THE EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	***Respondent***
Mr P Kocon	Building Consultants (UK) Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: London Central **ON:** 9-11 October 2019

EMPLOYMENT JUDGE: Mr J Tayler

MEMBERS:

Appearances
For the Claimant: **In person**
For the Respondents: **Ms Nanhoo-Robinson**

By a Judgment sent to the parties on 14 October 2019 the claim was dismissed. By letter dated 28 October 2019 the Claimant requested written reasons for the Judgment. These reasons are produced pursuant to that request

REASONS

Introduction

1. By a Claim Form Received by the Employment Tribunal on 6 June 2018, the Claimant brought complaints of unfair dismissal, automatic unfair dismissal for health and safety reasons, wrongful dismissal and race discrimination.

2. The matter was considered at a Case Management hearing before Employment Judge Lewis on 27 June 2019. After that hearing the claims under the Equality Act of direct race discrimination and victimisation were dismissed upon the Claimant withdrawing them.

3. There was a further Preliminary Hearing for Case Management before Employment Judge Quill on 18 July 2019 at which the issues for determination at this hearing was set out as in the annex.

Evidence

4. The Claimant gave evidence on his own behalf.

5. The Respondents called:

   5.1 Richard Dangoor, Manager

5.2 Steven Lane, Director of Building Consultants (UK) Ltd, at the material time

5.3 Joseph Dangoor, Director

6. The witnesses who gave evidence did so from written witness statements. They were subject to cross-examination, questioning by the Tribunal and, where appropriate, re-examination.

7. I was provided with an agreed bundle of documents. References to page numbers in this judgement are to the page number in the agreed bundle of documents. Those documents to which we were referred are marked in the Employment Judge's copy of the bundle.

Findings of fact

8. The Claimant commenced employment with the Respondent on or about 1 September 2008 as a Maintenance Engineer. The Respondent is a property maintenance company that provides services for estate agents and landlords. The business has grown considerably during the period that the Claimant has worked for it. He was a hard working employee and was very loyal to the Respondent. He was generally well regarded by his managers.

9. The Claimant is Polish. He speaks some English. Although these proceedings were conducted entirely with the use of an interpreter, the Claimant was able to communicate in English sufficiently to understand the instructions that he was given by the Respondent. During the course of this hearing we listened to a recording of a conversation between the Claimant and Richard Dangoor, the manager of the Respondent and Richard Carlton-Walker, an Asbestos Consultant, that showed that the Claimant was able to explain himself and understand discussions in English to a reasonable level, although he did need matters to be explained to him at in a simple and straightforward manner.

10. The Respondent considered that it was beneficial to have a long-standing employee like the Claimant. He was hard-working. He was known by tenants and could be trusted to attend premises when tenants were absent. The Respondent did not want the Claimant to leave their employment.

11. Unfortunately, relations deteriorated from on or about 12 August 2013 and thereafter. The Claimant was involved in a road traffic accident. The Claimant was driving a company van provided for him by the Respondent. He was hit from behind by another vehicle. There is nothing to suggest that the Claimant was at fault for the collision. The driver of the other vehicle intimated a claim. The Respondent's insurers wished to obtain a statement from the Claimant so that they could defend the claim. It appears that the driver of the other vehicle had previously brought claims that had been settled and the insurers on this occasion, bearing in mind that the Claimant's vehicle had been hit from behind, wished to defend the matter.

12. A meeting was arranged on 6 November 2017 at which an interpreter was present. The Claimant was asked to give his version of events. A draft witness statement was produced for the Claimant. The Claimant was asked to sign the witness statement and an “indemnity form” that merely set out details, such as the van, its value, the ownership of the van by the Respondent. The Claimant was only asked to sign to confirm that the information was true to the best of his knowledge and belief. The witness statement set out the Claimant’s version of events in straightforward terms in the usual manner for a road traffic accident. The witness statement included the Claimant’s address, although if the Claimant had raised a concern at the time it would have been possible for his work address to substituted. The Claimant produced the statement with the assistance of an interpreter. The final version was in English. The Claimant was also asked to sign the statement.

13. There appears to have been a misunderstanding, particularly in respect of the indemnity: the Claimant thought that he might be liable for any damages that were awarded to the driver of the other vehicle. That was not the case. There was no suggestion of personal liability on the part of the Claimant. The statement was required so that the insurers could defend the claim. The Claimant became upset. He felt stressed. Significant effort was taken to persuade him to sign the documents. Unfortunately, this made the Claimant feel even more stressed. Eventually, he was told that he should take a couple of days off and take the opportunity to obtain legal advice. It was thought that such legal advice would almost certainly result in the Claimant being told that there was nothing to worry about in signing the insurance “indemnity” document and the witness statement and that he should do so and return to work. The Claimant was told he should leave the company van as it might be needed by others. The Claimant was also told that he should remove his personal effects from the van because as there was a concern that if others used the van the Claimant might be concerned that his property would be taken. It was explained to the Claimant that he would not need to work for the next couple of days while he obtained advice.

