EMPLOYMENT TRIBUNALS

Claimant: **Mr P Tilden**

Respondent: **Cambian Group Ltd**

Heard at: **Exeter by Video** **On: 6-9 June 2022**

Before: **Employment Judge Smail**
Ms R. Clarke
Ms R. Hewitt-Grey

Representation
Claimant: **In Person**
Respondent: **Mrs S. Hornblower (Counsel)**

JUDGMENT having been sent to the parties on 24 June 2022 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

1. By a claim form presented on 29 January 2021 the Claimant claims: first, automatic unfair dismissal alleging the principal reason for his dismissal was that he had made one or more protected disclosures. Secondly, general unfair dismissal. Thirdly, direct age discrimination by association with his mother, whom we understand was 85 at the date of dismissal. Fourthly holiday pay – this claim has been paid in full and is no longer pursued. Fifth breach of contract. He was dismissed without notice. He says he should have received his notice pay. Sixthly, on the first day of the hearing, for reasons given at the time, the claim was amended at the suggestion of the Tribunal to include an allegation that the dismissal was automatically unfair on the basis that the principal reason for the dismissal was that the Claimant had raised matters of health and safety.

THE ISSUES

2. These were identified by Employment Judge Fowell in a preliminary hearing on 16 September 2021.

Unfair Dismissal

3. General Unfair Dismissal. What was the reason for the dismissal? The company said it dismissed on the grounds of conduct. If so, did the company act reasonably in all the circumstances in treating that as a sufficient reason to dismiss him? The Tribunal will usually decide in particular whether the company had a genuine belief in his misconduct made on reasonable grounds following a sufficient investigation and a fair process and whether dismissal was within the range of reasonable responses open to an employer in the circumstances.

4. We also have the remedy issues of whether, if there was deficiency in process, there was a percentage chance that he would have been dismissed anyway, the Polkey reduction. There is possible further reduction if there was contributory fault by blameworthy conduct; i.e., whether there should be a further percentage reduction to compensation. If there is contributory fault that is also a strong indicator that reinstatement would not be appropriate.

5. Automatic unfair dismissal. Was the reason or principal reason for the dismissal. First that the Claimant had made a protected disclosure. Alternatively, that he had raised matters of health and safety.

Breach of contract

6. Whether by his conduct, viewed objectively, the Claimant repudiated his contract or whether he was entitled to contractual notice of termination.

Age discrimination

7. We have also a claim of direct age discrimination by association. Did the company, in dismissing the Claimant, treat him less favourably than it treated or would have treated someone else in the same circumstances as the Claimant's save that they did not live with an elderly (85 year old) relative.

THE LAW

Automatic Unfair Dismissal

8. Section 103A of the Employment Rights Act 1996 relates to protected disclosure dismissals. 'An employee who is dismissed shall be regarded for the purposes of this Part 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. Protected disclosure is defined earlier in the Employment Rights Act. Section 43A says that a protected disclosure means a qualifying disclosure as defined by Section 43B. Section 43B deals with disclosures qualifying for protection by subsection (1). 'In this Part a qualifying disclosure means any disclosure of information which in the

reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following:

(a) A criminal offence has been committed, is being committed or likely to be committed;

(b) That a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject;

(c) - (f)…..

9. This case principally is put on Section 43B (1) (b). There has to be a disclosure of information which the Claimant as a matter of fact makes in the belief that he is doing so in the public interest; that belief has to be objectively reasonable; and it has to tend to show one or more of the stipulated matters.

10. The alternative way automatic unfair dismissal is being put following the amendment is under Section 100 of the Employment Rights Act 1996 which applies to health and safety cases. By subsection (1) an employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason, of if more than one the principal reason for the dismissal, is that … (d) in circumstances of danger which the employee reasonably believed to be serious and imminent which he could not reasonably have been expected to avert, he left or proposed to leave or while the danger persisted refused to return to his place of work or any dangerous part of his place of work; or (e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took or proposed to take appropriate steps to protect himself or other persons from the danger. By subsection (2) for the purposes of subsection (1) (e) whether steps which an employee took or proposed to take were appropriate, is to be judged by reference to all the circumstances including in particular his knowledge and the facilities and advice available to him at the time.

