EMPLOYMENT TRIBUNALS

Claimant: Mr P Bednarczyk

Respondent: WGC Ltd

Heard at: London Central **On:** 2, 3 & 4 October 2019

Before: Employment Judge Khan

Representation
Claimant: Mr L Bronze, Counsel
Respondent: Ms F Henry, HR Director

JUDGMENT

The claimant's claims for unfair and wrongful dismissal are not upheld and are dismissed.

REASONS

1. By an ET1 presented on 5 October 2018, the claimant complains that the respondent unfairly dismissed and wrongfully dismissed him. The respondent resists these complaints.

The issues

2. The issues on liability that I was required to determine are set out below:

3. ***Unfair dismissal***

   3.1 Was the reason or the principal reason for the claimant's dismissal a potentially fair reason, namely, conduct?

   3.2 Did the respondent genuinely believe that the claimant had committed the misconduct in question?

   3.3 Did the respondent have reasonable grounds for that belief?

   3.4 Did the respondent undertake a fair investigation, applying the band of reasonable responses test?

3.5 Did the respondent act reasonably in treating the conduct identified as a sufficient reason for the dismissal, applying the band of reasonable responses test?

3.6 If there was a procedurally unfair dismissal, would the claimant have been fairly dismissed in any event?

4. ***Wrongful dismissal***

4.1 Was the respondent entitled to dismiss the claimant without notice?

Procedure

5. The claimant gave evidence himself and also called his wife, Anna Bednarczyk to give evidence. The respondent called: Barbara Hensher Associate Director; Brian Lithauer, Nights Manager; Natalie Chedzey (formerly Morgan), Operations Manager; and Lawrence Macfarlane, Associate Director for Health, Safety and Welfare.

6. The hearing bundle exceeded 200 pages. There were some additional documents disclosed in the form of a handover contract and also the disciplinary rules and procedure. I read the pages in this bundle to which I was referred.

7. I also considered oral submissions from both parties and a written skeleton argument provided by Mr Bronze, together with the cases of Scottish Daily Record and Sunday Mail Limited v Lennon [1996] IRLR 665 and the first instance judgment in Whitham v Club 24 Limited t/a Ventura Case No: 1810462/2010.

The Facts

8. Having considered all the evidence, I make the following findings of fact on the balance of probabilities. These findings are limited to points that are relevant to the legal issues.

9. The respondent is a provider of outsourced hotel cleaning services.

10. The claimant commenced employment in the role of Night Manager on 1 February 2012. He worked on average between the hours 11pm – 8am and between 40-50 hours per week. He was able to manage his own hours. He was responsible for overseeing between 10-12 sites, mostly hotels, and between 60-80 workers who were engaged by the respondent on each shift. His line manager was Barbara Hensher, Associate Director.

11. Although the claimant denied this, I accept the respondent's evidence that the claimant was in possession of commercially sensitive information including labour and materials budgets for the sites that he oversaw. The claimant agreed that he knew how many workers the respondent employed on his sites and the pay rates for each worker. He was therefore able to ascertain the respondent's labour costs for each contract. He also had access to information about the respondent's expenditure on products and equipment for his sites. He also agreed that he had known when some of the respondent's contracts were due to end. He would therefore

have known when these contracts were up for renewal. He also had the contact details for his clients. All of this information would have been useful to competitors.

12. In his role the claimant had received training on eligibility to work in the UK and had been involved in two joint operations with the immigration service to facilitate interviews of its workers.

13. The respondent's HR Manual which included all of its HR policies was accessible via Central, the respondent's intranet site. The claimant had a work laptop. He accessed the intranet when he had new starters. This was, on average, five or six times each month, and sometimes up to 10 times a month. Ms Hensher reminded him to update his knowledge of HR policies from time to time.

14. In late 2017 the respondent agreed to provide a loan of £5,000 to the claimant for home improvements. This was to be repaid in monthly instalments.

15. On 18 August 2017 the claimant took over responsibility for the Berkeley Hotel London contract. This site had previously been overseen by Brian Lithauer, another night manager.

