Case No: 2409046/2020

EMPLOYMENT TRIBUNALS

Claimant: David Ravenscroft

Respondent: People Dynamix Ltd

Heard at: Manchester via CVP On: 2 and 3 August 2021

Before: Employment Judge Serr

Representation
Claimant: Mrs K Skeaping (Solicitor)
Respondent: Mr A Williams (Solicitor)

JUDGMENT having been sent to the parties on 9 August 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

The Issues

1. The Claimant was employed with the Respondent from 2016 until his eventual dismissal in June 2020. He brings claims for unfair dismissal and wrongful dismissal. The Tribunal was at the outset of the hearing presented with a very substantial bundle of documents running to almost 500 pages and lengthy witness statement from the Claimant as well as witness statements from Mr. Williams the owner of the business and Glen Bourne.

2. As will be seen, the Respondent utilised the services of a professional HR consultant to conduct its investigations into what was said to be misconduct on the part of the Claimant. A number of reports were produced including those of Mr McCabe on 1st of April 2020 a disciplinary report on May 15th 2020 authored by a Mr Gill and an appeal report of a Mr Hall on June 18th 2020. These reports formed the basis of the decision making. The disciplinary report leading to the Claimant's dismissal contained multiple allegations of what was said to be misconduct upheld by Mr Gil. Likewise the appeal report of Mr Hall, while finding some grounds of appeal and some

of the allegations not proven, still upheld a significant number of allegations said to constitute misconduct leading to the claimants dismissal by Mr Williams adopting the reports.

3. Before the Tribunal Mr. Williams the representative for the Respondent (no relation to the owner Mr Gareth Williams) indicated that the Respondent now only relied on a single allegation for the basis for the dismissal. This was said to be the allegation in respect of breaches in agency worker regulations compliance in respect of one of the Respondent's clients- Fowler Welch ("the Fowler Welch issue"). This was quickly extended to include two other allegations, that of a failure to complete and include service level agreements for various clients ("the SLA issue") and further the sending out the wrong terms and conditions of business 2 a client ("the T&C's issue"). Thus, significantly narrowed down, the parties focussed their cross examination and submissions on these three allegations and likewise the Tribunal focusses its deliberations on these three areas.

4. Accordingly, the issues for the Tribunal are as follows:

   (i) In respect to the unfair dismissal firstly was a fair reason for dismissal established by the Respondent under s.98 (2) ERA. The Respondent says that the three issues identified above SLA's T&C's and the Fowler Welch issue constituted misconduct. The Claimant disputes this saying that no fair reason has been established the issues raised are at best minor performance issues.
   (ii) Secondly has the Respondent acted reasonably in treating the three matters indicated as a reason for the Claimant's dismissal. The Claimant states that he has been unfairly dismissed for a number of reasons. The process was not impartial, the suspension was not justified, the investigation was inadequate and prejudged, he is not guilty of misconduct but at worst minor performance issues that could have been dealt with by training and guidance.
   (iii) Thirdly if the Claimant was unfairly dismissed, has he contributed to his own dismissal/and or would he have been dismissed fairly in any event had a fair procedure been used.
   (iv) Fourthly was the Claimant in fundamental breach of contract such that the Respondent was entitled to dismiss summarily without notice.

5. The Tribunal indicated that all other remedy issues would be considered at a further hearing if necessary.

The Facts

6. The Tribunal had before it a 479 page agreed bundle of documents. It heard from 3 witnesses and read their witness statements. Mr Gareth Williams the chief executive officer of people dynamics and shareholder. Glen Bourne head of technology and client delivery although at the material time a self-employed contractor consultant to the Respondent and the Claimant himself.

7. The Respondent is a recruitment and workforce management technology partner to a number of companies. So far as the Tribunal understood a key part of the Respondent's business is to provide consultancy services to employers who engage agency workers. It originally worked solely as a middleman an arrangement termed 'neutral vendor' between the agency worker suppliers and end users. Its role included ensuring agency staff compliance with various legal and regulatory requirements arising from the Agency Worker Regulations and other sources of regulation. From 2019 and the recruitment of another member of staff – Becky Grey it actually began to supply the agency workers itself to the end user clients. This aspect of the business was undertaken largely by Ms Grey herself.

