# EMPLOYMENT TRIBUNALS

**Claimant:** Samuel Wright

**Respondent:** Elizabeth Horne trading as WrightChoiceCare Agency

**HELD AT:** Hull **ON:** 12 and 13 March 2018

**BEFORE:** Employment Judge D N Jones

**REPRESENTATION:**

**Claimant:** Mr J Ellis, Counsel
**Respondent:** In person

# JUDGMENT

1. The claimant was wrongfully dismissed.

2. The claimant was unfairly dismissed.

3. The respondent made unauthorised deductions from the wages of the claimant in failing to pay him five days' holiday leave which were untaken at the termination of his employment and shall pay to him the sum of £460.27 [5 days at £92.05] in respect of such unauthorised deductions.

4. The respondent shall pay to the claimant damages of £1,907.59 for the breach of contract in failing to give him his contractual notice (such sum being one month's pay less one week's mitigating earnings).

5. The respondent shall pay to the claimant compensation in respect of the unfair dismissal of £13,049.09 being a basic award of £978 and a compensatory award, after adjustment for a failure reasonably to comply with the ACAS code of practice, of £12,071.09. The award is particularised in the attached schedule.

# REASONS

1. WrightChoiceCare Agency is a business which was set up at the beginning of 2014 by Mrs Horne, the respondent, Mr Wright, the claimant and Mrs Wright, the claimant's wife. It provides care to adults living in the community, in East Yorkshire, principally in and around Selby. It was agreed that Mr and Mrs Wright would be middle managers and that Mrs Horne would own and run the business. At that time Mr and Mrs Wright had moved to Yorkshire from Suffolk. Mr Wright had experience working with people with learning disabilities and special educational needs.

2. The claimant was employed as a Care Assessment Officer. He was issued with written particulars of employment which he signed on 1 May 2015. It provided that he was to be paid a monthly salary of £2,800 and work for 35 hours per week. His employment was stated to have started on 28 July 2014.

3. In April 2017 Mr and Mrs Wright separated. Mr Wright moved to the house of a neighbour, a family friend and carer employed by the agency who, in turn, moved into the matrimonial home to assist. The property was situated in the same street as the matrimonial home. Mr Wright moved to live in Otley with his new partner in early May. This is 35 miles from Whistow.

4. Mrs Horne and Mrs Wright had concerns as to whether or not Mr Wright would be able to discharge his duties as one of the managers, given the distance of his new home from Whistow. The arrangement had been that Mrs Horne and Mr Wright would travel to the more far flung homes of their service users, so that the other carers, of whom there were about ten, would cover principally the Selby and Whistow region.

5. Mrs Horne drafted two forms of alternative particulars of employment to be discussed with Mr Wright. The first proposed that he work as a Home Carer and Assessor at the rate of £10 per hour, for a minimum of 40 hours per week. The second proposed retaining Mr Wright as a middle manager and paying him a salary of £33,600 per year, twelve monthly payments of £2,800, but imposed a minimum requirement of 45 hours work. It provided that travel, emergency and staff sickness cover would not be included in those 45 hours, and they would not be paid as overtime. Furthermore, unsociable working hours including at least three weekends out of four were to be included. The maximum working hours were not to be measured, as the claimant was to hold the additional obligation as management to the agency. This included being on call and being able to attend clients at any time of day within sixty minutes of notification of an emergency, when not booked on a holiday or at a pre-scheduled event. This, last, specific provision was to address the concern that he was now living a significant distance away from the work base of the business. Nevertheless, Mr Wright was confident that he would be able to travel to Whistow within an hour, from Otley.

6. Mrs Wright left these two draft particulars of employment on her desk in the matrimonial home. Mr Wright saw them when he was visiting, the couple having young children. He was taken aback by what was being proposed. He had no

forewarning of Mrs Horne's intention to change the employment relationship or vary his terms of employment.

7. Mrs Horne wrote to all staff to inform them of the separation of her daughter and son in law. She reassured them that this would not affect the business. Mrs Horne also wrote to the service users in similar terms. She had consulted with Mr Wright about these letters and he agreed that these communications were appropriate. He added in his message that he was sorry it had come to that.

