THE EMPLOYMENT TRIBUNAL

HEARING BY CVP VIDEO CONFERENCE

BEFORE: **EMPLOYMENT JUDGE BALOGUN**

MEMBERS: **Mr J Hutchings**
Mr C Rogers

BETWEEN:

STEPHEN PAYNE

Claimant

And

PILGRIMS CORNER LIMITED (1)
SARAH NORMAN (2)

Respondents

ON: **1, 2, 3, 4, 5 & 9 March 2021**
In Chambers 13-15 April 2021

Appearances:
For the Claimant: Mr Gidney, Counsel
For the Respondent: Mr Harris, Counsel

RESERVED JUDGMENT

1. The unanimous judgment of the Tribunal is that:

    a. The ordinary unfair dismissal claim succeeds. The basic award is reduced by 60% for contributory fault and any compensatory award by 75% in respect of Polkey,

    b. The automatic unfair dismissal claim pursuant to section 103A Employment Rights Act 1996 is dismissed.

c. The detriment claim pursuant to section 47B Employment Rights Act 1996 is dismissed.

d. The first respondent failed to provide the claimant with a statement of employment particulars. The claimant is awarded 4 weeks' pay pursuant to section 38 Employment Act 2002.

e. The matter will be set down for a 1 day remedy hearing on a date to be advised.

REASONS

2. By a claim form presented on 10 January 2018, the claimant complains of ordinary unfair dismissal, automatic unfair dismissal; and public interest disclosure detriment. The claimant also contends that he was not provided with a statement of employment particulars. All claims are pursued against R1 whilst the PID dismissal and detriment claims are pursued against both R1 and R2. All claims are resisted by the respondents.

3. We heard evidence from the claimant. On behalf of the claimant we heard from Ken Galbraith (KG) former Support Worker; James McLaughlin (JMC) former Deputy Manager; and Kieran Jones (KJ) former Deputy Manager. The respondents gave evidence through Sarah Norman (R2) Managing Director; Julian Finnis (JF) former Manager; Paul Bishop (PB) HR Consultant and Nikki Whistler (NW) former Operations Manager, Rubicon House.

4. We were provided with an electronic bundle and references in square brackets in the judgment are to the pdf bundle numbering.

The Issues

5. The agreed issues are set out at pages 85-87 of the bundle and are referred to more specifically in our conclusion below.

The Law

PID Dismissal

6. Section 103A of the Employment Rights Act 1996 (ERA) provides that an employee shall be regarded 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.

Qualifying Disclosure

7. Section 43B ERA provides that a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the matters listed in sub-sections (a)-(f).

8. There are 4 stages to reasonable belief –

i) the claimant's subjective belief – did the claimant believe that the disclosure tended to show a relevant failure.

ii) The objective belief – was that belief reasonable. In considering the objective test, those with professional or insider knowledge will be held to a different standard than laypersons in respect of what it is reasonable for them to believe. Korashi v Abertawe Bro Morgannwg University Local Health Board 2012 IRLR 4 EAT

iii) did the claimant believe that the disclosure was in the public interest

iv) If so, was such a belief reasonable.

PID Detriment

9. Section 47B ERA provides that a worker has a right not to be subjected to any detriment by his employer on the ground that the worker has made a protected disclosure.

Ordinary Unfair dismissal

10. Section 94 ERA provides the right not to be unfairly dismissed.

11. Section 98(2) ERA sets out the potentially fair reasons for dismissal. One of those reasons is conduct *98(2)(b*).

12. Section 98(4) ERA provides that in determining whether a dismissal is fair or unfair, the tribunal must have regard to whether in all the circumstances the employer acted reasonably or unreasonably in treating the reason shown by the employer as sufficient reason for dismissal.

13. In considering whether a dismissal is fair, the tribunal must not substitute its view for that of the employer but should consider whether dismissal fell within the range of reasonable responses open to the employer. The *range of reasonable responses* test applies to both the decision to dismiss and the procedure applied. Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23 CA.

Statement of Employment Particulars

14. Section 1 ERA, provides that an employer must give an employee a written statement of particulars of employment no later than 2 months after commencement of employment.