8. While growing, the Respondent is a new business only beginning in 2016 and very small in terms of staffing, only employing some six staff in total at the material time. The Claimant was employed from the outset of the business on 1st November 2016 as an operations manager. The Claimant has a significant amount of experience in the industry. He was previously employed in the largest business in the sector De Poel, as an operations executive managing the account of Sainsbury's. As a very large employer the Claimant's role at De Poel was different to the one he undertook with the Respondent. His role was essentially client contact. He spent a lot of time travelling to see clients. He would not get involved in contracts for which De Poel had its own in-house legal function. The nature of the Respondent meant inevitably the Claimant would have a wider ranging role with more areas of responsibility.

9. The business began to grow and further staff were taken on. What was a relatively informal management arrangement of the Claimant by Mr. Williams took on some greater formality.

10. In November 2019 there was an appraisal with the Claimant and Mr. Williams, the first one that he had had. Personal development objectives for 2020 were set. One of the personal objectives was that all SLA's would be in place across all contracts and supply chain partners. These service level agreements are essentially tripartite agreements between the Respondent the end user and the agency supplying the labour. Ensuring the SLA's were in place was indicated as an objective in 2019 for the Claimant. However, it seems likely given the size of the Respondent's business and the Claimant's role that some responsibility for ensuring SLA's were in place lay

with the Claimant throughout his employment before being formalised in the plan.

11. The Claimant had an excellent work record was a valued member of staff and had had no previous disciplinary or capability matters raised with him prior to 2020. On 6th January 2020 Mr. Williams sent an email to the rest of the staff confirming that the Claimant had been promoted to operations director in recognition for his support and commitment during the past 3 ½ years and had been an integral part of the success story so far. The promotion resulted in a salary increase and the introduction of a bonus and commission scheme.

12. On 17th January 2020 the Claimant provided the Respondent with an email outlining a breakdown of the first few weeks actual trading results. These figures were a deficit to the agreed January budget. The Tribunal finds that Mr. Williams blamed the Claimant for the fact that the business was under target. Indeed, this later formed an original reason for the dismissal although is no longer being relied on by the Respondent. It seems that as a result of the sales figures the shareholders were asked to put in more working capital into the business as evidenced in a meeting on 14th February 2020.

13. On 9th March 2020 the Claimant met Mr. Williams to go through the objectives that had been set in 2019 and budget figures. A number of new additional personal objectives were set which surprised the Claimant.

14. On 10th March 2020 at 1:11 Mr. Williams wrote to the Claimant with an email headed DR performance review actions. The email appears at pp38C-38e of the bundle. Within that email there were a number of matters raised said to constitute inadequate performance on the part of the Claimant. These included failure to effectively manage staff, failure to achieve the 2020 budget and a failure to provide testimonials and case studies. The issue of the SLA's was raised. The email stated inter alia

    Having done some investigation it is clear that our critical supply chain partners have not been audited in line with expected requirements. I am currently looking into this as well as to investigate how many SLA's are missing and not signed by our current trading supply chain and an update status of which agencies have been audited in out of responsibility through our NV contracts with GR & FW together with any other contractual client obligations. I had to speak to you in January on this serious matter and reiterate the importance of ensuring we deliver on our contractual obligations. It was reiterated at that point that this is your responsibility to ensure all client and supply chain contractual SLA's are kept up to date and adhered to at all times. Failure to comply with this request will be considered gross misconduct.

    The email concluded

In summary, the company is extremely disappointed with your performance and it is clear you have failed to achieve any of your agreed targets set back last year. Staff are feeling unsupported and demotivated and the business under your control is way behind budgeted expectations. As a small business we cannot continue you to operate in this role unless a significant improvement is made within the next 4 weeks. Failure to improve in line with expectations will result in disciplinary action to be taken.

