THE EMPLOYMENT TRIBUNALS

Claimant: **Mr L Haughton**

Respondent: **Clancy Docwra Limited**

Heard at: **Newcastle Hearing Centre** **On: 1st, 2nd, 3rd & 4th February 2021**
Deliberations: 24th February 2021

Before: **Employment Judge Speker OBE DL**

Members: **Mrs Lynn Jackson**
Ms Emma Wyles

Representation:

Claimant: **Mr Richard Owen (Consultant)**
Respondent: **Mr Paul Sangha of Counsel**

RESERVED JUDGMENT

The unanimous decision of the tribunal is as follows:

1. The claimant was unfairly dismissed.

2. No compensation is awarded. The tribunal finds that if a fair procedure had been followed the claimant would still have lost his employment.

3. The claim of automatic unfair dismissal for health and safety reasons is dismissed.

4. The claim for protection from suffering detriment in employment in health and safety cases is dismissed.

5. The claim for damages for breach of contract is dismissed.

REASONS

Background

1. The claimant, Liam Haughton has brought claims to the tribunal alleging unfair dismissal, breach of contract, automatic unfair dismissal on health and safety grounds and having suffered a detriment in employment with respect to health and safety issues. The issues were set out in a case summary by Employment Judge Shore at a preliminary hearing on 17th February 2020 which were supplemented by further issues in relation to the case put forward as to the claimant having suffered detriment in relation to protected disclosures.

2. This case was heard remotely by Cloud Video Platform (CVP) because of the Covid 19 pandemic. All of the parties, witnesses and representatives participated remotely as did the non-legal members.

3. The tribunal heard oral evidence from four witnesses on behalf of the respondent as follows:

   3.1 Roland Thomas, Security and Internal Investigations Manager (who carried out the investigation)

   3.2 Dhermin Mistry, HR Business Partner

   3.3 Lee Cuthbert, Associate Director NPG (Northern Powergrid) who dealt with the claimant's grievance

   3.4 Roger Culley, Associate Director and the claimant's line manager, who dealt with the disciplinary hearing and made the decision to dismiss

   3.5 Jim Davey, Executive Director who heard the claimant's appeal

4. For the claimant, Mr Haughton gave evidence on his own behalf and called the following witnesses:-

   4.1 Paul Eadington, a former employee with the respondent

   4.2 Judith Haughton, the claimant's wife

   4.3 Sarah McGow – who did not give oral evidence but her written statement was read

   In addition the tribunal was provided with a bundle of documents running to more than 1,402 pages with other documents added as the case proceeded. The case had been listed for four days. It was agreed by both sides that the first morning should be utilised by the tribunal reading essential documentation from a reading list which included the pleadings, previous orders, witness statements and relevant documents referred to including the transcript of the disciplinary hearing, the outcome letter and documents with respect to the claimant's grievance.

Findings of fact

5. The tribunal found the following facts:

5.1 The respondent is a substantial privately-owned construction company in the UK with a workforce of approximately two thousand. They have a number of offices including those in Sunderland and South Shields.

5.2 The claimant commenced employment with the respondent on 28th February 2010 as a contract manager in the multi-utility (MU) business unit. The claimant operated out of the Sunderland office.

5.3 The claimant was well-regarded for his work, knowledge and expertise and had no disciplinary record.

5.4 In the last two years of the claimant's employment there had been a number of changes in the company including rounds of redundancies and various departures and appointments.

5.5 In March 2018 the claimant was asked to chair a redundancy consultation process leading to a decision to make an employee Abbey Gellately redundant. The claimant undertook that role although Abbey Gellately was not in his department and he was not her line manager. She was given a letter of redundancy which the claimant signed as the manager chairing the meeting.

5.6 An issue arose between the claimant and Dhermin Mistry of HR relating to the claimant not having attended for management training which had been arranged for him and colleagues. There was some acrimonious exchange regarding the fact that the claimant had not attended and had not sent any explanation or apologies. The claimant protested at feeling he was being instructed to attend training by HR and in particular by Mr Mistry.

5.7 In November 2018 one of the claimant's team namely Sarah McGow raised a query as to changing her hours because of her pregnancy. Representations were made and the matter was the subject of an exchange of e-mails between relevant management including the claimant. The claimant himself wished to challenge the way in which the employee was being treated. He then copied Sarah McGow into the e-mail exchanges which had taken place between members of the management team of the company. That correspondence subsequently was referred to an employment tribunal claim issued by Sarah McGow in February 2019.

5.8 Towards the end of 2018 and taking into account financial results of the company, managers were asked to consider any proposals which could be put forward in order to save money for the respondent. The claimant prepared a business proposal under which the signing off of utility work could be sub-contracted to a company Podrig Limited of which he was a director. He put this forward to the directors of the company for consideration at the beginning of 2019.

