EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113760/2021

Hearing Held in Glasgow on 14, 15 & 16 March and 12 April 2022

Employment Judge: J McCluskey

Mr G Langan	**Claimant** **In Person**
Quarriers	**Respondent** **Represented by:** **Mr C Asbury - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is that the claimant was not unfairly dismissed and his complaint is therefore dismissed.

REASONS

Introduction

1. A claim was presented on 19 December 2021 in which the claimant made a complaint of unfair dismissal.

2. The respondent led evidence from (i) Carmen McKelvie, Operational Manager (ii) Irene Hattie, Operational Manager and (iii) Carol Russell, Head of Service (Adults). The claimant gave evidence on his own behalf.

3. There was a joint bundle of documents prepared by the respondent. Both parties added supplementary documents to the joint bundle, with the consent of the Tribunal, at the outset of the hearing.

4. The Tribunal has set out its findings in fact. Not every fact that could be found in the documents or oral evidence has been set out. The Tribunal has set out the facts as found that are essential to the Tribunal's reasons.

5. Similarly, the Tribunal has set out a short summary only of the parties' submissions and dealt with points made in submissions when setting out the facts, the law and the application of the law to those facts. The Tribunal considered the submissions with care. It should not be taken that a point was overlooked because the submission is not included in the Reasons or not included in the way it was presented to the Tribunal.

Issues

6. The Tribunal had to determine the following issues:

   a. Was the claimant dismissed for a potentially fair reason, namely (i) some other substantial reason of a kind such as to justify the dismissal of an employee holding the position that the claimant held or (ii) conduct?

   b. Was the dismissal procedurally and substantially fair in all the circumstances (including the size and administrative resources of the respondent's undertaking)?

   c. If the claimant was unfairly dismissed how much is he entitled to by way of a basic and compensatory award?

Findings in fact

7. The following findings of fact were reached by the Tribunal, on a balance of probabilities, having considered the evidence of witnesses and the documents to which the Tribunal was directed. Where the evidence was in conflict the Tribunal has determined, on a balance of probabilities, whether it was more likely than not that the matter in conflict happened or did not happen.

8. The claimant was employed by the respondent as a support worker from 12 May 2012 to 20 September 2021.

9. The respondent is a social care charity providing care and support to vulnerable children, adults and families.

10. The claimant's role was to provide support to a vulnerable adult ("PWS") who lived in their own house. PWS had complex care needs. The claimant worked solely with PWS. The claimant's line manager was John Dooley.

11. In November 2020 the claimant left a number of posts on the respondent's public facing Facebook page.

12. The claimant attended an informal meeting with Ms McKelvie on 4 December 2020 to discuss the respondent's concerns over the nature of the posts. The outcome of the meeting was that the respondent decided to investigate the claimant's conduct as a disciplinary matter.

13. The claimant attended a disciplinary investigation meeting on 18 December 2020 with Tony Rae, Project Manager.

14. The claimant was absent from work on sick leave from 24 December 2020. He did not return to work prior to the termination of his employment.

15. The respondent wrote to the claimant on 1 March 2021 setting out its findings from the investigation with Mr Rae. The findings included that the claimant had made comments which were inappropriate on a public facing social media page and did not consider the reputational damage this may cause the respondent. Mr Rae provided recommendations in relation to the claimant's actions. The respondent concluded that no further action would be taken under the respondent's disciplinary policy.

16. On 31 May 2021 Alistair Dickson, Director of People & Technology, sent an all-staff email to provide an update in relation to the Scottish Social Services Council ("SSSC") approach to the removal of registrants who failed to pay their SSSC annual fees.

17. On 1 June 2021 the claimant replied to Mr Dickson's email and said "*quick to look for money but not so quick to investigate issues some organisations are just stealing a wage for being incompetent*" (page 135).

18. On 2 June 2021 Mr Dickson replied to the claimant by email to invite the claimant to provide details, to allow Mr Dickson to investigate.

19. On 2 June 2021 the claimant replied by email referring to an incident in 2018 when a service user of the respondent had been beaten, whilst in hospital, by another patient in the hospital ("the 2018 incident").

20. The email exchange between the claimant and Mr Dickson continued.

21. On 10 June 2021, in an email to Mr Dickson the claimant made derogatory comments about the style of communication of the Chief Executive (page 134).

22. On 25 June 2021 Mr Dickson emailed the claimant to confirm that he was aware of the 2018 incident and would make further enquiry.

23. On 4 July 2021 the claimant replied to Mr Dickson's email of 25 June 2021, and wrote "*would love to know your findings (or cover up)*" (page 133).

24. On 14 July 2021, following a referral to occupational health, the claimant attended an individual stress risk assessment meeting with Ms McKelvie. A discussion took place at that meeting about the 2018 incident. Ms McKelvie provided reassurances to the claimant that the 2018 incident had been handled following the respondent's procedures in place at the time.

25. On 3 August 2021 the respondent wrote to the claimant to summarise the outcome of the individual stress risk assessment meeting. The letter included a summary of the discussion that took place at the meeting regarding the 2018 incident. The respondent provided reassurances to the claimant that the matter had been handled following the respondent's procedures in place at the time.

26. On 4 August 2021 Mr Dickson emailed the claimant, as a follow up to his email of 25 June 2021. Mr Dickson confirmed he had sought further clarity around the 2018 incident. Mr Dickson explained what he had found out. Mr Dickson provided reassurances to the claimant that the 2018 incident had been handled following the respondent's procedures in place at the time. Mr Dickson noted that the claimant had discussed the 2018 incident with Ms McKelvie during her meeting with him on 14 July 2021 and the same assurances had been given to the claimant by her. Mr Dickson said that he hoped the claimant could treat matters as closed. Mr Dickson said he would not be looking further into the 2018 incident. Mr Dickson offered the claimant support to move on in a constructive manner.

