Case Number: 2206629/2016

Reserved Judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Mr L McDonnell		**The City of London Corporation**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central **ON: 24-29 March 2021**

BEFORE: Employment Judge A M Snelson

On hearing the Claimant in person and Ms I Omambala QC, leading counsel, on behalf of the Respondents, the Tribunal adjudges that:

(1) The Claimant's complaints of unfair dismissal under the Employment Rights Act 1996, ss94, 98 and 103A are not well-founded.
(2) Accordingly, the proceedings are dismissed.

REASONS

Introduction

1 The Respondents are the local authority for the City of London. They employ about 3,500 people.

2 The Claimant, Mr Leighton McDonnell, is a surveyor by profession, now 59 years of age. He was employed by the Respondents in the role of Senior Surveyor from 5 August 2005 until 11 May 2016, when he was dismissed on the stated ground of gross misconduct. The dismissal was the result of a disciplinary process which had begun with his suspension on 5 November 2015. At the time of his dismissal he was earning an annual salary of a little over £48,000 plus sundry benefits.

3 By a claim form presented on 20 August 2016 the Claimant brought a complaint of unfair dismissal, which the Respondents disputed.

4 In a case management hearing on 4 November 2016 the Claimant was permitted to pursue, in addition to the evident complaint of 'ordinary' unfair dismissal, a claim for 'automatically' unfair dismissal on public interest disclosure ('PID'), or 'whistle-blowing' grounds. It seems that the Employment Judge did not give formal permission to amend the claim form; he did place on record that the 'whistle-blowing' claim was based on the eight alleged PID's referred to in the Claimant's letter to the Town Clerk of 24 March 2016, and that letter itself. As directed, the Respondents thereafter served supplementary grounds of resistance containing their defence to the entire case as clarified.

5 The matter came on for final hearing before an Employment Judge sitting alone in January and February 2017. He upheld both unfair dismissal claims but the Respondents then appealed to the Employment Appeal Tribunal ('EAT'). In a judgment handed down on 28 February 2019 the EAT (Choudhury J, President, sitting alone) allowed the appeal and remitted the entire case for re-hearing before a different Employment Judge.

6 Following the appeal, Employment Judge Tayler (as he then was) held a case management hearing on 23 April 2019, following which he placed on record the fact that the Claimant relied on the eight PID's listed in his letter of 24 March 2016 and issued an order requiring him to provide further information in relation to each of them. The Claimant responded to the order in an undated eight-page document with numerous attachments.

7 The remitted case came before me in the form of a liability-only hearing held remotely by CVP on 24 March this year, with six days allowed. The Claimant appeared in person and the Respondents were represented by Ms I Omambala QC, leading counsel. Having read into the case[1] on day one, I heard evidence and closing argument before reserving judgment on day four.

The Legal Framework

8 By the Employment Rights Act 1996 ('the 1996 Act'), s43B, it is stipulated that:

> **(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is in the public interest and tends to show one or more of the following –**
>
> **(a) that a criminal offence has been committed, is being committed or is likely to be committed,**
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,**
> **(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,**
> **(d) that the health or safety of any individual has been, is being or is likely to be endangered**
> **...**

[1] In order to be clear as to the basis of the remittal, I included the judgment of the EAT in my preliminary reading. I did not read the (overturned) ET decision, although parts of it were quoted by the EAT.

9 Qualifying disclosures are protected if made in accordance with ss43C to 43H (see s43A). By s43C, it is provided that:

> **(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure –**
>
> **(a) to his employer …**

10 A dismissal is 'automatically' unfair if the reason or principal reason is that the person dismissed has made a protected disclosure (s103A).

11 The 'ordinary' unfair dismissal claim is governed by the 1996 Act, s98. It is convenient to set out the following subsections:

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

12 Although my central function is simply to apply the clear language of the legislation, I am mindful of the assistance available, both legislative and judicial. By the Trade Union and Labour Relations (Consolidation) Act 1992, s207(2), any ACAS Code of Practice which appears to be relevant to any question in the proceedings is admissible in evidence and "shall be taken into account in determining that question". I bear in mind the guidance applicable to misconduct cases contained in *British Home Stores Ltd v Burchell* [1978] IRLR 379 EAT (although that authority must be read subject to the caveat that it reflects the law as it stood when the burden was on the employer to prove not only the reason for dismissal but also its reasonableness). The criterion of 'equity' (in s98(4)(b)) dictates that, the more serious the allegation and/or the potential consequences of the disciplinary action, the greater the need for the employer to conduct a careful and thorough investigation (*A v B* [2003] IRLR 405 EAT and *Salford Royal NHS Foundation Trust v Roldan* [2010] IRLR 721 CA). From *Iceland Frozen Foods Ltd v Jones* [1982] IRLR 439 EAT and *Post Office v Foley; HSBC Bank v Madden* [2000] IRLR 827 CA, I derive the cardinal principle that, when considering reasonableness under s98(4), the Tribunal's task is not to substitute its view for

that of the employer but rather to determine whether the employer's decision to dismiss fell within a band of reasonable responses open to him in the circumstances. That rule applies as much to the procedural management of the disciplinary exercise as to the substance of the decision to dismiss (*Sainsbury's Supermarkets Ltd v Hitt* [2003] IRLR 23 CA).