15. Where there is a change to any of the particulars, the employer shall give the employee a written statement containing the change no later than one month after the change (s.4)

16. By section 38 of the Employment Act 2002, where there has been a failure to give a statement of employment particulars and the provisions of 38(3) are satisfied, the tribunal must award the claimant 2 weeks' or 4 weeks' pay.

Findings of Fact

17. Pilgrims Corner Limited (R1) provides residential care, fostering services and an independent school for young people, aged 5-16, in the care system. R1 has residential

accommodation in 4 separate houses in Herne Bay, Kent: Spencer, Fleetwood, Lingate and Yew Tree Cottages. R1 also operates the Fairlight Glen School which provides education to those aged 10-18 who have been excluded or have difficulties assimilating into mainstream education. R1 has 2 directors; Sarah Norman (R2) Managing Director, and her mother, Linda Norman (LN).

18. The claimant commenced employment with the respondent on 10 March 2015 as Manager for Spencer and Fleetwood Cottages. On 26 November 2015, he became the registered manager.

19. The claimant has 25+ years' experience in the care sector and in 1997 had set up his own children's home, St Nicholas Lodge Ltd, employing 60 plus staff. He sold the care home in 2012.

20. On 5 February 2015 the respondent sent the claimant an offer of appointment letter. The letter states that he will receive a statement of terms and conditions and Handbook within 2 months of his start date [492-493].

21. On 1 April 2015, R2 sent a letter to the claimant with the subject heading: "*Re: Issue of Employee Handbook and Associated documents*". The claimant was asked to sign and return the documents as previously requested. At the bottom of the letter was a declaration that he had read the documents and agreed to them. This was followed by the claimant's signature and the date: 7 April 2015 [505-508]. Attached to the letter was a schedule of associated documents comprising a number of policies. The policies are non-contractual [150]. There was no reference in the letter to a statement of terms and conditions being attached and we find that one was not.

22. On 20 June 2017, the claimant was promoted to the role of Operations Manager. The claimant says that he was not provided with a statement of employment particulars for either his original or promoted role. The respondent has not been able to produce either a paper or electronic version of the particulars they say were provided. All they have produced is a template of employment particulars for an hourly paid Support Worker. [826]. As the respondent did not provide a template for either of the claimant's roles, we find that none exists. The other document produced was a job description for a Registered Manager, which is not a substitute for employment particulars. [832-833]

23. We find on the balance of probabilities that the claimant was not issued with a statement of particulars of employment either in his original position or on his promotion. We find R2's assertion that the claimant must have taken it with him when he left unconvincing. The claimant had no idea that he was going to be suspended and when it happened. Further, the respondent has been unable to adduce any tangible evidence that such a document ever existed.

24. In the template documents provided are 2 clauses relevant to these proceedings. The first is about other employment and the other is about devoting all of your time to the company. The respondents rely on these in support of the disciplinary charges subsequently brought against the claimant. The clauses are set out below:

***Other Employment**:*
It is a condition of your employment that apart from your work within the Company, you do not engage in any other employment or engage in any profession, trade or business, directly or indirectly, without the Company's prior written consent.

Permission will not be unreasonably withheld unless the other employment or activity has, or could be anticipated to have an adverse effect on the Company, its customers, your ability to carry out your work, or if it would create a conflict of interests in relation to your responsibilities to the Company.

***Devote Full Time to the Company**:*
You must devote the whole of your time, attention and abilities during the hours of work for the Company to your duties for the Company and may not in any circumstances, whether directly or indirectly, undertake any other duties of whatever kind during your hours of work for the Company.

25. There is a similar "*Other Employment*" provision in the Company Handbook, though not as restrictive. Under that provision, the obligation of the employee is simply to notify the respondent of other employment and such employment will only be objected to if it conflicts with the respondent's interests [173].

26. On 4 February 2016, the claimant and R2 met with the social worker of one of the young residents, JG, to discuss a potential move of JG to a 16+ service as the respondent's residential facility does not house residents beyond the age of 16. As part of those discussions, the respondent was asked if it would consider providing such a service and R2 asked the claimant to look into it.

