



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr. M Konche

**Respondent:** (1) Greenwich Primary Care Collaborative CIC ( in Liquidation)  
(2) Malling Health (UK ) Limited

**Heard at:** South London Hearing Centre

**On:** 7<sup>th</sup> June 2021

**Before:** Employment Judge McLaren

## Representation

**Claimant:** Ms. J Furley, Counsel

**Respondent:** Mr. J Wynne, Counsel

# JUDGMENT

The decision of the tribunal is that

1. The claim against the second respondent does not succeed. The sole or principal reason for that dismissal was not the TUPE transfer, for the purposes of TUPE 2006 Regulation 7(1).
2. The claims against the first respondent succeed.
  - The claimant was unfairly dismissed by the first respondent.
  - The claimant was dismissed in breach of contract and his claim of wrongful dismissal succeeds
  - The claims for unlawful deductions for failure to pay 4.5 days holiday and pay for 1-19 September 2018 succeed.

**3. The claimant is awarded**

- a basic award of £6096 (calculated as 1.5 X8 x£508)
- a compensatory award of £45,009.72
- holiday pay of £779 ( less tax as appropriate )
- unpaid wages of 13 days of £2250.43
- 8 weeks pay £6,9240.40 ( less tax as appropriate )

## REASONS

### Background

4. The claimant raises complaints that he was automatically unfairly dismissed for reasons connected with a TUPE transfer; unfair dismissal pursuant to section 98 (4) Employment Rights Act 1996; wrongful dismissal; unpaid wages of September 2019; and pay in respect of untaken holiday as at the date of termination.

### Issues

5. At the outset of the hearing the parties agreed the issues list which had been previously determined following an earlier case management hearing.
6. The issues against the second respondent are as follows

#### **Transfer**

7. The parties accept that there was a TUPE transfer of a medical practice from the First Respondent to MH(UK) Ltd on 1 October 2018

#### **Dismissal**

8. The Claimant was dismissed by the First Respondent on 19 September 2018.
9. Was the sole or principal reason for that dismissal the TUPE transfer, for the purposes of TUPE 2006 Regulation 7(1)?

#### **Remedy**

10. If the dismissal of the Claimant was for the sole or principal reason of the TUPE transfer, liability for his dismissal transferred to MH(UK) Ltd.
11. In the circumstances of the Claimant then being subject to an adjourned disciplinary hearing, would the Claimant have been dismissed lawfully and fairly for misconduct by MH(UK) Ltd? The Tribunal will need to address issues of Polkey and contribution.
12. What are the Claimant's losses?
13. Has the Claimant failed reasonably to mitigate his losses.
14. The issues against the first respondent are

What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was for gross misconduct.

If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

15. There is a claim is for unlawful deduction of wages pursuant Section 13 of the Employment Rights Act 1996 (ERA). The claim relates to payment for hours worked but not paid from and for 4.5 days unpaid holiday 1-19th September. The Tribunal is to determine whether the claimant suffered such unlawful deduction of wages and to determine the amount
16. The claimant also complains of wrongful dismissal and the tribunal must determine if the claimant's conduct amount to a fundamental breach of the contract of employment,

### Evidence

17. I heard evidence today from the claimant on his own behalf and from Paul Brown the former chair of Directors for the first respondent. I was provided with a bundle of documents amounting to 333 pages. In reaching my decision I considered the evidence before me together with those pages of the bundle to which I was directed. I was also assisted by helpful submissions from both parties.

### Finding of facts

#### Background

18. The claimant started work as a practice manager at the Clover health centre in Greenwich in May 2010. The centre was run by the first respondent under an NHS contract .Clover Medical Practice was a new

GP surgery and the claimant had been employed to help set up the practice from scratch. His involvement had therefore began in 2010 although he was not employed until 2011.

19. Mr Brown explained that he had also been involved in the establishment of the surgery before it began trading. The company had worked for had set it up and employ the staff and had raised the finances. They did so at risk, and the reward was that his employer would then provide accountancy services to the business. The contract with his company was later terminated, but he could not recall when. It was common ground that at the start of the establishment of a social enterprise organisation the directors of the company had all been GPs that over time all but one of these doctors had resigned their position as a director and so the three directors of the company were Dr Singh, the remaining GP, the claimant, the practice nurse, Mrs Golden, and Mr Brown who took on the role of chair from April 2017 until February 2019. Mr Brown did so on a voluntary basis, fitting this role in around his day job and therefore was not present or involved in the day-to-day running of the respondent organisation.

The claimant's resignation as director of the company

20. The claimant's evidence was that he had resigned as a director of the company in January 2018. The bundle contains at page 112 an email from 3 January which stated that with immediate effect he was tendering his resignation from the board. He will continue to do his duties of the practice manager of the health centre but as email noted that the stress he had been under was unsustainable. It was common ground that the claimant's removal from companies house website did not occur until some months later. The claimant explained that it was only when the new accountants came on board that he realised he had not been renamed from companies house and therefore with the help of the accountants firm and Dr Singh's cooperation, the relevant documents were filed. Mr Brown in cross-examination accepted that the claimant was unable to process the companies house documentation without actions taken by the respondent organisation i.e. the respondent had to organise the paperwork.
21. Mr Brown replied on the same day that this is very disappointing news to get, but commented that the claimant needed to look after himself and do what is right for him. Dr Singh also responded to the claimant's email setting out that in his view the current model was unsustainable and that it was working in a very stressful environment. He also identified that unless there was a sea change in the way they worked in the respondent organisation he too would have no choice but to consider his future in the coming weeks. Mr Brown then sent an email in response saying that he needed everyone to stay on the board until at least the end of March. He asked if everyone was prepared to do that.
22. Mrs Golden's response is within the bundle and she promises Mr Brown and the respondent organisation that they could continue to have her support for what she characterised as a difficult time. There are no replies to this email either Dr Singh or from the claimant.
23. In his witness statement and evidence before me Mr Brown maintained that he considered that the claimant's action in tendering his resignation amounted to him wanting to jump ship and leave the other two directors in the lurch. He explained that he understood that the claimant was not