8. On 7 May 2017 Mrs Horne saw Mr Wright at work and noticed he was not wearing uniform. She sent him an email, entitled "notice" and informed him that it was not acceptable and unprofessional. She said she expected him to wear the correct uniform at all times, and if he did not have any spare uniform he should ask. Mr Wright replied by email and stated that she could just have asked and not put it down in an email. In addition, Mr Wright telephoned Mrs Horne and left her a message on her answer phone. According to Mrs Horne, Mr Wright's tone was aggressive and derogatory. She said he shouted and accused her of picking on him and ended the call, saying "right, if that's the way you want to play it". Mrs Horne rang her daughter and played her the message. It has not been retained.

9. The following morning Mrs Horne sent an email to the claimant and informed him she wanted to keep the business separate, as she was sure he did. She said she was sorry he felt the way he did but trusted he would not leave the company as he was a valued part of it. She said he needed to be positive and pro-active and wear his uniform. She said she and her husband cared about him and would like to see it work. She said if he wished to talk about "non-work stuff" her husband could visit him for a coffee.

10. After Mr Wright had seen the draft contracts he attended at Mrs Horne's home. Mrs Horne said that he confronted her and her husband and bellowed, demanding to know why she and Mrs Wright had met to discuss these matters without him. She informed him that she was considering re-writing the contract to suit him better. She says he was accusing and demanding and it took him a while to settle down.

11. On 12 June 2017 Mrs Wright had a holiday, leaving Mr Wright and Mrs Horne to deal with all managerial issues. Upon her return, after a fortnight, Mrs Horne went on holiday for two weeks leaving Mr and Mrs Wright in charge. Before she left she sent a text to four of her staff asking them to email her with any comments or concerns they or clients had about Mr Wright. She stated that she understood it was difficult but it was necessary for her to collect evidence. Emma Moran replied on 22 June 2017. She expressed a concern that she had been unable to contact Mr Wright on 13 June, when she needed managerial approval in respect of her placement on the rota. She also said that he had not provided personal care for a client she had attended recently in his company. She said this had happened twice.

12. Another employee, Tanya Jones replied stating that she had been given a job which required her to undertake heavy lifting, which created a problem for her. She said that when she had spoken to Mr Wright about the matter he had been unhelpful saying the client had not needed lifting when he had attended. She said she felt

hurt at the way she had been spoken to. Susan Buckle also replied. She said she had noticed a change in Mr Wright's attitude, manner and appearance. She said he had become unreliable, turning up at the wrong time for calls and that he was less interested in clients. Natalie Bollington replied and complained that there was no one for her to speak to on 21 June when she called a manager from a client's address. She said that the clients had expressed their own unhappiness at Mr Wright's behaviour.

13. Mrs Horne had also spoken to a number of other staff and some clients. Mr A, one of the service users wrote a statement of 16 June 2017 expressing concerns about Mr Wright. He described how he was untidy and not in uniform when he had attended. He described an argument and shouting between Mr Wright and Mrs Wright when they had attended at his home. He said Mr Wright shouted and screamed.

14. Two other clients submitted short statements dated 17 June 2017 expressing concerns, as did Mrs Hayes. On 24 June 2017 L, another service user, submitted a written statement stating that Mr Wright's attitude had deteriorated since May. He described Mr Wright as having arrived dishevelled and distracted by other matters.

15. Mrs Horne spoke to ACAS to seek advice on how to deal with matters. She then wrote to Mr Wright on 27 June 2017, on her return from holiday, requiring him to attend a disciplinary hearing for gross misconduct in the workplace. There were five categories of allegations: insubordination and failing to obey reasonable management instructions in respect of eight acts, damaging the agency's reputation in respect of nineteen acts, neglect of duty in respect of twenty acts, bullying, harassing and hostile behaviour within the workplace in respect of twenty acts and trespass in respect of one act. She stated that some of the acts were included in more than one of the descriptions of behaviour and that they had occurred from 22 May 2017. She said a concise copy of the evidence would be provided on 3 July, the meeting scheduled to take place on 7 July. She required Mr Wright to provide any evidence he wished to produce 48 hours before the hearing. She offered him the opportunity to be accompanied by a team member. She informed him that if he did not wish to proceed with the hearing he could resign and complete four weeks notice, the end of his employment then being 25 July 2017. She informed him that if he failed to acknowledge receipt of the letter he would relinquish his right to a fair hearing and would be committing serious insubordination which would lead to his summary dismissal.