General Unfair Dismissal

11. General unfair dismissal is covered by Section 98 of the Employment Rights Act 1996. The Tribunal has had regard to Section 98 of the Employment Rights Act 1996. By Section 98(1), it is for the employer to show the reason, or if more than one the principal reason for the dismissal. A reason relating to the conduct of an employee is a potentially fair reason. By Section 98(4) where the employer has fulfilled the requirements of (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.

12. This has been interpreted by the case of British Home Stores v Burchell [1978] IRLR 379 EAT as involving the following questions.

- Was there a genuine belief of misconduct?

- Were there reasonable grounds for that belief?
- Was there a fair investigation and procedure?
- Was dismissal a reasonable sanction open to a reasonable employer?

13. We have reminded ourselves of the guidance in Sainsburys Supermarkets v Hitt [2003] IRLR 23 Court of Appeal that at all stages of the enquiry the Tribunal is not to substitute its own view for what should have happened but judge the employer as against the standards of a reasonable employer bearing in mind there maybe a band of reasonable responses, This develops the guidance given in Iceland Frozen Foods v Jones [1982] IRLR 439 Employment Appeal Tribunal to the effect that the starting point should always be the words of Section 98(4) themselves. In applying this section an Employment Tribunal must consider the reasonableness of the employer's conduct not simply whether the Employment Tribunal consider the dismissal to be fair. In judging the reasonableness of the employer's conduct, an Employment Tribunal must not substitute its decision as to what was the right course for that of the employer. In many, though not all cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view whilst another quite reasonably take another. The function of the Employment Tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair. If the dismissal is outside the band it is unfair.

Wrongful Dismissal/Breach of Contract

14. Wrongful dismissal relates to the failure to give notice. An employee is entitled to notice of dismissal as a matter of contract or compensation in lieu unless as a matter of fact, as determined objectively by the Tribunal on the balance of probability, the employee committed a repudiatory breach of contract entitling the employer to dismiss without notice by way of acceptance of the breach. The burden is on the employer to prove that.

Age Discrimination

15. We now turn to the Equality Act 2010. Age is one of the protected characteristics. Direct discrimination is provided for by Section 13(1). A person A discriminates against another B if because of a protected characteristic, A treats B less favourably than A treats or would treat others. By subsection (2), if the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim. The Respondent does not rely on that defence of proportionate means of achieving a legitimate aim; its defence is that it did not treat the Claimant less favourably on the grounds of age at all.

FINDINGS OF FACT

16. The Claimant was employed by the Respondent between 4 August 2014 and 14 August 2020. He was dismissed by Claire Reed, a registered manager, for what she described as three specific reasons:

    (a) Failure to provide a foreseeable return date.

    (b) Failure to provide a doctor's certificate or shielding documentation to cover your absence from 6 July 2020.

    (c) Failure to provide documentation covering the reasoning of your absence.

17. The significance of 6 July was that that was the date prescribed for a return to work meeting in a final written warning issued by Vicki Medlin, now Elsworthy, dated 30 June 2020 in which the Claimant was given the following instruction. He would return to work on 6 July 2020 at 10.00am at Valley View. On 6 July he will meet with Lindsey Hopkins at Valley View at 10.00am and a return to work meeting will be conducted along with an attendance review meeting. His training needs would also be discussed, a plan put in place to bring all his training up to date following absence. It was advised that should he not return to work on 6 July 2020 at 10.00am, and if he did not have a valid sicknote to cover his absence from that date forwards, then this will be considered as being absent without authorised leave and that Awal process would proceed up to and including disciplinary proceedings which could result in dismissal.