- resigning as a statutory board director but was resigning from the operational board.
24. In answer to cross examination questions Mr Brown explained further that he continued to invite the claimant to board meetings for two reasons, he had not as he had already explained, understood that the claimant had resigned as a statue director and because he did not really think that the claimant meant his resignation to be accepted. Mr Brown commented that many GPs had resigned and not really meant it. He commented that if they wanted out and he thought the claimant was continued support for the had not really resigned. He noted the claimant had attended one board meeting after this resignation he thought in about March. The claimant says that it is entirely clear that he attended this only as practice manager not as a director.
  25. I find that the terms of the claimant's resignation are clear and he did not withdraw this. He continued his employed role as practice manager but has resigned from the board. The claimant did not respond to Mr Brown's email which asked him and the other directors to stay on the board for a further period of time.
  26. I find that the claimant's resignation was intended to be not just from any operational board, but as a statutory director, despite the fact the paperwork for this is not processed for some months later. I find, as Mr Brown has confirmed, the claimant did continue to support the practice in his role as practice manager. However, while I am clear that that was the claimant's intention I also accept that Mr Brown generally did not understand this was the position.
  27. It was put that the relevance of the timing of the claimant's resignation in July and not January was that it was perceived as an act of betrayal in July that caused Mr Brown's tone of communications to change. I find that this may have been a contributing factor and a lens through which Mr Brown viewed the claimant's actions as he clearly took offence at this resignation. Mr Brown's incorrect beliefs that the claimant resigned in July. The background to his dismissal but is not connected to the transfer.

#### The claimant's health

28. Mr Brown accepted that the claimant was under stress at the time he wrote this email in January and said that they tried to accommodate his requests and were sympathetic to it. Colleagues supported the claimant but it was a small practice and that was the context in which support could be offered. Mr Brown also accepted that it was a very stressful period for everyone that the business was under resourced and this was extremely tense.
29. Mr Brown accepted that the claimant was practice manager of the doctor's surgery when he was appointed but that over time his role widened because the income streams of the practice to widen. Mr Brown accepted the claimant was required to take on the management of these additional streams such as the nursing home. However, his evidence was all practice managers would be asked to do this.
30. Mr Brown confirmed that he was aware that the claimant was in hospital for a week in March 2018 with pneumonia. He accepted that while the claimant was at home recovering he assisted the practice by running the payroll. He did not accept the characterisation of this as the claimant being asked to

- work from his sick bed, although he did accept that the claimant was certainly helpful to the practice at this time.
31. Other than Mr Brown's assertion that colleagues were sympathetic, there is no evidence that the claimant was given any assistance with the stress it was acknowledged that he was suffering from. Indeed, Mr Brown accepts that the claimant was assisting the practice time and he was unwell. I conclude that little or no steps are put in place to alleviate the claimant's workload or to deal with the stress he said he was suffering from.
32. I find that Mr Brown is on notice of the claimant's health issues from this point onwards and knows that he suffers from stress which can be caused by overwork.

#### The claimant's work performance

33. Mr Brown considered the claimant to be a friend and was consistent in his evidence that in the 7 to 8 years they had worked together there had been no problems with their communication and that he had regarded the claimant as a diligent worker. There had been no problems with either his work or his attitude.
34. However, he considered that problems began to arise with the claimant's conduct and performance from around July 2018, and with hindsight they problems had been there much earlier.

#### Absence issues

35. The contract for the running of the practice was awarded to the second respondent in July 2018. Mr Brown said that in the months leading up to the claimant's dismissal, the claimant was increasingly absent from the respondent and difficult to contact. He explained that he was told this by Mrs Goldman and Dr Singh. Mr Brown himself, of course only came into the practice once or twice a month and generally did so before he went to work and so would not be present when the claimant was apparently leaving. It appears from his evidence that complaints about the claimant's absence arose from the time at which the first respondent becomes aware that it has lost the contract to run the practice. While this timing links to the transfer, these complaints are not related to the transfer.
36. In his witness statement Mr Brown says that the claimant frequently told him, Mrs Golden and Dr Singh that he was going to meetings with the CCG and/or the second respondent but he was subsequently alerted that no such meetings are taking place. Mr Brown said the claimant had lied to him about where he was.
37. Mr Brown accepted that the claimant would come into the office relatively early, he would generally meet with him at around 7 or 7.30 in the morning. It was not disputed that the claimant would arrive before that, in his evidence he said that he could do the office as early as 6 a.m. The claimant generally therefore finished between 4 and 4.30. He was contracted to work 40 hours a week but on his account worked considerably more. I accept that he did so.
38. The claimant did not accept that he had left early in the sense it was inappropriate him to do so. He accepted that he would sometimes leave early when he had worked long hours. He also confirmed that he had been at various meetings and have therefore left to attend these and that they

included meetings that he was obliged to attend as part of his role as practice manager.

39. No dates or times for these absences were given. There are two allegations, that the claimant was generally absent and secondly that he gave reasons for his absence which were false. I accept Mr Brown believed the claimant lied about absence, although he had no clear evidence on which to do so.

#### Staff issues

40. It was agreed that there were approximately 10 staff employed by the first respondent including the claimant. Mr Brown gave evidence that he went in to talk to people in the period after the tender had been lost with the intention of listening to what they said. He did so in part because he had been told by both Mrs Golden and Dr Singh that there were issues with the claimant's interaction with staff that he wanted to get some independent verification. He could not recall the date of this attendance and there is no written record of what he was told. He explained that at least six staff, and it was agreed that at around the relevant time only seven staff would have been in the offices, complained to him about the claimant's conduct as sometimes unpleasant and that he had shouted at the staff.
41. It is evidence Mr Brown suggested that Mrs Golden then held a meeting with staff on 14 August to clarify what was going on. Mr Brown clarified that this meeting was in fact to discuss the implications of the TUPE transfer and that the claimant was invited to attend as an employee. He was unable to arrange the meeting also attended because he was on approved annual leave.
42. Mr Brown confirmed that he did not raise the staff complaints with the claimant prior to the disciplinary process. The claimant denied that he had ever been unpleasant to staff or shouted at anyone. I prefer the claimant's evidence on this point as it seems unlikely that almost 100% of the staff would complain and no action was taken I find that any complaints raised to Mr Brown were minor, which is reflected in his decision not to note them or to take any action.

