Case Number: 3201384/2017

RM

EMPLOYMENT TRIBUNALS

Claimant: Mr S Muhmud

Respondent: London Borough of Tower Hamlets

Heard at: East London Hearing Centre

On: 24, 25, 26, 27 July 2018

Before: Employment Judge Moor

Representation

Claimant: Ms A Baumgart, counsel
Respondent: Mrs H Winstone, counsel

RESERVED JUDGMENT

1. **The complaint of unfair dismissal is not well-founded and is dismissed.**

2. **The Claimant conducted the proceedings unreasonably by deliberately omitting significant post-dismissal earnings on the Schedule of Loss dated 27 December 2017.**

3. **The Claimant is ordered to pay to the Respondent the sum of £3,000 in costs.**

REASONS

1. The Claimant worked as a Peer Education and Involvement Manager at the London Borough of Tower Hamlets, (‘the Council’). This claim arises from his summary dismissal, on 7 June 2017.

2. In essence the Council contends it dismissed the Claimant for gross misconduct because he failed to make full and accurate declarations of his financial interest and secondary employment in a company, Puzzle Focus Limited (‘PF’), which he knew received money from the Council. The Claimant contends that his dismissal was not fair because a reasonable investigation would have shown that he had made annual declarations of his interest in PF, which were approved by his manager.

Issues

3. On 19 July 2018, the Claimant withdrew his claims of race discrimination and claims based upon alleged protected disclosures. The Claimant had not claimed wrongful dismissal (notice pay) and unpaid holiday pay in his ET1. Having taking instructions, Ms Baumgart did not apply to amend. The only head of claim before me was that of unfair dismissal.

4. It was agreed at the outset of the hearing that Ms Baumgart's list of issues, taken together with the factual arguments she set out under 'submissions' in her opening note, described the outstanding issues in the case. By her closing submissions she had sensibly focussed her fire on two main issues: whether the investigation was reasonable in that the Respondent failed to question the Claimant's manager and whether the sanction of dismissal fell within the range of responses of a reasonable employer.

5. I confirmed that I would hear evidence on liability and remedy together. Ms Baumgart confirmed that the Claimant was not seeing reinstatement or reengagement.

Findings of Fact

6. Having read the witness statements and heard the oral evidence of Mrs Karen Starkey (nee Sugars), Mr Danny Hassell, Ms Claire Belgard, Mr John Adeniyi, the Claimant and Mr Abdul Malik; and having heard the oral evidence of Mr Hasan Faruq; and having read the documents referred to me in the evidence, I make the following findings of fact.

7. The Claimant started working at the Council as a part-time youth worker. After gaining a degree and experience in youth training, he was appointed to the Council in November 2006 as a Peer Work Worker and then to Peer Education Coordinator. On 1 December 2013 he was promoted to Peer Education and Involvement Manager at Principal Officer grade 4. Peer education, as I understand it, is a strand of youth work that develops the capacity for young people to learn from each other.

8. The Claimant's main responsibility was to develop and deliver a peer education strategy. He managed 3 full-time and 4 part-time staff and, from time to time, a group of workers on zero hour contracts. His line manager, Mr Hasan Faruq, was himself line managed by the Head of Youth Service, initially Dinar Hossain. Given his responsibilities and position in the hierarchy, the Claimant was a senior manager.

9. The Claimant's work and promotion record with the Council is an impressive one. He had plainly shown a great deal of commitment to young people in the borough. Prior to these events his disciplinary record was unblemished.

10. In order to be certain of probity in its dealings, the Council had to ensure that its staff were not influenced by other interests. In order to maintain public confidence,

it also had to ensure that its staffs were not perceived to be so influenced. As part of this, every Council worker had to comply with the Code of Conduct. This set out important rules about what an employee must do to declare outside interests (section 4) and what they must do if they wished to undertake and declare secondary employment (section 9).

11. Paragraph 4 of the Code (on interests) provided that:

    11.1 employees were '*responsible for declaring interests which conflict with the impartial performance of your duties or put you under suspicion of improper behaviour. These interests may be financial or personal….*' (4.1);

    11.2 any interest that could be considered a conflict with Council's business should be declared in writing (4.2);

    11.3 employees were required in their declaration to give '*information about the **nature of the interest** and the names of the parties and the **functions** involved*' (4.4) (my emphasis);

12. Paragraph 9 of the Code of Conduct (on '*outside and additional work*') provided that

    12.1 employees were required to obtain approval in advance of any fee that they received from employment outside the Council (9.1);

    12.2 they were also to obtain written consent in advance if they wanted to engage in any other business or additional employment (9.2); and

    12.3 '*outside work was not to be undertaken for any company who is known by the employee to have a contractual relationship with the Council or who is seeking work from the Council.'* (9.7)

13. The disciplinary policy provided that one example of gross misconduct was a serious breach of the Code of Conduct.

14. The Council required annual Declarations of Interest ('DOI'). Employees were also required to amend them when there was a change in circumstances.

15. The DOI forms changed over time.

    15.1 Initially they required the employee to write '*nature of interest or Additional/Secondary employment'* as well as to confirm that written confirmation had been obtained from their Chief Officer (see e.g. 241).

    15.2 By 2013 the responsibilities of the employee were set out in detail and they were expressly referred to the Code of Conduct. Employees were told to complete the form '*carefully'* and, if in doubt, seek advice. Financial Interests were described as '*any financial interest you have in any matter involving the*

Council. This includes details of any … company that has done business with the Council (or which may in future do business with the Council) with which you … are involved.' The employee was required to state the '*nature of the interest (please give name and address of … company, along with brief details of the nature of the interest and date at which it started)'*. There was a separate section for Additional Appointments and Secondary Employment reminding staff that prior written approval was required. The form concluded with a formal declaration with the warning in bold '***Failure to declare a relevant interest may lead to disciplinary action** …' 'I hereby declare that I have read the Council's Code of Conduct, and that the information provided in this declaration is **full and accurate**…*' (my emphasis). The employee undertook to inform management of relevant changes without delay (see e.g. 247, 248).

15.3 Later the form became electronic, but these declarations remained (257).

16. The DOI went to the line manager to approve or reject. Managers were given a checklist to help them decide what to do (279). Under '*what do I do if an employee makes a declaration of an interest e.g. financial*' the manager is told to ask '*Does the interest conflict with their role in the Council? For example, an employee may record that they are a Director of a voluntary organisation within the borough and that they receive a grant.*'

17. It is uncontroversial that after the Council's elected mayor's dismissal from office in 2015, there arose myriad allegations of financial wrongdoing. Some of the investigations that followed centred on the Council's Youth Service. They were overseen by a body called the Project Group. This group found that a number of employees in the Youth Service, had involvement financially with external organisations. The Claimant was identified as having worked for, and having a financial interest in PF, a company that the Council had paid to deliver training. Understandably, therefore, he became the subject of individual disciplinary allegations.

18. The Project Group decided there were 5 allegations potentially amounting to gross misconduct against the Claimant. He was informed of them by letter of 23 January 2017 (101):

'breach of the staff Code of Conduct in that you failed to declare an interest in Puzzle Focus Ltd during periods it was in receipt of Council funding;

breach of the staff Code of Conduct in that you failed to declare additional employment with Puzzle Focus which was delivering training to the youth service during periods while you worked for the youth service;

failing to bring to the attention of management a grants scheme you operated through the Peer Education Programme which resulted in a breach of the Commissioners Directives relating to grants;

knowingly circumventing management instruction on the use of zero and

additional hours and attempting to conceal this by failing to follow management instruction on the central submission of timesheets to the services administration team;

bringing the Council into disrepute.'

