# EMPLOYMENT TRIBUNALS

| **Claimant** | | **Respondent** |
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| **MR J GLANVILLE** | **V** | **SUNRISE UK OPERATIONS LIMITED** |

**Heard at**: Watford (by CVP) **On**: 15, 16, 17, 18 November 2021 and 25 November 2021 (in chambers)

**Before:** Employment Judge Skehan
Ms Hancock and
Mr Hoey

**Appearances**
**For the Claimant:** Mr Crammond, counsel
**For the Respondent:** Mr Chadwick, solicitor

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## RESERVED JUDGMENT ON LIABILITY.

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1. The claimant was unfairly dismissed contrary to S.94 of the Employment Rights Act 1996 and his claim for unfair dismissal is well-founded.
2. The claimant was wrongfully dismissed and his claim for breach of contract is successful.
3. The principal reason for the claimant's dismissal was not that the claimant had made a protected disclosure and his claim for automatically unfair dismissal contrary to S103A of the Employment Rights Act is not well-founded and is dismissed.
4. This matter will be listed for a remedy hearing and a case management order will be sent to the parties separately.

## REASONS

5. We heard evidence from Ms Dean, Mr Prantl and Mr McCoy on behalf of the respondent. We heard evidence from the claimant on his own behalf and also from Ms Felton and Ms Maine. We were provided with a main bundle of documentation that stretched to 721 pages, together with a supplemental bundle of 10 pages. Any page numbers within this judgement refers to the main bundle unless stated otherwise.

6. All witnesses gave evidence under affirmation or oath and their witness statements were adopted and accepted as evidence-in-chief. All witnesses were cross-examined. As is not unusual in these cases the parties have referred in evidence to a wider range of issues than we deal with in our findings. Where we fail to deal with any issue raised by a party, or deal with it in the detail in which we heard, it is not an oversight or an omission but reflects the extent to which that point was of assistance. We only set out our principal findings of fact. We make findings on the balance of probability, taking into account all witness evidence and considering its consistency or otherwise considered alongside the contemporaneous documents.

7. The respondent is a large employer operating care homes in the UK. It has substantial administrative resources. It has an internal human resources department, six Operation Directors (ODs) in addition to a 'Senior Leadership Team'.

8. The claimant was at all relevant times employed as the 'general manager' of the respondent's 'Westbourne' care home. The care home industry is highly regulated by the Care Quality Commission ('CQC). The claimant reported into an OD'. In 2018 Ms Sam King was the claimant's OD. This role was taken over by Ms Dean in August 2018. The respondent operated a policy whereby the claimant was afforded regular documented 'supervisions', similar to appraisals, carried out by his line manager. In turn, the claimant was line manager for 11 Heads of Department (Hods) within the Westbourne care home.

9. The Westbourne care home was a large property, it caters for approximately 114 residents and can take up to an hour to tour. It has a workforce of approximately 150 people. The care home is referred to as 'the community'. In the year leading up to the claimant's suspension the community was undergoing a multi-million pound renovation. Ms Dean comments in the claimant supervision of 21 September 2018, '[the claimant] continues to manage the refurbishment with a very calm approach although I respect the disruption it causes.' And on 7 June 2019 Ms Dean comments, 'the refurbishment is progressing well in the community with James providing oversight to this'. The claimant said that due to the size and layout of the community he did not see all of his colleagues every day. That would not have been possible unless he did a tour of the whole building every day and the claimant did not do that.

10. The relevant parts of the claimant's written contract are set out within the 'offer letter' dated. These are recorded as:
    a. ……your normal place of work will be Sunrise operations of Westbourne Ltd, 16 to 18 Poole Road, Westbourne, Bournemouth, Dorset. BH4 9DR.
    b. Contracted hours of work: 40 hours per week.
    c. Notice: four months written notice on either side.

11. The respondent had a disciplinary procedure that provide examples of gross misconduct including, 'persistent unauthorised absence from work (including training)'.

12. It is common ground between the parties that on or around April 2018 the claimant made a protected disclosure to his regional head of care nursing, Jenny Davies. He told her that his direct line manager, Ms Sam King, had conducted audits without visiting the sites in contravention of CQC requirements. The respondent accepts that this disclosure was made and that it constitutes a protected disclosure within the meaning of section 43B ERA. We find on the balance of probability that the claimant had made a similar disclosure to Mr Michael Burke, senior operations director in 2018 by a telephone and also to Ms Jo Balmer the director of care Sunrise UK in late April 2018. We make this finding is based on the evidence of the claimant and a lack of any evidence produced by the respondent from either Mr Burke or Ms Balmer suggesting otherwise.

13. The claimant said that he told Ms Dean of his allegations relating to Ms King during a supervision on 5 November 2018. This is not said to be a separate protected disclosure by the claimant. The claimant refers to the supervision document at page 171, where a note is made that the claimant has only received one supervision year to date. The claimant explained, that the respondent's normal practice was to provide at least three supervisions per year but these had not been completed by Ms King. This particular note within Ms Dean's supervision was made following a discussion between the claimant and Ms Dean relating to Ms King the claimant's previous complaints. Ms Dean told the tribunal that she had no recollection of this discussion and was not aware of the claimant's previous whistleblowing. We find on the balance of probability that the claimant did tell a Ms Dean of the issues that he had experienced as he had reported to the respondent previously.

14. There is a considerable volume of documentation within the bundle indicating that up to June 2019, the claimant was considered an exemplary general manager by the respondent. The tribunal was referred to appraisal/supervision documents from 2016 onwards that recorded the claimant's exemplary performance. The later supervision records were completed by Ms Dean who agreed that the claimant was considered an exemplary employee who went 'above and beyond' requirements of his role. The documents are filled with praise for the claimant and his strong leadership skills and good relationships with the heads of departments reporting to him. The tribunal was referred to a document dated 21 December, where the claimant was given credit for the respondent's CQC rating moving from 'good' to 'outstanding'. This was a significant achievement for both the claimant and respondent. The claimant was awarded various pay rises and annual bonuses. In January 2019, the claimant was awarded a 'retention bonus' of £15,000 January 2019.

15. All of the documentation prior to June 2019 points to a good and positive relationship existing between the claimant and the respondent. At this time, Ms Dean did not consider that the claimant had any issue with timekeeping. On 5 November 2018, Ms Dean records within her supervision document under the heading 'sickness, absence, timekeeping, personal holiday management': 'there are no concerns in this area'. All of the other supervisions made available to the tribunal contain a similar comment. The November 2018 supervision as completed by Ms Dean finishes with the comment, 'you run a beautiful community, and knowledgeable about your business and have a sound understanding of the needs of your team and residents'.

16. The claimant had a system called 'Kronos' that allowed staff to check-in and checkout of their buildings, recording their arrival and departure times. Unlike many of his colleagues, the claimant's pay did not depend upon his hours worked. While the claimant would sign off his HoD's Kronos records, he did not know what the relevance of the Kronos records were for him personally. The claimant says that his use of Kronos changed in 2018. The claimant refers to discussions with Mr Burke and Ms King in mid-2018. He says that all general managers were to view the communities as their 'own' businesses. General managers were told that the emphasis was on their performance, and they were required to be delivering for the business overall. Kronos was not considered relevant the general managers anymore. During the subsequent disciplinary hearing the claimant was accompanied by general manager Ms Britton, who also told Mr Prantl of a lack of emphasis placed by the respondent on Kronos for general managers. By the appeal stage of the disciplinary hearing the respondent's position was that 'not all general managers are using the time and attendance system to regularly clock in and clock out of the community/home'.