16. Having received the email Mr Wright rang Mrs Horne. She recalls the call as an aggressive and threatening one. She said Mr Wright asked for proof of the allegations and when she asked him to return the form, she says he said "like fuck I will" and hung up.

17. Mrs Horne took further advice from ACAS. She was concerned about revealing the identity of those who had made allegations for fear that there may be repercussions. Some of those were vulnerable service users and others were members of staff who reported to Mr Wright.

18. She followed up the phone call with a letter of 27 June 2017 recording that she felt that the call had been aggressive, threatening and insubordinate. She informed Mr Wright that she had been informed by ACAS that by law she was not at liberty to give him any further details until the date of the hearing. She had been advised that good practice would involve sending a summary. She attached to the letter a list which included the incidents, which were identified by a letter of the alphabet (A to Y), the date of the incidents, the time they took place and how they were communicated to Mrs Horne. The list set out the incidents under each heading of alleged gross misconduct.

19. On 28 June 2017 Mrs Horne wrote to Mr Wright and re-scheduled the meeting to be heard on 3 July 2017.

20. On 30 June 2017 Mrs Horne wrote again to the claimant to remind him of the hearing and to inform him that he must provide any information he wished the panel to consider by 1 July 2017. She stated that although he was at present suspended, he was still under contract and expected to follow reasonable management instruction [in fact he had not been suspended but was on annual leave by this time]. She informed him that a failure to acknowledge receipt would relinquish his rights to a fair hearing and be an act of insubordination which could lead to summary dismissal.

21. Mr Wright responded on 30 June 2017 and asked for a postponement of the hearing so that he could be accompanied by a union representative. He informed Mrs Horne that this would take four weeks, whilst he joined a union. Mrs Horne replied on 30 June 2017. She stated that she did not have a legal obligation to wait four weeks to hold a hearing to enable Mr Wright to join a union. She provided a summary of the allegations. Mr Wright received only the first of a seven page summary. It only identified the acts of insubordination.

22. In the one page of allegations which was sent, there were nine identified incidents or series of incidents. The first, on 24 May 2017, concerned, a failure of Mr Wright to wear uniform at work and leaving an unprofessional voicemail in response. The second, on 28 May 2017, concerned a failure of the claimant to update a care plan of a service user, the wrong care plan having been updated. It was said this was still incomplete by 22 June 2017. The third concerned a failure to bring a service user's notes to the office. His response was alleged to have been that he did not know where they were or to blame his wife for moving things around the house. Mrs Horne had asked for backdated reports to be put on the planner and she said that by 17 June there had been no response. The fourth, on 31 May 2017, concerned the instruction from Mrs Horne to Mr Wright to ensure he stayed close to base during which the absence of Mrs Horne and Mrs Wright. Mrs Horne did not believe he had complied. The fifth, between 5 and 16 June 2017, concerned a change on the rota requested by Mrs Horne, to which Mr Wright replied he was sticking to the rota Mrs Wright had written and would not do extra hours. He was said to have told Mrs Wright to stop changing the rota. The sixth, on 21 June 2017, concerned an attempt made by a staff member to contact Mr Wright when he was on duty as a manager. Mr Wright had not replied to the dismay of the member of staff and the concern of the service user's family. The seventh related to various incidents in which it was alleged the claimant had refused to work in the evenings and on

morning shifts on the same day if he had an early shift on the following morning. The eighth, of various dates, concerned a failure of Mr Wright to update a client's care package. The ninth concerned the phone call of 27 June 2017 after Mr Wright had received the notice of the hearing. He was alleged to have been aggressive and threatening and concluded the call by saying "like f' I will".

