EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mr E Williamson	**AND**	Demontfort Fine Art Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: BRISTOL ON: 26TH / 27TH APRIL 2021

EMPLOYMENT JUDGE MR P CADNEY (SITTING ALONE)

APPEARANCES:-
FOR THE CLAIMANT:- **IN PERSON**
FOR THE RESPONDENT:- **MR N SMITH (COUNSEL)**

JUDGMENT

The judgment of the tribunal is that:-

1. The claimant's claim that he was unfairly dismissed is not well founded and is dismissed.

Reasons

1. By this claim the claimant brings a claim of unfair dismissal. I heard evidence from the claimant on his own behalf; and from the respondent from Mr Mathew Sherwin, Mr Justin Mountford, and Ms Rebecca Ball. There is a substantial quantity of documentary evidence, and whilst it is necessary to set out the evidence and disputes in some detail, the central dispute at the heart of the case is straightforward and is summarised below.

Summary

2. On 23rd July 2019 the claimant launched a website www.fineartinvestor which purported to be the website of Fine Art Investor (FAI), described as a "world class art advisory service", and "specialist art investment team, working in partnership with Whitewall Galleries, Clarendon Fine Art and DeMontfort Fine Art Group" offering "unparalleled advice on art investment". As is set out in greater detail below the respondent contends that the claimant was sacked essentially because those assertions, at least as far as they relate to the respondent, are untrue. It had not entered into any partnership with FAI or the claimant individually to provide art investment advice. The claimant was in fact an employee of the respondent; and they concluded that the website was set up to

be in competition, or potentially in competition, with them whilst using their name and purporting to be in partnership with them, thus obtaining the benefit of and misrepresenting their involvement in the project. This was a wholly false prospectus. The claimant was, or at very least reasonably appeared to be, fraudulently attempting to obtain the perceived benefits of being in partnership with them for what was in fact a private venture. This was gross misconduct for which he was entirely fairly dismissed.

3. The claimant's case is not specifically that any of the assertions set out above are true, save that he is an art expert specialising in twentieth century art. FAI was simply a name that he had adopted for the website, there is no team but only himself, and neither it nor he was in any form of partnership with the respondent. However he contends that the contents of the website were largely taken from earlier investment guides which he had permission to use; and that towards the end of June 2019 he had been placed on a personal improvement plan (PIP) by the respondent. At a meeting on 18th July 2019 with his line manager Siobhan Taylor and Jennie Edwards, an HR Manager, it was specifically agreed as part of that plan that he would launch the website, and that both the name Fine Art Investor and the assertion of FAI being in partnership with the respondent were proposed by Siobhan Taylor in the presence of Jennie Edwards. Shortly after this he informed the respondent that he believed that the imposition of the PIP and the failure to support him amounted to constructive dismissal. In consequence they concocted an excuse for his dismissal in the pretence that the contents of the website were not known to or approved by his line manager. He contends that those involved in the disciplinary process either conspired in this knowing full well that the allegations were false, or at very least failed adequately to investigate and interrogate internal documents held by the respondent (in particular end of day reports, 1-2-1 meetings, and the final PIP document) which would have supported these contentions and demonstrated his innocence. His dismissal was thus both substantively and procedurally unfair.

Bundle/Disclosure

4. The claimant had earlier contended that the respondent was in breach of tribunal orders in relation to the preparation of the bundle and he made an application for the response to be struck out which I heard at a TPH on 26th March 2021. At that hearing neither party wanted the final hearing adjourned and I took the view that I could not make any finding of fact as to the alleged breaches of any order, and that in any event the alleged breaches appeared to be relatively minor and that a fair hearing was self-evidently still possible. The directions I gave have been complied with and before me at this hearing there is in fact an agreed bundle with which both parties have worked without any apparent difficulty.

5. However here has been further disclosure of a document not in the bundle. I have not seen this document but it apparently includes extracts from the end of day reports of which the claimant had sought disclosure for the period September 2018 to September 2019. The extracts cover April 2019 to July 2019 and are set out in the form of a spreadsheet. This spreadsheet was sent to the claimant shortly after 6.00pm on Friday 23rd April 2021. Mr Smith explained that he was instructed via direct professional access and that the process of compliance with

litigation obligations was being conducted internally. He had a conference on the afternoon of Friday 23rd and had been told that the information contained in the end of day reports, which are sent via email, are also stored on a database. He advised out of an abundance of caution that they should be disclosed although they did not on their face appear to assist the claimant's case. Although they do not cover the whole period, given the explanation of the claimant's case as set out above they do cover the critical period of June/July 2019. However, as they had been disclosed late he was not applying to be allowed to rely on them but would not object if the claimant applied for them to be admitted. In addition he accepted that the printed document is difficult to read and said that if the claimant wanted more time to consider it the claimant was welcome to do so on his (Mr Smith's) laptop. The claimant declined and did not himself apply for the document to be admitted and as a result I have not seen it and it has played no part in this decision.