16. In January 2018 the claimant recognised one of the workers on this site, Nicholas Tamale, as someone who had previously worked under him on a different site and who had been dismissed by the respondent because he had failed to provide evidence of his right to work in the UK. The claimant saw that Mr Tamale had been re-employed by the respondent under a different name and was therefore suspicious that he did not have a legal right to work in the UK. He did not immediately report this to the respondent. The claimant says that he intended to report his suspicions to Ms Hensher at the next site inspection later that month but she did not attend on this occasion.

17. In the same month the respondent received an anonymous letter alleging that the claimant was running his own cleaning company, Phoenix Deluxe Limited ("Phoenix") together with his wife who was a director of this company. This letter alleged that the claimant had worked for Phoenix at the London Marriot Park Lane and had used the respondent's labour, cleaning products and machinery for this work.

18. Phoenix secured the cleaning contract with the London Marriott Park Lane in around 2017. This contract was for back of house night cleaning. Mrs Bednarczyk accepted that this was the same contract which the respondent had previously provided to the client. She also confirmed that she had tendered for another back of house night cleaning contract albeit unsuccessfully in early 2018. From at least 2017, Phoenix was therefore in competition for business with the respondent.

19. The anonymous allegations were referred to Ms Hensher to investigate. An internet search revealed that Phoenix offered a marble maintenance service which was something that the respondent also provided. Mrs Bednarczyk was listed as a co-director of this company. Ms Hensher was

therefore concerned that this raised a potential conflict because the claimant had access to commercially sensitive information which she felt would be useful to a competitor business. She discussed this with Flick Henry, HR Director

20. Ms Hensher telephoned the claimant on 30 January 2018 to discuss these allegations. He initially denied having any knowledge of Phoenix. However, when Ms Hensher asked him if his wife had an interest in the company he confirmed that she was a director. She told him that she wanted to meet with him to discuss this issue further. Ms Hensher then contacted him to invite him to a meeting the next day.

21. On her way to this meeting Ms Hensher telephoned the claimant when he told her he would not be able to attend because of childcare commitments.

22. Later that day the claimant was certified by his GP as being unfit for work until 11 February 2018 by reason of stress, insomnia and hypertension. The claimant forwarded a fit note to the respondent when he noted "the whole situation get me into a serious stress and I need a rest". I accept the claimant's evidence that this stress related to the demands of his job which had been exacerbated by the respondent's investigation into Phoenix.

23. Ms Henry emailed the claimant later that day to ask for more details about his stress. She told him that he should not work whilst he was signed off and she offered him access to counselling. The claimant read this email but did not respond to it.

24. The claimant obtained a second fit note on 12 February 2018 in which he was signed off work until 25 February 2018 because of work-related stress and insomnia.

25. Ms Henry wrote to the claimant the next day to advise him to refrain from driving because of his stress. She told him that he would cease to be insured to drive his company car from 14 February 2018. He was instructed to arrange for his car to be collected.

26. The claimant was signed off work again on 28 February 2018 until 12 March 2018 because of stress at work.

27. In around late February 2018 the respondent's contract with the Hilton London Metropole ended. This had been one of Mr Lithauer's sites.

28. Ms Henry wrote to the claimant on 6 March 2018 to confirm that he would be paid statutory sick pay and not company sick pay which she said was only paid in exceptional circumstances.

29. On or around this date Mr Lithauer and Isaac Quainoo, another manager, collected the claimant's company car from his home. During this visit the claimant asked Mr Lithauer if he knew of any potential floor work as he was now concerned about losing his job.

30. When Mr Lithauer took possession of the claimant's company car he saw that a telephone number for Phoenix was stored in the system's memory. I accept the claimant's evidence this had resulted from Mrs Bednarcyzk using her telephone when driving hands free on a trip they had taken to Poland in this car.