18. The Respondent operates homes for children in care. Three children we understand live at Valley View. The Claimant worked as a residential care worker. There had been no issue about his performance in the role or his attendance up until the matters concerning this case. The problem was that he had been off work since 29 October 2019. At first this was related to the death of his father. As soon as Covid hit the Claimant's position was that he could not risk infecting his mother with whom he lives. We understand she was 85 years of age. He tells us that she has a heart condition.

19. As to the absence relating to his father: he was challenged about this by the Respondent on 27 January 2020. Authorised compassionate leave had expired on 2 December 2019 after the sad demise of his father. It was suggested that the Claimant had not been in touch with management since. He was taken to a disciplinary hearing about this period of absence on 17 February 2020. No formal action was decided upon by Nikki McClements, the Regional Manager. The letter recording the outcome of the disciplinary hearing on 17 February 2020 laid down some expectations about attendance in future including attending a meeting on 4 March 2020 to discuss a phased return.

20. It is clear that his father's death, and the illness leading to it, and its aftermath was a difficult time for the Claimant. That was also confirmed by an Occupational Health report dated 27 February 2020. The Claimant has made it clear to us, and as he made it clear throughout the attendance management process, that he found the 27 January 2020 letter offensive in which it had been alleged he was absent without leave. The Claimant did not attend the

meeting on 4 March 2020, informing the Respondent that he would not be able to attend it but would be able to attend a meeting on most other days.

21. Covid then hit - the first day of national lockdown was 23 March 2020. The Respondent resumed trying to manage attendance by email dated 8 April 2020. He was asked for a return to work date to be provided by 14 April 2020. He did not provide one and so a letter was written to him by Lindsey the Homes Manager on 14 April 2020 asking him to contact her by 21 April 2020 to explain why he had not provided a return to work date and when was he proposing to return to work. He was advised that being absent without leave could result in dismissal.

22. There is an internal email dated 16 April 2020 from Laura Clovey of Human Resources to Lindsey Hopkins and Nikki McClements saying "could you please advise [Phil] that should he need to isolate to protect his mother that is absolutely fine and understandable but we will need him to provide supporting documents as we ask from any colleague not attending work because of Covid". In many ways this email is at the heart of the case. Did the Respondent manage to convey that information clearly enough to the Claimant? They clearly understood that it was his position that he could not return during Covid so as to risk catching Covid and so risk infecting his elderly mother. Laura Clovey repeated this on 22 April 2020. She asked whether there had been any contact since the email of 16 April 2020 from the Claimant. She wrote:

> "As I have said, we can absolutely try and support working from home if possible. Catching up on training is a great idea but if he is self-isolating because of his mother we need documents to support this as per policy".

23. On 23 April 2020 Lindsey Hopkins emailed the Claimant and said:

> "Can I also check while you are isolating looking after your mum and your own health, what method you are wanting to use for being off from work. I have added the link for company advice and support which would also give you information on the ground for people experiencing hardship due to Covid 19. I also shared the details for NHS advice and support. I am hopeful you will be able to advise me so I can support you appropriately".

24. She then puts in a link to the Respondent's website on Covid. She goes on:

> "Employees will receive statutory sick pay. If you are refraining from work because (a) you are caring for someone in the same household and have therefore been advised to do a household quarantine (b) you are living with someone who falls within the high risk category and you have been advised to do a household quarantine (c) someone in your household has coronavirus symptoms, in line with current government directive, statutory sick pay will be paid from day one of absence instead of day 4. You can self certify for the first seven days of work. This means following the company process but not having to get a note from a doctor or NHS 111. If you are self isolating due to

coronavirus for more than seven days, you should get an online self isolation note from NHS 111 online at the NHS link".

25. It seems likely to us that after that email the undated email from the Claimant at page 107 was written. The Claimant wrote:

> "I am sorry that you have unsuccessfully tried to contact me. Unfortunately, as I said at my disciplinary hearing, as you will not get a signal on my home phone, email is probably the best way. I had hoped to return in about February but the disciplinary was very upsetting and I feel very unjust. You were aware of the lockdown, at the moment my mother lives with me and she is over 70. I am not willing to risk getting infected and passing it onto her. I hope some of the restrictions will be eased soon and I hope to return then. I have actually missed Valley, I hope the young persons are all well".

