EMPLOYMENT TRIBUNALS

Claimant: Mr R Jordan

Respondent: Delta Merseyside Ltd

Heard at: Liverpool Employment Tribunal (by CVP)

On: 17, 18, 19 and 20 May 2021

Before: Employment Judge Dunlop
Ms A Jackson
Mr I Taylor

Representation

Claimant: In person
Respondent: Mr Steel (Solicitor)

JUDGMENT having been sent to the parties on 24 May 2021 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. Mr Jordan was employed by the respondent taxi company as a telephone operator ('Telop') from 7 March 2015 to 11 April 2019, when he dismissed on grounds of gross misconduct. He brings claims of unfair dismissal, wrongful dismissal and in claims in respect of dismissal/detriment on the grounds of having made a protected disclosure.

The Hearing

2. The Tribunal heard the case over four days on 17, 18, 19 and 20 May 2019. This was a CVP hearing and there were some intermittent technical problems with the CVP connections of Mr Steel and one of the respondent's witnesses. Although this slightly lengthened the hearing, everybody was able to participate fully in the hearing and the Tribunal is satisfied that the problems were not detrimental to the fairness of the hearing.

3. Mr Jordan represented himself and gave evidence on his own behalf. The respondent called three witnesses: Paul McHugh, HR Manager, John Lynch, Booking and Dispatch Manager and Neil Rooney, former Booking and Dispatch Manager. The Tribunal had regard to an extensive agreed bundle of documents. There were two additions made to the bundle of documents during the hearing, and these were identified as R1 and R2. The Tribunal only read those documents which were referred to in witness statements or during the course of the hearing. We also have the benefit of written submissions prepared by each party and we considered these carefully.

4. There was one case management application dealt with in the course of the hearing. This related to remedy and is discussed further below.

The Issues

5. A preliminary hearing for case management had taken place on 22 November 2019 in front of Employment Judge Horne. That set out the issues which this Tribunal would determine, and we confirmed with the parties at the start of the case that those remained the issues we would be asked to determine. They were as follows:

UNFAIR DISMISSAL

1 Whether the Claimant was dismissed for a potentially fair reason, namely conduct, within the meaning of section 98 Employment Rights Act 1996.

2 If so, whether the Respondent acted fairly and reasonably in the circumstances within the meaning of s98(4) ERA in treating the reason as a sufficient reason for dismissing the Claimant. In particular:

2.1 Did the Respondent have a genuine belief that the Claimant was guilty of the misconduct alleged?

2.2 If so, did the Respondent have a reasonable grounds for this belief?

2.3 Had the Respondent followed a fair procedure, including a reasonable investigation?

3 Was the Respondent's decision to dismiss the Claimant within the range of reasonable responses available to a reasonable employer? If there were any procedural failings which rendered the Claimant's dismissal unfair, would the Claimant still have been dismissed had a fair procedure been followed?

4 If the Claimant was unfairly dismissed, should any compensation awarded be reduced by reason of the Claimant's conduct?

5 If so, by what measure?

WRONGFUL DISMISSAL

6 The issues for determination here appear to be relatively straightforward. The respondent's counsel did not have instructions, but did not think that there was likely to be any significant dispute about the claimant's contractual entitlement to notice pay. The real dispute is about whether or not the claimant repudiated his contract. Paragraph 6 of the claimant's list of issues puts the point succinctly: Did the claimant's actions amount to gross misconduct?

PROTECTED DISCLOSURE

7 The issues for determination are:

7.1 Did the claimant believe that the information in his e-mail tended to show that the respondent had breached employment law? (His case will be that he believed that employers had a legal obligation, in a general sense, not to discipline employees for the way in which they did things that they had not been trained to do. He did not have any specific legal provision in mind.)

7.2 Was it reasonable for the claimant to hold that belief?

7.3 Did the claimant believe that he was making the disclosure in the public interest?

7.4 Was it reasonable for the claimant to hold that belief?

Detriments

8 The claimant contends that the respondent subjected him to the following detrimental acts on the ground that he had made that protected disclosure:

8.1 Withdrawing express permission to work for Raggit Limited;

8.2 Commencing disciplinary proceedings; and

8.3 Dismissal.

9 It does not appear to be in dispute that the respondent did these things. The issue will be, in the case of each detrimental act:

9.1 Was the act motivated to any material extent by the fact that the claimant had made a protected disclosure?

10 For any detrimental act allegedly done before 10 April 2019, the tribunal must additionally consider:

10.1 Was it part of a series of acts similar to the dismissal?

10.2 Was it part of an act extending over a period which ended on or after 10 April 2019?

10.3 If it was neither of these things, was it reasonably practicable to have presented the claim within the statutory time limit and was the claim presented within a further reasonable period?

11 If the whistleblowing detriment complaint succeeds, the tribunal must consider, when assessing the claimant's remedy, whether or not he made his disclosure in good faith.

Findings of Fact

Parties and background

6. The respondent is a large taxi company operating in Liverpool and neighbouring areas. The claimant was employed as a Telop from 7 March 2015.

7. The respondent is a family business. It appears that the owners/directors did not involve themselves in the events giving rise to this case. At the time of Mr Jordan's dismissal there were around 120 Telops working for the business and upwards of 2,000 taxi drivers on its books (drivers are considered to be self employed). Several years ago, five supervisors were promoted to managerial roles. Subsequently, one of these, Mr McHugh, moved into an HR manager

role. Mr McHugh has no formal training or qualifications in HR, but relies on his experience, online updates and legal advice which he seeks on a case by case basis. The other managers were styled 'Booking and Dispatch managers'. It was a flat management structure. This structure provided managerial coverage for the respondent's shifts, which run on a 24/7 basis.