14. Unfortunately, the Claimant misunderstood the situation and believed that he was being told that there would be no further work for him. It appears to have been in that context that took legal advice which did not focus on whether he should sign the witness statements and “indemnity” for the insurers, but whether he might have an employment dispute. The Claimant produced a grievance with the assistance of his solicitors. He complained about being invited to the meeting and asked to sign the witness statement and “indemnity”. The writer of the grievance seems to have been under the impression that there was no translator. That was incorrect. The Claimant had the benefit of an interpreter, although once the statement was put into writing, it was in English. The grievance letter suggested that the Claimant believed that he had been dismissed instantly. Again, that was a misunderstanding of the situation. The Claimant complained that he had not been issued a statement of written particulars of employment. It was contended that the dismissal might have been because of the Claimant asserting a statutory right to be provided with employment particulars. The Claimant stated that he had been subject to discrimination. It was alleged that he had not been provided

with a statement of employment particulars, whereas other employees had. It was also alleged that he was harassed in the workplace and ridiculed because of his allegedly poor English. In evidence, the Claimant suggested that the discrimination complaint was something that the lawyer came up with.

15. On 4 December 2017 the Claimant was invited to a grievance meeting. He was asked whether he believed that he had been treated less favourably than other employees on grounds of his nationality and whether he had been ridiculed because of his allegedly poor English. He stated that he had not. In evidence the Claimant initially contended that this was because he feared losing his job should he make such accusations. However, on further questioning, the Claimant accepted that he had not been ridiculed by anything that was said. The only feeling he had on occasions was that there was "smiling" when he was in the office. He did not know what it was about, but had inferred the possibility that it might be something to do with his spoken English. The Claimant did not suggest it was a matter of any significance at the time.

16. The Claimant also complained about a text message sent while he was absent in which it was suggested that he was absent after his sick certificate had expired. The Claimant accepted that was a misunderstanding of a rather confusing doctor's note.

17. The Claimant continued to complain about the witness statement. He was told that it was only sought so the insurers could defend the claim.

18. On 12 December 2017 Richard Dangoor wrote dismissing the grievance save for the grievance that the Claimant had not been provided with a statement of employment particulars. Thereafter, the Claimant was provided with a detailed draft contract of employment. The contract required that he must limit his work to work for the Respondent. The Claimant was reluctant to agree to that and refused to sign the contract. The Claimant continued to refuse to sign the insurance documentation with the consequence that the insurers were not able to defend the claim, although it appears there was a valid defence to the claim. The Respondent is not aware of precisely what occurred as a result, although they assume that payment was made as their insurance premiums have increased.

19. In December 2017 the Claimant started doing works at a property at Longford Court, Belle Vue Estate. There were various works, including works to the bathroom and kitchen. During the course of the works Claimant became concerned that there might be asbestos present. There were a number of possible sources of asbestos. There was piping, board and cement that might have some asbestos content. Understandably, the Claimant was extremely concerned about the situation and contacted his employer who arranged for the attendance of an asbestos consultant, Richard Carlton-Walker, who attended on 12 December 2017. The Claimant covertly recorded the conversation with his. I was provided with a transcript of the conversation. During the course of the conversation, it was accepted that there was asbestos and that remedial works would need to be undertaken. It was contended that

this would not preclude any works continuing before the remedial works were undertaken. Joseph Dangoor attended the meeting. He suggested that some tiling work could be undertaken. The Claimant raised a concern that this might involve cutting tiles. It was agreed that such work would not be undertaken. Joseph Dangoor asked the Claimant to fix the toilet because, otherwise, those renting the flat would have no toilet, potentially for a lengthy period of time as the Christmas break was coming up. The Claimant did not suggest that he could not undertake that work without disturbing asbestos. He did not raise any concerned with Richard Carleton Walker that he could not undertake the agreed work without disturbing asbestos. He did ask Richard Carlton-Walker whether the cement at the bottom of the toilet. pedestal was asbestos. Richard Carlton-Walker told him that it was not. The Claimant did not say at that stage that he was unhappy carrying out the limited further works before the asbestos was removed. He did a temporary repair that allowed the toilet to be used. He then left the property.

20. The next day that a contractor came to remove the asbestos. The Claimant was concerned about the relatively short time the work took. He was concerned whether the asbestos had been fully removed. That view was based only on the time that the work had taken. He did not raise that concern with the Respondent.

