EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr G Hurley	**v**	Suffolk County Council

Heard at: Bury St Edmunds

On: 7, 8 & 9 May 2019
6 June 2019 – In chambers.

Before: Employment Judge Laidler

Appearances
For the Claimant: Ms E Grace, Counsel.
For the Respondent: Mr A Hodge, Counsel.

JUDGMENT

1. The claimant was unfairly dismissed

2. A remedy hearing to determine quantum will now be listed

RESERVED REASONS

1. The claim in this matter was received on 2 March 2018. The claimant claimed unfair dismissal and breach of contract for failure to pay his notice pay. The respondent in its response received on 6 April 2018 denied the claims in their entirety asserting that the claimant was dismissed for a fair reason namely conduct or alternatively for some other substantial reason and that it had acted fairly in all the circumstances of the case. It asserted the claimant had been guilty of gross misconduct and defended the breach of contract claim on that basis.

2. There was a preliminary hearing before Employment Judge Warren on 14 June 2018 when a hearing was listed for 4-6 December 2018. That had to be vacated hence this hearing. At the preliminary hearing the

issues were clarified, and the claimant's solicitors undertook to file the amended list following that hearing. For some reason they had not found their way into the bundle, but the agreed list was filed for this hearing. It is as set out below: -

Unfair Dismissal

(i) Did the respondent unfairly dismiss the claimant contrary to s.94 of the Employment Rights Act 1996?

(ii) Was the reason for dismissal a potentially fair reason under s.98(2) of the Employment Rights Act 1996?

- The respondent relies on conduct; namely the claimant's deregistration as a foster-carer, or in the alternative SOSR; namely, reputational damage. Both of which are set out in paragraph 8 of the grounds of resistance.

- The claimant does not believe he had committed misconduct and the respondent did not have a reasonable belief in misconduct. He does not agree that there is reputational damage.

(iii) If the reason or principal reason related to conduct, whether the test in British Homes Stores Ltd v Burchell [1978] IRLR 379 is satisfied, in that:

- Did the respondent have a genuine and honest held belief as to misconduct of the claimant alleged at the relevant time?

- Did the respondent have reasonable grounds to hold that belief?

- At the time at which the respondent formed such belief, had it carried out as much investigation as was reasonable in all the circumstances of the case?

(iv) If so, did the respondent act reasonably and within the band of reasonable responses in treating the reason as a sufficient reason for dismissal, within the meaning of s.98(4) of the Employment Rights Act 1996 in light of the size and administrative resources of the respondent and in accordance with the equity and substantial merits of the case?

(v) When assessing the range of reasonable responses:

- Was the claimant's dismissal covered by Article 8 of the European Convention of Human Rights ('ECHR')?

- Was there an interference of the claimant's Article 8 right and if so was that justified?

- If the interference was not justified, was there a permissible reason for the dismissal under the ERA that did not involve unjustified interference with the Article 8 right?

- If there was a justified reason for the interference whether the dismissal was fair when reading and giving effect to the ECHR under s.3 Human Rights Act 1998 so as to be compatible with the Article 8 right?

Wrongful Dismissal

(vi) Was the claimant in fundamental breach of his contract, thereby justifying summary dismissal?

(vii) If not, was the claimant's summary dismissal a breach of his contract of employment?

(viii) If so, is the claimant entitled to notice pay under his contract of employment and/or the statutory entitlement under s.86 of the Employment Rights Act 1996?

3. As the case only had three days allocated to it and the Judge was concerned about the time-tabling it was agreed that in the first instance the representatives would in their questioning and submissions focus on the issue of liability. In the event it was not possible for the tribunal to deliberate within the allotted timescale and this decision was reserved.

4. The tribunal heard from the following on behalf of the respondent: -

4.1 David Jacobs, formerly Head of Service for Children's Social Care Fieldwork (now retired).

4.2 Sebastian Smith, Head of Service.

4.3 Stuart Hudson, Troubled Families Co-Ordinator.

4.4 Gitanjali Banerji, HR Change Partner.

And the claimant gave evidence on his own account.

5. The tribunal had a bundle of documents running to approximately 400 pages. From the evidence heard the tribunal finds the following facts.

The facts

6. The claimant commenced employment with the respondent on 1 September 2008 as a support worker. His basic role consisted of collecting "looked after children" from their foster carer(s) and transporting them to a pre-arranged destination which could be a children's centre,

family home or in the community for a contact session which he would supervise. During that session he was required to write detailed observation notes about everything that happened during the time the children spent with their family member. Those notes would be read and signed by the family member before being passed to the social worker for court use. The claimant could then be called upon to give evidence in court.

7. At the end of the contact session the claimant would return the child or children to their carer. Other duties involved supporting young people in school to try and keep them in education and one-to-one support of the young person's foster placement with the aim of preventing any placement breakdown. The claimant would also be involved in supporting other agencies in looked after children, social activities and being on-call to collect young people from Police stations to transport them to a bail address.

8. The claimant injured his knee on 11 July 2013 and started a period of sickness absence on 15 July. He attended an occupational health appointment on 13 September 2013. As a result of the knee injury it was recommended that he carry out an office-based job on a temporary basis. In a report dated 16 September 2013 Dr Lalith Kithulegoda, Occupational Health Physician expressed his view that the claimant was unlikely to return to his normal role for the foreseeable future until he had better symptom control of his right knee. If there was any office-based work that he could do the doctor believed that would allow an earlier return to work on reduced hours and duties to build up to normal hours. The claimant he said might also require transportation as the claimant had not been able to drive because of the knee issue. He had asked the claimant to meet with his managers to look at the practicalities of those options. He believed that once the claimant had seen a specialist and had appropriate treatment he would recover fully from the problem. He also advised an up-to-date workstation assessment for any office-based work assigned to the claimant.

9. The claimant had an operation on his knee on 9 January 2014 and was able to return to work after that. On 17 February 2014 he went back to work as an office co-ordinator. In that role he received requests from social workers to organise schedules for supervised contacts. That involved booking venues, booking support staff to facilitate the contact and arranging time slots. These supervised contacts were arranged for up to a year in advance and up to five times per week countrywide. When vulnerable children came into the office they were never unaccompanied and always had a supervisor and parent(s) present. Neither the claimant or the children were free to wander the building. If the supervisor had to pop out the claimant would be in the room with the children but the parents would be there also. This was also noted on page 3 of Jeannette Rouse's report

10. The claimant was also involved in payroll. He ratified the claims made by all non-contracted staff for the hours/mileage and expenses over the previous month through submitting all claims to payroll. All claims were copied and filed in case of query.

11. The claimant also received training to fulfil safety checks weekly with regard to fire alarm testing, water testing and to be able to risk assess and complete fire risk assessment. He was responsible with two office-based colleagues for unlocking the building in the morning and shutting down the building and ensuring it was secure at the end of the day.

12. The claimant was also responsible for ensuring that all workers vehicles had MOTs, were taxed and insured, also that driving licences were current for Human Resources. Along with others he was responsible for keeping the building in a safe and clean state as there was no budget for a cleaner. He booked pool cars for team members to use if necessary and was available to step into contact sessions should the supervising worker require a comfort break or require assistance if a session had become unstable or aggressive.

13. Dr Hall-Smith Occupational Physician reported having seen the claimant recently by letter of 27 February 2015. The claimant was then walking with a limp but was able to climb the stairs slowly holding the rail but his right knee was swollen. It was evident that the claimant was currently living a restricted life as he was only able to walk about 200 metres without pain and having to stop. That had not improved in the last 6 months, but the claimant could now kneel slowly which he could not do 6 months ago. He was unable to walk and undertake any lifting activity due to pain. The claimant was able to manage his current office-based duties but again the Occupational Health Physician stated that he could benefit from a workstation assessment. That would include an assessment of his seating. The claimant had reported that the amount of driving and lifting required in his substantive role would make that impossible although the claimant did manage to drive the 20 miles to work.

14. The doctor was unable to determine whether the claimant might be able to return to his definitive role. It appeared that the specialists involved in the claimant's care were optimistic that his symptoms would completely resolve over time but clearly that was not happening as anticipated. He could not envisage that the claimant would have recovered sufficiently to be able to return to his substantive role within the next 6-8 weeks. His incapacity may persist beyond that. Management may wish to consider a further review in 2 or 3 months' time depending on the claimant's progress.

<u>The claimant registered as a foster carer</u>

15. Whilst working for the respondent the claimant was registered as a foster carer with his wife Alison. They had been looking after the same child for approximately 10 years. Concerns arose over their care of the child and the child was removed from their care on 15 November 2015.

De-registration – Fostering Panel 25 November 2015

16. The issues came before a Fostering Panel to consider the continued registration of the claimant and his wife as foster carers.

