# EMPLOYMENT TRIBUNALS

**Claimant:** Mr H Pugh

**Respondents:** Rendall & Ritter Limited (1)

PL Management Limited (2)

**Heard at:** London Central

**On:** 9, 10 and 11 September 2020

**Before:** Employment Judge Khan
Mr P Lewis
Mr I McLaughlin

**Representation**
Claimant: Mr D Langley, Solicitor
Respondents: Mr C Johnson, Consultant

# JUDGMENT

The unanimous judgment of the tribunal is that:

(1) The claimant was employed by the second respondent at all relevant times.

(2) The complaints of automatically unfair dismissal (by reason of health and safety or the making of protected disclosures) and detriment (on the ground of health and safety) fail, and are dismissed.

(3) The complaint of a failure to provide a statement of changes succeeds.

(4) No order for compensation is made because none of the other complaints were upheld.

# REASONS

1. By an ET1 presented on 3 January 2020, the claimant brought complaints of automatically unfair dismissal (i.e. by reason of health and safety or the making of protected disclosures), detriment (i.e. on the ground of health and safety), a failure to comply with the notification requirements under the TUPE Regulations 2006 and a failure to provide a statement of changes. The respondents resisted these complaints.

2. The claimant subsequently withdrew the TUPE complaint which was dismissed on withdrawal. A judgment dismissing the amended statement of particulars complaint which was also made was revoked on reconsideration.

3. On the first day of the hearing, Mr Johnson, for the first respondent contended that it was not the correct respondent because the claimant's employment had not transferred to it and the claimant had remained employed, at all relevant times, by PL Management Limited ("PLML"). Prior to this late intervention both the claimant and the first respondent had proceeded on the basis that the claimant's employment had been transferred from PLML to the first respondent. We agreed to add PLML as a second respondent, under rule 34, because the first respondent's contention related to the assignment of liability for any successful complaints and required a judicial determination.

4. Mr Johnson confirmed that: he had authority to act for both respondents; in the event that the second respondent was found to be liable then it would accept liability although he gave an undertaking that the first respondent would be responsible for any such liability.

**The issues**

5. The issues we were required to determine were agreed by the parties and set out in the Order of Employment Judge Norris dated 1 June 2020 and these were amended during the hearing following discussion with the parties. These are as follows:

   (1) <u>The employer</u>

   1.1 Was the claimant employed by the first or second respondent at the relevant times?

   (2) <u>Unfair Dismissal (section 100 ERA 1996)</u>

   2.1 Was the reason or the principal reason for the claimant's dismissal a reason set out in sections s100(1)(c) or (e) ERA?

   2.2 In respect of section 100(1)(c) [and section 44(1)(c)]: the claimant relies on the information set out below in paragraphs 3.3 to 3.5. The respondents conceded that the claimant reported health and safety concerns set out in paragraph 3.5. It is agreed

that there was neither a health and safety representative nor safety committee at the claimant's workplace.

2.3 In respect of section 100(1)(e) [and section 44(1)(e)] the claimant relies on an email dated 31 May 2019 in which, he contends, he proposed to take the action that he would leave the site immediately should the sewerage pipe get blocked again and there were excessive spillages, and toxic fumes.

(3) Unfair Dismissal (section 103A ERA 1996)

3.1 Alternatively, was the reason or the principal reason for the claimant's dismissal the fact that the claimant made a protected disclosure?

3.2 Did the claimant make the disclosures listed below or any of them and were they qualifying disclosures made in the public interest?

3.3 The claimant relies on sections 43B(1)(b) and (d) ERA. He says he disclosed information which related to:

a. Untreated sewage on levels 2 and 3 in the underground car park.
b. High temperatures in the building.
c. Unserviceable extractor fans in the underground parking area.

3.4 The claimant says that he reported the health and safety concerns / made disclosures (a) and (b) to Katerina Cebanenko a few days before 28 May 2019.

3.5 It is agreed that the claimant reported the health and safety concerns / made disclosures (a) and (b) to Catherine Orezzi by email on 28 May 2019 and (c) by email to her on 17 September 2019.

(4) Detriment (section 44 ERA 1996)

4.1 Did either respondent subject the claimant to a detriment by an act or deliberate failure to act on one of the grounds set out in section 44(1)(c) or (e) ERA?

4.2 The alleged detriments the claimant relies on are:

a. The deliberate withholding of sick pay on 30 June 2019.
b. The respondent seeking / manufacturing complaints in order to dismiss the claimant.

4.3 Was this complaint presented in time? If not, should time be extended on the basis that it was not reasonably practicable to bring the complaint in time and was it presented within a reasonable time thereafter?

(5) Failure to provide a statement of changes (section 4 ERA 1996)

5.1 Did either respondent fail to notify the claimant in relation to changes in the identity of the employer and the date on which his continuous service began in accordance with section 4(8)?