19. The Council appointed an external investigator, Ms Baker. She interviewed Ms Belgard, on 15 December 2016 i.e. prior to the fixing of the allegations. Ms Belgard told Ms Baker about the systems she had set up upon becoming interim Head of Youth Service from 16 November 2015. She said she had imposed a ban on additional and zero hours and that the Claimant would have been aware of this. She explained that she set up a centralised system whereby all timesheets went centrally to her administrator, Savina, to be checked before going to payroll. But after this, 4 timesheets, 3 in respect of the Claimant's brother Shah Mashud, had been sent directly to payroll, who had sent them back to Sabrina for checking. These timesheets were in respect of zero hours work.

20. Ms Baker interviewed the Claimant on 14 February 2017. He was accompanied by his Trade Union representative. He provided documents and answered questions relating to the allegations.

    20.1 He said he was familiar with the Code of Conduct and understood why the declaration of conflicts of interest was important.

    20.2 He provided his DOIs showing that: he had declared he had an interest in PF as Director from 2010 until the DOI on 12 April 2013 where no financial interest in PF is declared but a role is declared as a freelance trainer working ad hoc hours for PF in the additional employment section (248). Then his DOI in October 2014 declared a financial interest as a freelance trainer with PF. This declaration continued on his remaining DOIs.

    20.3 He told Ms Baker that his role in PF had changed from director to freelance trainer '*around April 2013*'. When asked why, he ultimately said that he realised in his new role he couldn't hold the director position. He said he had handed the company over to Mr Barick but stayed freelance in case work came up. (I note, as did the disciplinary hearing panel, that he did not obtain his new role until the following December 2013.)

    20.4 He also told Ms Baker that the other people on the register of PF at Companies House were there '*just to satisfy [company house] requirements but they never worked for PF*'. The only other person on Companies House documentation as director was Mr Barick.

    20.5 Ms Baker showed him a schedule of payments from the Council to PF (138). He denied that he knew PF was being paid by the Council. He told her: '*as I said before as a freelance trainer I wouldn't ask that question*'. The schedule showed the first payment in June 2013 (in respect of training given in February), then in October 2013, December 2013 and April 2015. They totalled £5,800 in the financial year 2013/14 and £3,000 in the next year.

20.6 In relation to a question about who was responsible for submitting grant applications at PF, he said '*could have been anyone. I wasn't there at this time*'.

20.7 In relation to zero hours work he said he had created a policy for the fair distribution of work. His DOIs showed that he had declared that his brother was in employment with the Council and, from July 2015, that he line managed him (82). (I note that he started to line manage his brother as a zero hours worker in late 2013).

20.8 In answer to the allegation that claim forms signed by him and approved by his manager, Mr Faruq, had gone straight to payroll avoiding the scrutiny process set up by Ms Belgard, his answer was that there was one occasion when his brother said he hadn't been paid, that Ms Belgard had investigated and approved the payment.

21. Documents from Companies House showed that Mr Barick became director of PF upon the Claimant's resignation in October 2013.

22. In February 2017 the Claimant sent Ms Baker a response to the allegations (111). In it he contended that:

22.1 PF had been set up to provide support for young people in the borough. He referred to the Companies House register and Company Accounts and Annual Returns.

22.2 He had declared his interest as a Director in PF every year from April 2010 until 2013. And thereafter as a Freelance Trainer. He provided the DOIs for Aug 2010 through to January 2017.

22.3 PF had received Council funding for work procured through its R2P system on 19 June 2013; 21 October 2013; 5 December 2013 and 1 April 2015. He gave details of the programmes delivered. He explained that in respect of these periods he had declared his interest as a Freelance Trainer for PF and had delivered 3 of these 4 sets of training. In respect of the 4th he had '*asked'* another trainer to do it (112).

22.4 Mr Hossain had approved the Declaration of Interest in 2010 (DOI) and had received the other forms and knew about his involvement with PF.

22.5 On the zero hours issue, he provided emails showing that he had sent requests for work not only to his brother but others. He had set up a protocol for the fair allocation of work, in the absence of one from the Council.

22.6 He contended that the first he had known of a ban on zero hours workers was at a meeting on November 2016 with Ms Belgard and that, in any event, the Peer Education team was exempt from it.

23. Ms Baker then submitted her report to the Council. In summary she concluded that:

    23.1 PF had received a total of £8,826 funding from the Council in 2013/4 and 2014/15. The Claimant had consistently declared his interest in PF (129). She explained that this was, first, as director and then, in April 2013, as freelance trainer. She thought the information from Companies House broadly supported this information.

    23.2 While there was no documentary evidence to support that he was linked with any grant application in either his role with the Council or PF, the Claimant must have been aware, as founder of PF, that it received funds from the Council. She was unsure of his employment relationship with PF.

    23.3 He was aware of the process for zero hours/additional hours and did not follow it, although his motives were unclear.

    23.4 The disrepute allegation was to be considered by the disciplinary panel.

24. Ms Martins-Taylor, whom I have not heard from, informed the Claimant that there was a case to answer on all 5 allegations. She informed him that that the allegations could amount to gross misconduct. The matter went to a disciplinary hearing before Ms Sugars (now Mrs Starkey) who was a Divisional Director of Commissioning from outside the Youth Service and Mr Jolil, Interim Children's Centre Senior Locality Lead.

25. The disciplinary hearing took place on 30 May 2017. The Claimant was accompanied by his Trade Union representative.

    25.1 Mrs Starkey showed the Claimant the timeline she had prepared (567) showing that the change in his DOIs from director to freelancer coincided with the point at which PF began obtaining funds from the Council.

    25.2 He said he understood purpose of DOI process was so that the '*organisation can make an informed decision*' if there is a conflict (190). He said Mr Hossain had told him, if there was a problem, HR would pick it up. When asked about safeguards he had put in place for himself he said the DOI was one, another was his manager approving, another was not doing PF work during the working day; and he resigned as a director so it did not appear that he was bidding for work.

    25.3 On the schedule of payments he said he had '*asked'* another company to deliver one of the training courses '*because I didn't have the expertise*'. He referred to PF in this period as '*my company*'. When asked '*was it just yourself'* he replied '*yes, but also a company secretary and some trainers'*. He said he would select trainers. It was clear from his answers that he knew PF were paid by the Council (which contradicted what he had told Ms Baker).

25.4 Mrs Starkey checked whether he knew about the moratorium on zero hours workers. I accept her evidence that he nodded 'yes'. This is because she had also heard from Ms Belgard that the moratorium had caused a furore in Youth Service because, for example, youth clubs had had to close and it would have been impossible not to know about it.

25.5 Ms Belgard explained that zero hours had to be agreed in advance. She was concerned to see the Claimant signing off timesheets for his brother, which was a conflict of interest. She observed if the moratorium had held it would not have been a problem. The Claimant argued that he had not shown favouritism in circulating zero hours work to brother and on one occasion his brother was the only one able to do the work.

25.6 The Claimant said he had asked his manager to move the line management from his brother. On balance, I find that he did not provide the disciplinary hearing with the email at page 281/546. (This shows that he asked Mr Faruq '*did you have a chance to consider changing line management for Shah Mashud so that we can use him for casual work*.') This is because the minutes record the Claimant saying that he had a conversation to this effect (194) and Mrs Starkey queried what the evidence for that was. He invited her to question Mr Faruq. (In any event it was a document showing he understood the need not to give his brother work directly.)