31. On 14 March 2018 Mr Lithauer emailed Martin Birch, Chief Executive, together with Ms Henry and Ms Hensher when he alleged that the claimant had repeatedly suggested they start a business together and he reported his suspicion that the claimant and another employee had undertaken secondary work together using company equipment. He also referred to the claimant's enquiry about floor work.

32. The claimant was signed off work again on 27 March 2018 until 10 April 2018 because of stress.

33. At around this time the claimant discovered that his security clearance for the Connaught London had been revoked. This was one of his sites.

Investigation

34. On 11 April 2018 Ms Henry wrote to the claimant to invite him to an investigation meeting two days later. She did not refer to the allegations under investigation. The claimant was told that he was not required to attend work in the meantime.

35. The claimant attended this investigation meeting on 13 April with Ms Hensher and Mr Henry. At the start of this meeting the claimant agreed that he understood that the reason for the investigation was his alleged involvement in his wife's company. He was unable to recall whether he initially denied any knowledge of Phoenix when Ms Hensher had telephoned him on 30 January 2018 as it was early in the morning. Ms Henry noted that Phoenix had been set up in 2015. The claimant agreed that Phoenix had a contract to clean the London Marriot Park Lane. The claimant said that although he had considered telling Ms Hensher about Phoenix he had not felt that this was necessary as they were not engaged in the same work. However, when Ms Hensher asserted that Phoenix was in direct competition doing identical work with the respondent he disputed this but agreed that they carried out similar work. In respect of his failure to disclose his wife's interest in Phoenix, he compared himself with cleaning operatives who carried out secondary employment without declaring this to the respondent.

36. The claimant initially denied that he had asked Mr Lithauer about work. He then agreed that he had when he was shown Mr Lithauer's allegations. He clarified that he had enquired about future work and not secondary employment. He was angry that Mr Lithauer had made these allegations and he called him a "backstabbing wanker". He then disclosed his suspicions about Mr Tamale. He noted that Mr Tamale had been hired by Mr Lithauer and Mr Quainoo with the implication being that they had knowingly hired him under a different name.

37. In his evidence, the claimant said that he had not wanted to get involved i.e. to make an allegation about Mr Tamale as he felt this could have resulted in Mr Lithauer's dismissal. His position changed once he became aware of Mr Lithauer's allegations against him.

38. The claimant covertly recorded this meeting. Although the transcript of his recording was incomplete it was not materially different from the respondent's record. This recording was only disclosed by the claimant after his dismissal and appeal were decided.

39. After this meeting the claimant posted a comment on Facebook that Mr Lithauer was a "back stabbing wanker". Although this was a private post I accept Mr Lithauer's evidence that some of the respondent's clients with whom he was friends on Facebook would have seen it.

Suspension

40. Later that day Ms Henry wrote to the claimant suspending him with immediate effect pending an investigation into the following four allegations:

    40.1 He had failed to disclose that his wife was a director of Phoenix which supplied an identical service and was in direct competition with the respondent in breach of his duties of loyalty and fidelity.

    40.2 He had failed to disclose that Mr Tamale had been terminated for not having the correct right to work documents and had subsequently been re-employed by the respondent. He was told that this indicated a breakdown of trust and confidence.

    40.3 He had posted a Facebook comment in breach of the respondent's Social Networking Policy.

    40.4 He had asked Mr Lithauer for work whilst on sick leave.

41. At around this time Ms Hensher spoke to Mr Lithauer and Mr Quainoo who denied having any knowledge that Mr Tamale had worked for the respondent before under a different name.

Disciplinary process

42. Natalie Chedzey, Operations Manager, was appointed to conduct the disciplinary process. She wrote to the claimant to invite him to attend a disciplinary hearing two days' later. She referred to the same four allegations in Ms Henry's suspension letter. The claimant was told that the meeting could result in dismissal and he was advised of his right to be accompanied. This meeting was rearranged to 24 April 2018.