#### Financial issues

43. On 16 July 2018 Mr Brown emailed Dr Singh, Mrs Golden and the claimant. The subject was IMS and it made reference to an extension to the first respondent contract to run the medical practice. This email stated that Mr Brown was not blaming anyone, just wanted to know that this issue was sorted. It also specifies that once they win the extension he will ensure extra resources put into manage things they are clearly unsustainable as they are, but until then we need to make sure we keep on top of things. This is not an email that is critical of the claimant's performance and is in fact addressed to 3 individuals.
44. The next day Dr Singh sent an email saying he received a call from HMRC asking for payment of just under £20,000. The email specifies that the claimant was believed to be aware of this issue and had not called HMRC as requested. It was Mr Brown's evidence that the claimant had control of the respondent's bank account was responsible for paying HMRC, no one else knew how to access the account and therefore no one realised HMRC had not been paid until Dr Singh took this call. Mr Brown accepted that

- HMRC were paid. The claimant explained that he always paid staff wages first, waited for additional funds to arrive and then paid the tax.
45. The claimant accepted that he had been made aware of the HMRC position but that he had told the contact point that the money will be paid once funds were received. I accept the claimant's evidence that he paid invoices when there was money. The claimant does agree that the money was outstanding for a period and I find that it is reasonable for this to be a matter for concern to Mr Brown.
  46. Following this incident, on 17 July, Mr Brown emailed the claimant, Dr Singh and Mrs Golden to arrange a board meeting. In his witness statement Mr Brown says that the claimant did not attend the meeting and chose not to do so. Based on my finding of fact I've already found the claimant had ceased to be a board member prior to this. While there was a proposed agenda, no minutes were produced and Mr Brown accepted in answer to cross examination questions that in fact this was not an official board meeting. Nonetheless, Mr Brown took some action following this meeting and he emailed the claimant about the respondent's bank transactions.
  47. On 18 July Mr Brown emailed the claimant saying that without action the respondent would struggle to survive through to next month the board must consider bringing in the receiver. Before taking such action Mr Brown asked for some information about payments in and out of the bank account. The claimant was asked as a priority tomorrow to let Mr Brown know what the position was. Email specified "to be clear this is the number one priority for you tomorrow, all other things can wait." The email concludes that Mr Brown recognise the stress that the respondent only to find if all three pulled together. The final line is "not preaching to you, as you have always been brilliant with me, but wanted to hear first-hand what I said tonight".
  48. Mr Brown confirmed that his judgement of the claimant as always brilliant with him was what he described as a little white lie. He had already become concerned about his absence issues by this point and therefore he wrote this email in these terms as he was trying to keep everyone together.
  49. The instruction to provide Mr Brown with this information and to treat it as a number one priority was given on 18 July at 19.40. It is accepted that the claimant was on a course when the email was received and on the next day which was a mandatory requirement for the regulator. Mr Brown's evidence was that had the claimant made him aware of this he would have reorganised that course. The claimant needed to make the financial issues the number one priority as he had been instructed.
  50. At 04.16 on 20 July Mr Brown writes to the claimant again say that he is disappointed not to have had a reply. The Email specified that if you run away from this you are the only one with access to the account and the business will fail everyone will be made redundant. The claimant was given a specific instruction to do the work and to make arrangements for short-term financial support if required.
  51. The claimant responded at 15.34 on 20 July with a brief email giving some details of the financial position. Mr Brown characterised this response in his witness evidence as inadequate for the practice manager and not providing the detailed cash flow information that had been requested. The claimant said that he has provided what was asked but he was not the practice accountant.



52. Taking a straightforward reading of the request from Mr Brown and the claimant's response I find that the claimant has not provided the level of detail Mr Brown would reasonably expect.
53. The next issue that caused concern is an email 6 August 2018 from the accountants. The correspondence is at pages 159-160. They illustrate that the accountants are chasing a response from the claimant to queries about various invoices and bank transactions. They relate to invoices from November 2017 to 1 August 2018. At the time the claimant replied following day to say that one person could only do so much, that he was covering other staff absence and responded to NHS complaints and dealing with the improvement plans from QOF. He expanded on this in his evidence before the tribunal to explain that he had contacted the accountant and had also attempted to find anything invoices and at the date on which invoices have been paid up to date.
54. The claimant explained that the invoices had not been his responsibility but that of the previous accountants and that once he became aware they were unpaid he did his best to address this. He was at the time dealing with the absence of those administrators, one had been granted six weeks leave by Mrs Golden, the receptionist and other staff shortages. He did all he could reasonably do. While that may be the case, it is not disputed that the invoices were outstanding and that the claimant did not at the time explain that he was responding to the request for information and was attempting to deal with this. The impression that he gave Mr Brown was that he had not provided the material despite being chased several times.
55. On 13 August Mr Brown sent an email to Mrs Golden, Dr Singh and the claimant in which he attached a cash flow spreadsheet that need to be completed. The email said that the claimant had agreed to spend some time in the morning collecting the remaining data. This email does not criticise the claimant's performance or raise any issues about his failure to deal with financial matters.
56. The three directors held a board meeting on 14 August. Mr Brown stated that the minutes of the meeting were not verbatim but simply referred to action points and that, while they do not record this, the claimant's conduct was discussed at this meeting under the section relating to his resignation from the board. Mr Brown said that the concerns about the claimant's performance and conduct were evident from the actions agreed in that he was going to write to the claimant to instruct him that all payments have to be approved by him and that Mrs Golden had to be made a bank signatory urgently. He explained that these unusual actions were because the board had lost trust in the claimant by this point. This is a result of what he believed to be the claimant's frequent absence, his failure to deal with financial tasks as requested and his treatment of staff. Mr Brown felt it was necessary to be more involved in the first respondent's finances as he felt the claimant was not performing his role satisfactorily.
57. Accordingly Mr Brown emailed the claimant on 14 August 2018 asking him to add Mrs Golden is a bank signatory and adding an extra control, that is that Mr Brown would authorise every payment made by the first respondent. There is no reference in this email to the claimant's conduct with staff. Mr Brown accepted that he should have sat down with the claimant and talks about his behaviour and that it will be an ongoing problem that transferred to the second respondent. However, he justified this by saying that nobody was saying that he threatened them with physical abuse it was merely a

threatening tone. He did not think it was enough to warrant disciplinary process and at this point he was simply trying to get the organisation to survive. He was focusing on two key things patient safety and the safe conclusion of the practice. If the first respondent had been a going concern then he wouldn't address the point but as it was he did not think it should be taken in a disciplinary way. Accepting Mr Brown's own evidence, I find that he did not in fact consider any matters that he was aware of up to the 14 August were sufficient to warrant any disciplinary action, although he did believe them to be true.

