EMPLOYMENT TRIBUNALS

Claimant: Mr C Steer

Respondent: St Mungo Community Housing Association Limited

Heard at: London Central Employment Tribunal

On: **23 and 24 January 2020**

Before: Employment Judge Quill (sitting alone)

Appearances
For the claimant: Mr K Perera, Legal Representative
For the respondent: Mr J England, Counsel

RESERVED JUDGMENT

(1) The complaint of unfair dismissal is not well-founded and it is dismissed.

(2) The claim alleging breach of contract for failure to give notice fails, and the Claimant is not entitled to damages.

(3) All claims relating to holiday pay were withdrawn and are dismissed upon withdrawal.

REASONS

Introduction

1. The Claimant is a former employee of the Respondent. He presented this claim on 24 June 2019.

The Claims & Issues

2. The Claims were for unfair dismissal and breach of contract (being failure to give notice of dismissal).

3. The issues which I had to consider were as follows.

Unfair dismissal

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

3.2 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'?

3.3 If the claimant was unfairly dismissed and the remedy is compensation:

3.3.1 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?

3.3.2 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?

3.3.3 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)?

Breach of contract (notice pay)

3.4 To how much notice was the claimant entitled? (Both sides agreed that the Claimant had more than 12 years' service, and neither side alleged that he had a contractual entitlement which exceeded 12 weeks' notice.)

3.5 Did the claimant fundamentally breach the contract of employment by his conduct? (In other words, has the Respondent proved, on the balance of probabilities that the Claimant behaved in a particular way, and, if so, did that conduct entitle the Respondent to terminate the contract without notice?)

3.6 If so, was that the reason that the Respondent terminated the contract?

3.7 Prior to terminating the contract, did the Respondent waive the Claimant's breach(es) if any?

3.8 The alleged conduct which the Respondent relied upon was denied by the Claimant, and the details of the allegations were:

3.8.1 "The Gross Misconduct Allegation": The Claimant dishonestly claimed to be unfit to attend work form 5 June 2018 to 6 July 2018 when he was not unfit to attend work.

3.8.2 "The Serious Misconduct Allegations":

3.8.2.1. The Claimant failed to co-operate with a reasonable management request evidencing his original travel arrangements (12/05/18 to 05/06/18) and subsequent amendments to those.

3.8.2.2. The Claimant knowingly asserted and encouraged St Mungo's safeguarding procedures should be departed from. Examples of which were:

3.8.2.2.1. On 08/02/18, stating that "in my opinion" the alleged perpetrator of a rape should be told of the allegation, and "I'd want someone to tell me if it was me" which was alleged to be contrary to police and senior manager guidance which the Claimant was aware of.

3.8.2.2.2. On 07/03/18, when Elinor Childs of the Quality Team was delivering a Team Briefing, the Claimant demonstrated awareness that staff should not administer medication but said that he still would do this regardless.

The Hearing and the Evidence

4. I had a bundle from the respondent of approximately 500 pages, and also some additional documents from the claimant, which were approximately 17 pages.

5. There were three witnesses at the hearing each witness had produced a written witness statement and attended to give evidence in person and was cross examined and answered my questions.

6. On behalf of the respondent, there was Ricardo Lopez who is the Regional Head – South East London. There was also Kellie Murphy who is Regional Director for South and East London and South England. The claimant gave evidence on his own behalf, he was the only witness for his side.

7. The Claimant's representative stated at the outset that holiday pay claims mentioned in the ET1 were withdrawn.

8. The Claimant's witness statement referred to union membership and activities, including industrial action. The Claimant's representative confirmed that the claim was one of ordinary unfair dismissal only (in reliance on the factors set out in Section 98 ERA) and that the Claimant was not seeking to bring a claim under any other legislation to assert – for example - that the dismissal was on the ground of trade union membership or activities or in connection with industrial action.

The findings of fact

9. The claimant was an employee of the respondent. His start date was 17 February 2003. His last day of employment was 21 February 2019. His employment terminated because he was dismissed without notice by the respondent.

10. The respondent is a not for profit housing association. The respondent works with rough sleepers, homeless people and vulnerable adults at risk of homelessness.

11. Since 1 April 2013, the claimant's job had been that of a project worker. He worked at a hostel operated by the respondent which was for single homeless men and women with medium to high support needs. Project workers such as the claimant generally have 6 or 7 clients each and are responsible for responding to issues arising from those clients as well as assisting with each client's ongoing support.

12. The respondent has various policies for its employees. One of these is its leave policy which was last reviewed July 2016.

    12.1 In accordance with the respondent's leave policy, if an employee is ill during a period of annual leave, then the employee may be entitled to treat the days of sickness as days of sickness absence and to count them against sick pay entitlement and be re-credited with the annual leave. There are some requirements that have to be met in order for this to happen. For example, the employee must provide a doctor's certificate or other medical evidence and must follow the respondent's standard absence reporting procedures as per its sickness and attendance policy.