26. Lindsey Hopkins replied to that on 4 May.

> "Hi Phil, its great to hear from you. I am glad you are keeping well. I totally understand that you are at home caring for your mother and you do not appear to be fitting into any of the categories for sick pay. However, from my perspective, this puts us in a difficult situation. If you do not have one of these formats for not being at work, then you are absent from work. I am aware you are going to seek advice to see if you have missed something. I need a response by 8 May 2020 with your return date, isolation note, sick note or any other method that you feel suits your needs. Please advise me of how you would like me to support as I would like this not to go any further with the absence policy. We can resolve this issue".

27. The Respondent knew that the Claimant's issue was his mother and the Tribunal, which includes HR Specialists, have been tracking whether the Respondent, throughout the history of dealing with this matter, made it reasonably clear - whether it acted reasonably in terms of its investigation - in establishing the three things it needed to establish bearing in mind it knew the issue was his mother. Those issues were:

- Whether the mother lived with him.
- Her age
- Any relevant health conditions.

There can be no more than those three things that was relevant to the position they knew he was adopting.

28. The Claimant was then invited to a second disciplinary hearing. For reasons that do not matter, he had the letter twice. The problem identified by the Respondent in the invitation to the second disciplinary hearing was as follows:

> "I appreciate you have stated the reason for your absence via email on 15 April 2020 and you are currently self-isolating to care for your

mother who falls with an at-risk group. You have however, not provided any letter from the GP, NHS or specialist confirming any medical need to self-isolate. It is company policy and standard procedure that any absence over seven days is to be covered by a sick note or an NHS GP letter which are being received by people in high risk groups at this time. You have also failed to confirm whether you would like to arrange any authorised leave to support you during this period".

29. Does this make it clear that the Respondent was seeking evidence relating to the Claimant's mother? Or is there confusion that it might be asking for the Claimant to provide evidence relating to himself? On balance the Tribunal cannot help thinking that this is not sufficiently clear.

30. Zoe Austin chaired this disciplinary hearing. It is certainly right that in the meeting the Claimant also made it clear that he was very unhappy about being challenged by the period he was off work connected with his father. This is a recurrent theme in the Claimant's position and the Respondent witnesses have confirmed their suspicion to us that in fact the Claimant simply did not want to return to work. He also raised in this meeting matters which purported to raise disclosures. Zoe Austin dismissed him on 20 May 2020 summarily for gross misconduct. The relevant passage for our purposes is page 122, five paragraphs down.

> "You contacted Lindsey Hopkins on 15 April 2020 to advise that you were sharing a home and isolating with you mother who falls within an at-risk group. I agree that you should not be asked to come to work if this potentially puts your mother, yourself, or others at-risk. However, this does require the same documentation as any other absence. Despite numerous emails and an additional letter dated 7 May 2020 you have not provided either a note from the NHS, your GP or agreed the period of authorised leave with your manager. The response you provided to Lindsey Hopkins on 12 May 2020 still did not confirm your return or request any authorised leave".

31. Again, in the Tribunal's assessment this passage did not focus upon the evidence relating - not to him - but to his mother. The Claimant appealed the dismissal, he did so by email dated 2 June 2020, and in this extensive four page appeal he included the following:

> "My dismissal letter also complains that I submitted no documentation with regards to my decision to self-isolate due to the Covid 19 situation. However, as I explained to my manager Lindsey Hopkins and as I explained at my disciplinary, Cambian does not have any administrative route which may permit someone in my position to seek leave if they decide to self isolate. The procedure seeks a note from the NHS but the link provided in the Cambian documentation to the NHS website is for people who have symptoms of Covid 19 and serves to report such cases to the NHS. As this is the third time I have had to repeat the same information I will reiterate. I looked carefully at the documentation and there is no means by which I can be absent from work under Cambian rules for the purposes of self isolation. Neither Zoe Austin nor Laura Clovey made any comment about this during my