#### Provision of data to CCG

58. On 22 August 2018 Mrs Golden forwarded to Mr Brown an email from Jill Prescott, the primary care commissioning manager of NHS Greenwich CCG. This attached the checklist of tasks to be completed by the first respondent in relation to transfer and asked that the tasks be updated when the actions were completed. Mr Brown queried whether one of the tasks marked as completed relating to insurance, had in fact been dealt with. Mrs Golden investigates that and confirmed in an email 23<sup>rd</sup> of August that she was not able to get a clear answer as yet. Mr Brown interprets this as Mrs Golden being unable to get a clear answer from the claimant. The claimant explained that he had actioned the task and he had not got a clear answer from insurers at that point. Given that the claimant is reported to say that he is going to update the second respondent at the next meeting, on the balance of probabilities I prefer the claimant's account that he had explained that he was working on this but there was no answer from insurers. I find that the claimant had indeed taken the action was assigned to him in relation to insurance and was actively working on this point.
59. Mrs Golden expresses frustration in this email and is clearly annoyed that the claimant is going to update Ms Randall, the practice manager of another surgery operated by the second respondent, on the insurance issue and makes the comment that she feels the claimant is speaking as if he is already working for them. This concern about the claimant interacting with Ms Randall appeared to be shared by Dr Singh. It was clarified in an email exchange that Ms Randall had a role in the transfer process, but nonetheless an email 29 August two Dr Singh and Mrs Golden Mr Brown states that the claimant should be working for the first respondent 30 September the new practice manager having the responsibility for things until then.
60. In his witness statement Mr Brown explained that he wrote this email because he felt that the claimant was focused on "feathering his own nest" with the second respondent was neglecting his duties with this respondent and all its staff. Mr Brown could not provide any evidence that led him to this conclusion. He did accept that the claimant was required to speak to Ms Randall about the transfer process and this would be normal. I find that Mr Brown felt aggrieved about the claimant meeting with the second respondent although the claimant was only carrying out meetings as he was required to do. I accept that, however unjustifiably, Mr Brown believed that the claimant was looking after himself by building a new relationship with the new employer.

#### The bank account

61. One of the required actions was that the claimant make sure that Mrs Golden was added as a signatory on the bank account. Mr Brown's perspective was that as only the claimant was a bank signatory, no one else had access to banking information which was why they were so reliant upon the claimant continuing to deal with financial matters. The claimant's account was very different. He explained that all the directors had access to bank information using QuickBooks which was linked to the bank account. You don't need to be signatories in order to have access to financial information.
62. He also explained that adding any signatory to the bank was extremely difficult because when the account had been set up all the GPs who within directors had been signatories and their consent was still required to amend the bank mandate. He told me that he had attempted to add Mrs Golden to the bank account on at least three occasions physically escorting her to the bank branch but it had not been possible to do so because she needed to provide missing paperwork.
63. This information from the claimant's perspective is not shared at the time with Mr Brown. In an email of 30 August Mrs Golden advised both Mr Brown and Dr Singh that she was not authorised as a signatory and that she could not speak to the bank because she did not have authorisation and therefore the claimant had to contact the bank to enquire about progress. Mrs Golden does not give any other details to Mr Brown.
64. This email goes on to say that she personally considers refusal to access the bank follow clear and authorise instructions to be seen as gross misconduct. She says that if he is attending meetings they should be entered in the diary so at least they would know where he was, even if they didn't know what he's doing. She also says that all the staff are fed up with the claimant's behaviour and comments like "not my problem."
65. Mr Brown appears to have accepted this email at face value and made no enquiries about its chase. He accepted that Mrs Golden had expressed a very strong view by characterising the behaviour as gross misconduct and that he read this as an email from someone who is deeply frustrated who felt that a colleague was dumping work on her.
66. Mr Brown was asked what it was the claimant was not doing. He suggested that he was not doing the financial management tasks, for example dealing with the bank account, but was instead sitting in reception desk which is not a priority. Mr Brown was not of course in the business on a daily basis and was therefore basing his view on information given to him by others who are not present to give evidence.
67. On balance I prefer the claimant's evidence in relation to the bank account. He was present at the time, Mr Brown is getting this information indirectly. On the balance of probabilities it seems unlikely that an organisation would continue to run where even the accountant did not have access to financial information and therefore I accept that such information was available to the accountant and the other directors via QuickBooks even if they couldn't actually sign cheques. This means that the directors and the accountant would have always had access to financial information would not have needed to rely on the claimant in the way that Mr Brown suggests is necessary.
68. On 30 August at page 178 Mr Brown replied to Mrs Golden and Dr Singh saying that he agreed with everything Mrs Golden had said. He sets out that

he will have a conversation with the claimant and that if the claimant agrees then there would simply be a polite confirmation. If the claimant did not agree, then he would be more forceful and if, when the claimant was back from holiday, he failed to comply then they should formally discipline him as he said "I've had enough as well".