23. The claimant attended the disciplinary hearing on 3 July 2017. It was conducted by Mrs Horne and Mrs Wright. A recording of the hearing was permitted by Mrs Horne. A transcript was produced to the Tribunal. Mr Wright was asked about each allegation and provided a response.

24. Mrs Horne and Mrs Wright discussed the matter following the meeting and concluded that Mr Wright was guilty of gross misconduct. It was determined that he should be dismissed without notice. This was communicated in a letter of 3 July. The letter listed the nine acts by reference to their letter, A, B, C, D, E, F, G, H and Y. (A) was said to cover four categories of gross misconduct, insubordination, neglect of duty, damage to company reputation, harassment and hostility, (B) gross misconduct, insubordination, neglect of duty, (C) gross misconduct, insubordination, neglect of duty, (D) an act of insubordination, neglect of duty and damage to company reputation, (E) an act of insubordination, neglect of duty, damage to company property, harassment and hostility, (F) an act of insubordination, neglect of duty, damage to company property, harassment and hostility, (G) an act of insubordination, neglect of duty, harassment and hostility, (H) an act of insubordination, neglect of duty, damage to company reputation and (Y) harassment and hostility. The letter stated:

> "*the panel were alarmed at the verbally aggressive and intimidating behaviour you displayed throughout the hearing. The panel believes this fundamentally shows you have completely undermined the relationship of trust and confidence between the employee and employer thus making it untenable to move forward together as a team*.
> *The panel generally believes and has reasonable grounds for believing, that you, Samuel Wright did commit gross misconduct as detailed above*".

He was informed of a right of appeal.

25. On 5 August 2017 the claimant wrote a letter of grievance. He complained that the disciplinary procedures were not fairly dealt with or in line with company policy or the ACAS guidelines. He stated he had not been offered proper written notice of the allegations within an acceptable time frame nor given the opportunity to be accompanied by trade union representative.

26. Mrs Wright replied on 9 August 2017. She stated that there was nothing to uphold in the stated grievance and as it was not a request for an appeal meeting the panel's decision stood. Mr Wright did not respond.

## The Law

Unfair Dismissal

27. By Section 98(1) of the Employment Rights Act (ERA 1996) it is for the employer to show the reason for the dismissal and that it falls within a category recognised in Section 98(1) or (2), one of which relates to conduct, see Section 98(2)(b).

*28.* Under Section 98(4) of ERA "*where the employer has fulfilled the requirements of Section (1) the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –*

> *(a) Depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employer; and*
>
> (b) *Shall be determined in accordance with equity and the substantial merits of the case.*

29. There is no burden of proof in respect of the analysis to be undertaken under Section 98(4) of the ERA. Material considerations in a case where the reason for the dismissal was conduct, will include whether the employer undertook undertake a reasonable investigation and formed a reasonable and honest belief in the misconduct for which the employee was dismissed[1]. It is not for the Tribunal to substitute its view, but rather to review the procedures against the statutory criteria and, if the process or decision fell within a reasonable band of responses the decision will be regarded as fair[2]. The reasonable band of responses in which an employer may act includes not only the determination of sanction but embrace the procedure as a whole including the investigation[3]. A fair investigation will involve an employer exploring both exculpatory avenues of enquiry as well as incriminatory ones[4].

30. By Section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, in any proceedings before an Employment Tribunal a code of practice issued by ACAS is admissible and any provision in the code which appears to be relevant to any question arising in the proceedings should be taken into account in determining that question.

31. The ACAS Code of Practice on Discipline and Grievance Procedures 2015 is one such code. It must be read in full but a number of provisions are particularly pertinent. By paragraph 6, in misconduct cases, where practicable, different people should carry out the investigation and the disciplinary hearing. By paragraph 9, if it is decided that there is a disciplinary case to answer, the employer should be notified

[1] BHS v Burchell [1980] ICR 303.
[2] Iceland Frozen Foods v Jones [1983] ICR 17.
[3] J Sainsbury PLC v Hitt [2003] ICR 111.
[4] Salford Royal NHS Foundation Trust v Roldan [2010] ICR 1457.

of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its consequences to enable the employee to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification. Under paragraph 12, at the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or an employee intends to call relevant witnesses they should give advance notice that they intend to do this.