17. Having heard the evidence including that from the claimant and his wife the panel unanimously agreed the recommendation that they be de-registered and no further children be placed with them for the following reasons:-

> "A range of professionals had expressed serious concerns about their care of the child. The carers had responded with a reasonable explanation as to why each action was necessary. This was often said to be on the advice of professionals. Panel members acknowledged they were not in a position to judge between these reports but considered that the range of concerns expressed over time by workers in health, social care and education led to the conclusion that the risks involved in continued fostering would be too great."
>
> There had been six previous reported incidents or allegations regarding protection and quality of care issues since 2008. It was noted that they had not all been substantiated but in the panel's view showed a pattern of concerns over time about the child's wellbeing. The panel could not therefore be confident that they could provide safe care to a child.
>
> The child's unexplained weight loss and gain, and the carers response to this was of significant concern.
>
> The carers did not seem to demonstrate insight into concerns of some of the professionals and to work well in partnership.
>
> The carers might find it difficult to work with professionals in the future.
>
> The child had not been permitted to engage in age appropriate activities.
>
> The alarm fitted to the child's room was inappropriate and he had not been afforded sufficient privacy.
>
> The carers are approved for a specific child who does not want to live with them and there are no other plans to return him to their care. The child is of an age to determine where he wants to live."

18. The panel did recognise the commitment of the claimant and his family had shown to the child over the years as well as their commitment to training.

19. At the end of the decision was the recommendation to de-register. This was made by David Jacobs The Agency Decision Maker who ratified the panel's recommendation. He expressed his confidence that the panel had carefully considered the history of concerns and had made the right recommendation in the circumstances.

Letter from David Jacobs to the claimant and his wife 7 December 2015

20. Mr Jacobs confirmed his decision to the claimant and his wife in a letter of the above date. In the letter he is described as "Agency Decision Maker" and he wrote to inform them that he was intending to support the panel's recommendation and that he had to formally send them a Termination of Approval Notice and to set out the process for review of any decision should they disagree.

21. In this letter Mr Jacobs set out the panel's conclusions as have been set out above and advised the Hurley's that they had 28 calendar days to write to him if they wished the matter to be re-considered. He explained that there were two options for them to consider regarding a review. They may wish for the matter to be reviewed at the second Suffolk County Council Panel. That meant the case would be re-heard by a panel with different members and would be chaired by one of the Vice Chairs. Alternatively, they might like to ask the independent review body (Independent Review Mechanism) to review this decision. The IRM is a review process set up by the Government and conducted by a panel independent from the Suffolk fostering service. He gave a weblink for further information and a leaflet.

Email from Victoria Hurling to Allan Cadzow

22. On 2 February 2016 Victoria Hurling, Service Manager for Children and Young Persons wrote to Allan Cadzow Deputy Director and Lead for Early Help and Specialist Services. She referred to the sad case of the child who had been in the Hurley's care for 10 years. She explained that the young person had suffered significant abuse as a young child as did his siblings who were adopted. He was known to the Hurley's and they were approved as foster carers for him 10 years ago. They had not to her knowledge fostered any other child. She explained how a number of concerns arose during the period the child was placed with Mr and Mrs Hurley including lack of weight gain, lack of development and inappropriate responses being noted of Mrs Hurley in relation to her interactions with him. That had led to the investigation and the fostering panel decision. Ms Hurling understood that the decision regarding de-registration would be back with Mr Cadzow following the IRM panel decision.

23. The email went on to explain that Ms Hurling had been involved in the investigation of the Hurley's and met with them on a number of occasions regarding the concerns. She felt it only fair to comment that the child's behaviour had been "testing" and whilst the scenarios which led to the concerns being raised are unexplainable with regard to acceptable standards of care it could be argued that the Hurley's were "ill equipped to manage such behaviours and naïve in their judgment of the child's needs and what might be in his best interests". Ms Hurling explained that she was responsible for Brooks House where the Hurley's both have contracts of employment. It is not necessary for the purposes of this decision to go

into the details of Mrs Hurley's which was as a casual contract as a contact supervisor.

24. The email however confirmed that the claimant had not fulfilled his contractual duties for many months in view of his role being changed to being office bound as a result of his knee condition.

25. Ms Hurling stated there was currently no date for the IRM panel, but it was likely to be at the end of March/beginning of April, after which she understood Mr Cadzow would be asked to make the decision regarding continued registration. She expressed that the difficulty would be "if they are not deemed able to foster children can they be found suitable to continue in a role supervising contact for vulnerable children".

26. In response to this email Mr Cadzow stated as follows:-

> "Thanks for below. I do not see how if they are de-registered that we could feasibly continue with them in their contact supervisor roles. Mr Hurley should certainly not be doing building work. I would suggest getting HR advice at the earliest opportunity."

27. There had been earlier correspondence between Victoria Hurling, HR and Teresa Morrison concerning the staffing of Brookes House, where the claimant was based. She set out in a detailed email of the 8 January 2016 the staffing there and gave information about the claimant's role. She explained how he had suffered a knee injury that required surgery and been allocated to be office based for his recovery by OH. He had not recovered fully and driving long distances throughout the day was not possible. This had been assessed again by OH and it was agreed that the claimant stayed in the office as 'his skill base complemented our IT needs, property management, H&S checks, etc'. She reported that she had checked with Sam (believed to be Sam Boyd-Lambley who was copied into the email) and it was agreed that the claimant stay office based taking responsibility for the:

> 'IT, H&S checks and doing contacts at BH when it could be arranged for the children to be transported to and from the contact centre…Due to Graham's personal circumstances, Graham does not do an (sic) child contact work at the moment, he coordinates, manages IT, does all H&S checks, monthly payroll and all other duties, that would require and admin post and a cleaner post, we do not have the funding allocated in our budget for these roles'

It is of note that she did not express any concern as to whether the claimant was an employee or not.

28. Evie Tooke of HR wrote on 26 January 2016 confirming that the claimant was indeed working under a contract of employment and was an employee as there appeared to have been some doubt about his status. She refers to a LADO (Local Authority Designated Officer) meeting on 15 January 2016, and that as the claimant was an employee a disciplinary

investigation process must be applied to his case. Ms Hurling thanked HR for their assistance and asked to meet with Miss Banerji who was absent on leave. They met on 23 February 2016 to discuss the matter further. They continued to have concerns about the claimant's status as although he was employed as a support worker he had been performing a different role on a temporary basis. There were questions over whether he had contact with clients in that temporary role. It was also unclear to HR at that point what action the Police were taking. There were further emails exchanged between them and Miss Banerji provided a template suspension letter.

IRM Review 5 April 2016

29. The Hurleys took the route of applying for a review under the Independent Review Mechanism (IRM). The hearing took place in London on the above date. The chair of the panel was a Rachel Bailey who sat with four other members, one described as a social worker in the minutes. The minutes record that the remit of the panel was to consider whether the Hurleys remained suitable to continue as foster carers. The meeting then started with questions to the Hurleys. These concerned the whole history of the time the child was with them and information about their own family circumstances. After the question sessions the Hurleys were given further opportunities to comment.

30. At the end of the report the panel gave a summary of its discussion and then its decision.

31. It was agreed by the panel that the applicants presented well and demonstrated a comprehensive understanding of fostering in its entirety as well as empathy for children placed in foster families. The panel recognised that they had clearly dealt with an extremely challenging situation concerning the child's placement with them initially when they themselves were new carers. Even at that time they had managed to contain and continue with the placement providing stability, consistency and inclusion for a very troubled boy and then adolescent. For many years they demonstrated the ability to work with professionals, attended meetings, encouraged the child with his education, became involved in thereputic work with him, undertook training and as a family demonstrated commitment to fostering. The panel members commended them for how well they had done given their novice status initially. It was recognised that as a couple they had demonstrated that they were resilient and non-judgmental foster carers. They assisted the child to explore his sexuality and advocated for him. They were consistent with him and stuck by him, managing some extreme behaviours and threatening situations exhibited by him. The panel expressed concerns about the restrictions the couple placed on the child's access to the fridge and the installation of an alarm to monitor his movement at night. It was noted that the reasons given for these devices were varied and changed over time, but that Fostering Service Provider (FSP) had been supportive and sanctioned them initially. The panel members went on that:

> "We're satisfied that despite their shortfalls Alison and Graham and their sons still have a lot to give to children needing fostering families even if that is not in relation to every foster child. Panel members were disappointed that the FSP workers did not come to the meeting well informed or prepared. It was not clear what evidence was being used to substantiate comments and decisions either from the documents submitted to the panel or the verbal responses provided by the FSP representatives during the meeting. There was no clear understanding of the issues around the child's weight or the complexities the families were dealing with. The removal of the child from the placement had not been undertaken in a satisfactory manner particularly given the length of time he had been with the family. Panel members agreed that the processes involved in reviewing the carers and reaching the intended decision to terminate A and G's approval were not done in accordance with national regulations and standards governing fostering and therefore had not been just either to the child or the carers."