The Rival Cases

13 The Claimant's primary case was that the reason or principal reason for dismissal was that he had made one or more PID's. As already noted, he had clearly identified eight PID's pursuant to EJ Tayler's order. In his closing argument he purported to rely additionally on two more. Alternatively, he contended in any event that the dismissal was unfair under the 1996 Act, s98(4), in its substance, in that the sanction was unreasonable and disproportionate, and in the process followed, which, it was said, was flawed in numerous ways.

14 The Respondents' case as presented before me was exceedingly straightforward. They raised no direct challenge (compare the supplementary grounds of resistance, paras 20-23) to the Claimant's right to rely on the eight identified PID's, but objected strongly to his attempt in his closing submissions to add a further two. They did not take any point on what the information disclosed might 'tend to show' or test his asserted 'reasonable belief' that its disclosure was in the public interest. They simply said that the conduct-based explanation for the dismissal was true, the PID's were nothing to do with it and their decision-making and procedural handling of the disciplinary exercise had fallen within the range of permissible choices open to them.

Oral Evidence and Documents

15 I heard oral evidence from the Claimant and, on behalf of the Respondents, Mr Nicholas Gill, Mr Michael Cogher, Mr Peter Bennett, Ms Caroline Al-Beyerty and Mr Peter Lisley. Of these the last three were the principal witnesses, being the senior officers who, respectively, conducted the disciplinary hearing (Mr Bennett and Ms Al-Beyerty) and the appeal (Mr Lisley). Mr Gill carried out the suspension of the Claimant and Mr Cogher conducted the initial investigation and recommended disciplinary action.

16 In addition to the testimony of witnesses I read the documents to which I was referred in the substantial bundles of documents.[2]

17 I also had the benefit of a very brief chronology and the Claimant's written closing submissions.

The Facts

18 The evidence was extensive. I have had regard to all of it. Nonetheless, it is not my function to recite an exhaustive history or to resolve every evidential

[2] The Respondents produced the principal three-volume bundle of more than 1,400 pages. The Claimant produced two further volumes containing over 500 pages in total.

conflict. The facts essential to my decision, either agreed or proved on a balance of probabilities, I find as follows.

Background

19 The Respondents have a very substantial property portfolio with an estimated value of £3.5bn. Management of the City's property interests is the primary responsibility of the City Surveyor's Department, which employs about 300 members of staff. The Department is made up of four main groups, one of which is the Investment Property Group, which is responsible for asset management of the estate. The Claimant was employed within that Group.

20 The Claimant's immediate line manager was Mr Andrew Cross, who reported to Mr Trevor Nelson (Assistant Director), who in turn reported to Mr Gill, Investment Property Director (already mentioned), who in turn reported to Mr Bennett, City Surveyor until October 2016 (also already mentioned).

21 The disciplinary proceedings against the Claimant were based largely on three allegations. I will summarise the facts underlying each in turn.

Allegation 1 - Tudor Markets

22 Leadenhall Market is owned and run by the Respondents. It is an important commercial centre, with a range of retailers, food outlets, bars, pubs, restaurants and offices. From time to time corporate and private events are held there. These require licences which are issued by the Respondents and the completion of other paperwork including 'Authorised Delegated Authority' ('ADA') forms. Tenants who trade in the Market will also expect to be consulted, or at least notified, of such events in advance.

23 The Claimant was one of a small team within the Investment Property Group asked by Mr Gill in June 2015 to take on the day to day asset management of the Market.

24 In July 2015 the Claimant was contacted on behalf of a body of traders called Tudor Markets with proposals for a one-week market between Monday, 3 and Friday, 7 August 2015. In the email correspondence which followed he did not at any point state that the Corporation's approval was subject to appropriate formalities being completed, including the issue of a licence. Tudor Markets confirmed by an email sent late on Thursday, 30 July that they would be arriving on the Sunday evening to set up in readiness for trading on the Monday. The Claimant was away on leave on Friday, 7 August. In consequence, he became aware for the first time that the market was proceeding when he arrived at work on 3 August. The first his managers, Mr Cross and Mr Nelson, knew of the matter was the same morning, when they started receiving emails from tenants asking what was going on and why they had not been consulted. An urgent discussion took place involving the Claimant, Mr Cross and Mr Nelson, which resulted in a decision to allow the market to proceed. The ADA form was not completed until 17 August.

In the meantime, the Respondents had to deal with a number of angry complaints from Leadenhall Market tenants.

