Case No: 2202549/2015

EMPLOYMENT TRIBUNALS

Claimant: **Mr. H. Kahn** **Respondents:** **VisitDenmark**

London Central Remote Hearing (CVP) **On: 8-12 March 2021**

Before: **Employment Judge Goodman** **Mr D. Shaw**
Mr T. Robinson

Representation
Claimant: Mr. E. Wojciechowski, solicitor
Respondents: Ms. K. Davis, counsel

JUDGMENT

1. The claim for failing to give written reasons for dismissal is dismissed on withdrawal.
2. The age discrimination claim fails.
3. The claimant was unfairly dismissed by the respondent, but there is no award for unfair dismissal having regard to the claimant's conduct.

REASONS

1. This is a claim of unfair dismissal and age discrimination. The claimant was dismissed on 30 September 2014, the effective date of termination being 30 June 2015, following concern about payments made to his son's company. The respondent denies age played any part in the decision-making, denies the dismissal was unfair, and asserts that if it was unfair, a different process would have made no difference, or any award should be reduced for conduct, having regard to matters discovered after he had left.

2. The claim was presented on 25 November 2015, and has unfortunately taken a long time to reach a final hearing. When the claim was served, the respondent asserted sovereign immunity and the case was then stayed awaiting the Supreme Court decision in **Benkharbouche,** handed down in October 2017. A case management hearing in January 2019 fixed a preliminary hearing on jurisdiction In May 2019**.** The tribunal ruled, in a decision sent to the parties on 11 June 2019, that the English tribunal had jurisdiction**.** The respondent then filed a

substantive response to the claim on 11 November 2019. What was to have been the final hearing, starting 11 May 2020, was tpostponed because of pandemic restrictions and relisted for March 2021.

3. The hearing was conducted remotely, with access to the public, although in fact no one unconnected with the case observed the hearing. We were confident that all participants had adequate equipment and technical help.

Evidence

4. The tribunal heard evidence from:

Henrik Kahn, the claimant
Alexander Kahn, director of Timgu Ltd, and the claimant's son.
Helene Krieger von Lowzow, marketing coordinator employed in Copenhagen 2010 to 2012, gave some evidence about knowledge of Timgu within the organisation.
Vidar Morch, marketing director, Norway until 2016, gave evidence about the practice of prepaying invoices at the end of the year.
Jan Boesen Olsen, the respondent's CEO, based in Copenhagen, who dismissed the claimant.
Flemming Bruhn, the respondent's finance director, also based in Copenhagen.
Marianna Staal, head of finance and administration for the UK and Norway, based in London.

5. Mr Olsen and Mr Bruhn gave evidence with the assistance of a Danish language interpreter. Their witness statements were in English, without a Danish original, and it was explained that they gave instructions to their solicitor in Danish and he then wrote an English language statement for approval.

6. There was a hearing bundle of 886 pages, including some, but not all, of the Danish originals of translated documents, and a supplemental bundle of 196 pages, plus a PowerPoint presentation. Part way through the claimant's case he sought to adduce a schedule of invoices which listed a few (four or five) not included in the bundle, but the claimant was unable to produce these items.

Findings of Fact

7. Having heard all the evidence, we set out our findings of fact, but it is important to remember that not all these facts were known to the respondent at the time.

8. The respondent is the national tourist organisation of Denmark. It was not a large employer. At the time of dismissal it employed 137 people in eight offices. Its head office was in Copenhagen.

9. The UK was Denmark's fifth-largest market for tourism. At the time of dismissal the claimant was the respondent's Marketing Manager or Director (*'markedschefen'*) for UK and Ireland, working from their office in the Danish Embassy in London. He had a staff of 10 or 11 people reporting to him. From 2010 to 2014, the respondent's UK expenditure ranged from £940,000 to £2.7 million, about 4 - 9% of its total expenditure. Of this, £84,000-£149,000 was an overheads budget which the claimant could allocate with minimal reference to

head office. He approved for payment invoices submitted to London office, with a counter signature from the local finance officer.

10. The claimant was first employed on 1 November 1999 by the Danish tourist board (*Danmark Turistrad* -DT), a commercial foundation supervised by the Danish Minister for Economic and Business affairs, reliant on government funds, and carrying out both commercial and regulatory functions in tourism. It was subject to the Danish Public Administration Act. Before 1999 he had spent five years working for "Wonderful Copenhagen", the city's tourism marketing organisation.

11. In 2010, (as described in the judgement of May 2019), the tourist board was reconstituted by statute, the Visit Denmark Act, as a public administrative body promoting tourism in Denmark, shorn of its regulatory function, with close government control of its use of public funds.

Contract Terms and Procedures

12. The claimant has had various contracts of employment in largely similar terms; the most recent was signed in 2002.

13. Clause 5 provides that he is:

> "not entitled without written consent from the DT executive board in each individual case to be directly or indirectly interested in any business or activities, whether actively or passively, or take any other paid or unpaid employment or engage in any paid outside duties. The same applies for any unpaid outside duties which would require some of the market managers time".

14. Clause 16 provides: "in case of extreme neglect or breach of contract employment relationship can be terminated with no warning". Clause 17 provides that during his employment and afterwards he has a duty of confidentiality to the company "in relation to any relationship or information about the organisation during his employment and should not be brought to a third party under any circumstances". He was entitled to 9 months' notice of termination, whereupon the employer will pay the cost of moving back to Denmark, unless he had been dismissed for gross negligence. Clause 20 states that Danish employment law and holiday law applies, and that the Copenhagen court is agreed as the court of arbitration for the contract.

15. Within the supplemental bundle is an employee handbook (we have the April 2014 edition) which goes into much detail on local practice (down to the washing up of coffee cups in the office kitchen) and includes a number of policies – on discipline, grievances, equal opportunities, and bullying, but none on gifts, corruption or conflict of interest, nor any reference to the Danish Public Administration Act. When the respondent dismissed the claimant, it did so by reference to this Act.

16. The Danish Public Administration Act states that it applies to “all public administration bodies”, and also to “all activities of independent institutions, associations, foundations, et cetera which are established by or pursuant to statute and independent institutions, associations, foundations, et cetera which are established under private law and which perform large-scale public activities and are subject to intensive public regulation, intensive public supervision and intensive public control”.

17. The section relevant to this case, setting out the procedure which the respondent believed it followed when dismissing the claimant, is section 19, providing that where a decision is to be made by an administrative authority, then:

    “if a party cannot be assumed to be aware that the authority holds certain information on the facts of the case or external professional assessments, no decision may be made until the authority has disclosed such information or assessments to the party and given an opportunity to comment. However, this only applies if the information or assessments are to the detriment of the party in question and of considerable significance to the determination of the case”.

18. The other relevant section concerns decision-making where there is a conflict of interest. Section 3, on disqualification, provides that: “any person employed by or acting on behalf of a public administration body is disqualified from being involved in a particular matter” where “he himself has a particular personal or financial interest in the outcome of the matter…”, or “his spouse or person related by blood or marriage… has a particular personal or financial interest in the outcome of the matter”, or “he is involved in the management of or is otherwise direct closely involved in an enterprise, an association or other private legal entity which has a particular interest in the outcome of the matter”, or “there are other circumstances which are likely to cast doubt on the relevant persons impartiality”. However, by section 3 (2), there is no disqualification if there is “no risk that the determination of the matter may be affected by irrelevant considerations”. The disqualified person may not make decisions or be involved in administrative processing. Section 6 states that anyone who is aware of circumstances relating to himself in section 3(1) “must notify his superior at the relevant authority as quickly as possible unless it is obvious that such circumstances are of no significance”.