5.9 In January 2019 Roger Culley who had previously been general manager on the respondent's Thames Water business unit was promoted and appointed to the role of associate director for the respondent's multi-utility England

(MU) business unit. In that role he became the claimant's line manager, Mr Haughton being one of four contract managers who reported directly to Mr Culley. The claimant and Mr Culley had been acquainted as colleagues in 2013 when Mr Culley was based in the Haydock offices and the claimant was in the Sunderland office.

5.10 Monthly BPPM meetings were held by management which were attended by the claimant. Such meetings took place at the Leeds regional office on 24th January 2019 and 21st February 2019. Roger Culley and the claimant attended both of these. Issues were raised with regard to the need for competencies to be in order with regard to employees carrying out relevant tasks and it was repeated in the February minutes that monthly competency checks for each gang must be completed each month for all gangs. The claimant considered that he received unfavourable treatment and was humiliated in certain respects by attitudes towards him at these meetings.

5.11 In February 2019 the claimant discussed with Roger Culley the business proposal which he had put forward and in particular there was discussion with regard to whether the proposal would involve a payment being made by the respondent to the claimant. No agreement was reached as to that issue and it was made clear to the claimant that the business proposal could not proceed. The day after that meeting took place and shortly after the BPPM meeting the claimant went "on the sick" and continued on the sick until his employment was terminated.

5.12 The day before he went on the sick the claimant had also been made aware in an e-mail that Peter Gellately, a former colleague of his at the respondent and whose daughter had been the employee Abbey Gellately on whose redundancy consultation the claimant had been the chair, had indicated that he bore a grievance against the claimant about his part in the redundancy, and that these e-mails were something which the claimant described as being sufficient to push him over the edge.

5.13 On 7th March the claimant was invited to attend a welfare meeting with Roger Culley to explore the issues relating to the claimant being absent and what could be done to enable his return to work and also to establish whether there were stress-causing factors with regard to the claimant's work. Alan Brunsden, Roger Culley's predecessor, had also spoken to the claimant on a welfare basis. There followed a number of exchanges whereby Roger Culley and Dhermin Mistry endeavoured to engage with the claimant and the claimant indicated he did not wish or intend to meet with Roger Culley.

5.14 On 14th March 2019 the respondent received notification of a tribunal application which had been issued by Sarah McGow in relation to treatment of her by the company in relation to her pregnancy. In the tribunal papers reference was made to disclosure to her of e-mails which had passed between members of senior management including comments made by the claimant. This was referred to Roland Thomas, Security and Internal Investigations Manager, who was requested to undertake a search of the claimant's e-mails over a certain period. The issue was communicated to

Roger Culley who instructed Dhermin Ministry not to progress the matter at that time as Roger Culley wished to focus on welfare issues and engaging the claimant's return to work.

5.15 The claimant was then invited to a further welfare meeting for 21st March 2019. The claimant wrote to Liz Stokes, Associate HR Director for the respondent, on 20th March raising issues as to his treatment whilst sick and in particular stating that he did not wish to speak to Roger Culley or Dhermin Mistry but would be happy to speak to someone other than them as to his health and well-being and he maintained that the two individuals had triggered his health situation. Liz Stokes responded to the effect that the claimant had a responsibility to engage with his Roger Cullen as his line manager. Liz Stokes advised that Roger Culley and Dhermin Mistry should continue to be involved.

5.16 A welfare meeting was rescheduled for 9th April 2019 and that welfare meeting took place. Following this the claimant wrote to Ms Stokes during which he stated "I want to thank Roger for taking time out of his busy schedule to call me to see how I was doing". The claimant maintained that there were inaccuracies with regard to the notes taken of the welfare meeting and he drew these to the attention of Ms Stokes and asked her to help in restoring the damage which he said had been caused to him. The claimant had taken issue with regard to the letter of invitation had drawn the claimant's attention to the potential expiry of his sick pay or the withdrawal of his sick pay if he did not co-operate.

5.17 Throughout the period when welfare meetings were taking place, the claimant raised issues with Liz Stokes about Roger Culley and Dhermin Mistry and her advice at each stage was that the claimant should continue to discuss matters with them and they with him.

5.18 During the welfare meeting on 8th May the claimant had objected strenuously to Dhermin Mistry being present. Roger Culley had confirmed that the attendance was in an advisory note-taking capacity. Attempts were made during the meeting to engage with regard to the issues of the claimant's absence and steps which could be taken to secure his return to work. At the end of the meeting Mr Culley had a without prejudice conversation with the claimant explaining that there were four possible ways in which the claimant's absence from work could conclude namely return to work in the same or alternative role, an attempt at return to work, consideration of termination on the grounds of ill health or if the claimant chose he could resign.

5.19 Following the above meeting the claimant wrote to Liz Stokes with his account of the meeting claiming he was being let down.