25.7 The Claimant argued he had declared his interests and his manager had approved. He acknowledged some learning from the disciplinary process that you don't only say what you do but '*give more detail for management'*.

26. Although, at the start of the hearing the Claimant stated that Mr Faruq was his witness and he had invited Mrs Starkey to question Mr Faruq, ultimately the Claimant did not call Mr Faruq to give evidence for him. I find that this was because he and his TU representative decided not to. He stated in cross-examination that they thought they had a sufficiently good case and, although he resiled from that a little later, I find that is most likely why he did not call Mr Faruq. This also makes sense because Mr Faruq himself was the subject of disciplinary proceedings and the Claimant could not be sure that he would not give self-serving evidence, which would not have assisted the Claimant. (Indeed, now that he has given evidence to this Tribunal, that is, in the main what he did.) Mrs Starkey acknowledged in her evidence that '*in an ideal world*' Mr Faruq should have been called; the appeal panel also found it would have been better to hear from him; however, they both decided that the Claimant had the opportunity to bring him forward and did not do so.

27. The disciplinary panel decided to dismiss the Claimant. Their reasons are set out in a decision sheet provided to the Claimant (202). They found the first two allegations (relating to a failure to declare interests) proven and amounting to gross misconduct. They found the third allegation (relating to grants) not proven. (The letter contains a typographical error near the end including this third allegation but all agree it was clear it was not proven.) They found the first part of the 4th allegation relating to use of zero hours contrary to management instruction proven but that it was not sufficient to justify dismissal. They gave no reasons in

relation to the second part of this allegation (relating to the central submission of timesheets) and Mrs Starkey confirmed this part of the allegation was not proven. I shall concentrate on the reasoning for the first two allegations because it was those which led to dismissal.

28. The panel decided that,

28.1 while the Claimant had declared an interest in PF, it was '*devoid of the exact nature of the relationship that could cause a conflict of interest and how the risk would be managed*'. This is awful language but what they meant was he had not given a **full** declaration of the **nature** of his interest. This is because he told the Council he was a freelance trainer doing ad hoc hours at PF when in fact he was running PF and it was receiving Council money. They explained that this '*absence of detail [limited] his manager's ability to understand the conflict and discuss control measures*'.

28.2 In deciding that he was '*not at arms length but central to PF'*, they relied on his statement that he had delivered 3 of the 4 training programmes commissioned by the Council and his own statement that he had '*asked someone else to do'* the fourth.

28.3 They took into account the coincidence in timing of his switch from director to freelance on his DOIs with when funding started from the Council and stated it '*could be judged by some it was in order to financially gain from the arrangement and that you were clearly involved in the central function of PF … the panel were not satisfied that your confirmation that you stepped down as director of PF to become a freelance trainer during periods when PF were receiving funding from the Council mitigates any of these actions'*. Again, this is poorly phrased but it is tolerably clear from the decision that the panel decided that the Claimant was central to the running of PF and thought that the switch from director to freelance on his DOIs did not reflect the reality of the situation. Mrs Starkey confirmed this in her evidence: the panel decided that the Claimant was still fully involved in running PF and the switch on the DOIs was '*cynical'* -- a dishonest attempt to suggest to the Council that he was at arms length from PF, lessening therefore the apparent conflict of interest.

28.4 They found the Claimant knew that, once the company was receiving the Council's money, the conflict was much greater and that, bearing in mind sections 9.7 and 9.2 of the Code of Conduct, the chance of approval smaller. They referred to para 9.7 not as a new allegation but to underline their point that his DOI was insufficient in circumstances where the nature of his employment was now in a company receiving funds.

28.5 They did not accept his defence that he expected management to highlight concerns because the '*onus was on you as an employee to clarify these situations'.* In any event, they were not convinced he had discussed his DOIs with managers because he had failed to present evidence to substantiate this.

29. In relation to the zero hours allegation the panel were not satisfied that the Claimant did not know about the moratorium (205) and that, during it, he had signed 4 timesheets for zero hours workers, 3 of which were for his brother. In those circumstances he should have ensured he had no involvement in providing work to zero hours staff, or signing timesheets and he had failed to protect himself against an allegation of a conflict of interest by failing to secure a move of line management of his brother. In those circumstances they considered that signing the timesheets showed a clear intent to give him undue benefit.

30. The Claimant sent an apology very shortly before the disciplinary panel was due to announce its decision. Mrs Starkey considered this came too late and was inconsistent with his approach in the disciplinary.

31. The Claimant's appeal was heard by a panel of Council members, chaired by Mr Hassell. It was in the form of a review, rather than rehearing. The appeal panel gave the Claimant and his TU representative an opportunity to make an opening statement, and the panel went through each ground of appeal in turn. The hearing took over 2 hours.

32. The appeal panel confirmed the dismissal. They first acknowledged the Claimant's apology to them; the enthusiasm and passion he had shown for his work and his service to the community in the borough. They were concerned that Mr Faruq had not been interviewed in the investigation and considered it would have been better to have done so. But they decided this was not procedurally unfair because he was available at the disciplinary hearing and the Claimant did not call him. He had had an opportunity therefore, before the decision, to put Mr Faruq's evidence before the panel had he so wished.

33. They considered the reference in the decision to 9.7 of the Code of Conduct was not unfair because it related to additional employment and this was what the second allegation was about.

34. In relation to management failings in approving the DOIs, the panel acknowledged them but took the view that this did not absolve the Claimant of his own responsibility to ensure his outside interests did not conflict with those of the Council.

35. They confirmed that the allegation concerning zero hours work would not have led to dismissal and thus the focus of appeal was on the first 2 allegations.

Evidence before me but not the disciplinary/appeal hearing

36. After his resignation as a director of PF, the Claimant continued to run PF's email account (admin@ etc). The business had a registered office, but PF ran mainly though email enquiries. For example the Claimant would answer requests for training.

37. Mr Malik was employed by the Council in Youth Service as an Area Manager at Bishop Challoner School. He knew that the Claimant '*was PF*', as he put it. He

advised the Claimant to register PF on the Council's R2P system, its list of accredited providers. He checked with the Claimant whether he had declared his interest in PF and the Claimant said he had. Mr Malik was happy for his staff to use PF to provide training.

38. Mr Faruq told me and I accept, that while he must have been aware of PF because he had signed an invoice, he did not know who ran PF. Training was not his remit. The work on the invoice he signed was probably commissioned by the youth worker at the Aberfeldy estate. Mr Faruq trusted the information on the DOI to be accurate and true.

39. Upon seeing on the DOI that the Claimant was a freelance worker doing ad hoc hours with PF, Mr Faruq's concern was whether the hours conflicted with the Claimant's working hours. He told the Claimant to ensure that there was no conflict with the hours he was working for the Council. His evidence was that he did not discuss with the Claimant that PF was delivering courses paid for by the Council. While there is a chance that Mr Faruq may well have been covering his own back in giving this answer, I find on the balance of probabilities, that it was more likely than not that they had no discussion. This is because the Claimant had left out the information about PF funding or his role in running PF on the form. It is likely therefore that Mr Faruq would not have thought to ask him about it and have directed his concerns to working hours.

40. Thus Mr Faruq's evidence, had he given it at the disciplinary hearing, would have contradicted the Claimant's contention that he had discussed his role in PF with him.

41. Mr Faruq knew that Ms Belgard had put a moratorium on zero hour workers. It was his view that this did not include Peer Education work for which the Claimant needed zero hours workers because a particular Service Level Agreement in relation to public health work required them. He knew however that Ms Belgard disagreed.