27. On 2 March 2016**,** the claimant met with R2 and LN at LN's home. The claimant says that they discussed his proposals for setting up a semi-independent 16+ facility for JG, which involved R1 providing accommodation that JG could move into, where he would be supported by current staff for a fee from the council of £2,200 a week. The claimant says that R2 instructed him to put together a more detailed proposal. R2 denies this, claiming that she told him that they were not interested. However, we accept the claimant's evidence on this as on 3 May 2016, he sent an email to R2 attaching his written proposal for a 16+ service [1305 & 543] R2 accepts that she received the email and saw the attachment. Had the proposal already been rejected, there would have been no need for the claimant to send it to R2.

28. On 11 May 2016, the claimant sent an email to R2 using the email address manager@pilgrimscorner.co.uk attaching more detailed proposals for the 16+ service for JG. [549] SN said that she never received it as the email address it was sent to was created for another manager, Wayne Moss. However, the claimant would have sent the email in the expectation that it would have been seen by R2.

29. The claimant says at paragraph 40 of his statement that in mid-May, he had a meeting with LN who told him that she had checked the finances and his 16+ service proposal was not for them but that he could do it himself. R2 disputes this. R2 was not present when the alleged conversation took place so cannot give first hand evidence about it. The only person, apart from the claimant, who can give such evidence is LN but she did not attend the hearing. We therefore accept the claimant's evidence on this.

30. Having been given the go-ahead by LN, the claimant set up his own 16+ service. In early June 2016, he re-activated a previously dormant company, Prime Caring Services Limited (PCS) as a vehicle for the 16+ service as social services would only deal with a limited company and not a sole trader.

31. On 25 May 2016, JG moved into a rented flat in Margate, provided by the claimant as part of his 16+ service. JG, who is autistic, had been in the respondent's care for a considerable time and required on-going care following the move. Jim McCloughlin (JMC) and Glen Galbraith (GG) worked for the respondent under zero-hours contracts and had latterly cared for JG prior to his move. In order to ensure consistency of care, the claimant used JMC and GG to provide on-going care for JG through PCS. When they were working for PCS, they were not paid by the respondent.

32. The claimant contends that R2 agreed that he could use existing Pilgrim's Corner staff wherever possible. At paragraph 15 of her statement R2 denies this, stating that she had no idea that the claimant had set up his own business and had no idea that he was using her staff to work there. However, during cross examination, she said for the first time that she knew her staff would be involved in JG's transitional care for 4-6 weeks but not beyond that. She told the Tribunal that this was discussed with the claimant when the idea of a flat for JG was first mentioned and that, possibly, JMC and GG were the staff members mentioned, though she could not recall the details of the discussion. This evidence from R2 is completely different from the position previously taken by R2 but is more consistent with the claimant's account. We therefore prefer the claimant's evidence. Reference to a transitional period was only introduced into the respondents' evidence during cross examination. There was no transitional care document, which would be the normal procedure, showing how long the transition was to last for. R2 said in evidence that staff assisting JG during this period would have filled in timesheets and been paid by the respondent. However, there was no evidence of this. We are satisfied that when JM and GG were working for PCS they were not being paid by the respondent.

33. On 8 June 2017, another of the respondent's residents, ER left the respondent's care and moved to a newly refurbished house in Margate provided by PCS. At some point, the respondent's residential support workers Shae Moyes (SM), Becki Huckle (BH) and Hannah Taylor (HT) started to provide their services to PCS. The respondents' position is that they were unaware of this and that the staff in question were not permitted under their contracts to work for PCS. We have not been provided with copies of any of their contracts. However, during R2's cross examination, it was revealed that they were all on zero hours contracts. We therefore consider it unlikely that they were prohibited from working elsewhere when hours were not provided by the respondent.

34. On 30 June 2017, a resident AE raised a complaint with BH that a member of staff of the respondent's school had approached another resident expressing a wish to foster them [654]

35. On 3 July 2017, AE made a further complaint, accusing members of staff at the school of behaviour that could be characterised as, at best, teasing and, at worst, bullying. The alleged perpetrators were the Headmaster and William Norman, R2's brother [660-663] The matter was referred to the claimant who escalated it to R2. On 5 July, R2 attended a meeting with AE, his support worker and others to discuss the complaint.