69. I've already found that as at 14 August Mr Brown did not consider that the events that occurred was sufficient to warrant any disciplinary action. I also find as at 30 August, when on his evidence Mr Brown had complaints from nearly all of the staff about the claimant's conduct, considers that the claimant is hardly ever at work, is pursuing his own interests at the detriment of the first respondent and is not carrying out the instructions given to him, nonetheless he only intends to move to a formal disciplinary process if, after meeting the claimant does not comply with instructions.
70. I find that, even if the events had occurred as Mr Brown characterises them, despite Mrs Golden's expressed opinion that this was gross misconduct already, Mr Brown did not share that view. His email evidences that he may move to formal disciplinary action only if the conversation, in effect a warning, does not improve matters. I also find that Mr Brown had already formed a negative view of the claimant's conduct and was predisposed to reach a disciplinary conclusions against him should the disciplinary procedure arise.

#### Completion of actions agreed with CCG

71. On 31 August when the claimant was on annual leave Jill Prescott contacts the three directors to explain that she had a reply from the claimant indicating that he was on leave. She was already aware of the claimant's holiday because she had contacted the claimant previously to ask him to ensure he would complete certain tasks before he went off on leave.
72. This email at page 178-179 of the bundle advised the three directors that a number of mobilisation tasks should be completed that week but that had not happened. The email set out three headings information, TUPE and CQC and contained actions. (Mr Brown said the task had been with the claimant to complete) without completing in and about informing anyone were outstanding tasks.
73. The claimant disagreed. His evidence was that it had handed a meeting with Mrs Golden. She had been at the initial meeting with him and was fully aware of all the tasks having also been given the mobilisation spreadsheet task list and that he had explained what had to be done. In his case that Mrs Golding knew that she was responsible for these tasks since the meeting was scheduled for 4 September date on which he was going to be away therefore she was going to have to lead that meeting. The documentary evidence supports the fact that Mrs Golden was intended to be involved in the process. She is clearly shown as present at the meeting 21 August and is sent the checklist on 22 August. I conclude that she was aware she had responsibility for tasks.
74. The claimant said that he had a draft of the required letter to staff ready to go on his computer. The information which was requested as outstanding was either readily available on his computer in a special folder that Mrs Golden was aware of, or could be produced in short order very readily by somebody else from easily accessible information. He did accept, however, that not all these tasks had been completed.

75. I find that Mrs Golden had been tasked with completing his actions in addition to the claimant and there had been a handover. I also find, however, as the claimant accepts, that he had not concluded all the tasks which, as they were in draft on his computer, I find he was responsible for.

Inappropriate information

76. Prior to his holiday the claimant had met with Ms Randall of the second respondent. She had requested staff information with regard to the transfer process. The claimant accepted that he had at the meeting a memory stick which contained a schedule of staff data. He had prepared this schedule for the purposes of the transfer but had for his own use and benefit only added some comments about staff in what he described in his witness evidence as a hidden column.
77. It appears that the stick was handed over to Ms Randall who copied the information onto her own system. She then handed the memory stick back to the claimant. She had copied the spreadsheet and retained this and the claimant was not aware that she had not done so. He was also unaware that she could see the column with his comments. He then left to go on holiday.
78. The claimant accepts that the comments were inappropriate. He apologised profusely for these and said that they were stupid and acknowledged he should not have made them. He told me that he had not intended them to be handed over and when I asked him about the comments that he had made about himself “make up your own mind” he said that was just him being stupid. On the balance of probabilities I find it unlikely that individual would make such a comment for their own purposes. I find it more likely that the claimant did intend to give some background about the first respondent staff team to Ms Randall, albeit he did not intend that to be a written record of this.
79. Some two days after this had occurred Ms Randall then emailed Mrs Golden and Paul Brown to say that the information she had received was inappropriate and not what was requested was sent back to them to “deal with accordingly.” I find that this is a neutral comment and does not suggest any predetermined course of action that Ms Randall or the second respondent is requesting the first respondent takes.
80. At page 185 of the bundle is an email from Mrs Golden to Dr Singh and Mr Brown updating them on the events of 30 August, that is the email from Ms Randall and the email from Ms Prescott. In this she states that there are some very unhappy people, presumably at the CCG, and that Ms Prescott will be attending the premises the next week to attain for the information requested. It also makes it clear that Ms Randall has spoken to Mrs Golden as is reported as saying that she has made it very clear she could not work with the claimant partly to do with attitude and also in regards to the email described as “terrible” as well as being a breach of GDPR. It is clear from this email that Ms Randall has taken advice from the second respondent’s HR department.
81. Mrs Golden concludes that the claimant’s behaviour and actions on these two incidents alone amounts to gross misconduct. She suggests he should now be disciplined and suspended.

82. Mr Brown responds to this on 1 September and this shows that his current thinking is that they would issue a written warning so that is on the file and the claimant should be asked to work from home until 30 September.

The decision to initiate a Disciplinary process

83. Despite this being Mr Brown's initial view, he then changes his mind. On 7 September he becomes aware that according to emails, phlebotomy invoices have been sent to the claimant quarterly that no returns had been received for over a year and the claimant had not responded to emails. This represented a loss of income over a seven-month period. The claimant accepts that the invoices had not been paid, but says that it was naught his role to organise this and said that as soon as he became aware there was a problem he was trying to deal with this by getting information, for example as to the draft date of payment made to the various parties. It was his position that the responsibility for this lay not with him but with the accountant. Mr Brown was adamant that even when a task is carried out by somebody else in this case payment of invoices remained clearly part of the claimant's duties he was responsible for oversight of this task. Paying the bills is set out by the claimant in his witness statement as one of his duties, although he also listed his duty sending off bills to the accountant.
84. Whether the claimant was or was not responsible for oversight of the payment of these invoices it is not disputed that they had been unpaid for a considerable period of time and that did impact the respondent's income stream.
85. On 10 September, following a visit to the first respondent premises by among others Ms Randall and Ms Prescott, Ms Golden reports that the claimant has not completed many tasks relating to the transfer requiring her to step in. The three individuals apparently looked in the claimant's office the documents relating to the transfers action the tasks claimant had not completed before he left on annual leave but were unable to find anything. While the claimant says that things were clearly left on his computer, it is not what Mr Brown is told and he has no reason to doubt the genuine complaints made by Ms Golden on this point.
86. Mr Brown was asked about why he had apparently changed his mind and decided to launch disciplinary route. He said that the suggestion of a written warning was his original thought. Over the next two days however he spoke to the CCG at least once and he reflected that he could not shirk his responsibilities and leave this issue. While he had wanted simply to secure a safe chance of the practice, when asked by the CCG if he was dealing with this incident he concluded that he had to do so. He did not want to be found it very difficult that he felt simply upon reflection that it was a necessary step.
87. I accept that Mr Brown did not originally intend to Disciplinary action, and I find that at least as at 1 September he did not consider that what occurred was sufficient to amount to gross misconduct. I accept his evidence as to the reason he changed his mind about carrying out a formal procedure. I find that it was the challenge made to him by CCG that made him reflect on what was the right thing to do and that he genuinely believed it was his responsibility to take action and not to leave this to the new employer.
88. It is suggested that the second respondent were unhappy at the prospect of working with the claimant. I was referred to any of 29<sup>th</sup> of August in which