Findings of Fact for Remedy

42. EJ Gilbert's Case Management Order of the 18 December 2017 included an order that the Claimant provide to the Respondent and to the Tribunal, on or before 29 December 2017, '*a properly itemised statement of the remedy sought (also called a schedule of loss). … The Claimant is to update the Schedule of Loss by 28 March 2018.*' This latter date was amended on 9 April 2018 by EJ Prichard to 20 June 2018. The Claimant submitted a Schedule of Loss on 27 December 2017 but had not provided an updated schedule by the start of the hearing.

43. The Claimant prepared the Schedule himself using a template. Under '*Compensatory Award*' he wrote: '*I am still seeking work. I did two weeks' temporary work in September 2013 but have been unable to find a permanent job'*. Under loss of earnings he put '*Length of time out of work: 6.3 months*' and calculated what this amounted to. Under '*LESS income received'* he stated he had earned £435 in temporary work. For future loss, he stated '*I have an ongoing loss of £2,721.00 per month. … I estimate that this loss will continue for a period of 9*

months.' He claimed past loss at £17,142 - 435 plus £50 and future loss of £24,489.00. His claimed a compensatory award of £41,746.

44. It was only during cross-examination on the third day of the hearing, 26 July 2018, that the Claimant informed the Tribunal he been in work from 1 July 2017 to 31 December 2017 in a Quality Control role with a company called Egg Free Cakebox and had also obtained some limited additional work at Queen Mary's University. He estimated his earnings to be £19,999 and £1,049 (these figures were gross). Counsel states, and I accept, that he informed her about these earnings overnight. At that point he was in the middle of his evidence and, quite properly, she was unable to take instructions because of the witness warning I had placed him under.

45. By the end of that hearing day the Claimant had not been able to provide full disclosure (of payslips and P45) relating to mitigation and the Respondent could not be sure of his figures or whether he had done additional work in his job at Goldsmith's University. Therefore I made a specific disclosure order that, by 9.00am 27 July 2018, the Claimant disclose his remaining payslips and P45 in respect of his work at Egg Free Cakebox and documents relating to the pay he received at Goldsmiths University in 2017 and 2018.

46. The Claimant provided an updated schedule of loss on the morning of the 4th day of the hearing, 27 July 2018. After discussion, the parties were able to agree that in fact the net income the Claimant had received post-dismissal but before the hearing was £16,041.83. The gross annual salary the Claimant received with Cakebox was only £2,000 less than that he had received with the Council.

47. I find the statements the Claimant made in his original Schedule of Loss were incorrect:

    47.1 he had not been 'out of work for 6.3 months' and

    47.2 the income he had received since dismissal was not £435: it amounted to many thousands more.

48. The Claimant confirmed in his evidence that he understood that the losses he claimed in his unfair dismissal claim were calculated as the difference between the salary he would have earned with the Council and what sums he had earned since the dismissal. He gave 3 reasons for omitting to include the significant earnings had had received post-dismissal: that it was a genuine error; that he had dyslexia with numbers; and that he had prepared the Schedule of Loss using a template without professional help. I am unable to accept any of these explanations.

49. First, the Claimant knew the principle by which losses were calculated. That much is clear from the Schedule: he knew to deduct earnings since dismissal. He is intelligent (as illustrated by his employment record and his university teaching). The earnings he omitted are significant and in respect of a job he undertook for 6 months. I do not accept that he could possibly have forgotten about it. Indeed

he prepared the Schedule at a time when he was still employed by Cakebox. Nor can he have made a mistake. This is because he did include some income received: he knew what the calculation required.

50. Second, any dyslexia with numbers does not explain the incorrect prose in the Schedule. In any event, he handled the numbers in the Schedule very well – better than I have seen many a professional representative manage.

51. Finally, that the Claimant used a template is irrelevant. It is the statements he made about his own unemployment in it that are wrong. They do not come from a template; they are specific to his circumstances.

52. In my judgment it cannot have been an honest error to miss out from his Schedule of Loss such a large amount of earnings over such a long period. I find that the Claimant knew that the Schedule he produced on 27 December 2017 did not tell the whole story. I find that he made a deliberate decision to omit these figures. In the period up to trial he presented the Council with a wholly misleading valuation of his claim. Had they considered settlement, this would have been to his advantage.

53. The Claimant made this omission worse by failing to correct it at the start of his oral evidence. He took an oath to tell '*the truth, the whole truth and nothing but the truth'*. He was specifically invited to correct any mistakes in his written statement. He did not do so and confirmed that it was true. At paragraph 61 of his witness statement, under the heading '*Remedy'*, he refers to the job applications he has made and stated he found it '*very difficult to find other jobs'* referring to his experience in combating extremism as niche. He stated that he continued to work at Goldsmiths 1 day a week and that he had secured employment with Newham Council in May 2018. Again, this statement was not the whole truth. While it refers to some work post-employment, it does not state that he worked for 6 months at Cakebox at a salary of only £2k gross per annum less than his job with the Council. The Claimant also provided a remedy bundle to the Council, which included a list of job applications but not payslips, that again gave the clear impression that he was not working until starting his job at Newham in May 2018.

54. Again, I conclude that the Claimant deliberately omitted to mention his work at Cakebox in his Witness Statement, exchanged prior to the hearing, in an effort to mislead the Council as to the value of his claim.

55. That he finally volunteered the information during cross-examination does not make a difference to my findings. The Claimant only gave the information in answer to a direct question about Cakebox. By this time, of course, friends and family were present and they were likely to have known that he had been working. This is likely to have influenced him as to what he could, in all conscience, say. And the oath he took may have led him to decide that he had to tell the truth if asked specific questions about Cakebox. It remains my view that prior to the hearing he deliberately failed to give the Council important information about his earnings in mitigation and failed to disclose the documents relevant to remedy.

56. The Claimant left his job at Cakebox at the end of December 2017 because he was extremely worried about a lump he had found on his leg. He had been referred to a radiologist because his GP thought it might be cancerous. He was extremely fearful of the future, so much so that he could not concentrate on work. It was not important to him anymore. He confirmed in cross-examination that 'whatever the job he would have walked out' including his job at the Council. Even though he would have been able to take sick leave or holiday at Cakebox, he did not do so. He said he would not have thought about sick leave or money. In the light of this evidence, I find that, had the Claimant still been employed at the Council, he would have left voluntarily at the end of December 2017 for the same reasons as he left the Cakebox job. While this decision would not necessarily have been rational, it was clear that the Claimant was not thinking rationally about his future in work and was so fearful of a cancer diagnosis that he could not stay in work.

Submissions

57. Both counsel provided written submissions (to which I refer and do not repeat here). They both made oral submissions and assisted me with my questions. Counsel concentrated on their best points and were more persuasive for doing so. My brief summary here does no justice to their eloquence.

58. Ms Baumgart, for the Claimant, focussed her submissions on two main points: first, that there was a failure to carry out a reasonable investigation and second, that the decision did not lie with in the range of reasonable responses.