5.20 On 7th June Roger Culley reviewed the investigatory matter which had been put on hold when communicated to him on 14th March 2019. He invited the claimant to attend an investigatory meeting with Roland Thomas and agreed

the claimant's request that this could be held remotely by telephone. in the event it was postponed.

5.21 On 14th June 2019 the claimant raised a formal grievance in a letter sent to Liz Stokes in which he referred to past conduct on the part of Dhermin Mistry. It was communicated that the investigation and grievance would run concurrently.

5.22 On 14th June 2019 in a telephone conversation Roland Thomas conducted an investigatory interview with the claimant. Dhermin Mistry was present to take notes. Allegations were put to the claimant with regard to his activities regarding communication of e-mails and sending e-mails to other addresses. As the claimant was uncertain as to the e-mails it was suggested that there be a face-to-face meeting. Roland Thomas offered that this could be at the Sunderland or Seaham offices but the claimant wished this to be elsewhere. Arrangements were made for it to be at the Hylton Gate Hotel on Wednesday 19th June. The claimant was given the opportunity of looking at the e-mails and giving his explanation. The claimant's response was "you're trying to stitch me up. I've done nothing wrong." As a result of the interview Roland Thomas prepared a detailed investigation report dated 20th June 2019 with appendices containing relevant evidence. His recommendation was that management proceed to a disciplinary hearing. It was suggested that the claimant's conduct could amount to gross misconduct with regard to disclosing confidential e-mail communications and passing sensitive material to e-mail addresses out of the company. The claimant did not say that he had received permission to deal with the e-mails as he had.

5.23 The claimant was invited to a grievance hearing to take place on 24th June and he received a separate invitation letter to attend a disciplinary hearing on 25th June.

5.24 The claimant indicated that he was unable to attend the disciplinary hearing on 25th June. He also suggested changes regarding the notes of the investigation. Following this Liz Stokes had engagement with the claimant including without prejudice discussions.

5.25 On 30th July the claimant was invited by Roland Thomas to attend a disciplinary hearing on 8th August. Liz Stokes invited the claimant on the same date to attend a grievance hearing on 6th August 2019.

5.26 On 6th August the claimant attended at the offices for the grievance hearing which did not take place because Lee Cuthbert who was to undertake the grievance hearing believed that it would not occur because he was under the impression that settlement terms had been agreed between the claimant and the respondent. The claimant communicated to Liz Stokes in writing on 6th August expressing disappointment that the grievance hearing had not taken place but stating that he would not be attending the disciplinary hearing on 8th August. On 7th August Liz Stokes informed the claimant that if he did not attend on 8th August then the hearing would proceed in his absence.

5.27 On 8th August the claimant failed to attend the disciplinary hearing and it proceeded. Roger Culley reviewed the allegations set out in the investigation report and the material provided with it and he decided that the claimant was guilty of gross misconduct and would be summarily dismissed. On 8th August Roger Culley wrote to the claimant setting out the reasons for the dismissal:

(i) findings of disclosure and dissemination of confidential information to a junior employee (Sarah McGow)

(ii) disclosure and dissemination of confidential information to a third party (the Claimant's wife's e-mail address)

(iii) improper conduct during the course of investigatory process (dishonesty) and

(iv) breach of trust and confidence relating to a misplaced loyalty to Sarah McGow and not acting in the best interests of the company.

Also on 8th August Lee Cuthbert wrote to the claimant stating that he had considered the claimant's grievance points and had not upheld them.

5.28 The claimant was informed of his right of appeal and he appealed in writing. The appeal was heard by Jim Davey, Executive Director on 17th September 2019. The appeal was not upheld. The outcome was communicated to the claimant by letter of 18th October 2019. The claimant also appealed against the grievance outcome and although a date was set for this to be heard, no appeal hearing took place. The respondent continued to offer the grievance appeal hearing into February 2020.

The Law

Unfair dismissal – Section 98 (1) and Section 98 (4) Employment Rights Act 1996

Section 98 - General

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show--

(a) the reason (or, if more than one, the principal reason) for the dismissal, and
(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)--

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
(b) shall be determined in accordance with equity and the substantial merits of the case.