43. At the start of the disciplinary meeting the claimant discussed corrections to the investigation meeting notes.

44. In respect of the four allegations under consideration:

    44.1 The claimant denied that Phoenix was in competition with the respondent.

    44.2 He said that he had not had time to report his suspicions about Mr Tamale to Ms Hensher and he alleged that Mr Lithauer and Mr Quainoo knew that Mr Tamale was working under a different name. He provided no evidence to substantiate this assertion.

    44.3 In relation to the Facebook post he said this was a private account, he had not referred to the respondent by name and he was not aware of the Social Networking Policy. He felt he had done nothing wrong. Mrs Chedzey noted that some of the respondent's staff including Ms Henry had seen this post. She also asserted that other people who had access to this post would have known the claimant worked for the respondent.

    44.4 The claimant said that he had asked Mr Lithauer about work in the event he was dismissed.

45. Mrs Chedzey wrote to the claimant on 30 April 2018 to confirm his dismissal by reason of misconduct with immediate effect. She upheld all four allegations.

    45.1 She found the claimant had failed to disclose that his wife was a director of Phoenix and this was in breach of his duties of loyalty and fidelity. She referred to the respondent's Conflict of Interest Policy which was contained in the HR Manual. This included the following provision:

> "All staff are required to recognise and disclose activities that might give rise to conflicts of interest or the perception of conflicts and to ensure that such conflicts are seen to be properly managed or avoided…There can be situations in which the appearance of conflicts of interest is present even when no conflict actually exists. Thus, it is important when evaluating potential conflict of interest to consider how it might be perceived by others."

    In her evidence Mrs Chedzey said that she had accepted that Phoenix offered identical services to the respondent and was therefore a direct competitor. She had not investigated this herself as she had relied on Ms Hensher's investigation. Although she accepted that the claimant had not worked for Phoenix she concluded that a potential conflict of interest had arisen because Mrs Bednarczyk was a director of Phoenix and he was senior manager. This was not comparable with a cleaning operative. Mrs Chedzey did not find that this failure on its own warranted dismissal.

    45.2 She found that the claimant's failure to notify HR and his line manager of his concern that Mr Tamale had been re-employed had put the respondent at risk of incurring a penalty fine. In her evidence, Mrs Chedzey said that she accepted that Ms Hensher did not attend the inspection in late January 2018 but this had not

excused the claimant's failure to report this issue. The claimant had admitted that he knew or suspected that he knew that Mr Tamale did not have a legal right to work in the UK. She said the claimant should have reported this issue immediately by whatever means he could. She concluded there was a risk that he would fail to report another incident in the future. She found that this failure amounted to gross misconduct as it represented a serious neglect of duties or a serious or deliberate breach of a contract or operating procedures and a breakdown of trust.

45.3 She found that the claimant's Facebook post had breached the Social Networking Policy. The language and tone were unacceptable. She concluded that Facebook friends would have known that the claimant and Mr Lithauer worked for the respondent due to their length of service. She did not view this as serious enough to have brought the respondent into disrepute.

45.4 She found that the claimant had canvassed Mr Lithauer for immediate work which he intended to carry out whilst on sick leave and which he would not have disclosed to the respondent. This would have breached the Conflict of Interest Policy.

46. Mrs Chedzey's decision had been authorised by the Board in accordance with the Disciplinary Procedure as this was required in cases of dismissal involving gross misconduct.

Appeal

47. The claimant submitted his appeal on 7 May 2018. He complained about the quality and accuracy of meeting notes and he also complained that he had been treated differently to his colleagues. He noted that neither Mr Lithauer nor Mr Quainoo had been investigated or suspended despite hiring Mr Tamale. He alleged that they had hired a second worker without the correct documents. He said that he had only become aware of this issue the night before. He referred to another colleague who had retained his car insurance whilst on sick leave. He also complained that the removal of his security clearance from the Connaught London demonstrated that his dismissal had been predetermined.

48. Lawrence McFarlane, Associate Director for Health, Safety and Welfare, heard the claimant's appeal on 1 June 2018. In his evidence, Mr McFarlane said that this was both a rehearing and a review. It was a rehearing because it dealt with the new matters raised by the claimant in his appeal and it was also a review of Mrs Chedzey's dismissal decision. The start of the appeal hearing was taken up with the claimant going through his corrections from his disciplinary notes. Mr McFarlane accepted all the corrections identified by the claimant.

