EMPLOYMENT TRIBUNALS

Claimant: Mr J McQuillan

Respondent: T & R Precision Engineering Limited

Heard at: Manchester (by CVP) **On:** 12, 13 and 14 July 2021

Before: Employment Judge Ross

REPRESENTATION:

Claimant: Ms A Johns, Counsel
Respondent: Mr S Myehoff, Solicitor

JUDGMENT having been sent to the parties on 6 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

Introduction

1. The claimant was employed by the respondent as a Quality and Business Development Manager from September 2011 until his employment was terminated for "some other substantial reason". He appealed against dismissal and his appeal was unsuccessful. He brought a claim to this Tribunal for unfair dismissal and failure to provide written particulars of employment.

2. The respondent relied on "some other substantial reason" as the reason for dismissal and in the alternative, conduct (gross misconduct.) It disputed that the claimant had not been provided with written particulars of employment.

Witnesses

3. For the respondent, I heard from the dismissing officer and Managing Director Mr Tim Maddison and from one of the appeal officers, Sales Manager Mr Kevin Perry. I did not hear from the other appeal officer Mr Nick Maddison and therefore attached limited weight to his statement.

4. For the claimant, I heard from the claimant himself. I had regard to statements provided by his wife, mother and late father. The respondent had no questions for these witnesses and neither did I although both the claimant's wife and mother were present and willing to give evidence if necessary.

The Issues

5. At the outset of the hearing it was agreed that the issues for the unfair dismissal case were:

(1) Can the respondent show the reason for dismissal? The respondent relied on some other substantial reason "SOSR" and/ or conduct.

(2) Was it a potentially fair reason?

(3) For SOSR, having regard to the type of job in question held by the claimant, did the respondent have a genuinely held belief of accusations the claimant faced via the court system and which were in the public domain and which were detrimental to the company's interest and had damaged their public image?

(4) Did the respondent act reasonably in all the circumstances in treating this as sufficient reason to dismiss?

(5) Was the dismissal procedurally fair within the meaning of section 98(4)?

(6) Was dismissal within the band of reasonable responses of a reasonable employer?

6. For conduct, the issues were:

(1) What was the conduct?

(2) Did the respondent have a genuine belief based on reasonable grounds following a reasonable investigation of the conduct?

(3) Did the respondent acted reasonably in all the circumstances in treating this as sufficient reason to dismiss, whether the dismissal was procedurally fair and whether it was within the band of reasonable responses?

Findings of Fact

7. I find that the claimant was a senior member of the respondent's management team which comprised the Managing Director Tim Maddison, the Sales Manager Kevin Perry and Nick Maddison the Operations Manager, as well as the claimant who was the Quality Business Development Manager. I find the respondent is a private limited company specialising in precision machining services to both the civil and military sectors within the aerospace supply chain. I find it operates out of its site in Lancashire and is a relatively small business employing approximately 60 employees.

8. I find the claimant was responsible for approximately 13 staff.

9. I find the aerospace industry is a relatively closed market although it is a global market. I find the claimant had a front facing customer role. I find his job was to look after the quality management system and develop business innovation. I find he was responsible for developing new business and that he liaised with customers and potential customers in the East Lancashire area and the wider North West aerospace alliance.

10. It is not disputed that the claimant was arrested on 7 August 2018 and the same day the police attended the respondent's premises with a warrant to seize his company laptop, having already seized his company mobile phone.

11. I find that the claimant informed Tim Maddison of the allegation against him which was that he had been arrested for attempted conversation with an underage girl which he denied. There was a dispute between the claimant and Mr Maddison about how much information the claimant gave him in 2018. I find it implausible that the claimant did not give details of the alleged offence to Mr Maddison at that stage given that they were part of a very small leadership team of four men and had worked together for approximately seven years. I have had regard to the notes the claimant kept in his diary at that time.

12. I find that Mr Maddison periodically asked the claimant about the police investigation.

13. The I find that on 8 August 2019 the claimant voluntarily attended the police station with a solicitor to discuss evidence which had been found on his mobile phone regarding two extreme pornographic images.

14. The claimant says that he informed Tim Maddison of his recent police station visit on 9 August. Mr Maddison says he cannot recall that conversation.

15. I find the claimant was required to attend court on 3 December 2019 charged with three offences: the conversation and the two images. I find he attended court that day where the judge decided the cases were to be heard separately. The claimant says he informed Tim Maddison of that court appearance. Mr Maddison disputed that.

16. I find is puzzling why the claimant has not recorded any diary entries in relation to those conversations he had with Mr Maddison, if they had occurred.