8. Mr Jordan's employment was subject to terms contained in a contract (updated on several occasions). In particular, clause 14.1 of the contract dealt with 'Other Work' and provided that permission must be sought for external work, but that that permission would not be unreasonably withheld. Earlier iterations of the contract provided that permission had to come from a director, but the latest version (December 2018) changed this to line manager. Clause 14.1 of the 2018 version stated:

   Other Work

   You must work exclusively for the Employer during normal working hours. You are not permitted to work on your own account or for any other employer during or outside normal working hours while you are employed by the Employer without the written permission of your Line Manager. Such permission will not be unreasonably withheld provided that your work will not or does not in the opinion of the Employer adversely affect your work for or the interests of the Employer. If the Employer comes to believe that any work does affect your work for or the interests of the Employer, permission to perform the other work may be withdrawn.

   If you are already working on your own account or working for another employer you must declare it to your Line Manager in writing and provide details of the hours during which you perform the other work.

   Failure to notify the Employer and/or work on your own account or for any other employer during or outside normal working hours While you are employed by the Employer without the written permission of your Line Manager shall be dealt with under the Company's disciplinary procedures and may result in summary dismissal.

   In the event that the hours during which you perform the other work change, you must inform the Employer immediately.

9. We were also shown an Employee handbook dating from November 2018. The Employee Handbook includes a disciplinary procedure. Paragraph 1.1.1 includes a list of conduct which will be considered to be gross misconduct. At point u., this list includes "*Failure to inform and obtain written permission of a Director of the Company before holding any directorship and/or working on one's own account or for any other employer/person during or outside normal working hours while you are employed by the Company where, in the opinion of the Company, this adversely affects the interests of the Company or is incompatible with your employment with the company.* "

10. There was an induction programme which Mr Jordan had completed in 2015. We were not shown any of the materials used.

11. Data protection was a concern to the respondent business. In particular, managers were alive to potentially serious issues which could arise from people calling up trying to obtain details about the movements of other people, for example a spouse trying to find out where their partner had been dropped off. The respondent's evidence was that Telops were told that they must not disclose any information about a booking or journey, other than to the person making the booking/journey, and that to do so would be a 'breach of data protection'. Mr Jordan emphasised that no formal training was given (he disputed there was any data protection content in the induction programme). He pointed to the very brief statement about data protection in the company handbook, which gives no specific details of what may or may not be disclosed (but nevertheless says that an employee may be dismissed for breach of the 'policy').

12. Mr Jordan himself appears to have had some previous experience of data protection, including having delivered training on the subject in a previous employment. He considered the respondent's written policy on this to be lacking. It was not entirely clear whether Mr Jordan nonetheless accepted the respondent's position that the simple rule of not passing on information about bookings was well known and understood amongst the Telops.

13. To the extent that it may be disputed, we accept the respondent's evidence that the rule was known and understood. This is evidenced by an email dated 26 January 2018 to all Telops, which emphasises the point in the context of stating that information must not be disclosed to the police (or anyone purporting to be the police) without a court order or similar documentation. We also noted that the respondent's appraisal form for Telops contains the question "Do you comply with GDPR guidelines?". In an appraisal dated 28 November 2018, Mr Jordan had ticked 'yes' to this question. He had not asserted that the training or policy was inadequate prior to the events described below.

Raggit Ltd

14. Whilst employed by the respondent Mr Jordan was involved in developing an online app called Raggit. The premise of the app is that it can be used by members of the public to rate and review customer service representatives at a range of businesses including shops, hospitality venues and any other business providing customer service. The individuals being rated are identified by their first name and the business that they work for. (We understand that in the case of a large chain, there would be separate entries for separate locations.)

15. We find that Mr Jordan was, and remains, passionate about Raggit and considers it has the potential to be very successful. He was clear in his evidence that the USP (unique selling point) of his app is that the ratings reflect the service provided by individuals, and not simply the business they work for. He believes that this will provide people with good customer service skills with a

way to evidence those skills for the purposes of appraisals, promotions and job seeking. He described various safeguards that are purportedly built into the app to stop 'spam' reviews, bad language, use of surnames and so on. Mr Jordan recognises that there are potential data protection implications of naming individuals but considers that he has adequately addressed these in the design and functioning of the app. His view is that customers are entitled to comment on the service they have received and that he is entitled to publish those comments regardless of the views on the individual customer service provider involved. We set this out by way of background and make no findings (nor were we invited to) as to any legal obligation that Mr Jordan, as the proprietor of Raggit may have (or may potentially breach) vis-à-vis the individuals who are identified and rated on the app.

16. By letter dated 5 January 2018 Mr Jordan formally asked for permission to hold directorships in two businesses, the Raggit business and another business concerned with providing learning and development. He stated in this letter:

> *"It is my honest belief that neither of these businesses pose a conflict of interest towards DELTA Merseyside Ltd., or would adversely impact my role as a Telephonist (or successive roles within the business) and ask that favourable consideration be afforded to a dedicated and reputable employee."*

17. Mr Jordan had to verbally pursue his request for permission several times, before it was granted in a letter dated 27 September 2018. Paula Beesley wrote to Mr Jordan on behalf of the business, saying "*the company has no issues with you having a second job as long as it does not adversely affect your work or the interests of Delta Merseyside*" Mr Jordan incorporated Raggit with himself as a Director. We find that he was open about this at his workplace and that many colleagues were aware of his entrepreneurial ambitions and, broadly, wished him well with them. On 10 December 2018 the Raggit app launched.

Data protection issue and protected disclosure

18. In order to maintain standards of customer service, the respondent employs quality control officers who will listen to recordings of calls. Mr McHugh explained (and we broadly accept) that an individual Telop would be monitored once a month, with quality control listening to around 30 calls (out of perhaps 200) dealt with by that individual on a particular shift. If concerns emerge, the monitoring can increase to weekly or even daily. This did not happen with Mr Jordan, whose work was generally of a high standard. Mr Jordan received positive feedback from his monitoring, although there were sometimes comments that he could be somewhat verbose, take too long on calls, and get too involved in customer issues.