## The evidence

6. The claimant gave evidence. The claimant has dyslexia. It became apparent during cross-examination that he struggled to understand some of the questions that were put to him. We took care to ensure that questions were repeated or clarified to ensure that the claimant understood what he was being asked. We noted that the claimant had a particular difficulty recalling dates and following the chronology. Although the claimant's representative had the opportunity to re-examine the claimant this opportunity was not taken. When assessing the claimant's evidence we were careful to take account of his apparent confusion during cross-examination when what he said conflicted with the contemporaneous documents. We found that the claimant was a credible witness although his evidence was not at all times reliable.

7. For the respondents, we heard from: Sibel Osman, Operations Manager for the first respondent; and Annette Tait, Property Team Manager for the first respondent.

8. There was a hearing bundle which exceeded 300 pages. Additional pages were introduced either by agreement or as ordered by us. These included documents which related to the claimant's transfer to the second respondent in March 2018 and an impending transfer of employees to the first respondent in November 2020.

9. We considered the closing submissions made by both parties.

## The facts

10. Having considered all the evidence, we made the following findings of fact on the balance of probabilities. These findings are limited to points that are relevant to the factual and legal issues.

11. The claimant was initially substantively employed by Harrods Limited from 18 October 2017 until February 2018.

12. He was, at all relevant times, employed as a Night Concierge for Bridges Wharf, a development consisting of three buildings: Altura Tower, Orbis Wharf and Vicentia Court Buildings. There were more than 260 residential apartments in this development. The first five floors of Altura Tower were occupied by the Crowne Plaza Hotel which was not managed by Harrods. There were three underground floors for parking. The alarm system was stored in underground level – 2. His role involved being on the front desk in Orbis Wharf, dealing with residents' enquiries, patrolling the corridors, car parks and outer perimeters of Bridges Wharf. He was required to check the lights and sensors in the hallways. He also liaised with contractors and visitors.

13. The claimant was contracted to work 42 hours per week consisting of four consecutive 12-hour night shifts from 7.00pm to 7.00am (followed by four consecutive shifts off work) between Sunday and Saturday.

14. His immediate line manager was Katerina Cebanenko, Building Manager. From around December 2018, the property manager for the development was Andrew Asante, Property Manager, who was based in the first respondent's head office.

Incident with Anish Ashok

15. On or around 15 December 2017 the claimant complained to Ms Cebanenko that another concierge, Anish Ashok, had used racist language towards a female colleague. Mr Ashok was subsequently redeployed.

16. The claimant felt that Ms Cebanenko failed to take appropriate and prompt action in relation to this issue. In an email to HR on 28 May 2019 he complained that no action had been taken in relation to Mr Ashok in 14 months. He also complained that Mr Ashok had used "my southern African background as a means to incite racial tension. My Asian colleague believed he was above the law informing me "because I was white I could have any women I chose etc".

Change of employer

17. In February 2018 Julian Cook, Managing Director of Harrods Estates, wrote to affected staff, including the claimant, about their proposed transfer to the second respondent. The claimant was informed that the second respondent was being purchased by the first respondent although this would not effect the transfer process.

18. Mr Cook wrote to the claimant again on 2 March 2018 in which he confirmed that his employment would transfer to the second respondent with effect on 16 March 2018 and also that "All other contractual terms and conditions of employment remain the same". This letter referred to the impending sale of the second respondent to the first respondent which was also expected to be completed on the same date as the transfer. The claimant was told to expect a further announcement to confirm the sale of the second respondent to the first respondent. None came.

19. Although the claimant said that he did not receive this second letter, we find that he did. This is because both of Mr Cook's letters were sent to the claimant to Bridges Wharf from the same source and we find it likely that they were both sent via the same means. We find that it is likely that the claimant received both letters.

20. Although the claimant understood that at some later date his employment had transferred to the first respondent, we find that he remained employed by the second respondent until his dismissal on 30 September 2019. In making this finding we placed reliance on the following:

(1) It is agreed that the first respondent's Grievance and Disciplinary policies were applied to the claimant. It is notable that both policies stated that the "The requirements of this Company Standard apply within Rendall and Rittner Limited and affiliated companies. This Standard applies to all Rendall and Rittner Limited employees, and employees whose employment is managed by Rendall and Rittner Limited". This therefore distinguished two categories of employees: those employed directly by the first respondent and those employed by an affiliated company but managed by the first respondent.

(2) The claimant's payslips were produced on the first respondent's stationery and headed "Rendall and Rittner Site Staff". The claimant's P45 also referred to "Rendall & Rittner Site Staff". This was not the claimant's employer but a division of the workforce in which he was situated.

(3) The signature blocks for the Concierge Bridges Wharf email address continued to refer to "PL Management" in September 2019.