21. The Claimant attended at the Respondent’s offices on 15 December 2018. He asked for a copy of the report that had been produced by Richard Carlton-Walker. He was told by Richard Dangoor that he could not be given a copy of the report as it had been commissioned by the landlord and they had specifically stated that copies could not be taken. However, Richard Dangoor stated that the Claimant could read the report and he was happy to explain what was said in the report to the Claimant. The Claimant did not take up the offer and refused to discuss the matter further.

22. There was also a discussion about the Claimant’s bear. It had been suggested on a number of previous occasions that he should shave. Somewhat surprisingly, the Claimant specifically linked feeling stressed to the fact he was asked to shave his beard more than to his request to see a copy of the asbestos report.

23. The conversation was brief. The Claimant stated that he was feeling stressed and that he was leaving to go to see his Doctor. Richard Dangoor asked him whether he would sit down and discuss the report. The Claimant was not prepared to do so. The Claimant did not say that he thought it been inappropriate to ask him to fix the toilet before the asbestos had been removed. The Claimant did not sate that he considered that the asbestos had not been properly removed. He simply asked for a copy report. When he was told that he could read the report and it could be explained to him, he took the matter no further. He insisted on leaving the Respondent’s premises. The report was dated 13 December 2017. There was a recommendation that the affected area be sealed off pending removal of the asbestos, but that in the meantime certain works could continue. Richard Dangoor was happy to show this report to the Claimant.

24. On 18 December 2017 the Claimant was signed off with anxiety from 15 December 2017.

25. On 18 December 2017 Richard Dangoor wrote to the Claimant and asked him to attend an informal meeting to discuss what had occurred on 15 December 2017, so that they could explain why they considered it was safe for the Claimant to work in the flat, to discuss the report and to seek to resolve their differences. He stated:

> "I do sincerely believe that we can resolve this matter with your cooperation. However, please note this is a serious matter of concern and your refusal to work on the basis that you were not provided with a physical copy of the report is unacceptable and disciplinary proceedings may be invoked. It is also unacceptable to leave work without authorisation and contrary to management instructions. I would like to meet with you to discuss this matter in view of resolving it by way of an informal chat and so we can agree a way forward and I hope that disciplinary action will not be necessary.
>
> Finally, please request your wife Grazyna to refrain from contacting either myself or Joseph regarding issues concerning your employment."

26. The last comet was made because the Claimant's wife had sent very intemperate text messages, that were inflaming, rather than calming, the situation.

27. The letter from Richard Dangoor was carefully written. It was an attempt t to resolve the difficulty informally The letter makes it clear that the Respondent wanted to resolve the matter and keep the Claimant in their employment.

28. On the same day, a letter was sent on the Claimant's behalf complaining about his treatment. It was sent before the letter from the Respondent had been received by the Claimant. It was written on his behalf by a friend. It included a number of criticisms that suggested a misunderstanding of what had occurred. It was unlikely to help resolve the situation and allow the Claimant to return to work. The Claimant could have returned to one of many other properties. There was no requirement on him to go back to the flat at Belle Vue. In the letter sent on the Claimant's behalf it was asserted that the Respondent was trying to constructively dismissed the Claimant and that he was being directed to do unacceptably dirty and dangerous work. It was alleged that he had been discriminated against and ridiculed for his poor command of English. The Claimant stated at the Tribunal hearing that was not, in fact, the case. The Claimant alleged that he had almost cried with embarrassment when on three occasions he was asked to shave. This was alleged to be race discrimination. It was again suggested that the very mildly worded text message sent when he was absent from work was harassing. It was suggested that the Respondent had acted entirely unreasonably in the way in which they had dealt with witness statement at the meeting with the representative of their insurers. It

was stated that the situation needed to be resolved to the Claimant's satisfaction failing which further action would be taken.

29. On 20 December 2017, Richard Dangoor wrote to the Claimant stating that he was stunned by the allegations made in the letter, but asking again for a meeting. The Respondent was still attempting to resolve the matter informally. The Claimant refused to attend a meeting.

30. On 5 January 2018, the Claimant's General Practitioner wrote stating that the Claimant had started medication for depression and anxiety and was to be reviewed to consider the best form of treatment. He raised a concern that the grievance meeting itself would be a cause of anxiety.

31. On 11 January 2018, Richard Dangoor wrote to the Claimant. He stated:

> "I have received a letter from your GP, Dr Anne Arnold, informing me that you appear to be stressed and anxious.
>
> I am sorry that you are feeling unwell. Dr Arnold further states that the thought of grievance meeting heightens your anxiety. It is not my intention to cause you any anxiety or stress and I would like to take this opportunity to reassure you that I sincerely wish to resolve any issues that you may have. In fact, a resolution may well go a long way to alleviating the anxiety. I have asked you to attend our offices in view of having an informal chat so that we could talk openly and resolve any issues and agree a way forward.
>
> I hope that the treatment and support from your GP will assist your recovery. Should you require any support from myself, I would be happy to have a chat. If it will assist you, I am happy to meet in a coffee shop.
>
> If your grievance is a source of stress as suggested by your GP, perhaps it would be best to work together resolving the issues and this in turn may assist your recovery."