    12.2 The respondent's leave policy also deals with circumstances in which an employee is late returning from annual leave. If the employee is unable to return to work on the due date then they must contact the respondent as soon as possible to notify it of the late return. If the stated reason for the late return is sickness, then the employee is required to produce relevant medical certificates. In particular, if the employee is away from home and unable to travel home then the employee is required to produce certification from a medical professional confirming the inability to travel. In such a case, according to the policy, the employee may also liable be required to produce documentary evidence relating to his original travel plans and the date(s) on which changes were made to that original plan.

13. The Respondent has is a safeguarding policy.

    13.1 Under the heading "responding to a disclosure of abuse" amongst other things, it states "do NOT contaminate evidence and witnesses by discussing the allegation of abuse with the alleged perpetrator or anyone other than the relevant manager".

    13.2 Under the heading "if there are concerns that abuse may be occurring", it is stated that if it is suspected that a client is being abused by another client in the same service both client safety and well-being plans must be reviewed.

    13.3 Under the heading sharing information, it states if the alleged perpetrator is a client and an inquiry is underway, guidance should be sought as to what information can be disclosed.

14. The Claimant's line manager, during early 2018, was Ms Bola Aridegbe, Interim Deputy Manager. Her manager was Mr Andrew McCarthy, Service Manager.

15. A meeting took place between the Claimant and Mr McCarthy on 1 March 2018. Mr McCarthy informed the Claimant that the Claimant had potentially committed misconduct and a formal disciplinary procedure would commence. Mr McCarthy stated that he would invite to the Claimant to a formal investigation meeting. By

letter dated 20 March 2018, the Claimant was invited to such a meeting to take place on 28 March.

15.1 The letter stated that there would be an investigation into "minor or general misconduct" being "negative, discourteous and unconstructive behaviour". Three alleged examples of this were given, relating to interactions with, respectively, Ms Aridegbe, Mr McCarthy, and Ms Elinor Childs (a member of the Respondent's quality team). The last of these was alleged to have occurred on 7 March 2018.

15.2 The letter also stated that there would be an investigation into "serious misconduct" being that the Claimant "knowingly asserted and encouraged St Mungo's procedure should be departed from". One example of this was said to have occurred on 8 February 2018 (in that the Claimant was alleged to have suggested that a client who had been accused of a serious sexual offence should be informed of the allegation by the Respondent, as opposed to by the police). The other example was that it was alleged that on 7 March 2018, the Claimant had told Ms Childs that he would administer medication to clients in some circumstances, despite knowing that this was contrary to the Respondent's policies.

16. The two allegations relating to Ms Childs post-dated the meeting on 1 March 2018 and therefore were added to the disciplinary investigation after the Claimant was first informed that there would be a disciplinary investigation, but before he was invited to the investigation meeting.

17. On 1 March 2018, Mr McCarthy made an occupational health referral in relation to the claimant. The reason for the referral was stated to be that the claimant had said that he was experiencing workplace stress. It referred to comments the Claimant had made to Ms Aridegbe during a supervision meeting on 12 February 2018.

18. On 19 March 2018, the claimant had a supervision meeting with Mr McCarthy. In February, the Claimant had requested a 6 month sabbatical absence. On 19 March, the Claimant was told that the sabbatical request had been refused. He was told that part of the reason for refusing, was that he had said his request should be approved on health grounds. Mr McCarthy asserted that and any health issues should be dealt with under different policies (not the sabbatical policy). Mr McCarthy stated that he was awaiting the report from occupational health.

19. During the 19 March supervision meeting, Mr McCarthy also discussed the Claimant's alleged conduct. As mentioned above, the next day, 20 March, Mr McCarthy formally wrote to the Claimant in relation to the formal disciplinary investigation.

20. On 21 March 2018, the occupational health report was sent to the respondent with a copy to the claimant. The report said that the claimant appeared fit to perform the full range of his duties. The report stated that it did not appear that the claimant met the definition of a disabled person within the Equality Act. The report stated that the claimant was fit to attend and take part in formal and informal meetings, but that management should take into account the claimant's health status and

that where possible the Claimant should be supplied in advance with written material, and that he should not necessarily be required to answer questions on the spot, but rather should be given sufficient time to formulate a response.

21. The claimant was absent from work from 21 March 2018 to 29 March 2018. The reason given by the claimant for the absence was stress. A return to work meeting took place on 6 April 2018, and a stress risk assessment form was created.

22. On 6 April 2018, Mr McCarthy wrote to the claimant to reschedule the meeting which had been due to take place on 28 March 2018. The new date was to be 18 April 2018. The allegations were the same.