17. The claimant's evidence in relation to his normal hours of work was:
    a. as a general manager he was in charge of his own hours.
    b. The contract provided for 40 hours a week.
    c. Set hours were never stipulated - the nature of the role would make virtually impossible.
    d. There were no set expected hours in the community. How he made up his 40 hours was up to himself.
    e. He could do 36 hours one week and 50 hours the next.
    f. He did not require authorisation to be out of the community. He did not need to tell anyone when he left the community
    g. It is a pressured job as the general manager is responsible for residents lives and well-being. To all intents and purposes general managers are permanently on-call and always at the end of the company mobile phone on a 24/7 basis.
    h. The claimant says that he left work usually mid to late afternoon. He described a routine where his daughters finish school at 4pm and he would be picked up by his wife after she collected their daughters, often at about 4.20pm or potentially after 5pm if there

was a sports game on. The claimant worked one late shift per week. The late shift was often midday until 8pm, however the claimant would still come into work on those days a complete and 11 hour + day.

i. he was always available on his mobile phone
j. he was not obliged to use Kronos and did so on occasion out of habit
k. when he did login in the morning, the login time may not reflect his arrival time as he may be 'waylaid' for various reasons on his way in.
l. The claimant gave various examples of requirements to work outside the community occasions when he might not be within the community such as when he was asked to assist with other communities, trips to head office, QUO training that consisted of a year-long programme of engagement with consultants, sickness annual leave, company conferences, and matters concerning the supervision of the building works.
m. It was the claimant's position throughout the disciplinary process and that tribunal that, subject to the above, he was expected to provide 40 hours of work 'within the community' and he maintained that he did so.

18. By way of example, there is correspondence in the bundle from September 2018 from Ms Dean to the claimant, requesting the claimant's assistance with support for the Southbourne community over two weeks in October 2018. Ms Dean describes the commitment as a couple of hours visiting that community three times a week.

19. Ms Dean was cross-examined in relation to her understanding, as the claimant's direct line manager, of the claimant's contractual obligations. Ms Dean said she did not revisit the contractual obligations when carrying out her investigations. Ms Dean said that the claimant's normal place of work was his community and:
    a. as a senior manager the claimant was in charge of his working hours and trusted to do those hours;
    b. there was no requirement on the claimant to work fixed hours on any set day;
    c. there was no requirement for the claimant to work on site for 40 hours a week;
    d. the claimant did not require authorisation from a senior manager to leave the community;
    e. even if the claimant was leaving the community at 3pm, this in itself does not show that the claimant was in breach of his contract; and
    f. The claimant appeared to be working as permitted by his previous line manager Ms King, and this went uncorrected by the respondent

20. Mr Prantl, who was tasked with the disciplinary told the tribunal that the claimant's contractual obligation was to work 40 hours 'in the community' and

the claimant required authorisation to leave the community. While he said there was no evidence before him of any requirement on the claimant to work set hours or seek authorisation to leave the community, it was Mr Prantl's understanding based on his four years within the respondent organisation that such obligations existed. Mr Prantl highlighted that the claimant accepted during the course of the disciplinary that he should complete 40 hours within the Westbourne community.

21. Ms Dean says that on 10 July 2019 the lead CQC inspector Catherine Bowles told her that she had received an anonymous whistleblowing allegation on 8 July 2019. Ms Dean said that she was requested to conduct an investigation into the claimant by the CQC and duly carried out an investigation. There was no written note of the allegation made by the CQC Inspector available to the tribunal. Nor was there any written note of a conclusion sent to the CQC by the respondent. During the course of the investigation, it was discovered that the anonymous CQC allegation against the claimant was made by a minibus driver, Mr Bob Grant. This allegation was raised in the context of the claimant raising issues in respect of Mr Grant's part in a resident outing that resulted in injury. The first note of Mr Grant's complaint is recorded in the investigation report. The allegations against the claimant were wide-ranging. The only allegation raised with the claimant as a disciplinary issue related to timekeeping. The only issue raised by Mr Grant relating to timekeeping and was:

    d. [the claimant] is infrequently working in the community and rumour has it that his wife has a care home due to [the claimant's] financial position and that he goes to support her.

22. The other complaints raised by Mr Grant included allegations that the community runs short of staff, the claimant refused to reimburse Mr Grant for safety items, a medication error had been covered up, the standard of food was deteriorating, residents' clothing were being damaged and not replaced. Residents had fallen on an escalator during a trip to John Lewis without the matter being reported to CQC, an incident where a resident had fallen and sustained a cut not been reported to the CQC. None of these matters were subsequently raised with the claimant as disciplinary issues.

23. Ms Dean accepted during cross examination that care homes must be registered with the CQC and she could have checked whether or not the claimant's wife had a care home without asking the claimant's colleagues to comment on rumour and gossip. Ms Dean accepted that the claimant's wife did not run a care home as alleged. It was not suggested that Mr Grant, as a minibus driver would have any direct knowledge in relation to the claimant's timekeeping. In a covert recording taken by the claimant, Mr Grant's initial allegation was described by Mr Felton, the respondent's HR advisor supporting the respondent's process, as 'a set of spurious rambling comments about everything and their dog'. Mr Prantl agreed with this assessment at the disciplinary hearing on 29 August 2019.

24. Ms Dean's investigation report lists the documentation she reviewed as the Kronos time detail (January 2018 to date), the duty manager reports (January 2019 to date) and the CQC notifications folder from 2019. Ms Dean's investigation report says:

> 'All heads of department interviewed unanimously stated that for the past 18 months [the claimant] has significantly not been present in the community. They state he arrives by approximately 9am in the morning, will always be gone by 3pm at the latest however there are several days a week where he will leave at 1pm and. The Heads of Department (apart from DT) state that he does not keep them informed of where he is and there are frequently days when he is not in the community and they do not know where he is. …….
> ……
> ….. From 1 January 2019… [the claimant clocks into Kronos] on average three times a week but has not clocked out once.
>
> When interviewing the heads of departments regarding the claimant's timekeeping it has identified the team significant frustration with the claimant as his lack of presence means there are significant times when the workload is delayed because he is not available to authorise.
> …
>
> The Heads of Department feel much unsupported by the claimant. DT has confirmed she completes the HoDs supervisions, validates Careblox and deals with most of [the claimant's work] which he then copies and pastes to send from his own email address. The team feel let down by the claimant and admit his lack of presence is a 'running joke' amongst them.
> …….
> On interviewing [the claimant] he states his wife does not own another care home and that he does not have any financial difficulties - I cannot find information to the contrary and feel that this is gossip generated from the claimant's lack of presence in the community.
> …

25. Ms Dean sought to minimise her involvement in the disciplinary process following the completion of her investigation report, telling the employment tribunal that once she submitted her report that was the end of her involvement in the process. However, that statement was not correct. Mr Prantl, during the course of cross-examination told the tribunal that Ms Dean had attended the further interviews he completed. These meeting notes record 'none', within the box intended to record 'other's present', suggesting that Ms Dean involvement in that further part of the investigation was hidden. We refer to our findings below in respect of Ms Dean's continued input and influence upon the decision to terminate the claimant's employment.

26. Ms Dean was asked whether she had carried out a disciplinary investigation prior to dealing with the claimant's investigation. She told the tribunal that she could not remember and did not know if she had completed an investigation prior to this matter. We find it likely that Ms Dean would remember if this was the first investigation she had carried out and we conclude that this is an example of Ms Dean choosing not to share information with the tribunal.