49. Mr McFarlane wrote to the claimant on 7 June 2018 to confirm that his appeal had been dismissed in which he upheld three of the four allegations.

49.1 He found that the respondent and Phoenix provided identical services to similar clients. This had given rise to a potential conflict of interest. The claimant's failure to disclose his wife's interest in Phoenix had breached the Conflict of Interest Policy. It was relevant that the claimant was a senior manager. He therefore upheld Mrs Chedzey's decision. In his evidence to the tribunal, Mr McFarlane said that he checked Phoenix's website and was satisfied that Phoenix offered services that were exactly the same as the respondent offered. At the time of making his decision he took account of the claimant's seniority and his access to commercially sensitive information which he concluded had created a potential conflict of interest. He felt that the claimant should have disclosed that his wife was running Phoenix. He concluded that the claimant was aware that Phoenix provided the same or similar services and that both companies operated in a limited 5-star market in London.

49.2 He found that the claimant knew that the respondent took the issue of illegal working seriously. As a responsible manager with the appropriate training and experience of joint operations with the immigration service he should have immediately reported his suspicion that Mr Tamale did not have the legal right to work in the UK. He concluded that this failure was a serious breach of company policy. He therefore upheld Mrs Chedzey's decision. Mr McFarlane did not consider the period between when the claimant became aware that Mr Tamale had been re-employed by the respondent and when he went on sick leave. Nor did he consider whether Ms Hensher had failed to attend the site for an inspection in late January 2018. He did not consider this was relevant. The respondent had a strict view on this issue which the claimant accepted. Mr McFarlane felt that the claimant had been duty bound to report this issue immediately by any means necessary. He agreed with Mrs Chedzey's decision that this failure was sufficiently serious to warrant dismissal.

49.3 He found that the claimant's Facebook post had breached the Social Networking Policy with reference to the following provisions:

> "The purpose of this guidance is to protect the reputation of employees of the Company from abuse via staff usage of social networking networking…staff must be aware of the potential legal implications of material which could be considered abusive or defamatory…[Employees must not]…Make defamatory remarks about the company, colleagues or service users…[Employees should]…Avoid bringing the organisation or its staff into disrepute and do not use your site to attack or abuse colleagues or the people we support – consult your manager if you're unsure whether the content is appropriate."

Mr McFarlane did not speak to Mr Lithauer about this post. He concluded that the comments were unacceptable in any circumstances. He did not accept there was a clear dividing line between personal and private and he concluded that the claimant's post had the potential to have brought the respondent into serious

disrepute and amounted to gross misconduct under the Disciplinary Procedure.

49.4 Although he made no express findings in relation to the allegation about floor work, only that the record of the disciplinary hearing had been corrected, I find that he did not uphold this allegation because the effect of this was that he accepted that the claimant's enquiry was about future work in the event he was dismissed and not secondary employment.

50. The appeal outcome letter also dealt with the additional issues raised by the claimant. Mr McFarlane explained that Mr Lithauer had received full sick pay, unlike the claimant, because he had been able to work during his sick leave although he had not received a pay increase or additional holiday entitlement because of this. He also explained that the claimant's car insurance had been removed because of a change to the terms of the insurance policy. He concluded that there was no evidence to show that the claimant's dismissal had been predetermined.

The Relevant Legal Principles

Unfair dismissal

51. If the employer is able to show that it had a potentially fair reason for the dismissal the general test for fairness under section 98(4) ERA must then be applied. This provides:

> 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.

52. The test to be applied in a conduct dismissal was articulated by the EAT in British Home Stores v Burchell [1980] ICR 303 as follows:

> "What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. 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."

53. The first element of the Burchell test is relevant to the requirement under sections 98(1) and (2) ERA for the employer to show that it had a potentially fair reason for the dismissal.