17. There is no dispute that on 9 December 2019 the Burnley Express, a local paper, published information which included the claimant's name and address although it did not name the respondent company. It stated that the claimant had been accused of attempted sexual communication with a child and of allegations of possessing an extreme pornographic image.

18. I find that Mr Maddison became aware of the newspaper article when it was drawn to his attention by one of his staff from the shop floor. I find Mr Maddison rang the claimant and I am satisfied he said to the claimant that the papers had "finished him".

19. I find that the claimant was suspended by letter dated 9 December 2019. The reason given for suspension says:

"I write to inform you that I have reached the decision to suspend you from work pending the conclusion of the court case that has been reported in the Burnley Express". It goes on to state a detailed investigation into these allegations will commence soon as reasonably practicable.

20. I find that on 12 December 2019 Mr Maddison visited the claimant at his home. I accept his evidence that he attended in a supportive capacity. What exactly was said was disputed. The claimant says he went into the allegations in detail and Mr Maddison disputed that.

21. I find that Mr Maddison attended the claimant's home on 7 January 2020. Once again there is a dispute about exactly what was said. I find the claimant misunderstood Mr Maddison. The claimant says there was a "gentleman's agreement" that Mr Maddison agreed to leave the matter for a further month. I find that is unlikely. I am not persuaded that the final sentence in the claimant's diary entry is contemporaneous. I find it is likely that Mr Maddison suggested resignation to the claimant and then retracted that suggestion.

22. I find that by letter of 13 January 2020 the respondent wrote to the claimant asking for details of the allegations against him in the court case. I find that suggests that although the claimant may have shared some information with Mr Maddison, the employer did not have detailed information.

23. The following day 21 January 2020 the claimant was invited to a disciplinary hearing. The letter makes it clear the hearing has been convened "to consider the allegation that the accusations that you face via the court system and which are in the public domain are potentially detrimental to the company's interest and potentially damaging to its public image". It goes on to state that the allegations against the claimant, if proven, have the potential to be considered gross misconduct. It makes it clear that the claimant is at risk of dismissal.

24. I find the claimant thought this letter meant that if he was found guilty in court then his job was at risk. He also said he thought the hearing was a "formality", although he concedes that once he arrived at the disciplinary hearing he realised the matter was serious because HR was present. In fact, the claimant had been notified that the respondent's HR adviser would be attending in the letter of invitation to the hearing.

25. In the disciplinary hearing Mr Maddison explained about the damage potential damage to the company's reputation and explained that he had received calls and had been fending off queries from people about the newspaper article. Mr Maddison made it clear to the claimant that the allegations against the claimant in court were not allegations for the employer to determine. The issue was the reputational damage to the company. The claimant accepted that he was well known, that he worked all over the sector and with different competitors and that he had a unique

name and that people "put two and two together". He also apologised for how Mr Maddison had been affected by these things. See minutes of disciplinary hearing.

26. The claimant's employment was terminated by Mr Madden by letter dated 27 January 2020. The letter made it clear that the reason the claimant was been dismissed was because of the reputational damage to the company.

27. By a letter dated 31 January 2020 the claimant submitted an appeal. An appeal hearing was swiftly arranged on 4 February 2020. A document entitled "Chair's notes for the appeal hearing" which was prepared in advance of the hearing at page 125 states:

> "Therefore based on this information alone we reject your appeal for item 1 and feel the company has a right to defend itself from bad publicity and employees who bring the company's reputation into disrepute."

28. I find the facts the notes were prepared in this way ahead of the appeal hearing clearly suggests that the appeal was prejudged.

29. By a letter dated 13 February 2020 the claimant's appeal was dismissed.

30. Although it is not directly relevant to the issues in this case, it is a matter of fact the claimant was acquitted of all the criminal allegations referred to in this judgment.

Conclusions

31. I turned to the issues.

32. I am satisfied the respondent has shown that the reason relied upon for dismissal was "some other substantial reason". The letter of dismissal makes it clear that the allegation for which the claimant was being dismissed was the reputational damage to the employer because of the court allegations the claimant faced, not the allegations themselves. The letter of dismissal clearly states:

"I concluded that the accusations that you face via the court system and which are in the public domain are detrimental to the company's interest and have damaged its public image".

33. The text of the letter clearly explains why the company has reached that conclusion with reference to the claimant's job title, his unique name, his role in the industry and the competitive marketplace in which it operates and the concerns being raised by its customers in relation to the claimant because of the nature of allegations against him in the criminal court.