27. On 5 August 2021 the claimant emailed Mr Dickson, replying to his email of the previous day (page 131). The claimant referred to the respondent and its management team in derogatory terms, including statements where he said "*perfectly covered up...now I think it is time to go I am afraid the top organisation I wanted to work for is now a shambles*". He likened the respondent's organisation to "*lions led by donkeys....absolutely clueless management*". He concluded by saying "*keep on stealing [our] wage at the end of the month. So [much] for a care organisation cannot believe you have stooped so low*".

28. On 5 August 2021 Mr Dickson replied to the claimant. His email included a statement where he said "*Honestly we cannot resolve every concern to every individual's satisfaction but we will and do everything we can to keep both the people we support and the staff safe*" (page 131).

29. On 5 August 2021 the claimant replied to Mr Dickson. The claimant was critical of the respondent as a care organisation. The claimant was critical of the respondent's procedures for dealing with concerns. The claimant was critical of the procedures in place to deal with the 2018 incident. The claimant was critical of management whom he referred to as "*the paper shufflers*" (page 131).

30. On 11 August 2021 the claimant sent a further email to Mr Dickson (page 138). His email included statements "*Extremely unhappy with [an] organisation that was considered best for social care that I joined in 2012 which has been dying a death since 2016 only if you are honest enough know the reasons*" and "*maybe you could answer me some questions that I have already asked you what has happened to an organisation that was considered best for care.....*" and "*One time folk were proud to work for Quarriers, now people just ask why!*".

31. During the period following the individual risk assessment meeting the claimant made arrangements with his local line management to return to work on a phased basis.

32. In light of the claimant's ongoing correspondence with Mr Dickson the respondent was concerned about the claimant's return to work.

33. On 19 August 2021 the respondent invited the claimant to attend a meeting with Ms Hattie on 27 August 2021.

34. The letter stated "*This meeting is being convened to explore the views that you have expressed and in particular the persistent suggestion that you do not trust Quarriers as your employer and have no confidence in its actions and decisions and the competence and motives of the staff who carry them out. I note that your position in this regard has remained unchanged despite continued efforts to offer you support, clarification and reassurances in relation to some of the concerns you have raised, and it is clear that the current situation cannot continue. Therefore the purpose of the meeting will be to ascertain whether or not the relationship that exists between you and Quarriers has irretrievably broken down*".

35. The invitation letter advised the claimant of the possible consequences of the meeting, including that a decision regarding his continued employment with the respondent may have to be taken.

36. The letter advised the claimant of his right to be accompanied at the meeting.

37. The letter enclosed copies of documentation on which the respondent had formed a view that a meeting with the claimant was necessary.

38. The meeting was subsequently rescheduled to 16 September 2021.

39. On 16 September 2021 the claimant attended the meeting. He confirmed he was aware of his right to be accompanied by a trade union representative or work colleague. He declined to be accompanied.

40. The meeting was attended by the respondent's decision maker, Ms Hattie. Lisa Orr, People Business Partner, attended to take notes.

41. At the meeting the respondent explained the purpose of the meeting to the claimant and noted that the claimant had received a copy of the documentation sent with the invitation letter.

42. The claimant was given a reasonable opportunity to set out his position and answer the respondent's questions. The claimant was critical of the respondent's management, including his line manager.

43. At the end of the meeting the respondent advised the claimant that it was adjourning the meeting to consider its decision.

44. The notes of the meeting were sent to the claimant. The claimant wrote on the notes "*For a true and accurate reflection of what was said Quarriers should record the meetings by audio or video*".

45. On 20 September 2021 the respondent wrote to the claimant confirming the decision to dismiss the claimant for some other substantial reason, with that reason being that the employment relationship had irretrievably broken down (pages 154 – 155).

46. The dismissal letter stated "*Overall, your responses during our meeting did not give me confidence and reassurance that you were both willing and able to work in partnership with Quarriers as your employer. On the contrary, it was clear to me following this that the relationship you have with Quarriers has*

irretrievably broken down. Your tone, attitude and behaviour throughout this period is not one that is aligned with our values as an organisation, and you do not appear to understand this nor do you recognise that your feedback is not constructive".

47. The dismissal letter continued "*In coming to my decision, I am clear that a range of attempts have been made to engage with you to understand and address the concerns you raised whilst also setting out our expectation of you around the way you communicate within or in relation to the workplace. Despite this your tone and use of language have remained inappropriate and unprofessional and you do not appear to accept our position that some of the concerns you continue to raise are factually incorrect and have no basis.... You have been, and continue to be, both unwilling and unable to act upon the guidance and directions that have been given to you. Your attitude towards the organisation and some of its staff makes it impossible for the employment relationship that Quarriers has with you to continue. Accordingly, I have decided to dismiss you for some other substantial reason with effect from today (20 September 2021)*".

48. The dismissal letter confirmed that the claimant's last day of employment was 20 September 2021 and that he was being dismissed with 9 weeks' pay in lieu of notice. The letter advised the claimant of his right of appeal.

49. On 23 September 2021 the claimant emailed the respondent to appeal the decision to dismiss him.

50. On 18 October 2021 the claimant attended the appeal meeting. He confirmed he was aware of his right to be accompanied by a trade union representative or work colleague. He declined to be accompanied.

51. The meeting was attended by Ms Russell who was the respondent's appeal hearer. Christophe de Lattre, People Manager attended to take notes. Ms Hattie was also in attendance as the original decision maker. Ms Russell had had no previous involvement in the matter.

52. The meeting commenced. After around 20 minutes the claimant took the decision to bring the meeting to an end by terminating the Microsoft Teams video call.

53. On 19 October 2021 the respondent sent an appeal outcome letter to the claimant. The letter confirmed Ms Russell's decision to uphold the decision to dismiss the claimant for some other substantial reason, with that reason being the irretrievable breakdown of the employment relationship. The appeal outcome letter sets out the reasons for Ms Russell's decision.