59. In relation to the lack of reasonable investigation, she argued that:

59.1 the Council ought to have obtained Mr Faruq's account. He had approved the DOIs and the Claimant contended they had discussed the nature of his interest. This was relevant both as to whether the Claimant had made an inadequate declaration and as to the seriousness of any failure;

59.2 she relied on paragraph 4 of the ACAS Code that the employer must carry out necessary investigations to establish the facts. She also referred me to the principle in W Devis & Sons v Atkins HL [1977] AC 931 at 953 that the employer could not be said to have acted reasonably if it ignored matters 'which it ought reasonably to have known and which would have shown that the reason for the dismissal was insufficient';

59.3 while she acknowledged that I must look at the investigation as a whole, including the disciplinary hearing and appeal, she submitted this failure to interview Mr Faruq was such an exceptional initial failure that it could not be resolved merely by allowing the Claimant to call Mr Faruq at the hearing. Where dismissal was likely, more was expected of an employer than that;

60. In relation to the harshness of the sanction she argued

60.1 this was not someone who had failed to declare anything. On the contrary

the claimant had declared his directorship and then employment association with PF on the form and that was sufficient. By doing so he was stating that he thought these matters were a conflict of interest. That is what the form was for;

60.2 the Claimant's evidence was that everyone knew he was involved in PF. And Mr Faruq, by signing the one of the invoices, knew that PF had received money from the Council. There was therefore no need to put any more detail on the form;

60.3 Mr Faruq had not followed the manager's checklist sufficiently and that also mitigated any failure by the Claimant;

60.4 Thus, this could not reasonably be categorised as gross misconduct, especially in the light of the Claimant's long unblemished record.

60.5 Although the zero hours decision did not justify dismissal, if the disciplinary panel had no reasonable grounds for its finding on it, this should lead me to question the probity of the overall decision.

61. Mrs Winstone, for the Council, submitted:

61.1 the Code of Conduct and the DOI form make abundantly clear that the Claimant had personal responsibility for fully informing the Council of the conflict of interest. This is the starting point. If he failed to do this then what his manager did or did not do with the DOI is irrelevant because the Claimant had not put him sufficiently on notice. The panel's decision that the '*onus was on you'* was correct.

61.2 The DOI required a '*full and accurate'* declaration. The Claimant's declarations were simply not full. The key DOI was dated 12 April 2013 (247). This was when the Claimant knew money was coming to PF from the Council because he had given the training course in February 2013. Yet on this DOI he did not mention a financial interest at all and merely stated that he had a role in PF as a freelance trainer under secondary employment. This declaration omitted the full story: that he ran the company, that it was on the R2P system (i.e. was seeking work from the Council) and that it had delivered training which the Council was to pay for. The Claimant knew the form was much less likely to be approved if he stated his interest in full and, therefore, he did not do so.

61.3 What the Claimant was doing was omitting to put in the true nature of his interest so that he could say he had declared an interest to people like Mr Malik who asked but did not do it fully so that it was more likely to be approved. This was indeed cynical and Mrs Starkey's conclusion in that respect was entirely reasonable.

61.4 Mrs Starkey had plenty of evidence for her decision that there was a failure fully to declare: Mrs Winstone compared the answers he gave to Ms Baker

(giving a clear impression that he was nothing to do with the running of PF) and the answers he gave Mrs Starkey (that he made decisions about running it). Nor did he show any remorse at the hearing but attempted to shift responsibility to his manager.

61.5 The Claimant had an opportunity to call Mr Faruq to give evidence at the disciplinary hearing. In those circumstances it could not be said to be unreasonable investigation. Mrs Starkey was open to all the other evidence the Claimant had brought. Anyway, Mr Faruq's evidence was not as vital as the Claimant contended. This is because the issue was whether the Claimant had misled the Council on his written declaration.

61.6 Even if I found the failure to interview Mr Faruq was unreasonable and therefore the dismissal unfair, Mr Faruq's evidence would not have helped the Claimant he would have been dismissed in any event such that the Polkey reduction would have to be 100%.

61.7 On remedy she contended, the loss stopped at the point the Claimant left his employment with Cakebox. Any loss beyond that date was caused by his decision to resign and did not flow from the dismissal. In any event, if he had still been employed with the Council he would have resigned at the same point because his concern about his health was overwhelming.

Law

62. It is accepted that the Council had a potentially fair reason for dismissal, namely conduct.

63. The Tribunal must then decide whether the dismissal was fair or unfair under section 98(4) Employment Rights Act and this '*(a) depends on whether the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case.*' This will include consideration of whether or not a fair procedure has been adopted as well as questions of sanction.

64. BHS Ltd v Burchell [1980] ICR 303 sets out guidance for the Tribunal in misconduct dismissals in considering the reasonableness of the employer's action. The Tribunal should usually consider whether the employer had a genuine belief in the misconduct; whether that belief was based on reasonable grounds and after reasonable investigation in the particular circumstances of the case.

65. A reasonable investigation entails consideration of evidence going in both directions. Paragraph 4 of the ACAS Code provides, as a general principle, that employers must make necessary investigations to establish the facts of what happened. Paragraph 12 provides that at the disciplinary hearing the employer must give the employee the opportunity to call witnesses.

66. The Claimant relies on the principle in W Devis & Sons v Atkins [1977] AC 931 at 953 that an employer cannot be said to have acted reasonably if it reached its conclusion '*in consequence of ignoring matters which it ought reasonably to have known and which would have shown that the reason was insufficient'*. It was this case that established, subject to this, that the Tribunal must judge the employer's decision on the facts it knew at the time.[1]

67. The Tribunal tests the fairness of procedure, including the conduct of investigations, according to the objective standard of the reasonable employer, Sainsbury's Supermarket v Hitt [2002] EWCA Civ 1588. It must consider the whole of the disciplinary process. If it finds that an early stage of the process was defective, it should consider whether the overall procedure adopted was fair, see Taylor –v- OCS Group Limited [2006] IRLR 613, CA.

68. Iceland Frozen Foods v Jones [1982] IRLR 439 establishes that, in many cases, there is a band of responses to an employee's conduct that a reasonable employer might have adopted. It is the Tribunal's function to consider whether, in the circumstances, the decision to dismiss fell within this band. I must therefore apply the objective standard of a reasonable employer rather than substitute my own view of what I would have done. I am reminded also that the range of reasonable responses test is not a test of perversity or irrationality; nor is it infinitely wide. It is important not to overlook section 98(4)(b), which indicates that Parliament did not intend the Tribunal's consideration of a conduct case to be a matter of procedural box ticking. It is entitled to find that dismissal was outside of the band of reasonable responses without being accused of placing itself in the position of the employer, see Bean LJ in Newbound –v- Thames Water Utilities Ltd [2015] IRLR 734, CA.

69. If I find that the dismissal was unfair then I must go on to consider the question what would have happened but for the unfairness. This is known as the Polkey question.

70. If I find that the dismissal was unfair, I can consider, on the evidence I have heard, whether the Claimant contributed to his dismissal by blameworthy conduct. If so, then I can consider whether to reduce the basic and/or compensatory awards accordingly.

71. In assessing any loss caused by the dismissal then I must assess only the loss attributable to the dismissal, not the loss caused by an intervening act. And I must ask whether the Claimant reasonably mitigated his loss.

[1] Counsel should both note that in future it is really helpful to the Tribunal if they distinguish in their submissions the evidence that was before the decision-maker with other evidence before the Tribunal that may be relevant to whether there was a reasonable investigation and/or Polkey and/or contribution. It is useful to adopt in submissions a similar approach to that suggested by Mummery J in London Ambulance Service NHS Trust v Small [2009] IRLR 563.

Application of facts and law to issues

Did the Respondent genuinely believe the Claimant was guilty of misconduct?

72. The disciplinary hearing panel found that the Claimant had not provided sufficient detail on the DOIs of his financial interest and/or his additional employment concerning PF and that this was gross misconduct.

73. In essence, the panel thought that the Claimant was cynical and dishonest in informing the Council only that he was a freelance trainer for PF at a time when he was fully involved in running it. He therefore failed to give his manager a full and accurate account of his interest, as the DOI process plainly required. It would have been far better if they had stated this view of his dishonesty in plain language. Nevertheless, I have found that the panel took the decision to dismiss for those reasons.