19. On 16 December 2018 Mr Jordan took a call from an individual who wanted to complain about a driver who had insisted on cash payment when, on the

understanding of the customer, it was an account booking. Mr Jordan's role, in this situation, was simply to provide the customer with details of the customer service department. Instead, Mr Jordan engaged in a lengthy discussion about the matter, during the course of which he disclosed pieces of information about the booking in question and also about associated bookings made by other people using the same account that evening.

20. On 9 January 2019, Mr Jordan was asked to meet with Kevin Button, one of the managers. That meeting was recorded using recording equipment installed by the respondent in its meeting room, and we were provided with a (non-verbatim) transcript. (Unless otherwise indicated, all the meetings referred to below were recorded and evidenced in this way.) At the outset Mr Button explained that they were there to talk about a call from 16th December and explained the reason for the delay which was related to Christmas and their respective availability.

21. During the meeting Mr Button plays the call recording in segments and discusses it with Mr Jordan. The meeting appears amicable, Mr Button at one stage informs Mr Jordan he is one of "the best" Telops in the business. Mr Jordan agrees at various points that he has "breached" GDPR. Although there is no reference to specific statutory provisions or company rules, in the view of the Tribunal there is evidently a shared understanding that Mr Jordan had gone beyond what was permissible in terms of disclosing information about bookings and jobs.

22. At the end of the meeting Mr Button informs Mr Jordan that he will receive a verbal warning in respect of the breach and that this will involving signing and returning a letter to acknowledge the warning. Mr Jordan appears to accept this relatively happily. At no point in the meeting does he argue either that he had done nothing wrong, nor that he had received insufficient training to realise that he was doing something wrong. He subsequently signed and returned a short "confirmation of verbal warning" notice.

23. The respondent's disciplinary policy is contained in the Company Handbook. It provides that an oral warning does not form part of the formal disciplinary process. The procedural safeguards that apply in respect of formal disciplinary sanctions (e.g. right to be accompanied to the meeting, right of appeal) do not apply to oral warnings under the company's policy. The panel would observe that it is unusual to have a 'verbal' warning procedure where that warning is recorded in writing and remains on an individual's personnel file, but which at the same time is said to sit outside the formal disciplinary procedure. There may be issues about whether that process complies with the ACAS code, which the respondent would like to consider. That observation does not, however, affect our conclusions in this case.

24. On 17 January 2019 a recorded meeting took place between Mr Jordan and John Lynch, one of the respondent's Book and Despatch Managers. It is

unnecessary to go into the issue which gave rise to the meeting, it was related to the events at the centre of this case, but only tangentially. During the meeting Mr Jordan explained that he was unhappy about the verbal warning he had received. In particular, he said it was unfair for him to receive a warning in respect of something he had not been trained in and asserted that ACAS has told him it was "a breach of employment law". Mr Jordan suggested, during this conversation, that he would like to have a further conversation in a room without recording equipment and raised some technical questions about GDPR requirements. Mr Lynch responded, in essence, that he wasn't able to deal with the points but would pass the matter on.

25. Also on 17 January Mr Jordan drafted an email, which he sent to himself, which set out, over approximately two pages, a detailed challenge to the verbal warning. The following morning (18 January 2019), at 6.57am he sent the email to Mr Lynch. Mr Lynch was not on shift that day and did not immediately see the email. This is the email which is relied on as being a protected disclosure. In fact, the respondent accepted that it was a protected disclosure. (The Tribunal was rather surprised by that concession, having regard to case law and, in particular, the case of **Chesterton v Nurmohamed [2018] ICR 731**. However, it was expressly conceded and we therefore proceed on the basis that the email was a protected disclosure.)

26. After sending the email, Mr Jordan was invited into a different meeting room for an unrecorded meeting with Mr McHugh and Mr Taylor. Mr McHugh's evidence was that in this meeting they discussed the question of training and agreed with Mr Jordan that if lack of GDPR training came up as an issue within the next round of appraisals, the company would consider offering formal training. He also clarified with Mr Jordan that the 'verbal warning' was not a formal warning within the disciplinary process. Mr McHugh considered that Mr Jordan was satisfied with these responses and that the matter was resolved. In his evidence Mr Jordan said that during that meeting he felt as if he "had the mickey taken out of him for 35 minutes" with attacks made on his maturity and common sense. He also complained the Mr McHugh had acted unprofessionally in calling him over for the meeting with a 'beckoning' gesture. This was a matter which had been raised in internal proceedings, and which Mr McHugh had admitted and apologised for in his witness statement. We set out our findings in relation to what occurred in this meeting later on.

27. Following this meeting, at 10.03, Mr Jordan forwarded his protected disclosure email to Mr Lynch (again), this time copying in Mr McHugh. In the forwarding email he wrote:

> *"Following a conversation with Paul McHugh and Garath Taylor today, I feel this issue has now been resolved.*
>
> *I acknowledge Paul's advise that a verbal warning does not form part of the DELTA Taxis Disciplinary process."*

28. Save for his sign-off, that is the entire content of Mr Jordan's email.

29. However, he then wrote again at 11.20. In this email he put forward further points to suggest that data protection training was incomplete and implies that Mr McHugh is going to investigate this. He also states:
On a personal note, as part of these recent circumstances, but not limited to, I have began to realise that my services may be better suited in another environment. it is my therefore intention to submit my notice of resignation within the next 60 days.

I would like to thank you for your support in recent years and wish you the best in your role, you're a good man.

30. Returning to the disputed accounts of the meeting; we find that the meeting was professional and cordial. In reaching this conclusion, we take account of the fact that it was Mr Jordan, nor Mr McHugh, who had asked for it to take place in a private room, without recording. We accept that Mr McHugh generally conducts himself in a professional manner and that there was no reason for this meeting to be any different. Most importantly, we take account of the lack of any overt criticism in Mr Jordan's emails.