19. The claimant has said he was not aware the Act applied to his employment. When challenged that he must have known of it as he had been in public employment from 1994, he said: “I thought we were more private than that” (referring to the respondent’s post-2010 status). We could find no specific mention of the Act in the handbook or the claimant’s contract. E J Walker’s judgment of June 2019 however found that the Visit Denmark Act of 2010 listed the Public Administration Act as applying. (It may be in the schedules, as it is not mentioned in the text in our hearing bundle).

20. Mr Bruhn gave evidence that as interim CEO in October 2010 he had conducted briefings in Copenhagen for all managers, including the claimant, on the transition in status, and that in explaining what changes the Visit Denmark Act brought, he had listed the statutes applying, including the Public Administration Act, although without going into the detail of each.

21. It is common ground that at that meeting, the claimant approached Flemming Bruhn, in the context of the contractual term on engagement in other enterprises (clause 5) to ask whether it would be in order to give fatherly advice to his son who was setting up a business. Mr Bruhn indicated his assent, and that he could also attend a few meetings outside office hours. Neither side says that anything else was discussed in connection with his son's business. Mr Bruhn recalled being asked by another employee if he could help coach his son's football team, and having replied that was in order if it was outside office hours and did not interfere with his work.

Timgu

22. It was also in October 2010 that the claimant's son, Alexander Kahn, who had previously worked for Google in Dublin, registered a UK company called Timgu Ltd with two other ex-Google colleagues as directors.

23. Alexander Kahn, when still working for Google, had, at the claimant's instigation, assisted the respondent in the autumn of 2009 to remove all traces of a brief but disastrous digital marketing campaign that had caused great public offence in Denmark after it went viral, leading to the resignation of the CEO, Dorthe Killerich. Flemming Bruhn had then acted up from late 2009 until a replacement CEO started in early 2011.

24. On 13 and 16 December 2010 the claimant authorised a payment of £16,000 in total to Timgu, over a number of invoices where the work was not specifically identified. It is common ground that these were prepayments, for services to be rendered.

25. On 2 January 2011 Mr Olsen became Visit Denmark's CEO. A head office project called AdSense had been initiated to explore digital marketing using Timgu. It was expected to be profitable, but after four months of exploration, with a number of meetings, it was brought to a halt. The reason was bluntly explained to Alexander Kahn by Ghita Scharling on 6 July 2011. Timgu had not covered the target group, or given exposure across all sites as briefed, the budget had not been used as intended, reporting was unsatisfactory, the fee was too high, and there were "astoundingly poor results".

26. In May 2011 the claimant authorised the payment to Timgu of £1,100 for work in Ireland, from the US office. The claimant said this was an inter-office transfer enabling payment by London for work on the UD budget to avoid foreign exchange costs, but there is no documentation showing how the US office took the initiative to seek the work.

27. From that date it does not seem that Timgu did any work for the respondent that did not originate from the London office. A payment was made by London in July 2022 of £1,131.43 for a banner, on 19 December 2011 of £1,500 for a campaign on North Jutland, and another on 27 December 2011 of £9,000 for an unspecified online marketing campaign. The respondent's London staff saw this last as another prepayment. To the tribunal, the claimant said it was for a

Christmas cottage campaign in November and December, (unless he meant the north Jutland campaign), but this was the first time this explanation was given. The invoice itself was sent to the claimant by Alexander Kahn on 12 January 2012 with the message: “see the attached, is everything fine with this invoice?”, and two weeks later the payment was made. In February 2012 Helene Krieger von Lowe (a finance officer) queried this £9,000 invoice with the claimant, asking whether “this is something I should know more about or is it something to do with the Olympics”. The claimant said it was the Olympics, and that the Vibeke Oliver (London marketing manager) had the money.

28. In February 2012 the Timgu partnership was splitting up, with the two Finnish directors taking their own course. In the course of dialogue about the cash and various office bank accounts Alexander Kahn said that the money received in London in December had been spent on salaries. The respondent argues this shows the claimant used prepayment to relieve a cash flow difficulty for Timgu.

29. In April 2012 the claimant told his son that the budget spend on Facebook and Google had been increased. In evidence he said he would have told any supplier this. This budget was for a promotion campaign run through the London office at the time of the London Olympics (July-August 2012). The claimant organised a houseboat to provide hospitality for visitors during the Olympics, with his wife Brigitte providing the catering, and at one such an event he introduced Alexander Kahn to Jan Olsen. The claimant cites this meeting as showing that Jan Olsen knew that Timgu was linked to the claimant, and was working for Visit Denmark.,

    Jan Olsen’s recollection is only that he was told at a social event that Alexander had done some work for the company, and was shown an app he had produced free of charge. He was not aware that the son’s business was doing paid work for Visit Denmark, and there was no reason why he should, as he did not, as CEO, review the detail of supplier invoices.

30. At the end of 2012, on 21 December, the claimant authorised payment of three invoices to Timgu totalling £6,000. They were in general terms stated to be for digital services – Facebook, newsletters, SCO display ads and Google. In almost all cases the invoices showed the claimant as the contact person or ‘bearer’. The respondent says this was another prepayment.

31. In 2013 Timgu received £1,644 for a Ryanair campaign, while at the same time being told the respondent’s partner, the Norwegian tourist board, on a similar campaign had preferred their own digital supplier. In July 2013 Timgu was paid £2,935 for an AdWords campaign, again where the claimant was the “bearer”. In December 2013 there were two small payments of £200. Unlike the previous years it does not appear there was a substantial invoice paid at the end of December by way of prepayment.

32. The claimant and Vidar Morch gave evidence that if at the end of the year there was money left in that year’s budget, it was accepted practice to make pre-payments to suppliers for work commissioned for the coming year. This was strongly disputed by Flemming Bruhn, the finance director, whose evidence was that any prepayment must be authorised by head office, and then for a sound financial reason, such as the discount given in Germany for paper supplies if paid in November. It was also his evidence that since the 2010 Act the respondent could bank underspent budget allocation as “equity”, so there was no pressure to spend surplus budget in a given year. It is possible that the practice

of some local managers escaped head office scrutiny, and also possible that at an earlier stage of the organisation budgets did have to be spent down by the year end, but we noted that the claimant did not make prepayments to other suppliers.

The January 2014 Appraisal

33. At some point in 2013 Mr Olsen was told by London staff that they were concerned about the claimant's extensive use of Timgu, given the family connection, and that they were not being asked to get estimates for digital work from other suppliers. He decided to raise it with the claimant at the annual appraisal, which took place on 22 January 2014.