54. In respect of the second and third elements of the Burchell test which are relevant to the fairness of the dismissal under section 98(4) ERA the burden of proof is neutral.

55. As to the standard of proof, the respondent is not required to show that it had conclusive evidence of the misconduct alleged, it is only required to show that it had formed a reasonable belief on the balance of probabilities, based on a reasonable investigation, when it dismissed the claimant.

56. The tribunal must then go on to consider whether it was reasonable for the employer to have treated the conduct in question as a sufficient reason to dismiss the employee i.e. whether this was within the band of reasonable responses which a reasonable employer might have adopted (see Iceland Frozen Foods v Jones [1982] IRLR 439).

57. The band of reasonable responses test applies equally to the tribunal's assessment of the investigation and other procedural steps carried out by the employer to dismiss the employee.

58. The procedure followed by the respondent must be viewed as a whole, so that any deficiencies in the disciplinary process are capable of remediation by the appeal process.

59. The tribunal must not substitute its own views and consider whether a lesser sanction would have been reasonable. It must consider whether or not the dismissal was reasonable in the particular circumstances of the case.

Wrongful dismissal

60. The reasonableness of the employer's decision to dismiss the employee is not a relevant consideration. The tribunal must consider, on the balance of probabilities, whether the employee's conduct was so serious as to amount to a repudiation of their contract of employment entitling the employer to terminate it without notice.

Conclusions

UNFAIR DISMISSAL

Did the respondent believe that the claimant had committed the misconduct in question?

61. I find that the respondent did believe that the claimant's actions amounted to misconduct. Each of the four allegations set out in Ms Henry's letter dated 13 April 2018 were capable of amounting to misconduct and the central facts underpinning them were not in dispute:

61.1 The claimant had failed to disclose that his wife was a director of Phoenix.

61.2 He had failed to immediately report his suspicion that Mr Tamale did not have the legal right to work in the UK.

61.3 He had made a derogatory post about Mr Lithauer on Facebook.

61.4 He had asked Mr Lithauer about work whilst he was on sick leave.

Did the respondent undertake a fair investigation?

62. The claimant complains that the respondent's investigation was defective. In particular, he complains that the respondent failed to investigate whether any actual conflict arose in respect of Phoenix and it also failed to investigate the circumstances in which he failed to report Mr Tamale on first suspecting he had been re-employed by the respondent.

63. I do not find that the respondent's failure to investigate whether any actual conflict arose in relation to Phoenix made the investigation unfair. The duty to declare a possible conflict under the Conflict of Interest Policy applied where there was a perception of conflict. This did not require the existence of an actual conflict of interest.

64. I also find that the respondent's failure to investigate the circumstances in which the claimant had not immediately reported Mr Tamale did not make the investigation unfair. The claimant admitted that he first suspected that Mr Tamale did not have the legal right to work in the UK in late January 2018 and he did not report this suspicion until the investigatory interview on 13 April 2018. The respondent accepted that Ms Hensher had not attended a site inspection in late January 2018, however, it was entitled to consider that the claimant was under a duty to have reported this immediately and by any means available to him.

65. For completeness, I find that the investigation undertaken by the respondent was within the band of reasonable responses. Ms Hensher conducted an investigation which was reasonable. Ms Henry wrote to the claimant to identify the four allegations which would be dealt with under the Disciplinary Procedure. Mrs Chedzey relied on Ms Hensher's investigation and made further enquiries with the claimant at the disciplinary hearing. Mr McFarlane considered the previous investigation conducted, he made his own enquiries into Phoenix and he investigated the additional allegations raised by the claimant at appeal. Finally, as noted above, the central facts underpinning the four allegations were not in dispute.

Did the respondent have reasonable grounds for that belief?

66. I find that the respondent had reasonable grounds to believe that the claimant's actions amounted to misconduct.

66.1 The respondent had a reasonable suspicion of misconduct when it was alerted by an anonymous letter in January 2018 about a

potential conflict of interest arising from Mrs Bednarczyk's interest in Phoenix.