(4) We were provided by the first respondent with letters on 10 September 2020, which were signed and dated 11 September 2020, to employees of the second respondent which stated that their employment was expected to transfer to R & R Operations Limited with effect from 14 November 2020 and which would be an internal transfer as both legal entities were owned by R & R Residential Management Limited. We accepted that these letters were genuine.

21. We therefore find that the claimant remained an employee of the second respondent from 16 March 2018 until his dismissal on 30 September 2019 and that he and other colleagues who worked at the Bridges' Wharf development were part of the Rendall and Rittner Site Staff division which was managed by the first respondent.

22. We were not taken to any document in which the second respondent wrote to the claimant to confirm that there had been a change in the identity of his employer or the date on which his period of continuous employment began. Nor did the parties contend that such a letter existed.

Sewerage and heat hazards

23. The claimant says that he raised the following issues with Ms Cebanenko in late May 2019:

a. There was untreated sewage on levels – 2 and – 3 of the underground car park. This had been unresolved and therefore in situ since 15 May 2019.
b. There were temperatures of up to 50 degrees Celsius in some of the common areas of the building he was required to patrol which included the underground car park.

24. We accept the claimant's evidence that he reported the sewerage issue to Ms Cebanenko because we do not find that he invented her response which was that "it is going to be unpleasant, but you will just have to put up with it". Unsatisfied with Ms Cebanenko's response, the claimant escalated his concerns about the sewerage leak to Catherine Orezzi, HR Director for the first respondent, by email on 28 May 2019 when he also

referred to the extreme temperatures which he felt had exacerbated the impact of the sewerage leak. He noted that it was expected that the sewerage leak and flood would be resolved the following day. They were.

25. We find that the claimant raised the heat issue with Ms Cebanenko because he referred to this second issue which he felt was related to the sewage spill in his email to Ms Orezzi on 28 May 2019. We also find that when he raised these health and safety hazards with Ms Cebanenko in late May 2019 he did so in similar terms to his email to Ms Orezzi.

26. These were both health hazards for the claimant, colleagues and residents.

27. The claimant emailed Mr Asante, Ms Orezzi and Vanessa Brandham, Head of Health and Safety for the first respondent, on 31 May 2019, when he highlighted the respiratory effects of exposure to "sewerage toxins". He said that if the sewerage pipe got blocked again and there were excessive spillages and toxic fumes "I would be within my human and health rights to leave the site immediately (?)" The sewerage issue had been resolved by this date. The claimant knew this. He was not therefore reporting a hazard which was currently serious or imminent. We do not therefore find that his statement was one in which he was proposing to take action to protect himself from a serious and imminent danger. He was indicating the action he would consider taking should the hazard reoccur.

Pay rise – June 2019

28. The claimant was awarded a pay rise, from £22,386 to £24,000, in June 2019. We find that the reason for this increase was that the claimant told Mr Asante that he had seen the same job advertised for this higher salary although we accept the claimant's unchallenged evidence that Mr Asante congratulated him on it and he therefore felt that it also conveyed recognition for his work.

Sick pay – June 2019

29. The claimant developed a rash on his arms and his asthma flared up during a patrol on 2 June 2019. He was signed off work by his GP from 3 until 10 June 2019 because of "work-related exacerbation of asthma". The claimant reported his sickness to Mr Asante. This was the first time he had been absent because of ill-health. The claimant was ready to return to work on 17 June 2019 but was only able to do so two days later, on 19 June 2019, once he had received clearance from his GP. He had therefore taken eight days of sickness absence i.e. on 3, 4, 9 – 12, 17 and 18 June 2019.

30. Under his Harrods' contract the claimant was entitled to occupational sick pay to cover this sickness absence. However, a gross deduction of £430.50 was made for "unpaid sickness" to his monthly salary on 28 June 2019.

31. The claimant reported this deduction to Mr Asante by email on 29 June 2019. Mr Asante queried this with payroll and instructed them to correct

this deduction. In his initial reply, Mr Asante told the claimant to follow this up with Ms Cebanenko because she was his line manager. Mr Asante copied Ms Cebanenko into this email.

32. On 2 July 2019 Ms Cebanenko instructed payroll to make a transfer to the claimant outside the normal pay run. It was agreed this would be paid to the claimant on 5 July 2019. Ms Cebanenko also understood that there had been a second pay issue in that the claimant's recent pay rise had not been applied to his June 2019 wages. She therefore told payroll that there were two mistakes made "by our side". Although this second error had not in fact been made (the confusion arose because the claimant had sent his June pay slip for 2018 instead of 2019 to Mr Asante), this demonstrated that Ms Cebanenko had acted in the claimant's best interests in ensuring that he was reimbursed without further delay for any monies which she understood he was owed.

33. Ms Cebanenko emailed the claimant on the same date, 2 July 2019, to confirm that a separate payment would be made on 5 July 2019 to correct the sick pay deduction which she explained had been the result of the payroll team overlooking that he was on a Harrods' contract.