disciplinary. I pointed this out to my manager, Lindsey Hopkins, in an email of 1 May. In her email reply of 4 May Lindsey Hopkins agreed with me that this is correct. She said you do not appear to be fitting into any of the categories for sick pay. I would like to point out that I have never asked for sick pay nor have I ever expected to receive it. However, I am not willing to put my mother who is categorised as a vulnerable person at-risk just because Cambian's bureaucracy refused to recognise any objectively legitimate reasonable and government approved decisions not to attend work. Besides I am aware of other employees who are also not coming to work at the moment due to Covid 19".

32. The Claimant here appears to be saying he was not able to access relevant information applicable to his case. Yet this is about his mother. Why did the Respondent simply not say 'provide the evidence in relation to your mother'?

33. The appeal was heard by Vicki Medlin, now Elsworthy. There is much of excellence in this letter. In the body of the letter she addresses directly perhaps the problem. She writes:

> "I appreciate that you were not sick. However, that is the case for all people in the shielding group. The purpose of shielding is to prevent people from becoming sick. As I am sure you can appreciate this current Covid 19 situation has affected a number of our team across the region and the country and a number of people have been required to shield either for themselves for dependents or for cohabitants who fall into a high risk category. All of these staff have provided documentation to cover the absence. Even if it has not been directly themselves that it is required to shield. Doctors have been very understanding in this unprecedented time and no staff have reported any issues with receiving conformation of the requirement to shield for themselves or their household. You have advised that you have not contacted your doctor at all during this time. It was made clear to you on a number of occasions that failure to provide documents to cover the absence would result in you being classed as absent without authorised leave and will be treated as such by the company. You were given a significant amount of time to provide this document and continued to refuse. You have still not provided any documents or agreed a return date by the time of your disciplinary hearing on 13 May at which point you were given further opportunity to provide documentation for your absence and still refuse. I view this as refusal to adhere to a reasonable management request as well as breach in the absence policy and your contract of employment as such I fail to view this as insufficient mitigation to overturn your outcome".

34. Why did Vicki Medlin make reference there to the Claimant contacting his doctor. It is not his doctor it is not his health. She does set aside the dismissal and takes points of mitigation. She writes:

> "I feel it is important that I highlight to you that I do not deem your action and behaviour up to this point acceptable. However, I have taken into account what you have raised about your previous record in the company and I have looked into your history and having worked

> for the company for five years you have had an excellent attendance and performance record in that time. I think this is a very important factor and consider this a strong mitigating point in your favour. I have taken into consideration that this failure to cooperate with management and failure to adhere to policy could be attributed to your recent difficult personal circumstances and the unprecedented worldwide situation created by Covid 19".

35. She substitutes a final written warning for the dismissal and we have set that out at paragraph 17 above. She said in respect of the direction to return to work on 6 July 2020:

> "I must advise you that should you not return to work on 6 July 2020 at 10.00am and if you do not have a valid sick note to cover your absence from that day forwards then this will be considered as being absent without authorised leave and the Awal process will proceed up to and including disciplinary proceedings which could result in dismissal".

36. She did not take the opportunity which she might have done to say provide the evidence relating to your mother (1) does she live with you? (2) How old is she? (3) What is her health condition?

37. The Claimant did not go back to work on 6 July and gave advance notice that he would not attend in person he offered to attend remotely. Purporting to comply with the requirements of the final written warning - aside from attending that is - the Claimant self-certified on 5 July 2020 and he approached his surgery for an online consultation on 3 July 2020 about himself, and not his mother.

38. On 16 July 2020, Claire Reed Senior Housing Manager invited him to attend the third disciplinary hearing on 21 July 2020. Prior thereto on that same day Shona Watson of HR emailed the Claimant:

> "Good afternoon Philip, thank you for your email. However, as you have been made aware, if you cannot come into work you must provide a valid sick note. Whilst I appreciate you advise me that your doctor will not issue a sick note we have company policies to adhere to and uphold and if you are unable to provide a sick note or isolation note or relevant GP letter to cover your absence, this absence will be treated as absence without authorised leave. Additionally, we have not had any other staff reporting difficulty with sick notes when required". Ms Reed accepted that email is about the Claimant's health not his mother's health.