32. The Claimant contends that he was harassed throughout this period by being sent the letters we have referred to. His wife sent text messages on his behalf, suggesting that any meeting should await his recovery.

33. When dealing with stress that results from disagreements in the workplace there is something of a chicken and egg situation. It is often impossible for there to be a resolution of the underlying stress without a resolution of the dispute. The longer the dispute goes unresolved, the longer the stress continues; and the greater the risk of continuing ill health.

34. It was for the Claimant to decide whether he was prepared to meet with the Respondent while signed off sick, but it was reasonable of the Respondent to seek to persuade him that it was in his best interests to attend an informal meeting so that their dispute could be resolved which would alleviate the stress he was feeling and could allow a speedy return to work.

35. On 19 January 2018, the Claimant's General Practitioner signed a fit note stating that the Claimant was not currently fit for work and that:

> "I understand meeting is planned with employer re grievances. If this can be managed I would hope patient can phase back to work after GP review in 2 weeks"

36. This suggested that a grievance meeting could take place before the Claimant was signed as fit to return. It appears that the GP appreciated that there was unlikely to be a recovery until the dispute between the Claimant and his employer was resolved.

37. On 22 January 2018, the Respondent wrote to the Claimant noting the provision of the further fit note and confirming that the Claimant had been paid in full until 14 December 2017, although thereafter he had been paid statutory sick pay. I accept that that must have made the Claimant's finances extremely difficult. He was under considerable financial stress. That could have been ameliorated had he taken up the offer to attend a meeting to resolve the issue and return to work.

38. On 23 January 2018 a letter was sent by the Respondent noting the possibility of a meeting and inviting the Claimant to an informal meeting on 29 January 2019 to discuss why he had left work on 15 December 2017 and why he was continuing to raise issues about the witness statement in circumstances where the grievance had been determined and not appealed. He was asked when he would be likely to be able to return to work. It was stated:

> "Please be assured that this is not a disciplinary meeting but will be your opportunity to put your point of view forward, in particular with reference to the events on 15 December 2017."

39. The Claimant's wife sent a message stating that he would not attend the meeting on 29 January 2018.

40. The Respondent wrote to the Claimant noting that he would not attend an informal meeting and issuing a notice of a disciplinary hearing in respect of his cessation of work on 15 December 2017, his failure to engage with the Respondent after leaving work and his refusal to discuss the matter.

41. The Claimant was also sent a letter on 30 January 2018 asking that he attend a medical examination with an independent occupational health expert on 31 January 2018.

42. The Respondent sent a witness statement to be relied upon at the disciplinary hearing. It was from Adam Roberts, a consultant estate agent, who gave his recollection of the meeting on 15 December 2017 as follows:

> "I am Adam Roberts lettings consultant at Hausman and Holmes, I arrived at work at approximately 8.30am on the 15th December 2017, I was sitting at my desk which is located at the front of the office talking to Richard Dangoor who was at the time sitting at the desk behind me, Pawel Kocon entered the offices at approximately 9am, Richard said "Hello", Pawel responded "Hello can I have the asbestos report", Richard responded that under the owners instructions he wasn't able to give Pawel a copy of the report but was happy for Pawel to read It, Pawel asked if he could take a photo of the report on his phone and Richard replied he could not allow this as It would be the same as taking a copy but reiterated that Pawel could read the report. Pawel responded "then this makes me stressed and I am not working today and I go home", Richard tried to engage Pawel In conversation and asked why reading the report was not enough to satisfy him, Pawel sounded disengaged at this point and said "I must go", he then started to walk towards the front door, Richard then moved towards Pawel and said "Pawel we have not finished this discussion, please sit down so we can discuss It, Pawel responded "I must go, I don't feel well", Richard asked again "Pawel please sit down so we can talk" Pawel responded "I must go" and walked out of the office. The whole period between Pawel's arrival and departure was approximately 1-3 minutes. I feel that Pawel had made his mind up prior to arriving that if he was not given what he wanted, he would then immediately leave and did not seem interested in an alternate course of action."