34. During a phone call between them two days later, on 4 July 2019, the claimant asked Ms Cebanenko, who was also on a Harrods' contract, whether she would have notified payroll about her contractual right to sick pay had she been on sick leave. Ms Cebanenko agreed that she would have done. The claimant says that during this call Ms Cebanenko had asked him "How is your sick pay deduction going" in what he felt to be a sarcastic tone. We do not find it likely that Ms Cebanenko was raising this issue in a sarcastic way because she had emailed the claimant two days earlier to tell him that he would receive this pay later that week. We find it more likely that she was asking the claimant whether he had received this pay already. The claimant relies on this phone call to complain that Ms Cebanenko deliberately failed to inform payroll about his entitlement to sick pay because of the health and safety concerns he had raised.

35. We do not infer from this exchange that Ms Cebanenko deliberately failed to inform payroll as the claimant contends. Firstly, it was not clear to us whether Ms Cebanenko or Mr Asante notified payroll about the claimant's sick dates because the claimant had reported his sickness absence with Mr Asante. Secondly, we find that even had it been Ms Cebanenko, it is more likely that she did not consider the impact to the claimant's pay at the time and as we have noted, once this issue became apparent she took action to remedy the underpayment of the claimant's wages and for an interim payment to be expedited outside the normal pay run. We do not therefore find that Ms Cebanenko deliberately omitted to tell payroll that the claimant was on a Harrods' contract nor that the claimant's pay was deliberately withheld.

Extractor fans

36. On 22 July 2019 a car caught fire in the underground car park on 22 July 2019. An investigation by the fire brigade who attended the incident revealed that smoke extractor fans were not working. It was unclear to us

when the claimant became aware of this issue. It is notable that at the grievance investigation meeting on 24 July 2019 the claimant said that there were no fans in the car park. It is likely that he became aware of this issue when he read the fire brigade report at a later date.

37. The claimant emailed Ms Orezzi and Alexandra Nikolatou, HR Advisor – Employee Relations for the first respondent, about this issue on 17 September 2019. It had already been resolved by this date. The claimant knew this. He was aware that the extractor fan was working again on 31 August 2019 when the claimant activated the fire alarm and recorded in his corresponding handover note "It was reassuring to hear the powerful ventilation fan". He was not therefore reporting a live health and safety hazard.

Grievance

38. The claimant submitted a grievance on 5 July 2019 in which he complained about Ms Cebanenko and in particular: the pay deduction which he alleged was a deliberate act made because he raised health and safety concerns; the sewerage issue; Ms Cebanenko's line management style / bullying. He said that he wanted Ms Cebanenko to be disciplined and would only communicate with her via WhatsApp or email which was how they were already communicating.

39. Although the claimant was not aware of this at the time, Ms Cebanenko was under a performance plan. As a result of the claimant's complaints, Mr Asante instructed HR to keep this under review.

40. This grievance was investigated by Michael Schrag, Estate Manager for the first respondent.

41. The claimant was interviewed by Mr Schrag on 24 July 2019. All of the interviews conducted by Mr Schrag were recorded and transcribed. The claimant began by referring to the racist comment by Mr Ashok i.e. "because you are white, you can get any woman". He said that he had referred to this incident and a second altercation with Mr Ashok to make the point that Ms Cebanenko had failed to deal with this issue. At the end of this hearing when asked to explain why he felt he could not communicate with Ms Cebanenko, the claimant said "I have tried, it is a cultural thing. Same issue with Anish. I am not saying I am racist, I might be a little racist, but there is an issue there". The claimant says this was a casual remark which referred to his background growing up in apartheid South Africa. He did not contextualise his statement, clarify or retract it, either during this interview or when he was asked subsequently to explain it. We find that, on the face of it, the claimant told Mr Schrag that he might be racist and this was the reason for his communication difficulties with Ms Cebanenko and also with Mr Ashok.

42. When Mr Schrag interviewed Ms Cebanenko, on the same date, she agreed that their relationship had deteriorated recently and she referred to the claimant's recent "health issues". She agreed that there had been a delay in dealing with the Ashok issue which was because of HR and the change in employer. She was aware that the claimant blamed her for this

delay to some extent. She explained how the claimant's dyslexia meant that "certain things were not the same for him" and this meant that she needed to spend more time communicating with him. We find that this demonstrated some insight and understanding of the claimant. Ms Cebanenko said that she had discussed the boundaries of the claimant's role with him although "he still struggles to separate certain things". She explained that the claimant had a tendency to help residents and she gave the example of replacing batteries in a smoke alarm inside a resident's apartment. She had told the claimant this was not within the team's remit. Although the claimant agreed that Ms Cebanenko had discussed this issue with the team in general he denied that she had discussed this issue with him specifically. We find that she did. This is because we find that Ms Cebanenko gave a consistent and detailed account of her discussions with the claimant to Mr Schrag and her concern about the claimant's boundaries was entirely consistent with his actions on 28 / 29 August 2019.