Ms Prescott refers to it being bad news that the financial person with who they have to work is the claimant. I was also referred to the email mentioned above in which Ms Randall says this could never work with the claimant. It was also common ground that, the claimant's role was practice manager, it was already agreed that Ms Randall would be practice manager of the Clover practice after the transfer.

89. While there do appear to be some issues in the relationship between the claimant and Ms Randall, I find that the decision to proceed with the disciplinary action was taken by Mr Brown alone. I accept Mr Brown's evidence as to the reasons for his change of heart and find that he reached the conclusion himself that the matter is that he believed had occurred, that is failure to provide relevant transfer information and inappropriate comments on the schedule, where one is that it was appropriate for the first respondent to deal with. While I accept that the second respondent was aware of the disciplinary process and, of course, provided information in relation to it, not least the schedule, I find that they did not play a role in the process. The decision to proceed to disciplinary hearing was not at the request of the second respondent, directly or indirectly. There is no evidence that the second respondent did not want the claimant's employment to transfer or were instrumental in his dismissal.

#### Disciplinary policy

90. Disciplinary policy was included in the bundle and it provides as follows  
*"When disciplinary matters arise, an investigation may be carried out to establish the facts. The investigation takes into account statements of any available witnesses (including your own account) along with any other evidence such as CCTV footage or documents such as expense forms and e-mails.*
- Sometimes it may be necessary to suspend you on full pay during the course of an investigation to avoid a potentially difficult situation or to allow a full and uninterrupted investigation to take place or where the facts, if proved, may result in your dismissal."*
91. It also provides that an individual must tackle business steps to attend any meeting that is convened for the conclusion investigation and they cannot attend must inform the person who has written for the meeting can be rescheduled to another date or time. It states that there is a persistent failure to attend the scheduled meetings and the disciplinary meeting may go ahead without them.
92. The document also contains details about how conduct matters will be addressed and provides that the individual will be given copies of all the evidence that they compare to answer the allegations and they are given options to fully state their case. They are allowed to raise points of information provided by witnesses and a further investigation is required then the meeting will be adjourned and reconvened following that.
93. The right to summarily dismiss is reserved stated to rise after a thorough investigation circumstances and allowing the individual the opportunity of explaining at that meeting. The policy contains a right of appeal.
94. The respondent did not follow this policy, including not giving the right of appeal.

Disciplinary process

95. Mr Brown wrote to the claimant they suspended on full pay and inviting the disciplinary meeting. This letter went through various drafts which were sent to Mrs Golden for the additional information. It was the original intention that of the three allegations that were set out, it should be supported by evidence. None was in fact provided by Mrs Golden to Mr Brown and the letter was sent to the claimant unsupported by any documentation.
96. The letter set out three allegations all of which are characterised as gross misconduct. They are that the claimant failed to complete the actions agreed with the CCG, leaving early and the reasons he gave for his early departure that he was meeting with the CCG or the second respondent was untrue, and that the claimant sent inappropriate information about staff in breach of GDPR.
97. The claimant was told that Mrs Golden was the investigating officer. Mr Brown conceded that she had already expressed very strong views about the claimant but felt that, nonetheless, it was appropriate she investigate because there was nobody else. It was put Dr Singh could have appointed which he accepted that remained of the view that Mrs Golden was the most appropriate person. I find that in fact, while it is a small organisation, there is no reason why Dr Singh could not have been appointed.
98. The claimant was invited to attend a meeting on 12 September at 5 PM when he was told that he would have the chance to state his case. The claimant responded asking that this be postponed for a week and this was accepted. The second invitation therefore was to attend a meeting on 18 September. The day before that meeting the claimant responded attaching a note from his GP stating that he was signed off due to work-related stress 31<sup>st</sup> of October 2018. The claimant asked for a postponement of the meeting until the expiry of the fitness to work statement. In this response the claimant also said he spoke into ACAS and taken legal advice and he asked for the evidence on which the respondent relied.
99. Mr Brown did not respond to the request for evidence at all. In cross-examination he simply said that the evidence was the allegations. It is clear from the drafts that Mr Brown had himself initially expected there would be evidence to back up the allegations. There were certainly the emails that form part of this bundle which could have been found and sent. In addition Mrs Golden could have prepared a written statement of what she considered happened, giving details of when and where. Instead, there was no written investigation report prepared by Mrs Golden. There was no evidence shared with the claimant. Mrs Golden did not attempt to make contact with the claimant to ask for his side of events prior to the disciplinary meeting. I find that there was no investigation whatsoever. I also find that the individual who was tasked with leading this investigation and presenting this to the decision maker had already made up her mind and was an inappropriate person to undertake this role. I also find that Mr Brown, as a decision-maker, was already predisposed to find against the claimant and his involvement in the allegations and his ready assumption to believe what Mrs Golden had said to him without checking the position.
100. Mr Brown refused a request for postponement because the doctors note simply specified the claimant was not fit for work, it did not say that you are not fit to attend a meeting. He felt the matter was so serious it could not wait



for six weeks as the claimant suggested. Mr Brown in his evidence seemed to suggest that he was not aware that the claimant was generally stressed. This is inconsistent with the fact he was made aware of this at the time the claimant resigned as a director in January and with the documents in which he accepts that there is a requirement for additional resource that he will seek to get this in place.