34. By English standards, even those of small organisations, this appraisal process was very light on paperwork. Mr Olsen did not keep any notes, apart from some jottings in a notebook which he had discarded by the start of this litigation. This seems to have been his usual practice – he had kept no notes of the claimant's appraisal in 2012 or 2013, nor was there any central record in HR. Nor did he send follow up emails. He was concerned with the broad picture. His evidence is that at this meeting he raised the claimant's use of Timgu as a supplier as a conflict of interest, and said it had to stop. The claimant's evidence is that nothing at all was said about Timgu, whether at this meeting or at any other time. The claimant disclosed a set of handwritten notes he had made on a pre-printed appraisal form, dated (in print) February 2014, which dealt extensively with various projects and targets, but said nothing about Timgu. The respondent is deeply suspicious of this document and believes that it was written after the event, sometime after 27 August 2014 when the claimant was first told that he had breached the instruction not to use Timgu again, and for the purpose of this litigation. Mr Olsen's evidence was that these forms were only introduced later in 2014.

35. Employment tribunals are not unfamiliar with parties asserting that an inconvenient document is a fake, and are usually sceptical of such assertions, but for a number of reasons we concluded that the claimant was at least *capable* of putting together a document to boost his case. Among these reasons are the fact that he switched explanation from question to question during cross examination, gave evidence in re-examination of 12 Timgu invoices not in evidence until then, and most disturbingly, that during a five-minute break in the hearing when he had twice been given the warning not to speak to other people about the case, especially important as his son Alexander was in the next room, he left his microphone on and was heard talking (in Danish) to another man at some length. Asked at the end of the break by the tribunal about him being heard speaking to another person, he replied that he had gone for a cigarette break and been talking to his wife. Challenged by the respondent's Danish-speaking solicitor, who had also overheard, that he had been discussing the questioning with a man, Alexander Kahn interjected that he had been advising his father to answer the question directly. What troubled the tribunal was not so much the content of his discussion with his son, more the fact that when challenged he had given an evasive and manifestly untruthful answer. We therefore concluded that the claimant might well have stooped to fake a

document purporting to be a contemporary record the content of the appraisal meeting that omitted any reference to Timgu. The claimant did not explain why the printed date was February.

36. In deciding what was said, we allow that the document might be genuine (for example, speculatively, if a document had been printed for a meeting that was unexpectedly brought forward), and that the notes may be confined to responses to the printed questions on the form, and make no note of supplementary matters, such as use of Timgu, either because there was no printed question to answer, or because the claimant disagreed with what he was being told. Against Jan Olsen's insistence that he did have the discussion on using Timgu, is the fact that if the instruction to stop using Timgu was important, most people would have thought it business-like to have confirmed that in an email - though again, most managers would keep some record of their appraisals.

37. The only other evidence on what was said on 22 January 2014 came from Marianne Staal, the London finance officer. Her evidence was that as the appraisal meeting ended, the claimant went out for a smoke, and she took the opportunity to ask Mr Olsen whether a person previously made redundant by the respondent might be coming back to work for them in London. He replied that over his dead body would that person be coming back, or, he went on, (unprompted) the claimant's family work for Visit Denmark in future, and if Timgu was used again, she was to inform him. When giving evidence it became clear in cross-examination that there had been some disagreement between the claimant and Ms Staal in March 2014: whatever he had said or done, she was deeply upset about it and called him a bully. We considered the possibility that there had been no instruction from Mr Olsen in January, and that when in August she told Mr Olsen that two Timgu invoices had come in, she was just reporting the use of Timgu in the same way and for the same reason as it had been reported in 2013, because staff were uneasy about the family connection, and because she resented Mr Kahn and wanted to get him into trouble. We ended by rejecting that possibility, concluding that the significance of her conflicted feelings arising from the episode in March was that they lay behind her decision *not* to report the first invoice (see below) and then not know what to do when the second and larger one came in.

38. After careful discussion, our conclusion was that Mr Olsen did tell the claimant in January 2014 not to use Timgu again. This was not a warning, in the formal sense that the claimant was told that if he disobeyed, there would be disciplinary consequences. There was no mention of consequences, he was just told to stop.

39. Mr Olsen's reason for giving this instruction was that in his mind it was nepotism; it was wrong that public money was used for the benefit of the claimant's family at the claimant's direction. The claimant should step aside from such decisions.

The Marguerite Project

40. In Denmark there is a scenic route called the Marguerite route (the direction signs were marked with daisies). The claimant had the idea of promoting this self-drive route on the respondent's website, with links to accommodation, and asked his son to work on it.

41. On 18 July 2014, the Vibeke Oliver left and was replaced by Margit Klemmensen. At around this time most of the London staff went on a trip to Denmark, followed in many cases by annual leave. On 21 July 2014 Alexander Kahn sent his father an email headed "re-: Marguerite route project plan", saying, "hi dad, I attach my pitch, but you might want to take a look", inviting him to discuss it. A number of emails followed during the day and into the next, dealing with the detail and costing, concluding with Alexander Kahn attaching the new version, and saying:

"you can obviously sell it on to your partners et cetera" . (Meaning other offices within Visit Denmark). Within the hour the claimant sent it on to HelleThomsen "this is a proposal for a solution for the Marguerite route map as well as budget. Peer support 300 per month is for a minimum term of 12 months". Helle Thomsen was the new online manager in London, still under probation. A few days later Alexander Kahn raised a technical problem with his father, saying he was did not have Helle's email (so demonstrating she had not been involved in the project) , and the claimant forwarded it to her that night. The on 30 July Timgu submitted an invoice for a Marguerite route initial payment of £1,200 naming Helle Thomsen as the bearer. On 12 August, after hesitation, Marianne Staal put it on the system for payment. On 13 August Alexander Kahn wrote to Helle Thomsen: "I'll send the second invoice for £3,250 to be settled, the final invoice would then be due once we have finalised the entire project and have integrated on your site listings et cetera you have requested". Ms Thomsen cautiously explored with him whether there would be any extras. She said later she was unhappy that she was having to sign a contract without any prior involvement of knowing if the price was reasonable, but did not want to cross the claimant when still on probation.

42. A week or two later the claimant was in correspondence with Visit Denmark's Netherlands office about the cost of translating the Marguerite route site into Dutch. The claimant relies on this as evidence that the London was not the only office instructing Timgu, but it seems clear to us that the online Marguerite project originated in and was run from London, and that this was an example of the claimant marketing it to his partners in other offices.

43. On 21 August the claimant asked for his six month bonus, and was paid a bonus for the idea of promoting the Marguerite route online.

<u>Initial Investigation</u>

44. On 22 August 2014 there was a telephone call between Jan Olsen and Marianne Staal. We do not know who initiated the call, but in the course of it she told Mr Olsen that there were now two more invoices from Timgu. She had put one on the computer for payment on 12 August, after delaying because she was wondering whether to pay it or tell him. Helle Thomsen, she reported, had felt under pressure from the claimant to sign the invoice, while concerned that she had no comparison for assessment of whether the price was good, and had not herself commissioned Timgu for all the work.