32. If a claim of unfair dismissal is established, the Tribunal shall make a basic and compensatory award, if no order for re-instatement or re-engagement is sought, see section 118 of the ERA. Formula for calculating awards is contained in Section 119 and Section 123 of the ERA.

33. Under section 122(2) of the ERA, where the Tribunal considers that any conduct of the complainant before the dismissal (or where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, it shall reduce or further reduce that amount accordingly.

34. Pursuant to Section 123(1) of the ERA, the amount of the compensatory award should be such amount as the Tribunal considers just and reasonable in all the circumstances having regard to the losses stated by the claimant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer. If the dismissal is unfair for procedural reasons, the Tribunal may reduce or extinguish any compensatory award if it is just and equitable to do so if the Tribunal concludes that the claimant would or might have been dismissed had the procedures been fair[5].

35. Under Section 123(6) of the ERA, where the Tribunal finds that the dismissal was to any extent caused or contributed by any action of the complainant it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to the finding.

**Wrongful Dismissal**

36. An employee will be entitled to contractual notice, alternatively reasonable notice by implication, of the termination of his employment. In certain circumstances such notice is not required if the employee commits a fundamental breach of contract, otherwise known as a repudiatory breach. Gross misconduct is one such category.

[5] Polkey v A E Dayton Services Ltd [1988] ICR 142.

## Discussion and Conclusions

### Unfair Dismissal

37. Mr Wright contends that Mrs Horne and Mrs Wright had no genuine belief in any act of misconduct he was said to have perpetrated. He suggests that the real reason for the dismissal was because of the marital breakdown. He draws attention to the draft changes to his contract which he says were prepared with a view to driving him out.

38. I reject that submission. I am satisfied that Mrs Horne and Mrs Wright both believed the claimant had committed acts of misconduct. They believed that the claimant's attitude was unacceptable and that he had been rude to Mrs Horne in a telephone message and a telephone call and upon attendance at her home. They also believed that his conduct with the clients had fallen short and that he was not acting in accordance with his duties as a manager, either by not being on call when requested to do so or providing notes to Mrs Horne on request or updating a client's care planner. The respondent has established that the reason for the dismissal within section 98(2)(b) of the ERA.

39. It is therefore necessary to consider whether, a potentially fair reason having been established, dismissal for that reason was reasonable in all the circumstances of the case.

40. I am not satisfied that Mrs Wright and Mrs Horne reached a reasonable belief in the claimant's misconduct and nor am I satisfied that the investigation was reasonable. Moreover, the procedure could not conceivably have been regarded as impartial and fair by an independent and informed observer.

41. I am required to have regard to the size and administrative resources of the undertaking, in making this determination. This was a small business. The three managers were part of the same family. There were only ten other employees. None of those held a managerial position. It was inevitably a difficult task to find an individual to conduct the disciplinary hearing, internally, who could be regarded as independent. Mrs Wright and Mrs Horne had both made, or been witnesses to, allegations against Mr Wright which formed the basis for many of the acts of gross misconduct. For them to have been the complainants, or witnesses to events and also the individuals who decided whether such contested events happened or not created an invidious situation. Mrs Horne and Mrs Wright were hardly likely to disbelieve their own allegation.

42. Nevertheless, in small businesses it is sometimes necessary to sacrifice some of the safeguards which are usually regarded as sacrosanct, such as that one must not be a judge in one own's cause, a fundamental tenet of natural justice. I would not therefore have regarded the proceedings as having been unfair if either Mrs Wright or Mrs Horne had felt there was no alternative for one or other of them to have conducted the disciplinary hearing. Many employers would have thought it appropriate to appoint an external adviser to conduct the proceedings. I remind myself, however, that simply because it would be reasonable for an employer to adopt one such approach, does not lead to the conclusion that it was unreasonable

for this employer, with its limited resources, to take another and to have used one of the two remaining managers to determine the proceedings with all the conflicts that involved. However, for both Mrs Horne and Mrs Wright to have conducted this disciplinary hearing was unreasonable and unfair. For Mr Wright to have had to face two of his accusers, one of whom was his estranged wife and the other his mother-in-law, could not possibly have given the appearance of a fair hearing. A reasonable employer would have recognised that was oppressive and excessive. Whilst a decision for one of them to have conducted the hearing would have fallen within a reasonable permissible range of decisions, for them both to have handled the matter was not.