27. We note, by way of example, the evidence provided by Ms Doina Tampu-Ababei (Ms Tampu), the claimant's deputy manager who worked closely with the claimant. There is documentary evidence in the bundle demonstrating a very good working relationship between Ms Tampu and the claimant, eg a previous appraisal noted, '[the claimant] made an excellent start and recovered what could have been a difficult situation due to the potential resignation of the deputy manager…..'. Ms Dean did not speak to Ms Tampu and the only evidence obtained from her was from Ms Pattinson, who was the respondent's general manager within the Southbourne community and the claimant's peer. The claimant complained during the disciplinary hearing about the appropriateness of Ms Pattinson's involvement. We note the email from Ms Pattinson to Ms Dean dated 1 August 2019 titled, 'meeting with Doina'. Ms Dean accepted during cross examination that the email from Ms Pattinson was an exaggerated account and this was not challenged by her. Ms Dean says in her witness statement that Ms Tampu 'volunteered information' and said during cross examination that the email from Ms Pattinson arose from a separate and independent complaint raised by Ms Tampu. We consider this explanation to be lacking in credibility.

28. The tribunal highlights the following examples of the mismatch between the investigation report compiled by Ms Dean and the evidence collated during the investigation procedure. This is not intended to be an exhaustive list:
    a. Ms Dean's statement that 'all heads of department interviewed unanimously stated that for the past 18 months the claimant has significantly not been present in the community. They state he arrives by approximately 9am in the morning, will always be gone by 3pm at the latest… is incorrect and not what the HoD's say. For example:
        i) Ms Tampu was asked, 'Over the last year he's been finishing earlier and earlier?' She responded 'he never stays till 5pm' and comments on the claimant's timekeeping 'when he started' but added that he was going in and out of the building.
        ii) Vanessa Jones, head housekeeper, tells Ms Dean that the claimant goes early maybe at about 3:30pm mostly on a Friday however she does not have much contact so she doesn't know really and probably doesn't notice.
        iii) When Morgan Ross is asked about the claimant's timekeeping, he responds, yes he is here of course, some days I don't see him although I don't see HoD's everyday- generally okay. When asked if the claimant

did 40 hours per week, he was 'not sure'. When asked if he had any other concern, he noted that it was worrying that someone had complained to the CQC as the allegation did not sound like something that needed to go to the CQC.

b. Ms Dean has omitted from her investigation report references to positive relationships the claimant had with his team. There is no mention of all of the previous supervisions undertaken by Ms Dean herself and the claimant's previous DO's, or the express references to timekeeping within those supervisions, the positive feedback on the claimant's skills from the CQC or the positive comments given by the HoD's during the investigation, for example, Ms Wendy Blown completed her interview with the comment, 'personally I think [the claimant] is a really good general manager'. Ms Tampu does not express any 'significant frustration' with the claimant's timekeeping and states her understanding that she considered the claimant to be in charge of his own hours commenting, 'I thought that if he was doing long days ……on a conference……these hours were counted in his hours'.

c. Ms Dean repeats the allegation contained with Ms Pattinson's email of 1 August 2019, that Ms Tampu completes the HoDs supervisions. This allegation is not reflected within the notes of the investigation meeting with Ms Tampu carried out on 2 August 2019. Further, Vanessa Jones, head housekeeper, told Ms Dean within her investigation interview that the claimant did her supervisions and she had had one recently where the claimant spoke to her about GDPR. The claimant told Mr Prantl during the course of the disciplinary that he completed supervisions for his HoDs and the allegation to the contrary was incorrect and could be easily checked by reference to the relevant supervision documents. This step was not taken.
d. While Ms Tampu refers to managing and writing up complaints, she does not within her interview say that she deals with most of the claimant's work which he then copies and pastes to send from his own email address. Ms Tampu does not say that she feels let down by the claimant.

29. The respondent's letter of 8 August 2019 sets out the disciplinary allegations. It states 'the purpose of the hearing is to consider the following allegations of gross misconduct that have arisen as a consequence of a whistleblower raising concerns with your CQC Inspector:
    e. That you are not working your contracted hours and are frequently absent without authorisation. Your management team have reported that you are consistently not present in the community for your contracted hours and that you have left the community early on numerous occasions. You failed to follow company procedure in

that you have not recorded your exits times using the time and attendance system and neither have you secured approval from your DO any different arrangements.

f. [not relied upon for dismissal]
g. The conduct in respect of the above had led to a breakdown in the working relationship.

30. The claimant was cross-examined in relation to the Kronos records included within the tribunal bundle and maintained that he completed his 40 hours per week of work. The tribunal was invited to review the Kronos records within the bundle and conclude that the claimant did not complete 40 hours per week. We were referred to page 193 – 204 that appears to be the Kronos records for the claimant between 1 January 2018 31 December 2018, page 225-228 that appeared to be the Kronos records that the claimant between 1 January 2019 and 15 August 2019. It was the respondent's case that these records demonstrated that the claimant often left the community between 3pm and 3.30pm was not performing his contracted 40 hour obligation. The tribunal was provided with no evidence from any respondent witness providing any analysis, said to be undertaken at the time of dismissal or since, in relation to the hours worked by the claimant. The claimant appeared to use the Kronos system in early 2018 but by late 2018, the claimant appeared to be logging in but rarely logging out. The claimant appears to have logged out only once in the whole of 2019 (page 227). The tribunal is unable to identify by reference to the Kronos records or any of the respondent's evidence, any record of the daily or weekly hours worked by the claimant in the community.

31. The respondent also produced rota documents referring to management, working within the community. The documents were confused and that they referred in headings to 2018 whereas the rota dates appeared to be in 2019. The rota documents shows the names of management staff including the claimant with various columns marked 'in', 'off', 'late duty', 'holiday' etc as appropriate. There was no reference within the rota documents to any particular hours. There was no reference to any date on the Rota where the claimant was alleged not to have been present when he should have been or alleged to have left early when he should not have done so. The tribunal was unable to identify any relevant information from the rota documents.

32. The claimant was invited to a disciplinary hearing, the first part of which was held on 29 August 2019. The disciplinary process was handled by Mr Prantl, who had been appointed at short notice the previous day.

33. Ms Felton was in attendance at the meeting on 29 August 2019, as the respondent's HR representative to take notes. Ms Felton is a highly qualified HR professional Ms Felton had not met the claimant prior to the disciplinary hearing. Ms Felton had previous dealings with Ms Dean, and they had clashed over other work scenarios. Following the termination of the claimant's employment Ms Felton's relationship with the respondent deteriorated and broke down completely. Ms Felton said that before the

disciplinary hearing, she had been given the company edict from Gill fitches (a more senior HR employee) that the outcome of the disciplinary hearing must be a dismissal as Ms Dean would not accept anything less. Ms Felton refers to other HR matters dealt with by Ms Dean where other employees have been effectively removed from the business at Ms Dean's instructions and where Ms Felton felt such a decision to be inappropriate. Ms Felton made no link between the claimant's predicament and his previous whistleblowing.

34. Mr Prantl told the tribunal that prior to the disciplinary hearing he had conversations with the respondent HR department including Mr McCoy and 'was fully aware that there was a view that the claimant's actions had led to an irrevocable breakdown in trust and confidence'. Mr Prantl denied that he had been instructed to dismiss the claimant.