45. Jan Olsen asked Annette Zerrahn in HR to investigate. She spoke to Marianne Staal and followed it up with an email on 26 August about help uncovering "what has happened at the UK office in relation to the collaboration with Timgu". She

asked for all material on any written agreements between Visit Denmark and Timgu, invoices and statements of account to show what was paid, did the invoices contain information about dates and meetings, did all UK employees know about the collaboration, or just her, Katrine and the digital marketing manager, and had they been told not to talk to others about it. She wanted a clear picture. In reply, Marianne Staal said the association began in 2009 when Alexander Kahn was still at Google and had helped get the worst "dirt" of the illfated marketing campaign off the Internet. She sent Ms Zerrahn all invoices back to 2010. She not seen any agreement. She and her finance colleague both thought that the claimant had made the invoices. She remarked on invoices being sent in at the end of the year if there was room in the budget. The collaboration with Timgu was not a secret but the arrangement felt wrong. Other companies did not get the chance to bid, and the agreements were "let in through the back door". Of the last two invoices on the Marguerite route, "this just after VO had left and when MHK was away from the office. It was Helle, our online manager, who sits with the project, and she has expressed her resentment that she was not involved in the decision-making as to which online company was chosen, and that she felt it was forced upon her. For your information – VO refused to work with Timgu and requested proposals from other online companies in connection with the project in 2013." She recommended getting more information from Finn Larson, head of IT in Copenhagen. Late that night she added that there were a number of counter-invoices on the big invoices in 2011, 2012 and 2013, so these were in and out arrangements. She suggested this was so Timgu could get commission from Google (something the claimant disputes and which was not explored in evidence; neither the claimant nor his son mentioned counter-invoices).

46. Jan Olsen discussed this with the chairman and deputy chairman of the board, Jens Willumsen and Kjeld Zacho Jorgensen, and with the deputy managing director, Lars Erik Jonsson. They decided there was a strong case for finding the claimant guilty of gross misconduct and to consider dismissing him, and that as he was employed on a contract under Danish law, they should follow Danish procedure.

Dismissal Consultation

47. On 27 August Jan Olsen met the claimant in London, and there handed him a four page letter in Danish; the English translation is headed "consultation on contemplated dismissal." This letter informs the claimant that Visit Denmark is contemplating dismissing him from his position as market manager in London, for "cooperation issues, more specifically abuse of your managerial authority as well as disloyalty towards your immediate superior", which, allowing for nine months notice, would make an effective date of termination on 30 June 2015. There follows a recitation of events, including Jan Olsen being told in late 2013 by London staff about the use of Timgu, the amounts involved, and that the claimant's sons owned it. The claimant had chosen to use them as digital services provider without enquiring into alternatives, and had asked the staff to use them. His superior had told him in January 2014 that it was not acceptable to deal with family members on Visit Denmark's behalf "with a view to providing them with a competitive and economic advantage, thus engaged in nepotism", and that there was to be no new dealing with Timgu. His superior had been informed on the Friday afternoon, 22 August, of new dealings with Timgu amounting to £4,800. He had been "acting in bad faith", had failed to comply with the express verbal order on 22 January, and had shown both disloyalty and lack

of managerial judgement in exercising his managerial powers. His conduct had "also given rise to significant concern on the part of the executive board" as to his ability to engage in a professional relationship with the executive board and his staff. He was to be released from his duties with immediate effect until the decision was made, to protect his staff, and in view of the breach of trust between himself and executive board. He should return his access card, and his Internet access would be temporarily shut down so that Visit Denmark could have free access to relevant information about dealings between London office and Timgu and to ensure that no documentation would be lost. Before a final decision was made, he had an opportunity under section 19 of the Public Administration Act to submit comments, by 10 September. If desired, he and a companion could discuss the matter first, arrangements were to be made with Jan Olsen.

48. No documents accompanied this letter.

49. On being handed the letter the claimant did not reply, but instead telephoned his wife to say that as she had predicted it was being claimed that he was working with his son. There was then a short discussion about whether the claimant could leave on improved terms - he seems to have been told in reply that he was lucky to get nine months notice. The claimant said nobody in London was unhappy with Timgu's services; Jan Olsen replied that he had heard differently from staff and Ms Staal was called in to confirm this. The claimant became enraged. After sending some emails from his office computer to his private address he left.

50. Mr Olsen had intended to set an out of office reply for the claimant saying that he was on leave, with a more forthcoming communication for senior management, but unfortunately what was in fact posted that night was a message that the claimant had left. When the claimant protested next morning about it, deeply hurt, it was taken down at 10 a.m., but at least three members of staff had seen it and no doubt the content made its way onto the grapevine.

51. The claimant consulted a Danish lawyer, who replied on his behalf on 7 September 2014. She stated that Timgu had provided Visit Denmark with both transnational campaigns, and local campaigns in the Netherlands and Germany, with services requested by head office or by individual market offices. She named six people at head office as having requested Timgu's services, and at local offices, Ghita Sorensen in Italy, Mathilde Henriques-Nielsen in the Netherlands, and Vibeke Oliver in the UK. It was denied that the claimant was the driving force behind any of these projects, or that he had been involved in the implementation or conclusion of any contracts. He had not instructed London office to use Timgu, and they have been asked to get quotations from more than one provider before making a decision, with the sole exception of the Marguerite project where a verbal price indication had been obtained; in addition the project was being managed by Helle Thomsen. He provided figures (estimated in the absence of access to his email and accounting records) of payment to Timgu of about three-quarters of the amount stated by the respondent, and out of that on only 40% was the claimant the bearer. Head office had signed off on payments, and Jan Olsen had met Alexander Kahn in the summer of 2012. He had also been awarded a bonus for the Marguerite project, at a time when managers were

"obviously aware" that most of the recognition was attributable to Timgu's work. On the alleged warning, it was denied that Timgu had been discussed on 22 January (or even that there had been a meeting then), and asserted that relations between the claimant and one of Timgu's owners were common knowledge within Visit Denmark, and had never been raised with him. Had such a serious allegation been made it would have been put in writing. The point was then made that a decision to dismiss had already been made, without the claimant's input, given the out of office message posted saying that he was no longer employed; a message intended for managers said it had been decided that the claimant would "no longer be employed as market manager at our London office". Accordingly they had flagrantly disregarded consultation rules, and this would be taken to the Parliamentary Ombudsman. Finally, it was asserted that in view of the manifest untruth of the allegations, the reason for dismissal must be age, noting that "in recent years during conversations .. you have confronted my client on several occasions with his age and questions as to whether it would be a good idea for him to consider retirement soon", and lack of agreement was met with "a facial expression signifying frustration and annoyance". She asked that Visit Denmark present evidence at a meeting, to show that departments other than London had dealt with Timgu.