Observations on the evidence

54. The Tribunal considered that the respondent's witnesses gave their evidence in a straightforward manner. Their evidence was each consistent with the other witnesses and consistent with the documentation to which the Tribunal was directed. The Tribunal found each of them to be credible and reliable witnesses and found their evidence to be persuasive.

55. The Tribunal found the claimant's evidence to be inconsistent at times. For example, he put it to Ms Hattie in cross examination that the working relationship had broken down, from his side, when he was told that, pending the outcome of his meeting with her, he could not return to work on a phased basis. Yet in his own evidence under cross examination, he said that the relationship had not broken down on his side. He sought to explain this inconsistency by asserting that he had no faith in the management of Quarriers but that did not mean that he had no faith in Quarriers. The Tribunal did not consider that this was a realistic view.

56. The Tribunal felt that the claimant did not appear to have any insight into his behaviour or that the manner and content of his interactions with management were causing real concern for the respondent. The Tribunal also considered that the claimant's view of the workplace and his position in it did not chime with reality. The claimant differentiated between the management of the respondent and his role as a support worker. He appeared to consider that he

could conduct himself with impunity in his interactions with management and that this would be viewed entirely separately from his day-to-day duties as a support worker. The Tribunal did not consider that this was a realistic view.

57. In evidence and in his submissions, the claimant stated that after the meeting with Ms McKelvie on 14 July 2021 he had moved on from the 2018 incident as he had had an answer from her to his question about 24-hour care. The Tribunal considered that this was not borne out by the claimant's continued criticism of the respondent and his antagonistic interactions with the respondent thereafter, in relation to the 2018 incident.

58. The claimant said in evidence that after his email to Mr Dickson on 5 August 2021, which he referred to as "*a rant*", the matter of the 2018 incident was closed for him and he had moved on. Again, the Tribunal considered that this was not borne out by the claimant's continued criticism of the respondent and his antagonistic interactions with the respondent thereafter, in relation to the 2018 incident.

59. The Tribunal's clear impression was that up to and including the appeal hearing the claimant had not moved on from the 2018 incident, and that remained the case at the Tribunal hearing.

60. There was disputed evidence about the contents of the various notes of meetings with the claimant included in the bundle. For example, the claimant said that in the meeting with Ms Hattie on 16 September 2021, the notetaker Ms Orr had interjected to ask the claimant whether he had trust in Quarriers. The claimant asserted that he replied to say that he did have trust in Quarriers. This interjection was not written down in the notes of the meeting. The claimant raised this in his email setting out his appeal against dismissal (page 156).

61. The claimant relied upon this as evidence that the notes of the meeting were inaccurate. The Tribunal also understood the claimant to rely upon this as evidence that he had confirmed to the respondent that he had trust in the

respondent. Therefore, asserted the claimant, it was unreasonable for Ms Hattie to conclude that the claimant did not have trust in the respondent.

62. The Tribunal observed that the notes of the meeting on 16 September state that they are not a verbatim minute, rather a summary of the main points discussed.

63. Ms Hattie was asked in cross examination by the claimant about whether Ms Orr had interjected to ask the claimant this question. Ms Hattie stated that she could not remember.

64. On balance, the Tribunal is of the view that Ms Orr is unlikely to have asked this question. There was no evidence that she had asked the claimant any other questions in the meeting. Her role was as the notetaker. She was not conducting the hearing and was not the decision maker. In any event the Tribunal is satisfied that even if that question had been asked by the claimant, and the claimant had replied to say that he did have trust in Quarriers, this does not result in the dismissal of the claimant being unfair. The Tribunal was satisfied that from all of the other surrounding evidence, including how the claimant responded to questions asked of Ms Hattie in the meeting with her, it was reasonable for Ms Hattie to conclude that the claimant did not have trust in the respondent.

65. The claimant also submitted that if the meeting had been recorded, this would have provided evidence to show that his tone, conduct and behaviour in the meeting were not a cause for concern. The Tribunal makes no criticism of the respondent for not recording this meeting or any of the other meetings with the claimant.

66. On balance, the Tribunal was satisfied that the written notes of the meeting were accurate. They had been taken by a member of the respondent's HR team and reviewed by Ms Hattie who was satisfied that they were an accurate summary.

67. The Tribunal was satisfied that the written notes provided ample evidence of the claimant's tone, conduct and behaviour at the meeting. The Tribunal did not accept the claimant's assertion that a recording of the meeting would have shown a different picture.

68. The claimant asserted that in so far as Ms Hattie had relied on the tone of the claimant's interactions, it was unreasonable of her to do so. He asserted that there had been no "tone" to his interactions with which Ms Hattie ought to have been concerned. He asserted that if the meetings had been recorded this would have shown that there was no "tone" to his communications. The Tribunal did not agree with that assertion.

69. The Tribunal was satisfied that the claimant's tone can be identified from the words used by the claimant, in his interactions with the respondent. The Tribunal was satisfied that the words used set an unprofessional and antagonistic tone to the claimant's interactions. In any event the tone used was only one element of concern for Ms Hattie, amongst others identified in her letter of dismissal.

Relevant Law

70. The right not to be unfairly dismissed is found in section 94 of the ERA–

"(1) An employee has the right not to be unfairly dismissed by his employer."

71. Section 98 ERA states:

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

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

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

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and(b) shall be determined in accordance with equity and the substantial merits of the case.

Submissions

72. Both parties made oral submissions. Mr Asbury also provided written submissions to the Tribunal and to the claimant. The claimant had an opportunity to consider the written submissions and hear the respondent's oral submissions before making his own oral submissions. The Tribunal has not attempted to summarise all of Mr Asbury's lengthy and helpful submissions here. Instead, the Tribunal has set out some key points only in relation to his legal submissions. The Tribunal has summarised and set out below the relevant parts of the claimant's submissions, in fairness to him. These are not a verbatim account. The parties are however assured that the Tribunal has considered the submissions of both parties in full.