Allegation 2 – the Barnett Waddington virtual golf event

25 In October 2015, Barnett Waddington, a firm of actuaries and consultants, wished to hold an event at Leadenhall market on Thursday, 5 November. The main attraction was to be a virtual golf competition and funds would be raised for charity. The matter was passed to the Claimant. He had refused a similar application in the summer of 2015 and remained opposed to the idea. He engaged in obstructive and confrontational email exchanges with Mr Adam Brook of Barnett Waddington and with Mr Chapman (already mentioned) an elected member of the Corporation, warning that he was refusing permission for the event and that access would be denied. Mr Chapman then sought the intervention of Mr Nelson, who spoke with the Claimant on or about 28 October, instructing him to complete the due diligence steps to enable the event to proceed as planned. Undaunted, the Claimant then contacted Mr Nick Salter, Senior Partner and CEO of Barnett Waddington, which resulted in renewed intervention by the Respondents' management in order to avoid further escalation of the dispute. The event duly went ahead but the Claimant's behaviour had caused a great deal of anger (particularly on the part of Mr Brook) and considerable embarrassment for the Respondents (reflected in their decision to waive the fee which Barnett Waddington would ordinarily have been required to pay).

26 It later emerged that the Claimant had sent a second message to Mr Salter, criticising Mr Brook and asserting that his conduct had not reflected well on Barnett Waddington.

Allegation 3 – CSFI and rodent control

27 CSFI, a Leadenhall Market tenant, raised a complaint about mice in 2014, which resulted in an action plan instigated by Mr Gill. Following further correspondence, Mr Gill also agreed on behalf of the Respondents to undertake works to the trunking in CSFI's office premises with a view to preventing mice from gaining access, and to provide a fortnightly pest control regime. The rationale for taking this action was that, while the Respondents were not responsible for providing pest control services directly to tenants, they did have such obligations in respect of common parts and the proximity of CSFI's premises to the communal bin store (a common part) might explain their particular rodent problem.

28 In October 2015, CSFI complained again of mice infestation, but following some contact with Mr Darren Turner, City Facility Manager, the Claimant wrote to them stating that the Respondents provided pest control measures to common parts only and they would have to make their own arrangements. This resulted in a complaint by CSFI (in an email of 4 November 2015), who explained that the rodent problem had become much worse over the last two months and further pointed out that the trunking work promised the previous year had never been completed. The complaint, which warned that legal remedies might have to be considered and the correspondence might have to be more widely circulated, was

forwarded to Mr Bennett, at whose direction a further inspection was carried out, resulting in the necessary remedial works being performed and further pest control measures implemented.

The PID's

29 The eight 'whistle-blowing' disclosures which are within the scope of these proceedings were articulated together in the letter 24 March 2016, to which I have already referred. I will quote directly from that document.

> **WHISTLE BLOWING 1**
> **In April 2013 I made a written complaint to the Town Clerk regarding the behaviour of Peter Bennett with reference to an appeal hearing, within which it was obvious he had no intention of managing in a fair and professional manner. …**
>
> **WHISTLE BLOWING 2**
> **In mid-2015 I made three monthly attempts at highlighting the fact that no planned programme maintenance tests … had been undertaken at any of my buildings … by emailing this to Tom Leathart (Assistant Director) with instructions to be put on the agenda for the Assistant and Director's monthly meeting. Not at any time did I have even an acknowledgement. This put myself and my building manager who collated the task list … in a very vulnerable position as we were specifically told by Peter Bennett at a staff contact meeting, in no uncertain terms, not to criticise the principle (sic) contractor Mitie who are responsible for these PPM's but who have a five year contract. This was at a great cost to the City running into several hundred pounds per annum (sic).**
>
> **WHISTLE BLOWING 3**
> **I recently made a formal complaint to the Standards Committee regarding a member John Chapman who was obviously committing fraud (within the definition of the Serious Fraud Office). Mr Chapman has since been found guilty of five breaches of the members code of conduct with sanctions including censure, removal as Deputy of the Property Investment Board Committee for 12 months as well as permanent suspension from any interaction whatsoever with Leadenhall Market. In his former role as a Deputy Chairman of the Property Investment Board, Peter will of course know John very well and would have met regularly. It is very likely that Peter will take a very rigid stance at any disciplinary hearing if he was allowed to hear (sic) and which he is of course insisting he undertakes.**
>
> **WHISTLE BLOWING 4**
> **I recently made a formal complaint to the Standards Committee regarding a member Mark Boleat who was obviously committing fraud (within the definition of the term by the serious Fraud Office). Mr Boleat was investigated by the Committee but found not guilty but only due to lack of sufficient evidence. Mark is also a member of the Property Investment Board as well as Chairman of the Policy and Resources Committee. Peter will of course know MB very well as they would meet regularly and is therefore likely to make every effort to avoid any further embarrassment which he could do by taking a very rigid stance at any disciplinary hearing.**
>
> **WHISTLE BLOWING 5**
> **I recently made a formal complaint to the Finance & Audit Committee regarding the Director Mr Nicholas Gill who was obviously committing fraud (within the definition of the Serious Fraud Office) on three separate counts. I was informed last week by the Committee that this is still ongoing. Peter will of course make every effort to avoid any further embarrassment which he could do by taking a very rigid stance at any disciplinary hearing.**