Protected disclosures – Section 47B of the Employment Rights Act

(1) A worker has the right not be subjected to any detriment by any act or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(1A) A worker ("W") has the right not be subjected to any detriment by any act or any deliberate failure to act, done-

(a) by another worker of W's employer in the course of that other worker's employment, or
(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

Protected disclosure – Section 103A of the Employment Rights Act

An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

Cases

British Homes Stores v Burchell 1978 IRLR379 EAT
Iceland Frozen Foods Limited v Jones 1982 IRLR439 EAT
HSBC Bank Plc (formerly Midland Bank Plc) v Madden 2000 IRLR27 CA
Kuzel v Roache Products Limited 2008 IRLR530 CA
Polkey v AE Dayton Services Limited 1987 IRLR503 HL
Retarded Children's Age Society v Day 1978 IRLR128 CA

Submissions

6. Both advocates provided the tribunal with detailed written submissions.

7. On behalf of the respondent Mr Sangha dealt extensively with the evidence provided to the tribunal commenting upon issues and challenges raised by the claimant and the various heads of claim. He submitted that there was no substance in the whistle-blowing elements put forward by the claimant. He argued that Dhermin Mistry and Roger Culley had been motivated only by exploring welfare in the claimant's interests. He submitted that it was reasonable for the disciplinary

hearing to proceed in the claimant's absence bearing in mind the history and the opportunities given to the claimant to attend. He also submitted that there was nothing unfair in continuing to have Roger Culley and Dhermin Mistry involved despite the claimant having submitted a grievance.

8. He further submitted that the investigation of the offences leading to the disciplinary hearing was thorough and objective and that there was appropriate material upon which to find that the claimant was guilty of the misconduct alleged and that there had been a sufficient investigation by Mr Thomas. He argued that the decision to dismiss was in the band of reasonable responses open to a reasonable employer in all of the circumstances. He disputed that there was any basis for the claims put forward by the claimant as to health and safety issues.

9. On behalf of the claimant, Mr Owen argued that the dismissal was procedurally and substantively unfair. He suggested that there were protected disclosures with regard to health and safety issues. These related to the Sarah McGow pregnancy, failure to complete staff competencies, the removal of Steve Taggart in a supervisory capacity. There were genuine concerns on the part of the claimant which he expressed in the interests of employees and the company and he submitted that it was the disclosures which were the principal reason for the claimant having been dismissed. He suggested to Dhermin Mistry and Roger Culley had taken exception to the claimant raising these issues and that this was compounded by the receipt of Sarah McGow's employment tribunal claim documents. Reference was made to a statement made by the claimant during his appeal meeting where he stated "I whistle-blew and I have been victimised for it. I did a protected act doing the right thing. Nothing was done and Dhermin has been out to get me ever since".

10. With regard to the unfair dismissal claim Mr Owen suggested that Dhermin Mistry had taken exception to the claimant's concerns about the Abbey Gellately redundancy situation as well as the claimant's responses regarding the training session which he did not attend. Dhermin Mistry and Roger Culley were clearly aware of the claimant's strong views about them being involved with him and that he felt they had not treated him fairly between February and June 2019 in the welfare meetings and that had exacerbated his stress levels. The claimant had specifically asked to have a meeting with Alan Brunsden instead of Roger Culley and this was shortly before Alan Brunsden left the company.

11. Furthermore it was submitted that Roger Culley had known that the claimant was considering leaving the company at the time he put forward the business proposal but that Mr Culley was wrong to suggest that the claimant was looking for a large payment in relation to the business proposal. It was further suggested that the rejection of the proposal may have been a trigger for the claimant's sickness absence although it was submitted on behalf of the claimant that it was Roger Culley's behaviour at the BPPM meeting on 21st February which was in fact the trigger. Mr Owen submitted that Roger Culley and Dhermin Mistry because of these matters had a desire and motive to dismiss the claimant. In proceeding with the investigation and disciplinary they were aware from what the claimant had said that he was unwell, had problems with his mental health and was off work with a stress-related illness.

12. Finally it was submitted that it was unfair for the disciplinary hearing to proceed in the claimant's absence bearing in mind what was known about him and that it should have been adjourned and that it should have been conducted by someone other than Roger Culley and Dhermin Mistry. It was submitted that the claimant had not been guilty of gross misconduct but that in any event regard should have been had to corroborative evidence from Paul Eadington to which the claimant made reference at his appeal and that the company should have taken into account mitigating factors and imposed if at all a lesser sanction such as a warning with an instruction to the claimant to cease sending company e-mails to his wife's address. Both Mr Owen and Mr Sangha made submissions with regard to Polkey.

Findings

13. This was a complex case involving a detailed chronology and many events going back into the two years prior to dismissal. The claimant was submitting that the reason that he had been dismissed was in respect of health and safety issues which he had raised in a responsible manner from his considerable experience of the industry and of the company.