101. While is the case that the GP note does not expressly state that the claimant cannot attend the meeting, it is clearly suffering from work-related stress and the respondent could have made enquiries and asked for example occupational health report before proceeding. I find that continuing with the meeting was acting unreasonably. The note was provided against a background Mr Brown had active knowledge that the claimant suffered from work-related stress. There is no legitimate reason given by the respondent as to why the matter could not have waited until the claimant was well enough to attend.
102. The claimant did not attend the meeting. No notes of that meeting were taken. It appears Mr Brown's evidence that two witnesses, employees of the practice, were called on behalf of the respondent who raised complaints about the claimant. There is no written evidence of what they said and no details of the allegations. Mr Brown said that the termination letter set out in effect what happened at the meeting and his reasoning.
103. The termination letter refers to matters beyond those of the three allegations set out in the invitation letter. It refers to further evidence of failure to undertake duties, identifies that staff said that they pointed out tasks that were outstanding but the claimant had said there had been completed. There is a reference to the phlebotomy invoices that have not been paid apparently since 2014. It also makes reference to staff telling Mr Brown that they felt threatened by him and unable to raise issues with him or the board. This is inconsistent with Mr Brown's previous evidence that when he had attended the practice six members of staff had come to him with complaints. Nonetheless, I accept Mr Brown's evidence that these individuals did attend the hearing and said what he summarises them as saying.
104. The letter also reaches a conclusion on the three allegations that had been put to the claimant and concludes that they are all upheld. Mr Brown said he has no hesitation in dismissing the claimant from his post with immediate effect.
105. As far as the original three allegations are concerned, the claimant accepted, albeit he said it was to a small extent, that not all actions had been completed as agreed with the CCG. The claimant also accepted that he put inappropriate comments on the schedule that was shared with Ms Randall. Two of the matters on which Mr Brown relied were, therefore matters the claimant accepted were true, at least in part. The fact that the claimant had left early and had given misleading information was something that Mr Brown was told by others and there is evidence that he had been told this within the bundle although there is no attempt to find information about the claimant's access logs to the building also look any diary. In the absence of hearing from the claimant I accept that Mr Brown believed this to be true. It was also true that the phlebotomy invoices had not been paid for a period of time. While the Claimant disputes that he was responsible for this, I accept that it is Mr Brown's belief that he was. As to the complaints from the staff present, I have accepted that they were there and Mr Brown has recorded what they told him.

106. I find no reason to doubt that Mr Brown was the sole decision maker. I also find that the reasons for the decision are the matters set out in his letter. I accept that Mr Brown believed these to be true, albeit he based his belief on no investigation whatsoever and without hearing the claimant's perspective.
107. The claimant was not offered any right of appeal. Mr Brown said he did not need to put that in the decision letter the claimant would have been fully aware of it policy had been sent with the invitation letter and because the claimant had drafted the policy in the first place. I considered this is not adequate or in accordance with the respondent's own policy.
108. The claimant was summarily dismissed and accordingly was not paid any money in lieu of notice. While the letter says that he will be paid up until the date of the disciplinary hearing, the claimant said he was not paid from 1<sup>st</sup> to 19 September. The respondent has not provided any evidence to the contrary. The claimant states that he was also not paid for four and a half days holiday and again the respondent has not disputed this.

### Relevant Law

Dismissal because of a relevant transfer

109. Regulation 7(1) provides that any dismissal will be automatically unfair if the sole or principal reason for the dismissal is the transfer. I was referred to 3 authorities.
110. In *P Bork International A/S v Foreningen af Arbejdsledere i Danmark* [1989] IRLR 41 the European Court said:

"In order to determine whether... the reason for the dismissal was the transfer itself, account must be taken of the .... circumstances in which the dismissal occurred and, in particular, in a case like the present one, the fact that it took place on a date close to that of the transfer and that the workers were re-engaged by the transferee. The factual assessment needed in order to determine the applicability of the directive is a matter for the national courts, having regard to the interpretative criteria laid down by the [European] Court'."
111. An important factor which may be taken into account in deciding the reason for dismissal is its proximity to the transfer. The Court of Appeal noted that although proximity to the transfer is not conclusive, it is often strong evidence in the employee's favour.
112. *Bork* was applied by the EAT and Court of Appeal in *Hare Wines Ltd v Kaur* [2019] EWCA Civ 216, [2019] IRLR 555, where an employee was dismissed shortly before the transfer, but the motive of the new employer in encouraging the dismissal of the employee was to avoid employing the employee because she had ongoing difficulties in her working relationship with another employee in scope for transfer, who would be her supervisor going forward. The EAT and Court of Appeal considered that the sole or principal reason for the dismissal was the transfer and was therefore automatically unfair.
113. Underhill LJ, stated: "In my view that means that the transfer was not simply the occasion for her dismissal but was, if not the sole reason, at least the principal reason for it: it was the transfer that made the difference between the problems being treated as a cause for dismissal and not. It does not ultimately matter what it was about the transfer that made that difference"

114. The ultimate question is one of fact. In *Marshall v Game Retail Ltd* UKEAT/0276/13 (13 February 2015, unreported), the EAT clarified the burden of proof where it is alleged that the dismissal is by reason of the transfer. In the view of the EAT, once the claimant has produced some evidence in support of his case, the burden lies on the respondent to establish that the reason for dismissal was not the (TUPE-related) automatically unfair reason.
115. I was also referred to *Royal Mail Group Ltd v Jhuti* [2019] UKSC, The Supreme Court held: "if a person in the hierarchy of responsibility above the employee determines that she (or he) should be dismissed for a reason but hides it behind an invented reason which the decisionmaker adopts, the reason for the dismissal is the hidden reason rather than the invented reason."
116. It was submitted on behalf of the claimant that Mr Brown's motivation of the decisionmaker is not clearly determinative of the reasons for the dismissal.