74. A breach of the Code of Conduct of this kind was plainly misconduct as it involved a deliberate omission. I shall address below whether the conduct for which the Claimant was dismissed amounted to gross misconduct.

75. The panel had no other reason for the dismissal. While there were investigations of other members of staff in the Youth Service, Mrs Starkey was not influenced by this. She did not take a ‘clean out the Augean’ approach but looked at the Claimant’s case on its merits and genuinely believed that what the panel found him to have done warranted dismissal. This is plain from the way the panel looked at the documents presented; looked carefully at what the Claimant had told them and the investigator; and rejected at least one of the allegations as not proven.

Was the decision reached after a reasonable investigation?

76. In considering the investigation must look at the whole of the procedure: Ms Baker’s investigation and the disciplinary hearing.

77. On the one hand, in the light of paragraph 4 of the ACAS Code, that all necessary investigation be done to establish the facts, it is surprising that Ms Baker did not interview the Claimant’s line manager, Mr Faruq. This is especially so after the Claimant had produced his DOI forms and stated that Mr Faruq had approved some of them. It is arguable that an investigator would have wanted to know the full picture, including what, if any, queries the manager had made of the Claimant after receiving his forms, and, in particular, whether he knew that the Claimant ran PF and whether he knew that PF received money from the Council or was on the R2P. By filling in the DOI, the Claimant was stating that he thought he had a conflict of financial interest (save for the April 2013 one). That is what the form was for. And the manager’s checklist required managers to ask questions of the DOI if they had any doubts.

78. On the other hand, at the time when PF was about to receive money and the Claimant was a director of it, his DOI in April 2013 did not include a declaration of any financial interest at all. He declared himself merely to be a freelance trainer

(although he was plainly more involved in running the company and selecting trainers). Once he removed his directorship from the form, Mr Faruq would not have been put on notice that the Claimant had a significant involvement in this company. The Claimant did not state on the form that the company was receiving money from the Council. In those circumstances, it was the Claimant's conduct in failing to give the necessary full details of his interest that was in question, not how Mr Faruq had responded to the inadequate form. In those circumstances it was arguably reasonable therefore to concentrate the investigation on what was or was not declared rather than how that declaration was treated. The misconduct alleged was the failure to declare and that matter came logically before any discussion with the manager.

79. It seems to me that the factor in this case that weighs in favour of the latter argument -- that there was a reasonable investigation -- is that the Claimant had every opportunity to call Mr Faruq to the disciplinary hearing so that, before the decision was made, the Council could hear his account. Mr Faruq was waiting to be called. The Claimant had stated that he was his witness. I have found as a fact that the Claimant actively chose not to call him and likewise at the appeal. This was a strategic decision made with the benefit of Trade Union representation. If he had felt that Mr Faruq's evidence was necessary to establish all the facts then he would have called him. Thus, while I accept Ms Baumgart's submission in theory that, if fuller declarations had taken place in conversation with the manager, that might have mitigated a failure fully to complete the form. In practice, here, that was evidence the Claimant could have put before the disciplinary hearing if it had existed. It was his choice that the Council did not have Mr Faruq's account before it made its decision. It does not lie in his mouth now to argue that it was unreasonable for them to make the decision without it.

80. I must look at the procedure as a whole (see Taylor) and apply the range of reasonable approaches test to it (Hitt). I must also have regard to the ACAS Code on Discipline. Ultimately, although there was a gap in the evidence about what discussions the Claimant had had with his manager about the DOI, it was reasonable for Mrs Starkey to allow the Claimant to decide whether to fill that gap. She knew Mr Faruq was available as the Claimant's witness and it was reasonable for her to allow him to decide whether to call him. Paragraph 12 of the ACAS Code requires employers to allow an employee to call witnesses and Mrs Starkey gave the Claimant the choice.

81. I do not accept Ms Baumgart's submission that the failure to initially interview Mr Faruq was a failure so significant it could not be resolved at the disciplinary hearing in this way. Mrs Starkey and the panel had shown themselves to consider all the evidence the Claimant put forward and there is nothing to suggest they would have ignored Mr Faruq simply because he had not been interviewed earlier.

82. The principle quoted by the Claimant from Devis v Atkins does not assist him. That is because I have found it was reasonable to allow the Claimant to decide whether to call Mr Faruq. In any event, of course now I have heard from him, it is not the case that he would have provided the evidence of knowledge of PF that the Claimant hoped he would.

83. In my judgment, therefore, the Council undertook a reasonable investigation into the facts of the case.

Did the Council have reasonable grounds upon for its belief in misconduct?

The first allegation – a failure to declare his financial interest in PF

84. The panel approached the question by addressing themselves to the facts before them. In reaching their decision that he had not fully declared his financial interest in PF they took into account that:

    84.1 from April 2013 he declared himself only as a freelance trainer for PF, and this change in declarations coincided with the time PF began to receive funds from the Council;

    84.2 he did not declare that PF received money from the council;

    84.3 that, even though he had resigned as a director in October 2013, It was he who did 3 of 4 of the training courses for the Council and he told them that 'he asked' the others to do training. He selected trainers. This was reasonable evidence to justify the conclusion that he was still fully involved in running PF and was far more than a freelance trainer;

    84.4 the impression he had tried to give Ms Baker in the investigation was that he was arms length from PF.

85. The panel therefore had ample grounds upon which to base their decision that he had failed to declare his real interest in PF at a time it was receiving money from the Council: he was far more than a freelance trainer and he had not declared on the form that PF was in receipt of Council money. He had failed to declare his function in the company or the nature of the conflict of interest as the Code of Conduct required.

86. It also had ample grounds upon which to decide that this failure fully to declare was deliberate ('*cynical*' as Mrs Starkey put it) namely: the timing of the change in declaration of status and PF's receipt of Council money; and the Claimant's attempt, at the interview with Ms Baker, to mislead the investigation by making it appear that he was not involved in the running of PF but was at arms length from it.

87. It was entirely reasonable to find on that evidence that the Claimant had not given the detail required by section 4 of the Code of Conduct. He gave only the name of a business he received ad hoc employment from. What he had not done was declare 'the nature of the interest' or 'the function involved' (para 4.4) because he had not stated that he ran a company receiving council funds. Had he done so, this would have been identified immediately as a real conflict of interest. While what he did declare may only have been a potential conflict with work hours and was much more likely to be approved by a manager.

The second allegation - the failure to declare additional employment with PF, which was delivering training to the Youth Service during periods while he worked with Youth Service.

88. At first I was inclined to think, by the very fact of the Claimant declaring his ad hoc employment with PF, that he had made an adequate declaration. But the DOI form covers appearances of conflict as well as real conflicts in order that the manager then decides how to deal with them. The form-filler is required to make a full and accurate declaration of the nature of the conflict so that the manager is put on notice whether to ask further questions or consider safeguards or simply not approve the declaration.

89. The difficulty for the Claimant, as the panel identified in its decision, was section 9.7 of the Code of Conduct. This specifically prohibited outside work for any company known by the employee to have a contractual relationship with the Council or who is seeking work from the Council. There was plainly evidence before the panel that PF had sought work and had done work for the Council. Thus in failing to declare that PF was doing training for the Council, the Claimant had obviously failed fully to declare the very real conflict his additional employment with PF presented.

90. Thus, it seems to me, there were reasonable grounds for the panel to find that the second allegation was proven.

91. The panel decided to dismiss because it found the first two allegations proven. I therefore do not need to deal with the fourth allegation but, because I heard evidence and submissions about it, I will do so.