32. The panel's recommendation was unanimously that the Hurleys were suitable to continue to foster. There reasons were as follows:-

> "1. Mr and Mrs Hurley had demonstrated a comprehensive understanding of fostering and that they had the knowledge experience and ability to meet the complex needs of foster children placed in their care.
>
> 2. As a family they have offered consistency and commitment to foster children over 11 years.
>
> 3. The couple value training and actively seek it out for themselves in relation to issues presented by foster children in their care."

33. The panel also provided feedback to FSP. They stated that the paperwork submitted was confusing, voluminous and repetitive which served to hinder rather than assist the panel members. There had been a lack of preparation for the meeting and an inability to provide an overview of the foster carer's caring career in its entirety which had been disappointing. The representatives failed to identify and evidence the substance of concerns the FSP cited as the reasons for the intended decision to terminate the carers approval. The panel also raised concerns that many of the matters in the case appeared to not have been properly investigated and substantiated. It concluded:-

> "It is not the remit of a strategy meeting, as happened in this case, to conclude that the applicants were unsuitable to continue to foster. Such recommendations should come via a foster carer review presented to the FSP's fostering panel where the applicants have the opportunity to respond to those areas of concern."

34. The decision is dated 14 April 2016.

<u>LADO Meeting 19 April 2016</u>

35. From an email that Leo Flatters, Service Manager sent to Victoria Hurling and Gita Banerji on 19 April 2016 it is known that a LADO Strategy

Meeting took place on that date. The decision must have been taken to invite the claimant to a meeting and suspend him pending investigation as Mr Flatters refers to draft letters.

The claimant's suspension 20 April 2016

36. The claimant must have been telephoned by Victoria Hurling asking him to attend a meeting on the afternoon of 20 April 2016. An email was seen from him to her of that date stating he would contact his Trade Union and take their advice. He then emailed asking for details of what the meeting was to discuss. The tribunal did not see any email in reply.

37. The claimant attended the meeting and he was duly suspended. Mr Flatters confirmed this in an email to Victoria Hurling, copied to HR and David Jacobs on 20 April 2016. The suspension was confirmed in writing in a letter of 20 April 2016. The letter explained that it was to advise the claimant "that in the light of the matters relating to your deregistration" Mr Flatters had "taken the precautionary step" of suspending the claimant from his duty as a family support practitioner with immediate effect until there had been a full investigation into the details presented to him. This was not to be regarded as pre-judging the matter. During the period of suspension, the claimant would be paid his contractual rate of pay. He was given Sam Boyd-Lambley as support during the duration of the suspension. During the suspension the claimant would be expected to make himself available for any meetings that might be arranged as part of the investigation.

38. At the point of suspension, the claimant had been carrying out the office co-ordinator role for just over 15 months and had been deregistered as a foster carer for over 4 months. There is no evidence that the respondent had before them IRM outcome when it took the decision to suspend. There is an email from Jeannette Bray of HR to Leo Flatters of 19 April 2016 (i.e. the day before the suspension) agreeing they would "continue with plan for GH" and that they were not pre-empting the appeal outcome. That suggests that they had not at that point had the IRM report.

Letter from Allan Cadzow 4 May 2016

39. The claimant gave evidence which was not challenged that the IRM had agreed that it's report would be delivered to both parties by courier on 20 April 2016 at 1pm. The claimant was suspended a few hours later.

40. The procedure within Suffolk County Council was that even after the IRM decision the matter reverted back to Mr Cadzow to either accept or reject their recommendations.

41. Mr Cadzow does not make reference to the detail of the IRM decision and recommendations. The tribunal did not hear from him. It has noted however that the reasons he has given in this letter that the original determination to not re-approve the claimant to fostering service and for

the deregistration to stand are taken word for word from the decision of the fostering panel. What however is then added is that Mr Cadzow did not believe that the IRM in making their recommendation: -

> "Sufficiently demonstrated the seriousness of the substantial abuse [the child] suffered in your care. There is no acknowledgement of the multi-professional concerns raised both in the here and now and in the past.
>
> The IRM have not acknowledged these ongoing concerns or taken them into consideration when making their recommendation.
>
> The IRM did not provide me with any confidence that your ability to work with professionals in the future would be any different to how you worked with professionals around [the child] in the past."

42. There had been no mention of "abuse" before and it is not clear where that came from and in relation to what actions by the claimant Mr Cadzow is referring to.

Investigation

43. On 20 April 2016, the day of the claimant's suspension Mr Jacobs wrote to Gita Banerji and Jeannette Bray HR regarding the investigation of the claimant's role as a foster carer. He stated it needed to be investigated by 'Corporate Parenting service worker' as they had expertise in that field. Cliff James (Head of Corporate Parenting) replied to Mr Jacobs on 27 April 2016 saying that having discussed the matter with managers within the service they felt there would be a conflict of interest for them to take on the role of investigating officer. They were dealing with the deregistration issue as foster carers and were responsible for the claimant's supervision as a foster carer. He therefore felt it would be far better for a manager within Mr Jacobs' service to deal with the investigation.

44. Mr Jacobs was not satisfied with that answer as he replied to Mr James on 28 April 2016 stating that he was not sure about this rationale. They nearly always investigate their own staff in respect of their performance/conduct regarding tasks for which they had supervisory responsibility and that is not regarded as a conflict of interest. Mr James' managers would have knowledge and experience of the matter and issues to be investigated. He said this was about conduct of a foster carer as a foster carer which was Mr James' service responsibility.

45. Jeannette Bray then emailed Mr James on 9 May 2016 suggesting Jeanette Rouse as an investigator. Mr James was content that it was appropriate to commission her and so made contact. There is an email from him to Human Resources on 10 May 2016 saying he had left a message on her mobile phone for her to call back to see if she would do the investigation.

46. It appears that Gita Banerji met with Jeanette Rouse on 16 May 2016 although Mr Jacobs was not able to be there. Gita Banerji emailed her on 16 May to confirm their meeting. She stated in this email "as discussed as the deregistration has occurred we do not believe the conduct itself needs to be looked into but rather the potential impact on the organisation in terms of risk to customer and risk to reputation". She also stated that the only people they thought that Miss Rouse needed to speak to were the claimant himself and David Jacobs who as service manager could speak about the claimant's role and the impact on the service. No terms of reference for Jeanette Rouse were ever seen.

47. By email of 17 May 2016 Miss Rouse asked to meet with David Jacobs to discuss the claimant's role. It was felt however that Victoria Hurling was best placed to do this as she had been the claimant's line manager.

48. Jeanette Rouse also wished to know who would be acting as chair of any disciplinary panel and Mr Jacobs approached Jacquie Gould. Mr Jacobs confirmed that she was prepared to act in an email to Gita Banerji on 28 June 2016.

49. By letter of 19 May 2016 Victoria Hurling wrote again to the claimant. She apologised for the delay with progressing the investigation which had been caused by the need she said to identify an appropriate and impartial investigator for the case and that she was writing now to clarify the current position. Although they had originally stated Natalie Rich would be the investigator that was no longer possible and Jeanette Rouse had been appointed. The letter stated that the investigation would focus "upon the impact of your deregistration as a foster carer in terms of both risk to the customer group and reputational risk to the organisation and service".

50. On 24 June 2016 Jeanette Rouse was advised by Victoria Hurling that there had been a complex strategy meeting arranged for 29 June chaired by their safeguarding manager. She would revert to Miss Rouse when she had full information. Jeanette Rouse wrote to Gita Banerji on 24 June 2016 stating that she could not complete her report until information about this and the potential implications if the police had decided to pursue a case were known.

51. By email on 11 July 2016 Victoria Hurling advised Jeannette Rouse that there had been a delay in the police investigation due to the child not having made any direct allegations against the carers and the essence of the investigation being that the carers had neglected his needs. The police wished to view the social care files and that was currently being processed and she was not expecting there to be an outcome in the immediate future. Miss Rouse forwarded this to Gita Banerji and stated she would speak to her on the phone. They spoke on 12 July 2016 to discuss the implications of the delay of the police investigation. They agreed that she would not wait for it but instead would finalise the investigation report.

Jeannette Rouse's report July 2016

52. On 13 July 2016 Jeannette Rouse sent her report to David Jacobs and Gita Banerji. She asked this be forwarded to the chair of the disciplinary panel, Jacquie Gould as she did not have her email address.

53. The report confirmed that she had interviewed the claimant and Victoria Hurling and had discussions with HR to establish as much information about the claimant's role. A telephone conversation was also held with the fostering and adoption team regarding information about deregistration.