35. Mr Prantl conceded that the allegations of misconduct put to the claimant was general in nature and did not relate to any specific identified day or time. While the allegations did not relate to any particular time period, Mr Prantl looked at a two-month time period. Mr Prantl conceded that the claimant would not know the time period referred to within the disciplinary allegations

36. The claimant covertly recorded this disciplinary hearing of 29 August 2019 and the tribunal had the benefit of an agreed transcript. The recording of the disciplinary hearing also records the private discussions between Ms Felton and Mr Prantl. The relevant parts include:

> MF: I actually think this is a stitch up. I can't say that.
> CP: Is there - why are senior management so….. adamant that…
> MF:…… Emma Dean has - for some reason a lot of influence, she seems to wield a lot of influence and I see this as a pattern……
> CP: (inaudible) that is very…
> MF: … She waves her arms in the air and says, 'I don't want this person working for me'……
> CP: Right
> ……..
> MF……. I said [to Gill] 'ultimately it's not my decision, it will be Chris's decision, although the decision's already been made. I said 'Gill, you can pull this to pieces.'
> CP: Yes you can.
> MF: You can take this to an employment tribunal and use it as it as a defensive piece of documentation.
> CP: No, clutching at straws and not getting through, so
> MF: It's crap
> CP: Yes (inaudible) saying (inaudible) find out about these, these bits of information.
> …….
> [Later in the transcript]
> CP: I can't I just can't ……
> MF: The message this sends out to all his colleagues will be absolutely catastrophic

CP: I -yes, I just don't think that….
MF: That there's substance to it at all
CP: There is none whatsoever
MS: There's nothing
CP: No. I'm not sure if you got it but I tried to defend us from a constructive dismissal claim.
MF: Yes
CP ……With my last question because he's basically told us that he doesn't think that he is in an untenable position, he believes he can overcome.
MF: Yes yes
CP: So hopefully that's avoided that. Yes, I don't know what we would be -Why - what we would be dismissing him for.
MF: .. Those investigation interviews, with the exception of Mr Grant, whose interview was just a complete set of spurious…… Rambling comments about….. Everything and their dog, I don't detect any breakdown of any relationship
CP: No
…….
[Later in the transcript]
CP: How do we convince Craig [McCoy] that that's the wrong decision? I mean a decision is a decision isn't it? But I think we should challenge that decision at least.
MF: Well it's like Gill said, because Gill and I and I believe Craig, have also challenged that decision and Craig obviously is now towing the corporate line saying what they want to say……..
……
MF: …. I don't know whether we have the power of influence, whether it's any greater than the influence that's already been yielded… But I – We're losing a good manager, for fucks sake. Why? I've seen it happen before. I saw it in Cardiff……
……
[discussion relating to adjournment of disciplinary hearing]
CP: And I know to ensure we made an impartial decision we also need to have sight of those outstanding bits…

37. Mr Prantl accepted during cross examination that he was aware that should the claimant be dismissed from his position as a general manager of a registered care home as a result of the allegations, he would not be able to obtain alternative work in the care industry and for this reason caution was required.

38. Mr Prantl in his witness statement says, 'one of the matters the claimant did raise was to say that Sam King had told him not to worry about using the Kronos time management system'. Mr Prantl was asked whether he accepted that Sam King told the claimant not to worry about Kronos. Mr Prantl responded that, 'I discounted Kronos'. Later in the cross examination, Mr Prantl was asked whether he accepted the claimant's position relating to his

expected use of Kronos. Mr Prantl responded that he listened and acknowledged this comment, but he had no evidence to prove or disprove it, he was not suggesting that what the claimant said was not correct and repeated that he had no information that would prove or disprove it. Mr Prantl despite being asked several times, refused to say whether or not he accepted that the claimant had been told he was not required to use Kronos. Later during the cross examination, it was put to Mr Prantl that Ms Kings instructions to the claimant, as recorded within the statement provided during the disciplinary process and repeated at paragraph 16 above, would provide a full defence to the disciplinary allegations. Mr Prantl denied this to be the case and responded that [the comments attributed by the claimant to Ms King] was not the way in which Sunrise conducted business, there was no reference to those discussions in other documentation and he 'could not believe that they were factually correct'.

39. During the course of cross-examination Mr Prantl conceded that he did have reservations in relation to the process that had been conducted by the respondent prior to his involvement and agreed 'it's crap'. Mr Prantl denied that as of the time of that hearing he considered the respondent's process so inadequate as to risk giving rise to a constructive dismissal claim on the part of the claimant. He said that his comments related to the claimant's ability to return to work should he not be dismissed,. We find that Mr Prantl's explanation to be lacking in credibility. We conclude that at this stage, Mr Prantle considered the process to be deficient to such an extent that the claimant may have a constructive dismissal claim against the respondent.

40. Mr Prantl said that he did not have sufficient information to make a decision at the initial meeting and therefore decided to conduct some additional investigation. Ms Felton says that Mr Prantl advised Mr McCoy and Ms Dean that he was unable to proceed with a dismissal on the basis of the evidence available. Ms Felton said that Mr Prantl was given instructions to find additional evidence to support the claimant's dismissal as Ms Dean would not accept anything less. Mr Prantl denies this was his instruction.

41. There is mention by the claimant during the disciplinary hearing to his previous whistleblowing relating to Ms King, this arises in the context of the claimant discussing requests by the respondent to work outside of the community. There is no link made by the claimant, Mr Prantl or Ms Felton at that time between the claimant's whistleblowing and the disciplinary proceedings in which he was involved.

42. Following the initial disciplinary hearing on 29 August 2019 Mr Prantl took the following steps :
    a. He interviewed Andrea who was a HoD and part of the concierge team. The claimant says that Andrea worked four days a week from 7am to 2pm. Mr Prantl conceded that her evidence was irrelevant to the allegations as she generally would not be present when it was alleged that the claimant left the community.

b. He interviewed Sheila, who was part of the concierge team. Sheila only worked two six-hour shifts most weeks at the respondent's front desk. The notes of Sheila's meeting record Sheila saying that the claimant was 'often not around'. When pushed as to what she meant by often, she says, 'I used to come in and say 'where is he' once a month on those two days'.
c. He interviewed the renovation site foreman, who said that he met with the claimant once a week for 10 minutes. The claimant had stated during the course of the hearing that 'in the late afternoons I would spend time with the building contractors' and Mr Prantl concluded that this showed the claimant's statement to be untrue. The claimant says that the community was undergoing a multi-million pound refurbishment that required him to spend time with building contractors in the plural, rectifying problems rather than simply the site foreman. The claimant said he spent time in the evening ensuring that the working areas are secure.
d. He obtained the claimant's mobile phone records and examines those records between 3.30 and 6pm for May and June 2019. Mr Prantl said that these records showed that 88% of the email traffic sent by the claimant during these hours were sent from his mobile phone rather than his PC/laptop indicating that the claimant was not present in the community. The tribunal notes records produced by Mr Prantle showing various emails sent by the claimant including, relating to 24 June 2019 from his mobile at 15.56 and from his PC/laptop at 16.05 and from his mobile at 16.23. Similarly, the records from 8 May 2018 show the claimant sending emails from his mobile at 15.42 and 16.08 and an email from his PC/laptop at 17.08, from his mobile at 17.58 and 18.49 and from his PC/laptop at 18.53 and 19.11.