23. During the return to work interview, the Claimant renewed his request for a 6 month sabbatical and followed this up with an email to Mr McCarthy dated 9 April. He asserted that the occupational health report contained reasons for approving the request. On 12 April 2018, Mr McCarthy replied stating that the claimant was free to submit a request for normal annual leave immediately (and should do so promptly if he wanted 3 weeks leave in May 2018). The email stated that Mr McCarthy would send a further reply shortly in relation to whether the Respondent had changed its mind about the refusal of the 6 month sabbatical (which the Claimant wanted to commence at the beginning of May).

24. The investigation meeting scheduled for 18 April did not take place because the claimant's representative was unavailable. On 23 April 2018, Mr McCarthy wrote to the claimant to invite him to a formal investigation meeting to take place on 3 May 2018. The allegations were the same as before.

25. By email dated 25 April 2018, Mr McCarthy wrote to the claimant to state that the renewed request for a sabbatical was declined. He referred to the contents of the sabbatical policy. He stated that sabbatical leave should not be used as a way of managing sickness absence. He said that 4 months' notice of a request was required. The same email also refused the Claimant's request that the Respondent approve 6 months absence, commencing at the beginning of May, outside the terms of the sabbatical policy.

26. On 8 May 2018, Mr McCarthy wrote to the claimant to invite him to a formal investigation due to take place on 18 May 2018. The allegations were the same as before.

27. Annual leave was approved and the Claimant flew to USA on 10 May 2018. He was due back at work on Thursday, 7 June 2018. On 6 June 2018, the claimant contacted the respondent to say that he was not well enough to return to work. In the email, which had a timestamp of 1903, the claimant said that he had not yet been given a definite date of return to work as he was having ongoing consultation. He attached a letter dated June 5, 2018, from a medical Centre in Jamaica.

28. As an attachment to an email dated 7 June 2018, the claimant submitted a document from the medical centre which had text which was otherwise identical to the first (including the date of 5 June 2018) except for the additional words at the end stating "and will be off work until July 6 2018".

29. The text common to both items stated that the claimant had a history of hypertension stress-related disorder, and that he complained of insomnia, headaches, lethargy dizziness, generalised aches and pains. It said that on examination he had sinus tachycardia and uncontrolled hypertension and that the remainder of the physical examination was essentially normal. It stated that he would be observed over the next 4 weeks to monitor the effectiveness of a new drug regime and that he had been advised not to travel during this time.

30. During June 2018, there was correspondence between Mr McCarthy and the Respondent's Human Resources department ("HR"). The correspondence indicated a degree of scepticism as to whether the Claimant was genuinely ill.

31. Mr McCarthy was due to be on leave in July 2018. He asked a deputy manager, Julius Bob-Emmanuel to meet the Claimant on the Claimant's return to work and to make an occupational health referral and to ask the Claimant for copies of airline tickets. At the time of this instruction to Mr Bob-Emmanuel, Mr McCarthy had in mind that there might be a disciplinary investigation into potential misconduct relating to the absence from 7 June 2018.

32. Mr Bob-Emmanuel met the claimant on 6 July 2018. He wrote to the Claimant on 11 July 2018 asking for documentary evidence showing the dates of the claimant's original travel plans and of the revised travel plans made for his return. He stated that this was a request originally made at the meeting on 6 July. On 11 July 2018, the claimant replied to say that he was waiting for union advice before replying.

33. On 23 July 2018, Mr McCarthy wrote to the claimant inviting him to a formal investigation meeting to take place on 31 July 2018. The allegations were the same as before. In other words, allegations relating to the absence from 7 June 2018 were not included in the letter.

34. On 23 July 2018, Mr McCarthy wrote to the claimant (with a copy to the union representative) stating that he was recapping discussions from earlier the same day. The email stated that the claimant was being asked to provide a copy of his original travel plans and also a copy of the travel plans made for his actual return. The email contained the purported reasons for the request (which included that the claimant originally requested a much longer period of absence, and then towards the end of the approved absence, he had submitted a sick note stating that he could not return from abroad for further month). The email asserted that the union representative had suggested that the Respondent did not have the right to request these items (other than as part of Stage 3 of the Sickness Procedure) and said that the Respondent did not agree with that assertion and believed it was making a reasonable request.

35. In relation to this particular request, the claimant replied by email dated 24 July 2018, to state that he wanted further queries to be made via his union rep, and that he did not believe that the respondent was acting reasonably in the manner of making the request. Mr McCarthy replied the same day, stating that the information was to be supplied by Wednesday, 25 July 2018, and that a failure to do so might be considered breach of the code of conduct.

36. The occupational health report, following Mr Bob-Emmanuel's referral, was sent to the claimant and to the respondent on 24 July 2018. This stated that the claimant had an underlying health condition which had been treated and monitored by his GP. The occupational health report suggested that the claimant was fit to work and attend any formal or informal meetings, and that no follow-up appointment had been arranged.