54. In a section headed "Summary" Miss Rouse concluded as follows:-

> "Concerns have been raised about the impact of the deregistration decision on Graham's ability to perform his contract role of support worker particularly in the context of being able to supervise contact sessions and to protect vulnerable children. There is also concern at the potential risk for reputational damage to SCC.
>
> In reviewing the evidence it is clear that Graham has not been undertaking his contracted support worker role for 2 years and his co-ordinator role has minimal contact with children. There is no specified end date for this arrangement which has been verbally agreed by Graham's line manager.
>
> Evidence indicates that in his current role as office co-ordinator there is limited risk to the customer group. There is however a greater risk if Graham returns to a role of support worker given the requirements of his role in supervising vulnerable children.
>
> In relation to the potential risk for reputational damage, it should be noted that Graham has stated that only two colleagues are aware that he has been a foster carer and he has stated that it is not in his interests to inform anyone that he has been deregistered. There is no list of deregistered foster carers in the public domain or accessible to members of the public.
>
> The Police are currently reviewing the social care files to assess whether there needs to be any action taken in relation to a criminal investigation. It has been indicated by the service manager that there is "unlikely to be an outcome in the immediate future"."

55. Her recommendation was set out as the final section to the report. In noting that the claimant had been undertaking the office co-ordinator role for 2 years with no specific end date there was "less clarity as to whether there is sufficient evidence to support the allegations against Graham in relation to the decision to deregister him as a foster carer". There was minimal evidence of a risk to reputational damage. With regard to his current co-ordinator role, there was minimal evidence that the decision impacted on his ability to perform the role or of a risk to the customer group. There would be increased risk if he went back to his support worker role and in that situation "there may be a case to answer". It was to be noted however there had been no change to his contract from support

worker to office co-ordinator. He had been performing that role for two years with the agreement of his line manager.

56. By email of 13 July 2016 Gita Banerji forwarded the report to Jacquie Gould (to be the chair of a disciplinary panel), David Jacobs and Jeannette Bray.

57. In this email Miss Banerji expressed her views about the report. She stated that Jeannette 'down played' the potential reputational risk which she still felt was a problem as staff were aware of the claimant's deregistration as a foster carer and it "does not look good" to have someone associated with allegations of neglect in service where safeguarding is key. Even if the claimant stayed in his project role he was currently doing with minimal contact with customer groups whilst he remained working for the council "we cannot prevent him from applying for other roles within the council where he would be directly working with children and young people. If he is dismissed from SCC this will show on his reference for his next job".

58. She stated that the decision maker, Miss Gould, had three options, none of which were without "risk implications": -

    (i) Take no formal action.

    (ii) Go to a formal hearing and depending on the evidence given potentially deliver a first or final warning.

    (iii) Go to formal hearing and depending on the evidence given potentially dismiss the claimant. That was described as being the least risky in terms of both customer and reputation but fairly risky in terms of employment "as the investigation report does not seem to support this option".

59. The decision now needed to be taken whether to go to a hearing. From a HR perspective Miss Banerji would advise that the threshold of the neglect allegations associated with the deregistration are such that she thought there was a case to answer at a formal hearing. As the investigation report did not specifically focus on the issues leading to deregistration "it may be that any documentation associated with this should be included in the pack if possible".

60. It should be noted at this point that Miss Rouse expressly states in her report that the purpose of her investigation was to ascertain "the implications of the deregistration" on the risk to the customer group and reputational risk and "it should be noted that the remit of this investigation is <u>not</u> to review the deregistration decision" [emphasis added]. She therefore did not have information about the deregistration decision. It is however hard to know what exactly she had as there are no written instructions to her and no terms of reference.

61. Miss Banerji went on in her letter of advice that it was important to ensure that the allegations were worded correctly in the invite letter to the disciplinary hearing, and she suggested something like "the allegation is that the circumstances of your deregistration amount to misconduct potentially gross misconduct with the potential to put CYPs client group at risk and/or to cause reputational damage to the service and Suffolk County Council".

62. She reminded Miss Gould about the timing when the packs of information should be sent. She then went on to discuss who should present the management case. This she said would usually be the investigator, so Miss Gould may need to co-ordinate with her. However, "it may be more appropriate for David to present the management case".

63. She concluded that if the claimant remained with the respondent he should be made 'formally permanent' in his current project role. That did carry some risk as the situation was never formalised in paper. There would also need to be a risk assessment about his access to customers as he was occasionally left alone with them when a supervisor left the room. She did not think he should undertake that duty.

64. In cross examination Miss Banerji confirmed that she had not seen the IRM report at the time she wrote this email. She did however have experience of previous cases and how these had been dealt with in the past where there were safeguarding concerns. She and the manager were surprised that Miss Rouse did not even recommend proceeding to a formal hearing. In cases she had seen before where safeguarding was an issue they had always gone to a formal hearing.

65. Miss Banerji confirmed in evidence that the reasons she suggested David Jacobs put the management case was that the investigating officer had fundamentally disagreed with the management case so it was more appropriate for David Jacobs to present it. Jeanette Rouse was not a safeguarding expert however and David Jacobs and Sebastian Smith who did in the end hold the disciplinary hearing were more aware of those issues. Miss Banerji attended a meeting with David Jacobs and Jacquie Gould on 28 July 2016 at which Jacquie Gould confirmed that she felt that there was a case to answer. It was agreed that a disciplinary hearing would be convened on 20 September 2016.

66. There is reference in an email of 28 July 2016 that Sam Boyd-Lambley spoke to the claimant and advised him of the decision, and Jacquie Gould replied that they had agreed the date and a letter would be sent as soon as possible. The tribunal could not see any letter sent to him at that stage in its bundle. That the claimant was aware of it is seen from his email to Jacquie Gould of 22 August 2016 about the meeting listed for 22 September 2016. He asked who he could bring as an independent person as he was not to be supported by his Trade Union.

67. In an email of 29 August 2016 the claimant wrote to Miss Gould stating that he had been advised in the earlier letter that all supporting documents would be sent to him within 10 working days and he had not received them.

68. By letter of 15 September 2016 the claimant was advised that as he was taking judicial review proceedings the disciplinary hearing on 22 September 2016 would be postponed. He would remain on suspension pending it being re-scheduled. No further action was taken in connection with the disciplinary until the claimant withdrew the judicial review application due to funding concerns. In July 2017 following receipt of the sealed order of the court the respondent re-commenced the disciplinary process.

69. By this time, it had been decided to change the chair of the disciplinary panel to Sebastian Smith Head of Service for Suffolk Multi Agency Safeguarding Hub ('MASH'). It was considered that a safeguarding manager would be best able to make judgments relating to the matters involved in the case. Although a date of 26 September 2017 was mooted the claimant had not had all the relevant paperwork, so a new date of 11 October 2017 was set. The respondent however decided that Jeannette Rouse should be at the hearing and she could not do that date so it was adjourned again to 1 November 2017.

<u>David Jacobs' management case report for the disciplinary hearing</u>

70. At page 231 of the bundle the tribunal saw David Jacobs' report of 20 September 2017. This was delivered at the hearing and he elaborated on some of the more important points.

71. His report made it clear that although the disciplinary investigation was not commissioned to re-visit the decision to deregister the claimant as a foster carer "it is important to note that management view the decision as the correct one given the very significant concerns leading to such a decision, that have relevance in considering GH's ability to safely and adequately perform his substantive role and current role in children's services".

72. He did set out that the IRM did not agree with the original decision, but that this was reviewed Allan Cadzow and re-instituted. He then stated that the claimant took the matter to court to appeal (the judicial review) and then asserted "but when the council asserted its case and the rationale to contest the application he withdrew his appeal". In evidence Mr Jacobs was questioned as to why he stated that as it appeared to the reader that the claimant only withdrew the judicial review application when the respondent asserted its case, believing the respondent's case to be strong and his to be weak. Mr Jacobs accepted it could be read like that, acknowledged that he did not have a conversation with the claimant as to why he had withdrawn and if that sentence was misleading he apologised for it. The tribunal accepts the claimant's evidence that he withdrew due to the costs of continuing with such an action.

73. Mr Jacobs made minimal reference in his management case to the decision of the IRM. He stated at the bottom of the first page that the decision to de-register was "not agreed by the independent review mechanism panel" but that the decision of the original fostering panel was re-instituted by Alan Cadzow. He made no reference to the criticisms made by the IRM of the poorly presented case by the foster service provider representatives, nor the detail of their findings and recommendations. In evidence Mr Jacobs could not remember if the disciplinary hearing had access to the report of the IRM. He maintained his position that that hearing was not to re-hear the de-registration as that decision had already been made.

74. Mr Jacobs stated that in respect of what child safeguarding risks were raised by the de-registration context and the claimant's response to it he was concerned that there were indications that: -

    74.1 The claimant may well not recognise safeguarding concerns for children he is supervising or who are otherwise attending the centre within which he works.

    74.2 If the claimant does not recognise a child safeguarding concern he will not be in a position to intervene where the necessity arises.