Facts/Disputes

6. In this section I will set out the undisputed facts and identify the factual disputes. My findings and the resolution of those disputes is set out below.

7. The respondent is a fine art publisher and distributor and operates Whitewall Galleries and Clarendon Fine Art as retail sales galleries. The claimant was employed as a Gallery Manager at Whitewall Gallery Salisbury from 26th October 2015 until his dismissal on 13th September 2019.

8. As a result of the Novichok attack in Salisbury footfall and sales from the gallery diminished markedly in 2018, although the claimant's evidence is that his targets were not adjusted to reflect this. The claimant made two connected proposals (as set out in paras 10 – 16 of his witness statement) to generate business. Firstly he proposed that he contact financial businesses to promote the respondent's artwork for investment and that they should be offered a 5% finder's fee/commission for any sales made. In addition the claimant put together a brochure "Investing for Pleasure and Profit" (IfPP) which was intended to be used when businesses were contacted in conjunction with the 5% finder's fee/commission. The businesses contacted by the claimant required a written contract for the 5% fee but when the claimant forwarded a template for approval Helen Swaby (CEO) declined to approve it. This appears to have occurred in April/May 2019 from the dates of the emails referred to by the claimant. Thus although the claimant had by that stage contacted a number of potential leads, no formal finder's fee /commission agreements were ever entered into. However the claimant contends that he had been given permission, or at least reasonably believed that he had been given permission, to use the IfPP document independently of any finder's fee/commission agreement. The claimant relies on an earlier email from Helen Swaby from 26th October 2018 in which she expresses her enthusiasm for the brochure as her approving of it. The claimant's evidence before the tribunal was that physical copies of the brochure had been on display and available in the gallery prior to and independent of the finder's fee arrangements and that he had never been told he could not use it.

9. In the bundle there are two versions of the IfPP brochure. In early October 2018 it appears from the emails that the claimant sent a number of versions to Siobhan Taylor. In an email of 4th October 2018 he sent a version from which earlier spelling mistakes had apparently been removed. On 26th October he sent further quotes he wished to add to IfPP which resulted in the enthusiastic email from Helen Swaby. It is not entirely clear which version is in the bundle but there is no dispute that it was created in or around October 2018. The subsequent website includes much of the material and wording included in this document. The most significant differences (for my purposes) are that the IfPP document on its frontsheet identifies itself as being from the "Whitewall Galleries Salisbury " and giving the claimant's name and the gallery's email details. The text describes the authors as "..a specialist investment team, part of Whitewall Galleries.." Thus whether it was in fact approved or not it does not purport to be from a separate business operating in partnership with the respondent. This version of the IfPP document was supplied by the claimant to Mr Sherwin as part of the investigatory process as it was not possible at that stage to download it from the website.

10. However there is another version of the IfPP document headed "Robin James Art Consultancy in association with Whitewall Galleries and Demontfort Fine Art". The wording in this document describes the Robin James Art Consultancy as a "..specialist art investment team working in partnership with Whitewall Galleries, Clarendon Fine Art and DeMontfort Fine Art Group" (Robin James being the claimant's middle names), which is the wording which subsequently appeared on the website. This version is not dated and it is not clear from the documentation itself whether it precedes or follows the version described in paragraph 9 above.

11. One interpretation of these events is that the claimant first prepared the "Whitewall" IfPP document and submitted it for approval in October 2018 as part of the finder's fee scheme and the attempt to generate more sales for the gallery in 2018. If this is correct the version sent to the respondent would be the first version of the document. Once that project did not proceed, as the finder's fee agreement had not been approved by the respondent, the claimant created a new RJAC version for his own use which includes the "partnership " wording and which subsequently became the basis for the website. There is no documentary evidence that this version was ever shown to the respondent and this interpretation is given some support by the fact that on 28th June 2019 an email was sent from the gallery email to his private email attaching the RJAC IfPP. If this is correct the suggestion that the "partnership" wording in fact came from Ms Taylor in July would appear unlikely. However the claimant's evidence is that the "Robin James Art Consultancy" version is in fact the first version and had been in existence since at least 2017. If true this is even curiouser as it would appear that the "partnership" wording had been created by the claimant in the original document; and had the changed it when submitting the document to the respondent, and then possibly reverted to the original wording on the website. If this is true it makes the suggestion that Ms Taylor suggested the wording even more improbable.