31. However, we do find that Mr Jordan had a tendency at work to agree with his managers and avoid conflict but to then reflect on matters in detail. Sometimes, the result of that reflection would be a conclusion that the respondent was acting badly. We find this is what happened in this case, Mr Jordan still did not consider that his concerns about the respondent's lack of formal data protection policy or training had been adequately addressed. We accept his evidence that his threat to resign imminently was intended as an invitation to the respondent to try to put things right. It would have been much more helpful if Mr Jordan had communicated his feelings on this in a more open and straightforward way.

32. There was no reply to that second email. We find that Mr McHugh and Mr Lynch believed that the matters raised in Mr Jordan's protected disclosure email were closed. In view of the second email, this was, to some extent 'wishful thinking' on their part, but we accept that they genuinely took that view.

Problems with Raggit

33. The next significant date is 29 January 2019 when Mr McHugh called Mr Jordan by phone whilst Mr Jordan was at home. The call lasted less than two minutes and the reason for it was that it had come to Mr McHugh's attention that the respondent's business was now named on the Raggit app and, in particular, 122 Telops' first names were listed. This was either all, or virtually all, the Telops employed in the business. It is recorded on a later date that only four of these individuals had actual ratings/reviews against their names. We do not know

whether this was the case on 29 January 2019, there may have been fewer at this point, and it appears that it later went up to six, but at no material time was it more than a handful out of the 122 total.

34. During the call (in respect of which an agreed transcript also appears in the bundle) Mr McHugh notified Mr Jordan that he had had "a couple of" complaints from staff whose names appear on the app, and that Delta's solicitors have advised that the names should be removed. Mr Jordan responds that he has different legal advice. He does not concede that the names should be removed, but asks if Mr McHugh would mind if he goes away to take some more advice and comes to him. Mr McHugh agrees to this, although notes that Mr Jordan may be liable to personal claims from the employees in question. The call ends without any deadline being discussed by which Mr Jordan will confirm his position. There is no instruction to take the entire app offline, or to do anything else.

35. Later that day Mr Jordan sent a letter, in formal terms, to Mr McHugh, essentially saying that he was under obligation to remove the names and there was no breach of any data protection obligation by having them appear on the app.

36. On 30 January Mr McHugh attended work on an early shift. Matters had escalated overnight, and Mr McHugh was faced with more staff who were unhappy with their first names appearing on the app, including one employee who was particularly upset due to her husband working in a very sensitive role which, she asserted, meant that the appearance of her first name and employer on the app might have security implications for her family. We slightly struggle to understand the suggestion of such serious consequences (though appreciate that the respondent did not go into the full detail of this individual's particular concern). For the purposes of this case, it is sufficient that we accept that the concerns were being raised, and that it presented a problem for Mr McHugh.

37. When Mr Jordan arrived for his shift, an hour or two after Mr McHiugh, Mr McHugh asked him into a meeting. The upshot of that meeting is that it was agreed that Mr Jordan would remove the majority of the names from app within 24 hours. He did not offer to remove the handful of names that had actual ratings or reviews, and Mr McHugh appears to have accepted that. The respondent has never suggested that any of the complaints came from individuals who had been rated/reviewed.

38. There is a comment in the transcript of the meeting where Mr Jordan is recorded as having said "*There are two challenges here: a legal challenge – you get the advice and I get the advice and we have to clash heads and take it, legally, that's one option. The other option is, can I continue to work in a workplace where I'm potentially…let's pick a word… despised*." We do not take that as an acceptance on Mr Jordan's part that his colleagues now despise him, as was

later suggested. However, we do consider that neither side had previously given any real consideration to the potential friction that the app could cause and the reality of that as an issue was now, belatedly, dawning on both Mr McHugh and Mr Jordan.

39. At 10.16 Mr Jordan emailed Mr McHugh expressing, albeit in perhaps slightly awkward terms, his own concern about the deterioration in relationships with colleagues and requesting Mr McHugh inform colleagues of his intention to remove the names. Somewhat bizarrely given the circumstances, the respondent took no further steps to check and record, by way of screenshots, what names appeared on the app at the point when the 24-hour period expired. Mr Jordan says they were removed as agreed, and we accept this evidence. We therefore find that at the point when an express instruction to remove the names was given, he complied with this and did so within the expected period.

40. The next day, 31 January 2019, Mr McHugh sent a letter to Mr Jordan which is also bizarre. It purports to accept Mr Jordan's resignation and to provide dates for the end of his employment. Mr Jordan had not resigned; as we have noted above he had indicated that it was his intention to do so at a future date. Mr McHugh's letter further refers to Mr Jordan's letter of 29 January as "*making it clear that you are not prepared to follow my instruction and remove [the] names*" and then speculates that if he hadn't "resigned" Mr McHugh would be considering taking action to terminate Mr Jordan's employment on SOSR grounds. The letter completely ignores the fact that Mr McHugh has subsequently had assurances from Mr Jordan that the names will be removed within 24 hours and that they were removed by the time this letter was written.

41. On 1 February 2019 Mr Jordan wrote to the respondent confirming that he had not resigned, and the respondent, sensibly, does not seek to rely on that 'resignation'. Instead, on 6 February, Mr McHugh sent a letter revoking the Mr Jordan's permission to do other work. Neither the letter, nor the contractual clause underpinning it, contain a definition of "other work". There is no express prohibition on being involved in other businesses, including holding directorships or shareholdings in third party businesses. Mr Jordan acknowledged this letter on the same day, confirming that "*I may play no operational role in the development or management of Raggit Ltd, whilst under employment with DELTA Merseyside Ltd*".

42. On 11 February 2019 Mr Jordan was signed off sick for four weeks. The reason given was "stress at work". On, 22 February 2019, during the sickness absence period, there was a grievance meeting conducted by another manager, Adam Kirk, that related back to the verbal warning issue. We don't need to set out the detail of what occurred in that meeting.

Disciplinary Process

43. By letter dated 11 March 2019 Mr Jordan was invited to an investigation meeting to discuss "*your involvement with Raggit App whilst you have been absent from work*". The investigation meeting was conducted by Adam Kirk, who did not give evidence. The respondent gave no evidence as to what led to the decision to pursue this as a disciplinary matter, around six weeks after the removal of the names which had given rise to the concerns of other staff.