43. Mr Schrag sent his grievance outcome recommendations to Ms Nikolatou on 2 August 2019 when he also identified three issues which he felt warranted further review or investigation. This included the comment the claimant had made about racism about which Mr Schrag wrote:

> "I am concerned about Howards [sic] use of words when describing his manager…The comments in the meeting and a self-confirmation of being a racist are not the standard the company work very hard to ensure."

44. We find that this set in train a decision to investigate the claimant under the Disciplinary Policy. We were taken to an undated handover note which advised "if we have enough evidence then dismissal, if not sanction – he completes 2 years in October 2019". We find that this note is likely to have been written between 2 August 2019, which was when Mr Schrag sent his recommendations to Ms Nikolatou, and 15 August 2019 which was the two-year anniversary of Ms Cebanenko's start date as the note also referred to this. The (undisclosed) author of this handover note was therefore of the view that the claimant's comments in relation to racism warranted a disciplinary sanction at minimum. This was unsurprising in light of Mr Schrag's assessment that the claimant had admitted to being a racist.

45. In his outcome letter dated 13 September 2019 Mr Schrag upheld two elements of the claimant's grievance only: there had been a failure to communicate with the claimant about the reason for the sick pay deduction and its resolution (however, as noted above, Ms Cebanenko had in fact written to the claimant about this on 2 July 2019); and there had been poor communication in relation to the sewerage leak. Mr Schrag recommended that the claimant and Ms Cebanenko took part in mediation. The claimant was told that his comments in relation to his communication with Ms Cebanenko would be addressed under the Disciplinary Policy.

46. The claimant appealed against the grievance outcome on 17 September 2019. He subsequently withdrew this appeal because he understood that

these issues would be resolved by mediation with Ms Cebanenko on 4 October 2019.

Voyager House – fire alarm deactivation on 29 August 2019

47. The fire alarm in Voyager House, a building in the neighbouring Viewpoint development, went off accidentally on 27 August 2019 at around 10.45pm. Vlad, the concierge on duty at Bridges Wharf, telephoned the fire brigade. It was a false alarm. Vlad reported this incident in an email to Ms Cebanenko at the end of his shift the next morning. In reply, Ms Cebanenko advised "We are not responsible for the management of Voyager House and would not expect you to call the fire brigade on their behalf" and she instructed that the management company for the development should be contacted in future. She provided the contact details for the management company in this email which she sent to the generic Concierge Bridges Wharf email which the claimant received.

48. The fire alarm was activated in Voyager House later that day, on 28 August 2019, when the claimant was on shift. This set off a large ventilation fan connected with the development. Several residents at Bridges Wharf who were affected by the noise of the alarm and fan attempted to contact the management company responsible for Voyager House without success. They reported this to the claimant. The claimant called the number which Ms Cebanenko had circulated. There was no answer. He walked over to Voyager House and spoke to the only resident in that development who was on the telephone to the correct management company. She was outside because she could not get a signal inside the building. The claimant agreed to go inside and deactivate the alarm by following the instructions and using the code which the resident shouted to him from outside the building. By now it was in the early hours of 29 August 2019. The claimant confirmed the steps he had taken in a handover note to Ms Cebanenko at the end of his shift.

49. Ms Cebanenko emailed Mr Asante later that morning, on 29 August 2019, to report her "very serious concerns about Howard and his understanding of what he should and should not do in his role". This was consistent with the concerns she had discussed with Mr Schrag and which we have found she raised directly with the claimant. Ms Cebanenko asked Mr Asante for advice on how to proceed as she felt that she could not have been any clearer about what the claimant should do in the event of a fire alarm in the Viewpoint development.

Orbis Wharf – fire alarm activation on 31 August 2019

50. At around 7am on 31 August 2019 the claimant accidentally set off the fire alarm in Orbis Wharf whilst he was demonstrating how to set and deactivate the alarm to Lyn Garbett, a temporary concierge. This was subsequently reported by Ms Garbett to Ms Cebanenko on 2 September 2019 who said that the claimant has insisted on taking her to the fire panel and giving her a demonstration when she had asked him it where it was. Although the claimant had also referred to the fire alarm activation in his handover note of 31 August 2019 this did not state that he had activated it.

51. Upon receiving Ms Garbett's report and understanding the claimant had activated the alarm, and had failed to record this in the fire alarm log book, Ms Cebanenko reported this to Mr Asante.

Disciplinary allegations

52. Mr Asante, who the claimant said was an efficient manager and against whom the claimant had no complaint, escalated the Voyager House and Orbis Wharf fire alarm incidents to Ms Nikolatou on 6 September 2019. In respect of the Voyager House incident, Mr Asante noted that Ms Cebanenko had issued a clear instruction about who to contact in the event of a fire alarm which the claimant had not followed. In respect of the Orbis Wharf incident, he noted that the claimant had activated the fire alarm intentionally and without authorisation.