43. Prior to his dismissal the claimant asks Mr Prantl to speak to the remainder of the HoDs. Mr Prantl did not approach the remaining five individuals who acted as HoD reporting to the claimant. Mr Prantl told the tribunal that he did not speak to all HoDs as he did not wish to put the claimant in an impossible position should the claimant return to work.

44. The claimant requested further documentation including supervision notes with his reports that he says are relevant to allegations that his reports were unsupported and audit documentation relevant to his remit as general manager, that were deemed irrelevant by the respondent.

45. Within his witness statement Mr Prantl says that he discussed his findings with Craig McCoy, Nick Crossland, a senior director of operations and Ms Dean as he wanted to be sure that he had not missed anything. Mr Prantl says that the clear consensus was that the evidence showed that the allegation was proven and the claimant had not been completing his required hours of work and was frequently absent from work without authorisation.

46. Mr Prantl said that he considered potential alternative outcomes including the deployment to another site or another role with Mr McCoy Ms Dean and Mr Crossland. There is no note of this discussion. Neither Mr McCoy nor Ms Dean refer to such a topic of discussion within their witness statements. We conclude on the balance of probabilities that while there was considerable discussion between the individuals relating to the claimants dismissal, there was no consideration of any lesser sanction than dismissal.

47. Mr Prantl was supported by Ms Main during the reconvened disciplinary meeting on 4 October 2019. Ms Main was working as a temporary HR business partner within the respondent. We were referred to an email from Mr Prantl to Gill Fitches on 23 September 2019 timed at 11.41 that states, 'Gill, do you want to fill Jo [Main] in on the background here and how consensus was determined?' Mr Prantl was cross-examined in relation to what he meant by this email. He told the tribunal that the consensus referred to within this email related to the decision to dismiss the claimant. The word 'consensus' referred to his decision only. It was put to Mr Prantl that it was simply implausible that a reference to a 'consensus' meant his view and his view alone. Mr Prantl reiterated that it did and the decision to dismiss was his view alone and he had conversations with the others to make sure that everyone was happy with it.

48. Ms Dean says in her statement that she was strongly of the view that the claimant's position was untenable from the evidence that she had seen. She voiced her concerns to Ms Fitches, Mr McCoy and Mr Crossland, the senior operations director. Ms Dean also says that she had discussions with Mr Prantle who was fully aware of her views.

49.. Ms Main's evidence can be summarised as follows:

a. She could not understand how the claimant could have such a glowing review and then on a matter of weeks be suspended and facing gross misconduct dismissal with nothing on the file to indicate that there was ever any issue.
b. By nature of the job general managers did not work to specific timetables they have to be flexible and that she understood they came and went managing their workload and diaries as required by the work.
c. The paperwork demonstrated that the claimant timekeeping was entirely acceptable. There was nothing on the file to have supported the suggestion that the claimant would have known that his timekeeping was a problem
d. She explained to Mr McCoy that she did not understand how they could dismiss somebody when the person did not actually know what they were doing was wrong and that she did not consider there was sufficient information to support a finding of gross misconduct

e. Should they proceed with a gross misconduct dismissal the claimant would find it 'nigh on impossible' to find work in the care sector and would have no option than to go to tribunal
f. She was given instruction by Ms Fitches to remove the claimant from the business by dismissing them as they felt there was a breakdown of trust between the company and the claimant. Ms Main felt may have been based on a personal dislike driven by Ms Dean. She says that there were discussions in relation to whether or not the claimant was 'doing the hours' but there were also general comments along the lines of what Mr Main describes as 'face-fit'.
g. She discussed the instruction to dismiss with Mr Prantl and believed that Mr Prantl was reluctant to dismiss but tried to justify it.
h. Following the reconvened meeting Ms Dean contacted Ms Main and was 'adamant that she wanted the claimant out of the business'.
i. Ms Main believed that the decision was ultimately that of Ms Dean's who was bullish in her approach.
j. Nothing within her evidence suggests a connection between the claimant's dismissal and his previous whistleblowing.

50. We conclude on the balance of probability that Mr Prantl had a vague perception that the claimant was 'not doing the hours' and was either unwilling or unable to make this decision independently. The decision to dismiss the claimant was driven predominantly by Ms Dean who had strong views and remained involved throughout the disciplinary process, with whom the others, who wished to obtain a consensus, agreed. Mr Prantl was influenced to the extent that the decision to dismiss the claimant can be fairly described as a consensus or joint decision between them.

51. The claimant was summarily dismissed by letter dated Thursday, 8 October 2019. Mr Prantl concludes, 'I find that you have not worked your contracted hours and have been absent without authorisation. The explanations you offered including stating that while you were not in your office but still on site that you were holding meetings with the contractor on site, are not supported by the evidence. This absence without authorisation amounts to gross misconduct.'. Mr Prantl also finds a fundamental breakdown in the working relationship because 'your actions have breached the trust that needs to exist in the employment relationship between employer and employee. This amounts to gross misconduct.'

52. The claimant appealed the decision to dismiss. Mr McCoy appointed himself to conduct the appeal. Mr McCoy was the respondent's senior HR director. He conceded that there were numerous other senior managers who could have heard the appeal, but he considered he was the most appropriate person to undertake the role. Mr McCoy insisted that he was both independent and impartial when dealing with the appeal. Mr McCoy reviewed the decision on

the basis of the information put forward by the claimant. It was not dealt with as a rehearing and there was no further investigation undertaken by him.

53. Mr McCoy's says that that he was kept appraised of the progress of the investigations and discussed matters with Ms Dean Mr Prantl Mr Crossland and members of the HR team. He said that it was abundantly clear from these discussions that Ms Dean and Mr Crossland felt that the evidence had been obtained during the investigation showed the claimant had regular periods of unauthorised absence and he had not been present in the community when he should have been. They felt his position was untenable. However, Mr McCoy drew a distinction between the strong sentiment of the management team and actually making a decision.

54. Mr McCoy said in his statement that the claimant did not dispute the fundamental allegation against him that he was not working his contracted hours in the community and that there were numerous occasions of unauthorised absence. Mr McCoy considered as important that the claimant did not say during the appeal that the allegation which had led to his dismissal with either untrue or unjustified. Mr McCoy conceded in the course of cross-examination that the claimant did dispute the allegation during the appeal hearing.

55. The respondent is a large organisation with substantial administrative resources. Mr McCoy is an experienced HR Director who had been involved in every stage of the process to the extent that we have made a finding that he played a part in the consensus decision to dismiss the claimant. We conclude that Mr McCoy was neither independent nor impartial in his dealing with the appeal process. The claimant was informed of the unsuccessful outcome of the appeal by letter dated 18 October 2019.

**The law**

56. The requirements for a protected disclosure are set out in section 43B of the Employment Rights Act 1996 (ERA). Section 103A ERA provides that an employee who is dismissed 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.

57. In a claim of 'ordinary' unfair dismissal contrary to section 94 of the ERA, it is for the respondent to show a genuinely held reason for the dismissal and that it is a reason which is characterised by section 98(1) and (2) of the ERA as a potentially fair reason. Conduct is a potentially fair reason for a dismissal under section 98 of the ERA. If the respondent shows such a reason, then the next question where the burden of proof is neutral, is whether the respondent acted reasonably or unreasonably in all the circumstances in treating the reason for dismissal as a sufficient reason for dismissing the claimant, the question having been resolved in accordance with the equity and substantive merits of the case. It is not for the Employment Tribunal to

decide whether the respondent employer got it right or wrong. This is not a further stage in an appeal.