WHISTLE BLOWING 6
I recently made a formal complaint to the Finance & Audit Committee regarding the Assistant Director Mr Trevor Nelson who was obviously committing fraud (within the definition of the Serious Fraud Office) on two separate counts. I was also informed by the Committee that this is still ongoing. TN refused to turn up for the investigatory meeting held by Michael Cogher and had apparently taken a day's leave which could only have been approved by Peter Bennett and Peter will of course make every effort to avoid any further embarrassment which he could do by taking a very rigid stance at any disciplinary hearing.

WHISTLE BLOWING 7
Earlier in 2015 I requested a meeting with the Investors in People (sic) who were visiting the Guildhall. At a later meeting Sutopa Sen (HR department manager under Peter) despite not myself raising the matter of IIP, Sutopa claimed I was "disloyal" in not raising any issues I had beforehand with the Department which affected not just myself but all staff. One issue being that only two days notice was officially given, that a senior principal position within the Department was being advertised internally only. Peter will of course make every effort to avoid any further embarrassment which he could do by taking a very rigid stance at any disciplinary hearing.

WHISTLE BLOWING 8
From 17.06.15 I was undertaking 2.5 full-time work roles (instead of just one previously) to cover for maternity leave. I was expected to work under enormous stress, without error and that I was denied by my line manager (in writing) that I could not even record this additional new role (with additional financial and management targets) within my mid-term appraisal. It took until September and only after repeated requests (including raising several issues with HR Director Chrissie Morgan) before it was formally recorded and signed off. Previously it had wrongly recorded the new maternity cover role was to be split between three asset managers. Peter will of course make every effort to avoid any further embarrassment which he could do by taking a very rigid stance at any disciplinary hearing.

I will refer to the disclosures as 'PID(1)', 'PID(2)' and so on.

30 It can be seen that some of the allegations relate to members of the Corporation and others to employees. The procedural consequences of this difference will be explained shortly.

The disciplinary process

31 On 5 November 2015 Mr Gill suspended the Claimant pending investigation into a number of concerns about his behaviour at work.

32 On 10 November 2015 the Claimant made the allegations subsequently formulated as PID's (3)-(8) above. Those directed at Mr Gill and Mr Nelson alleged failure to comply with the Respondents' policy to manage Leadenhall Market on a sound commercial basis and failure to comply with their own recruitment policies in relation to a particular vacancy. The complaints against Mr Chapman and Mr Boleat, both elected members of the Corporation, alleged wrongful political interference in the management of Leadenhall Market. The Claimant supplemented these complaints on 16 and 19 November 2015.

33 The allegations against Mr Gill and Mr Nelson were investigated in accordance with the Respondents' whistle-blowing policy and were found to be without substance.

34 The allegations against Mr Chapman and Mr Boleat were, investigated in accordance with the procedures applicable to complaints against elected members. Those concerning Mr Boleat were found at an early stage to be unsubstantiated and no further action was taken in his case. Those relating to Mr Chapman were referred to a full hearing before the Standards Committee which, on 26 February 2016, found that he had committed misconduct in a number of respects and imposed significant sanctions upon him.

35 In the meantime, the Respondents proceeded with a disciplinary investigation into the matters which had brought about the Claimant's suspension. The investigating officer was Mr Cogher (already mentioned), who had conducted the preliminary investigations into the Claimant's complaints of 10 November 2015. He is a solicitor of the Supreme Court with a full practising certificate and has some 30 years' experience of legal work within local government, since April 2012 as Comptroller and City Solicitor.

36 At all material times, Mr Cogher was unaware of PID's (1) and (2). He became aware of PID's (3)-(8) in the course of his investigations and of PID's (1) and (2) more recently, in the course of these proceedings. Prior to November 2015 he had had no contact with the Claimant.

37 Between December 2015 and February 2016 Mr Cogher conducted a thorough investigation into the subject-matter of Allegations 1, 2 and 3 and into one additional matter, relating to an organisation called UI Centric. In a report presented on 29 February 2016 he explained his conclusions that there was a case to answer in respect of Allegations 1, 2 and 3, and that it was appropriate to add a further allegation, not based on any new facts, that the Claimant's conduct had undermined trust and confidence between him and his employer.

38 By a letter dated 22 March 2016 the Claimant was invited to attend a disciplinary hearing on 6 April 2016 to answer the four allegations identified in Mr Cogher's report, which were formulated as follows.