15. Mr. Williams had at 12:24 on the same day received some terms and conditions signed from one of its clients, Denholm UK Logistics, from Becky Gray. The email found at page 91 and the T&C's attached at pp92-95 of the bundle is significant in that it is the sole piece of evidence supporting what would become the T&C's allegation. Mr Williams forwarded the email to Glenn born at 2:38. Within that forwarded email he said "*Glenn this is not our client terms that I have approved although it's not becky's fault Dave has allowed this to happen others to follow you may want to review gaps missing and prepare an addendum*". Contrary to the email no further examples ever did follow.

16. The fact that the highly critical email of 10th March came so soon after the Claimant was promoted is extremely surprising and can only be explained by the fact that the Claimant was being blamed for the disappointing trading results at that stage.

17. On 11th March 2020 the Claimant was verbally suspended by Mr. Williams and on 12th March 2020 a follow up letter confirming that suspension was sent to him. The follow up letter of 12th March states that the reason for suspension was "as you were informed during the meeting the company have grave concerns regarding your ongoing and current performance and wish to investigate claims of serious neglect of duty exposing the company to serious risk". The Tribunal finds that there was no need to suspend the Claimant at this point. So far as there were any capability issues, they had already been raised in the letter of 10th March with the Claimant being afforded supposedly an opportunity to improve in the next 4 weeks. The suspension did not accord with the guidance in the Respondent's handbook. No counselling was considered although that was an option within the staff handbook and the letter of 11th March did not indicate in terms why the Claimant was being suspended. In cross examination Mr. Williams could not give any further details to the Tribunal as to why the decision was taken to suspend when it was or why it was necessary to remove the Claimant from the workplace.

18. On 11th March Mr Williams instructed Mr Bourne to begin an investigation into alleged failings by the Claimant. There is little documentary evidence as to the actual investigation conducted by Mr Bourne albeit there are some emails passing between him and some other members of staff touching on what would be come disciplinary issues shortly after. One email that is of relevance is at p.90 from Lyndsey McGurk dated 11th March giving a list of

6 SLA's that were missing in January that she was asked to help obtain. It seems from his evidence that his role was essentially as a go between with the Respondent and the professional HR advisor it employed to undertake the investigation.

19. On 13th March a client meeting occurred with Fowler Welch over MS teams. The Claimant was of course not present at this meeting because by now he had been suspended. The Respondent, through Mr Bourne, asserts that Scott Maddock of Fowler Welch had raised an issue about agency worker regulations concerns. It was said that a number of workers had worked in excess of 12 weeks without being put onto parity of terms with the full time workers as required by the agency worker regulations. It was said that the Claimant was at fault for this as he had failed to identify that they were passing through the 12 week period and taking appropriate action by advising Fowler Welch. The Tribunal had no sight of any minutes of this meeting or any documentation from Fowler Welch confirming their view that there was a breach of the agency regulations for which the Claimant was responsible. It is clear to the Tribunal that this specific issue i.e. that there was a breach of the agency worker regulations for which the Claimant was responsible and had failed to identify it with the end user client was never put to the Claimant at any point during the subsequent disciplinary investigation.

20. The Respondent decided to use a professional HR company 'face to face' in order to continue to conduct the disciplinary investigation. The Tribunal makes no criticism of the use of face to face which was reasonable given the very small size of the Respondent's business. Nor in fact does the Tribunal criticise the role of Mr. Williams in corresponding with face to face during the disciplinary process. It is unrealistic given the size of the Respondent's undertaking that face to face could act wholly independently without having some input and assistance from the chief executive officer.

21. On 17th March 2020 a further letter was sent to the Claimant inviting him to an investigation meeting. The letter simply stated that the meeting was to discuss some concerns about the Claimant's conduct. The meeting was to take place the following day on 18th of March at a neutral venue in Liverpool. The meeting was subsequently rearranged. A letter was sent on 19th March 2020 to the Claimant inviting him to attend a meeting on 25th March. That letter gave more particulars of the concerns which included an "alleged failure to provide the correct standard terms of business to clients" which was the T&C issue. The meeting was held on 25th of March 2020 by Andrew McCabe of face to face consultants with the Claimant.