37. On 26 July 2018, the claimant sent an email to Mr McCarthy, copied to his union representative. The email contained details the claimant's booking confirmation dated 19 April 2018 for flights between London and Miami. These showed the scheduled return date to London from Miami as 6 June 2018.

38. On 26 July, Mr McCarthy replied to the claimant asking for evidence of the plans he had made to travel to Jamaica (from the US) as well. Again, the request was for both the original travel plans, and for evidence of when the Claimant had changed those original plans. Over the next few days, Mr McCarthy and the Claimant exchanged further emails on the matter without progress being made. Evidence about the Jamaica leg of the trip was not provided at this stage, and nor was it provided subsequently.

39. On 31 July 2018, Mr McCarthy wrote again to the claimant inviting him to a formal investigation meeting. The meeting was due to take place on 2 August 2018 at 3pm and the allegations were the same as before. In other words, allegations about the absence from 7 June 2018 were not included in the letter.

40. At 12:52pm, on 2 August, the claimant's union representative wrote to Mr McCarthy stating that he should not be the investigating officer because he was a witness for one of the allegations and that a "neutral manager" should be appointed. The formal investigation meeting did commence place on 2 August 2018 at around 3pm. The Claimant and his union rep, David Oladele, stated that they did not consent to continuing the meeting, referring to the email sent earlier the same day at 12:52pm (and also making an allegation of negligence against the Respondent in relation to its handling of the allegation of the sexual offence). The meeting ended without any questions being put to the Claimant on the substantive matters. (For completeness, a different meeting did take place between the same parties on 2 August 2018. This was under the sickness procedure and resulted in the Claimant being set a target in relation to future sickness absence.)

41. On 6 August 2018, the Claimant emailed Mr McCarty with a copy of his boarding pass for the flight dated 3 July 2018 from Miami to London. On 9 August, Mr McCarthy replied asserting that this did not comply with the instruction that had been given, and that the Claimant was still required to provide evidence of both (a) his original plans to return from Jamaica to USA and (b) the dates on which any changes to those original plans were made. The Claimant replied asserting that he believed that he had complied with what was required of him.

42. On 16 August, Mr McCarthy wrote to the Claimant. The letter stated that the Claimant had been suspended with effect from that date. It said that there would be an investigation into "gross misconduct" ("That you dishonestly claimed to be unfit for work from 5th June 2018 to 6th July 2018 when this was not the case"). It also said that there would be an investigation into "serious misconduct" being the

alleged failure to comply with "a reasonable management request" in relation to the provision of documents about his travel plans and changes to those plans. The letter cited extracts from the Code of Conduct and enclosed the Code of Conduct, disciplinary procedure and information about suspension. It invited the Claimant to an investigation meeting under the disciplinary procedure and told the Claimant that he could be accompanied. It said the meeting would be 23 August 2018. The letter did not refer to the earlier allegations of misconduct which had been the subject of various meeting invitations (as outlined above) from March onwards.

43. The meeting was rearranged and took place on 30 August. The Claimant was accompanied by a union representative, Greg James. Minutes of the meeting were produced. During the meeting there was a discussion of the matters referred to in the 16 August letter. Mr McCarthy asked if the Claimant would also like to discuss the other, earlier, allegations of misconduct. The Claimant declined. Mr James stated that a separate meeting should be arranged so that the Claimant could be accompanied by Mr Oladele instead, who had been advising the Claimant in relation to those matters. Mr McCarthy stated that he did not propose to seek to arrange such a further meeting (asserting that the Claimant and Mr Oladele had already had sufficient opportunity to attend an investigation meeting in relation to those matters) and that he would compile an investigation report which took into account both the newer allegations and the older ones.

44. Mr McCarthy's report was dated 9 October 2018.

    44.1 It ran to 22 pages, not including appendices (of which there were 30).

    44.2 As foreshadowed on 30 August 2018, it addressed all the allegations of misconduct, both those mentioned in the 20 March 2018 letter and those mentioned in the 16 August 2018 letter.

    44.3 The report asserted that the Claimant has been asked for travel documents 9 times (and included a table to itemise those occasions) and that on 5 of those occasions he had specifically been asked to provide evidence for the Jamaica leg of the trip.

    44.4 The report included two paragraphs (3.35 and 3.36) and an appendix (6) in which Mr McCarthy asserted that the integrity of the doctor who signed the letter from the medical centre had been called into question. There was reference to a newspaper article about the possibility of a forged will.