Respondent

73. What was the reason for dismissal? See **Abernethy v Mott, Hay and Anderson 1974 ICR 323** where it was stated that "*A reason for dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee*."

74. The respondent asserts that there existed some other substantial reason for the dismissal of the claimant (within section 98(1)(b) of ERA), specifically an irretrievable breakdown in the employment relationship between the claimant and the respondent.

75. The claimant has not asserted that there was any other reason for his dismissal. The respondent asks the Tribunal to find, therefore, that the

claimant was dismissed because of an irretrievable breakdown of the employment relationship. This is a form of SOSR, which is a potentially fair reason for dismissal within the meaning of section 98 ERA.

76. It is noted that there is an element of conduct in this case. Disciplinary sanctions were not progressed as the respondent wanted to repair the employment relationship. Following the meeting with Ms Hattie it determined that it could not do that and that the relationship had broken down irretrievably. The case is similar to that of **Eszias v North Glamorgan NHS Trust 2011 WL 806781** where the dismissal for some other substantial reason was found to be fair.

77. Was the reason for dismissal a potentially fair reason for dismissal? The burden of proof on the employer at this stage is not a heavy one. The employer does not have to prove the reason actually did justify the dismissal. The Tribunal was referred to the cases of **Mercia Rubber Mouldings Ltd v Lingwood [1974] ICR 256**, **Willow Oak Developments Ltd v Silverwood [2006] EWCA Civ 660** and **Gilham v Kent County Council (No 2) 1985 IR 233** where it was stated that "*...if on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the inquiry moves on to section 98(4) and the question of reasonableness*."

78. From the evidence heard it is submitted that the respondent had genuine reasons to decide that it could not take the chance of putting the claimant back to work in the role which he was employed to do. Accordingly dismissing him because of that irretrievable breakdown in the employment relationship was a potentially fair reason for dismissal.

79. Was the dismissal reasonable in all the circumstances? Once the Tribunal determines that the dismissal was for SOSR the Tribunal must determine whether the dismissal was reasonable in all the circumstances (including the size and administrative resources of the employer's undertaking) in accordance with section 98(4) ERA. The Tribunal will need to investigate the reasonableness of the dismissal but the onus is neither on the employer to

prove it was fair nor on the employee to prove that it was not (**Boys and Girls Welfare Society v McDonald [1996] ICR 693**). Further the Tribunal must not substitute its own decision for that of the employer. The respondent submits that the dismissal was substantially and procedurally fair in all the circumstances and was within the band of reasonable responses.

80. The claimant's main argument seems to be that the decision to dismiss was not reasonable because there had not been an irretrievable breakdown in the employment relationship. It is submitted that the evidence presented to the Tribunal presents a very different picture. The claimant openly told the respondent on various occasions that he had no trust or faith in the organisation, its management or its rules, and he did nothing to hide his disregard for his and the respondent's regulatory body and their rules. His tone, language and attitude throughout this process further demonstrates the lack of disrespect that he had for his employer. The claimant in evidence was given a number of direct opportunities to explain why he felt the decision to dismiss him was unreasonable. It is submitted that he was not able to offer any substantive or logical explanation for that.

81. Taking all of this into account, together with the risks that the claimant's continued employment would have presented for the respondent, it is submitted that it is simply not possible to make any legitimate argument that a relationship of trust and confidence existed between the claimant and the respondent at the point of dismissal.

Claimant

82. The initial issue that led to this Tribunal was the claimant's comments in posts made on Facebook. The claimant had highlighted on Facebook an issue about a member of his team and said the question was whether or not Quarriers was the company it used to be. The claimant made a comment in a

post about how the company was managed up until 2016. The claimant was contacted by his line manager Mr Dooley saying that Ms McKelvie wanted to meet with him. The claimant assumed this was a clear the air meeting. But Ms McKelvie had a discussion with the claimant about the Scottish Social Services Council (SSSC). Ms McKelvie knew the claimant had strong views about the SSSC. The claimant was told by Ms McKelvie that he was to be investigated in relation to his fitness to practice. The claimant found this to be demeaning. Thereafter there was an investigation meeting with Tony Rae. The end result was that there was no further action.

83. After the meeting with Mr Rae the claimant was off work due to his diabetes. Dr Toal of occupational health suggested a stress risk assessment. The stress risk assessment meeting was carried out by Ms McKelvie. At that meeting there was a discussion about PWS, the service user whom the claimant supported. Ms McKelvie asked the claimant if the service user should have had 24-hour support whilst in hospital. The claimant said yes and that ended the issue. The meeting ended on a great note and the claimant was looking forward to going back to work. The claimant's question about whether the respondent was a top company was not answered.

84. The claimant received an email on 5 August 2021 from Mr Dickson which said the claimant was being unreasonable about his comments about management. The claimant never got an answer about whether the respondent was a top company. Respect goes both ways. Mr Dickson said the comments made by the claimant on 11 August 2021 could merit investigation. From the claimant's perspective the email of 11 August 2021 was a rant by him that he thought would then close matters. In the claimant's email he raised issues which were then taken on board by the respondent on their website.

85. The claimant had spoken to his diabetic nurse and was ready to return to work on a phased return to do shadow shifts. On 16 August 2021 before he had done the shadow shifts, he was stopped by Quarriers from doing so. As far as the claimant was concerned his question about the 2018 incident had been

answered. But the question about whether the respondent was a top company had not been answered and he had not been given assurances that his job would not be lost to a tendering process.

86. At the meeting with Ms Hattie on 16 September 2021 the claimant asked Lisa Orr, People Business Partner/ Notetaker, if she had spoken to Mr Dooley. Ms Orr said she could not recall. The claimant said that he had no faith in Quarriers management getting to the bottom of issues.