44. Questions were immediately about the fact that app could still be downloaded. There appears to have been an assumption that if Mr Jordan was not working for Raggit the app would be taken down from the internet. We note that Mr Jordan had never been asked to take the app down.

45. When Mr Kirk asked Mr Jordan if he was still working for Raggit he denied doing so and read out a prepared statement as follows:

> "*I confirm, that in accordance with your instruction on 6th February 2019 and in adherence with my Contract of Employment (14.1) with Delta Taxis, I acknowledged and have upheld your request that, "....[I am] not authorised to carry on with any other work which would adversely affect the work I do for DELTA*."

46. Mr Kirk then asked whether Mr Jordan was the sole director or main person involved with Raggit. Mr Jordan then read out another pre-preared statement:

> *"In accordance with the Raggit ltd. Confidentiality Agreement (2019) and in accordance with the Raggit Ltd. Employment Contract (2018), I regret that (I) will be unable to disclose any confidential information about my role or employment within Raggit.Ltd, the development of the Raggit App or the performance, processes, data or administration of the Raggit brand."*

47. A copy of the Confidentiality Agreement and Employment Contract appeared in the bundle. As Mr Jordan accepted under cross-examination. These were agreements essentially made with himself. He did not appear to accept Mr Steel's point that he was hardly going to sue himself and was therefore free to explain his position with Raggit and to answer the respondent's questions. The Tribunal, however, fully accept that point.

48. Unfortunately, after reading out his statements, Mr Jordan essentially refused to engage meaningfully with Mr Kirk's questions, and instead offered only repetition of the statements in response. Following the letter purporting to accept his resignation, we have some sympathy for Mr Jordan, who saw a need to protect himself. However, that sympathy is limited. It was entirely within Mr Jordan's power to provide a full and frank explanation of his involvement with Raggit and entirely reasonable for the respondent to accept that. Mr Jordan did himself no favours in the approach he adopted in this investigation meeting.

49. Following the meeting, an invite to a disciplinary hearing was sent to Mr Jordan, formulating two allegations of potential gross misconduct. The first allegation was that Mr Jordan was operating a business out of working hours which was interfering with the company's interests and was contrary to clause 14.1 of the contract. We consider that the respondent had legitimate grounds to put that to Mr Jordan as a disciplinary allegation.

50. The second allegation was that Mr Jordan was in breach of a reasonable management instruction in that he was asked to remove the names in a phone call on 29 January and had not been prepared to do so. As we have explained in our findings of fact, we do not consider that there was an instruction given on 29 January. There was an instruction given on the morning of 30 January for the names to be removed within 24 hours, which was done. We therefore conclude that there was no basis to put forward point 2 as a disciplinary allegation.

51. There might have been other allegations which R could have formulated arising out of Mr Jordan's involvement with Raggit. For example, Mr Steel's cross-examination focussed on an allegation that the 122 names had appeared on the app only because Mr Jordan had used his position as an employee to record those names and entered them onto the app himself. Although Mr Steel's points in relation to this appeared compelling, that allegation had never been the basis for the disciplinary proceedings.

52. At the disciplinary hearing Mr Jordan was somewhat more forthcoming about the arrangements at Raggit, although he still relied on the confidentiality agreement to avoid providing a full and frank account The questioning on that allegation focussed around companies house documentation which showed that he was still registered as a director. Mr Lynch, conducting the hearing, did not seem able or willing to analyse exactly what involvement would be permitted or impermissible as "work" and this led to somewhat confused questioning.

53. The outcome letter is also, regrettably, confused. The two initial allegations have expanded to three allegations. The third is a breakdown in trust and confidence. The way the letter is phrased appears to indicate that it is the claimant's trust and confidence which has broken down, as it refers to comments made by the claimant about the way he has been treated. The ET3 claims that the breach of trust and confidence arose from procrastination over the removal of names and a refusal to answer questions, but those are not the matters relied on in the outcome letter. They are certainly not clear allegations of misconduct which have been put to Mr Jordan and which he has had a chance to defend himself against. The letter contains no clear analysis or conclusion as to which, if any, allegation has been found to be made out as an act of misconduct. Nor is there any analysis of what "work" Mr Jordan has been doing for Raggit. The only conclusion in the letter is as follows:

In the circumstances my conclusion is that you are involved in the business and your ongoing involvement and lack of clarity in this issue has caused a fundamental breakdown of trust and confidence in our working relationship with you which is untenable and therefore I regret to advise you that I have decided to terminate your employment on the grounds of gross misconduct.

54. An appeal took place in front of Mr Rooney. We find it odd that the appeal officer was the most junior of the booking and despatch managers, and would have expected it to have been heard by a director. Mr Rooney's junior position is underlined by the fact that, by the time of the hearing, the business had contracted with the result that Mr Rooney had been made redundant but had then returned to a non-managerial role. We have no confidence that Mr Rooney was someone with the authority within the business to overturn a decision made by Mr Lynch. The appeal was lengthy, but much of it focussed on the issues surrounding the verbal warning. It did not address any of the issues we have identified with the dismissal.

The Law

55. Section 47B Employment Rights Act 1996 ("ERA") provides:

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

56. Section 103A ERA provides:

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

57. Section 98, so far as relevant, provides as follows:

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

(a) the reason (or, if more than one, the principal reason) for the dismissal and

(b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this sub-section if it-

(b) relates to the conduct of the employee

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

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonable 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

58. The respondent bears the burden of proving, on the balance of probabilities, that the claimant was dismissed for a potentially fair reason: s. 98 (1) ERA. In this case the potentially fair reason relied on is misconduct. If the respondent does not succeed in proving that the dismissal was for a potentially fair reason, the Tribunal will consider whether the claimant has produced some evidence to show that it was for an automatically unfair reason (in this case, the protected disclosure). If he has, then the burden will shift back onto the respondent to demonstrate that the automatically unfair reason was not the principal reason. Therefore, it does not automatically follow that a Tribunal which rejects the respondent's reason must accept the claimant's reason (**Kuzel v Roche Products Lrd [2008] ICR 799**).