<u>Further Investigation</u>

52. Annette Zerrahn was asked to investigate the specifics of this letter, but there was no meeting. Information was provided by Janne Gronkjaer Henriksen, Agnete Sylvester Jensen, Finn Larson and Helle Thomsen; the email shows that the first two had been already met her on 27 August to give the statistics. They commented on what was asserted by the claimant's lawyer, agreeing there were instructions from Vibeke Oliver and Ghita Sorensen for Ryanair, denying the others, and agreeing that the AdSense project came from head office, unless concerning the Olympics, which was on the UK budget. Finn Larsson reported that he had only been involved with the unsuccessful AdSense project (in 2011). Helle Thomsen, late in the process, filed a detailed account of the Marguerite project, saying it was under consideration when she joined, and the claimant had taken the lead with some very specific wishes as to what to do and when; it became a high priority project. At a half-yearly meeting the claimant had told her he would find some solutions for getting the route online, but he did not bring them back to her, instead informing her that they were to use Timgu, as they had worked with the office before, and could do it inexpensively. She then had the project description, and clarified some points with Alexander Kahn, not appreciating that this was finalised until as they left for Denmark the claimant told her at the security gates at Stansted that they were to go ahead with Timgu, and when she said she had not seen the prices, and did not know the price level, he had told her it was cheap and they wanted to start; it would be funded from extra money in her budget which he said was earmarked for Marguerite, and from his own. She had asserted he had already made the decision; he had replied that she will be the one to sign. She had not discussed it further because this was "one week before my probationary period ended". Later during the Denmark tour she was told that he had instructed Timgu to go ahead. She had seen no quotations; in ongoing dialogue about the detail she had remained "neutral and hesitant"; a lot of the dialogue bypassed her altogether.

<u>Dismissal</u>

53. On 30 September the respondent terminated the claimant's employment by an eleven page letter, which responded to the lawyer's arguments point by point. Did not agree that the claimant had had limited engagement with Timgu on these projects; to the contrary, the only head office initiation was in January 2011, (Foursquare) and came from the claimant's personal intervention. Even where another office was involved, the work had come through the claimant. They disagreed that Marguerite was the only example of not getting other estimates first. There was no evidence of other estimates in any project from December 2010 to date, and as for Marguerite, Helle Thomsen had never been told of any alternative supplier's figure, even verbally. He was offered sight of all accounts payments from Visit Denmark to Timgu. As for any dispute on the amounts involved, that did not relieve him from the leadership responsibility which had been abused when starting a partnership that did not follow the standard rules, and had involved "funnelling money to a company where there is a clear breach of trust (nepotism)". In any case, Helle Thomsen's detailed account showed that she had been ordered to sign the agreement so that he was not the "bearer". As for the current leadership not finding out about the collaboration until the end of 2013, that was because only then did local staff inform them. He had never discussed collaboration with his son or engaged with them. Local offices selected suppliers, and head office went with that decision. There had been no reason to suspect impropriety until Jan Olsen was informed in the autumn of 2013 of the claimant's link with Timgu, and staff unhappiness about their instruction. Jan Olsen recollected meeting the claimant's family in 2012, but not that his son owned Timgu. The Marguerite project bonus was for the creative project idea, not for any work done by Timgu; in any case, as of 21 August, Jan Olsen did not know that Timgu was working on Marguerite. The information came to him because of the "whistleblower solution" Jan Olsen had established with the finance staff on 22 January. As soon as he was informed he had investigated and then called the meeting on 27 August. As for the unfortunate out-of-office message, it had been corrected quickly, only three internal employees got it; it had since been communicated that they were discussing a restructure of the London office. It was denied that age had anything to do with the decision. Any earlier discussion about retirement was initiated by the claimant in relation to his pension status. Overall, the board was worried that the claimant had supported the relationship between Visit Denmark and Timgu for several years without considering whether it was correct to use close family and to channel money to them, or whether his actions could put Visit Denmark in a bad light in Danish media. At a minimum, he should have asked the board for consent to continue the working relationship. He should have known this, given that he was marketing director in the local office, and a former leader of Wonderful Copenhagen, with many long lasting relationships to current employees there. He should have brought the close relationship between Timgu and Visit Denmark to an immediate stop. There was reference to a recent media storm in Denmark over Wonderful Copenhagen. (This is a reference to a publicly controversial budget overspend in the organisation's budget for the Eurovision song contest in May 2014). There followed detailed arrangements for leaving with nine months' notice, to be taken on garden leave (*Fritstilet*) at the request of his lawyer, but subject to mitigation were he able to obtain alternative employment during leave.

Mitigation

54. Between November 2014 and January 2016 the claimant made eight applications for jobs in tourism, six of them in Norway and Denmark, as well as registering his CV with agencies. None resulted in any offer of employment. At the same time he and his wife started looking for a restaurant business to run in Malaga, without success. In February 2016 they started a restaurant in Denmark, renting for nine months, and then running an inn, so far at a loss.

Later Discoveries

55. The discussion of the consultation process above sets out what was known to the respondent at the date of dismissal, namely the extent of Timgu's work for Visit Denmark, whether senior managers knew about the family connection, whether other suppliers had been asked to quote, and whether the work came from the claimant, or independently within the organisation.

56. Following more detailed investigation after termination and the commencement of tribunal proceedings, the respondent concluded that the claimant was in breach of the term of his contract as to outside activities to a significant extent, given the depth and detail of his involvement in Timgu's business, and has pleaded that as evidence of conduct tending to show that any compensation for unfair dismissal should be reduced.

57. On the claimant's case, he had confined himself to fatherly advice to the start-up; he said: "I wasn't very much involved in running Timgu". In our finding the involvement went beyond that. Several of the invoices, starting from the three invoices of 13 December 2010, were prepared on the claimant's office laptop kept at his home. The claimant said this was because his laptop was also used by Alexander Kahn. He attended a board meeting on 16 December 2010.

58. In January 2012 Alexander sent his father direct (not copying the marketing manager Vineke Oliver) details of his bank account so that the December 2011 invoices could be paid. This, and the meta data suggesting later creation of invoices than the stated date, tends to reinforce the impression that these large prepayments were tailored to Visit Denmark's budget surplus, rather than any commercial assessment of anticipated invoices. (This is also the month when Alexander's younger brother Jonathan was first employed by Timgu.) According to Alexander Kahn, after Timgu's finance director left, his father worked on invoices for him from 2012 to 2014. In April 2012 company minutes showed that the claimant was to act as the unpaid chairman and visit the office once or twice a week. Challenged that this would intrude on his working time, the claimant said that he would do the meetings on the way to or from work, at 8 am and 5 pm. In June 2012, following the split from the Finnish partners, he is shown in an organisation chart as the company chairman; he was asked to advise on the first draft of the business plan. In August 2012 the claimant told Alexander that the marketing budget for Google had gone up; challenged that this was not something he would have told another supplier, the claimant disputed it but gave no examples. In September 2012 he declined an outlook calendar invitation to attend a Timgu board meeting, while at the same time emailing his son to say that he would be attending, and had only declined because "I need to get it out of my system", indicating to us that he was aware that a meeting on another company's business during his own working hours should fly under the company's radar. In October 2012 wrote a stern letter to a creditor of Timgu, who was also a business partner of Visit Denmark, saying: "as you probably know, I

am the chairman of Timgu" telling them to pay up, using his visit Denmark sign off as director, UK and Ireland. (Earlier emails show that the lead to this debtor was sent to Alexander by his father in 2010). In December 2012 the claimant gave Alexander detailed advice on his VAT returns. On 21 December 2012, tellingly, Alexander wrote his father: "I attach the two invoices, one for £2,000, one for £3,000, so take your pick" – he would not enter them officially into the accounts until he had decided which. In the event, the claimant did not take his pick, but paid both of them, and a third invoice for £1,000, so the total payment at the end of year was £6,000. In February 2013 he sent his son detailed advice on splitting off the Finnish elements of the company accounts, after being sent the accounts were sent to him direct by Timgu's accountant. He seems to have helped out with Timgu's cash flow difficulties in 2013. In October 2013 Alexander Kahn asked his father for a loan of 100,000 Danish kroner, in connection with a court case in Denmark, for repayment by May 2014. In November 2013 the claimant corresponded with Islington Council about Timgu's business rates (there was a County Court summons for non-payment). In March 2014 Timgu repaid most of the loan. We also saw that in February 2014 the claimant forwarded to Alexander Kahn an internal PowerPoint about Visit Denmark's Google AdWords marketing plan, saying it might be an idea to reach out to the new head office manager, adding that the attachment was "obviously confidential". Challenged that he was breaching company confidentiality and knew that, the claimant agreed "it looks odd". Also in 2014 the claimant gave Alexander Kahn very detailed advice about their employment practice.