22. In his answers to Mr McCabe on the SLA issue he stated that as far as he was aware all SLA's were up to date. The Claimant also stated that the situation was fluid in that end users frequently moved providers requiring new SLA's, that SLA's were routinely generated and checked and that he had encouraged staff as he had been told to be responsible for generating SLA's themselves for their jobs. In his answers to Mr McCabe in respect of

the T&C's issue he stated that the Respondent provide a lot of logistics clients as a recruitment business (rather than a neutral vendor). The Claimant had had a conversation with Mr. Williams because he had concerns over the terms of business not being the correct terms of business when the Respondent was acting in this capacity. He was told that the existing terms used for other clients when the Respondent acted as neutral vendor would be sufficient. These clients all belonged to another member of staff (Becky Grey) and that member of staff confirmed to him that she had terms of business which had been issued.

23. Mr McCabe subsequently produced an investigation report dated 1st April. No other person was interviewed other than the Claimant. There was no further investigation into the specific matters raised by the Claimant such as the fact that he had discussed the terms of business issue with Mr Williams and the fact that Denholme was Becky Grey's client and she had been responsible for sending out the T&C's. Much of the report refers to matters which the Respondent no longer relies upon as forming a reason for the Claimant's ultimate dismissal.

24. The alleged breach of the agency worker regulations in respect of Fowler Welch is not referred to at all in the report. The report does refer to the fact that Ashley Smith, one of the Respondent's employees, put in an email to Mr Williams on 2nd March that "Scott was still awaiting for information around Swedish Derogation" from the Claimant but this was not the same issue. The SLA issue is referred to at paragraphs 9-16. 6 SLA's were missing in January. 5 were missing in February but of these only 1 ACS construction appeared in the January list. The T&C's issue is referred to at paragraphs 19-21. The report found that the terms provided to Denholme were incorrect and that the Claimant instructed Becky Grey to provide those particulars to Denholme.

25. The report of Mr McCabe recommended that in the light of the findings that the Claimant was to attend a disciplinary hearing. There were multiple allegations. The only relevant issues now relied upon by the Respondent are under paragraph 36. 1 (a) failed to ensure the correct terms of business are provided to clients and (b) failed to ensure SLA's are provided to clients.

26. On 7th April 2020 the Claimant was invited to attend a formal disciplinary hearing to take place on 15th of April 2020. The letter was written by Mr Bourne but it was confirmed that it would be held by a person from face 2 face. The allegations to be dealt with were taken from the recommendations of the McCabe report. Only the following remain relevant to consider: 1. it is alleged you have failed to ensure the business remains compliant in respect to its procedures namely (a) you have failed to ensure the correct terms of business are provided to clients (b) failed to ensure SLA's are provided to clients.

27. The disciplinary interview took place with a Mr Gill. The subsequent report following on from that interview is dated 15th May 2020. No other person other than the Claimant was interviewed. The findings in respect of the two relevant allegations that is the T&C's and the SLA's are contained at page 199 and 200 of the bundle paragraphs 18 through to para 26 of the report. The T&C's allegation was found proven on the basis of 10th March email from Gareth Williams to Glenn Bourne. The SLA's allegation was found proven on the basis that Lyndsey McGurk, Office Manager, emailed the Claimant on 31st January 2020, highlighting that 9 clients were missing SLA's. These gaps had not been fully addressed as of 19th February 2020 and that this was the ultimate responsibility of the Claimant. The Tribunal has already indicated that there was only 1 SLA still missing in February from January.

28. The Gill report recommended that the Claimant acted or failed to act in such a way as to cause a fundamental breach of the implied contractual term of mutual trust and confidence. The report recommended that the Claimant be dismissed with immediate effect without notice or payment in lieu.