    74.3 The claimant may well not report child safeguarding concerns if he recognises them.

75. Regarding the temporary role that the claimant was undertaking (which he had been doing for 2 years due to his knee problems), Mr Jacobs stated that it was not permanent and "does not exist within establishment of the service". Whilst the claimant was not alone in "such anomalies" they are "agreed as temporary measures to support staff in a staged return to substantive roles". He went on: -

> "Given widely known and appreciated financial constraints the council has to continually review its deployment of resources and is endeavouring to resolve the temporary exceptional arrangements that have arisen from well-meant supportive intentions."

76. There has been no evidence given to this tribunal that until these matters arose there was any issue with the claimant's temporary role. The tribunal is satisfied that that had been agreed with him due to his difficulties experienced with his knees and in particular driving.

77. With regard to risk to the reputation of the service, whilst acknowledging that the claimant had stated only two colleagues were aware he had been a foster carer and that it was not in his interests to inform anyone he had been de-registered and that the investigating officer had concluded there was "minimal evidence of a risk to reputational damage" Mr Jacobs stated that regrettably he thought it highly unlikely that awareness of the

de-registration would be as limited as the claimant had asserted. He concluded that there was reasonable cause for concern in respect of public trust and confidence in the service if the claimant returned to his contracted role or that which he was performing prior to April 2016. In answer to a question in cross examination he confirmed that his view at the time he wrote the report was that the claimant could not remain in the role. He did not think it right that he stay in employment. He did not consider training or make such a recommendation as his view at the time he wrote the report was that the claimant could not remain in the role.

The disciplinary hearing

78. The disciplinary hearing was conducted by Mr Seb Smith, minutes were taken and seen in the bundle at page 317. As stated Mr Jacobs presented the management case from his report, Jeanette Rouse attended as did Gita Banerji of HR. Mr Jacobs' report was in fact cut and pasted into the minutes.

79. The claimant was given the opportunity to present a response but stated the majority had already been said with regard to his concerns raised at previous meetings and he did not feel it necessary to go over them again. He disputed some of the facts of de-registration. He stated the starving the child of food did not happen and none of the witnesses or people who visited were asked to corroborate the allegations that were made regarding the child. Mr Smith is noted as stating that the de-registration decision had already been made, had been tested and found to be good and legitimate, and so they were "unable to revisit this decision today". In fact, however, it had not been found to be good as can be seen from the IRM report.

80. Mr Smith was taken in cross examination to the letter inviting the claimant to the disciplinary hearing sent by him on 11 October 2017. This stated that:-

> "The allegations in broad terms are that the circumstances of your de-registration amount to misconduct, potentially gross misconduct with the potential to put CYP's client group at risk and/or to cause reputational damage to the service and Suffolk County Council."

81. It went on to state that the purpose of the hearing would be to discuss "the issues around your conduct as set out in detail in the investigation report". In cross examination when taken to this letter Mr Smith explained that whilst they were not looking at the de-registration they were looking at the consequences to the respondent as the employer of employing someone who had been de-registered. The letter was written in broad terms he said to allow both parties to introduce into the hearing what was relevant. The disciplinary hearing could consider some of why de-registration occurred in considering the risk to the respondent. The reasons for de-registration varied and some are more significant than others.

82. Mr Smith confirmed that he had not considered the IRM report as the hearing was not concerned with the de-registration. He did not know what the IRM had decided. He could not re-visit and had no mandate to re-visit the de-registration. He did not think that the IRM's view that there was minimal damage on all charges was something he needed to look at. He did not think he needed to read the IRM report.

83. Jeanette Rouse joined the meeting as a witness to give information about her investigation report. She gave some background on her employment history. She had been an external HR consultant working with the respondent for 9-10 years coming in and doing a variety of work and investigations. She stated this had been a complex case as the claimant had not been performing his contacted role as a support worker for 2 years and instead was performing more of an office co-ordinator role. She is recorded as stating: -

> "At the time of the investigation GH's role was working as on office co-ordinator. As an office worker with minimal contact with children, it had been her assessment that this was minimal risk to SCC as he was not working alone with children. Cases she had seen that have gone to tribunal is where something has actually happened and not just the potential for something to happen."

84. Mr Smith intervened to state there was no documentary evidence that the temporary role was contracted. There was discussion about the rate at which the claimant was paid. Mr Jacobs stated that the role could not be called co-ordinator and suggested that perhaps the claimant was assisting with the role but not completing the role himself and that he was paid as a support worker. Miss Rouse commented that the service manager at the time clarified the role the claimant was completing and that he was not performing a support worker role and that this was due to him having an injury. As noted in her report the claimant was completing 70% co-ordination role and 30% maintenance role.

85. The notes then record that Mr Jacobs and Miss Rouse left the meeting. The claimant made a statement before the decision was given.

86. Mr Smith is noted as stating that the decision had been made that de-registration could not be looked at again. Employing someone who had been de-registered as a foster carer for putting a child at risk of harm has an impact on the reputation of the respondent. The decision would be to dismiss the claimant from his role as a support worker with immediate effect.

87. In cross examination it was put to Mr Smith that the point of reputational damage was not supported by the investigation report. He thought it was in part. He was referred back to the minutes which have been cited above where Miss Rouse stated that the risk was minimal but his response was that he disagreed with her. When asked on what basis, he acknowledged "I don't set out the basis at great length. I think I set out in the final conclusions".

88. The tribunal was then taken to a document in the bundle at page 331 which is a note of the disciplinary decision. Mr Smith accepted that was not a document that the claimant saw.

89. Section 1 asked if there had been as much investigation as was reasonable and Mr Smith noted there had been a full investigation by an independent investigator. He does not however acknowledge that the investigator did not find that there was a case to answer. He again stated that the decision to de-register fell outside the scope of the hearing. The basis for his genuine belief that the claimant had committed the misconduct as alleged was that: -

> "a. GH had caused harm to a child while working as a foster carer and this was the conclusion of the managers who confirmed his de-registration. This decision was recognised as sound by myself and was not open to review.
>
> b. To employ as a support worker an individual who had been de-registered as a foster carer on the grounds that they had harmed a child would necessarily risk reputational damage to the local authority and potentially put the client group at risk."

90. In section 4 Mr Smith explained that he had reasonable grounds on which to sustain that belief as the allegation:

> "is an undisputed matter of fact. It is the impact of the substantiated finding to de-register DH as a foster carer that was the subject of the hearing. The hearing considered that status of GH's current employment and found that GH substantive post was that of a support worker. This role is incompatible with the proven actions of GH as a foster carer."

he stated no mitigation had been put forward so he had not been able to consider any mitigating circumstances. In cross examination he stated that most people would find it surprising that the respondent would employ someone that they did not think was suitable as a foster carer. The two are mutually not compatible.

91. Mr Smith confirmed that he relied on the respondent's view of de-registration as the key element but he needed to know the context of why de-registration occurred to form a view on the risk to reputation. It could become known that the claimant had been de-registered. That is the risk. He did not think as an organisation they were comfortable about employing someone de-registered just as he did not think others would know about it. The facts of de-registration are not public. There had been no police action. That the claimant said that he had only told two people in two years gave Mr Smith cause for concern. He could not be satisfied that the claimant had not told others. He did not know of any media attention.

92. Mr Smith acknowledged that if the claimant had won his judicial review application this would have carried more weight and they would have had to have adhered to it. When it was put to him that there was nothing more

the claimant could do once he could not afford to pursue judicial review Mr Smith's answer to the tribunal was the claimant had the opportunity to put his case at the disciplinary hearing. When it was put to him though that he could not change the fact of the de-registration Mr Smith acknowledged that de-registration was very significant.

93. Mr Smith confirmed the dismissal in his outcome letter of 1 November 2017. In this letter it was stated that the disciplinary hearing had been held in relation to the alleged misconduct in that the circumstances "of your registration amount to misconduct potentially gross misconduct with the potential to put CYP's client group at risk and/or to cause reputational damage to the service and Suffolk County Council". He went on that it had been established to his reasonable satisfaction that the gross misconduct had occurred, and that decision was made on the basis that "de-registration from your role as a foster carer for harm caused to a child was in itself gross misconduct and that in addition this would necessarily risk reputational damage to the local authority". He acknowledged however that causing harm to a child was not in the invite to the disciplinary hearing. It was put to Mr Smith in cross examination that it had never in fact been found that the claimant had harmed a child. He was taken to a document at page 74-75 of the bundle which is a letter from Victoria Hurling to Alan Cadzow of 2 February 2016 in which she sought to summarise the concerns against the Hurleys. Mr Smith did not believe he had seen that document. The documents he considered were the investigating officer report and David Jacobs' management statement that stated whilst in the care of the Hurleys the child had reached five and a half stone, the child required hospital treatment for catastrophic weight loss. When he was asked where the decision came from that the claimant had harmed the child he answered that neglect was a form of harm and abuse. If the child had not been harmed in their care they would not have been de-registered. He took that as a matter of fact. He was asked what mitigating circumstances the claimant could have raised and Mr Smith said he could have said he was coerced by his wife. The judge asked Mr Smith whether he would have still said that the de-registration was a fact and he acknowledged that he would. He stated however that the claimant was able to put forward any mitigation he wished but was told that to revisit the de-registration could not form part of the disciplinary hearing. He did not explore other mitigation as one of the issues with the de-registration was the failure of the Hurley's to acknowledge any fault on their part. If the claimant had acknowledged that they did not get things right, that to a degree would have been considered as mitigation.