59. In our finding this level of involvement well went well beyond fatherly advice to a start-up; even of it had been, we do not accept that all the help was outside working hours. Although it was suggested by the claimant's solicitor that he worked flexitime and long hours, the only evidence we had of the claimant's working time indicated he worked 9-5. In practice, if not in name, he performed the functions of company chairman, advising, often in detail on business organisation, accounts and business plan, suggesting leads, chasing debtors.

60. Further, the content of the advice included tip-offs about potential leads within Visit Denmark, and availability of budget, as well as the claimant's promotion of Timgu. It demonstrates that the relationship between Visit Denmark's London branch and Timgu was anything but arm's-length. It is most unlikely the claimant would have performed these services for any other supplier, and there was no evidence to say otherwise. The letter he sent to the creditor on behalf of Timgu (saying he was chairman) clearly overstepped the line. Nor would any other supplier have been invited to submit additional invoices at the end of the year.

61. One further matter that the respondent later investigated and now represents as misconduct is the use of the claimant's wife as a catering supplier. In our understanding she is a chef, but did not run a catering business. During 2012 she catered for a number of events for Visit Denmark, some of them relatively small, and most of them hospitality connected to the July 2012 Olympics. It appears that the claimant prepared the invoices for her; they were paid by the London offices Olympics marketing budget. He also lent his credit card to purchase catering equipment, and submitted an invoice for £2,000 consultancy fee, which is over and above the invoices submitted the particular events. No other caterer seems

to have been contacted; it was suggested by the claimant, without detail, that Visit Denmark had been let down by an alternative caterer three weeks out. The respondent does not object to her catering particular events, and knew of it at the time, but it does object to the additional consultancy fee, which they view as another way of diverting Visit Denmark budget to the claimant's family. We had no evidence from Mrs Kahn, and the evidence about the credit card damaged the suggestion that the £2,000 was to buy catering equipment.

Relevant Law

62. The Equality Act 2010 at section 13 provides that "a person (A) discriminates against another (B) if, because of a protected characteristic, a treats be less favourably than a treats or would treat others". Age is a protected characteristic.

63. The word "because" requires the tribunal to examine the reason why an employer acted as he did, and whether the protected characteristic had "a significant influence on the outcome" – **Nagarajan v London Regional Transport (2001) AC 501**.

64. Because people rarely admit to discriminating, may not intend to discriminate, and may not even be conscious that they are discriminating, the Equality Act provides a special burden of proof. Section 136 provides:

> "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

65. How this is to operate is discussed in **Igen v Wong (2005) ICR 931**. The burden of proof is on the claimant. Evidence of discrimination is unusual, and the tribunal can draw inferences from facts. If inferences tending to show discrimination can be drawn, it is for the respondent to prove that he did not discriminate, including that the treatment is "in no sense whatsoever" because of the protected characteristic. Tribunals are to bear in mind that many of the facts require to prove any explanation are in the hands of the respondent.

Unfair Dismissal

66. Unfair dismissal is a statutory right. By section 98 of the Employment Rights Act 1996, it is for the employer to show that the reason for dismissal was a potentially fair reason. Section 98 (1) includes as potentially fair reason is a dismissal for conduct. An employer may also potentially dismiss fairly for: "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held".

67. If a potentially fair reason is shown, section 98 (4) provides that it is the employment tribunal to determine:
"whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—"

(which)

(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".

68. In conduct dismissals tribunals have regard to **British Home Stores v Burchell (1978) IR 379**. We must consider whether the employer had a genuine belief that the employee was responsible for the misconduct, whether the employer had reasonable grounds on which to base that belief, and whether at the time the employer form that belief it had carried out as much investigation as is reasonable in all the circumstances. The tribunal was only take into account what was known to the employer at the time of dismissal – **W. Devis & Son v Atkins (1977) AC 931**. It must consider the facts known to the decision-maker, even if other facts were known within the organisation, but not within the group of people responsible for the investigation – **Royal Mail Ltd v Jhuti (2019) UKSC 55.** The tribunal must not substitute its own view for that of the employer, provided the employer's action was within the range of responses of a reasonable employer, and this principle applies both to findings on whether the decision itself was reasonable, and on whether the process adopted was reasonable – **Foley v Post Office (2000) IR LR 82,** and **Sainsbury's Supermarkets Ltd v Hitt (2002) EWCA Civ 1588.**

69. On procedure, where an employer makes a mistake about the law when deciding to dismiss, we should consider whether it is reasonable having regard to equity and the substantial merits of the case that the employee should bear the consequences of the employer getting the law wrong, even if the employer's mistake was not unreasonable **– Eversheds Legal Services Ltd v de Belin (2011) ICR 1137.** It has been held that where an employer follows the procedure agreed with the unions, it is hard for an employee to establish that this was inadequate or failed to meet the standards of the ACAS code of practice **– East Hertfordshire District Council v Boyton (1977) IRLR 347.** In such cases tribunals must not forget that they have to decide whether the employer acted reasonably.

70. Where a dismissal is found unfair because of shortcomings in the process by which the decision was reached, when it comes to remedy, the tribunal can consider what difference a fair procedure would have made to the outcome – **Polkey v AE Dayton Services Ltd (1988) AC 344**.

71. As noted, the tribunal must decide whether the employer acted reasonably unreasonably in dismissing having regard to what that employer knew at the time. Where an employer discovers wrongdoing after the dismissal, there is provision for a tribunal to reduce the basic award by virtue of section 122 (2) of the Employment Rights Act. The conduct may not have contributed to dismissal, nor need the employer have known about it at the time, for the tribunal to exercise its discretion to reduce the award such that it will be just and equitable to do so.

72. There is also provision to reduce the compensatory award, by section 123 (6) of the Employment Rights Act where the tribunal finds that the dismissal "was to any extent caused or contributed to by any action of the complainant". In such circumstances it must reduce it "by such proportion as it considers just and equitable". When doing so it must consider four questions: what was the conduct said to be contributory fault; irrespective of the employer's view, was that conduct blameworthy; did that blameworthy conduct cause or contribute to the dismissal; if yes, to what extent is it just and equitable to reduce the award - **Steen v ASP Packaging Ltd (2014) ICR 56.**

73. Finally, on compensation, where the employer has failed to follow the ACAS Code of Practiceo discipline and grievance, and the tribunal considers that failure unreasonable it may, if it is just and equitable, increase the compensation otherwise payable by up to 25% – section 207A Trade Union and Labour Relations (Consolidation) Act 1992.