36. On 24 August 2017, R2 was informed by AE's social worker that AE had sent texts to his sister repeating earlier complaints against the school plus further serious allegations about the Art teacher making comments of a sexual nature to him. The claimant contends that when R2 informed him of this, he told her that she had breached safeguarding protocols by failing to notify AE's social worker or LADO of his earlier complaints of 3 July. The claimant told us that he was referring to the respondent's

"Protection of Children Child Protection Referrals" policy and the "Protection of Children Allegation Against Staff" policy [224 and 229] He said that he told R2 that she had not followed the mandatory procedures in respect of the earlier complaints and that he needed to inform LADO. He said that R2 was not happy with his plans and said that she thought that AE was being malicious. The claimant relies on this as his first protected disclosure.

37. The claimant says that on 25 August 2017, he telephoned LADO to inform them of AE's complaint and that R2 had breached safeguarding procedures by failing to inform LADO about AE's previous complaint of 3.7.17. LADO does not have a record of this call and the claimant did not make a record of it either. He relies on this as his second protected disclosure.

38. The claimant says that on the 29 August 2017, he told R2 that he had contacted LADO about AE's complaint and again told her that she had failed to follow mandatory safeguarding procedures by not informing the social worker of AE's 3 July complaint. The claimant said that R2 said she was unhappy that he had taken matters into his own hands and that it was her job to inform LADO. He relies on this as his third protected disclosure.

39. R2 denies that the claimant raised concerns with her, either on the 24 or 29 August 2017, about the handling of AE's complaints and contends that the claimant agreed with the approach taken in respect of AE's July complaint.

40. There are no contemporaneous records of the alleged conversations; they were not followed up by email; and there is no attendance or diary note made by the claimant. The first record of the conversation is in the claimant's appeal letter following his dismissal.

41. The claimant had over 25 years' experience in the care sector. Not only would he have been familiar with the concept of whistleblowing, he would have appreciated the need to follow the internal whistleblowing policy and to maintain a paper trail of any allegations raised. The respondent's whistleblowing policy provides that staff should always report bad practice in writing and if the complaint is not dealt with satisfactorily, then external confidential advice can be sought by calling the Ofsted Whistleblower hotline [208]. The claimant did not follow the policy. Further, he did not contact Ofsted to report his concerns until 29 September 2017. We refer to this further below.

42. At [724] the claimant completed a document relating to AE headed "Running Record For Referral of Child". The first entry is 24 August 2017 – the date the first conversation with R2 was said to have taken place. No reference is made at all to the concerns that he says he raised. When asked in cross examination why this was so, the claimant said that he could not explain it.

43. On 30 August 2017, the claimant did make a referral to LADO but there is no suggestion within it that the claimant had any concerns about how AE's earlier complaint had been dealt with [776]

44. On 31 August 2017, the claimant sent an email to AE's social worker in his capacity as the respondent's child protection officer. In it, he summarises the actions taken in relation to AE so far and appears supportive of them. He also refers to LADO's response

to his referral the day before, which does not raise any concerns about the respondent's approach [735].

45. In light of the above matters, we find, on balance, that the claimant did not make the first second and third disclosures referred to above.

46. On 5th September 2017, R2 and LN quizzed the claimant about his use of their staff to look after ER and made other allegations. At the end of the discussion, the claimant was told that he was suspended. On 6th September 2017, the respondent wrote to the claimant confirming his suspension pending investigation into allegations of gross misconduct, in particular, that he had set up his own company and failed to tell the respondent [820-821]

47. An initial investigation was carried out by R2, which involved interviewing a number of staff. [851-856]. Julian Finnis (JF) did a, so called, reflective statement and Debbie Saidyah provided a statement by email [860]. The claimant was not interviewed as part of the investigation and neither R2 or LN prepared statements in relation to their own involvement in the matters being investigated.

48. The respondent instructed an external consultant, Paul Bishop (PB), recommended by their solicitors, to carry out the disciplinary hearing and make recommendations. This was because of R2's involvement in the events and there being nobody in the organisation above her that could carry out the process internally. [865]

49. On 18 September 2017, the claimant was sent an invitation to a disciplinary hearing to respond to 6 allegations [822-823] An updated invite was sent on 22 September with an additional allegation. Accompanying the invitation were the documents relating to the investigation that had been carried out by SN. [870-872].