12. In any event irrespective of the actual sequence of events, about which it appears to me impossible to make any firm findings on the evidence I have, it is clear that the version the claimant himself supplied to Mr Sherwin during the

investigation was the first version described above; which is also referred to specifically by Ms Ball in the outcome of the appeal in which she notes and relies on the differences in the wording between the website and the IfPP document.

13. The specific events which the claimant contends led to his dismissal began at the end of June 2019. On 28th June Ms Taylor emailed a draft Performance Improvement Plan. The email stated that it was intended to refer to the performance of the gallery as a whole and not the claimant's individual performance, and set up a meeting for the 18th July 2019 shortly after the claimant's return from holiday. There are no notes of that meeting and no final PIP. The respondent asserts that the draft is the only version in existence, the claimant that a final PIP was prepared and has been deliberately withheld as it would reveal the truth that the website was discussed. What I do have is an email exchange of 28th July through to the 1st August 2019. In it the claimant complains that "*I had hoped that the actual plan would have changed from our meeting and incorporated some of the points made*." Although not definitive this would appear to suggest that the draft plan had not in fact been altered following the meeting which would appear to support the respondents contention that there was no final plan produced. In addition in his letter of appeal the claimant complains that he only has "Siobhan's working copy" and has never been supplied with nor signed any final version. In relation to social media the claimant complains that *" I have been hearing about all this since I have been at of the company for some four years and have yet to see an effective media campaign. However the company will not listen to suggestions we put forward*." Again although not definitive it is curious that this assertion is made if in fact Ms Taylor had specifically agreed as part of the PIP to the website going live. In this document, and repeated in an email of 1st August 2019 is the assertion that the claimant believes that he is being constructively dismissed. As set out above he contends that it is this which led to the disciplinary proceedings.

14. On 23rd July 2019 the website went live, although it was not fully functional at that point. In addition to the particulars set out above the contact email address was his gmail address and the contact telephone number was his mobile phone. It offered a number of services including a free copy of the IfPP document to members although it could not at that point be downloaded, provided art information and blogs written by the claimant about two artists. The claimant contends that those blogs contained the gallery details and details of his employment which do not appear elsewhere on the site. Mr Sherwin's evidence is that when he looked at the site he does not recall the details being on the blogs but he did not keep a record as they were not downloadable at that time and he did not think the contents of the blogs to be significant. In addition the claimant contends that the website included an "About me" page which referenced the fact that he was employed by the respondent which he provided to Ms Ball after the appeal. For the reasons set out below she was extremely sceptical as to the provenance of it.

15. The respondents' case is that, although there is no documentary evidence, that the existence of the website was drawn to their attention by Carl Gordon following a visit to the gallery; as a result of which it was decided to investigate. The claimant does not accept that this is true.

16. Before dealing with the disciplinary process it is convenient to set out the factual position in respect of the claimant's contract and the respondent's social media policy.

17. One of the findings which led to the claimant's dismissal was that he was in breach of contract in a number of specific respects (clauses 19.1,21.1.21.2,21.4,22.1,22.2 and 22.4). As is set out below Mr Mountford concluded that the claimant spent working time creating the website, had used company equipment to do so and was disclosing company information on the website. The claimant does not accept that he was in breach of contract and in cross examination Mr Mountford accepted that the conclusions as to the breaches of contract resulted from his general conclusions and that he had not made any specific individual findings as to how the claimant was in breach of any of the clauses of the contract relied on. By way of example whilst he had concluded in general terms that the claimant had been working on the website during working hours in breach of clause 19.1 he had not any specific evidence nor made any specific finding of when and to what extent the claimant had done so. Similarly he was unable to point to any specific disclosure of confidential information in breach of clause 22.1. However, he gave evidence (as set out below) that his fundamental and central conclusion was based on the contents of the website and that he would have dismissed the claimant in any event even had he found no specific breach of contract. As a result in his final submissions Mr Smith submitted that the significance of this aspect of the decision had fallen away. My conclusions are set out below.

18. The second is the social media policy. One of the findings made against the claimant was that the website breached the respondent's social media policy. The claimant contests this and has supplied a number of examples of other members of staff's use of different social media platforms, which he contends were essentially no different from his use of the website. The policy permits the use of social media and the claimant's evidence is that staff were actively encouraged to use it to promote the galleries. It requires members of staff to consider anything they post and the "..*impact…on our brand, image, values, reputation and competitive position*." Again my conclusions are set out below.