34. I find it is unfortunate that the respondent included a sentence in the letter of dismissal stating the company's disciplinary procedure defines a criminal offence causing harm to the reputation of the company or relations with the company's employees as gross misconduct. That sentence is irrelevant. The claimant had not been convicted of criminal offence and the disciplinary allegation against him was

reputational damage to the employer because of the allegations against him via the court case.

35. The next issue is whether "some other substantial reason" is a potentially fair reason within the meaning of the Employment Rights Act 1996, and I am satisfied it is.

36. The next and most critical and difficult question for me to decide is having regard to the type of job in question held by the claimant did the respondent have a genuinely held belief that the accusations he faced via the court system and which were in the public domain were detrimental to the company's interest and had damaged the company's reputation.

37. I am reminded of the legal test in section 98(4). It is not for me to substitute my own view. The test is whether a reasonable employer of this size and undertaking could have reached this decision.

38. I have taken into account my findings of fact that the claimant was in a customer facing role. I have taken into account he was one of the senior management team. He accepted he had a unique name and was well known by the respondent's customers. He did not dispute that the Managing Director was being contacted by customers of the respondent about the claimant and indeed the claimant apologised for that. The claimant also stated that the criminal allegation against him was the "worst offence" he could be accused of. He did not dispute that the respondent operated in a competitive market.

39. On the other hand, as his representative pointed out, this was not an organisation working with children or vulnerable people. The claimant had not been convicted of a criminal offence in terms of initiating sexual conversation with the child or holding pornographic images, he had been accused of those matters. The newspaper article named the claimant and gave his address but did not name the respondent company.

40. However, I find that the claimant had a unique name and was well known to the businesses he worked with and so the failure to name the company was not particularly significant. I also find that he was the face of the company to those businesses and the nature of the allegations against him were sufficiently damaging to cause those business contacts to raise concerns with Mr Maddison the Managing Director. In a global world where communication is frequently via the Internet the respondent was entitled to be concerned about an information search online would reveal that the claimant now that the information was in the public domain, as demonstrated by the newspaper article.

41. The respondent was entitled to have regard to the fact which was unchallenged that they worked in a very competitive business and there were plenty of other competitor companies, many within 10 miles of the respondent's site, with whom their customers could easily choose to place orders, instead of the respondent.

42. I am therefore satisfied in the particular circumstances of this case, given the nature of the claimant's role within the business, the competitive nature of the business and the potential reputational damage to it, that the respondent had a genuinely held belief that the accusations the claimant faced via the court system and which were in the public domain were potentially detrimental to the company's interest and damaging to their public image.

43. I am satisfied that a company of this size, a relatively small business, acted reasonably in treating this reason as sufficient reason to dismiss. As stated above, I have reminded myself it is not what I would have done which counts, it is whether a reasonable employer of this size and undertaking could have acted reasonably in the circumstances in treating this as a fair reason for dismissal.

44. I turned to the other procedural issues. I find dismissal is potentially within the band of reasonable responses of a reasonable employer in these circumstances. I find the respondent was entitled to take into account the seniority of the claimant's role and the "customer facing" role of his position.

45. I find that although Mr Maddison candidly admitted he did not specifically take the claimant's clean disciplinary record into account nor did he expressly consider alternative sanctions, I am satisfied that this made no difference to the decision to dismiss. I entirely accept the dismissing officer's evidence that there was no realistic alternative sanction to dismissal. The claimant held a senior role- there was no other role he could have reasonably done- and I am satisfied suspending the claimant without pay until the court case took place would not have resolved the problem of the reputational damage.

46. However, I find the dismissal was procedurally unfair because of the way the appeal was conducted. I find Mr Perry to be candid witness. However he could not explain why the notes entitled "chair notes to be followed on the day," which he honestly admitted were prepared in advance of the appeal hearing, specifically state at page 125 "therefore based on this information alone we reject your appeal for item 1". This section of the notes appears to relate to Nick Maddison (see page 124) but he did not attend the Tribunal hearing as a witness and so I cannot ask him about the entry.

47. I note the appeal officer was not someone senior to the dismissing officer. The context was two other members of the management team scrutinising their Managing Director's decision making.

48. I find that recording that a ground of appeal is unsuccessful before the hearing has even started is evidence to show the appeal outcome was prejudged. That is unfair.

49. Thus the dismissal was unfair for procedural reasons.

50. Having found the dismissal was unfair for SOSR, there is no requirement for me to consider the alternative reason of conduct. In circumstances where the reason

for dismissal was the reputational damage to the company by reason of criminal allegations made against the claimant, I am satisfied that the correct legal label is SOSR. (If I had analysed it under the Burchell test I would have found the respondent had a genuine belief based on reasonable grounds following a recent investigation of the conduct namely the potential reputational damage to the respondent and I would have reached the same conclusion in relation to band of reasonable responses and procedural unfairness).