87. In the meeting Ms Hattie did not grasp that the matter was closed including that the claimant said he was prepared to work in other places. But why should the claimant change, he submitted, when everything had worked fine for the previous 8.5 years. When the claimant continued to say to Ms Hattie that he had not had answers to questions, he was trying to get Ms Hattie to understand how complex the needs of PWS, the service user, were. The impression the claimant got at the meeting was that Ms Hattie did not want to listen.

88. The meeting notes of that meeting with Ms Hattie are not a true and accurate account of what was said. In the dismissal letter Ms Hattie referred to my tone and language. If the meeting on 16 September 2021 had been recorded, what would have been understood would have been completely different.

89. At the appeal hearing on 18 October 2021 a recording would have shown that Ms Russell was not interested and what really happened at the end of the meeting when Ms Russell and Ms Hattie were talking over each other.

90. He submitted that his dismissal was unfair as managers in some parts of the respondent cannot take criticism and their processes need to be reviewed. The claimant's question, which was not answered, was whether the respondent was the top company that they once were. Ms McKelvie said in her evidence that she looked into the question but she gave me no answers.

91. After the stress risk assessment, the claimant was stopped from returning to his job. The investigation of Ms Hattie blames everyone apart from

management. She tried to put blame on the relationship between the claimant and his line manager Mr Dooley but the claimant didn't have issues with his line manager. Ms Hattie had said that the claimant was not reflective. The respondent's management don't know the complex needs of service users like PWS.

92. All the claimant wanted to do was to return to work in August 2021. He was stopped from doing so as the respondent took offence to the claimant asking questions which they did not like and which they did not answer. The respondent had a false perception of him. The respondent has lost someone willing to work extra hours and as part of a team.

Discussion and decision

93. In considering the complaint of unfair dismissal the Tribunal had regard to the terms of section 98 ERA which set out how a Tribunal should approach the question of whether a dismissal is fair. There are two stages: first, the employer must show the reason for the dismissal and that it is one of the potentially fair reasons set out in section 98(1) and (2). If the employer is successful at the first stage, the Tribunal must then determine whether the dismissal was fair or unfair under section 98(4). This requires the Tribunal to consider whether the employer acted reasonably in dismissing the employee for the reason given.

The reason for dismissal

94. The first issue for the Tribunal to determine is whether the respondent has shown the reason for the dismissal of the claimant. The respondent admitted dismissing the claimant and asserted the reason for dismissal was some other substantial reason of a kind such as to justify the dismissal of an employee

holding the position which the claimant held: namely an irretrievable breakdown of the employment relationship.

95. The claimant did not consider that there had been an irretrievable breakdown of the employment relationship. The claimant asserts that he had moved on from the 2018 incident prior to his dismissal and was ready to come back to work. The claimant asserts that this was evidenced by the fact that he had made arrangements with his line manager to return to work on a phased basis. The Tribunal understood the claimant to assert that this indicated that the reason for the claimant's dismissal could not be some other substantial reason, namely that the working relationship had broken down irretrievably. The Tribunal understood the claimant to assert that the reason for his dismissal was that the respondent could not take criticism. The Tribunal did not agree with these assertions.

96. The Tribunal referred to the case of **Abernethy v Mott, Hay and Anderson 1974 ICR 323** where it was stated that "*A reason for dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee*."

97. The Tribunal noted that the burden of proof on the employer at this stage is not a heavy one. The employer does not have to prove the reason actually did justify the dismissal. The Tribunal was referred to the cases of **Mercia Rubber Mouldings Ltd v Lingwood [1974] ICR 256**, **Willow Oak Developments Ltd v Silverwood [2006] EWCA Civ 660** and **Gilham v Kent County Council (No 2) 1985 IR 233** where it was stated that "*...if on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the inquiry moves on to section 98(4) and the question of reasonableness*."

98. The Tribunal was referred by the respondent to the case of **Eszias v North Glamorgan NHS Trust 2011 WL 806781** where the dismissal for some other substantial reason was found to be fair. The respondent submitted that their case is built around the same set of central facts, namely that the employee

engaged in conduct towards others within the organisation that led the employer to determine that that there had been a loss of trust and confidence to the extent that the employment relationship had irretrievably broken down.

99. With these authorities in mind, the Tribunal turned to consider the reason for dismissal. The Tribunal had regard to the letter of dismissal (pages 154 - 155) where it was clearly stated that Ms Hattie had decided that the relationship with Quarriers had "*irretrievably broken down*" and where she gave her reasons for her decision.

100. The Tribunal was satisfied, having regard to the letter of dismissal, the contents of the claimant's interactions with management, and the claimant's interactions with her at the meeting 16 September 2021, that Ms Hattie believed that the relationship between the claimant and the respondent had broken down irretrievably and that this was the reason for the claimant's dismissal.

101. The Tribunal was satisfied that the respondent had shown that the reason for dismissal was some other substantial reasons of a kind such as to justify the dismissal of an employee holding the position which the claimant held. The substantial reason was the breakdown in relationships between the claimant and members of the management team. This is a potentially fair reason falling within section 98(1) ERA, which could justify dismissal.

102. The Tribunal must now determine whether dismissal for that reason was fair or unfair.

Fairness of the dismissal

103. The Tribunal must decide the fairness of the dismissal by asking whether the decision to dismiss fell within the band of reasonable responses which a reasonable employer might adopt.

Invitation to meeting

104. The claimant was invited to a meeting by letter dated 19 August 2021. The letter advised the claimant that in light of the views the claimant had expressed regarding his lack of trust and confidence in the respondent's actions and decisions, and the competence and motives of the staff who carry them out, the purpose of the meeting was to ascertain whether or not the relationship between the claimant and the respondent had irretrievably broken down. The claimant was provided with a pack of emails and notes of discussions with him, containing his views. The claimant was given an opportunity to be accompanied to the meeting by a work colleague or trade union representative. He declined to do so.