19. The disciplinary investigation was conducted by Mr Matthew Sherwin the respondent's Head of IT. On 2nd August 2019 the claimant was invited to an investigation meeting in relation to the website to investigate allegations that he may be acting fraudulently, misrepresenting the respondents business and brands, be in breach of confidentiality, may be working for another business without the respondent's consent, copyright infringement, using company equipment for non-work activities, and be in breach of company policy, procedure and his contract of employment. The meeting took place on 8th August 2019. The claimant was not accompanied at the meeting. The invitation letter notified him of the right to be accompanied by a work colleague or trade union representative; but also directed him to keep the matter confidential. The claimant contends that as he was not a member of a trade union he understood the requirement of confidentiality effectively to preclude him from being accompanied.

20. There are notes of the meeting which Mr Sherwin accepts are not verbatim, but which he contends are broadly accurate. The claimant does not accept this, asserting that he did tell Mr Sherwin that the website had been approved by Ms Taylor and that in so far as the notes do not record this they are inaccurate. The notes themselves record him saying in reference to the brochure that he had Helen Swaby's permission to use it; that he had created the website in his own time with the help of his son; that the email address was his own gmail address and the mobile phone number was his own. In answer to the question *"You've discussed the guide with people but did you ever discuss the website with anybody?"* he replied *"No its just a blog site like other social media" – Q But you didn't seek any permission from anyone?" – " Well no as it is separate from Whitewall. Just like if I was to put a photo on Instagram*"; and he contended that what he had done was no different to what "*other people do within the company".* Mr Sherwin's evidence is that this is an accurate account of the meeting and that the claimant never told him that he had been given approval for the website by Ms Taylor or that she had recommended the name Fine Art Investors, or the "partnership" wording on the website.

21. Following the meeting Mr Sherwin spoke to Ms Swaby who denied that she had ever given permission to create a website or blog; or to distribute the IfPP document. He spoke to Ms Taylor who stated that she had become aware of the website when Carl Gordon had drawn it to her attention; that the claimant had never discussed it with her and she had not given permission for it. She said that it had been communicated clearly that the IfPP document was not to be used. He also spoke to Ellen Sawyer who worked at the gallery. She stated that she was aware of the website as the claimant had been working on it whilst at the gallery; he had been working on it for some months and it was originally "The Robin James Art Consultancy"; that there was a bookmark on the desktop in the gallery from which it could be accessed but that had been deleted by the claimant when he knew that Ms Taylor was visiting the gallery; and that he had previously told them not to discuss the site with anyone. Mr Sherwin accepts that he did not interview Carl Gordon or Briony Jackson who also worked in the gallery to confirm either Ms Taylor or Mrs Sawyer's accounts, nor Ms Carol Preston, Carl Gordon's line manager.

22. Mr Sherwin concluded that there was a case to answer in that the claimant had created and operated the website without following the correct process; had accessed the gallery PC to create or operate the website during working hours; used the Whitewall branding on the IfPP document which was intend to be accessible from the website but had confirmed that the website was completely separate from the respondent; that the assertion of a partnership could mislead clients, and had been done without agreement; he had not complied with GDPR in obtaining client details; had provided inconsistent information; the other social media evidence provided did not demonstrate any comparable activity; that he had created the website for his own gain and had asked a subordinate not to disclose the site to anyone.

23. In consequence the claimant was invited to a disciplinary meeting by a letter dated 27th August 2019 to consider allegations of creating and operating the website; doing so without permission from DeMontfort Fine Art or Whitewall

Galleries or Clarendon Fine Art; that the website could fraudulently mislead customers or potential customers of DeMontfort Fine Art or either of its gallery trading entities; that the website misrepresents DeMontfort Fine Art and its trading entities; that he created and operated the website during working hours and using the respondents equipment; that the website was created in breach of the respondent's social media policy; and that he was in breach of seven sections of his contract of employment. The letter informed the claimant that these allegations potentially amounted to gross misconduct for which he could be dismissed and told him of his right to be accompanied.