53. Ms Nikolatou wrote to the claimant on 20 September 2019 to invite him to attend back-to-back grievance appeal and disciplinary hearings on 24 September 2019. She confirmed that the following three allegations would be considered at the disciplinary hearing:

    (1) He had breached the Dignity at Work Policy "Specifically, the comments you raised against your line manager at the grievance hearing were considered as inappropriate, unprofessional and discriminatory, in particular where you stated "it is a cultural thing. Same issue with Anish. I am not saying I am racist; I might be a little racist, but there is an issue here.""
    (2) He had activated the fire alarm on 31 August 2019 without authorisation.
    (3) He had failed to follow clear management instructions in regard to health and safety processes. "Specifically, it is alleged that on the 31st August 2019 you de-activated the fire alarm of the development near your working place…your actions could have potentially put the residents in the building in danger."

54. In relation to allegation (1) we have found that Mr Schrag was concerned by the claimant's comments at the grievance investigation meeting on 24 July 2019 and recommended that this issue was investigated. In his outcome letter dated 13 September 2019 Mr Schrag told the claimant that it would be dealt with as a disciplinary matter. Allegations (2) and (3) were based on the issues which Mr Asante escalated to Ms Nikolatou. We find that Mr Schrag and Mr Asante were genuinely concerned about the claimant's conduct which the first respondent (in lieu of the second respondent) had reasonable cause to investigate under its Disciplinary Policy. We do not therefore find that there was a wilful attempt to seek or manufacture allegations in order to dismiss the claimant.

55. The claimant was warned that because of his "short period of employment" the outcome of the disciplinary hearing could be dismissal. This was a reference to paragraph 1.4 of the first respondent's Disciplinary Policy which provided that "If you are a short service employee or still within the probationary period, you may not be issued with any warnings before dismissal". Paragraph 1.4 disapplied paragraph 1.2 of the Disciplinary Policy which provided that "No employee would be dismissed

for a first breach of conduct, except in case of gross misconduct or gross negligence when summary dismissal may be appropriate." Although the term "short service employee" was not defined in this policy it was common ground that this meant an employee with less than two years' service and who therefore lacked the requisite qualifying service to bring an ordinary unfair dismissal complaint.

56. The day before Ms Nikolatou wrote to the claimant, she emailed Katherine Biglen, of Citation, in which she forwarded her draft invite letter (which was not disclosed) and asked "Do you think we should leave the option of summary dismissal in case the first allegation proven or go with the short service dismissal?". We find that all Ms Nikolatou was doing was seeking advice on whether to refer to the provisions of paragraphs 1.2 and / or 1.4 of the Disciplinary Policy. As we have noted, her letter to the claimant referred to short service which related to paragraph 1.4 of this policy.

57. On the same date, 19 September 2019, Ms Nikolatou emailed Martin Hellenas, Area Director for the first respondent, in which she wrote about the scheduling of the claimant's disciplinary hearing: "It's a sensitive and a bit urgent case as the employee completes 2 years of service in mid-October and if we want to dismiss, we have to act quickly."

58. Although we find, by reference to the undated handover note which we have found was written in the first half of August 2019 and Ms Nikolatou's email to Mr Hellenas, the first respondent had a practice of identifying short-service employees who were subject to its Disciplinary Policy and this was an important consideration when it came to considering the timing of any disciplinary action and dismissal, we do not find that it was intent on dismissing the claimant nor that the claimant's dismissal was predetermined. We find that t he only intention was to execute any dismissal decision before the claimant's second anniversary if the evidence warranted this sanction.

Dismissal

59. The disciplinary hearing was rescheduled to take place on 30 September 2019 at the claimant's request because he wished to organise union representation. It was chaired by Sibel Osman, Operations Manager for the first respondent. Ms Nikolatou was also in attendance. The claimant attended without a workplace companion or representative. The hearing was recorded by both parties by agreement.

60. At the end of this hearing, following a 20-minute adjournment, the claimant was told that he was being dismissed under the short-service route with immediate effect and would receive a payment in lieu of one month's notice. Ms Osman confirmed that the principal reason for her decision to dismiss the claimant was allegation (3) with allegation (1) a subsidiary factor. Although Ms Osman focussed on all three allegations in her witness statement she did not refer to allegation (2) when she confirmed this decision at this hearing nor in her letter confirming her decision on 3 October 2019 and she agreed when giving evidence that this was not a material consideration for her decision.

61. In relation to allegation (3) we find that Ms Osman did not understand which management instruction the claimant was alleged to have failed to follow. She had not seen Ms Cebanenko's email dated 28 August 2019. Nor had she seen the correspondence between Ms Cebanenko and Mr Asante referred to above which resulted in Mr Asante escalating this issue to Ms Nikolatou. However, we find that her focus was on the claimant's specific actions in de-activating the fire alarm in Voyager House which she concluded had put the respondent's reputation and the lives of residents in Voyager House at risk.