#### Unfair dismissal

117. There are five potentially fair reasons for dismissal under section 98 of ERA 1996: capability or qualifications, conduct, redundancy, breach of a statutory duty or restriction and "some other substantial reason" (SOSR). In this case the respondent states that the reason was conduct.
118. Once the employer has established a potentially fair reason for the dismissal under section 98(1) of ERA 1996 the tribunal must then decide if the employer acted reasonably in dismissing the employee for that reason.
119. Section 98(4) of ERA 1996 provides that, where an employer can show a potentially fair reason for dismissal:  
"... 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.
120. By the case of *Sainsbury's Supermarkets Ltd v Hitt* 2003 IRLR 23 tribunals were reminded that throughout their consideration in relation to the procedure adopted and the substantive fairness of the dismissal, the test is whether the respondent's actions were within the band of reasonable responses of a reasonable employer. In this case the Court of Appeal decided that the subjective standards of a reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. The tribunal is not required to carry out any further investigations and must be careful not to substitute its own standards of what was an adequate investigation to the standard that could be objectively expected of a reasonable employer.

#### Wrongful Dismissal

121. An action for wrongful dismissal is a common law action based on breach of contract. The reasonableness or otherwise of an employer's actions is irrelevant, all the court has to consider is whether the employment contract has been breached. The tribunal is concerned with the factual question: Was the employee guilty of conduct so serious as to amount to a

repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract?

Holiday pay

122. The Working Time Regulations 1998 provide workers with a statutorily guaranteed right to paid holiday. Subject to certain exclusions all workers are entitled to 5.6 weeks' paid holiday in each leave year beginning on or after 1 April 2009 — comprising four weeks' basic annual leave under Reg 13(1) and 1.6 weeks' additional annual leave under Reg 13A(2). The entitlement to 5.6 weeks' leave is subject to a cap of 28 days. Reg 13(1).
123. Compensation related to entitlement to leave is set out in regulation 14
- 14.—(1) This regulation applies where—
- (a) a worker's employment is terminated during the course of his leave year, and
- (b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13(1) differs from the proportion of the leave year which has expired.
- (2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).
- (3) The payment due under paragraph (2) shall be—
- (a) such sum as may be provided for for the purposes of this regulation in a relevant agreement, or
- (b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—
- where—
- A is the period of leave to which the worker is entitled under regulation 13(1);
- B is the proportion of the worker's leave year which expired before the termination date, and
- C is the period of leave taken by the worker between the start of the leave year and the termination date.
- (4) A relevant agreement may provide that, where the proportion of leave taken by the worker exceeds the proportion of the leave year which has expired, he shall compensate his employer, whether by a payment, by undertaking additional work or otherwise.

Conclusion

124. Applying the relevant law to the findings of fact I have made ,I conclude as follows. The first issue I must determine is was the sole or principal reason for that dismissal the TUPE transfer, for the purposes of TUPE 2006 Regulation 7(1)?
125. I have found that Mr Brown was the sole decisionmaker, that he reached the decision to implement disciplinary action having reflected on what the CCG told him but that he made the decision himself. He simply considered a not too serious to be left alone. I have found that there was no evidence that the second respondent did not want claimant's employment transfer or were instrumental in his dismissal. I therefore conclude that the reason for dismissal were the reasons set out in the termination letter and that the transfer did not "make the difference between the problems being taken as a cause for dismissal or not". The sole or principal reason for the dismissal was not the transfer, but was the respondent's perception of the claimants conduct.
126. It follows that none of the remedies issues identified as against the second respondent need to be considered. I do, however, need to go on to consider the claims brought against the first respondent that is unfair dismissal called, wrongful dismissal and unlawful deduction from wages.
127. As far as the dismissal by the first respondent is concerned I find that the reason given by the respondent was the claimant's conduct. However, I conclude that the procedure followed fell far short of that required by reasonable employer. I have found that there was no investigation, the investigating officer was involved in the allegations and there she and the decisionmaker had a negative mindset towards the claimant, that there was no evidence provided to the claimant and that he did not have an appropriate opportunity to answer these allegations. Further, the allegations were expanded without the claimant being given notice of these and yet these new allegations contributed to his dismissal. I have also found that the failure to postpone the disciplinary hearing due to the claimants ill-health was unreasonable. This also denied him an opportunity to put his case. No right of appeal was offered. I conclude that the dismissal is unfair procedurally. I conclude that the first respondent failed not only to follow so disciplinary code but also the ACAS code of conduct.
128. On the evidence in front of me, I also conclude that dismissal is not within the reasonable range of responses taking into account the claimant's length of service and exemplary record as well as Mr Brown's conclusions that the matters that formed the background to the disciplinary hearing did not in themselves note any action at all.
129. In respect of the complaint of wrongful dismissal I must determine whether the claimant was in fundamental breach of contract. The only evidence of potential breach of the employment contract is the failure to carry out actions agreed with the CCG and the inappropriate information about staff. I have concluded that the claimant had largely carried out the actions required by the CCG level. His failure to complete a few tasks does not amount to a breach of contract. While the claimant did make inappropriate comments about staff I find that this is not sufficient to amount to a breach of contract. The claim for wrongful dismissal therefore succeeds.
130. The claim for unpaid wages and holiday pay is not disputed by the first respondent and therefore these claims also succeed.
131. Having made these findings in favour of the claimant I need to award remedy. Counsel for the claimant had prepared a schedule of loss which

was included in the bundle. This calculated the basic award, unpaid holiday, unpaid wages from the first of 19 September and the eight week notice period. While the claimant's contract had provided a one months notice, his length of service is entitled to 8.

132. I awarded the claimant compensation for his period of loss up until when he got a new job. The no challenge to the mitigation position therefore accepted the claimant's schedule as his evidence on this. I can see from that schedule that he obtained a job at a lower salary and again, without any challenge from the respondent, I awarded the claimant a sum of ongoing loss as set out in that schedule.
133. The claimant had requested 25% uplift the compensation in respect respondent stayed for the ACAS code. I considered that this was appropriate in the circumstances. Despite this being a small organisation there was a blatant failure to follow procedure that was hugely prejudicial to the claimant.
134. For these reasons I have awarded the amounts set out in the decision.

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**Employment Judge McLaren**  
**Date:11 June 2021**