Fourth allegation – knowingly circumventing management instruction on the use of zero and additional hours

92. It is only the first half of the fourth allegation that the panel found proved.

93. The panel had heard about the following facts:

    93.1 Ms Belgard’s account was that everyone in Youth Service knew about the moratorium on zero hours work because it caused such a furore.

    93.2 There was evidence that of 4 zero hours timesheets the Claimant had signed during the moratorium, 3 were for his brother.

    93.3 They also had evidence that the Claimant had made email requests for zero hours work to other workers.

    93.4 The Claimant had prepared a protocol for the distribution of zero hours work. He had also, from July 2015 declared that he line managed his brother on a DOI approved by his manager.

94. In my view, the panel had reasonable grounds for concluding that the Claimant had circumvented the moratorium on zero hours work. They were entitled to accept Ms Belgard's evidence and disbelieve the Claimant that he knew about it. They also had reasonable grounds for deciding that the Claimant knew there was a conflict of interest in giving his brother work and should have done more to put safeguards in place to prevent that from happening. These two points alone were enough to amount to further misconduct. (I note that if I am wrong and the panel had seen the email at 281, it would not have assisted him. In fact it would have made it far worse because the email shows that he knew he should not allocate work to his brother while he was line managing him.)

95. It has been more difficult for me to decide whether the panel had sufficient grounds for deciding that the Claimant had given his brother '*undue financial advantage'* by allocating him zero hours work. On balance in my judgment they did not: this is because they had not established the pool for the relevant work; nor had they established the circumstances in which the brother was given work. It was unreasonable on the limited evidence they had to decide that he had given his brother an undue advantage.

96. I do not accept Ms Baumgart's submission that this final failure of the panel, casts doubt on the probity of their decision in relation to the remaining allegations. As I have found, they had ample evidence to conclude that the Claimant had failed fully to declare his interest and additional employment fully.

97. I will deal with whether the misconduct found could amount to gross misconduct under the next subheading.

Was the decision to dismiss with the range of reasonable responses?

98. In my judgment the misconduct found by the panel could reasonably be said to be a serious breach of the Code of Conduct and therefore gross misconduct. In the alternative, it was plainly a serious breach of trust, and therefore gross misconduct. I have reached this view for the following reasons:

98.1 It is not enough for the Claimant to argue that he made declarations and his managers approved them, if those declarations failed to describe the true nature of his interest and his true function within PF. This is what the Panel found. This is because the Claimant did not put the Council on notice of the real conflict his work at PF presented, once PF started bidding for work and being paid by the Council.

98.2 The failures to fully and accurately declare the nature of his interest were serious because they created a misleading DOI. The Claimant was not just doing ad hoc work for an unrelated company as his DOIs suggest. He was running a company being paid for doing work by the Council. The two are entirely different. The failure was therefore significant.

98.3 The panel's view that the Claimant had made a cynical decision to change

his function on the DOI (from director to freelance when still running the company) also goes to the seriousness of his conduct. They decided that his was a dishonest attempt to mislead, not merely an error or a misunderstanding. Mrs Starkey was clear in her evidence to me that she thought dismissal was appropriate because of the breach of trust his conduct created.

98.4 The manager's conduct was nothing to the point because the misconduct arose at the point of filling in the DOI: that was the Claimant's sole responsibility. Even if his manager had failed in some way, that could not exculpate the Claimant's prior misconduct in deliberately failing fully to inform him of the conflict.

98.5 The statements that accompany the DOI forms and the express reference to the Code of Conduct made it clear to the Claimant that failure fully and accurately to declare his interest could be a disciplinary matter. He can have been under no illusion, as a senior officer in a public authority, how important a proper declaration of outside interests was. Officials spending public money have to be 'squeaky clean' (as Mrs Starkey put it). The very purpose of the Council is to spend public money to serve the public: that it is not in any way improperly influenced or perceived to be improperly influenced when doing so is vital.

98.6 These considerations reasonably outweigh the fact that the Claimant was a relatively long-standing member of staff with a previously unblemished record and evident commitment to the young people in the borough. These were matters that the appeal panel took into account in reaching their decision.

99. For the same reasons, in my judgment, it was well within range of responses of a reasonable employer to dismiss for the misconduct the panel found.

Other Issues

100. For completeness, and because none of these points was conceded, I deal with the remaining issues from Ms Baumgart's opening note (para 14, 15 17) insofar as I have not covered them already in my decision:

100.1 *Managers knew about nature and extent of involvement in PF* (para 14 (a)(iii): I have not found this to be the case. While the Claimant asserted this at the disciplinary hearing; the Claimant had an opportunity to call his manager to confirm but he chose not to take it. It was reasonable therefore for the Council to find it unlikely that managers did know.

100.2 *Lack of training* (para 14(e)): it is not clear to me that the Claimant made his lack of training in risk management a point at the disciplinary hearing. But, given that he acknowledged during the process that he was familiar with the Code and understood why declarations were important, a lack of training does not make it unreasonable to dismiss him.

100.3 *Introduction of 9.7 on the day of the hearing* (para 16(b): this was not a new allegation but the part of the Code the panel referred to, in order to emphasise to him why his failure was so serious.

101. For all of the above reasons, the complaint of unfair dismissal is not well-founded and should be dismissed.

Remedy

102. If I had had to make findings on remedy, I would have found the Claimant would have contributed to his dismissal by 100% by his own conduct. This is because, on the evidence before me, I would have found that he had committed gross misconduct by deliberately failing to provide full declarations of his conflict of interest to the Council. He deliberately decided not to say he was a director from April 2013 and this coincided with the point at which he knew PF was about to obtain Council money and he knew therefore there was a real conflict of interest. Up until October 2013 he remained a director. Even after that he deliberately decided not to inform the Council that he 'was PF', as Mr Malik put it i.e. he was fully involved in running the company. Instead, he gave the impression on his DOI forms that he was merely an ad hoc trainer for them. He was not. He selected those who did the training; he had access to the admin@ PF email address. Furthermore, he failed at any stage to inform his manager that PF was receiving money from the Council. While Mr Faruq at one point signed an invoice, I would not expect him to remember this as he had not organised the work. The Claimant's was a deliberate attempt to mislead. As Mrs Winstone put it, it left him able to say he had declared his interest to anyone who asked, but knowing that he had not declared so much that his DOI would be questioned. I find his was a deliberate attempt to mislead. I have the benefit, in reaching this decision, of seeing how the Claimant approached the information to put on his Schedule of Loss. He declared some of his loss of earnings, but not all, and in so doing gave a misleading impression of the value of his claim. While two examples do not necessarily make a pattern, the similarity in approach is striking and makes me more confident in my conclusion.

103. Finally, and in any event, I would have found that the loss of earnings attributable to the dismissal stopped on 31 December 2017 because at that point, the Claimant made a voluntary decision to leave the well-paid job he had obtained on 1 July 2017. It was clear from his evidence that he would have left his job at the Council if he had still been working there. Thus any loss thereafter is attributable to that voluntary decision, made because of health fears, and is not connected to the dismissal.

Costs Application

104. At the end of the hearing, the Council made a costs application on the ground that the Claimant had conducted part of the proceedings unreasonably:

104.1 by withdrawing his claims of race discrimination and public interest disclosure very late;

104.2 by presenting an untrue Schedule of Loss.