29. On 18th May 2020 the Claimant was written to by Mr Gareth Williams. The letter indicated that the Claimant was to be dismissed with immediate effect following the report of Mr Gill.

30. On 21st and 25th May 2020 the Claimant appealed his dismissal. The dismissal grounds were drafted by Mrs Skeeping. The appeal grounds were wide ranging but included allegations about an unfair process and impartial investigation; a decision being taken by the CEO; evidence relied on to reach findings being woeful and unfair targets said to be based only on 1 quarterly performance; the dismissal being outside the bounds of all range of reasonable responses and the process being a witch hunt.

31. An appeal hearing was conducted on 1st June 2020 by a Graham Hall also of face to face. A report was produced on 18th June. Within that report the Fowler Welch issue, having not been addressed with the Claimant at any stage is actually referred to at paragraph 50 indicating that the Claimant was responsible for a failure to identify with Fowler Welch an AWR breach.

32. So far as the SLA and T&C's issue was concerned the report stated at para 80

    A further serious matter or concern that was proven at disciplinary stage is that the wrong terms of business were provided, and SLA's were not provided to some clients. This was proven and taking into consideration DR's evidence and his view that he is not a legal contracts expert, GH finds that DR would have the correct level of experience within his industry to identify the correct contract and ensure that the Terms and Conditions of business are correct and signed. SLA's also should have been provided and it is GH's view that as Operations Director and also as Head of Operations,

it would be DR's responsibility to ensure that this was done. GH does not accept that the terms of business was a matter for GW alone to deal with and that DR was not responsible for ensuring that the contracts were correct. Templates had been professionally drawn up and had been provided for use. This is a serious matter of concern in GH's view and is within the range of reasonable responses, meets the test of the Burchell case and could lead to a finding of gross misconduct. GH also upholds this finding based on the available evidence and considers the matter to be a gross misconduct.

33. While some points were overturned on appeal the majority were upheld as well as the decision to dismiss. Accordingly on 23rd June 2020 Mr Williams wrote to the Claimant maintaining the decision to summarily dismiss.

The Law

34. The Claimant's unfair dismissal claim was brought under Part X of the Employment Rights Act 1996. Section 98(1) places the burden on the employer to show the reason or principal reason for the dismissal and that it is one of the potentially fair reasons identified within Section 98(2), or failing that some other substantial reason.

35. It for the Tribunal to determine under which, if any, of the acceptable reasons the employer's factual reason for dismissal falls. This was emphasised by the EAT in *UPS Ltd v Harrison* (UKEAT/0038/11/RN) (16 January 2012, unreported). The Tribunal should first make findings as to the employer's own reasons for dismissal. It should then ask itself how those reasons are best characterised in terms of ERA 1996, s 98. Whilst the Tribunal is not bound by the employer's label, it must seek to characterise the employer's own reasons (i.e. the reasons which the Tribunal finds, as a matter of fact, led the employer to dismiss), rather than substitute its own view as to the reason for the dismissal.

36. The potentially fair reasons in Section 98(2) include a reason which:- "relates to the capability or qualifications of the employee for performing work of a kind which he was employed by the employer to do".

37. Section 98(3) goes on to provide that "capability" means capability assessed by reference to skill, aptitude, health or any other physical or mental quality.

38. Where the Respondent shows that dismissal was for a potentially fair reason, the general test of fairness appears in section 98(4): "…the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer) – (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall

be determined in accordance with equity and the substantial merits of the case". The starting points should be always the wording of section 98(4) and that in judging the reasonableness of the employer's conduct a Tribunal must not substitute its decision as to what was the right course to adopt for that of the employer. In most cases there is a band of reasonable responses to the situation and a Tribunal must ask itself whether the employer's decision falls within or outwith that band.

39. In cases of lack of capability fairness usually demands that before dismissal an employer should inform the employee what is required, inform the employee of the ways in which he is failing to perform his job adequately, warn him of the possibility that he may be dismissed because of this and provide him with an opportunity to improve.