> **(i) You failed to follow the appropriate procedure and practices to put in place a licence for the Tudor Markets event which took place on 3 August 2015, including failing to agree the heads of terms, failing to promptly regularise the position despite a reasonable management instruction to do so, failing to consult and take instructions from management before acting, failing to communicate with relevant stakeholders and line managers in a timely manner or at all and failing generally to take reasonable care to protect the Corporation's interests thereby exposing it to the risk of loss and damage, and causing reputational damage …**
>
> **(ii) That you acted in an unprofessional and obstructive manner, and failed to act in a corporate and collegiate manner, in relation to the Barnett Waddingham Virtual Golf Event which took place on 5 November 2015. Further, you involved yourself in an unprofessional conflict with a Barnett Waddingham employee that you inappropriately, and without authorisation, escalated to the firm's Chief Executive thereby acting in a manner likely to damage the Corporation's interests and reputation …**

> **(iii) That you caused a complaint from a tenant, CSFI, to the Chairman of the Policy and Resources Committee by unilaterally terminating pest control measures provided by the Corporation in their premises on 4 November 2015 without properly informing yourself as to the background and reason for the measures which had been put in place by senior management, failing to inform and consult senior managers and corresponding with the tenant in a terse and unhelpful manner thereby causing damage to the reputation of the Corporation and the Department …**
>
> **(iv) As a result of the above, and your conduct and attitudes towards the Corporation's core values, customer care and collegiate and cooperative working generally, there has been a breakdown of trust and confidence between you and the Corporation …**

The letter drew attention to the Claimant's right to be accompanied and pointed out that one possible outcome of the hearing was dismissal. It also made him aware of his right to call witnesses and to present evidence in support of his case. He was asked to provide copies of any documents on which he intended to rely. With the letter was a bundle of documents comprising all the material generated by the investigation (pp 292-1066 in the main bundle before me).

39 The disciplinary hearing panel was composed of Mr Bennett and Ms Al-Beyerty. The former has already been introduced; the latter was at the relevant time Financial Services Director. She is a qualified accountant and a member of the Chartered Institute of Public Finance and Accountancy.

40 At all relevant times, Mr Bennett was unaware of PID(1). Specifically, he was unaware of any written complaint about him by the Claimant in 2013 (or at any other time). He was aware that, in early 2014, the Claimant had objected to him chairing a disciplinary appeal which he had brought against a six-month warning for failing to obtain legal advice before settling a landlord and tenant dispute. Mr Bennett had considered the objection but found no merit in it and had proceeded to hear the appeal, which was unsuccessful. At all relevant times, Mr Bennett was also unaware of any complaint or allegation corresponding to PID(2). For reasons already explained, he was aware of PID's(3)-(8). But if and in so far as the Claimant suggests that he had made those disclosures, or any of them, before 9 November 2015, Mr Bennett was unaware of any such prior disclosure.

41 When asked to sit on the disciplinary panel, Ms Al-Beyerty had no prior knowledge of the Claimant and had had no contact with him. She was not aware of any prior disclosure(s) on his part. In the course of preparatory reading ahead of the disciplinary hearing, she inevitably became aware of PID's(3)-(8). Like Mr Bennett, she was not aware of any disclosure (whether of a similar kind or otherwise) by the Claimant prior to 9 November 2015. At all relevant times, Ms Al-Beyerty was entirely unaware of any disclosure by the Claimant corresponding with PID's (1) and/or (2).

42 The disciplinary panel sat with HR support in the form of Mr Roger Farrington, Head of Corporate HR & Business Service.

43 In a departure from standard procedure, Mr Bennett directed that the management case be presented by Mr Mark Lowman, Acting Projects Director

(ordinarily, Mr Cogher would have been the natural choice for that role). Mr Bennett told us that this arrangement was intended to allay the Claimant's fears that the process might not be fair or impartial. If that was his intention, it was not fulfilled.

44 Prior to the disciplinary hearing, the Claimant submitted a document entitled "Defence Against Allegations of Gross Misconduct", together with accompanying documents. These materials argued that at the time of the events giving rise to the disciplinary action the Claimant had been greatly overworked. They were also to a large extent devoted to making diverse allegations against Mr Chapman, Mr Gill and Mr Nelson.

45 The disciplinary hearing duly took place on 6 April 2016. It began at 9.30 a.m. and ended at 1.10 p.m. The note in the bundle summarises the main contributions but does not purport to be a full record. The Claimant represented himself and Mr Lowman presented the management case. The Claimant was content for the hearing to proceed and raised no concern about the time which he had been allowed for preparation. He had a full opportunity to argue and develop his defence to the charges. He also called a supporting witness, Steve Ivers, a member of the City Surveyor's Department, who told the panel that it was not usual to offer pest control to CSFI and that he had a good working relationship with the Claimant. As well as relying on witness statements In the names of Mr Chapman, Mr Gill and Mr Nelson, the Respondents produced Mr Gill as a live witness and the Claimant had the opportunity to put questions to him.