45. On 31 October 2018, Mr Lopez sent a 6 page letter to the Claimant. It attached the investigation report (and appendices), the disciplinary procedure and the Code of Conduct. It stated that there would be a disciplinary hearing on 13 November 2018 to consider the allegations in the report. It stated that the Claimant could be accompanied. The possible outcomes were said to be: dismissal; a sanction short of dismissal; a finding that the allegations were unfounded and no further action. On 12 November 2018, the Claimant said that his union rep was unavailable. The hearing was therefore rearranged for 27 November. On 23 November 2018, the union rep, Mr James wrote seeking a further postponement on the grounds that he was ill. The meeting was therefore postponed to 13 December.

46. The Claimant attended the meeting, accompanied by Mr James. Minutes were produced. All the allegations were discussed. The Claimant's position was that he had genuinely become unwell while in Jamaica and had contacted his UK GP who recommended visiting a local doctor. He had done so, and the letter from the medical centre was proof that he had genuinely been ill. Mr Lopez agreed that the Claimant could seek to obtain additional documents about his travel plans and submit those after the hearing. By email dated 17 December, the Claimant sent Mr Lopez an email dated 28 May 2018 from the airline in relation to the Miami-London leg of the trip. It showed that that leg had been scheduled for 3 July 2018.

47. On 25 January 2019, the Claimant received a copy of the hearing notes. He replied the same day to suggest some amendments/corrections. In making his subsequent decision, Mr Lopez took into account the Claimant's 25 January document as well as the email from the airline.

48. By letter dated 21 February 2019, Mr Lopez communicated his decision to the Claimant. The decision was dismissal. The letter upheld all the allegations. The letter was 15 pages long and contained Mr Lopez's analysis of the evidence for each allegation, and his reasons for finding that allegation proven. The opinions stated in the letter were Mr Lopez's honest opinions.

49. Mr Lopez's decision was that the Claimant had dishonestly claimed to be unfit to attend work from 5 June 2018 to 6 July 2018 when, in fact, he not been unfit to attend work. Mr Lopez's decision was that the Claimant had made a pre-meditated decision to dishonestly claim to be unfit and that the Claimant had continued to be dishonest during the investigation and the hearing. His decision was that the Claimant had failed to comply with a reasonable management instruction to supply evidence of his original travel bookings, and the changes to them. His opinion was that this conduct by the Claimant destroyed the relationship of trust and confidence between Claimant and Respondent. In turn this opinion led him to decide that the Claimant would be dismissed. In making the decision to dismiss, Mr Lopez also took into account his findings that the Claimant had committed other misconduct by being impolite to colleagues and expressing a willingness to depart from the Respondent's policies (in relation to the handling of criminal complaints, and in relation to medication).

50. The explanation of Mr Lopez's findings in relation to the dishonesty allegation was approximately 3.75 pages of the letter. In summary,

    50.1 Mr Lopez thought it significant that the Claimant had been seeking 6 months leave and had repeated the request after it was turned down originally.

    50.2 He thought it significant that the Claimant had been asked 9 times to supply documents about his travel plans but had not supplied a complete record showing what his full plans had been and when those plans were changed. Mr Lopez believed that this showed an attempt to conceal the full facts.

    50.3 Mr Lopez's opinion was that it was significant that the Claimant had made the plan to travel from Miami to London no later than 28 May, which was several days before the note from the medical centre dated 5 June.

50.4 Mr Lopez also thought that these timings were inconsistent with what the Claimant had said at the disciplinary hearing, namely that he had felt sick for "4 or 5 days" before going to the medical centre. In other words, Mr Lopez believed that feeling unwell for 4 or 5 days prior to 5 June was inconsistent with a decision, made no later than 28 May, to book a flight to the UK departing 3 July 2018 (and arriving in UK on 4 July).

50.5 In relation to what had been said about the integrity of the doctor, the letter included the following sentence, as part of a longer paragraph of conclusions "*The period of time off that you were given coincided with your return flight arrangements, the sick note specifically stated that you should not travel and this doctor's integrity has been noted which you stated you were aware of*".

51. Mr Lopez did not make a finding that the doctor at the medical centre was dishonest (in general terms) or that he had been dishonest in producing (either version of) the letter dated 5 June 2018. Mr Lopez's decision to dismiss the Claimant was not based on a finding that the doctor had been dishonest. The dismissal letter accurately set out his findings which were that (even taking into account the letter from the medical centre) there was sufficient evidence to conclude – on the balance of probabilities - that the Claimant had pre-planned to come back late from his trip abroad and to give a dishonest reason for so doing and that he had formed this intention a significant period of time prior to attending the medical centre.

52. The dismissal letter informed the Claimant of his right to appeal. He appealed by email dated 6 March 2019. His grounds of appeal included:

52.1 He disagreed with the findings of dishonesty and asserted that it was unreasonable for the Respondent to decide that his medical certificate was anything other than conclusive evidence that he had been genuinely too ill to work/travel to UK.

52.2 That Mr McCarthy's investigation report inappropriately implied that the doctor was not trustworthy by including a news article from the internet.