43. The Claimant did not attend the first disciplinary hearing that had been fixed.

44. On 19 February 2018 a further formal notification of a disciplinary hearing was sent to the Claimant. The allegations were in relation to the Claimant's absenting himself on 15 December 2017, refusal to attend a meeting in response to the Respondent's correspondence, failure to attend the medical examination with the occupational health expert and failure to attend the initial disciplinary hearing fixed. In addition, there was a new allegation that the Claimant had been working and while signed off sick and in receipt of statutory sick pay. Attached to the letter were a number of photographs; one showing the Claimant in a builder's van and one showing him on a bicycle. There was a witness statement from a David Lucas who stated that:

> "I am David Lucas. From Monday 5th February through to Wednesday 7th February I followed and took photographs of Pawel Kocon entering [address] On each of these 3-day Mr Kocon left hs home [address] by bicycle at approximately 8.15 am arriving at [address] at 8.30 am. Returning home for what appeared to be lunch 12.00 pm returning 1.20 pm, remaining there and appearing to do a full day's work. On the Monday the 5:11 at around 9.30 am I entered the building with Richard Dangoor enquiring from the porter if he knew Pawel Kocon and if he knew where he was working. The porter told us flat 4 and directed us, the door to the flat was open and we could see Mr Kocon working inside."

45. Joseph Dangoor gave evidence at he in fact was in attendance on that occasion.

46. There was a witness statement from Richard Dangoor also confirming what had occurred on 5 February

47. On 21 February 2018, the Claimant wrote refusing to attend the disciplinary meeting, stating that he had a doctor's appointment and he had insufficient time to prepare.

48. On 22 February 2008 Richard Dangoor asked the Claimant and his wife to stop bombarding them with text messages and stating that the Claimant should disclose any documentation.

49. Amongst the text messages sent from the Claimant's telephone was one in which the Claimant threatened that if the Respondent continued in their allegation that the Claimant had been working while on sickness absence and in receipt of statutory sick pay, that he would make allegations of improper activity on their part.

50. In response to the letter dated 22 February 2018 from the Respondent, the Claimant and his wife wrote a very detailed handwritten letter complaining about his treatment, alleged discrimination, principally in respect of him being asked to shave, and repeating the Claimant's previous complaints that had been made in his previous grievance.

51. On 24 February 2018, the Claimant provided a document headed Witness Statement from the builders in whose van he had been seen. It was stated:

> "I am writing in regards to the photo that has being taken by the boss of my colleague Pawel Kocon
>
> First of all I disagree to photographing my company van without permission, secondly I would like to make that situation clear when photo was took on the 31 of January Pawel did not work for me, I have lend him my company car as he wanted to collect some furniture that he has bought from the charity shop!"

52. As the Respondent pointed unusual that someone whom the Claimant said was only a friend referred to the Claimant as "my colleague".

53. In addition, a document was produced by an acquaintance of the Claimant who stated:

> "I would like to clarify that Pawel Kocon, whom I have known for the past seven years or so, has been helping a friend with some ad-hoc handyman assistance over the past couple of weeks, unpaid.
> Having bumped into him, Pawel seemed terribly down, which apparently was due to him having been unfairly dismissed from his job. I was

surprised to have heard this, having understood Pawel to be an extremely hard-working man with a long-term job. I explained to Pawel that my friend was also experiencing some difficulties. My friend who was renovating her flat, was thoroughly let down by her decorators, and was actually in need of an extra pair of hands to help her finish the flat. Having occasionally used Pawel's handiwork to repair odd bits in my own home, I asked him if he would be interested in helping the lady complete her flat. Pawel apologised, explaining that he was in no state to work, due to his severe stress, anxiety attacks and palpitations, and that he was seeing a doctor.

I was upset to learn how, apparently, his job loss had affected his health and suggested that he should get out of the house a bit, to help improve his spirits, and that my friend would be only too grateful if he would perhaps help her as 'an extra pair of hands'. After thinking about it, Pawel said that he was unable to commit to anything due to his poor health, he would, however, agree to try and help with odd-jobs, both as a favour to me, and as a means to getting him out the house whilst he continue to recuperate back to full health.

I hope Pawel will recover soon and be in a good state to get back to working."

54. The Claimant attended a disciplinary hearing on 27 February 2018. There was a detailed discussion about what had occurred at the premises where the Claimant had found asbestos. It was explained arrangements had been made for removal of the asbestos. There was a discussion about the meeting on 15 December 2017 and the fact that the Claimant had left shortly after being told that he could not take copy of the report but that he could read it and have it explained to him. The Claimant did not state and at the time that he thought that the asbestos had not been properly removed. He did not state that he believed that it had been it had been unsafe him to an carry out the temporary repair to the toilet. He did not say that he needed a copy of the report so that it could be translated into Polish.