58. In a case where the respondent shows the reason for the dismissal was conduct, it is appropriate to have regard to the criteria described in the well-known case of ***Burchell v BHS [1978] IRLR 379*****.** The factors to be taken into account are firstly whether the respondent had reasonable grounds for its finding that the claimant was guilty of the alleged conduct; secondly whether the respondent carried out such an investigation as was reasonable in the circumstances; thirdly whether the respondent adopted a fair procedure in relation to the dismissal and finally whether the sanction of dismissal was a sanction which was appropriate, proportionate and, in a word, fair. In relation to each of these factors, it is important to remember at all times that the test to be applied is the test of reasonable response.

59. If a dismissal is found to be procedurally unfair, the tribunal must consider what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed in accordance with the provisions of Polkey v AE Dayton Services Ltd [1987] UKHL 8;

60. If a dismissal is found to be unfair, the tribunal must consider whether there is blameworthy or culpable conduct or actions on the part of the claimant that caused or contributed to the dismissal and if so whether the basic and/or compensatory award should be reduced by a set proportion as the tribunal considers just and equitable having regard to that finding in accordance with the provisions of Section 122 (2) & 123(6) of the ERA.

61. The tribunal must consider whether the respondent unreasonably failed to comply with the ACAS Code of Practice on disciplinary and grievance procedures and, if so, what whether it would be just and equitable in all the circumstances to increase any award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 ("section 207A").

62. The test for wrongful dismissal in cases of summary dismissal is not the same as the test for unfair dismissal: the tribunal does not consider the reasonableness of the employer's decision to dismiss. Instead, in a case of wrongful dismissal, the tribunal must consider whether the employee was guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract.

63. The justification for summary dismissal replied on by the respondent is misconduct by the employee described as 'gross misconduct'. The legal test is not whether the conduct can be labelled 'serious misconduct' or 'gross misconduct'. Instead, the question is whether the employee's behaviour amounts to repudiation of the whole contract. The general This is a question of fact for the tribunal. The tribunal must decide (on the balance of

probabilities) what the employee did and whether it amounted to a repudiatory breach of the contract by the employee. The respondent in this case refers to the express definition of misconduct justifying summary dismissal that includes 'persistent unauthorised absence from work'.

**Deliberations and conclusions**

64. This is a unanimous decision of the employment tribunal. We have discussed the facts and conclusions reached at length. We note the detailed oral submissions made by both Mr Crammond and Mr Chadwick and are grateful to both representatives for their professional approach. We make some initial comments in relation to the evidence we have heard.

65. We refer to the findings as set out above and record on a general level we found Ms Dean an uncooperative, evasive and at times during cross examination, an unreliable witness. We found Mr Prantl to be evasive in his evidence and at times unreliable. Mr McCoy is a senior and experienced HR adviser and we his evidence in relation to his dealing with the claimant's appeal to be lacking in credibility.

66. Mr McCoy suggested his evidence and it was reiterated by Mr Chadwick during his submissions that it was 'naive to suggest that discussions don't take place'. We consider it commonplace and generally unremarkable for those undertaking particular steps of a disciplinary process to have some information of events prior to their allocated step. Such a scenario does not by itself render a dismissal unfair and each case must be considered on its own facts. However, the tribunal process is to consider the evidence, determine the facts, apply the law and reach a decision on that basis. The tribunal rejects any contention that it is in any way 'naïve' to determine the particular circumstances of this case in this way.

67. In contrast, we found Ms Felton and Ms Mayne to be reliable and straightforward witnesses. This is an unusual case where two of the respondent's HR advisers provide evidence on behalf of the claimant. We considered the claimant to be a straightforward and helpful witness.

Was the reason or the principal reason for the claimant's dismissal that he had made a protected disclosure?

68. In considering the reason for the claimant's dismissal we note:
    a. While the evidence provided by both Ms Felton and Ms Main points to a severely flawed dismissal, neither witness provided evidence of any link between the claimant's dismissal and his previous whistleblowing.
    b. Ms Dean had knowledge of the claimant's whistleblowing from 2018 as detailed above. The claimant had developed an obvious positive relationship with Ms Dean following this time. We find it unlikely that, had Ms Dean for a reason connected to the claimant's whistleblowing wished to remove the claimant from the respondent's business, that she would not have provided such overtly glowing reports of the claimant.

c. There is no obvious reason why Ms Dean would take such action against the claimant reason connected with his previous whistleblowing. The claimant's allegation within his witness statement does not point to any particular motive but states that Ms Dean, 'or someone else in the senior management team did not like the fact that I complained about Sam King's actions and the regarded me as a 'snitch''. We have not been referred to any evidence that would support such a suspicion.
d. We note our general findings in relation to the evidence of Ms Dean above and have considered whether any adverse inferences should be drawn by the tribunal from the apparent lack of justification as outlined below for the claimant's dismissal. While we have raised issues in respect of Ms Dean's evidence, we do not consider that there is any basis for inferring any link between the claimant's whistleblowing and his dismissal. We note that both Ms Felton and Ms Main attributed Ms Dean's actions to how management style referred to unconnected workplace interactions where Ms Dean has behaved in a similar fashion. Indeed the claimant makes a comment during the disciplinary process that his treatment may well be a reflection of 'corporate life'. We conclude that there is nothing before this tribunal that would allow us to draw any inference that the claimant's dismissal was connected to his previous whistleblowing.
e. The claimant says in his witness statement and reiterated during the hearing that at the time of dismissal he was not suggesting that the disciplinary hearing was connected to the disclosure about Sam King

69. In the circumstances, as the tribunal is unable to identify any connection between the claimant's previous whistleblowing and his dismissal, we find on the balance of probability that the reason or principal reason for the claimant's dismissal was unconnected to his previous whistleblowing. We refer to our findings below in relation to the reason for the claimant's dismissal.

Unfair dismissal

70. The first aspect for the tribunal to consider is the reason or, if more than one reason, the principal reason for the claimant's dismissal. The respondent relies upon the potentially fair reason of 'conduct' only in respect of the disciplinary allegations. We find that there was more than one reason for the claimant's dismissal including:
    a. Notwithstanding the issues we have identified below, we find that in investigating Mr Grant's complaint, Ms Dean encountered information supplied by the claimant's colleagues that led her to conclude, in broad and general terms, that the claimant was not 'doing the hours'. Ms Dean formed her view during the investigation, prior to the formulation of the disciplinary allegations, she was vocal in respect of her opinion and her position remained unchanged throughout the subsequent process. She was a driving

force in the claimant's dismissal. Mr Prantl and Mr McCoy shared this general concern that the claimant was not doing his required working hours as expressed by Ms Dean. This is a matter related to the claimant's conduct.

b. There was an unspecified negative perception built by Ms Dean following Mr Grant's complaint of the claimant. This was identified by Ms Main as a concern that the claimant's was no longer a 'face-fit' for the respondent.
c. Ms Dean formed the view that the claimant's position was untenable for her. Mr McCoy and Mr Prantl were both keen to reach a 'consensus decision', which necessitated dismissing the claimant as Ms Dean would not accept anything other than the claimant's dismissal.

71. In evaluating the above, we are obliged to identify the principal reason and we conclude taking the entirety of the evidence into account that the principal reason for the claimant's dismissal was because the claimant was perceived by the respondent to be 'not doing the hours'. The principal reason for the claimant's dismissal related to his conduct.