52.3 That he had complied with the Respondent's sickness policies

52.4 That he had not (or had not deliberately) failed to comply with an instruction to supply documents

52.5 That the other allegations also should not have been upheld (and were potentially a misunderstanding of his actual opinions, and/or an unfair denial of his right to express an opinion).

52.6 That his health had not appropriately been taken into account.

53. On 16 April 2019, the appeal hearing took place. It was conducted by Kellie Murphy, Regional Director of South and East London and South of England. The Claimant attended and was accompanied by a friend. Mr Lopez attended. The Claimant's friend presented his arguments for the appeal to be upheld. Ms Murphy asked questions. She asked Mr Lopez why Mr McCarthy had included the newspaper article about the doctor. Mr Lopez said that he did not know but that

he had not found that piece of information to be important; he had mentioned it in the letter because it was part of the evidence available to him, albeit a small part.

54. Ms Murphy rejected the appeal. She sent an outcome letter dated 2 May 2019, and this letter contained her genuine opinions. In the letter, she informed the Claimant that she was satisfied that Mr Lopez had "placed very little weight on the fact that the doctor may have been implicated in dishonesty and forgery". Having summarised the evidence which Mr Lopez did take into account, she concluded that there was no reason for her to reach a different conclusion to Mr Lopez's. She noted that the Claimant had made his travel plans for 3 July 2018 more than a week before visiting the medical centre and for return date which was more than a month into the future. She concluded that this showed he had made a decision to extend his stay overseas which was not based on lack of fitness to attend work. She also rejected his appeal on the other allegations and upheld the decision that the Claimant's employment terminated with effect 21 February 2019.

Additional findings of fact specifically in relation to breach of contract

55. The Claimant's additional documents for the tribunal hearing included a letter from his GP dated 10 January 2020. This stated that the Claimant contacted the surgery on 4 June 2018 and had reported that he was unwell and that he was advised to see a local doctor (given that he was abroad at the time).

56. GP notes were also included which showed that the Claimant had attended the surgery on 4 May 2018 and told the GP that he was about to fly to Florida and was not sure of his return date, and that he had booked annual leave for one month, having been refused 6 months leave. On his return to UK, he visited his GP on 31 July 2018 and informed them that he "had check up in Jamaica". The notes do not reveal that he informed his GP that he had been seriously ill, or too ill to travel. Nor do the notes reveal that either the Claimant or his GP thought it necessary for the GP to liaise with the medical centre in Jamaica.

57. During the tribunal hearing, the Claimant was asked about his travel between USA and Jamaica and back. He was asked when he booked that and why no documents at all had been disclosed, and why he was unable to show that he had originally booked a return flight from Jamaica to USA which would have enabled him to fly from Miami to London on 6 June 2018.

58. The Claimant's answers were that he had flown to Jamaica from USA and back, but that he could not remember the name of the airline or how he booked his tickets. He believed that he probably attended the airport on the days of his intended travel and bought his tickets at the airport and that he therefore had no emails or other documents relating to this leg of his travel. I do not find this account to be credible. My finding is that the Claimant would be aware of the details of the airline and would have had, or else would have been able to obtain, documentary evidence relating to his bookings.

59. At some stage or other, the Claimant must have decided that he would go to Jamaica and back. If he travelled to Jamaica before 28 May, and with plans to return to USA from Jamaica before 6 June, then that would be consistent with his

account that he unexpectedly became too ill to travel and was forced to change his plans on 28 May 2018. However:

59.1 If he travelled to Jamaica after 28 May, then that would cast doubt on his account. That would mean that he had made a flight after (on his account) he had realised that he would not be well enough to travel until around 3 July.

59.2 If he booked a flight from Jamaica to USA, for a date later than 6 June, and made that booking earlier than 28 May, then that would cast doubt on his account. That would mean that his plan to extend his absence from work had been formulated earlier than 28 May 2018.

60. I have to make findings of fact (which are relevant to the breach of contract claim, but irrelevant to the unfair dismissal claim) about why the Claimant did not come back to work on 7 June 2018. My finding is that the Claimant did not extend his absence to cover the period 7 June to 6 July 2018 because he was unfit to work during that period or unfit to travel during that period. He did have genuine and on-going medical issues for which he was seeing his GP. However, those conditions did not prevent him travelling from UK to USA. His GP notes record what the Claimant told them on 4 June and 31 July 2018, but do not demonstrate any concern that the Claimant had (allegedly) become so ill that he could not travel for a month. The travel plans for the Miami-London leg were made on or before 28 May 2018 and were made for 3 July 2018. At that time, the Claimant had not sought any medical advice or evidence about his fitness to travel. Furthermore, he did not seek any such advice until 4 June (the phone call to GP). The Claimant made a decision on or before 28 May 2018 that he would come back late from his annual leave and would falsely claim to the Respondent that this was because he had unexpectedly become ill and was unable to work/travel until early July.