Discussion and conclusion - Reason for dismissal

74. The tribunal finds that the respondent's reason for dismissal was a genuine belief that the claimant was guilty of misconduct both in using his son's business as a supplier without referring the conflict of interest to the CEO or the board, and in defying the verbal instruction to stop using Timgu.

Age Discrimination

75. We considered the extent to which this decision was influenced by the claimants age, given that sometimes employers will seize on some event as an excuse for what is at base a discriminatory decision. There is no named comparator. What facts have been shown?

76. The claimant was 61 at dismissal, and intended to retire at 65. The respondent had no plans for his succession in 2014, and he was not replaced until 2016, by a man aged 50.

77. Jan Olsen was five years younger than the claimant. At the time of dismissal the German country manager was two years older than the claimant, the head of IT Finn Larsson was a year older, as was the design manager for digital media, and the head office marketing manager. An employee in the Hamburg office was two years younger. The financial controller in New York was five years older than him.

78. Jan Olsen conceded that he would from time to time refer to people in their age group, including himself, as "digital immigrants", a variation on the usual term "digital natives", meaning people who grew up using IT, as against those who have had to learn these skills in adult life. He had never suggested that the claimant was at sea in the use of IT or online marketing. We note that at head office senior positions in IT are occupied by people in their 60s. There is no reason to believe Jan Olsen wanted to replace the claimant with someone younger.

79. The claimant relies on hostile remarks during the appraisals, indicating that he should retire. In the tribunal's finding, it was the claimant himself who raised the retirement issue, as shown by emails he sent on 2 April 2012, and another on 5

April 2013, asking about his entitlement to a Danish pension, given his service overseas. Both met with positive and businesslike replies from HR. It cannot be said that merely mentioning retirement in the appraisal interview for one in his age group indicates discrimination. It is reasonable for an employer who understands that an individual is considering his retirement provision to enquire about his intentions, so as to consider succession where necessary. Significantly, it was not put to Mr Olsen that he had wanted the claimant to leave before 65, or displayed any hostility to the claimant in discussion of plans. We do not accept there was any hostility. The claimant has not proved any facts from which we could conclude age was the reason for dismissal.

80. We have concluded that the claimant's age played no part whatsoever in the decision to dismiss him when the Marguerite project came to Mr Olsen's attention in August 2014. The use of family without seeking authority, and defiance of the instruction, were the reason for dismissal. The age discrimination claim does not succeed.

Discussion and Conclusion – Fairness of Dismissal

81. The process adopted did not meet English standards of fairness. The claimant did not see the documents or emails containing evidence against him, there was no hearing where he could put his case or submit contrary evidence, and there was no appeal.

82. As well as that, the timetable set out in the consultation letter indicates a decision had already been made unless he could persuade them otherwise, and that he would not be heard (or read) with an open mind. The out of office suggests that the staff member asked to set it had been led to believe the decision was final – after all this is what senior managers were being told - even if Mr Olsen intended something more nuanced for public consumption at that stage. Further, whatever the intention, the effect was to burn their boats.

83. Evidently the respondent acted under a Danish statutory procedure, inviting comment before making a decision. We do not know if the statute includes giving the employee documents, but the letter was very full, and it seemed to us that they did treat the employee response seriously and investigated conscientiously.

84. Why was the Danish procedure used, when in fact the respondent's London handbook contained what would be considered a fair procedure in England? The point was not explored, so we do not know if this was oversight – Copenhagen HR and legal advisers did not know about it – or by intention, having regard to the respondent's view on sovereign immunity. Nor do we know why the claimant did not protest. As the senior person in London he might have known about it. Probably he instructed a Danish lawyer, given the respondent's statement stated reliance on the Public Administration Act procedure, who could not have known of English employment law, with the result that both sides saw the termination consultation process through the prism of Danish law.

85. We are invited by the respondent to find that a mistake as to applicable law (**de Belin**) did not render the dismissal unfair, viewed as a whole, alternatively, that they used an established procedure (**Boyton**) and it would have been too difficult to discard it and use another. The latter argument does not deal with the problem that they *did* have an established (and fair) procedure in the handbook, but whether by accident or design chose not to use it. The former argument is more attractive, given that there may have been a mistake of law as to whether the Danish procedure applied, given the contract term as to Danish law, and the fact that state immunity was believed to apply. (In September 2014 the EAT decision in **Benkharbouche** had been given a year before, and the Court of Appeal judgment was February 2015, though there is no reason to think the respondent was aware of either.) The Danish procedure allows some opportunity to the employee to challenge the case against him, though without access to evidence or the opportunity of appeal, and although a hearing was offered, for some reason it did not happen. In **de Belin**, the employer's mistake concerned how to treat equally in the redundancy selection process the comparator employee who was on maternity leave, here the mistake is harder to understand when the reason for not using their own London procedure is unknown. Viewed in the round, it was not fair to dismiss an employee without access to the evidence, only a statement of it, without a hearing, and without any appeal. The respondent suggested the claimant could have sought judicial review in Denmark, but there is no reason to hold that this would address the substance of the decision when as far as is known the process followed Danish procedure. The mistake was also of a different character. It is not asserted that the Danish process was deliberately chosen in preference to the London handbook procedure. It may simply have been overlooked by both sides, and the claimant might be excused from noticing when he was working to a tight timetable and no longer had access to the respondent's systems and materials, while the respondent did have that access.

86. We conclude the dismissal was unfair in the process adopted. We do however find that the respondent carried out a conscientious investigation both initially and to examine the claimant's did not dislodge their belief in misconduct. Indeed the claimant's insistence that the respondent had known of the link with Timgu for some years suggested he accepted approval was needed, and reinforced their belief that his judgment was unsound.

87. We also hold that dismissal for such conduct was within the range of reasonable responses. The claimant and Jan Olsen shared a common culture in Danish public employment. There was a clear rule that potential conflicts of interest of the employee and his family with the respondent's interest must be referred elsewhere. The claimant's: "I thought we were more private than that", indicated to us he knew the rule. A more junior employee might have been given a reprimand and a warning. The claimant however was in charge, he had leaned on his staff to accept the arrangement, and his response to the accusation was to suggest that Timgu was a generally accepted supplier, when all the evidence – which they had investigated and – showed that this was untrue, and that Timgu was only used because introduced and promoted by the claimant. He should have known better, and his evasive response confirmed that. This was quite apart from not heeding the specific instruction six months earlier to stop using them.