43. It was unreasonable for Mrs Horne to have conducted the investigation as well as to have conducted the disciplinary hearing. This is cautioned against in the ACAS Code. It was practicable to have someone else conduct the investigation, either in the form of Mrs Wright, or by using another family whose advice had been sought informally and who had some experience in human resources.

44. More fundamentally, I am not satisfied this was a fair hearing. Having heard the accounts put forward by Mrs Wright and Mrs Horne, I find neither of them fairly and dispassionately considered the explanations put forward by Mr Wright to the allegations. For example, to the sixth allegation that he had not responded to a call from a care worker when he was said to be on-call, Mr Wright responded to say that he was not the manager on the rota for that night and he did not have the on-call phone. He said Mrs Horne was the on duty manager for that night. In these proceedings a generic message to all staff was disclosed for the date in question, which informed all staff that Mrs Horne was at the Sheffield Arena and they should contact Mr Wright directly in the event of an emergency. Mrs Horne had not directly contacted Mr Wright that evening, but had assumed he would read the message sent to all. The generic message was sent within an hour of the call the care worker made to Mr Wright. He was unaware he had been substituted as on duty on-call manager. He would only have access to Mrs Horne's message by email. Because he was at a child's birthday party he did not have access to his emails. No message had been left on his mobile phone by the care worker who had been trying to contact him. This allegation was not further investigated, nor was Mr Wright's explanation further explored by examination of the rota and the precise circumstances which led to his being substituted as the managerial port of call in emergencies. Had Mr Wright's explanation being taken responsibly and seriously, his culpability for the events that night would have been put into a very different context; not one a reasonable employer could have regarded amounted to gross misconduct, or even misconduct.

45. I regarded this as an instance of the attitude of mind of Mrs Horne and Mrs Wright, which was to seek any cause to justify terminating the employment of Mr Wright regardless of whether it was well founded or not[6]. This impression is supported by a number of text messages which have been disclosed. For example on 24 May 2017, shortly after Mr Wright had discovered the proposal to change his contract of employment, Mrs Horne sent a text to her daughter to inform her that she

[6] That is not to say I do not accept they had persuaded themselves of his culpability, which is why I have accepted that 'conduct' was the reason for the dismissal. The test of the reason for the dismissal is a subjective one. The test under Section 98(4) is governed by objective considerations.

was aware Mr Wright would be twisting things, that she was aware he could not be sacked as he had not broken his contract, that she would laugh and couldn't wait to hear all about the work he had put in and she was not upset her daughter had sent him packing. The message she sent to four employees asking for any comments or concerns they or clients had about Mr Wright, must be seen in the context of these earlier observations; namely dismissal of Mr Wright would require evidence of a breach of contract, as Mrs Horne understood the law. She was inviting such evidence.

46. The element of bias and partiality is also confirmed, in my judgement, by the reference in the dismissal letter to 'verbally aggressive and intimidating demeanour displayed throughout the hearing'. The tape-recording played during these proceedings of that meeting did not make out such a criticism. The remarks were then qualified by Mrs Horne and Mrs Wright, in these proceedings. They said that the Tribunal did not have the advantage of witnessing the physical conduct of Mr Wright during the meeting which put his behaviour in a threatening perspective. I regarded that as an unconvincing shift in position, noting that the letter itself cited the verbal, not physical demeanour of Mr Wright as warranting criticism.

47. A number of written statements had been taken from employees and service users, but these were never provided to Mr Wright. They were relied upon. That much was conceded by Mrs Wright. In evidence she agreed that she had had regard to all of the allegations, not just those that Mr Wright had received notice of under the category of acts of insubordination. At the disciplinary hearing Mrs Horne and Mrs Wright agreed to restrict consideration to only nine acts of insubordination; those which had been summarised in the first page of the summary which had been sent to Mr Wright. In addition to Mrs Wright's concession, the dismissal letter itself describes the nine series of acts as not only insubordination but also as neglect of duty, damage to reputation, harassment and hostility. None of that was known by Mr Wright when he responded to them in the disciplinary hearing.