24. The meeting was conducted by Justin Mountford, Head of Product, who was accompanied by Anthony Sutton an external HR consultant who was the notetaker. During the meeting the claimant was asked the purpose of the website and referred to the IfPP document which he said had been approved by Siobhan Taylor and which describes working in partnership with WW (Whitewall). He accepted that could be misleading. He accepted that the implication was of a partnership between himself and the respondent but that it had been taken to Helen Swaby and nobody said not to use it. He stated that in meeting businesses in anticipation of the finder's fee agreement that he had given them the IfPP document and that he understood the email of Ms Swaby of 26th October 2018 to have given him specific permission to use it. In relation to the website he states that it was originally called Robin James Art Consultancy but that he changed the name to Fine Art Investor because *"I thought it was a better name."* He was asked whether the company was aware of the site and replied " *They know I blog. I use Instagram and social media*.." In answer to a question " *I'm concerned that it pertains to be in partnership with WW/CFA/DMFA" and that "I think it could be considered intentionally misleading people and the public"* he replied "*They come to me -this is not a WW blog site or website."* Somewhat curiously he then goes on to deny that on the website FAI claims to be acting in partnership with the respondent. There is a discussion about the statements obtained during the investigation. He describes Ellen Sawyer as a disgruntled employee, and states that Siobhan Taylor is lying. Later on in answer to the *question "To be absolutely clear did you have permission from WW/DMFA to do this?" he replied "No*".

25. Mr Mountford concluded that the claimant was guilty of gross misconduct and should be summarily dismissed. The claimant was informed verbally on 13th September 2019 and this was confirmed in writing on 17th September 2019. The letter is a lengthy and detailed one. It summarises the discussion in the hearing and sets out the basis of the conclusion that the claimant had committed gross misconduct, which in summary are that the claimant created and operated the website without permission; that he website could fraudulently mislead customers or potential customers in that it purported that FAI was acting in association with the respondent which was untrue; that it had been created and operated during working hours and using the respondent's equipment; that it misrepresented the respondents brands without permission; that it was in breach of the social media policy; and that it breached seven specific clauses of the claimant's contract of employment. Following a detailed explanation of the findings Mr Mountford concluded " *I consider and conclude that you set up the website..as a business either in competition with …(the respondent).. or to test the market to set up your own business in competition with ..(the respondent).. in serious breach of your*

contract of employment." In evidence Mr Mountford stated that the most serious allegations and the fundamental basis for his decision to dismiss was the creation of the website and the misrepresentations as to the respondent's participation, and that even if he had concluded that the claimant was not in breach of the specific sections of the contract of employment that he would still have dismissed the claimant.

26. The claimant appealed setting out the following grounds: that the sanction was too severe and disproportionate to the misconduct; the sanction is inconsistent with sanctions imposed on other staff; his strong sales, exemplary performance and seniority had not been taken into account; the facts supplied had been ignored and he had been prevented from speaking to colleagues who could support his account; he had not been allowed to cross examine witnesses; that there was evidence of entrapment; that a fair investigation had not taken place.

27. The appeal was heard by Rebecca Ball (Retail Director) on 7th October 2019 with Jennie Edwards attending from HR. The following are extracts from the notes of the meeting:

i) The IfPP document is discussed and the claimant contends that he had permission to use it referring again to the support of Siobhan Taylor and the enthusiastic comments of Helen Swaby.

ii) He was specifically asked " Fineartinvestor.co.uk did anyone approve it?" and he replied " Why would I need approval? There is no reference to needing approval for this in the Social Media policy. I used wording from the investment brochure on the website that was approved."

iii) Later he is asked "I am trying to link this together. Did anyone give you permission" "No, but I was allowed to set this up myself without permission."

iv) Later he is asked "Are you saying that ST knew about the website and gave you permission?" " "It doesn't say in the SM policy that I can't, there was no way of contacting the website";

v) ""I want to understand the timing of this, if the website wasn't live until July 2019 but you are saying we are aware of the information- was that the Investment guide not the website?" " ST would have known about blogs, she follows me on LinkedIn and I provided evidence that ST was viewing my profile. She might not know about the website but it was on LinkedIn so I presume she knew." "You just said you told her about the website, was ST aware of the website?" " Blog site but I presume so" " Presume so you haven't told her?" " I have told her in meetings what I was going to do with blogs, but I didn't tell her about the website."

vi) Later the following exchange is recorded " "Did you mention the website when you spoke to either of them?"" No" "So it's on your LinkedIn but you didn't mention it " "No" " So you didn't mention the website to HS or ST?" "Mentioned at meeting I think but I didn't say to ST about it, it was on the website. I mentioned the investment brochure in the meeting JE was at about my PIP" and "

"Everything I have done ST knew all about it" " You said earlier that you didn't show her the website?" "It was only up two weeks" "Trying to understand, ST didn't know about the website?" "ST encouraged me at every stage to blog, the web site was on the desktop she could have seen it."" I have still not seen anything to show that ST has approved the website"" What has this got to do with the website?" "The whole thing." "No one is taking this seriously. I don't have anything to say I can't do it." "But you have nothing to say you can?" "I haven't physically shown ST the website but you are wrong your point is flawed."" "You are saying your boss was fully aware of what you were doing but you ever showed her the website." "Yes I told her about it." " You told her about the website?" "You are taking the terminology in a different way she knew about my blogs.".