62. In relation to allegation (1) we find that Ms Osman did not accept the claimant's denial that he made the statement that he was a "little bit racist" on 24 July 2019 which had been recorded contemporaneously. She and Nikolatou gave the claimant several opportunities to explain this comment. She was not satisfied by his responses and felt the claimant showed neither remorse nor regret. She was also concerned that in previous meetings there had been "an undertone that pertains to picking out origins and race of some kind which I just don't see any relevance to". However, this was not the main reason for her decision to dismiss the claimant.

63. Ms Osman agreed that she was aware of the sewerage issue because the claimant referred to it during the disciplinary hearing. She was unable to recall whether she was cognisant of the other two hazards which the claimant had reported although we find that it is likely that she was aware of the heat issue because this was referred to in the record of the claimant's grievance investigation interview which contained his comment about racism and which Ms Osman had reviewed.

64. We find that Ms Osman made the decision to dismiss the claimant on her own based on her genuinely held assessment of the claimant's conduct in relation to allegations (1) and (3). We also accept Ms Osman's evidence that having decided that the claimant's conduct warranted dismissal she sought advice from Ms Nikolatou in relation to executing her decision only. Ms Nikolatou told her that the claimant could be dismissed because he was a short service employee. As noted, under paragraph 1.4 of the Disciplinary Policy, the first respondent (in lieu of the second respondent) was not required to issue the claimant with any disciplinary warnings in the first instance. It was also Ms Nikolatou who advised that the claimant should be dismissed with one month's notice in lieu. The effect of this was that the claimant had not accrued two years' service on the date when his employment was terminated.

Appeal process

65. The claimant appealed against his dismissal on 4 October 2019. Although he understood that only allegation (3) had been upheld he disputed all three allegations: in relation to allegation (1) he noted that there had been a failure to identify any incident of racist behaviour; similarly, in relation to allegation (3) that there had been a failure to identify the clear management instruction breached; and in relation to allegation (2) he denied activating the fire alarm and contended that no evidence had been produced to substantiate this.

66. This appeal was heard by Annette Tait, Property Team Manager for the first respondent, on 15 October 2019. This hearing was recorded and transcribed. We find that Ms Tait was diligent and thorough in the way in which she dealt with the claimant's appeal. Although Ms Osman had upheld two of the three allegations, Ms Tait reconsidered all three allegations as part of her appeal investigation. We accepted her evidence that she wanted to be satisfied that Ms Osman's decisions in relation to all three allegations were sound. She therefore considered all three allegations. Mindful of the claimant's complaint that there was a lack of evidence in relation to allegation (2) Ms Tait requested an activity log for the fire alarm on 31 August 2019.

67. Ms Tait wrote to the claimant on 11 November 2019 to confirm that his appeal had not been upheld. She upheld all three allegations.

    (1) In relation to allegation (1) Ms Tait concluded that having confirmed that he was a racist it did not matter to what degree the claimant felt this was so. She felt that the claimant had been given ample opportunity to explain his comment to Mr Schrag on 24 July 2019. The transcript of the appeal meeting records that she gave the claimant several opportunities to explain this comment. As had Ms Osman at the disciplinary hearing. Ms Tait found that the claimant failed to provide a satisfactory explanation for his apparent admission.
    (2) In relation to allegation (2) Ms Tait referred to Ms Garbett's email and the fire alarm log for 31 August 2019. The log showed that there had been one manual activation at 7.04pm which was when the claimant had been present with Ms Garbett. Ms Garbett's email stated that the claimant had set off the alarm when he was demonstrating how the fire panel worked. The claimant had denied this in his appeal letter. Ms Tait concluded that the evidence showed that the claimant had activated the alarm.
    (3) In relation to allegation (3) Ms Tait agreed in her evidence that she did not uphold it on the basis that the claimant had breached a specific management instruction. Her focus, as she wrote in her outcome letter, was the claimant's conduct of deactivating the fire alarm in another property which was outside the respondent's jurisdiction and which she concluded was a "huge breach of health and safety".

68. We accepted Ms Tait's evidence that to the extent that she was cognisant of the health and safety hazards which the claimant had reported she did not view this as being a relevant consideration to her assessment of Ms Osman's decision to dismiss the claimant by reference to his conduct. We find that Ms Tait concluded that the claimant's conduct in relation to all three allegations warranted the sanction of dismissal. She therefore rejected the claimant's appeal.

**Relevant legal principles**

Health and Safety cases

69. Section 44 ERA provides that an employee has the right not to be subjected to any act (short of dismissal), or any failure to act, by his employer, which is done on one or more of the grounds set out in subsections (a) to (e).