39. He replied on the 31 July 2020 the Claimant wrote to Shona Watson:

> "I was supposed to have a hearing today at 4.00pm however, I notice yesterday that the location was not given. I have tried to call Claire Reed but have not been able to get through. I emailed her yesterday to advise her of the above but she has not got back to me yet. I have been trying to contact my GP to obtain a sick note. I spoke to them yesterday. The GP was unable to give me a telephone consultation

> cannot do one next week and the receptionist advised me to phone next week in order to book a consultation for the following week. Sorry but apparently, they are overwhelmed.

40. This confusion from the Respondent's instructions is manifested in the Claimant's own confusion as to precisely what it is evidence-wise he is supposed to adduce. The true position was that his health was not relevant; it was his mother's alleged vulnerability.

41. The Claimant was dismissed by Claire Reed by letter dated 14 August 2020 following a hearing held on 10 August 2020. She does give the specific reasons that we have referred to above. Failure to provide foreseeable return date, failure to provide doctor's certificate or shielding documentation to cover your absence period from 6 July 2020, failure to provide documentation covering reasoning of your absence.

42. In the body of the letter she writes:

> "The mitigation you provided for your actions was that you are living with your vulnerable elderly mother and due to global Covid 19 pandemic you have to shield to protect her. Unfortunately, you are unable to provide any documentations confirming that you are isolating. You are also unable to provide a foreseeable return to work date. Therefore, I conclude that your actions constitute gross misconduct and summary dismissal. Further to the careful consideration given to your representations and final written warning on your file I was unable to find any mitigating factors for a lesser sanction".

43. The Tribunal asked Ms Reed in the course of evidence whether she thought about asking why he had not produced medical evidence relating to his mother. She told us that she had thought about that but decided against it because it might upset the Claimant. She said it might be thought to be too personal to ask about his mother's health condition. The Tribunal does not find that that is a reasonable position, indeed the Tribunal finds that is an entirely unreasonable one. It was precisely his mother's medical condition which was the reason that the Claimant was putting forward for why he could not risk leaving the home and catching Covid and infecting his mother.

44. We also note that the Claimant confirmed that he remained disillusioned with the Respondent relating to the challenge of him about his attendance in connection with his father's illness and death.

45. He appealed that decision to dismiss him in the appeal letter dated 27 August 2020. He writes as follows:

> "You also cite a lack of evidence to justify my absence. I have explained this numerous times. I have sent you proof that my GP, due to the extra work caused by the Covid 19 situation, has not been issuing any of the normal routine administrative paperwork such as letters and sick notes. I have sent you several times a screen shot from their website confirming this. I have also told you that I have spoken to one of the doctors at the practice, Dr Holman, who told me

emphatically that the practice was indeed not doing such paperwork and claimed that this was due to government dicta. You have not engaged with this and have failed to mention it in the dismissal letter.

'Moreover, Lindsey Hopkins affirmed that I don't appear to be fitting into any of the categories for sick pay. However, I was not asking for sick pay or for any pay at all but merely for the reasonable request to self isolate in accordance with government guidelines. I would like to emphasise that I have not been a financial drain on the company in any way during my absence. The only costs you have incurred have been due to your own intransigence. Cambian is well aware of my domestic arrangements of my age. It seems very likely that I would have a mother who is over 70 and thus more vulnerable than most. It is clear that the absent management policy you quote does not cover the unprecedented situation presented by Covid 19. It seems highly unjust to apply this unrevised policy to my situation and at this time".

46. Again, there is passage in this appeal letter showing that the Claimant had been seeking to engage his doctors relevant to him but that was not the issue as the Respondent did or should have understood it, it was the evidence relating to his mother's condition. That penny does not appear to have dropped with the Claimant. Part of the explanation for that, we find, is the muddled communications he was getting from the Respondent.