72. Before addressing the individual aspects to determine whether or not the dismissal was fair or unfair we note:
    a. It is common ground that the claimant was considered by the respondent to be a highly regarded and successful general manager up to July 2019.
    b. The claimant had considerable agreed autonomy in relation to his running of the community managed his own time. He had been told by his DO that he should treat the community as 'his own business' and that the respondent's emphasis was on performance.
    c. Ms Dean considered the claimant to be in charge of his working hours and trusted to do those hours. She knew that the claimant did not work any fixed hours and did not believe that the claimant required authorisation from a senior manager to leave the community.
    d. The claimant also worked one late shift per week that could involve an 11 hour + day. Even if the claimant left the community between 3 and 3:30pm or at other unspecified time, as the claimant had no set hours, this was not in itself misconduct on the claimant's part due to the above factors..
    e. The disciplinary allegation of gross misconduct is said to arise as a consequence of Mr Grant's wide-ranging whistleblower complaint to the CQC. While we accept that this complaint was made, we find it odd that other than the reference within Ms Dean's investigation report, there is no written record of either the CQC complaint or the respondent's formal response to it. This leads the tribunal to conclude that little importance was placed by either the CQC or the respondent on Mr Grant's whistleblowing complaint. We consider this initial allegation was accurately described by Mr Felton during

the disciplinary process as, 'a set of spurious rambling comments about everything and their dog'. Neither party suggests that Mr Grant had first-hand knowledge of the allegations relating to the claimant's timekeeping. The specified element within Mr Grant's complaint as it related to timekeeping, alleging that the claimant attended his wife's care home was accepted by the respondent to be false. Mr Grant appears to have potential ulterior reason to make such a complaint by reference to his alleged part in a problematic resident outing. Ms Dean ignores the obvious lack of credibility within the initial complaint.

Did the respondent have a genuine belief in the claimant's alleged misconduct.

73. While we have accepted that the principal reason for the claimant's dismissal related to a perception that he was 'not doing the hours', In examining this part we first look to the actual alleged misconduct that led to the claimant's dismissal as set out above. The main allegation is vague and we make the following comment on the detail of the allegation:

    a. *That you are not working your contracted hours and are frequently absent without authorisation. Your management team have reported that you are consistently not present in the community for your contracted hours and that you have left the community early on numerous occasions.*

    No basic or genuine consideration was given by the respondent to the claimant's contracted hours or obligations. There was no genuine belief that the claimant required authorisation to leave the community. While it is the case that some of the claimant's management team reported that the claimant 'left the community early', the issues identified below and the omission of any reference to any date or time period or indication of when it is said that the claimant should have left the community, or cross reference to his contractual obligation leads the tribunal to conclude that there was no genuine belief in the claimant's misconduct on the respondent's part.

    *You failed to follow company procedure in that you have not recorded your exits times using the time and attendance system and neither have you secured approval from your DO any different arrangements.*

    It is common ground that the claimant only recorded his exit time on one occasion during 2019. However, at the time of dismissal, the claimant had explained his previous DO, Ms King's lack of emphasis on the Chronos system. Ms Brittain confirmed that she, as general manager, did not use the time and attendance recording system. Mr Prantl's evidence on this point was confused. Mr Chadwick in his submissions told the tribunal that the respondent accepted that the claimant was not required to use the Chronos

system. In considering this part of the allegation we conclude that there was no genuine belief on the part of Ms Dean, Mr Prantl or Mr McCoy that the claimant had failed to follow any applicable company procedure in recording his exit time.

74. In summary, in examining the above question we find that the respondent had no genuine belief in the alleged misconduct. However, if we are wrong we continue to the next step in any event.

    If so, whether that belief was based on reasonable grounds and whether that genuine belief in those reasonable grounds have been formed after carrying out a reasonable investigation.

75. Mr Crammond refers the tribunal to the case of *A v B [2003] IRLR 405* and stressed the importance of a reasonable investigation in all circumstances but particularly where the loss of employment is acknowledged likely to be career ending for the claimant. He submitted that the investigation was very, very poor. There was no impartial investigator, the investigation was conducted with a closed mind with a presumption of guilt, searching for anything that could be found against the claimant while ignoring the positive. We remind ourselves that again we are considering the band of reasonable responses. There is no single acknowledged correct way to conduct an investigation. In these particular circumstances the respondent was fully aware that should the claimant be dismissed as a result of the disciplinary allegations, due to the highly regulated nature of the care home industry, this would have a significant impact on his ability to find alternative work within the industry. The required standard of reasonableness is always high where an employee faces the loss of his employment. The potential effect on the employee's future employment does not impose a higher standard but reinforces the need for careful and conscientious enquiry.

76. When considering the investigation conducted by Ms Dean we note:
    a. Serious discrepancies exist between the underlying information available to Ms Dean and her investigation report said to be compiled from this information. All of the discrepancies noted by the tribunal are detrimental to the claimant, no similar error that assists the claimant in any way has been made by Ms Dean. The picture painted by Ms Dean in her investigation report, starting most starkly with 'all heads of department interviewed unanimously stated that for the past 18 months the claimant has significantly not been present in the community' is incorrect, when cross referenced to her own investigation. It is fair to say that Ms Dean's investigation report is an inaccurate and inexplicably negative account of the matter.
    b. The tribunal considers that a basic requirement of fairness within an investigation is that it is conducted in an "even-handed" manner. The investigation report omits any reference to the claimants previous exemplary conduct, the references to timekeeping within the previous document of supervisions or reference to an the

positive relationships existing between the claimant and his team. We find the investigation consisted predominantly of a search for evidence against the claimant to support Ms Dean's the view that the claimant's position was untenable.

c. This is a scenario where the main allegation of misconduct is that the claimant was not sufficiently present in the community. The tribunal was referred to the gross misconduct element contained within the disciplinary policy relied upon by the respondent citing 'persistent unauthorised absence from work'. However, the investigation does not seek to identify a single identified occasion or any identified period where the claimant is said to be absent without authorisation.

77. We also consider the further investigation carried out by Mr Prantl:

a. Mr Prantl concedes that the information provided by Andrea who normally finished work out 2pm was irrelevant to the allegations. Sheila, who only worked two six-hour shifts per week and appears to refer to the claimant leaving the community early 'once a month' and not being present in very general terms, in the tribunal's view adds no weight to the information against the claimant.

b. Similarly, Mr Prantl's interview with the site foreman does not appear to shed any light on the claimant's presence in the community, nor does it counter the claimant's claims of his general involvement in the refurbishment project spending considerable time with building contractors in the plural and ensuring that the working areas are secure. It is common ground between the parties that the refurbishment was large in scale and the claimant had management responsibility and oversight for it, as referenced within the supervision documentation however Mr Prantl does not consider this acknowledged responsibility.

c. Mr Prantl place considerable weight on the email traffic sent by the claimant from 3.30pm from his mobile phone rather than his desktop during May and June 2019. However, the records relating to 24 June 2019 and 8 /June 2019 produced by Mr Prantl show emails being sent by the claimant from his mobile with subsequent emails sent from his PC/laptop, indicating that the claimant may well use his mobile to send emails within the community. It is obviously likely that some of these emails were sent by the claimant from outside the community as it is the claimant's own evidence that he often left work at 4:20pm.