Meeting on 16 September 2021 with Ms Hattie

105. The claimant argued that it was the perception of Ms Hattie that the relationship between the parties had broken down irretrievably. He did not agree with that perception. The Tribunal considered whether the belief of Ms Hattie that the relationship had broken down irretrievably was genuinely held. The Tribunal also considered whether the perception of Ms Hattie, that the relationship had broken down irretrievably, was a reasonable one.

106. The Tribunal had regard to the notes of the meeting prepared by Ms Orr, the respondent's People Business Partner.

107. In advance of the meeting on 16 September 2021 Ms Hattie had made herself familiar with the paperwork which had been provided to the claimant. In the meeting she adopted an approach of looking at the claimant's current view of the organisation. The Tribunal was satisfied that Ms Hattie approached the question of whether or not trust had broken down irretrievably with an open mind. She wanted to understand "*where we are in terms of working on our employment relationship*" (page 147). Her focus was on the current situation and whether the claimant was now able to "*work in partnership*" (page 148) with Quarriers. Ms Hattie said in evidence that she was looking for reassurances that the claimant had trust in Quarriers and was prepared to

move forward positively. The Tribunal was satisfied that Ms Hattie was looking at whether the relationship could be repaired.

108. Ms Hattie asked the claimant to explain his current position. The claimant said that he had spoken to his line manager about returning to work on reduced duties. Ms Hattie asked what was different from "*the responses you had been giving since last November to August of this year whereby you had indicated that as an employee, you didn't have a lot of faith or trust in us?*" The claimant responded "T*hat is right, I don't*" (page 148).

109. Ms McKelvie asked for some reassurances from the claimant. "*We seem to have been at an impasse. You had been very vocal directly and in your written word about how you felt and your perception. We are at an impasse where we are saying that we have an employee who has advised that he doesn't trust us despite us offering reassurances to some of the concerns he has raised. Moving forward, we need you to work in partnership with us so what assurances can you give me that you would do that. What has changed?*"

110. The claimant responded by referring to issues which had been raised in previous emails or discussions with the claimant and where the respondent had previously indicated that the claimant needed to move on. These included his continued assertion that the respondent should have taken responsibility for the 2018 incident and dealt with matters differently.

111. Ms Hattie identified that it did not appear to her that the claimant was able to move on from his previous issues. Ms Hattie told the claimant that the attitude he was displaying was a concern to the respondent and that his continued behaviour and attitude in his meeting with her was further breaking this relationship down. Ms Hattie said "*If you entered the workplace acting in the manner that you are talking with me today, then we are back to square one and that is my fear..... It needs to be put to bed in a positive and professional manner which today, you are not showing....I am not asking you to accept whether we are right or wrong; but you need to act in a professional manner*

and move forward." The claimant continued to refer to the 2018 incident saying that *"it'll be wiped under the carpet*."

112. As the meeting progressed Ms Hattie said that the claimant and respondent needed "*to work in partnership with each other*" (page 149). The claimant responded by saying "*It would be better off if he [PWS] was a separate entity to Quarriers as we get nothing from them*". This indicated to Ms Hattie that the claimant was still at a point where the claimant had no real trust in the management team or in the respondent as an organisation. Ms Hattie was also concerned that the claimant was of the view that PWS would be better off if he was not supported by the respondent. The meeting progressed with the claimant continuing his assertion that the respondent had not given him an answer to the 2018 incident. He asserted that the respondent could not take criticism. He referred to his assertion that Ms McKelvie had questioned his fitness to practice. He criticised the organisation, the management and his team leader. He stated he was unwilling to change, saying "*I am not changing the way I am*."

113. Having considered what was said by the claimant in the dismissal meeting with Ms Hattie (pages 147 – 153), including the examples set out above, the Tribunal was satisfied that the belief of Ms Hattie that the relationship had broken down irretrievably was genuinely held. For the same reasons the Tribunal was also satisfied that the perception of Ms Hattie, that the relationship had broken down irretrievably, was a reasonable one. The claimant did not demonstrate in the meeting that he was prepared to move on from the 2018 incident or the other matters which he had raised. On the contrary the Tribunal formed the view that the claimant had made it clear that he was not willing to move on or able to refrain from being antagonistic towards the respondent's management in his interactions with them.

114. The claimant's position in evidence appeared to be that even if there was a breakdown in the relationship between him and management, this did not mean that there was a breakdown in the relationship between him and Quarriers as an organisation. The Tribunal understood the claimant to assert

that Ms Hattie ought to have made this distinction and that it was unreasonable for her not to have done so. The claimant relied on the fact that he had made arrangements with his line manager to return to work on a phased return. The claimant asserted that this showed that it was unreasonable for Ms Hattie to have terminated his employment.

115. The Tribunal did not accept this. Quarriers is the legal entity against whom the claim is raised and it was not disputed that Quarriers was his employer. The Tribunal is satisfied that Ms Hattie was entitled to view a breakdown in the relationship between the claimant and the management of Quarriers as being a breakdown in the relationship between the claimant and Quarriers as an organisation.

116. The Tribunal was satisfied that the dismissal fell within the range of reasonable responses open to the employer. The respondent had engaged with the claimant on numerous occasions from 4 December 2020, following the inappropriate comments the claimant placed on the respondent's Facebook page. The purpose of those engagements was to seek to understand the claimant's concerns, investigate those, provide reassurances and support to the claimant and assist him to move on in his relationship with the respondent in a positive and constructive manner. This engagement continued right up until and including the meeting with the claimant on 16 September 2021, where the claimant was given ample opportunity to demonstrate to the respondent that he was prepared to move on in a positive and constructive manner.