55. There was also a very lengthy discussion about the Claimant having been asked to shave.

56. The Claimant had full opportunity to put forward his side of the story at the disciplinary hearing.

57. On 7 March 2018, the Respondent wrote to the Claimant confirming his summary dismissal. It was held that there had been a series of failures to obey lawful instructions and insubordination. It was held that the Claimant had been at undertaking unauthorised paid, or unpaid, employment during his working hours.

58. The Respondent set out their contention that when the Claimant had been told that he could not take copy of the asbestos report as it was one that was produced for the landlord who had refused that that permission for it to be

copied, he left without discussing the matter with the Respondent and had thereafter had refused to engage in any dialogue to explain his concerns and give the Respondent an opportunity to provide alternative employment with him. It was held that the Claimant had on 15 December 2017 refused to enter into any discussion about the report, that he had refused to attend informal meetings to discuss his grievance, had refused to undertake a medical examination, failed to attend the first disciplinary hearing and, finally, that he had undertaken work while off sick. The Claimant had suggested that he merely visited and talked with some friends of his and that he attended to provide advice. The Respondent did not accept that was the case. The Respondent concluded that the Claimant had been undertaking work despite being signed off sick.

59. On 21 March 2018, the Claimant submitted an appeal against the decision to dismiss him. He alleged that there had been procedural impropriety, that there had been a failure to form a reasonable belief in his guilt and that dismissal fell outside the band of reasonable responses.

60. The Claimant was invited to an appeal hearing on 3 April 2018 before Mr Lane. There were various delays in fixing the appeal because of matters such as difficulty in obtaining a translator. Because of changes at the last minute the Respondent could not provide a formal formally qualified translator, but did have a person who could translate English to Polish. The Claimant agreed to go ahead with the meeting. The Claimant complained again about not being given a copy of the asbestos report and set out his belief that he had a right to demand documents and to take copies. He alleged that it had been unfair to dismiss him. There was a detailed discussion about the evidence that suggested the Claimant had been undertaking work while he was signed off sick and in receipt of statutory sick pay. On 31 May 2018 Mr Lane wrote dismissing the appeal. He considered that the grounds of appeal were not made out. He set out his conclusions in detail. In essence, he concluded that the Respondent had been entitled to reach the conclusion is that it had reached.

61. The Respondent has a disciplinary procedure which attaches disciplinary rules. There are a number of types of contact conduct that are stated will normally be regarded as gross misconduct. This includes repeated or serious failures to obey instructions or any other serious act of insubordination. It is also stated that gross misconduct is conduct of so serious in nature as is likely to irreparably damage the working relationship and trust between the Respondent and their employees. In effect, the Respondent defines as gross misconduct conduct on the part of an employee that is in breach of the implied term of mutual trust and confidence.

The Law

62. Pursuant to s.94 of the Employment Rights Act 1996 (“ERA”) an employee has the right not to be unfairly dismissed. The tribunal has to consider the reason, or principal reason, for the dismissal.

63. Certain reasons for dismissal are automatically unfair. Section 100 ERA provides:

> (1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—
>
> (c) being an employee at a place where—
>
> (i) there was no such representative or safety committee, or
>
> (ii) there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,
>
> he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,
>
> (d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or
>
> (e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.
>
> (2) For the purposes of subsection (1)(e) whether steps which an employee took (or proposed to take) were appropriate is to be judged by reference to all the circumstances including, in particular, his knowledge and the facilities and advice available to him at the time.

64. Determining the reason, or principal reason, for dismissal requires an enquiry into what facts or beliefs caused the decision maker to dismiss: the Tribunal is not bound to accept at face value a statement by the employer as to his reasons for dismissal: **Abernethy v Mott** [1974] ICR 323.

65. It is rare for there to be direct evidence that an employee was dismissed for an automatically unfair reason. It will often be necessary to draw inferences from primary facts: see by analogy in the case of protected disclosures **Kuzel v Roche Products Ltd** [2008] IRLR 530. If the employee establishes grounds for considering that he may have been dismissed for an automatically unfair reason the tribunal will generally look to the employer to prove the reason for the dismissal. There may be circumstances in which the Employment Tribunal is fully persuaded on the evidence what the reason for the dismissal was, and that it was unrelated to the making of any disclosure.

66. If the Claimant was not dismissed for a reason that renders the dismissal automatically unfair, it is for the Respondent to establish one of a limited number of potentially fair reasons for dismissal. These include, pursuant to s.98 ERA, a reasons that relate to the conduct of the employee or some other substantial reason for dismissal which may include a breach of the implied term of mutual trust and confidence.

67. Where the employer establishes a potentially fair reason for dismissal the Tribunal will go on to consider, on a neutral burden of proof, whether the dismissal was fair or unfair, having regard to the reason shown by the employer. This 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. This is to be determined in accordance with equity and the substantial merits of the case.