14. The tribunal noted that this was not being argued as a case of dismissal on the grounds of ill health or incapacity. However, there was a considerable amount of evidence with regard to the claimant's absence from work from 23rd February 2019 and how this was managed. These issues, although not central to the case being advanced, were relevant as part of the circumstances to be looked at by the tribunal within the statutory definition of unfair dismissal in Section 98 (4) of the Employment Rights Act 1996. It was of significance that the claimant stated that whilst he had had a successful career with the respondent, the last two years of that employment were stressful and unhappy for him. It is of relevance in this context to take note of the fact that Mr Roger Culley only became the claimant's line manager in January 2019 and therefore had no involvement in the issues about which the tribunal heard during the previous two years although Mr Dhermin Mistry the HR business partner did have involvement. One issue concerned the fact that Dhermin Mistry had arranged training for managers such as Mr Haughton but the claimant had chosen not to attend that training or send any apology. When he was challenged about this in a manner which appeared not to be inappropriate, the claimant expressed disapproval of this and he felt that the matter was held against him by Dhermin Mistry; certainly, the claimant was unhappy at Mr Mistry's actions in seeking to secure Mr Haughton's involvement in that training. In relation to other matters which occurred, the tribunal could not see anything adverse in relation to Mr Mistry seeking to arrange such training for managers particularly bearing in mind the role in which managers such as Mr Haughton would be expected to be involved.

15. Another issue which occurred was the redundancy of Abbey Gellately. Her father had been a colleague of the claimant within the respondent company. The claimant was not Abbey Gellately's line manager but he was requested by Dhermin Mistry to chair the redundancy consultation meeting because Abbey Gellately's manager was located elsewhere in the country. It was explained that it was not unusual for managers to undertake this role at redundancy meetings. It was clear that the claimant was reluctant to do this and indeed expressed concern both about the way

in which Abbey Gellately was treated, the small sum she was being offered as part of the redundancy package and the fact that he was having to be involved in any way. He did chair the meeting although he ventured to suggest at times that he did not do so. In the normal way he was asked to sign the letter confirming what had occurred and was extremely reluctant to do so and expressly stated that he did not wish his signature to be on the letter which was sent out to Abbey Gellately. This did cause friction between him and Dhermin Mistry who made all the arrangements. Mr Mistry found this attitude on the part of the claimant to be unhelpful bearing in mind that it was considered to be part of the role of someone in the position of contract manager to undertake these duties however unpleasant it may be. The fact that there was subsequent communication to the claimant to the effect that Peter Gellately some months later had expressed unhappiness about the role the claimant had played in his daughter's redundancy is of relevance and mentioned below. It should also be noted that during the redundancy process and perhaps because of reservations mentioned by the claimant, additional enquiries were made with Jonathan Edwards and another opportunity was found for the continued employment of Abbey Gellately which was mentioned at the final version of the letter, a point by which the claimant should have been reassured and could have emphasised in the letter. It was not made clear whether that opportunity was taken up by Abbey Gellately but this is not relevant for the purposes of this hearing.

16. Late in 2018 managers were asked to come forward with suggestions with regard to possible money-saving initiatives for the company bearing in mind that the results of the company particularly with regard to the MU activities were disappointing. The claimant put forward a business proposal which amounted to signing off work being undertaken on a sub-contract basis by a company called Podrig Limited which had been set up some years earlier and of which the claimant was a director. The proposal set out some brief details and figures suggesting that the claimant would be responsible for that sub-contracting work and inevitably would leave the employment of the respondent company to do this. Nothing was made clear as to how such a sub-contract could be awarded without any procurement procedure. As part of the enquiries in setting up this business proposal the claimant had asked for details as to his total cost to be employed by the company including salary, company car and other benefits which produced a figure in the region of £90,000. It was assumed that this would be inherent in the proposal being put forward by the claimant. The business proposal was considered by directors of the company but ultimately it appeared that this was to be the subject of discussion between the claimant and Roger Culley who would have the final decision as to whether the proposal was to be put forward. Discussions took place about this and these centred upon what payment if any the company would make to the claimant by way of severance to "tide him over" in the period when he was setting up the sub-contracting business within his company. There was an issue with regard to what was discussed but the tribunal concluded that it was clearly within the expectation of Mr Haughton that he would secure a payment from the respondent. Mr Culley's evidence was to the effect that the company had never in the past made such a payment to someone setting up a sub-contracting function of this kind and that the company might be minded to consider a small payment of in the region of £5,000 but probably not; certainly if the claimant was looking for a figure in the region of £20 - £30,000 this was out of the question. In the face of these discussions, it was communicated to the claimant that his business proposal would not be taken up

and the tribunal accepts that the claimant was disappointed and disenchanted by this.

17. There was the monthly BPPM meeting held at which the claimant maintained that he was belittled and humiliated by the attitude of Roger Culley whose first two meetings were the January and February meetings. Mr Culley denied that he had done anything which could amount to belittling of the claimant. A reference which the claimant had made to morale being low in Sunderland and the staff being downhearted prompted Mr Culley to ask another of the managers for her view. The claimant took exception to this and he maintained that this was part of the reason why he was stressed and went "on the sick".

18. These recent events all occurred within a short time. It was not possible, and it is not necessary, for the tribunal to reach a definitive conclusion as to what it was that triggered the claimant being off sick with stress. From the evidence he was suggesting that it was the behaviour of Roger Culley towards him at the meetings, possibly combined with the refusal of the business proposal, aligned with the negative attitude as he perceived it Mr Mistry and also the concerns which the claimant had having seen the e-mail from Peter Gellately. The fact of the matter is that the claimant was then off sick and remained so for several months.

