplinary hearing, I would have expected a Respondent who was genuinely concerned about such conduct to have been able to explain why it had been the subject of the charge in the first place.

85.2 An allegation the Claimant had failed to follow board direction in relation to the investigation and suspension of Mr. Perkins. The charge did not make clear what specific board direction was being referred to or when he had failed to follow it and there was no recognition that the Claimant had had a heart attack on 4<sup>th</sup> June.

85.3 The allegation about the events of 28<sup>th</sup> July and that there had been a "physical altercation" notwithstanding Ms Stanton's account that there was no physical contact and the fact that Ms Scullion had not

yet provided her account of the event. There was no suggestion at any point that Mr. Perkins should be subject of an investigation as to his part in the events of that day. Despite questions to the Respondent's witnesses I remained unclear why the Claimant was being investigated for going backstage whilst off sick. He was at the time still a member of staff.

- 86 In October additional matters were added including an additional charge relating to an "alleged text message which could bring the business into disrepute" about which the Tribunal heard no further details and the bitTorrent matter. As to the bitTorrent matter there was no consideration of when the material had been downloaded. In my view there was no proper analysis because by then the outcome was predetermined.
- 87 As well as the shifting nature of the allegations, documents in the bundle suggest that the outcome of the process was predetermined. I refer in particular to
- 87.1 an email from Mr. Cole on 9<sup>th</sup> November 2016 (304A) which says "None of us wants to go down the disciplinary route as that will end in dismissal"; and
  - 87.2 an email from Mr. Cole of 10<sup>th</sup> November "during evening of 8<sup>th</sup> November, Nick and I had a conversation to the effect that we would invite PJ into the ECM firstly for grievance hearing and then after a small break and at the disciplinary hearing with its predicted outcome. It was noted that during the break PJ could be approach and asked if he wanted to discuss a compromise agreement on our terms."
- 88 Mr. Perks' evidence was that at a meeting of the trustees on 16<sup>th</sup> November, a row broke out between the trustees as to whether the Claimant should be offered a compromise agreement or "go straight to dismissal". (The October meeting had concluded that the Claimant be offered a compromise agreement.) Mr. Cole was of the view that the Claimant should be offered a compromise agreement while Mr. Reeves was of the opinion that the Claimant could be summarily dismissed without any cost to the Trust. Although the minutes record that the "committee accepted the advice from Peninsula that no compromise agreement should be offered, if the decision was to dismiss" I am satisfied that there was never any issue as to whether or not the Claimant would go -- the debate was simply whether he would be dismissed or offered money to go.
- 89 My conclusion is supported by Mr. Hodges inability to explain clearly how he had reached the conclusions that he had – other than to say that they had acted on the advice of Peninsula.
- 90 Mr. Whittaker's evidence was also that at the appeal stage it would not have been practicable to reinstate the Claimant and that the relationship had completely broken down. Mr. Whittaker said that his personal experience of working with the Claimant in 2016 (acting as a volunteer rather than a trustee) had not left him with a good impression - it "was almost impossible to make

progress” and that the Claimant procrastinated. Mr. Perkins on the other hand commanded the respect of the trustees who was regarded as a talented and hard-working member of staff and “we were lucky to have him”.

91 For those reasons I conclude that the Claimant was dismissed for general matters of concern that had come to light before 5<sup>th</sup> August, including the failure to secure a DVD from Filmbank, the failure to keep the trustees informed about the outcome of the Alits investigation and the breakdown in the relationship with Mr. Perkins. Thereafter the Respondent was effectively going through the motions and no longer had an open mind. I accept that there were genuine matters of concern and that the Claimant was on a final written warning but the process followed was one of form over substance and was unfair.

92 A remedy hearing is listed for 13<sup>th</sup> February 2018. Issues will arise both as to Polkey (what would have happened had a fair process been followed) and whether compensation should be reduced to reflect contributory conduct on the part of the Claimant. I considered whether I should make those findings in this Judgment but concluded that the parties should have an opportunity make submissions on these issues in the light my findings above. Those issues will be considered at the remedy hearing.

93 Directions for the remedy hearing

93.1 The Claimant to provide an updated schedule of loss and further disclosure of any earned income obtained since his dismissal and his continuing efforts to find alternative employment no later than 22nd January 2108.

93.2 The parties shall liaise to prepare a list of issues relevant to remedy to be agreed and sent to the Tribunal on or before 29<sup>TH</sup> January 2018.

93.3 The parties shall liaise to prepare a joint bundle of documents relevant to remedy, primary responsibility for that preparation resting with the Respondent. The Respondent shall send the prepared remedy bundle to the Claimant on or before 5<sup>TH</sup> February 2018 and bring a further 3 copies to the remedy hearing 2 of which will be for the Tribunal and the witness table.

93.4 Witness statements relevant to remedy shall be exchanged no later than 12<sup>th</sup> February 2018.



- 94 The parties are encouraged to liaise to explore whether the remedy can be settled without the need for a further hearing, and if they are successful to inform the Tribunal at the earliest opportunity so the date can be vacated.

-----  
Employment Judge F Spencer  
13<sup>th</sup> December 2017