68. In considering dismissal for misconduct the Tribunal is guided by the principles set out in **British Home Stores v Burchell** [1978] IRLR 379, taking into account the neutral burden of proof in considering the fairness of the dismissal. The Tribunal considers whether at the time of the dismissal the Respondent had a genuine belief in the misconduct alleged, whether the Respondent had reasonable grounds for believing the Claimant was guilty of that misconduct and, at the time it held the belief, whether the Respondent had carried out as much investigation as was reasonable in all the circumstances.

69. The Tribunal will go on to consider whether the dismissal fell within the band of reasonable responses: **Iceland Frozen Foods v Jones** [1982] IRLR 439.

70. It is not for the Tribunal to re-try the facts that were considered by the employer or to substitute its decision for that of the employer: **Foley v Post Office, Midland Bank plc v Madden** [2000] IRLR 827.

71. The band of reasonable responses test applies to the decision to dismiss and the investigation that took place: **Sainsbury's Supermarket Ltd v Hitt** [2003] IRLR 23.

72. The Tribunal must consider whether the investigation was reasonable, not whether it itself would have chosen some alternative reasonable methodology to that adopted by the Respondent.

73. When considering fairness of procedures, the Tribunal considers the overall process including any appeal: **Taylor v OCS Group Ltd** [2006] ICR 1602.

74. It is relevant to consider the Claimant's length of service and good conduct in determining whether a decision to dismiss fell within the band of reasonable responses.

75. Dismissal of an employee without giving notice is unlawful unless the employee is guilty of a fundamental breach of contract which permits the employer to dismiss immediately because it goes to the root of the contract

and shows that the employee no longer considers himself to be bound to comply with the terms of the contract. Such a claim of wrongful dismissal if successful allows the employee to claim damages for the notice period to which he would have been entitled.

Analysis

76. This case lies at the intersection between action by the Claimant that might be treated as a misconduct or that results in a breach of the implied term of trust and confidence which is defined by the Respondent in their policy to constitute gross misconduct.

77. I first considered the reason for the dismissal of the Claimant. I consider that the factual reason for the dismissal of the Claimant was that when he was told that he could not be provided with a copy of the asbestos inspection report he left at the Respondent's premises having refused to discuss the matter. Thereafter he refused to engage in attempts by the Respondent to resolve the matter informally. He then did not attend the first disciplinary hearing fixed, did not attend occupational health appointment. He was found to have been working for others while signed off sick and in receipt of statutory sick pay. I am fully persuaded that these were the reasons for his dismissal.

78. I do not consider that the evidence suggests that the Respondent dismissed the Claimant because he raised concerns about asbestos. While the the Claimant brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety, when he initially raised his concerns about asbestos, the Respondents took steps to resolve those difficulties and engaged an asbestos consultant to ensure that the problem was dealt with. They did not criticise the Claimant in any way for raising a concern that needed to be addressed. At the meeting on 15 December 2017 the Claimant did not raise any further specific concerns he merely demanded that he be provided with a copy of the report. While he was dismissed, in part, because he refused to engage with the Respondent to discuss what his concerns were, I do not consider there is evidence from which I could conclude that his raising the concern was the reason, or principal reason, for the decision to dismiss.

79. I do not consider that on 15 December 2017, there was circumstances of danger which the Claimant reasonably believed to be serious and imminent and which he could not have been reasonably expected to avert as a result of which he left or refused to return to his place of work. When at the Respondent was told that he could not take away a copy of the report the Claimant left to go to the doctor. There was no requirement on him to work at the flat at Belle Vue. If he had discussed the matter with the Respondent other work could be found for him. I do not accept that the Respondents dismissed the Claimant because he had concerns about working at the flat after asbestos had been removed. He did not say that he thought that the asbestos had not been properly removed or that he felt that he could not work in the flat because of danger from asbestos. He did not suggest that there was a continued problem in

working at the flat. I do not accept that the Claimant was dismissed because he took appropriate steps to protect himself or other persons from the danger by requesting a copy of the report. He did not state that there was a specific reason why he needed to have a copy of the report, such as that he wanted to have it translated into Polish. He refused the opportunity to read the report and discuss it with his employer and to explain any concerns he had about working in the flat. I do not consider that there are any proper grounds to conclude that the Claimant's dismissal was automatically unfair for the purposes s100 ERA.

80. The matters I have held above were the reason for the dismissal of the Claimant constitute reasons relate to the conduct of the Claimant. The Respondent genuinely believed that the Claimant was guilty of the conduct alleged against him. They had reasonable grounds for the belief. They reach the decision after a fair investigation. The Claimant was provided with the evidence relied upon against him. He was invited to a meeting at which he had an opportunity to put forward his version of events, in full.