50. On 27 September 2017, the claimant wrote a letter to R2 complaining about the conduct of an employee GD, who he alleged was abusive towards him on the phone. He relies on this as a PID detriment. [1250]

51. On 27 September 2017, the claimant telephoned Ofsted's whistleblowing hotline and reported concerns about the welfare of AE and the respondent's handling of AE's complaints. The claimant relies on this as his fourth protected disclosure. The timing of this report is telling as it was after the respondent had commenced disciplinary action against him and at a time when both LADO and AE's social worker were aware of how the respondent had handled AE's complaint and had not raised any concerns. Hence, by this point, any concerns that the claimant may have had (whether reported to the respondent or not) should have been allayed. We would therefore question whether the claimant had the necessary reasonable belief at this point. More importantly, the claimant accepts that the respondent did not know about the Ofsted call at the relevant time.

52. The disciplinary hearing took place on 28 September, chaired by PB. SN was in attendance as a note taker [1057-1064]

53. On 5 October 2017, PB wrote to the claimant with his findings on the disciplinary allegations. He upheld all of the allegations, apart from allegation 3, and recommended that the claimant be dismissed for gross misconduct [1087-1096]

54. Based on PB's recommendation, R2 wrote to the claimant on 9 October 2017 dismissing him. [1097-1099]

55. On 13 October 2017, the claimant appealed against his dismissal [1100-1101]. The appeal was heard on 6 November 2017 by an external consultant, Theresa Addison [1226-1247]. On 27 November 2017, the respondent wrote to the claimant informing him that his appeal was unsuccessful [1248-1249]. Theresa Addison did not give evidence in these proceedings.

56. On 5 March 2018, the claimant commenced new employment as a Care Home Manager at Rubicon, a children's care home in Herne Bay. Four references were received for the claimant, three were good and the fourth from R2 was neutral. Nikki Whistler (NW), the Operations Manager at Rubicon, contacted R2 by phone for more details.

57. The claimant alleges that on 6 March NW told him that R2 had said that he was a "*nasty piece of work*" and referred to his Tribunal claim against them. NW denies making such a report to the claimant and R2 denies making such a statement to NW. We are satisfied that there was a conversation between the claimant and NW on 6 March 18 when the claimant asked NW whether she had received his references. We believe this because when asked about paragraph 73 of the claim form where the claimant recounts the conversation, NW does not say that there was no conversation, she says that the claimant's account is "*perhaps a slight exaggeration but she can't remember*". In her original statement given to the respondent's solicitors on 31 May 2018, NW said that SN said <u>*something along the lines of*</u> *(my emphasis)'that he was not a particularly nice person and you need to be 'wary'* [764]. That is not a clear recollection of what was actually said.

58. R2 agreed in cross examination that she told NW that the claimant was not a nice person and she should be wary. She had little option given NW's evidence. The difference between the sentiment; "*not a nice person*" and "*a nasty piece of work*" is in the strength of feeling of the person making the statement. It is clear to us having heard from R2 that by the time of the claimant's dismissal, she felt deeply antagonistic towards him and those feelings were strengthened following the issuing of these proceedings. We can well imagine R2 describing the claimant as a nasty piece of work and on balance, we find that she did.

<u>Submissions</u>

59. The parties presented written submissions, which they supplemented orally. We have taken these into account.

<u>Conclusion</u>

<u>Disclosure 1 – 24/25 August 2017 – informing SN that she had not followed the respondent's Child Protection Referral Policy for dealing with complaints</u>

60. In light of our findings at paragraph 45 above, we find that there was no qualifying disclosure.

Disclosure 2 – 25 August 2017 – reporting of concerns to LADO

61. In light of our findings at paragraph 45 above, we find that there was no qualifying disclosure.

Disclosure 3 -29 August 2017 – repeating disclosure 1 concerns to SN

62. In light of our findings at paragraph 45 above, we find that there was no qualifying disclosure.

Disclosure 4 – 27 September 2017 – reporting concerns to Ofsted

63. We accept that the claimant did make a disclosure to Ofsted as we have seen the response to it from Ofsted [787 & 789]. However, the claimant accepted that he did not tell the respondent of this and does not suggest that anybody else did.