48. The information provided to enable Mr Wright to defend himself was wholly inadequate. Whilst a legitimate concern may have arisen in respect of a need to protect the identity of vulnerable service users, this did not arise in respect of the nine allegations which were being addressed. Those allegations concerned complaints, either from Mrs Horne or Mrs Wright or came from other members of staff. As is apparent from the Code of Practice, the evidential basis for the criticisms should be disclosed and discussed with the employee in the hearing. None of the written statements of the members of staff were disclosed. There is no reliable evidential basis upon which to conclude that those members of staff had expressed any concern about their complaints being raised in the form of this disciplinary hearing. None of their signed statements suggested such worries. This is not one of those cases in which their statements required anonymization, let alone non-disclosure. The brief summary of events which was disclosed to Mr Wright was not sufficient for him to be able to defend himself in respect of the many detailed criticisms.

49. There was no individual consideration of the allegations. The note of the deliberations fails to reflect any consideration of the representations which Mr Wright had advanced in respect of them. Mrs Wright said, in cross examination, that they

did not discuss each allegation A to Y, when it was pointed out that there was no reference to allegation Y in the analysis. This supports the impression that there was a closed mind to the disciplinary process. It was merely a means to an end.

50. For those reasons I am satisfied that this dismissal was unfair. It fell outside any reasonable procedure. It fell well short of the ACAS code of practice.

**Polkey**

51. I am not satisfied, had the respondent conducted a fair procedure, that the claimant would or might have been dismissed in any event. If considered fairly, the claimant had explanations which discounted any serious misconduct or put the criticisms of his behaviour in a context where the circumstances were mitigated substantially. Such issues as a failure to wear the uniform and producing notes of a service user- late were shortcomings which usually would be dealt with informally. Even if amounting to acts of misconduct they could not, on any reasonable assessment, warrant dismissal in the absence of a disciplinary history of warnings.

**Contributory Conduct**

52. Nor am I satisfied that there was conduct on the part of Mr Wright which justifies a reduction in either basic or compensatory award. I am satisfied, on a balance of probabilities, that Mr Wright did not wear his uniform on a number of occasions and failed to provide Mrs Horne with the notes of a service user as soon as he might have done after her request. In respect of his alleged aggressive and threatening behaviour, I am not satisfied, on a balance of probabilities, that such is made out. Measured against the similar criticism of his behaviour in the disciplinary hearing, which I heard on tape, I was not satisfied that the voicemail, telephone conversation or behaviour at Mrs Horne's home were likely to have been of the nature alleged.

53. In respect of Mr Wright's concern about working late nights and early morning shifts, I am satisfied that he had expressed that as a preference to be avoided, but no more. He had expressed concerns about the late changes of the rota but I do not regard that as an act of misconduct. In respect of not being on call when members of staff attempted to contact him, I accepted the explanation advanced by Mr Wright in the disciplinary hearing, to the effect that he had not been given adequate notice or was unaware that he was on call in the circumstances.

54. In summary, I am not satisfied conduct has been established, on a balance of probabilities, of such a nature that it is just and equitable to reduce any award.

**Adjustment for unreasonable failure to comply with the ACAS code of conduct**

55. The failings of the respondent which have been identified were breaches of the ACAS Code; but the Code was applied in part. There was a hearing and the opportunity afforded of an appeal. It is inappropriate to increase the award by 25% for the breaches I have identified, in these circumstances. However, it is appropriate to adjust the award by an increase of 10% to reflect the unreasonable shortcomings.

56. The respondent invites me to reduce the compensatory award on the grounds of Mr Wright's failure to exercise a right of appeal. I do not consider that appropriate. It is apparent that the letter of grievance he had submitted was one in which he was complaining about the process and I am satisfied most employers would have treated that as a notice of appeal. Because the claimant did not then follow that up, when Mrs Horne wrote to say that she had no grounds to uphold the grievance and had not received a notice of appeal, I do not criticise the respondent for not processing an appeal in any event. Nevertheless, I am not satisfied it is just to reduce the compensatory award given the claimant's intimations of unfairness in the process in his grievance letter.