117. The claimant relied heavily on the fact that, prior to 16 September 2021, he had arranged with his line manager to return to work on shadow shifts and thereafter light duties. Ms Hattie did not agree that this was indicative of the claimant being able to move on in his relationship with the respondent in a positive and constructive manner. Ms Hattie took the view that the claimant's continued criticism of the respondent in the meeting and the way he did so, indicated to her that he would not be able to move on in a positive and

constructive way. The Tribunal was satisfied that Ms Hattie had reasonable grounds to sustain her belief that there was an irretrievable breakdown in the relationship between the claimant and the respondent.

118. The Tribunal concluded that this was a situation where neither the claimant nor the respondent had trust and confidence in the other. The evidence was that the claimant recognised the breakdown in relations between himself and management and had no interest in repairing it. He viewed the management of the respondent as being separate from the respondent, a view which the Tribunal is satisfied is erroneous. Having reached that view, it appeared to the Tribunal that the claimant considered that he could continue to communicate with management in the antagonistic way in which he had being doing, without repercussions for his continued employment.

119. In submissions the claimant asserted that, from his perspective, the meeting with Ms McKelvie on 14 July 2021 had ended well. The claimant felt that he had received a response from Ms McKelvie to the 2018 incident. That response had ended the issue of the 2018 incident for him. The Tribunal concluded that this submission was at odds with the claimant's actions after 14 July 2021 in his continued interactions with Mr Dickson and with Ms Hattie thereafter. The Tribunal was satisfied that it was reasonable for Ms Hattie to conclude that claimant had not moved on from the 2018 incident. The Tribunal was satisfied that from the way in which the claimant interacted with management, which was continuing in the meeting with her, it was reasonable for Ms Hattie to conclude the claimant would continue to interact with the respondent in an antagonistic and unprofessional manner.

120. In evidence and in his cross examination of witnesses the claimant made multiple references to his belief that at no time up to and including his dismissal had he been given an answer to his question "Is Quarriers a top company?". The Tribunal understood the claimant to assert that he was entitled to conduct himself in the manner in which he did, up to and including his dismissal, because he believed he had not been given an answer to this

question. The Tribunal did not agree with this. The Tribunal was satisfied that this belief on the part of the claimant, and whether or not the claimant had received a response to this question, did not mean that it was unreasonable for Ms Hattie to reach the conclusions which she did.

121. The Tribunal next considered the alternatives to dismissal.

Alternatives to dismissal

122. The Tribunal began by directing itself to the case of **Turner v Vestric Ltd [1980] ICR 528** It is helpful to set out the decision of that case. The EAT held that where a dismissal was due to a breakdown in a working relationship it was necessary, before deciding whether or not the dismissal was fair, to ascertain whether the employers had taken reasonable steps to try to improve the relationship; and, that to establish the dismissal was not unfair, the employer had to show not only that there had been a breakdown but that the breakdown was irremediable.

123. The Tribunal was satisfied that the respondent had taken reasonable steps to improve the relationship. The respondent had held various meetings with the claimant where his concerns had been discussed. This included the individual risk assessment meeting with the claimant on 14 July 2021, where the 2018 incident was raised by the claimant. The incident was discussed and the claimant was provided with an explanation of the procedures which had been followed by the respondent at the time. The claimant was given assurances that the respondent had followed the correct procedures and protocols at the time. The claimant was given guidance and support about how to raise any new concerns, promptly, in the future.

124. The respondent had also provided reassurances to the claimant about his concerns about the 2018 incident in email correspondence. This included in the email exchanges between the claimant and Mr Dickson in the period June - August 2021. The claimant raised the 2018 incident in various emails to Mr Dickson. The claimant used increasingly unprofessional and inflammatory

language when doing so. Some examples include the claimant alleging that the SSSC were "*stealing a wage for being incompetent*" (page 135), making derogatory comments about the style of communication of the Chief Executive (page 134), responding to Mr Dickson's confirmation that he would look into the 2018 incident by writing "*would love to know your findings (or cover up)*" (page 133).

125. Mr Dickson looked into the 2018 incident. He replied to the claimant by email dated 4 August 2021 (page 132). Mr Dickson provided the claimant with an explanation of the procedures which had been followed by the respondent at the time. The claimant was given assurances that the respondent had followed the correct procedures at the time. Mr Dickson noted that the 2018 incident had been discussed with Ms McKelvie during her meeting with the claimant on 14 July 2021 and assurances given to the claimant at that time. Mr Dickson said that he hoped the claimant could treat the 2018 incident and the matter with Ms McKelvie about his practice as closed.

126. The claimant responded to Mr Dickson's email of 4 August 2021 in an email sent by the claimant on 5 August 2018 (page 131). The claimant referred to the respondent and its management team in derogatory terms, including statements where he said "*perfectly covered up...now I think it is time to go I am afraid the top organisation I wanted to work for is now a shambles*". He likened the respondent's organisation to "*lions led by donkeys....absolutely clueless management*". He concluded by saying "*keep on stealing [our] wage at the end of the month. So [much] for a care organisation cannot believe you have stooped so low*".

127. Mr Dickson responded the same day to say "*Honestly we cannot resolve every concern to every individual's satisfaction but we will and do everything we can to keep both the people we support and the staff safe*" (page 131). The claimant responded in an email, also on 5 August 2021, in derogatory terms, raising again the 2018 incident and referring to management of the respondent as "*paper shufflers*" (page 131)

128. The Tribunal was satisfied that prior to the meeting with Ms Hattie on 16 September 2021 the respondent had taken reasonable steps to improve the relationship and had made sensible and genuine efforts to see whether any improvement could be effected.