59. If a potentially fair reason is shown, then consideration must then be given to the general reasonableness of that dismissal under s.98(4) ERA.

60. In considering the question of reasonableness, the we have had regard to the decisions in **British Home Stores v. Burchell [1980] ICR 303**; **Iceland Frozen Foods Limited v. Jones [1993] ICR 17**; **Foley v. Post Office and Midland Bank plc v. Madden [2000] IRLR 82**.

61. In summary, these decisions require that we focus on whether the respondent held an honest belief that Mr Jordan had carried out the acts of misconduct alleged, and whether it had a reasonable basis for that belief. The panel must not, however, put itself in the position of the respondent and decide the fairness of the dismissal based on what we might have done in that situation. It is not for the panel to weigh up the evidence as if we were conducting the process afresh. Instead, the Tribunal's function is to determine whether, in the circumstances, the respondent's decision to dismiss the claimant fell within the band of reasonable responses open to an employer.

62. In conduct cases, when considering the question of reasonableness, we are required to have regard to the test outlined in the '**Burchell**' case. The three elements of the test are:

62.1 Did the employer have a genuine belief that the employee was guilty of misconduct?

62.2 Did the employer have reasonable grounds for that belief?

62.3 Did the employer carry out a reasonable investigation in all the circumstances?

63. It was confirmed in **Sainsbury's Supermarket v Hitt 2003 ICR 111** that the 'band of reasonable responses' test applies equally to the employer's conduct of an investigation as it does to the employer's decision on sanction. Whilst an employer's investigation need not be as full or complete as, for example, a police investigation would be, it must nonetheless be even-handed, and should focus just as much on

evidence which exculpates the employee as on that which tends to suggest he is guilty of the misconduct in question.

64. Sections 122(2) and 123(6) ERA respectively provide that the tribunal may reduce the amount of the basic and/or compensatory awards payable following a successful unfair dismissal claim where it is just and equitable to do so on the grounds of the claimant's conduct. In the case of the compensatory award, the Tribunal can only take into account conduct which caused or contributed to this dismissal.

65. Under the principle in **Polkey v A E Dayton Services Ltd 1988 AC 344** the Tribunal may reduce the amount of compensation payable to the claimant if it is established that a fair dismissal could have taken place in any event – either in the absence of any procedural faults identified or, looking at the broader circumstances, on some other related or unrelated basis.

Submissions

66. Both parties chose to prepare written submissions documents which were supplemented with oral submissions. Neither made reference to the law in any detail, but instead focussed on emphasising the parts of the evidence which supported their respective cases.

Conclusions

67. Turning first to the protected disclosure claim, the respondent's concession that the email of 18 January 2019 was a protected disclosure meant that we did not have to consider the issues set out at paragraphs 7.1-7.4 of the List of Issues.

68. Paragraph 8 sets out three detriments which Mr Jordan alleged were done on the ground of him having made a protected disclosure. Those were: (1) the withdrawal of permission to work for Raggit, (2) commencing disciplinary proceedings and (3) dismissing him.

69. In fact, the claim in respect of dismissal would usually fall to be considered under s103A ERA, and not as a detriment under s47B. The statutory provisions are worded slightly differently, and in some cases the distinction may be significant. This potential problem with the List of Issues was not discussed with the parties, however, we are satisfied that the result would be the same whether the matter is considered under s47B or s103A.

70. We find that in each case that the email of 18 January had nothing to do with the respondent's actions. The respondent's actions were instead motivated by the realisation that the appearance of its business, and its employees' names, on the Raggit app could potentially cause friction amongst its staff and, to put it informally, was a headache for Mr McHugh and the wider management. Although the respondent may not have addressed this in an appropriate way, we have no doubt that the concern over this issue was genuine. The respondent's concerns about Raggit were unconnected to the face that Mr Jordan had sought to challenge his verbal warning.

71. The means that the protected disclosure claim must fail, and that the issues set out at paragraphs 10 and 11 of the List of Issues do not fall to be considered.

72. Turning then to unfair dismissal, and whether the respondent has shown a potentially fair reason. We find that Mr Jordan's conduct in operating the Raggit app and (in the view of the respondent) delaying in taking down the names and continuing to be involved in it after a management instruction had been given to cease working for it, was the reason for his dismissal. We accept that this is a reason related to Mr Jordan's conduct, and therefore a potentially fair reason.

73. Potentially, this could have been seen as a 'some other substantial reason' dismissal. It is possible that, even without Mr Jordan doing anything wrong in law or contrary to his contract, his operation of an app on which his fellow Telops might receive public praise or criticism, could have proved incompatible with him continuing as a Telop himself. However, for the respondent to have dismissed fairly on that ground, the Tribunal would have expected to see evidence of continued friction at work following removal of the names – and there was absolutely no evidence of that. We would also have expected to see some sort of process followed and it is possible that such a process- being less confrontational than a disciplinary process – may have resulted in more constructive engagement from Mr Jordan. However, the respondent has not chosen to go down that route. It chose to pursue a gross misconduct dismissal and to rely on the grounds set out in the dismissal letter. We therefore have to assess the respondent's decisions through that lens.

74. Conduct is a potentially fair reason for dismissal. We then have to apply the well-known test in **Burchell v British Home Stores**, which is also reflected in the list of issues.