Remedy

88. Having found the dismissal unfair for want of process, we consider what difference it would have made had the respondent followed its London process. In our view the outcome of a fair process would have been the same. The claimant has now had full disclosure of documents and sight of the respondent's evidence. He has had a fuller hearing before this tribunal than might have taken place under procedure. Having heard all the evidence on the matters he was dismissed for, we anticipate a reasonable employer hearing his case following disclosure of the evidence , and hearing any appeal, would have concluded (1) that he did know that he should not have used Timgu as a supplier without explicit permission as there was a conflict of interest, (2) that he did not seek permission to send them work, only to offer his son advice on setting up his business, (3) that he knew that almost all work for Timgu (Adsense aside, which ended without credit to Timgu) originated through him, and that at least from 2011 work was not sent to Timgu other than through the claimant, whatever name was on the paperwork, or whatever impression he tried to create that work came from head office and other branches independently of the claimant. Most employers would have viewed very seriously the by-passing of the staff supposed to be originating the supply of work (as Helle Thomsen was) as an abuse of their power and independence of effective oversight, and any reasonable employer could have dismissed him for disobeying without excuse an earlier instruction to stop using them. It might be argued that by giving the claimant notice the respondent indicated that his conduct was not serious – the contract provided for summary dismissal – but the respondent's explanation was that the board recognised his long and otherwise satisfactory service, while no longer feeling able to employ him in a position of trust.

89. Had there been a fair process, in our finding that would have delayed the dismissal by at most a month. We can see that the respondent could and did act swiftly when presented with material to investigate and when they had a decision to make. They would have held a hearing within the consultation period, investigated when they did, and if they had already used all available personnel from the board, could have found an independent person to hear an appeal – someone from the embassy perhaps, or a Danish professional living in London or Copenhagen.

Reduction of Awards?

90. We turn to consider the respondent's argument that the basic or compensatory award should be reduced.

Compensatory Award

91. In relation to the matter for which the claimant was dismissed, and whether any conduct contributed to the dismissal, we consider whether the claimant knew what he was doing was wrong, and whether, given the claimant's assertion that the respondent already knew Timgu was a supplier connected him, he could conclude from their behaviour that he was doing nothing wrong.

92. As noted, there is some doubt that the Danish Public Administration Act was referenced in the contract documents, and it is not mentioned in the wide-ranging handbook. There is a modern practice of spelling out every principle and misdemeanour in a code, policy or mission statement which in conflict of interest matters has intensified with American legislation on bribery and its very long reach, but that does not mean employees need only beware of what is written down. In our finding, anyone who works for a company they do not own, in the private sector as much as when publicly funded, knows that they must be faithful and fair and not use the company as an opportunity for their own financial advantage. They should also be aware that their judgment may be impaired when there is a potential conflict and should not themselves be the judges of what is proper. It is not necessary to tell employees they should not put their hands in the till, or favour their families, in order to dismiss them (fairly) for doing that. These are implied terms. Explicit codes are only needed if there is an unusual feature (the seriousness of breaching a smoking ban in a munitions factory for example) or the employer has decided no longer to tolerate behavior previously tolerated. We add that the fact that his own staff were unhappy about it shows that even if they could not have cited the Act, they knew what he was doing was wrong.

93. Apart from this, the claimant had worked in Danish public service before the 2010 Act, and will have known of the need to report and step aside if his family interest was concerned. He no reason to believe the position was otherwise after 2010, and if he was in doubt he did not try to check. In our finding he did know he should have reported the use of Timgu for paid work, and that seeking permission for fatherly advice did not cover instructing them to work for Visit Denmark, let alone favouring them with prepayments. His attempt to create the (false) impression that Timgu was an existing and recognised supplier used across the organisation independently of London shows he knew he had to disguise his role as their promoter. He was not able to show that competing quotes had been obtained, as would have occurred with any other supplier. It may be the case that Timgu were cheaper than competitors, and it is not shown they did not earn all the money (the point has not been investigated), but he was not dismissed for that, but for breaking the rules, favouring his family, and concealing the position. He has not explained why he should seek permission to advise his son, but not seek permission to give them work. He also knew there was public scrutiny of the use of public funds, both from the 2009 affair (even though before the Visit Denmark Act) and from the more recent outcry about the use of funds by Wonderful Copenhagen, of which he must have been aware as a former employee, and that this could damage the respondent's reputation.

94. Of the claimant's argument that it was "obvious" that he was connected with Timgu, so removing the need for Executive Board approval, there is no good reason for thinking anyone outside London knew of the connection, while his own staff disapproved, but kept their heads down. (Our reading of Jan Olsen being informed late in 2013, and the claimant not making an end of year prepayment at that time is that Vibeke Oliver objected, such that only when she had left did he involve Timgu again). The claimant relied on the 2012 meeting of Jan Olsen and Alexander Kahn. In our finding this is flimsy cover. There is no reason why a CEO on a meet and greet should know that this was a paid supplier, or remember the name of the son's business. It was also suggested that any impropriety would have been picked up on audit. Our understanding is that auditors sample invoices for a deeper look. The invoices may never have been sampled. If they had, not all had the claimant's name on them, even where in practice he had instigated the use of Timgu. We concluded the claimant had been lulled by the passage of time into confusing what was wrong with what he

could get away with, and at best had persuaded himself the practice was permitted because it had lasted more than three years. We do not however accept that he genuinely believed there was nothing wrong with what he was doing.

95. The other element of conduct we need to consider is abuse of his position as London Manager to get his staff's name on the invoices from time to time, to pressure Helle Thomsen to take a done deal, and more generally to set a very bad example to his staff of proper standards when a leader should lead by example.

96. We conclude that the conduct was serious, given his seniority, and blameworthy. It also caused and contributed to the dismissal. There was no other cause. It might be said that the respondent relied heavily in disobedience to the instruction, but we find that the instruction was issued on discovery of and in response to the claimant's existing poor conduct; he was lucky to be given the benefit of the doubt by a private conversation and the prospect of a clean slate if he stopped using Timgu. In many organisations there would have been disciplinary proceedings at that point. We concluded that it is just and equitable to reduce the compensatory award (one month's pay) by 100%.

Basic Award

97. On the basic award, which would otherwise be 22.5 weeks pay, we can take account of later discovered conduct. What has been uncovered after dismissal is a serious and prolonged breach of the requirement not to be engaged in other business, and even more seriously, the active role taken by the claimant in a business his employer used, in a way that gave them a financial advantage. It is natural for parents to want to help their children, but he used his position to help in a way which he must have known his employer would not have countenanced. His prepayments of substantial sums (compared to the value of most invoices) gave his son significant and no-cost help with cash flow, always the most difficult problem for a start-up. He tipped them off on leads and budgets. He used his position in Visit Denmark to prevail on a creditor for them. There was clear collusion in the creation of invoices, and he decided to pay sums without regard, it seems, to what work they were for and what that work amounted to. The consultancy fee for his wife was opportunistic, not a charge she would have made without his knowledge there was a bit more in his budget.

98. What the respondent had discovered at dismissal was but the tip of the iceberg. In our finding the claimant's use of his position to assist his family's interests was dishonest, and he knew it should be concealed. In deciding to what extent the basic award should be reduced we also took into account the fact that he had some opportunity in the procedure adopted to put his case, and have it investigated, and secondly, that he was given the benefit of the doubt in view of long service and paid a full nine months' notice, which we doubt would have been paid if the board had known the full story. Taking these factors into account we concluded that this was one of the unusual cases where it is just and equitable to reduce the basic award by 100%.

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Employment Judge Goodman

Date: 16/03/2021

JUDGMENT and REASONS SENT to the PARTIES ON

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17/03/2021.

FOR THE TRIBUNAL OFFICE