46 The panel faced a difficult task at the hearing in seeking to maintain a proper focus on the disciplinary charges. The Claimant appeared much more interested in making allegations about others rather than resisting those brought against him. In particular, his presentation included fierce attacks on the professionalism of Mr Gill and Mr Lowman, on matters which had nothing to do with the disciplinary charges. At one point, asked about the allegations which he had made against senior managers, and their impact on trust, he replied,

> **What am I supposed to do? I have four disciplinary accusations against me and of course I will retaliate.[3]**

In so far as it was possible to extract a defence from him, the Claimant's line was that he had been extremely overworked and under extreme pressure. He repeated the contention first made at the investigation stage that he had been required to perform the roles of two and a half full-time positions. He did not, even when pressed, explicitly acknowledge any error or failure on his part although he did ultimately comment that he might have done some things differently.

47 At the end of the hearing, the panel members adjourned to deliberate, but soon reached the view that, before going any further, the proper course was to enquire into the new and serious allegation which the Claimant had raised concerning Mr Gill. The nub of it was that Mr Gill had approved a substantial

[3] I am satisfied that he used these words, quoted by Mr Bennett in the letter of dismissal (see below) or language so close to them as to be indistinguishable.

compensation payment without proper authority. Having studied the relevant documents, Ms Al-Beyerty concluded that there was no substance to the allegation: the compensation payment had been duly authorised. Moreover, it was evident from the records that documents had been copied to the Claimant at the time which showed that the proper procedures had been followed.

48 The panel then resumed its deliberations and reached the conclusion that the disciplinary charges were made out and that the proper sanction was dismissal with notice. The outcome was conveyed to the Claimant in a letter dated 8 April 2016, signed by Mr Bennett, which included the following:

> **We found the allegations to be substantiated and that your conduct was sufficiently serious to warrant dismissal for gross misconduct …**
>
> **Initially you did not accept that you have done anything wrong in relation to any of the allegations and continued only to blame others for the mistakes that had been made.**
>
> **Your main mitigation for your actions was your claim that you had an unreasonable workload; you were under pressure and did not have time to devote your full attention to particular tasks. Towards the end of the hearing you did eventually accept that there were other actions you could have undertaken. We took into account your claim of extra work pressures …**
>
> **In respect of allegation four, whilst we appreciate that this was a stressful time for you we were concerned that you demonstrated throughout the investigation and during the hearing that you clearly had no respect for, or trust or confidence in your Line Managers or Senior Managers, especially Nick Gill, Investment Property Director.**
>
> **You demonstrated this throughout the investigation and during the hearing by constantly blaming these managers for your own shortcomings and making some quite serious and unsubstantiated allegations.**
>
> **As an example, in your submission for the hearing and repeated during the hearing you made an allegation against Nick Gill … The Financial Services Director has investigated your allegation and found that … the decision [to enter into the compensation agreement] was properly made. …**
>
> **You commented at the hearing "what am I supposed to do, I have four disciplinary accusations against me, and of course I will retaliate". Given the seriousness of your unsubstantiated comments we do not see how you can still have and demonstrate trust and confidence in your managers or indeed how you can expect them to have the same trust and confidence in you. We have a duty of care to all our employees firmly believe that there has now been a complete breakdown of trust and confidence between you and the City of London Corporation.**

The letter also advised the Claimant of his right of appeal.

49 The Claimant appealed against the decision of the disciplinary panel. His principal grounds were that the disciplinary hearing had been unfair in that Mr Bennett had been biased, the sanction of dismissal had been unfair and disproportionate and the Claimant had suffered prejudice owing to his 'whistle-blowing' disclosures.

50 Under the Respondents' disciplinary procedure, appeals do not ordinarily take the form of a rehearing and fresh evidence is not adduced (para 38).

51 The appeal hearing was held on 20 May 2016 before a panel of three, of whom one was Mr Lisley (already mentioned), Assistant Town Clerk. The Chairwoman of the panel would have been the natural choice of witness at the hearing before me but she had unfortunately died during the interim. It was not in dispute before me that the panel was duly constituted.

52 At all relevant times the appeal panel was unaware of PID's (1) and (2) and, like Mr Bennett and Ms Al-Beyerty, aware of PID's (3)-(8) in so far as they were made on and/or after 9 November 2015 but not otherwise.

53 The appeal hearing lasted for nearly three hours and the Claimant had a full opportunity to present his arguments. The panel reserved its decision.

54 By a letter of 24 May 2016 signed by the Chairwoman of the appeal panel, the parties were notified that the appeal failed. Addressing the main grounds of appeal, the panel found as follows. First, it had been appropriate for the disciplinary panel to include Mr Bennett. Given the nature of the charges, a qualified surveyor was required and in view of the allegations raised by the Claimant, the only suitable candidate was the City Surveyor. Moreover, the disciplinary panel had been appropriately constituted to include the Financial Services Director as co-chair. Second, the sanction of dismissal was appropriate given the nature of the misconduct and the mitigation advanced. The Claimant had exhibited "serious failings in [his] professionalism" and had wilfully breached the trust and confidence implicit between employer, employee and work colleagues. Third, the Claimant's 'whistle-blowing' allegations had been appropriately investigated and had not prejudiced the disciplinary hearing.