28. In respect of ground two he referred to others who used social media and did not use their own name but "fun "names, and that the website was a blog which was permitted. He repeated the allegation that Helen Swaby and Siobhan Taylor were lying.

29. Ms Ball concluded that the wording on the website had not be approved by Ms Taylor or Ms Swaby; and that it was in breach of the respondent's Social Media Policy. She held that here was no inconsistency between the treatment of the claimant's website and the social media accounts of other members of staff in part because the contents of the website did not refer to the respondent but invited contact with the claimant directly; that Mr Mountford had taken the claimant's performance into account in determining the sanction; that it was not unfair that he had not been able to cross examine the witnesses, that there was no evidence of entrapment and that there had been a fair investigation. She fundamentally concluded that the website not had been set up by the claimant as part of his role with the respondent but for his own gain and that it was in direct competition with and in conflict with the respondents business and she dismissed the appeal

30. At the appeal hearing the Ms Ball asked the claimant to identify to her where on the website she could find his name and the Salisbury gallery details as she could not see them. The claimant said that he could not at the meeting itself but subsequently supplied an "about me" page, allegedly part of the website. Unlike the website it contained no date stamp, and the formatting and properties were not the same as the website itself. She confirmed that neither Mr Mountford, nor Mr Sherwin had ever seen this page and also that neither Jennie Edwards or Steve Mellor who had separately captured screen shots from the live site had seen it. She did not accept that it had been missed during the investigation or disciplinary process but rather that it had been altered by the claimant.

Factual Conclusions

31. There a number of specific disputes of fact in the account set out above which need to be resolved. As the question of the fairness of the dismissal has to be judged against the information available to the decision makers at the time, the primary dispute is what defence the claimant was advancing as a matter of fact during the investigatory and disciplinary process. As set out above the claimant

contends that at each stage he told Mr Sherwin, Mr Mountford and Ms Ball that he had received specific permission both to launch the website and as to the specific wording of the website from Ms Taylor, and that the most contentious wording in relationship to the "partnership" came from her. Each of them insists that that is not true and that the notes of the individual meetings fairly reflect what was said. If those notes are accurate they paint a relatively consistent picture. The claimant was not alleging that he had any specific permission or agreement in respect of the website, but he did have, or believed he had, permission to use at least one version of the IfPP investment guide, if he in fact needed permission at all it use it on social media. If the website was misleading or misrepresented the facts that was because the contents of the IfPP had been innocently transposed to the website.

32. The respondent submits that for the claimant to be correct he must have been the victim of a conspiracy between the decision makers and the notetakers for which there is at best no evidence, and which is in reality vanishingly improbable. The notes do not simply omit any reference to the defence he now advances but specifically record him as saying the opposite and denying on many occasions that he had received permission. If the claimant is correct the true information has been omitted, and the exchanges recorded must simply have been invented.

33. The respondent is obviously correct that there is no evidence other than the oral evidence of the claimant to support this allegation, and that it is at first sight an implausible one. However the fact that an allegation is implausible does not necessarily mean that it is untrue. However, in my judgement the preponderance of the evidence clearly supports the respondent. In my judgement it is inconceivable that if the claimant had told Mr Sherwin that he would not have complained to Mr Mountford that the investigation did not accurately record his defence to the critical allegations; and similarly if Mr Mountford himself had omitted it that he would have set this out in the letter of appeal. However the letter of appeal makes no such assertion. This confirms my impression having heard from all three witnesses that their evidence was honest and reliable and I am satisfied on the balance of probabilities that the account being advanced in the tribunal was not advanced at any stage during the internal process.

34. A related factual dispute is whether in fact that claimant's account as to the naming and the wording of the website being discussed and proposed by Ms Taylor at the PIP meeting on 18th July 2019 is correct in any event. Although I have not heard from Ms Taylor for the reasons set out in paragraph 11 above I am sceptical as to this account; and that scepticism is even greater given my finding that the claimant did not rely on this account at any stage during the disciplinary process. Given that I have significant doubts as to the reliability of the claimant's evidence, if it were necessary to make any finding of fact I would not, on the balance of probability be inclined to accept it. However the findings of fact set out above are the necessary and relevant ones for my purposes it is not therefore necessary to make any specific finding as to the reliability of the underlying assertion.