Submissions

105. In relation to the late withdrawal Mrs Winstone argued that the Claimant was intelligent and capable of assessing his claims at an earlier stage; that he been professionally represented at the Preliminary Hearing before EJ Prichard in January 2018; that EJ Prichard had sent the Claimant away to consider his position in relation to the new discrimination claim he wished to pursue on grounds of his political belief. On 7 March, the Claimant confirmed he did not wish to do so. Yet, he did not withdraw his race and 'whistleblowing' claims until 19 July 2018, 2 working days before the start of the hearing.

106. Counsel submitted that the discrimination claims had put her client to a great deal of additional preparation (the professional costs of which they estimated at about £4,500 = 50 hours at £90 per hour) and a wasted 8-day brief fee rather than a 4-day brief fee (an additional £4,000). Counsel called it a '*lengthy and complex claim*'.

107. In relation to the Schedule of Loss, Mrs Winstone submitted that the Schedule presented in December 2017 simply did not set out the reality of the Claimant's situation. Within about 3 weeks of his dismissal he had walked into a job paying only £2,000 a year less than the job he had with the Council. Even with the basic award and an injury to feelings award, this made his claim much lower in value. The Council had therefore lost an opportunity to take a commercial view and negotiate settlement, which would have saved them the costs of the hearing. At the very least, the extra work involved in obtaining mitigation disclosure, the further cross-examination about this had taken the Tribunal into an extra day, and their attendance might not have been required on the final day. The costs of running the case as a whole amounted to about £30,000. Counsel submitted £5,000 costs should be awarded to reflect the lost opportunity the misleading schedule had caused. She acknowledged that the Council was less willing to settle discrimination claims but nevertheless it would still have considered doing so for one of low value.

108. The Claimant submitted that it was a saving of costs to withdraw the discrimination and 'whistleblowing' claims. That Mr Searle, a direct access barrister, had advised him only in January 2018. That the race discrimination and whistleblowing cases were bound up with his belief that he had been singled out as one of the mayor's labour party supporters. That when the Claimant confirmed to the Tribunal he would not be seeking to amend to include political belief, he mistakenly thought that was a withdrawal of the race and whistleblowing claims, too.

109. In relation to the Schedule, Counsel repeated the explanation for it the Claimant had given in evidence: that it was a genuine error. He did not see Cakebox as a career job and the remarks he made on his Schedule were about finding work in his chosen field. She also submitted that the Claimant had informed her this case was a matter of principle and he had wished to 'clear his name'. He also hoped the declaration of unfair dismissal would help in the vetting process that is required for work in combatting extremism.

Means

110. The Claimant gave evidence about his means: he earns £38,000 per annum gross. His wife is paid at an apprentice rate. He has a child of 3. He has a mortgage on his home, which he has just started to pay off. He was unable to say how large the loan was but he pays about £1,000 per month. He owns two properties in the borough, which he lets out and there is some of that income left over after the mortgages are paid. He has no other significant assets. PF was wound down.

Tribunal Rules on Costs

111. Under Rule 76(1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ('the Rules') *'A Tribunal may make a costs order … and shall consider whether to do so, where it considers that (a) a party … has acted … unreasonably in … the way that the proceedings (or part) have been conducted'*

112. Rule 78(1) provides that *'A costs order may (a) order the paying party to pay the receiving party a specified amount, not exceeding £20,000, in respect of the costs of the receiving party.'*

113. Rule 84 provides that '*In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.'*

Decision on Costs

114. I am not persuaded that the Claimant conducted the proceedings unreasonably in withdrawing his race discrimination and public interest disclosure claims so late. This does not appear to be a case where the Claimant all along thought his claims had little prospect of success. Here, I accept that he genuinely believed that he was treated differently from others primarily because he was seen to be associated with the former mayor. He saw this as a combination of discrimination because of race, whistleblowing and 'political' belief. Once he realised he could not raise political belief, he judged the remaining claims to be weaker. As Mrs Winstone herself submitted, the claims were lengthy and complex and he did not have the benefit of professional advice at that time. In those circumstances it was not unreasonable to continue to review the claims and decide not to proceed with them, even at such a late stage. I note that while the draft bundle was exchanged in early February 2018, witness statements were not exchanged in accordance with the timetable set by EJ Prichard. Had the Respondent insisted upon this timetable, it may have encouraged the Claimant to review the merits of his case earlier.

115. I take a different view in relation to the preparation of the Schedule of Loss. The Claimant's net loss of earnings until 31 December 2017 was in reality:

3.2 weeks x 2721x12/52 = £2,277

plus the difference between Council and Cakebox for 6 months

6 x (2721- 2535) = £1,116

less other net earnings (435 + 962.98) = (£1397.98)

Net Loss until 31 December 2017 = **£1,995.02**

Yet his Schedule of Loss in December claimed a past loss of **£16,757.**

116. As to future loss, the Claimant's misrepresentation meant that the Council did not appreciate it could argue that his loss of earnings stopped on 31 December 2017 because the Claimant's resignation from his job at Cakebox led to the further losses.

117. I have found that he deliberately misrepresented his earnings in mitigation until the third day of the hearing. He claimed far more in past loss than he knew he had suffered and prevented the Council from arguing that his loss stopped in December 2017. In my view, he inflated the value of his claim in the hope of achieving a better settlement. There is no other conclusion to reach but that he conducted this part of the proceedings unreasonably. According to Rule 76, I must therefore consider whether to make a costs order.

118. The overriding objective requires all parties to assist the Tribunal in dealing with cases justly. This includes dealing with issues proportionately and with a view to saving expense. By stating in his Schedule that his claim was worth far more, the Claimant did not do this. I understand the Council's argument that they lost an opportunity to consider a commercial settlement of the case. I take into account the fact that the case included a discrimination claim until very recently; the Council is less willing to settle such cases; and the injury to feelings award would have added into its assessment of value, even conservatively £7,000-10,000. Thus the case was still worth around £14,000 -17,000. I doubt the Council would so have readily taken a commercial view of such a case rather than an unfair dismissal claim valued at about £7,500. Nevertheless I agree that they lost a not insignificant opportunity to consider saving costs, through a negotiated settlement of the claim, at the very least a last minute settlement would have saved Counsel's refreshers.

119. Ms Baumgart, on instructions, submitted that the Claimant has always wanted his declaration of unfair dismissal and that money was not the issue in the claim. I note that, in his Schedule of Loss, the Claimant contended as part of his argument for a 10% ACAS uplift that '*the Respondent had not responded to ACAS mediation after requesting a possible out of court settlement. I tried to get a response through union but was ignored.*' I therefore do not accept that this case was only ever about the declaration. There was plainly a real chance that it could have been settled had the Respondent known its true value.

120. The Claimant's late disclosure of his work in mitigation took up tribunal time when it should not have done: disclosure had to happen; I gave time for instructions to be taken and time for further cross-examination once disclosure had occurred. I agree with Mrs Winstone that it is very likely the parties would not have had to attend on Friday if it had not arisen.

121. For both of those reasons it seems to me that the Council has incurred extra cost because of the Claimant's unreasonable conduct of the proceedings. The Rules do not require me to make such a causal link, but, where there is one, the argument for a costs order is much stronger.

122. The Claimant has assets beyond his family home in the form of two residential properties he lets out. These make him money beyond repayments on the mortgages and of course are increasing in capital value. He is currently in work, above the average wage. I consider he has the ability to pay some costs without causing hardship to his family.

123. I have therefore decided that because of the serious nature of the unreasonable conduct; and the costs that may have been avoided; and the Claimant's ability to pay, I should award costs in this case.

124. I order the Claimant to pay to the Respondent £3,000 in respect of costs.

Employment Judge Moor

6 August 2018