66.2 This triggered an investigation which I have found to be reasonable for the reasons given above.

66.3 Its reasonable suspicions were also alerted by Mr Lithauer's allegations on 14 March 2018.

66.4 The claimant's disclosure regarding Mr Tamale and his Facebook comment added further credible concern about his conduct.

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67. It was reasonable for the respondent to conclude that the claimant had breached the Conflict of Interest Policy.

67.1 The respondent knew that: Mrs Bednarczyk had set up Phoenix in 2015; she was a director of this company; it offered some of the same services to the same clients as the respondent; Phoenix had secured the London Marriott Park Lane contract which the respondent had previously had. It therefore concluded that Phoenix was a potential business competitor.

67.2 The claimant agreed that Phoenix carried out similar work to that of the respondent.

67.3 The claimant accepted that he had access to information relating to staffing numbers, hours and pay from which he could calculate the labour costs to the respondent for the night work he oversaw and he also had access to client contact details. This was commercially sensitive information.

67.4 The claimant had failed to disclose that his wife was a director of Phoenix.

67.5 The duty to declare a possible conflict under this policy applied where there was a perception of conflict. This policy emphasised that it was important for staff to evaluate how a potential conflict might be perceived by a third party. There was no evidence that the claimant had adequately considered this.

67.6 The respondent had formed a reasonable belief that there was such a perception of conflict which the claimant was duty bound to declare.

68. It was reasonable for the respondent to conclude that the claimant failed to report his suspicions about Mr Tamale at the earliest opportunity.

68.1 The claimant admitted that he first suspected that Mr Tamale did not have a legal right to work in the UK in late January 2018.

68.2 He agreed that he had received in-house training. He was a senior manager who had participated in two interventions by the Immigration Service. He also agreed that this was an important

issue for the respondent which could have resulted in financial penalties.

68.3 The claimant did not report Mr Tamale until 13 April 2018. It was also reasonable for the respondent to take into account the context of the claimant's disclosure on this date. The claimant had not volunteered this information, perhaps out of loyalty to Mr Lithauer, but this changed when he was shown Mr Lithauer's allegations against him.

69. It was reasonable for the respondent to have found that the claimant's Facebook post had breached the Social Networking Policy.

69.1 The claimant's post was objectively offensive.

69.2 The purpose of this policy was to protect the reputation of the respondent's employees from abuse and it cautioned against attacking or abusing colleagues or making defamatory comments about them.

69.3 It was likely that this post had been seen by third parties who would have known that the claimant and Mr Lithauer were employed by the respondent. This had the potential to cause damage to the reputations of Mr Lithauer and the respondent.

70. In respect of the floor work issue. Mrs Chedzey understood that the claimant was looking for secondary employment and she concluded that had he been offered work then it was likely that he would have taken up this work whilst still employed and failed to declare this. She found that this would have amounted to a breach of the Conflict of Interest Policy. I do not find that this belief was reasonably held. However, this defect was cured at appeal when Mr McFarlane did not uphold this allegation because he accepted that the claimant's enquiry was about future work in the event that his was dismissed.

Was the decision to dismiss the Claimant within the band of reasonable responses?

71. Having found that the respondent formed a genuine and reasonable belief in the claimant's misconduct, founded on a reasonable investigation, I also find that the decision to dismiss him because of this conduct was within the band of reasonable responses.

71.1 The claimant had failed to disclose that his wife was a director of Phoenix. This was a breach of the Conflict of Interest Policy.

71.2 The claimant had failed to report his suspicions about Mr Tamale at the earliest opportunity. This was a serious neglect of his duties.

71.3 The claimant had posted an offensive comment on Facebook about Mr Lithauer. This was a breach of the Social Networking Policy.