47. The appeal manager Mrs Fern did in contrast understand precisely what the issue was. The Claimant had managed by the time of the appeal hearing to get a backdated sicknote from a doctor covering 21 July – 21 August 2020 recording that he was unfit for work for stress and anxiety and headaches but as Mrs Fern pointed out that was not his issue. His issue was his mother and she wrote in paragraph 3 of her decision rejecting his appeal:

"Throughout this unprecedented time, we have had a number of staff who were required to shield themselves due to being in high risk categories or having caring responsibilities for someone in a high risk category and the company has supported these staff. All staff that were required to self isolate due to being in a higher risk category were issued with a letter either from the NHS or their GP or consultant, advising of their need to isolate and shield themselves with their dependants. You have confirmed that you were shielding as you mother is over 70. However, you confirmed that she never received a letter advising her to shield and you were basing your decision on government guidelines even after all shielding guidance was lifted on 1 August 2020. Whilst I acknowledge that you have not requested payments for this period, an employer cannot accept that you will be indefinitely absent from work while you refuse to provide a return date. I understand this option was given to you several times and you repeatedly refused to confirm a return date I do not uphold this aspect of your appeal".

48. It was the Claimant's position that he could not provide a return date until such time as he felt that by going out he would not be potentially exposing his mother to risk. The Claimant was not given a clear direction to provide

evidence not concerning him but concerning his mother's age and state of health and vulnerability.

Matter of Protected Disclosures

49. The Claimant alleges that the principal reason for his dismissal was that he had made one or more protected disclosures. He says that he was interviewed in April 2019 in respect of an investigation as to the consequences of a deliberate management decision to understaff the home by one person. In the course of that, one of the children slit her wrists with a razor, bled into her sheets and slept in these sheets for three nights. Nikki McClements investigated this matter. It was not as we understand it the Claimant who brought this matter to the Respondent's attention, but he was interviewed in the course of the investigation. He gave his account. He also says that in approximately August 2019 he told Ms Bellamy, the then Manager of Valley View in a team meeting, that should there be further matters of safeguarding concern he would bypass the internal procedure and go straight to Ofsted.

50. We find that the Claimant did not make a protected disclosure in either of these incidents. He gave his account in the course of an investigation. The Respondent was already aware of the first issue. As regards the August 2019 matter an indication that in the future he might bypass the reporting procedure if there is any further safeguarding concern as he saw it, is not a protected disclosure. That is an intimation of what he might do in the future. That is not a disclosure of information purporting to show a breach of civil obligation which he believed was made in the public interest. There is no disclosure of information whatsoever.

51. The Tribunal finds he did not make protected disclosures but more fundamentally none of this had any relevance or had any influence upon the decision to discipline or dismiss him for attendance. He was disciplined for not going to work over an extended period. He was not going to work and as the Respondent saw it, it was unauthorised because he had not produced the documentation that they required. The Tribunal has no hesitation in rejecting the Claimant's suggestion that the reason or principal reason for his dismissal was that he had made any protected disclosure. Firstly, he had not made any protected disclosure, secondly, it had no causal relationship to the decision to dismiss him.

CONCLUSIONS

52. As to the claim that the Claimant was automatically unfairly dismissed for having made a protected disclosure: we repeat that the Tribunal finds he did not make protected disclosures but more fundamentally none of this had any relevance or had any influence upon the decision to discipline or dismiss him for attendance. He was disciplined for not going to work over an extended period. He was not going to work and as the Respondent saw it, it was unauthorised because he had not produced the documentation that they required. The Tribunal has no hesitation in rejecting the Claimant's suggestion that the reason or principal reason for his dismissal was that he had made any protected disclosure. Firstly, he had not made any protected

disclosure, secondly, it had no causal relationship to the decision to dismiss him.