81. I consider that dismissal falls within the range of reasonable responses. His actions as a whole were so serious as to amount to gross misconduct. The fact that the Claimant had been working for others, even if not paid, during the period that he was signed off sick and in receipt of an statutory sick pay is gross misconduct that, of itself, entitled the Respondent to dismiss.

82. An alternative analysis would be that there was a fundamental breakdown in trust and confidence between the Respondent and the Claimant. While I accept that the Claimant was unwell for much of this period, even before he commenced medication he would not engage in repeated attempts by the Respondent to convene informal meetings so that any misunderstanding could be resolved. Instead he took an increasingly belligerent approach, making very serious allegations against the Respondent, or allowing those who acted on his behalf to do so. He has sought to distance himself from the majority of those allegations at this hearing. The Claimant refused to engage with the Respondent. There was ample evidence for the Respondent to conclude that the Claimant had been undertaking work while absent for ill health and in receipt of statutory sick pay. It may well be that the Claimant felt forced into doing so because of his parlous financial situation. Those financial problems could have been resolved easily, had he engaged with the Respondent, discussed his concerns and returned to work.

83. Finally, I consider the claim of wrongful dismissal. To establish wrongful dismissal the Claimant must show that he was dismissed in circumstances where there was no fundamental breach of contract that entitled the Respondent to terminate the contract without giving contractual notice. I conclude that the Claimant was, in fact, guilty of conduct that fundamentally undermined the implied term of mutual trust and confidence that entitled the Respondent to terminate the contract and to dismiss him without notice. In particular, I find that the Claimant undertaking work, whether paid or unpaid, during the period when he was signed off sick due to ill health and in receipt of statutory sick pay, was gross misconduct that entitled the Respondent to terminate the contract without notice.

84. Accordingly, the claims brought by the Claimant fail and are dismissed

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EMPLOYMENT JUDGE TAYLER

7 January 2019

……………………………………………….
JUDGMENT SENT TO THE PARTIES ON
7 January 2020

……………………………………………….
FOR THE TRIBUNAL OFFICE

Annex

Unfair dismissal

(i) What was the principal reason for dismissal and was It a potentiality fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 (·ERA")? The respondent asserts that It was a reason relating to the claimant's conduct.

(ii) If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

Automatic Unfair Dismissal - Sections 100(1)(c) and (d)

(iii) At the preliminary hearing in June, the Claimant specified that these were the subsections he was relying on and that his allegations is that he was dismissed because he told his employer about dangerous asbestos, and/or because he did not want not work near dangerous asbestos. .

(iv) It will be necessary to establish If the Claimant, did, in fact, bring to his employers attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety. If not, his claim under Section 100(1)(c) fails. If he did,

a. It will be necessary to decide if the Respondent had any representative (or committee) of workers on matters of health and safety at work (I) in accordance with arrangements established under or by virtue of any enactment or by reason of
being acknowledged as such by the employer.

b. If so, H will be necessary to decide if it was not reasonably practicable for the Claimant to raise matters by those means.

(v) It will be necessary to establish whether or not the Claimant did leave (or propose to leave, or refuse to return to) his place of work or a particular part of his place of work in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert.

(vi) If the facts mentioned in either of the previous paragraphs are made out, it will be necessary to consider, in each case, whether that was the principal reason for which the Claimant was dismissed.

Remedy for unfair dismissal

(vii) If the claimant was unfairly dismissed and the remedy is compensation:

a. if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had
a fair and reasonable procedure been followed / have been dismissed in time anyway? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825: 1W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Credit Agricole Corporate and Investment Bank v Wardle (2011] IRLR 604];

b. would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2);
and if so to what extent?

c. did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

Wrongful dismissal

(viii) Was the claimant dismissed in circumstances in which. due to the claimant's conduct, the respondent was under no obligation to give notice. [N.B. This requires the respondent to prove, on the

balance of probabilities, that the claimant actually committed the gross misconduct]; if so, did the respondent affirm the contract of employment prior to dismissal?

(ix) The conduct the respondent relies on is failing to carry out his duties without a reasonable justification.

(x) If the claimant was wrongfully dismissed without notice, then (i) what was the notice period to which the claimant was entitled and (ii) what remuneration would the claimant have been entitled to had he received such notice.

Remedy
(xi) If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular. if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

a. did the respondent unreasonably fail to comply with a relevant ACAS Code of Practice, rf so, would It be just and equitable in all the circumstances to increase any [compensatory] award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207 A of the Trade Union & Labour Relations (Consolidation) Act 1992 ("section 207A")?

b. did the claimant unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to decrease any [compensatory] award and if so, by what percentage (again up to a maximum of 25%),pursuant to section 207 A?