Conclusions on 47B detriment claim

64. Based on our findings that the first 3 alleged disclosures were not made and that the fourth disclosure was made but not known to the respondent, the detriments relied on by the claimant could not have been because of any qualifying disclosures. The detriment claims must therefore fail.

Automatic Unfair Dismissal

65. For the same reasons as paragraph 64 above, the automatic unfair dismissal claim must fail.

Ordinary Unfair Dismissal

66. We are satisfied, based on paragraphs 53 and 54 above that the claimant was dismissed by reason of conduct.

67. In considering whether the dismissal was fair, we have taken into account the following matters:

    a. whether there were reasonable grounds for believing that the claimant was guilty of the allegations, as set out in the letter of 22 September 2017 [870-872]

    b. whether at the time the belief was formed, the respondent carried out a reasonable investigation

    c. whether the respondent otherwise adopted a fair procedure

    d. whether dismissal was within the range of reasonable responses.

68. In relation to the above matters, we deal with each allegation separately below:

Allegation 1 - breaching express term of contract by engaging in outside work without express consent.

69. For there to be a reasonable investigation of this allegation, we would expect, at the very least, that the investigator would request a copy of the claimant's contract and view the wording of the express term relied upon by the respondent. PB told us that he found the claimant's assertion that he had no written contract of employment unconvincing yet he did not see any evidence of such a contract. The respondent provided him with a template contract for a zero hours employee, which the claimant was not. PB preferred R2's assertion that the contract was missing and that it had been removed by the claimant from his personnel file. That information was obtained from R2 after the disciplinary hearing and was not made known to the claimant so he did not have an opportunity to challenge it. There does not appear to have been any probing of R2's account by PB. For example, there was no enquiry as to why there was not an electronic copy of the claimant's actual contract or why he (PB) had not been provided with a template version of an Operations Manager's contract.

70. In relation to the claimant engaging in outside work without consent, PB accepted R2's assertion that the respondent only authorised the claimant to provide accommodation for JG and had no knowledge that he was providing other services. That again is information obtained from R2 outside the disciplinary hearing, which the claimant did not have an opportunity to challenge. As is clear from paragraph 32 above, R2 admitted that she knew the claimant would be providing transitional care for JG and that her staff would be involved in this for 4-6 weeks. That information was not disclosed to PB but could have come to light had he allowed the claimant an opportunity to challenge R2's account. PB admitted in cross examination that had he known about this at the time, it would have influenced his decision.

71. PB also said that he spoke to LN outside the hearing who told him that she was unaware that ER had moved to the claimant's flat. Again no statement was taken from LN and the details of the conversation were not made known to the claimant, who did not have an opportunity to challenge it.

72. PB had statements from JF and DS, both stating that they knew about the claimant's 16+ service. PB did not consider why, given that 2 Managers knew about this, that SN and LN did not. It was a small organisation and one would have thought it was something that was difficult to hide.

Allegation 2 - encouraging other members of staff to breach the express terms of their contracts by working for PCS without informing the respondent

73. A reasonable investigation would have involved a review of the contracts of the staff in question by PB in order to satisfy himself of the existence of the express term in question. PB was not provided with copies of the contracts of the staff and he did not question the absence of these. Whilst R2 had used the excuse that the claimant had taken his own contract from his personnel file, she was not using that argument in relation to other staff contracts. PB also had no evidence in front of him that these employees were given a handbook. For example, there was no signed acceptance of the handbook in relation to them. PB did not interview any of the staff concerned and there was nothing within their individual witness statements from which he could reasonably conclude that the claimant had encouraged them to breach their contracts.