Miscellaneous facts

55 The Respondents operate a Code of Conduct, which applies to all their employees in the performance of their internal functions and while engaging with external organisations and individuals. It includes the following extracts:

> **City Corporation employees are expected to give the highest possible standard of service to the public, service users, members and fellow employees …**
>
> **Employees must not conduct themselves in a way that brings the Corporation, employees, members, service users and partners into disrepute or causes reputational damage.**
>
> **Employees are expected to conduct themselves in a way that, in the reasonably held belief of the City Corporation, is not likely to fundamentally undermine the required relationship of trust and confidence between themselves and the organisation.**
>
> **Any substantive contravention of this code may result in disciplinary proceedings, and those disciplinary proceedings could end in dismissal. …**

56 The Respondents' disciplinary procedure prescribes a range of penalties for disciplinary offences, including dismissal with or without notice. The document

includes within a non-exhaustive list of examples of gross misconduct offences or actions which:

> **c. have or could have a damaging effect on the reputation and integrity of the City Corporation or its partners;**
> **d. are considered to be a wilful breach of the trust and confidence that is implicit between the employer, employee and work colleagues.**

The policy explicitly states that dismissal is a permissible sanction for gross misconduct, even where it is a first offence.

57 At the time of his dismissal, the Claimant was not the subject of any current disciplinary action or 'live' warning. It is, however, material to note that he did not have a clean disciplinary record. In 2010 he received a six-month written warning for misconduct in the form of failing to follow managerial instructions and failing to treat colleagues with courtesy, respect and helpfulness. And, as already noted, in February 2014 he was the subject of a further six-month warning, this time for failing to seek legal advice before concluding a settlement.

58 Nor were the complaints about the Claimant generated by the events with which these proceedings are concerned unprecedented. In unchallenged evidence, Mr Bennett gave several examples, including instances in 2009 and 2012 where the Claimant's allegedly threatening, offensive or otherwise unacceptable behaviour resulted in complaints for which he (the Claimant) was ultimately constrained to apologize.

59 In routine appraisals over a number of years up to 2014, the Claimant's allegedly confrontational and disrespectful communication style was also the subject of adverse comment on a number of occasions, as was his perceived tendency to take action without appropriate consideration of its consequences and/or without appropriate communication with his line manager.

60 As has been noted, the Claimant asserted as part of his defence to the disciplinary charges that at the time of the relevant events he had been performing "2.5 roles". It was common ground in the evidence before me that over the relevant period the City Surveyor's Department had been under some pressure. That said, it was not established at any stage of the disciplinary process or before me that the work load was such as to require the Claimant (or anyone else) to work excessive hours.

Secondary Findings and Conclusions

The PID's

61 It was obviously impermissible for the Claimant to attempt, as he did in his closing submissions, to rely on two fresh PID's. Allowing him to do so would have caused prejudice to the Respondents, who had prepared their case on the basis of the information supplied by him pursuant to the EJ Tayler's directions.

62 Since no other challenge was raised on this part of the case, I proceed on the footing that PID's (1)-(8) were all both qualifying and protected disclosures.

Unfair dismissal

63 What was the reason or principal reason for the dismissal? It was, I find, the belief of the disciplinary panel, affirmed by the appeal panel, that the Claimant had committed the misconduct alleged in the first three disciplinary charges and that the relationship of trust and confidence between him and the Respondents had broken down.

64 I am further satisfied that the disciplinary panel attributed the breakdown of the working relationship to three main factors: first, his unprofessional behaviour manifested in the events giving rise to the first three charges; second, his refusal to acknowledge his personal responsibility for that misconduct; third, his liberality in maligning senior managers and others and, without just cause, calling into question their professionalism and integrity.

65 I do not discount the possibility, perhaps probability, that in weighing up the third factor, the disciplinary panel had in mind in part PID's (4), (5) and (6), which had been found to be without substance. But I am quite satisfied that those disclosures by themselves were nowhere near determinative of its decision that the relationship had broken down. Much more vivid and significant in the eyes of Mr Bennett and Ms Al-Beyerty was the fact that, at the disciplinary hearing itself, when he had the opportunity to acknowledge responsibility, show a degree of remorse and seek to make amends, the Claimant had instead adopted a defiant stance launching a fresh attack on the professionalism and integrity of Mr Gill and training his sights on a new target, Mr Lowman. In both instances the tirades were wholly irrelevant and gratuitous. And in the accusation directed at Mr Gill the Claimant's behaviour was worse still because, as Ms Al-Beyerty found in her investigation, documentation establishing that the settlement had been duly approved had been shown to the Claimant at the time. These circumstances were justifiably seen by the panel members as pointing to the new charge against Mr Gill having been made in bad faith. In short, the disciplinary panel was faced with compelling evidence directly from the Claimant at the very hearing itself that there was no reasonable prospect of restoring a working relationship between him and his employer.[4]