75. We do not consider that Mr Lynch had a genuine belief, based on reasonable grounds, that Mr Jordan had committed misconduct in respect of item 2 in the dismissal letter (taking down the names). If he had properly analysed the facts of the matter, including the transcripts of the calls, then he could not possibly have held had a genuine belief that Mr Jordan had failed to comply with a management instruction to remove employee names from the app. To the extent that he may have had have a genuine belief that there had been such a failure, that belief was not reasonable and was not based on a reasonable investigation. Had Mr Lynch (or Mr Kirk) taken the care to construct a timeline and consider the basic question of when Mr Jordan was instruction to take the names down and when he did take the names down then he could not have concluded that there had been a failure. The 'refusal' to take the names down set out in the letter of 29 January, must be seen in the context of the conversations with Mr McHugh, where the claimant initially asked for time to take advice which was permitted, and then, one day later, agreed to remove the names.

76. In respect of allegation 3, as phrased in the dismissal letter, it is not 'misconduct' for the claimant to have lost trust and confidence in his employer. Therefore, whilst Mr Lynch may have believed that Mr Jordan had lost trust and confidence, this is immaterial in determining whether he should be dismissed for gross misconduct.

77. It is harder to reach a conclusion with point 1; the allegation was that the claimant was "operating a business outside work which is now interfering with the company's interests and is contrary to the rules set out in your contract of employment". Notably, Mr Lynch's conclusion in the letter is "*you are involved in Raggit and your ongoing involvement has caused difficulties for this company and is in breach of your contract of employment*". Being "involved" in a business is not necessarily the

same as "operating" a business (which is how the allegation was expressed) or "working for another employer" (which is what the contract addresses). A conclusion that Mr Jordan is "involved" is not, in the circumstances we have outlined, sufficient to demonstrate a breach of the contract of employment or the letter of 6th February.

78. The tribunal accepts that the fact that the app seemingly remained live and that Mr Jordan was listed as a Companies House director gives rise to a suspicion that Mr Jordan was acting in a manner which was inconsistent with his contract, given the revocation of permission. We accept that the respondent was frustrated in its attempts to investigate that given the claimant's responses, and that the usual standards of a fair investigation have to be viewed in that light.

79. However, we remain troubled by the failure to appreciate and analyse the difference between "involvement" and "operating" and "work". Where an employer wishes to restrict the freedom of its employees in respect of what they do outside working hours then it is incumbent on the employer to be clear and explicit about what is being forbidden. Mr Jordan rightly took the view that he was forbidden from "working" and made it clear by his prepared statement that he was not (at least in his view) carrying out any work.

80. With that serious reservation, we accept that the respondent did have grounds for a reasonable belief, supported by a reasonable investigation, that the claimant was continuing to work for Raggit in breach of his contract and the February 6 letter. This conclusion is largely based on the claimant's failure to cooperate fully and frankly with the disciplinary investigation, which mean would have been legitimate for the respondent to conclude that he was "working" despite the fact that the actual work that he was doing was not investigated in a meaningful way.

81. However, given that that was only one part of the stated grounds for dismissal, we cannot find that the **Burchell** test is satisfied in relation to the dismissal as a whole. The mere fact of Mr Jordan working for Raggit outside his working hours had not been a problem for the respondent before his colleagues began to complain about the app. Whilst the situation is different once permission has been revoked, we are not satisfied that it was the simple fact of Mr Jordan working for Raggit which was Mr Lynch's primary concern in deciding to dismiss. Rather, we consider that the other matters referred to in the letter, as well as all the broader context of the Raggit episode were exerting a considerable influence on the decision-making process. That being the case, the fact that the **Burchell** test was satisfied in respect of one element of the claimant's alleged misconduct is not enough to enable us to conclude that the dismissal was fair.

82. We then went on to consider, as per issue 2.3, whether the respondent followed a fair procedure. We have concerns that this was not a fair procedure for the following reasons:

82.1 In his letter of 31st January Mr McHugh had indicated a clear intention that Mr Jordan's employment should be terminated in circumstances where there was no cause to do so. That causes the Tribunal concern that there may have been a predetermined outcome to the subsequent disciplinary proceedings. Whilst we note that Mr McHugh withdrew from the proceedings, and we do not make a positive finding that there was a

predetermined outcome, we do find that, certainly by the end of the process, Mr Jordan was not being treated in a fair and objective way.

82.2 Mr Kirk's investigation was flawed. There were no clear terms of reference and no clear conclusions. He does not appear to have undertaken any investigation into what was showing on the app following the expiry of the 24-hour period for removal of naes. There is no evidence that he spoke to any of the staff to see whether they were content with the position regarding their own names, and felt able to work with Mr Jordan in the future.

82.3 Mr Lynch's disciplinary hearing did not correct the errors in the investigation. As noted above, the outcome letter added an allegation which had not been put to Mr Jordan and was not properly an allegation of misconduct.

82.4 Further, in failing to make a distinction between "involvement" in a business and "operating" or "working for" a business Mr Lynch appears to have applied a higher standard to Mr Jordan's conduct than was required by the contract. This is an example of Mr Jordan not being treated in a fair and objective way.

82.5 Mr Rooney's appeal did not correct the flaws in the investigation or in the disciplinary. The Tribunal finds that he was not an appropriate person to hear the appeal.

83. In those circumstances, given both the respondent's failure to satisfy the **Burchell** test and the procedural failings we have identified we conclude that the claimant's dismissal was unfair within the terms of s98(4) ERA. The claimant's claim of unfair dismissal therefore succeeds.

84. The claimant's claim for wrongful dismissal also succeeds. We do not find that the claimant was in repudiatory breach of his contract at the time of dismissal and he is entitled to his notice pay. Although we accept that the respondent had a reasonable believe that the claimant was "working" for Raggit when he had been instructed not to, that believe came about largely due to the claimant's failure to cooperate with the investigation. We repeat paragraph 79 above – where an employer wants to prohibit outside activities it can expect to have to be explicit about what is permitted or prohibited. We have heard evidence from the claimant about the fact that he was ill during that period, about the fact that the app, once live, would remain live without intervention and that the claimant was also able to rely on other people to carry out essential tasks. We accept that evidence and find that any minimal amount of work which may have been carried out by the claimant in this period was not such as to amount to a repudiation of his contract with the respondent.