Allegation 3

74. This was not upheld so we have nothing to say about it.

Allegation 4 – Misinformed HT that the respondent was dissatisfied with her performance and was considering terminating her employment, thus damaging her relationship with the respondent

75. HT's evidence on this allegation should have been key to the investigation. Yet PB did not interview her. There were two statements purportedly from HT, one signed and the other unsigned, which contradicted each other in part. Counsel for the claimant invited the tribunal to find that R2 wrote the unsigned statement herself with the express intention of procuring the claimant's dismissal. We decline to do so as there is insufficient evidence to support such a conclusion. However, the fact that there were 2 conflicting statements from HT was reason enough for PB to interview her for clarification. He did not do so but instead relied on hearsay evidence from JF that the claimant had told HT that the respondent was unhappy with her and wanted her out. That was another conversation that took place after the disciplinary hearing that the claimant was not told about or given an opportunity to respond to.

Allegation 5 – Failing to act in the best interest of the respondent by using a member of their staff in PCS when the respondent was struggling to find sufficient staff cover and causing staff to be late because they were working for PCS

76. PB's reasons for upholding this allegation are set out in his conclusions at [1091-1092] We are satisfied that there was sufficient evidence before PB for him to uphold this particular allegation. The claimant accepted during his disciplinary interview that on at least one occasion, HT was late for her shift at the respondent because she was working a shift a PCS. There was also evidence from an email chain between the claimant and DS that it was the claimant's decision to remove HT from shifts with the respondent during the period 5-20 June 2017 and to use HT in his PCS facility during that period [969] At the time there were difficulties covering the shifts and PB was entitled to find that this represented a conflict of interest and was to the detriment of the respondent.

Allegation 6 – That the claimant moved ER to his provision without informing the respondent or allowing a proper transition against her best interests

77. PB rejected the claimant's assertion that he had told LN in June 2017 that ER had transferred to his provision. However, he accepted the different accounts from R2 and LN as to when they were informed of this. R2 told him that the claimant informed her on 24 August 2017, whereas LN told him she was not aware until 6 September. Again, their accounts seem to have been accepted without question. PB did not seem to query why R2 would not have told LN immediately on becoming aware of this or, more importantly, how LN would only have been aware on 6 September when both she and R2 questioned the claimant about his use of their staff in his provision on 5 September. On the second part of the allegation, there is no dispute that ER was someone who was vulnerable and would need transitional care on leaving the respondent's residence. The claimant told PB that he could not remember what the transition arrangements were for ER. Given that ER had only moved into his facility in June, PB was entitled to find that response not credible and to conclude, as he did, that the claimant did not put in place proper transitional arrangements, in breach of safeguarding.

Allegation 7 - That the claimant breached his employment contract. company policies and rules by undertaking work for PCS during normal paid hours of work for the respondent.

78. This allegation relates to private work undertaken by the claimant for Haringey Council in relation to a mosaic funds application and to private work on a business contract. The claimant's work computer showed that some of that work was undertaken during his working time with the respondent on 12.6.17 and 16.8.17. The claimant did not deny this allegation. It was therefore reasonable for PB to uphold it. It was also reasonable for him to find that the claimant was aware of his obligation to devote the whole of his time and attention to his duties for the company during his working hours.

Conclusion on reasonable belief

79. In relation to allegations 1, 2 and 4, we find that the respondent's belief in the claimant's guilt was not based on a reasonable investigation of the circumstances. In relation to allegation 5 and 7 and the second part of allegation 6, we find that there was sufficient basis for their belief.

Procedural Matters

80. Much was made by the claimant's counsel of the fact that R2 was involved in the initial investigation. The principle of fairness would generally dictate that, where practicable, a witness to an allegation should not be involved in its investigation. However, the respondent was a small organisation with a very flat structure. The claimant reported to the two directors and there was nobody above them that could have commenced the investigative process. We do not consider that this was fatal to the process. The initial investigation was limited to the taking of statements and compilation of documents. We are satisfied that any potential unfairness was mitigated by the appointment of PB, an external and independent consultant, to carry out a full investigation and make recommendations. Our concern, however, is about the way PB undertook that task.