53. Was he automatically unfairly dismissed because he had raised matters of health and safety? We find that the Claimant does not demonstrate that. The reason why he was dismissed was because he had not produced corroboration for his position that he had to shield to protect his mother. He had not produced any written corroboration justifying that and that was the reason he was dismissed. Had he provided that information, he would have been supported by the Respondent. If the information exists, it is a matter of genuine sadness that he has been dismissed for failing to produce the documentation that might actually exist. That is the reason for his dismissal. The claims under Section 100(1)(d) and 100(1)(e) fail.

54. The claim of age discrimination also fails. Having identified the reason for dismissal, namely the failure to provide corroborating information and therefore failing to provide a return to work date in the absence of that corroborating information, the Respondent's position would have applied to a hypothetical comparator with caring obligations for a third party of any age. The Respondent still would have required the production of corroborating documentation. The Claimant does not establish even a prima facie case that it was the fact that his mother was elderly over the age of 70. He does not demonstrate a prima facie case that this influenced the decision in any way whatsoever.

55. With regards to general unfair dismissal, there was a potentially fair reason for dismissal that was misconduct. Being absent without authorisation is misconduct, potentially. 'Serious misconduct' within the Respondent's policy, it is not. This is a matter which activated the Claimant significantly. It is not one of those examples of gross misconduct which amount to criminal or gross negligence care of individuals. The Respondent's belief was that they had a basis for believing that it was absence without authorisation because they did not have a corroborating document in support. That is a dismissal offence, potentially after warnings.

56. The problem in this case, as we have been alluding to throughout, goes in our judgement to the reasonableness of the investigation. We find that the Respondent failed to ask the Claimant directly and simply to produce the information required to support his position. Their requests were confused and in some respects bungled. The position of Ms Reed, the dismissing officer, in making a positive decision not to ask for the relevant information because it might be thought to be too personal and therefore offend the Claimant is beyond any range of reasonable response. The Claimant was saying he could not go to work because to leave the home would run the risk in the pandemic of catching Covid and he could not risk his elderly vulnerable mother, having just lost his father, catching Covid. The evidence required to justify that position, which it seems the Respondent would have accepted from its internal emails from HR, was no more than: Did the Claimant's mother live with him? How old was she? What were her medical problems if any? The Tribunal has a real sense of frustration that request was not communicated clearly such that the Claimant understood it. We have seen significant amounts of evidence of the Claimant going off to his own GP trying to report his own absence to his own doctor when that missed the point.

57. The Claimant has served on the Respondent, and adduced before the Tribunal, public statements of knowledge of the Covid vulnerability of the elderly and those with, as he says his mother had, a heart condition. We were shown the House of Lords library document posted on the website on 3 June 2020 which deals with the position of the elderly and has links to a variety of complications and it only takes a few clicks to be informed, out there in the public domain, that someone over the age of 60 with a heart condition has a significantly higher risk of serious complications of Covid including death.

58. The Respondent unreasonably conducted its investigation by failing to ask the Claimant in clear terms to serve upon it the evidence relating to his mother's health. For that reason, this dismissal is unfair.

59. In terms of remedy, we need production from the Claimant of evidence relating to his mother's state of health. He will have to provide what he might have provided to the Respondent had they made their request reasonably clear. We do not at this stage offer percentages for Polkey or contributory fault reductions. These should be dealt with at the remedy hearing. We also prefer to look at the issue whether the Claimant repudiated his contract for the purposes of notice pay at the remedy hearing. Once the Tribunal knows what he might have provided we will have the information upon which we can fairly make decisions on the remaining matters.

60. All claims are rejected aside from general unfair dismissal. It is the conclusion of the Tribunal that the Claimant was unfairly dismissed, there was a failure in the investigation by failing to make it clear that what the Respondent needed was not the Claimant's evidence of sick notes relating to him, but details of his mother's accommodation, age and medical vulnerability.

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Employment Judge Smail
Date 11 August 2022

REASONS SENT TO THE PARTIES ON
22 August 2022 By Mr J McCormick

FOR THE TRIBUNAL OFFICE