129. Turning then to the meeting on 16 September 2021, the Tribunal was satisfied that Ms Hattie had approached the meeting with an open mind and had made a genuine effort in the meeting to see whether any improvement could be effect. The claimant submitted that in the meeting Ms Hattie did not grasp that the 2018 incident was closed, from the claimant's perspective. The Tribunal was satisfied that it was reasonable for Ms Hattie to conclude, from the meeting, that the claimant did not consider the 2018 incident to be closed as he continued to refer to the incident and to criticise the respondent's procedures in place at the time for dealing with it. This is borne out by the claimant's submission that he continued to refer to the 2018 incident in the meeting as he had not, in his view, had answers to questions and was trying to get Ms Hattie to understand the complex needs of PWS.

130. The Tribunal was satisfied that Ms Hattie considered the option of moving the claimant to another part of the respondent's organisation. Ms Hattie addressed this in her letter to the claimant of 20 September 2021 terminating his employment. Ms Hattie said "*I have looked at alternative options available to me including allowing you to return to work. However, both your presentation during our meeting, which I highlighted to you at the time gave me cause for concern as it continued to reflect the concerns Quarriers have around your behaviour towards the organisation, and the information available to me have left no other alternative but to consider your future employment with Quarriers. You have been, and continue to be, both unwilling and unable to act upon the guidance and directions that have been given to you. Your attitude towards the organisation and some of its staff makes it impossible for the employment relationship that Quarriers has with you to continue*".

131. The Tribunal is satisfied that it was reasonable for Ms Hattie to conclude that the claimant did not have trust in the respondent given his wide-ranging criticism of the management of the organisation. This criticism was not limited to his line manager, such that a move to another part of the organisation, with another line manager, could have been considered. The claimant's lack of trust and criticism of the respondent extended to management of the respondent as a whole, whom he referred to on various occasions as "*paper shufflers*". His criticism extended from the Chief Executive down. He had told Ms Hattie "*I am not changing the way I am. You can't change a person*" (page 152). Here was a situation where neither party had trust and confidence in the other. Longstanding issues remained unresolved and it was reasonable for Ms Hattie to conclude that he had no interest in repairing it.

132. The claimant raised in the meeting that he was going to respond to an email from his line manager looking for staff to work at Rivendell, one of the respondent's care facilities. Ms Hattie asked the claimant what would change if he was to return to work. The claimant responded by saying "*Count to 10 Gerry*..." and "I *am at the end of my tether with this*". The Tribunal was satisfied that it was reasonable for Ms Hattie to conclude that she had not been given reassurances by the claimant that he was prepared to move on from the 2018 incident and that he had confidence in management and that he could return to work, whether to provide care services to PWS or to work elsewhere in the respondent's organisation.

133. The claimant asserted that it was unreasonable for Ms Hattie to reach a decision based on the previous 11 months. He had worked for the respondent since 2012 and had not changed during that period. The Tribunal was satisfied that it was reasonable for Ms Hattie to base her decision on the previous 11 months. In any event she was not aware of concerns about the claimant prior to that.

134. The Tribunal was satisfied that it was reasonable for Ms Hattie to conclude that there had been an irretrievable breakdown of trust on the part of the

claimant in the management of the respondent and that this created a risk for the respondent if the claimant continued to be employed in any capacity.

Dismissal appeal meeting on 18 October 2021 with Ms Russell

135. The claimant was given the opportunity to attend an appeal hearing and this took place on 18 October 2021. He was entitled to bring a work colleague or trade union representative but elected not to do so.

136. The claimant argued that he had not been given a fair appeal hearing. He submitted that Ms Russell was not interested in his appeal and that a recording would have shown this. He submitted that prior to the meeting ending, Ms Russell and Ms Hattie were talking over each other. That is why he switched off the link and the meeting ended. The Tribunal makes no criticism of the respondent for not recording the hearing. Notes of the hearing were taken by a member of the respondent's HR team as a summary of what was said. Ms Russell had reviewed those notes and was satisfied that they were accurate.

137. The claimant chose to end the appeal meeting prematurely. Ms Russell required to reach a decision based on the information which she had available to her, from the dismissal process and matters discussed at the appeal hearing before it was ended by the claimant. In reaching her decision Ms Russell noted that, on the one hand, the claimant was saying that there were no outstanding issues. On the other hand, the claimant had raised the 2018 incident in the appeal and was critical and derogatory of the respondent saying that "*Quarriers had done bugger all about this*".

138. Ms Russell reached the view that the decision to dismiss should be upheld. In her appeal outcome letter (page 163) she said "*...you have shown a continued inability to accept or comprehend any views that do not mirror the ones that you hold, hereby making any employment relationship impossible.....Unfortunately I have been left with no confidence that if future situations were to arise, that you would be able to engage with Quarriers and*

its staff any differently. For me, this has been a key consideration in coming to my decision".

139. The Tribunal was satisfied that the respondent carried out a fair appeal hearing and Ms Russell engaged with the claimant in the appeal hearing. The Tribunal was satisfied that it was reasonable for Ms Russell to decide to uphold the dismissal decision reached by Ms Hattie.

140. The Tribunal has set out above that it was satisfied the respondent had shown the reason for the claimant's dismissal was some other substantial reason. The Tribunal has also set out above its conclusion that Ms Hattie had reasonable grounds upon which to sustain her belief that there was a breakdown in trust and confidence between the claimant and the respondent. The Tribunal reminded itself that the question it must ask itself is not whether the Tribunal would have dismissed the claimant. The Tribunal must ask whether the respondent's decision to dismiss the claimant fell within the band of reasonable responses which a reasonable employer might have adopted (**Iceland Frozen Foods Ltd v Jones 1983 ICR 17**). The Tribunal decided that, in the circumstances of this case, that the respondent's decision to dismiss the claimant fell within the band of reasonable responses which a reasonable employer might have adopted. The dismissal was fair.

141. The Tribunal therefore dismissed the claimant's claim for unfair dismissal.

Employment Judge: Jacqueline McCluskey
Date of Judgment: 25 April 2022
Entered in register: 27 April 2022
and copied to parties