78. We note Ms Dean's continued direct involvement and influence within this further investigation. We refer to Mr Prantl's obvious concerns in relation to the evidence available to him at the original disciplinary hearing. The tribunal is unable to identify anything from Mr Prantl's additional investigation that addresses the flaws identified within Ms Dean's original investigation and we conclude that this was a search for further evidence against the claimant in an attempt to bolster the predetermined decision to dismiss. We conclude that

the investigation carried out by the respondent did not fall within the band of reasonable responses and renders this dismissal unfair.

79. If we are wrong, we go on to consider whether the dismissal was fair or unfair. We note the large size of and the substantial administrative resources available to the respondent. The concept of misconduct and to a greater extent gross misconduct requires, in our opinion, behaviour that is culpable or blameworthy in some way on the employee's part. In these particular circumstances, there is nothing within the respondent's investigation or the evidence provided to this tribunal to suggest that the claimant was in any way aware that his timekeeping a presence in the community was an issue for or in any way unacceptable to the respondent. There is documentation expressly confirming no issue with the claimant's timekeeping. While we have accepted that the reason for the claimant's dismissal was related to his conduct, the claimant appeared to be working as permitted by his previous line manager Ms King, and this went uncorrected by the respondent. There is no managerial direction or input in respect of the claimant's working pattern or instruction for the claimant to change his working hours. We are unable to identify any culpable or blameworthy aspects to the claimant's behaviour in these particular circumstances and this leads us to conclude that the decision to dismiss the claimant by reference to an allegation of gross misconduct falls outside the band of reasonable responses of a reasonable employer.

80. We note the vagueness of the allegations in that the respondent is unable to identify any day, week or time period where it is said the claimant has not worked his contracted hours or has left the community in circumstances where he was unauthorised to do so. The tribunal is unable to identify how the claimant may be found guilty of 'Persistent unauthorised absence from work (including training)' without this information. Mr Chadwick told the tribunal that the primary allegation was that the claimant often left the community between 3 and 3.30pm and was not performing his contracted obligation, however we do not consider that this addresses the vagueness of the allegations. We consider the decision to terminate the claimant's employment on such vague allegations to fall outside of the band of reasonable responses of a reasonable employer.

81. We refer to the procedural flaws identified above. We consider the flaws in the investigation to be such that the process amounts to a sham. A dismissal based upon that process falls outside the band of reasonable responses of a reasonable employer.

82. No consideration was given to any sanction other than dismissal. No consideration was given to potential use of the respondent's supervision process or other management device to discuss and communicate the respondent's requirements in respect of presence or visibility within the community with the claimant. No consideration was given to the possibility of discussion or mediation to address any weakening of relationships between

the claimant and his reports or indeed those more senior within the respondent. The claimant's exemplary prior performance was ignored.

83. We note that the claimant was offered the opportunity of an appeal hearing. This hearing was carried out by Mr McCoy and we refer to our findings in respect of Mr McCoy's input as set out above. We consider that the appeal hearing was little more than a rubber stamp process that does nothing to remedy the flaws identified above.

84. For the sake of completeness, we also comment upon the respondent's allegation in relation to a 'breakdown of trust and confidence'. Mr Chadwick told the tribunal that the respondent only relied upon conduct as a reason for dismissal. The breakdown of trust and confidence is said by the respondent to arise entirely from the claimant's alleged misconduct addressed above and we repeat our findings in respect of that conduct.

85. In summary, we have concluded for the reasons set out above that the claimant's dismissal was unfair.

86. We heard submissions from both parties in relation to potential 'contribution' on the claimant's part to his dismissal. We refer to our findings below in relation to the wrongful dismissal claim. We have found no conduct of the claimant's part that could be classed as 'culpable or blameworthy' that caused or contributed to the claimant's dismissal. In the circumstances we decline to make any reduction to any basic and compensatory award on the basis of the claimant's conduct.

87. We also heard submissions in relation to a potential '*Polkey'* adjustment. We refer to our findings above and the substantive nature of the flaws identified within the process and the sham nature of the procedure followed by the respondent. In the circumstances the tribunal is unable to assess what the outcome may have been had a fair and reasonable process followed. For this reason, we decline to make any adjustments to the claimant's compensatory award in accordance with the '*Polkey'* guidelines.

88. We heard submissions in relation to the ACAS Code of Practice on disciplinary and grievance procedures. We repeat our findings as set out above and conclude that the respondent has failed to comply with the ACAS code of conduct. We note the following:
    a. Paragraph 3: the respondent is a large employer with substantial administrative resources and an internal HR department. We consider it practicable for the respondent to take the steps set out in the code.
    b. Paragraph 5: we reference our findings above relating to the flaws within the investigation and conclude that the respondent did not carry out necessary investigations to establish the fact the case.
    c. Paragraph 6. We refer to our findings above conclude that while purporting to have different people carrying out the investigation

and disciplinary hearing, Ms Dean's influence and input was such that she played a part decision to dismiss.

d. Paragraph 18 to 21: we note our findings above and conclude that no consideration was given to any sanction other than dismissal.
e. Paragraph 27 provides that an appeal should be dealt with impartially and wherever possible by manager who has not previously been involved in the case. We refer to our findings above in relation to Mr McCoy's influence during the disciplinary process to the extent that we have found him to be part of the decision-making 'consensus'. The claimant was not provided with an impartial appeal manager in circumstances where the respondent was of a size and had the administrative resource to provide one.
f. While it is the case that the respondent has identified the separate steps of an investigation, disciplinary hearing and appeal process, the reality of the process applied by the respondent in these particular circumstances can be fairly described as a sham that was implemented to terminate the claimant's employment.

89. Taking the entirety of the above into account we conclude that the respondent has failed to comply with the ACAS code and it is just and equitable in all the circumstances to increase the compensatory award by 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 ("section 207A").

Wrongful dismissal

90. In considering the claim for wrongful dismissal we are a acknowledge that we do not have the benefit of hearing directly from those employees involved within the respondent's investigation. We have evaluated the hearsay evidence within the interviews gathered from the witnesses and considered as part of the disciplinary process by the respondent. We repeat our findings set out above. We find the allegations to be vague. Mr Chadwick told the tribunal that the primary allegation was that the claimant often left the community between 3 and 3.30pm and was not performing his contracted obligation. This allegation is not supported by the evidence collated within the respondent's investigation. The respondent is unable to identify any particular date or time period where the claimant was absent. It is likely, on the balance of probability that the claimant did leave the community between 3 and 3:30pm on occasion, however as the claimant had no set hours and did not require authorisation to leave the community, this by itself is not misconduct. This tribunal has difficulty in identifying any misconduct related to unauthorised absence in the absence of identification of the hours the claimant worked within specified week(s) and comparison to his contractually required 40 hours per week. We conclude on the balance of probability that the claimant was working his 40 hrs a week in a manner as permitted by his line manager and in the absence of any instruction from the respondent to do otherwise, the claimant's conduct cannot be considered 'misconduct'. In the absence of any misconduct on the claimant's part, we conclude that the respondent was not

entitled to summarily terminate the claimant's employment contract and the wrongful dismissal claim succeeds.

Summary

91. The claimant was unfairly dismissed contrary to S94 of the ERA, his claim for 'ordinary' unfair dismissal is well-founded and succeeds. The claimant's claim for automatically unfair dismissal contrary to section 103A of the ERA is dismissed. The claimant was summarily dismissed in breach of his contract and his claim for wrongful dismissal succeeds. This matter will be set down for a remedy hearing and a case management order will be sent to the parties under separate cover.

Employment Judge Skehan

Date: 8 December 2021

Sent to the parties on: 24/12/2021

N Gotecha

For the Tribunal Office