61. In reaching this conclusion, I have no reason whatsoever to doubt that the medical centre in Jamaica produced what it considered to be an honest report on the situation. Their report was, of course, based on the information which the Claimant gave to them about his symptoms. The fact that there was a subsequent addition of the words “and will be off work until July 6 2018” was, in my judgment, an addition made at the Claimant’s request and was timed to coincide with the flight plans which he had made on or before 28 May 2018.

The Law

Unfair Dismissal

62. Section 98 of ERA 1996 says (in part)

> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
> (2) A reason falls within this subsection if it—
> …

(b) relates to the conduct of the employee,
…
(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.

63. The respondent bears the burden of proving, on a balance of probabilities, that the claimant was dismissed for misconduct. If the respondent fails to persuade the tribunal that it had a genuine belief that the claimant committed the misconduct and that it genuinely dismissed him for that reason, then the dismissal will be unfair.

64. Provided the respondent does persuade the tribunal that the claimant was dismissed for misconduct, then the dismissal is potentially fair. That means that it is then necessary to consider the general reasonableness of that dismissal under section 98(4) ERA 1996.

65. In considering this general reasonableness, I must take into account the respondent's size and administrative resources and I will decide whether the respondent acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissal.

66. In doing so I have had regard to the guidance in British Homes Stores Ltd v Burchell [1980] ICR 303; Iceland Frozen Foods Ltd v Jones [1993] ICR 17; and Foley v Post Office / Midland Bank plc v Madden [2000] IRLR 82.

67. In considering the question of reasonableness, I must analyse whether the respondent had a reasonable basis to believe that the claimant committed the misconduct in question.

68. I should also consider whether or not the respondent carried out a reasonable process prior to making its decisions.

69. In A v B [2003] IRLR 405, the Employment Appeal Tribunal noted that the relevant circumstances to be taken into account include the gravity of the charge and their potential effect upon the employee. 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 affected. Those comments do not, of course, imply that the standard of proof, or the burden of proof changes, just that the employer might need to carry out a more detailed investigation in such cases.

70. In terms of the sanction of dismissal itself, I must consider whether or not this particular respondent's decision to dismiss this particular claimant fell within the band of reasonable responses in all the circumstances.

71. The band of reasonable responses test applies not only to the decision to dismiss, but also to the procedure by which that decision was reached. (Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23).

72. It is not the role of this tribunal to access the evidence and to decide whether the claimant did or did not commit misconduct, and/or whether the claimant should or should not be dismissed. In other words, it is not my role to substitute my own decisions for the decisions made by the respondent.

Breach of Contract

73. The Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 gives the employment tribunal jurisdiction to consider (some) complaints of breach of contract.

74. When a tribunal is considering a wrongful dismissal claim (a claim that the dismissal was breach of contract) that requires an entirely separate, and different, analysis than the consideration of whether the dismissal was fair or unfair.

75. Where the employer terminates the contract without good cause, or without providing the employee with sufficient notice, the Claimant may have grounds to succeed in a claim for wrongful dismissal. The amount of notice to which an employee is entitled is determined by the contract, subject to the statutory minimum.

76. It is an objective question for the Tribunal to consider whether the Respondent did, in fact, have good cause to dismiss the Claimant for committing a repudiatory breach of contract. Where there is a dispute about whether the Claimant did, in fact, commit certain acts (or make certain omissions) then the tribunal is required to make findings of fact about the Claimant's relevant conduct. In so doing, the tribunal is not limited to considering only the evidence which had been available to the Respondent when it made its decision to terminate. Any relevant evidence presented at the hearing can be taken into account.

77. To assess the seriousness of any breach which is found to have occurred, it is necessary for the Tribunal to consider all of the relevant circumstances including the nature of the employment contract, the nature of the term which was breached, the nature and degree of the breach, and also the nature of the Respondent's business and of the Claimant's position within that business. Having assessed the seriousness, the tribunal will decide if the breach was such that the Claimant had no entitlement to be given notice of dismissal (and no entitlement to a payment in lieu of notice).

Analysis and conclusions

Unfair dismissal

78. The principal reason that the Respondent dismissed the Claimant was that Mr Lopez formed the opinion that the Claimant had dishonestly claimed to be unfit to attend work from 5 June 2018 to 6 July 2018 when, in fact, he not been unfit to attend work. He formed the opinion that the Claimant had made a pre-meditated decision to dishonestly claim to be unfit and that the Claimant had continued to be dishonest during the investigation and the hearing. He also formed the opinion that the Claimant had failed to comply with a reasonable management instruction to supply evidence of his original travel bookings, and the changes to them. Mr

Lopez's opinion was that this conduct by the Claimant destroyed the relationship of trust and confidence between Claimant and Respondent and that was the reason that caused him to decide that the Claimant would be dismissed.