66 It goes without saying that the attacks on Mr Gill and Mr Lowman in the disciplinary proceedings were not protected disclosures. In the circumstances, assuming in the Claimant's favour that *any* relevant PID featured in the disciplinary panel's decision to dismiss, I am satisfied that it formed a relatively minor part of the overall assessment that trust and confidence had broken down, which itself was only part of the decision to dismiss. To approach the analysis from the other

[4] For the avoidance of any possible doubt, my reference to 'bad faith' does not betray a basic misunderstanding of the law relating to 'whistle-blowing'. It is elementary that the 'bad faith' defence was removed from the legislation in 2013 and in any event I am not concerned here with a disclosure on which it was open to the Claimant to rely as a PID. The relevance of the panel's perception of bad faith is that it contributed significantly to its conclusion that the employment relationship had broken down and was irreparable.

end, I am quite satisfied that, but for PID's (1)-(8), the disciplinary panel would have reached the same conclusion based on the established misconduct, the absence of any acknowledgement of it and the Claimant's stance and behaviour throughout the disciplinary proceedings and in particular at the disciplinary hearing.

67 The above reasoning compels the conclusion that the Claimant was not dismissed for the reason, and certainly not for the principal reason, that he had made one or more of PID's (1)-(8). Accordingly, the claim under the 1996 Act, s103A fails.

68 Rather, the reason was one relating to the Claimant's conduct and, as such, a potentially fair reason for dismissal (s98(1)(a) and (2)(b)).

69 Did the Respondents act reasonably in treating the reason as sufficient? In other words, did their decision fall within a range of permissible options open to them in the circumstances? At first blush, I was inclined to think that the sanction of dismissal was notably harsh on the facts of this case. By the end of the hearing, I could see considerably more force in the Respondents' defence of the penalty imposed. On the facts found, and permissibly found, by the disciplinary panel the Claimant had on three separate occasions disregarded clear obligations or instructions, undermined and embarrassed his line managers and caused a nuisance, inconvenience and annoyance to valued customers or stakeholders. He had accepted no responsibility and given no assurance that such behaviour would not be repeated. On the contrary, he had reacted contemptuously when taken to task for what he had done. Even at the disciplinary hearing he accepted no blame and expressed no contrition. On the contrary, he launched (in addition to what had gone before) new and wholly gratuitous attacks on two particular managers. It is true that there was no 'live' disciplinary warning in place but the Claimant was not a stranger to disciplinary action. And he had been spoken to on a number of occasions about his way of dealing with people. Moreover, he was a senior employee of many years' standing. In my judgment, the disciplinary and appeal panels were entitled to the conclusion they reached that on the unusual facts dismissal was not outside the range of reasonable options open to them in the circumstances.

70 Was the procedural handling of the case reasonable in the sense of falling within permissible limits? I am entirely satisfied that it was. In the first place, there was an adequate investigation. The only rational conclusion open to Mr Cogher was that which he reached, namely that there were arguable grounds for charging the Claimant with misconduct. The decision to proceed to a disciplinary hearing was proper. The Claimant was duly and appropriately charged. The fourth charge was not unreasonably vague. It was plainly based on the first three. Relevant evidence was shared with the Claimant. He was given adequate notice of the hearing in accordance with the Respondents' disciplinary procedure. It was obviously permissible for Mr Bennett, the City Surveyor, to sit on the disciplinary panel and it was reasonable to seek to allay the Claimant's stated concerns in that regard by adding Ms Al-Beyerty as co-chair. The Claimant was given the chance to be accompanied at the disciplinary hearing. There was no application on the day for an adjournment or postponement and the panel obviously acted reasonably in

proceeding. He was permitted every opportunity to put forward his defence. The decision to dismiss was fully explained in the outcome letter. The appeal was unobjectionable: in accordance with the Respondents' procedures, it amounted to a careful and comprehensive review of the first-instance decision. The appeal outcome was fully explained. I have found no merit in any of the Claimant's many procedural complaints.

71 For all of these reasons, the complaint of unfair dismissal under the 1996 Act, s98 also fails.

Outcome and Postscript

72 As I explained to the Claimant, in determining liability my function is not to judge him but the Respondents. For the reasons I have given, I am satisfied that they did not infringe his legal rights in any respect. Accordingly, both claims fail and the proceedings are dismissed.

73 Had I seen the 'ordinary' unfair dismissal claim differently, I would have seen a great deal of force in the Respondents' submissions based on the *Polkey* principle and contributory conduct. Any award of compensation would have been very modest. Any application for reinstatement or re-engagement would have been hopeless.

Employment Judge Snelson

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26th April 2021

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Judgment entered in the Register and copies sent to the parties on : 26/04/2021

..... for Office of the Tribunals :