35. There are a number of other factual disputes. As set out above the claimant contends that there exists a final PIP document which includes reference to the

website and which proves the truth of his assertions, and which the respondent has deliberately refused to disclose. The respondent insists that the draft PIP is the only one ever produced. The difficulty for the claimant is that both by implication in his email , and explicitly in his letter of appeal he asserts that no final document was produced, or at least sent to him. This obviously supports the respondent's account; and it is hard to understand why he should continue to assert that a document exists which on his own account he has never seen.

36. In respect of the IfPP document the claimant's case is that even if it is not accepted that he had been given permission to establish the website by Siobhan Taylor, that he had been given permission to use the IfPP document. This is based on the email from Helen Swaby of 26th October 2019. The respondent contends that enthusiasm and approval are not the same thing and that even on the claimant's case there is no evidence that Helen Swaby ever approved the document for use, and that the claimant could not reasonably have understood her to have done so. Moreover, given that it is the claimant's own evidence that it was intended to be used in conjunction with the finder's fee, any approval of the IfPP document could only be conditional on approval of the overall scheme. As it is not in dispute that the scheme was never approved it follows that no final permission can ever have been given to use the IfPP document and the claimant has no evidence that it had. In effect the respondent submits that in seeking to place such weight on one email that the claimant is clutching at straws to attempt to justify what would otherwise obviously be unjustifiable. As a matter of fact it appears to me impossible reasonably to read Ms Swaby's email as giving the claimant unfettered permission to use the IfPP as he saw fit, although that does not necessarily mean that the claimant did not think that he had been. However what it cannot do in my view is to give the claimant permission to make assertions on the website that are plainly untrue and known to be untrue by him; and there is nothing before to me to indicate that Ms Swaby had ever done so.

37. Similarly, although it's not necessary to make findings of fact about it, as nothing essentially turns on it I share Ms Ball's scepticism as to the true provenance of the document supplied to her after the appeal by the claimant. Why one document of the pages of a website containing some 75 pages should have different properties and be in a different format to the others is entirely unexplained, and there is no obvious explanation for it.

38. It follows that I am extremely dubious as to the reliability of all of the primary factual assertions made by the claimant. Looked at overall I am not satisfied that evidence the claimant has given is reliable or credible; particularly in relation the issue of what he told Mr Sherwin, Mr Mountford and Ms Ball and where there is a dispute I prefer the evidence of the respondent's witnesses.

Conclusions

39. As this is a conduct dismissal there are four questions for me to answer. The first is whether the respondent has satisfied the burden of demonstrating that it had a potentially fair reason for dismissal. The claimant asserts that the real reason for his dismissal was concocted and that the purported reason was not the genuine reason. Having heard from both Mr Mountford and Ms Ball I am entirely satisfied

that the conclusions and the reasons for forming those conclusions that they set out in the dismissal letter, the letter dismissing the appeal, and in evidence before me were the genuine reasons for dismissal and that the respondent has satisfied the burden on it to show that the claimant was dismissed for a potentially fair reason. Specifically, I do not accept, and there is no evidence before me, that there was any conspiracy of which Mr Sherwin, Mr Mountford or Ms Ball were a part to dismiss the claimant for reasons which they knew to be untrue.

40. The remaining questions are the "Burchell" questions. Was there a reasonable investigation, were reasonable conclusions as to the misconduct drawn; and was dismissal a reasonable sanction. In respect of each of those questions the range of reasonable responses test applies. I have addressed each of those questions below and the challenges made by the claimant but I accept, and bear in mind the respondent's submission that the issues raised by the claimant obfuscate what is essentially a simple case. How and why did he come to launch a website which made a number of untrue assertions about the respondent and its relationship with FAI and did the respondent reasonably dismiss him for having done so?

Investigation

41. Even if he is wrong as to the conspiracy the claimant contends that there was a failure adequately to investigate. Firstly at no stage were Carl Gordon or Briony Jackson in particular interviewed. The relevance of this, the claimant asserts, is that if Carl Gordon had been interviewed and it had emerged that the original information about the website had not come from him that it would at least have cast doubt on the veracity of the information received by the respondent. Similarly interviewing Briony Jackson would have revealed whether the allegations of Ellen Sawyer were supported and of not it would or at least could support the allegation that they were malicious. Put simply he contends that Mr Sherwin simply accepted at face value evidence which he should have challenged or at least investigated.

42. The respondent submits that the investigation was self-evidently reasonable. In reality, given that it is not in dispute that the claims set out on the website are not true all that is required is to give the claimant the opportunity to explain how that came about. The claimant was given that opportunity, and Mr Sherwin interviewed those who were alleged to have given the claimant permission and a member of the gallery staff. No more was required and on any analysis this fell within the range reasonably open to the respondent.