40. An action for wrongful dismissal is a common law action based on breach of contract. It is very different from a complaint of unfair dismissal. The reasonableness or otherwise of an employer's actions is irrelevant: all the Tribunal has to consider is whether the employment contract has been breached. If it has, and dismissal is the result, then it is wrongful *Enable Care and Home Support Ltd v Pearson* EAT 0366/09.

<u>Conclusions</u>

<u>Unfair Dismissal</u>

41. Logically the first question for the Tribunal is what is the reason for the dismissal and whether the reason as identified can properly be best characterised under one of the reasons given in section 98.

42. A reason for dismissal is the set of facts known to the employer or, it may be, of beliefs held by them, which cause them to dismiss the employee. The Tribunal is prepared to accept that the reason in this case was (i) the SLA issue (ii) the T&C's issue (iii) the Fowler Welch Issue.

43. Even allowing for the fact that conduct does not need to amount to gross misconduct, nor does it need to be wilful or deliberate conduct the Tribunal concludes that the reason as found cannot possibly be characterised as conduct. These issues clearly fall within capability under s.98. Even the Respondent itself originally characterised them as such in its email of 10th March 2020 where it referred to problems of performance and the need to improve. Accordingly, the Respondent has established a potentially fair reason under s.98 being capability.

44. The Tribunal must however then go on to consider whether the dismissal was fair in all the circumstances applying s.98 (4). The Tribunal has already indicated that given the size and administrative resources of the Respondent it does not criticise the decision per se to rely on face to face to conduct the investigation and to adopt its conclusions- see *GM Packaging v Haslam* UKEAT/0259/13. That said, by adopting such a

methodology the Respondent clearly remains liable for any failings in that investigation and the fairness of the decision to dismiss.

45. The Tribunal has little hesitation in concluding that in all the circumstances the Claimant's dismissal was unfair for the following reasons:

(i) So far as the SLA issue was concerned this was raised in an email of 10th March. The Claimant was seemingly provided with 4 weeks to rectify any deficiencies in SLA completion but was then inexplicably suspended the next day with the promised opportunity to improve taken away. In addition, the Respondent failed to consider the fact that of the January SLA's that were missing only one was still missing in February evidencing that SLA's were being monitored and completed. A reasonable employer would have taken this into consideration when considering the extent of any failure as well as to what extent other members of staff were responsible for non-completion of the SLA's. No other staff were interviewed other than the Claimant and this was never a matter given any consideration.

(ii) So far as the T&C's issue was concerned the Claimant provided a complete explanation to the investigation which was never given adequate consideration. The explanation was that the terms and conditions attached to the email of 10th March were the ones used when the Respondent acted as a neutral vendor i.e. a middleman between the agencies supplying the workers and the end users. No further terms and conditions were provided by Mr Williams to the Claimant following the introduction of the direct provision of agency staff by the Respondent despite the Claimant raising this as an issue with Mr Williams. The agency work that was subsequently adopted by the Respondent was undertaken by Becky Grey. It was Becky Grey that sent out those terms and conditions and the Claimant was not involved. The Claimant in fact did not send contracts out to clients and this was something that Mr. Williams did. There was no adequate investigation into any of the matters raised by the Claimant. Any reasonable employer would have interviewed Mr Williams and Becky Grey to assess the validity of the Claimant's explanation. No other T&C's were ever adduced by the Respondent during the course of the disciplinary investigation or indeed to the Tribunal. A reasonable employer would have looked to see if any other T&C were in existence. Despite Mr Williams indicating other examples of wrong T&C's being used in his email no other examples were ever subsequently provided.

(iii) The Fowler Welch issue was at no time raised with the Claimant during the disciplinary hearing and is only expressly mentioned for the first time in the appeal report. The Claimant was accordingly provided with no opportunity to address this issue.

(iv) The Respondent did not have due and proper cause for suspending the Claimant. As has been indicated in the findings of fact the Claimant was not provided with the reasons for suspension, it was not necessary to remove him from the workplace and no reasonable employer could have concluded it was at this stage.