The principle in Polkey v AE Dayton Services Limited

51. I turned to the **Polkey** issue. This is an issue a Tribunal is obliged to consider. Case law remind me I must not avoid this issue - even if it is difficult to assess what might have been, I must do my best with the evidence before me.

52. It is undisputable in this case that the respondent found a document on its company server entitled “reasons for chatting” at pages 84 to 87. It is dated from September 2018 and clearly contains information which suggests the claimant was becoming bolder in behaving in a sexually inappropriate way at work. I accept the analysis of Mr Maddison that the document suggests the claimant was exposing himself to others sexually on chat sites whilst at work.

53. I find the claimant’s explanation that this was a “white lie” which he told his wife to reassure her that his actions visiting adult chat sites did not only occur in the matrimonial home to be implausible. I remind myself this document which the claimant himself created.

54. In addition, the claimant admits accessing the adult websites on the company laptop, albeit from home.

55. There is a dispute as to whether the claimant had the company handbook and company rules contract of employment. However I find as a member of the senior management team responsible for the members of staff he must have been aware that the behaviour outlined on his “reasons for chatting document” was absolutely and completely inappropriate in the workplace and a matter of potential gross misconduct. I have no doubt that a reasonable employer faced with this information would have dismissed the claimant fairly for gross misconduct.

56. In addition, I am satisfied the respondent had a further potential fair reason which is likely it would have relied upon to dismiss the claimant fairly and that is working during the respondent’s company time for two other businesses. I do not accept the claimant’s explanations in relation to that work. I find them implausible. I find that as a senior manager the claimant must have been aware that he was obliged to devote his time to this employer only. I am not satisfied that he did the work for the other two businesses in his own time or that he had permission to do so.

57. I therefore find it was wholly inevitable that the claimant would have been dismissed fairly for gross misconduct. This employer moved quickly through the disciplinary stages once it had invited the claimant to disciplinary hearing and I am satisfied that the respondent would have acted promptly on the information on its own server and the other documents and I am satisfied that any appeal would have

been unsuccessful and accordingly dismissal would have occurred properly within four weeks of the original dismissal.

58. Given I have been informed the claimant received eight weeks' pay I find there is no entitlement to compensation to the further four weeks the claimant would have remained in employment, had he been fairly dismissed as I have set out above for conduct reasons. There is no entitlement to a basic award because although the claimant was unfairly dismissed because the appeal was prejudged, it was wholly inevitable he would have been dismissed for a fair reason four weeks later as described above.

59. I have not dealt with contributory fault because I have found it was wholly inevitable the claimant would have been dismissed in any event and has no entitlement to compensation. If I am wrong about that I find there was culpable and blameworthy conduct meriting a 100% reduction in both the basic and compensatory which caused such a dismissal – I rely on the reasons set out above in the **Polkey** section of this Judgment.

Failure to provide written particulars of employment

60. There is no dispute that the claimant received a detailed offer letter of employment, but it did not contain all the required particulars of employment.

61. There is a dispute as to whether or not the claimant received a contract. It is true the contract dated 2 January 2018 is unsigned.

62. I find that at that time in 2018 the workforce had been provided with new contracts of employment and the claimant's manager was responsible for ensuring that those employees he managed had signed and returned their contracts. The claimant in giving evidence minimised his role as a manager, suggesting that he simply listened and passed on any concerns. I heard evidence that new contracts were also provided to the senior management team, but that Mr Perry and Mr Nick Maddison were unhappy about aspects of their contracts and so had not signed them. I find it unlikely that everyone else who was an employee of the business was supplied a new contract and not the claimant. I find the claimant was issued with a new contract in 2018. I find it is likely that the claimant has forgotten that he was issued with the new contract at that time.

63. There was an issue about whether or not the claimant had signed for receipt of company rules. The claimant was initially adamant that he had not signed but appeared to concede when giving evidence that perhaps he had done so.

64. I therefore find that having been supplied with written particulars of employment in 2018 his claim for failure to provide written particulars fails.

Delay

65. Finally I apologise for the lengthy delay in sending these written reasons to the parties, which were requested promptly by email of 29 July 2021 by the

respondent's solicitor. Unfortunately, due to an administrative oversight, the request for written reasons was not actioned and the file was closed. The request was not brought to my attention until 27 January 2022 when the respondent's solicitor chased the matter.

Employment Judge Ross
Date: 2 February 2022

REASONS SENT TO THE PARTIES ON

3 February 2022

FOR THE TRIBUNAL OFFICE