43. In my judgement this is correct and I cannot see any basis for concluding that the investigation fell outside the range reasonably open to the respondent.

Conclusions/Misconduct

44. There are two challenges to the respondent's conclusions as to the misconduct which I can deal with relatively briefly. Firstly the claimant contends that the conclusion that he was in breach of contract as found by Mr Mountford is

untenable in the absence of specific factual findings in respect of each. As set out above Mr Mountford accepted that he had not made any such specific factual findings. In those circumstances in my judgement the claimant's case on this point has some merit. I am not persuaded however that it is sufficient in and of itself to render the decision to dismiss unfair. Mr Mountford's evidence, which I accept, was that the fundamental reason for dismissal was setting up and launching the website which contained false representations as to the respondent's involvement and which was or was intended to be in competition with the respondent. If those conclusions were reasonably open to him they are sufficient in my judgement to allow the conclusion that the claimant was guilty of gross misconduct irrespective of any specific finding in respect of breaches of contract.

45. Secondly, the claimant submits that the conclusion that he had breached the social media policy is untenable and inconsistent with other colleagues use of social media. The claimant contends that the material in the bundle demonstrates different members of staff using different social media platforms with different levels of formality and professionalism, and in a manner which is essentially different from his creation of the website. There is no evidence any of them either sought or received specific permission to do so. As far as the evidence before me is concerned that is obviously true; and insofar as launching the website itself is concerned in my judgement the claimant has an arguable point that to do so is not in and of itself a breach of the policy. However that appears to me something of a red herring. The difficulty for the claimant is that there is no evidence before me that in any of the social media posts the claimant relies on that any other member of staff has made assertions about the respondent's business that are demonstrably untrue. It follows in my judgement that if it was reasonable for the respondent to conclude that the claimant did not have permission to make those assertions that it was also reasonable to conclude that he was in breach of the social media policy in using a social media platform to make false representations as to the respondents involvement in the FAI project.

46. That leads to the fundamental issue in the case, which is whether Mr Mountford, and on appeal Ms Ball could reasonably have concluded on the evidence before them that the claimant had committed the misconduct alleged. In my judgement they were entitled to do so. Firstly no one contends that any of the assertions were true; and it follows that the conclusion that the claimant had used the website to make false representations as to the respondent's involvement was obviously reasonable. Secondly as set out above I accept that on the evidence before them that the claimant was not asserting that he had specific permission to do so, but that he had assumed, essentially on the basis of one email that he had. They were in my judgement on the evidence before them entitled to conclude that he had no such permission. In my judgement it must be borne in mind that the claimant's case is only even arguable if the version of the IfPP document sent to Ms Swaby was the RJAC version which contained the same "partnership" wording as the website, and if it is possible to construe a general expression of enthusiasm as permission to use it. However the version supplied by the claimant to Mr Sherwin, and which the claimant asserted was the one on the website, was the other version which did not contain that wording. There was therefore, in fact no evidence before Mr Mountford or Ms Ball that any permission

for the disputed wording had ever been given by anybody. In those circumstances the conclusion that the claimant did not have permission was in my view inevitably and necessarily one they were entitled to draw.

47. Fundamentally I accept that both Mr Mountford and Ms Ball were entitled to conclude on the evidence before them that the claimant had set up a website which was intended to draw custom to FAI in competition with the respondent, and had misrepresented the respondent's involvement, whilst he was an employee of the respondent and that this constituted gross misconduct.

Sanction

48. The claimant contends that the sanction was too harsh both in relation to the misconduct itself , and given his seniority, previous exemplary record a strong sales figures. It is clearly true that he sanction would be arguably too harsh if the contents of the website had the permission of the respondent or had arisen from an innocent error. However that was not the finding of either Mr Mountford or Ms Ball and the fairness of the sanction must be judged against their conclusions. The other points made by the claimant appear to me to be something of double edged sword, in that his seniority arguable aggravates rather than mitigates the misconduct. In my judgement looked at overall, if Mr Mountford and Ms Ball were entitled to reach the conclusions they did (which I accept they were for the reasons given above) then dismissal necessarily fell within the range of sanctions reasonably open to them.

49. It follows that all of the Burchell questions having been resolved in the respondent's favour that the claimant's claim must be dismissed.

Employment Judge Cadney
Date: 19 May 2021

Judgment and Reasons sent to the Parties: 28 May 2021

FOR THE TRIBUNAL OFFICE