Remedy

85. Our conclusion on liability gave rise to various issues in respect of what reductions might be appropriate for Polkey/contributory fault. Although we had initially invited the parties to address these matters as part of their submissions,

neither had devoted much attention to the matter and we considered it appropriate to deliver the liability judgment and invite further submissions on Polkey/contributory fault whilst recognising that any arguments in relation to mitigation of loss would be left (as previously agreed with the parties) to a remedy hearing at a later date.

86. When we invited the parties to make further submissions, Mr Steel made an application to adjourn the hearing and argue both Polkey and contributory fault at a later date. The purpose of this would be to allow the respondent to adduce evidence about the allegation that the claimant had used his position as an employee to obtain the names of the respondent's Telops to add to the Raggit app. Mr Steel submitted that that was an unanswerable example of misconduct which Mr Jordan could have been dismissed for and that the Tribunal should take account of that when considering the award and make a reduction on just and equitable principles.

87. The panel were unanimously of the view that it would not be appropriate to grant an adjournment and allow the respondent to introduce new evidence on that matter at this stage. The hearing had been listed to deal with liability and remedy. It had been agreed with the parties at the outset (as is common) that we would not hear evidence on mitigation of loss. However, the introduction of that evidence at a remedy hearing will not involve re-opening matters which are closely related to the issues determined on liability. We did however, listen to Mr Steel's submissions on the point made in reliance on the evidence (and cross examination) that we had already heard.

88. We note that the case of **W Devis and Sons Ltd v Atkins [1977] ICR 662** enables an award to be reduced (or extinguished altogether) where an employee has been guilty of misconduct which was unknown to the employer at the time of dismissal (and therefore cannot have contributed to the dismissal) but which comes to light subsequently and which means that it would not be just for the employee to be compensated in full for his unfair dismissal as he otherwise would be. However, the principle in **Atkins** applies to misconduct which was not known about at the time of dismissal. Here, the respondent knew that the names of all (or virtually all) of the Telops had appeared on the Raggit app, the vast majority without any rating or review. The conclusion that their appearance is somehow connected to Mr Jordan's employment with the respondent is an immediately obvious and logical one. The respondent had every opportunity to investigate that connection and to pursue a disciplinary process in respect of any allegation which it formulated as a result of that investigation. For whatever reason, it chose not to discipline Mr Jordan on those grounds. Having made that decision, this Tribunal believes that it is not legitimately open to the respondent to have 'another bite of the cherry' and seek to re-run the disciplinary procedure using an allegation of misconduct which they chose not to rely on first time around. for this reason, we make no 'just and equitable' adjustment to the award on the grounds argued for by Mr Steel.

89. We turn then, to what would have happened if Mr Jordan had not been unfairly dismissed. This is not a case in which we can say that the claimant would have carried on working indefinitely for the respondent if the dismissal had not happened. We accept that Mr Jordan's competing loyalties to Raggit and Delta may have caused difficulties with his on-going employment from the perspective of both parties.

90. On the one hand it is possible that, the names having been removed, any bad feeling amongst the claimant's colleagues would have died away and, the respondent, acting reasonably, may in time have seen fit to restore his permission to work for the app.

91. On the other hand, it is possible that tensions would not have died away, that doubts would have continued to remain about Mr Jordan's involvement with Raggit and his loyalty to Delta, and that either alternative disciplinary charges would have been formulated, or a fair dismissal for an SOSR reason may ultimately have occurred. Equally, it is possible that Mr Jordan himself would have chosen to seek other work, rather than operate under the constraints of his contract in the circumstances.

92. In the long-term, we consider that the latter possibilities are considerably more likely. It is difficult to say when this employment would have ended. It was not simply a case of extending or re-running a hypothetical version of this disciplinary process, as this process was fundamentally flawed. By way of an estimate, and seeking to do just to both sides, we consider that the employment would have terminated around 8 months after the actual date of termination, and that Mr Jordan should be limited to recovering losses which arose in that 8 month period. This is, by necessity, a speculative figure, balancing the possibility that employment could have ended much sooner but, equally, could have continued for longer and possibly (although we consider this unlikely) indefinitely. We consider that in these circumstances the 8 month cut-off balances the positions of the parties more justly than applying a percentage reduction on an on-going basis.

93. We should deal with a further specific argument that Mr Steel made in relation to Polkey. Mr Steel asked us to make a finding that Mr Jordan's actions in the investigation and disciplinary hearing, by failing to cooperate fully and by relying on the confidentiality agreement, mean that he was acting as an employee of Raggit at that time, and that leads to a Polkey deduction. The finding of the Tribunal is that, under the Burchell test, we accept that Mr Lynch formed a reasonable view that Mr Jordan was working - that is largely because Mr Jordan failed to provide the sort of explanation that he has now provided. The Tribunal made no finding of fact that Mr Jordan was actually engaged in outside "work" within the terms of the contract. Nor do we consider that Mr Jordan's conduct in the hearing (obstructive and ill-advised thought it was) would be viewed in any common-sense way as meaning that he was undertaking work for Raggit whilst he was participating in the investigatory and disciplinary hearings with

the respondent. We consider that submissions about the way Mr Jordan conducted himself in the hearing are more appropriately considered under the question of contributory fault.

94. Turning then, to the contributory fault question, we consider that Mr Jordan's conduct in relying on a confidentiality obligation owed, essentially, to himself, in order to avoid answering questions about who and how Raggit was operating in circumstances where he asserted he was not working for the business, was culpable and blameworthy. We also find, as a matter of fact, that it contributed to his dismissal. We consider that the appropriate reduction in respect of this conduct is 25% from both the compensatory and the basic award.

95. We hope that, those findings having been made, the parties will now be able to resolve the question of appropriate compensation between themselves, but a remedy hearing has been listed and case management orders made. Those will be recorded in documents sent to the parties separately.

Employment Judge Dunlop

Date: 14 June 2021

REASONS SENT TO THE PARTIES ON

16 July 2021

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FOR THE TRIBUNAL OFFICE