71.4 The respondent's trust and confidence in the claimant was gone.

72. Turning to the two judgments cited by Mr Bronze, for the claimant:

    72.1 Scottish Daily Record is relied on to contend that the claimant's dismissal is unfair because the respondent did not apply its mind to the conflict issue. I have found that the respondent was not required to establish the existence and extent of any actual conflict. The respondent found that Mrs Bednarczyk's interest in Phoenix combined with the claimant's position as a senior manager with access to commercially sensitive information gave rise to a potential conflict which the claimant was required to disclose under the Conflict of Interest Policy.

    72.2 Whitham is relied on to contend that the respondent's failure to consider whether the claimant's Facebook post had damaged its reputation renders this dismissal unfair. The claimant's post was objectively offensive and the respondent was entitled to have concluded that it breached the Social Networking Policy. I have also found that some of the respondent's clients would have had access to this post.

    72.3 I also find that the present case is distinguishable from these cases. The claimant was not dismissed solely because of the conflict issue or his Facebook post. He was dismissed because the respondent found that both issues taken together with his failure to immediately report Mr Tamale had the combined effect of destroying its trust and confidence in him.

73. For completeness, the claimant complained about three process issues: his lack of familiarity with HR policies; he contends that the respondent's records of the investigation and disciplinary meetings were inaccurate; and he complains about the fact that Mrs Chedzey's dismissal decision was authorised by the Board. I do not find that these render the dismissal process unfair for the following reasons.

    73.1 The claimant said that he was not familiar with the policies contained in the respondent's HR manual. As has been noted, he accepted that these policies were accessible on the respondent's intranet. He also accepted that Ms Hensher had reminded him to update his knowledge of these policies. As a senior manager with responsibility for up to 80 employees per shift he was required to know the HR manual. The claimant's evidence was that he found it difficult to access and make sense of documents. However, he did not go to any of his managers to ask for support.

    73.2 The claimant was able to correct the notes of the investigatory interview at the disciplinary hearing and he made corrections to the note of the disciplinary hearing at the appeal hearing when all of his corrections were accepted.

    73.3 Mrs Chedzey's decision to dismiss the claimant was authorised by the Board. Although this was only revealed by the respondent during closing submissions this was a requirement which applied to his dismissal and it was set out in the Disciplinary Procedure. The

claimant would have known this had he familiarised himself with the policy. I do not find that this renders the decision to dismiss him unfair. I find that Mrs Chedzey was the decision-maker as she was able to provide a clear rationale for her decision which was then ratified by the Board. Even had this made the dismissal process defective then any defect was cured by the appeal when the claimant had the opportunity to challenge his dismissal before Mr McFarlane who was the appeal decision-maker.

WRONGFUL DISMISSAL

Did the claimant commit gross misconduct?

74. I find, for the reasons set out above, that the claimant's conduct amounted to gross misconduct.

    74.1 The claimant's failure to immediately report Mr Tamale amounted to gross misconduct because this had amounted to a serious neglect of his duties. He was a senior manager who knew, or ought to have known, the importance of reporting this issue immediately. He did not. He waited until the investigation hearing and then only once he became aware that Mr Lithauer had made allegations against him. The claimant had not disclosed his suspicions about Mr Tamale, out of loyalty to Mr Lithauer. This delay had put the respondent at risk of continuing to employ someone without the legal right to work in the UK for which it was liable to a financial penalty.

    74.2 Whilst the claimant's failure to disclose his wife's interest in Phoenix and his Facebook post did not on their own amount to gross misconduct, I do find that taken together with the claimant's failure to report Mr Tamale they had the effect of breaching the respondent's trust and confidence in him. There was a genuine appearance of conflict because the claimant was in a managerial role with access to commercially sensitive information and his wife was a director of a company that operated in the same market and competed for some of the same contracts. The claimant's Facebook post was objectively offensive and seen by some of the respondent's clients. Overall the claimant had not exercised the judgment and standard of conduct required of him.

75. I therefore find that the claimant's conduct had the effect of repudiating his contract. In relying on this conduct to dismiss him without notice the respondent did not breach his contract.

Employment Judge Khan

Date 19 December 2019

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

20 December 2019

FOR EMPLOYMENT TRIBUNALS