94. In going back over the investigating officers report Mr Smith said that he relied upon it for the circumstances around the issue. He disagreed with its conclusions although gave them some weight. When asked why have the investigating officers report, Mr Smith's position was that it provided a level of independence in seeking information and talking to relevant people, and setting out the framework of the situation. There was expediency of getting someone external to do it in a timely manner. If it

had been someone within the respondent, then that compromises objectivity and there may have been time constraints.

95. When asked about training he acknowledged that people are trained to recognise harm and abuse, and sometimes this is effective and others not. He stated however he was sure that training would have helped the claimant but he did not consider it.

The claimant's appeal

96. By letter of 6 November 2017 the claimant advised that he wished to appeal the decision to dismiss. He submitted an appeal statement by letter of 27 November 2017 (pages 344-347). In this he set out a chronology of events, he then noted that the police had taken no action against him, that an independent body did not uphold the de-registration, Jeanette Rouse had found no case to answer yet Suffolk County Council chose to ignore their recommendations. It was alleged that there was 'undue duress' put on the claimant due to the length of the process from 2 August 2016 to 1 November 2017. The claimant believed that the dismissal was unfair.

97. Stuart Hudson was to conduct the appeal. Miss Banerji of HR wrote to him on 28 November 2017 sending the claimant's appeal statement to him. She stated it read as if it had been written by a lawyer and consequently was asking for some legal advice. She set out in this email things that she was not concerned about and things that she was.

98. She was not concerned about:

98.1 The issue about management having a different opinion to the investigator and independent review panel about the level of risk.

98.2 The fact the claimant had been unrepresented.

98.3 The issue of going over the reasons for the de-registration stating "the fact is it occurred and the disciplinary was concerned with the repercussions of this on his employment".

99. She considered the arguments about what was the claimant's substantive role and what should have happened there to be more complex.

The appeal hearing on 19 December 2017.

100. The hearing was conducted by Stuart Hudson, Seb Smith attended as did Gita Banerji and the claimant was represented by Richard Allday, UNITE Trade Union representative. Mr Hudson started the meeting with introductions and explained the process. The meeting would start by the claimant having the chance to express his statement. Mr Smith would present the case for the employer and then there would be a chance to ask questions. He might ask questions throughout the process. The

employer can then make their final statement and no new evidence should be brought forward at that time.

101. The claimant commenced by discussing the child's weight and pointing out that he had been suitable for working from November through to February, and if he was deemed to be a safe employee in the role may be as an alternative to being dismissed he could have been moved into a different role. He had been carrying out the role for 2 years and he could have been moved sideways. Mr Smith intervened to say that they all recognised that de-registration was something they could not look at again "We can't cover this ground again". The de-registration was "proven and was taken as a matter of fact".

102. The claimant's trade union representative stated he was puzzled by what the nature of the alleged misconduct was and how this affected the terms of the contract. Mr Smith stated they had two facts to go on, one that they had harmed a child and they do not employ anyone who has done that, and secondly that the employee's conduct could bring the council reputation into disrepute. They were he said the two disciplinary allegations. The claimant pointed out that the accusations were made against him in the November and he was not suspended until the April. His trade union representative stated that any reputational damage would already have been done. They had continued to employ him for months.

103. Mr Hudson then asked the claimant what he had been doing on a daily basis in his then role. The claimant confirmed he worked at Brookes House in a co-ordinator role, sometimes he would meet families when they came in and escort them to rooms, he would then return to the front office if a worker needed a break he would be called back in to look over the occupants. He was also doing all the testing of fire alarms in the building. It was acknowledged that this role had been due to health reasons. Mr Smith stated he would have made the same decision regardless of which of the claimant's posts it applied to. His actions were incompatible with either post and dismissal was the appropriate action.

104. After discussion and questions with the claimant Mr Smith summarised from a statement which was headed 'Statement for Appeal Hearing'. He refers to 'abuse' of a child which amounted to gross misconduct. Again, it was not within the remit of the disciplinary hearing to review the de-registration.

105. Mr Hudson confirmed in cross examination that he had all the documents and saw the IRM report. It was correct that they were not there to find out about the facts of the de-registration.

106. Regarding the issue about mitigation, Mr Hudson was asked what that could have looked like. He stated that hypothetically if the original allegations and fostering issue had been completely overturned and the claimant and his wife allowed to foster again then that would have affected the issue of safeguarding. He was asked about the IRM outcome and

stated it did not take into account the reputational issues the respondent might suffer if the claimant and the family were to continue to foster children. The decision was based on what the average person in the street would think if children were still being look after by the claimant. The investigating officers report was only "advisory" and it had already been established the managers did not agree with it. It was the management's decision that Jeanette Rouse's report was not correct from the facts.

107. Mr Hudson completed a similar disciplinary decision form as had Mr Smith and this was found at page 375. With regard to investigation, again he acknowledged that the matter had been investigated by an independent investigator. It was pointed at the disciplinary hearing de-registration was a fact and could not be looked again. Mr Hudson did not think about having another investigation. There is reference in the decision notes to the claimant's "temporary post did not exist" and his actions that caused the de-registration were in Mr Hudson's view gross misconduct and as such re-deployment or some other form of move was not an option. He could not find mitigation put forward by the claimant and his representative sufficient to not uphold the original decision.

108. When asked what weight the IRM decision held, Mr Hudson stated he was there to look at employment status and whether the claimant was suitable based on what he had seen and heard and taking everything into account. It was difficult to weigh up one particular part of the process. The claimant's omissions to care for the child and potential with regard to other children in the future was gross misconduct. Not doing something is equally as bad as doing it. His honest belief was that the claimant's omissions led to abuse by neglect. He believed that safeguarding and abuse were the same thing, it was just different language.

Relevant Law

109. The claimant claims unfair dismissal and it is for the respondent to satisfy the tribunal that it had a potentially fair reason for dismissal falling within s.98 of the Employment Rights Act 1996. The respondent relies upon conduct, a potentially fair reason but has also sought to rely upon "some other substantial reason" within the meaning of s.98(1)(b).

110. If the respondent satisfies the tribunal that it had a potentially fair reason for dismissal, the tribunal must then apply the provisions of s.98(4): -

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

111. In considering a conduct dismissal the tribunal must have regard to the guidance given in British Homes Stores Ltd v Burchell [1978] IRLR 379 (a passage which was cited with approval by the Court of Appeal for example in Sainsbury's Supermarkets Ltd v Hitt [2002] EWCA Civ 1588): -

> "First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case …"

112. In A v B [2003] IRLR 405 the EAT held that the relevant circumstances including the gravity of the charge and their potential effect upon the employee come within the expression "relevant circumstances" in s.98(4). The EAT said:-

> "Serious allegations of criminal misbehaviour, at least where disputed, must always be the subject of the most careful investigation, always bearing in mind that the investigation is usually being conducted by lay men and not lawyers. Of course, even in the most serious of cases, it is unrealistic and quite inappropriate to require the safeguards of a criminal trial, but a careful and conscientious investigation of the facts is necessary and the investigator charged with carrying out the enquiries should focus no less on any potential evidence that may exculpate or at least point towards the innocence of the employee as he should on the evidence directed towards proving the charges against him."

113. This passage was approved by the Court of Appeal in Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721. It held that according to A v B it is particularly important that employers take seriously their responsibilities to conduct a fair investigation where the employee's reputation or ability to work in his or her chosen field of employment is potentially apposite.

114. In considering fairness it is well established that the tribunal should not substitute its view for that of the employer but must consider whether the sanction of dismissal was within the band of reasonable responses. So long as the whole process leading to the dismissal is within that band the dismissal will be fair.

115. Miss Grace handed up the decision in Ramphal v Department for Transport [2015] IRLR 985. In this case the EAT stated in paragraph 48: -

> "The Burchell principles are clearly set out by the Employment Judge. The principles are so well-known I need not repeat them. But I would observe for the

> purpose of these proceedings, that for the dismissal to be fair there has to be a fair investigation and dismissal procedure. If the integrity of the final decision to dismiss has been influenced by persons outside the procedure it, in my opinion, will be unfair, all the more so if the Claimant has no knowledge of it."

The court went on: -

> "In my opinion, an Investigating Officer is entitled to call for advice from Human Resources; but Human Resources must be very careful to limit advice essentially to questions of law and procedure and process and to avoid straying into areas of culpability, let alone advising on what was the appropriate sanction as to appropriate findings of fact in relation to culpability insofar as the advice went beyond addressing issues of consistency. It was not for Human Resources to advise whether the finding should be one of simple misconduct or gross misconduct ..."