81. As already mentioned PB did not interview those who provided statements when it would have been prudent to the investigation for him to do so. This was particularly so given R2's involvement in their production and the inconsistency between the 2 statements of HT. No statements were produced by R2 or LN setting out the basis of the allegations against the claimant. Instead, PB interviewed them after the disciplinary meeting. He did not make a note of those discussions or provide details to the claimant, who had no opportunity to respond before the disciplinary outcome. PB preferred the accounts of R2 and LN, without challenge or scrutiny. This is most stark when it comes to the issue of whether the claimant and other staff had written contracts. PB accepted the respondent's evidence on this without seeing a single contract for any of the staff in question. For all these reasons we find that the investigation was flawed.

82. The appeal did not address the flaws in PB's investigation. We did not hear from the appeal manager so there was no direct evidence about the approach she took. However having reviewed her outcome letter, it does not appear that she carried out any additional investigation. For example, there is no suggestion that she interviewed the witnesses in the case.

Was dismissal in all the circumstances fair

83. The right of a person to know the case against them and to have an opportunity to respond to it is a matter of natural justice and fundamental to a fair disciplinary process. We find that the flaws identified above were so serious as to taint the whole process and render the dismissal unfair.

84. In all the circumstances, the unfair dismissal claim succeeds.

Polkey

85. In considering whether to make a Polkey deduction in this case, we have asked ourselves the following questions:

    i. If a fair process had occurred, would it have affected when the claimant would have been dismissed and

    ii. What is the percentage chance that a fair process would still have resulted in the claimant's dismissal.

86. In our view, a fair procedure would have involved taking formal statements from R2 and LN and providing these to the claimant in advance so that they were available for him to respond to. It would also have involved interviews with those employees that provided statements. PB was instructed to carry out the disciplinary investigation on 18 September 2017, the disciplinary hearing took place on 28 September and he issued his findings on the disciplinary allegations on 5 October. The process took just over 2 weeks. Had a fair investigation been carried out, we believe the dismissal would have taken a week longer.

87. On the second question, we have already found at paragraph 79 that there were reasonable grounds for believing that the claimant was guilty of allegations 5, 7 and 6, in part. We are satisfied that these matters together are capable of amounting to gross misconduct under the respondent's handbook [183]. Whilst it does not follow that dismissal would have been the sanction, in all the circumstances, we consider that there was a 75% chance that a fair procedure would have led to that result. Any compensatory award for unfair dismissal will be reduced accordingly.

Contributory Fault

88. In order to find that the claimant contributed to his dismissal, the Tribunal has to be satisfied, based on the evidence before it, that the claimant was guilty of the conduct leading to dismissal. The only allegation upon which we are able to make a clear finding of the claimant's guilt is allegation 7. The claimant admitted in evidence that he worked on PCS contracts during the working day when he should have been devoting his time to the respondent's business. He also confirmed that he was aware of his obligation to devote all his time at work to the respondent's business. We therefore find as a fact that he was in breach of that obligation. We also find that this was culpable and blameworthy conduct which contributed to his dismissal.

89. In considering whether or not it is just and equitable to make a deduction for contributory fault, we have taken account of the fact that there is significant overlap between the relevant factors and those taken into account in making the 75% Polkey deduction. Hence in order to avoid the risk of the claimant being penalised twice for the same

conduct, we consider it just and equitable to apply a contributory fault deduction to the basic award only. That deduction is 60%.

Failure to provide the claimant with a Statement of Employment Particulars

90. Based on our findings at paragraph 23 above, this claim succeeds. Pursuant to section 38 (2) and (4) of the Employment Act 2002, the Tribunal can award either 2 or 4 weeks pay. Having considered the overall circumstances, including the total failure to provide either an original or updated contract, we consider it just and equitable to award 4 weeks pay.

Judgment

91. The unanimous judgment of the Tribunal is that:

    e. The ordinary unfair dismissal claim succeeds. The compensatory award is reduced by 75% in respect of Polkey, and the basic award by 60% for contributory fault

    f. The automatic unfair dismissal claim pursuant to section 103A Employment Rights Act 996 is dismissed.

    g. The detriment claim pursuant to section 47B Employment Rights Act 1996 is dismissed.

    h. The respondent failed to provide the claimant with a statement of employment particulars. The claimant is awarded 4 weeks' pay pursuant to section 38 Employment Act 2002.

    i. The matter will be set down for a 1 day remedy hearing on a date to be advised.

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Employment Judge Balogun
Date: 28 July 2021