19. The tribunal finds that the initial approaches made by Mr Culley and Mr Mistry to try to engage with the claimant were appropriate in order to seek to establish what were the stresses causing the claimant's health problems and whether there was anything which could be proposed which would assist in securing Mr Haughton's return to work. From the outset it seemed clear that the claimant saw Mr Mistry's involvement as unhelpful because of the history that there was between the two. The claimant had also formed an unhelpful view of Mr Culley's treatment towards him and this led to successive letters being sent by the claimant to Liz Stokes Head of HR requesting that others be involved in the welfare meetings rather than Mr Culley and Mr Mistry. The repeated response was that Mr Culley as the claimant's line manager was the correct person with whom he should engage and not with the predecessor who was on his way out of the company.

20. Whilst Mr Culley was seeking to engage with the claimant and even having without prejudice discussions the details of which for obvious reasons were not disclosed to the tribunal, Mr Culley decided not to proceed with the further investigation of matters brought to his attention in relation to Sarah McGow's employment tribunal claim and the disclosure of confidential information by the claimant which had come to light when the papers had been seen. The focus was kept on seeking to resolve the claimant's problems. However when it became apparent that no resolution had been reached and the claimant remained off work, Mr Culley requested that the investigation process proceed and it did so in the hands of Roland Thomas, a witness who impressed the tribunal with his experience of undertaking investigations from his years in the police force. The tribunal found that the investigation was carried out in a proper and responsible manner even though there were concerns that the claimant was being questioned initially by telephone and then in person at a time when he was absent from work owing to stress and anxiety. No detailed medical evidence was ever obtained in order to identify the extent of this or whether any treatment was being received.

21. Following completion of the investigation the report was sent to Mr Culley with a recommendation for disciplinary action. The claimant then issued a grievance once the investigation had commenced and included in the grievance were concerns about the way in which he had been treated during the time of his absence owing to sickness and he made adverse comments with regard to Mr Culley and Mr Mistry in this regard.

22. The claimant was then invited to a disciplinary hearing on 25th June 2019 and to a grievance hearing on 24th June. Mr Culley and Mr Mistry were to deal with the disciplinary hearing. It was clear that the claimant was unhappy with this. In the event the hearings were postponed and the disciplinary hearing rescheduled for 8th August and the grievance hearing for 6th August. In the meantime the tribunal saw documentation indicating that negotiations had continued between the claimant and the company and as late as 6th and 7th August 2019 documents were being drawn up to reflect a settlement which had been reached between the claimant and the respondent for a payment on terms. In the event when the claimant had seen the document he was being asked to sign he declined to sign it stating that it would be against his principles having reviewed the precise terms. Because of the stage of these investigations, the grievance hearing was assumed not to be taking place although the claimant did arrive at the offices on 6th August in order to participate in it. At the same time he wrote to Liz Stokes stating that he would not be attending the disciplinary hearing which was still scheduled for 8th August.

23. The evidence from the claimant was that he could not attend the disciplinary hearing as his doctor had advised him to have a break and he therefore had arranged to go to Ireland to see his mother and family. However nowhere in his communication to Liz Stokes at the time did he explain that he would not be attending the disciplinary hearing for these reasons – he merely stated that he would not be attending. no evidence was produced by the claimant as to this.

24. The disciplinary hearing proceeded in his absence as the claimant had been told would occur. The issues were considered by Mr Culley and he reached the conclusion that the claimant was guilty of gross misconduct with regard to his activities in relation to the confidential e-mails concerning Sarah McGow and the other e-mails concerning confidential company information. A penalty of dismissal was imposed, it being stated that the duty of trust and confidence was broken and the company could no longer have any trust in the claimant.

25. The claimant appealed against the decision and there was an appeal hearing which the claimant appeared to regard as fair. It was at that appeal the claimant mentioned for the first time that he had express permission from Paul Eadington to work from home and send company e-mails to a personal e-mail address. That had not been something which had been put to the company at any time during the investigation or placed before Mr Culley when he made the decision to dismiss. The appeal was not upheld.

<u>Unfair dismissal</u>

26. In an unfair dismissal the first question to be asked and the first issue in this case is what was the reason, or if more than one the principal reason, for the dismissal and if so was it a potentially fair reason. The tribunal finds in this case that the reason why the claimant was dismissed and certainly the principal reason for the decision to dismiss him at the time it was made, was related to conduct namely the claimant's actions with regard to company e-mails. What had given rise to the investigation was the information in Sarah McGow's employment tribunal application which brought to the company's attention the fact that the claimant had copied Sarah McGow into internal management e-mails dealing with her requests for change of hours during her pregnancies. In investigating that matter which had come to the company's attention it Had been found that there were other e-mails of a confidential nature were being sent by the claimant to a home e-mail address which the claimant said he shared with his wife. At the time there was no evidence to the effect that the claimant had consent to send work e-mails as he had and his activities were a clear breach of the company's IT policy.