(v) No reasonable employer could have summarily dismissed the Claimant in respect of the above issues and dismissal fell outside a band of reasonable responses. The Gill report on which the Claimant's dismissal was based found 15 allegations proven in part or in whole (which did not include the Fowler Welch issue). On appeal a small number of allegations were additionally found not proven but the majority remained (including at this stage Fowler Welch). Before the Tribunal only 3 allegations were relied on. The Claimant had an exemplary record and had just been promoted and was described as integral to the success of the business. Any reasonable employer would have provided the Claimant with an opportunity to address the SLA issue by demonstrating compliance which could be monitored and verified (as indeed the Respondent promised to do). If the Respondent wished the Claimant to use a separate set of T&C it was incumbent on it to provide such a document with clear instructions to him and the rest of the team as to their use. The Respondent's own disciplinary and grievance procedure provides for warnings or counselling as an alternative to dismissal, none of which was even considered by the Respondent. No reasonable employer could have concluded that the Claimant was guilty of gross misconduct. Accordingly, the Tribunal finds the dismissal unfair.

46. Turning then to the issue of Contributory Fault. The Tribunal accepts that a finding of contributory fault in a capability dismissal is the exception see *Slaughter v Brewer and Sons* (1990) IRLR 426. As the principal reason is one of capability a deduction for contributory fault would not normally be appropriate in the present case. That said the Claimant was tasked with SLA completion in 2019, there is evidence that he was spoken to in January 2020 in respect of non-completion of SLA's and that there continued to be gaps in the SLA completion in February 2020 prior to his suspension. This must be balanced against the fact that he was not solely responsible for SLA completion and there is evidence that it was being monitored as is clear from the different list in January and February. This is blameworthy and culpable conduct justifying a reduction in both the basic and compensatory awards albeit the Tribunal recognises the different statutory tests set out in s122 and 123 Employment Rights Act 1996. The conduct is at the very lowest end of blameworthy and its contribution to the overall dismissal to be characterised as very modest. The appropriate reduction is 10%.

47. The Tribunal declines to make any deduction under the principle in Polkey on the basis that it is not satisfied that had a fair procedure been adopted there is any chance the Claimant would have been fairly dismissed. The

Tribunal has almost no evidence of the Fowler Welch allegation in respect of what was said to be agency worker breaches. There is no evidence from Fowler Welch itself and there are no documents in respect of 13th March meeting. In any event no reasonable employer would have dismissed the Claimant based on this allegation without first providing an opportunity to address the issues including any breach of agency worker regulations which the Tribunal finds the Claimant would have taken. Likewise, the Tribunal has no evidence that supports the assertion that the Claimant may have been fairly dismissed had a full investigation into the T&C's issue taken place. The Tribunal has had sight of no other T&C other than that attached to Mr Williams email.

Wrongful Dismissal

48. The Tribunal accepts the Claimant was responsible for a single capability issue being the timely completion of certain SLA's which the Respondent had already agreed to deal with by way of warning and monitoring in the 10th March email.

49. So far as the T&C issue is concerned the Tribunal accepts the Claimant's explanation to the Respondent in its entirety. It has seen no evidence to suggest that there were other T&C's or that Mr Williams told the Claimant to use a different set of T&C's to those used.

50. The Tribunal has seen no cogent evidence that supports the assertion that the Claimant was responsible for allowing Fowler Welch to breach the Agency Worker Regulations and the Tribunal does not accept that he did.

51. The SLA's was a single isolated capability issue and fell far short of constituting a repudiatory breach of contract.

52. Even if the Claimant was responsible for the SLA's and the other issues as well this would still not constitute gross misconduct.

53. Accordingly, the Claim for wrongful dismissal succeeds. The Claimant was not guilty of a repudiatory breach of contract and was entitled to be dismissed with notice.

Employment Judge Serr

Date: 17 August 2021

REASONS SENT TO THE PARTIES ON

14 September 2021

FOR THE TRIBUNAL OFFICE