**Wrongful Dismissal**

57. For the reasons I have set out in relation to contributory conduct, I am satisfied there was no fundamental breach of contract by Mr Wright. Evidence was submitted to me in the form of a statements of service users and members of staff. These had not been served in the form of witness statements in these proceedings and those witnesses had not attended and been subjected to cross examination. They carry very limited weight in the circumstances. I am not satisfied that the failure to wear a uniform or the late presentation of the notes of a service user amounted to such serious acts as to constitute gross misconduct. I do not find the other allegations established.

58. In the circumstances there was a breach of contract in failing to provide the claimant with notice of termination. The contractual notice period is four weeks.

**Holiday Pay**

59. The parties agreed that the claimant was entitled to five days holiday pay for untaken leave at the termination of his employment.

**Remedy**

Wrongful Dismissal

60. Mr Wright obtained alternative work on 26 July 2017. Had he been given notice his employment would have terminated on 3 August 2017. I have taken into account those mitigating earnings in awarding him three weeks' pay for damages for the breach of contract in failing to give him notice.

**Unfair Dismissal**

Basic Award

61. The Schedule of Loss contended for a period of three weeks continuous employment. That was on the basis that had he been given his contractual notice period he would have passed his third anniversary in employment. Under Section 97(2) of the ERA the effective date of termination of an employee who is summarily dismissed is extended, for the purposes of Section 119 of the ERA, in computing the

continuous period of employment for the basic award, by the *statutory* notice period, not the contractual period. In this case that would have been two further weeks, under Section 86 of the ERA, and would not take Mr Wright beyond his third anniversary. In the circumstances his continuous period of employment is two years. The award is set out in the schedule attached to this judgment.

62. In respect of the compensatory award no evidence was adduced to suggest that the claimant has failed to mitigate his loss to date or in the future. I have therefore awarded compensation on the basis of the claimant's schedule with a number of adjustments. The first is that the notice period duplicates the period sought between the date of termination and the date of the hearing. In fact the period should be 31 weeks and not 36 weeks. That also applies to the mitigating earnings.

63. In respect of future losses, there is an arithmetical error in deducting the future loss of income had the claimant remained in the employment of the respondent and his mitigating earnings.

Employment Judge D N Jones

Date: 10 April 2018

**SCHEDULE**

**A Holiday pay (agreed)**

5 days at £92.05 = £ 460.27

**B Wrongful Dismissal**

One month's notice pay being £2,177.59

Less

One week's mitigating earnings from 26 July 2017 to 3 August 2017 at £270.00 = £1,907.59

**C Unfair Dismissal**

Basic Award £489 (being the statutory maximum weekly rate at the date of dismissal) x two years continuous employment £ 978.00

(Although the claimant contended for three years, Section 97(2) of the Employment Rights Act 1996 does not extend the effective date of termination by the contractual notice pay but by the statutory period for the purposes of computing continuous employment under Section 119 of the ERA.

**D Compensatory Award**

Past losses

Loss of income at £502.52 per week x 31 weeks [not 36 as contended for as this duplicates the claim for contractual notice pay] £15,578.12

Less mitigating earnings at £270 for 31 weeks £8,370.00

£ 7,208.12

Future Loss

| | | |
|---|---|---|
| Loss of income at £502.52 per week less £298.42 per week mitigating earnings being a differential of £204.10 x 16 | = | £3,265.60 |
| Loss of statutory rights | | £ 500.00 |
| Sub total Compensatory Award | | £10,973.72 |
| Adjustment of 10% increase for the respondent's unreasonable failure to comply with the ACAS Code of Practice on discipline and grievance procedures | | £ 1,097.30 |
| Total Compensatory Award after adjustments | | £12,071.09 |
| Total Award for unfair dismissal | | £ 987.00 |
| Plus £12,071.09 | | £13,049.09 |