27. This reason for dismissal was related to conduct and therefore a potentially fair reason. In considering whether the investigation was appropriate the tribunal applied the test in the well-known case of British Home Stores v Burchell

    (i) Was it established that the employer through Mr Culley believed that the claimant had committed the misconduct? The tribunal finds that Mr Culley did believe this on the basis of the evidence beforehand.

    (ii) Did the employer have reasonable grounds upon which to sustain that belief? The tribunal finds that Mr Culley did have reasonable grounds based upon the detailed investigation report and documentary evidence presented to him.

    (iii) Did the employer carry out such investigation as was reasonable in all the circumstances of the case? With regard to the allegations, the tribunal finds that there was sufficient investigation by gathering in all of the documentary evidence and putting this to the claimant during a telephone interview and at a face-to-face interview during which the claimant was shown the materials in question and given the opportunity of offering an explanation. Whether the claimant was off work sick at the time and suffering from stress, Mr Thomas considered that any employees who are subjected to investigations will demonstrate stress but he felt that opportunity was available for the claimant to provide a relevant explanation if he had one.

28. It was then appropriate for the tribunal to apply the general test of fairness under Section 98 (4) of the Employment Rights Act 1996. Did the employer act fairly in dismissing the claimant for this reason in all the circumstances (including the size in administrative resources of the employer's undertaking) and determining this question in accordance with equity and the substantial merits of the case?

29. The tribunal expressly takes into account the approach set out in Iceland Frozen Foods Limited v Jones 1982. This establishes that the correct approach for an employment tribunal to adopt in answering the question isinitially the words of the statute. In applying the section a tribunal must consider the reasonableness of the

employer's conduct not simply whether they, the members of the employment tribunal, consider the dismissal to be fair. The tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In many cases there was a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another. The function of the tribunal is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair; if the dismissal falls outside the band it is unfair. This "band or range of reasonable responses" approach was approved in the case of HSBC Bank Plc v Madden. It establishes that the function of the tribunal is to determine whether the decision to dismiss falls within the band of reasonable responses "which a reasonable employer might have adopted".

30. Consideration of reasonableness and the circumstances includes the question of whether the procedure adopted by an employer in itself was reasonable. The tribunal noted in particular that Mr Haughton over a considerable period of time had expressed concerns about the way in which he was being managed by Mr Culley and the involvement of Mr Mistry. He made numerous requests that he be allowed to engage with others rather than Mr Culley notwithstanding that Mr Culley was, albeit for a short time, his line manager. The tribunal found it understandable that Liz Stokes repeatedly emphasised that as the line manager of the claimant, Mr Culley was the person with whom the claimant should be engaging with regard to work issues and the exploration of circumstances in which the claimant would be able to return to work in an acceptable way albeit with any reasonable adjustments which might be required.

31. However when it became clear that the welfare discussions had not reached any finality and that the investigation into the allegations of misconduct was to proceed and then result in a disciplinary hearing, consideration should be given as to whether a fair hearing, that is fair to the claimant, could be held by Mr Culley bearing in mind the repeated reservations which were being put to the respondent by the claimant. Whilst it may be argued that it is not for an employee to determine whether his line manager should be managing him or to make his own selection as to the HR support available, regard must be had to the size and administrative resources of the undertaking as set out in Section 98 (4). Taking into account that the claimant was on long-term absence for stress and anxiety and that he was making it clear that he regarded Mr Culley and Mr Mistry as having caused or contributed to his health problems, a fair employer would have taken this into account in determining whether a fair hearing could take place if Mr Culley and Mr Mistry were involved.

32. Mr Mistry had explained to the tribunal how, with regard to the Abbey Gellately incident, it was common to request managers to be seconded in order to perform roles in necessary processes including redundancy or in this case a disciplinary hearing. The tribunal concludes therefore that it was unfair for the respondent to insist that the disciplinary hearing arranged for June and then rearranged for August should take place under the chairmanship of Mr Culley. It was abundantly clear that the claimant believed that Mr Culley had treated him unfairly, including at the BPPM meetings and the rejection of the business proposal. A dismissal hearing

should be held by a person who can be regarded as objective and impartial. It was absolutely clear that Mr Haughton did not regard Mr Culley as able to perform this role in the circumstances. Similarly and even to a greater extent, Mr Haughton had expressed repeated reservations with regard to Mr Mistry's attitude towards him and had expressed a view that he felt that Mr Mistry had an agenda to move the claimant from the company. These were clear justifications for the employer to enable a meeting to take place to consider the disciplinary charges and to be chaired by someone other than Mr Culley and supported by someone other than Mr Mistry. To proceed as the respondent did was unfair and in the unanimous view of the tribunal it tainted the disciplinary hearing arrangements.