70. Sections 44(1)(c) applies to an employee who has brought to his employer's notice, by reasonable means, circumstances connected with his work which they reasonably believed were harmful or potentially harmful to health and safety. These provisions will only apply if there was no safety representative or committee at the place of work or if there were, it was not reasonably practicable for the employee to have raised the matter by those means.

71. Sections 44(1)(e) applies to an employee who, in circumstances of danger that they reasonably believed to be serious and imminent, took or proposed to take appropriate steps to protect themselves or other persons from the danger.

72. The provisions enumerated at (a) to (e) of section 44 are mirrored in the corresponding provisions of section 100 which apply to a dismissal.

Protected disclosures

73. For there to be a protected disclosure, a worker must make a qualifying disclosure, as defined by section 43B ERA, and do so in accordance with sections 43C to 43H ERA.

74. Section 43B(1) ERA provides that a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of six prescribed categories of failure (enumerated at (a) to (f) of section 43B(1)). These include: that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject (b); and that the health and safety of any individual has been, is being or is likely to be endangered (d).

75. Section 43L(3) ERA provides that where the information is already known to the recipient, the reference to the disclosure of information shall be treated as a reference to bringing the information to the attention of the recipient.

76. A qualifying disclosure is protected if it is made to the employer (section 43C ERA).

Automatically unfair reasons for dismissal

77. If the reason or principal reason for a dismissal is that an employee has raised a health and safety hazard with his employer for the purposes of

section 100(1)(c) or has taken or proposed to take action for the purposes of section 100(1)(e) then such a dismissal will be automatically unfair.

78. Similarly, under section 103A ERA a dismissal will be deemed to be automatically unfair if the reason or principal reason for the dismissal is that the employee has made a protected disclosure.

Dismissal – Burden of proof

79. Where a claimant lacks the requisite qualifying service i.e. two years of continuous employment to bring a claim for ordinary unfair dismissal the burden is on them to show that the reason or principal reason for their dismissal was one of the proscribed reasons relied on (see Smith v Hayle Town Council [1978] ICR 996, CA; Ross v Eddie Stobart Ltd UKEAT/0068/13/RN).

80. The focus of the tribunal's enquiry must be the factors that operated on the decision-maker's mind so as to cause them to dismiss the employee. In Abernethy v Mott, Hay and Anderson [1974] ICR 323, Cairns LJ said this, at p. 330 B-C:

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

This guidance was approved by Underhill LJ in Beatt v Croydon Health Services NHS Trust [2017] IRLR 748 when he said this:

> "As I observed in *Hazel v Manchester College* [2014] EWCA Civ 72, [2014] ICR 989, (see para. 23, at p. 1000 F-H), Cairns LJ's precise wording was directed to the particular issue before the Court, and it may not be perfectly apt in every case; but the essential point is that the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which cause them to take the decision – or, as it sometimes put, what 'motivates' them to do so…"

Written statement of particulars

81. The legal requirement to provide workers with a written statement of their employment particulars is set out in sections 1 to 6 ERA 1996.

82. Under section 4 workers have the right to be notified of any changes made to any of these particulars by means of a written statement containing particulars of any changes made.

83. Where there is a change in the identity of the employer and there is no change to the worker's continuity of employment, provided there are no other changes in relation to any matters which must be specified in a section 1 statement, the new employer is only required to notify the worker of this change. This written notification must be provided not more than one month after the change has taken effect and specify the date on which the worker's continuous employment began (sections 4(5) to (8) ERA).

84. Section 38 EA 2002 does not give rise to a free-standing right to claim

compensation for a breach of these provisions. A tribunal may only make an order for compensation if there is also a successful claim brought under one of the jurisdictions listed in Schedule 5 EA 2002.

## Conclusions

Issue 1: The employer

85. We have found that the claimant was employed by the second respondent at all relevant times. He was managed by the first respondent to whom the decisions to investigate the claimant under its Disciplinary Policy and to dismiss him were vested.

Issues 2 and 3: Unfair dismissal

86. These complaints fail because we have found that the reason for the claimant's dismissal was his conduct.

Issue 4: Health and safety detriment

87. This complaint fails because we have found that the claimant's pay was not deliberately withheld. We have found that the claimant's pay was deducted because of an oversight which was remedied as soon the claimant raised this issue with his managers. Nor have we have found that the disciplinary allegations were manufactured or sought out in order to dismiss the claimant. We have found that the claimant's managers had genuine concerns about his conduct and the first respondent had reasonable cause to investigate these allegations under its Disciplinary Policy.

Issue 5: Statement of changes

88. This complaint succeeds because we have found that the second respondent failed to provide the claimant with written notification of the change in the identity of his employer nor confirmation of the date when his period of continuous employment began.

89. Pursuant to section 38 EA 2002, no award for compensation is made because we have not upheld any of the other complaints brought by the claimant.

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**Employment Judge Khan**

**06.11.20**

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

06/11/2020

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FOR EMPLOYMENT TRIBUNAL