79. This dismissal reason was one which related to the conduct of the Claimant.

80. As discussed above, he based his decision on the contents of the investigation report, what he heard at the hearing, and the documents subsequently sent to him by the Claimant.

    80.1 On the one hand, he had evidence that the Claimant had wanted to spend a longer time away (longer than the period 12 May 2018 to 6 June 2018 that was approved), and that he had booked a flight to London for 3 July on 28 May (being later than the start of his holiday, but several days before seeing a doctor, as well as several days before he would have been due back at work).

    80.2 On the other hand, he had evidence from a medical practitioner which stated that the Claimant was indeed to ill to work/travel.

81. Different people might have interpreted the evidence differently and/or given different weight to different pieces of evidence. Mr Lopez decided that the evidence in favour of a pre-planned intention to come back late (and to give the employer a false reason for that lateness) outweighed the evidence that the Claimant had unexpectedly become ill and had to change his plans. Mr Lopez's analysis was not an unreasonable one. He had reasonable grounds for his belief that it was more probable than not that the Claimant had acted dishonestly (by claiming to be too ill to work/travel when that was not the case).

82. Mr Lopez also had reasonable grounds for his belief that the Claimant's conduct (as he found it to have been) had caused a breakdown of trust and confidence.

83. The procedure which the Respondent followed was not an unreasonable one.

    83.1 The Claimant complains that Mr McCarthy was a witness to one event, and also investigator. This is reference to the fact that one allegation was that the Claimant was impolite to Mr McCarthy (as well as to Ms Aridegbe and Ms Childs). This minor involvement as a witness was not such as to render the investigation as a whole unfair.

    83.2 The Claimant complains that Mr McCarthy did not, ultimately, carry out an investigation meeting regarding the first set of allegations. This was not a factor which leads to the process as a whole being unreasonable.

        83.2.1 The Claimant was offered numerous dates for such a meeting, and the meeting was regularly postponed.

        83.2.2 The meeting commenced on 2 August, and the Claimant and his then rep, Mr Oladele, declined to continue. They raised their objection to Mr McCarthy's being the investigator 2 hours before the hearing, having known that he was the investigator since 20 March.

83.2.3 The meeting of 30 August contained an offer to discuss the earlier allegations.

83.2.4 The Claimant was not deprived of an opportunity to respond to the allegations. He was able to address them at the disciplinary hearing before Mr Lopez.

83.3 The Claimant complains that there was not a proper reason to attack the integrity of the doctor at the medical centre, and that newspaper reports about that doctor ought not to have been included in the investigation report. I agree with the Claimant that there was no adequate evidence for Mr McCarthy to impugn the doctor's integrity and that it would have been better practice for him to completely omit the newspaper reports from the investigation report. However, the lengthy report (with appendices) was otherwise fair and reasonable and it was not rendered unreasonable by the inclusion of this particular piece of information. Furthermore and in any event, I am satisfied that Mr Lopez did not make a finding that the doctor had been dishonest, and did not base his decision to dismiss the Claimant on any such finding.

84. The Claimant was given sufficient opportunity to prepare and to present his own case. He was accompanied at each stage and he was given an appeal.

85. The decision to dismiss was not outside the band of reasonable responses. The Respondent was involved with the care of vulnerable people and the Claimant had a responsible position within the organisation. Some reasonable employers might have decided to impose a sanction which was short of dismissal. However, some reasonable employers would have decided that dismissal was the appropriate response, taking into account that other examples of misconduct were also found proven, and that it was found that the Claimant had continued to be dishonest during the disciplinary process.

86. My decision therefore is that the dismissal was not unfair.

Breach of Contract

87. The Claimant's conduct amounted to a serious breach of his contract of employment. The breach was sufficiently serious that the Respondent was entitled to treat the Claimant's conduct as a repudiatory breach and to terminate the contract without giving notice.

88. The Claimant's actions were pre-planned dishonesty, and he continued that dishonesty throughout the investigation and the disciplinary hearing.

89. There was a financial consequence for the Respondent in that if the Claimant was genuinely ill then it was liable to pay sick pay to him for the relevant period, but if he had been fit to work then he had been obliged to attend work and give value for the payment of salary. The Claimant's non-attendance caused the Respondent to suffer the loss of his work. I have not made a finding that the Claimant's motivation was financial gain. However, a loss was caused to the Respondent and the Claimant knew that that would be the case.

90. In light of the Claimant's actions, the Respondent was entitled to decide that it no longer had sufficient trust and confidence in the Claimant. The Respondent did not waive these breaches by conducting an investigation and following a disciplinary procedure prior to making its decision to dismiss.

91. Therefore the breach of contract claim fails and is dismissed.

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Employment Judge Quill

Dated 23 April 2020

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

28/04/2020

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FOR EMPLOYMENT TRIBUNALS