33. Although the claimant did not make it clear when communicating to Liz Stokes that he would not attend the disciplinary hearing on the grounds that Mr Culley and Mr Mistry were involved in it, it is clear to the tribunal that this was the difficulty which he was not prepared to face. Such is the degree of unfairness that we find that this taints the dismissal and therefore we find that the claimant was unfairly dismissed.

34. Under the principal in Polkey v AE Dayton Services Limited the tribunal considered whether Mr Haughton would still have been dismissed even if a fair procedure had been followed. To have remedied the unfairness highlighted would have meant the employer arranging for a different manager to have chaired the disciplinary hearing whether proceeding in the claimant's absence or not. The tribunal has considered whether it concludes that the claimant would have been dismissed had there been a different manager. The tribunal's unanimous conclusion on this is that such is the extent of the claimant's misconduct particularly with regard to the Sarah McGow e-mail communication, that the claimant would have been dismissed in any event. This is consistent with the finding expressed by Mr Culley that the claimant's sanctions breached the duty of trust and confidence and that there could be no dependence upon Mr Haughton not repeating such act if he felt justified in doing so. His actions were such that he would be prepared to compromise the interests of the company if he felt it was appropriate to do so. This is also affected by the fact that the claimant continued to express the view that he did not think he had done anything wrong. If he could not comprehend the fact that his actions constituted a significant breach of this duties as an employee and as a senior employee who was part of management then dismissal was certainly within the band of reasonable responses and the tribunal concludes that this would have been the view whoever had chaired the disciplinary hearing.

<u>Protected disclosures</u>

35. It was clear from our findings above that the tribunal has not concluded that the reason for dismissal was related to the disclosures and health and safety issues referred to by the claimant. The tribunal did not find that there was in fact any protected disclosure on the part of the claimant. This was not a case of automatically unfair dismissal on health and safety reasons or a dismissal because of protected disclosure and nor was the claimant subjected to any detriment as a result of health and safety issues.

36. The claimant's actions with regard to Sarah McGow's pregnancy were not a protected disclosure. Mr Haughton decided to support Sarah McGow. He sought

to exert some influence with regard to how the company was to deal with this. However, the tribunal did not find that this amounted to a protected disclosure.

37. With regard to the completion of competencies issue which the claimant raised at two BPPM meetings, this would be a typical matter on the agenda at such meetings. It would be expected that this would be discussed. The fact that the claimant did discuss it and this was minuted did not provide any evidence that this constituted a protected disclosure within the statutory definition and nor was the tribunal convinced that it played any part in the decision for him to be dismissed.

38. The suggestion that the removal of Steve Taggart, about which the claimant made representations, amounted to a protected disclosure was not convincing in any way. Again in his role as a contract manager it would be expected that the claimant would discuss with his superior, decisions which were being made and he could certainly have reservations if he felt that changes in personnel affected the degree of supervision which would apply on sites. However, the tribunal did not find any basis to support the suggestion that the claimant suffered a detriment because of voicing these concerns or that they were relevant to his dismissal.

39. Whilst the claimant stated at his appeal hearing that he "whistle-blew" and had been "victimised for it" and that he "did a protected act to do the right thing" the tribunal was not persuaded that there were any protected acts or that the claimant had suffered any detriment because of issues which he raised.

Breach of contract

40. The claimant was dismissed for gross misconduct and was given no notice. As this has been included in the claim the tribunal has considered whether it concludes that the claimant's actions amounted to gross misconduct and this is based upon the tribunal's conclusions rather than on the question of the band of reasonable responses test. The tribunal unanimously finds that the actions of the claimant and in particular the disclosure of the trail of e-mails related to Sarah McGow and her pregnancy did amount breach of contract by the claimant and effective repudiation of the claimant's responsibilities under his contract. This was fortified by the fact that the claimant appeared not to accept that he had done anything wrong in breaching this significant duty of confidentiality in a way which was contrary to the interests of the company. He owed a duty of confidentiality to the company; a duty to maintain confidential communications which he received where the company was considering its position with regard to a claimant who potentially could (and indeed did) make a claim against the company for pregnancy/sex discrimination. The fact that even when the matter was drawn to his attention the claimant expressed the view that he had done nothing wrong encouraged the legitimate concern that he could well do something similar again, which would be a breach of the trust and confidence which the company would need to have in the claimant as a contracts manager. Accordingly, his actions and his persistence in maintaining that he had done nothing wrong amounted to gross misconduct and justified a dismissal summarily namely without notice therefore the claim for notice is dismissed.

Authorised by EMPLOYMENT JUDGE SPEKER OBE DL

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 10 March 2021