116. In that case the EAT upheld the tribunal judges finding that Human Resources clearly involved themselves in issues of culpability which should have been reserved for the investigating officer. He clearly went beyond discussing issues of procedure and law and accepted that he discussed his emerging findings.

Submissions

117. Miss Grace for the claimant handed up closing submissions and Mr Hodge for the respondent relied on his outline submissions which had been handed up at the outset. Whilst these will not be recited again here they both spoke orally to them as follows.

For the claimant

118. The respondent did exactly what a respondent ought not to do. It had regard only to evidence in favour of the respondent and none that was in favour of the claimant. Even when the claimant was backed by the IRM that he was still suitable to act as a foster carer and the investigator recommended there was no case to answer. It was submitted this is as straightforward a case of unfair dismissal as you can get.

119. The claimant had an unblemished service record. The stress suffered by him in the last 3 years is difficult to quantify. Both the claimant and his wife lost their roles and the child whose wellbeing lies at the heart of these matters.

120. The claimant's conduct was deemed to be gross misconduct. It has also been suggested that the allegation of reputational damage to the respondent was "some other substantial reason". That was never put to the claimant and the respondent's case should be restricted to the argument of gross misconduct.

121. The respondent has relied upon the de-registration of the claimant as a foster carer but not just the fact of it but that it is inextricably linked to harm

to the child or abuse. The respondent's position was not supported by the independent investigation or the IRM decision. The respondent put to the claimant in cross examination that he had not submitted the IRM decision to the disciplinary hearing. The claimant had not been subject to a disciplinary process before, he had no assistance, but the respondent had. The test is one of reasonableness, what the respondent knew at the time. The respondent knew the IRM outcome.

122. The claimant's role had become that of office co-ordinator which did not involve significant contact with children and there was no evidence that he would be a risk.

123. The entire disciplinary process was unbalanced and unfair, and the appeal failed to rectify this or even recognise it. The unfairness and the unbalance is enough to show that dismissal could not be within the band of reasonable responses.

124. With regard to the Burchell test, the respondent's belief in misconduct was unreasonable. It disregarded the investigating officers report, stating that she was down playing the claimant's actions/reputational damage. She however, is the only one who interviewed the claimant or did any fact finding. It cannot be fair when only one side is considered. The respondent's belief was not a reasonable one.

125. The respondent took no action for nearly 4 months after the claimant was de-registered and then he was suspended on full pay for 2 years. Those are not the actions of an employer who reasonably believed there was risk to reputation.

126. There has been an escalation of the language as the process was gone through. It started with safeguarding issues, then referred to direct harm and then abuse to a child. When it was put to the respondent's witnesses they continued to exaggerate as both Seb Smith and Gita Banerji said that safeguarding was interchangeable with the abuse to the effect that someone guilty of a failure to safeguard was also guilty of child abuse. They used increasingly inflammatory language. They did it to back up their determination to dismiss.

127. The respondent failed to distinguish between the fact of the de-registration and the circumstances that led to it.

128. As stated, the respondent chose to ignore the report of the independent investigator. It is not clear how Gita Banerji was in a position to say that Ms Rouse had down played the risks. Mr Hudson the appeal chair had no qualms about not following her report and still maintained it was a fair process. His record describes the allegations of one of abuse, but he had no evidence for that.

129. The original allegation was a failure to recognise safeguarding which was not supported by the investigation and could have been remedied by training.

130. Given the severity of the allegations the respondent had to carry out a particularly rigorous investigation then otherwise. It was put to Mr Hudson that it would have been fairer to hold another investigation, but he just maintained that the process was fair.

131. The sanction of dismissal cannot be fair and was unbalanced. When David Jacobs wrote his management case he had already formed the view that the claimant should be dismissed. The claimant was criticised during his disciplinary for "having no remorse" whilst endeavouring to dispute the allegations throughout.

132. The claimant had an unblemished record and had been the foster carer for a child with complex needs. He was not allowed to dispute the de-registration or rely upon the IRM overturning it.

133. The evidence for the disciplinary hearing was put together by David Jacobs so it is not surprising it did not assist the claimant and only supported the respondent's case.

134. When the witnesses were asked to hypothesise on what mitigation could have been, they referred to illness or turning over the de-registration when the Hurley's had tried their utmost to try and do that and the IRM was their only option. The claimant was stuck and there was nowhere to turn for mitigation.

135. As set out in the written submissions at paragraph 46 Gita Banerji's intervention further underscores the unfairness. This is not something that the claimant would have known about at the time.

136. The appeal is part of the whole process and must also be reasonably conducted, the claimant was in a unique position. The respondent had access to foster carer records and employment records. That could only happen to a foster carer employed in the same authority. It also goes to the issue of the reasonableness of the belief.

137. Counsel also argued that the claimant's Article 8 rights were clearly breached to the extent that the respondent was able to intrude into his private life.

138. The tribunal should not consider any Polkey argument, there is nothing that the claimant did that would justify any reduction. The dismissal was clearly not within the range of reasonable responses. The claimant's life has been destroyed. Counsel could not express adequately the pressure that the family had been through and the impact on the claimant and his family needs to be taken into account.

For the respondent

139. It was submitted that the alleged acts of misconduct must be considered in the context of the claimant's contract of employment and the background of the particular employer-employee relationship. His role was part of the children and young persons' team, which had the role of safeguarding of vulnerable children. In the claimant's second role the building in which he was based was one into which many vulnerable children and parents came to see the respondent. If the supervisor left the room there was potential for the claimant to step in. Although at the time of these events the claimant was not working as a support worker, the claimant was still coming into contact with vulnerable children.

140. The respondent relies upon conduct or some other substantial reason. Although counsel for the claimant has suggested that some other substantial reason had not been put to the claimant it was put to him that reputational damage may result from something he may have done or not done.

141. In answer to the above point the claimant's representative stated that the letter of dismissal states gross misconduct and not some other substantial reason. If the respondent relied upon that it should have been categorised in that way in the letter. Mr Hodge stated he relied on some other substantial reason in the alternative.

142. As set out in the written submissions it is submitted for the respondent that Mr Smith had a genuine belief in the claimant's guilt as did Mr Hudson. References are given at paragraph 16 of the written submissions. This case however is all about s.98(4).

143. Were there reasonable grounds for forming the belief of the misconduct? David Jacobs' evidence to the disciplinary hearing was in his statement of case and it quite clearly established a case against the claimant on the grounds of gross misconduct.

144. The range of reasonable responses test must of course apply to the investigation. The nub of the matter seems to be that Jeanette Rouse was commissioned and following recommendations of her, that in fact the decision was taken to go to a disciplinary process with David Jacobs presenting the management case. The question is not whether that was right or wrong, but whether that avenue chosen by the respondent was within the band of reasonable responses. If every employer would have taken that decision, then it is fair. Only if the tribunal can conclude that no reasonable employer would have taken that route then it is not. It was submitted in essence that the specialist knowledge of David Jacobs is paramount.

145. The respondent followed a fair procedure and after Alan Cadzow's decision it was perfectly proper for the respondent to start a disciplinary process and the claimant accepted it was reasonable to be interviewed by

Jeanette Rouse. It was a totally fair course of action to delay due to the judicial review proceedings as they could have had a profound effect on them.

146. There were no flaws in the disciplinary hearing. Seb Smith conducted it in a perfectly proper way, hearing David Jacobs' management case and then the claimant.

147. With regard to the appeal, the point that Mr Hodge had been making in cross examination was that he has no issue that the findings and outcome are all subject to the band of reasonable responses test. What he was dealing with in cross examination was that the appeal hearing when the claimant was represented by a trade union representative and if Mr Smith and Miss Banerji tried to say more then he would have no doubt raised objections. It was conducted in a perfectly proper manner and there can be no criticism of them.

148. With regard to the involvement of Gita Banerji, counsel took the view that there is not sufficient interference in the widest sense so as to make the decision unfair as in the case of Ramphal. Gita Banerji was a key advisor. Seb Smith and Mr Hudson did not feel that she had influenced any decision.

149. Regarding the language used of harm and then abuse, what was said in evidence was correct, that they are all intrinsically linked and can be used interchangeably. Whilst it may be regrettable looking back now that there was no consistency of approach, they were all inextricably interlinked.

150. Dismissal was within the band of reasonable responses. The respondent is a local authority employer and its paramount concern was for the safety and wellbeing of children. The de-registration was a fact. That in itself meant that dismissal for that is reasonable coupled with the damage to reputation. Even though the claimant says he only spoke to two individuals in the workplace it is perfectly reasonable that Seb Smith and Mr Hudson considered what might have happened with regard to reputation.

151. The claimant's Article 8 rights have not been infringed and although it is an ingenious argument put forward by the claimant's counsel, s.98(4) is sufficient within which to consider the claimant's Article 8 rights.

152. The respondent will submit that there was contributory conduct by the claimant as he was culpable in the event that the tribunal finds the dismissal was unfair. Whether there should be any Polkey deduction will depend on the tribunal's findings.

153. Given that de-registration is not in dispute and there was reputational damage to the respondent there is sufficient evidence to justify summary dismissal.

The tribunal's conclusions

154. The claimant was dismissed for gross misconduct. This is clear from the disciplinary outcome letter of 1 November 2017. This makes clear that the circumstances of the claimant's de-registration amounted to misconduct potentially gross misconduct with the potential to put CYP's client group at risk and/or cause it reputational damage. Mr Smith states that to his reasonable satisfaction that gross misconduct had occurred. He makes it clear the decision was made on the basis that de-registration as a foster carer for harm caused to the child was in itself gross misconduct and that in addition this would necessarily risk reputational damage to the authority. There is no suggestion that the respondent was also stating or had stated that it was relying on some other substantial reason to justify the dismissal.

155. Applying therefore the guidance laid down in Burchell, did the respondent believe that the claimant was guilty of the misconduct alleged? It certainly did. It decided that the very fact of de-registration was an act of gross misconduct.

156. It did not however have reasonable grounds upon which to sustain that belief.

157. Looking firstly at the Fostering Panel Minutes (p285) and the decision to de-register it is quite clear that it recognised that the child had complex needs. They had been numerous concerns raised but these are expressed as concerns and of being a 'pattern' and that the child had a lack of 'social, emotional and physical development'. There was concern that the Hurley's did not seem 'to recognises the concerns neither are they able to take responsibility for their role in this'. Mrs Hurley spoke at length about the difficulties they had experienced. At the end of the meeting before giving their decision the chair acknowledged the Hurleys commitment to the child over the last 10 years and how he was 'very damaged' when he arrived with them. They did unanimously agree with the recommendation to de-register for the reasons set out. However, they do not use the language of 'harm' or 'abuse' which was adopted by the respondent. The respondent determined that the very act of de-registration amounted to gross misconduct without allowing the claimant to discuss what led to the de-registration and his response to the criticisms.

158. The respondent commissioned Jeanette Rouse as an independent investigator with experience of investigating matters. She is the only one that interviewed the claimant. She was satisfied that the claimant had not been undertaking his contracted support worker role for 2 years and his co-ordinator role had minimal contact with children. She found there was limited risk to the customer group. There might be a greater risk if he were to return to his role of a support worker. There was she found minimal risk of reputational damage.

159. The respondent chose to ignore this report. Miss Banerji although not the investigating officer nor the decision maker decided that Miss Rouse had

"down played the potential reputational risk". It is difficult to understand the reason for having an independent investigator if the report was not going to be followed. The judge suggested to Mr Hudson the appeals officer that perhaps in the circumstances he might have considered another investigation to which he replied he did not think of that at the time. There was no consideration by any of the respondent's officers about the effect of disregarding Jeanette Rouse's report. They had decided that the only outcome was the dismissal of the claimant. Indeed, Mr Jacobs confirmed this when he discussed in cross examination his view when he prepared his management case. Despite this they seek to rely on the investigators report in their decision making (for example Mr Smith's disciplinary decision at p331 'there has been a full investigation by an independent investigator)

160. Not only did the respondent have the report of Jeanette Rouse but by 20 April 2016 it had the report of the IRM. Alan Cadzow took the decision, communicated to the claimant and his wife on 4 May that he would still stand by the decision to de-register notwithstanding the findings of the IRM. Mr Smith and Mr Hudson totally ignored those findings. Not only had the IRM found that the claimant could continue to foster, but they were highly critical of the manner in which the case had been presented on behalf of the respondent. Mr Smith and Mr Hudson maintained throughout their position that the fact of the de-registration could not be interfered with. What then was the point of having a review mechanism?

161. The last limb of the Burchell test is whether at the time the belief was formed there had been as much investigation as was reasonable. Miss Rouse's investigation was reasonable but not considered by the respondent. There was therefore no reasonable investigation leading to the respondent's conclusion of gross misconduct. That of itself makes the dismissal unfair.

162. The disciplinary process was then grossly unfair. All that the claimant was told in the initial invite letter to the disciplinary hearing was that the allegations "in broad terms" were that the circumstances of the claimant's de-registration amounted to misconduct, potentially gross misconduct with the potential to put CYP's client group at risk and/or cause reputational damage.

163. In considering fairness the tribunal must have regard to all the circumstances of the case and that therefore must include Jeanette Rouse's independent investigation and the review by an independent review body that the claimant and his wife still had a lot to give children needing fostering families. It was their unanimous recommendation that the Hurley's were suitable to continue to foster. Despite that conclusion the representatives of the respondent continued to refer to safeguarding issues which were then elaborated upon to be causing harm to a child and then child abuse. Whilst acknowledging that in some situations those words may as the respondent's representatives

suggested, be interchangeable, it was not appropriate to do so on the facts of this case.

164. If as suggested Jeanette Rouse was not an 'expert' and those at the respondent understood safeguarding issues better, then why did they not seek an investigator who would be such an expert. That was their choice. It is quite clear that the obtaining of an independent report was just going through the motions so that the decision makers could say one was obtained whilst ignoring its conclusions.

165. To maintain the stance throughout that the de-registration was 'a fact' that could not be revisited but rely upon it without considering the independent investigators report or the decision of the IRM was grossly unfair. The claimant was then criticised for not providing any 'mitigation' when his very mitigation was that he had not behaved in the way that the fostering panel had found.

166. The representatives never considered that the role of a foster carer of a child with complex needs was a different role to the claimant's current role with the respondent or even his original role. The respondent also failed to acknowledge that it was privy to information as an employer that it would not have had if the claimant and his wife had not fostered for an authority for which they also worked.

167. Miss Banerji sought to intervene in a very direct way going much further than merely HR advice. In her letter to Jacquie Gould who was to be the decision maker but was then changed, it was she who used the words that Jeanette Rouse had "down played the potential reputational risk", but that she, Miss Banerji still felt "it is a problem". She was satisfied there was a case to answer at a formal hearing and it was her advice that although the investigating officer would normally present the management case, in these circumstances it was more appropriate for David Jacobs to present it.

168. It is also relevant to note that Miss Banerji and others within the organisation seemed to cast some doubt in their correspondence between each other about the claimant's role. It was quite clear from the evidence that he had been in a different role for over 2 years and carrying that out without any concerns or criticisms before these matters arose. There was even email traffic between them in or about January 2016 where there was concern being expressed as to whether the claimant was even an employee and what his status was. It was another attempt by the respondent to in some way shed doubt on the claimant's role and standing within the organisation. He had quite clearly been moved to the co-ordinator role because of the problems with his knee and driving. He had been working in that role for over 2 years, there was no suggestion at the time of these events that he would not continue to do so. The respondent however sought to overplay his contact with children in that role. In answer to questions put, Mr Jacobs suggested that it was too late for training. If the concern was whether the claimant would recognise safeguarding, then training should have been considered as a possibility.

The respondent however had a closed mind to any other options other than dismissal.

169. The appeal went nowhere to correcting any of the defects. Mr Hudson just sought to rubber stamp what had already been decided. He took really no decisions of his own. He even adopted the same language and terminology as had others about the fact of the de-registration and that they were entitled to just disregard the independent investigator's report. He also put emphasis on the fact that the claimant had not put forward any mitigation. It would he said have been something material that would have changed the original decision. He was asked by the judge what that would have looked like. He stated that hypothetically it could have been if the fostering issue had completely been overturned and the claimant and his wife were allowed to foster again. That is what had happened with the IRM. With regard to reputational damage the investigatory report was advisory only and the managers did not agree with it. Her opinion was not held by the other managers. The process was he still felt a fair one.

170. There was nothing fair about the process at all. The respondent had a closed mind and the decision was always going to be that the claimant was dismissed.

171. S98(4) requires the tribunal to consider the 'size and administrative resources' of the respondent. The respondent is not a small organisation, it is a public authority with an HR department and in-house legal advice. IT seems never to have considered the issue of fairness towards the claimant in any of its actions.

172. The respondent has not satisfied the tribunal on the facts that it had grounds for summary dismissal and the claim of wrongful dismissal is also upheld.

173. There are no circumstances in this case where any deduction from a compensatory award would be appropriate on the grounds set out in Polkey or for causation contribution. The claimant did not cause or contribute to his own dismissal. He followed the path that he was told he could follow by applying to the IRM and they upheld his view that he and his wife could still foster children. The de-registration was therefore not a fact as the respondent continued to say.

174. A remedy hearing will now be listed to determine the remedy to which the claimant is entitled. Case management orders will be set out separately

_____
Employment Judge Laidler

Date: ……9.7.19…….

Sent to the parties on: .....13.7.19....

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For the Tribunal Office