EMPLOYMENT TRIBUNALS

Claimant: **Mr B Kristensen**

Respondent: **Portman Healthcare Limited**

Heard at: London Central (by cvp) **On:** 29 June & 25 August 2022

Before: Employment Judge Emery

Appearances
For the claimant: In person
For the respondent: Mr D Sillitoe (solicitor)

PRELIMINARY HEARING JUDGMENT

1. The meeting on 27 May 2020 retains Employment Rights Act 1996 s.111A protected conversation status.
2. The claimant's statement on 16 August 2020 and his subsequent disclosures were not qualifying protected disclosures under ERA 1996 ss43A&B
3. The claim of automatic unfair dismissal is struck-out.

REASONS

The Issues

1. This hearing was to determine the following issues:
    a. Has a meeting on 27 May 2020 lost s.111A 'protected conversation' status because of the respondent's conduct during this meeting?
    b. Did the claimant make protected disclosure(s)?
    c. If (b) is yes, should some or all of the detriments claim be struck-out on the basis they stand no reasonable prospects of success?

Witnesses

2. I heard evidence from the claimant and from the respondent's witnesses:

    a. Ms Louise Oates – Head of Operations E&W
    b. Ms Karen Ferguson – Practice Manager Harley Street

3. I read documents referred to in statements and in evidence. This judgment does not recite all of the evidence I heard, instead it confines its findings to the evidence relevant to the issues in this case. It incorporates quotes from my notes of evidence; these are not verbatim quotes but are instead a detailed summary of the answers given to questions

Preliminary Issue

4. The claimant argues that he made disclosures commencing on 16 August 2021 and subsequently in a grievance, the respondent states that the claimant has only alleged that a disclosure on 27 August 2021 amounts to protected disclosure; hence there can be no detriments prior to this date.

5. The claim form states that the claimant discovered an employment contract on his personnel file with what was purported to be his signature on 12 August 2021, he contends that this signature is a forgery. It is common ground that the claimant attended his workplace on 16 August 2021 with a police officer present. The claim form says that the claimant reported that his contract had been forged to his employer *"both contemporaneously and in subsequent grievances".* It says that his access was hindered to his personal file on/around 16 August 2021, *"… because the police had attended the respondent's premises with him, and because the claimant had made a disclosure that a criminal offence had been committed"* (paragraph 22 page 19).

6. The claimant provided voluntary further information on his claim which states that his 'protected disclosure was on 27 August 2021 in a letter tilted "Whistleblowing regarding forgery of signature".

7. Mr Sillitoe accepts that Ms Ferguson's evidence was the claimant said his contract was forged when he attended with a PC on 16 August. He accepts that this is mentioned in the claim form; that it could be inferred that paragraph 22 of the claim refers to a protected disclosure on this date. But the respondent sought further information on this claim and received a specific answer that only the 27 August letter was his alleged disclosure. *"So if there is an earlier disclosure, there is no detail, it is inferred at best, and not pleaded and not in F&BPs"*.

8. I concluded from the wording of the claim that the claimant is alleging he made the following disclosure on a repeated basis orally and in writing, commencing when the police attended the respondent's premises on 16 April 2021 – that a criminal offence had been committed by the forging of his signature on his contract. While the further particulars says that his disclosure was later, it is clear that the claimant was not arguing he made no disclosures earlier, this was a reference to his formal written protected disclosure.

9. I concluded that the claimant had not intended to argue that none of his earlier comments amounted to protected disclosures. I concluded that it was necessary to look at what the claimant said from 16 April 2021 onwards to determine whether or not any of the claimant's statements, written and oral, amounted to protected disclosures, whether taken in isolation or read together.

Relevant facts

10. The claimant was employed as a Dental Hygienist by the respondent from May 2008 to 30 September 2021. The respondent says he was fairly dismissed for conduct related reasons, the claimant argues his dismissal was unfair and that he was dismissed because he whistleblew.

The 'protected conversation' – 28 May 2021

11. The respondent's position is that all that happened at this meeting is governed by Employment Rights Act 1996 s.111A, that it was a protected conversation. The claimant accepts that this is how the meeting was characterised by the respondent, but argues that Ms Oates conduct during the meeting amounted to improper conduct, and that the meeting loses its protected conversation status.

12. The respondent's case is that it called this meeting because his managers had valid concerns about the claimant's conduct and what they considered to be his failure to address his low utilisation and the reasons for this, including repeated failures by him to abide by management requests to address his low utilisation, in particular his failure to call up patients for a hygiene appointment. The respondent says that at the time of the protected conversation they considered this should be addressed by a protected conversation as an alternative to a disciplinary process.

13. The claimant accepted in his evidence and during his questions of Ms Ferguson that he had issues of low utilisation, his dislike of calling patents had been discussed with him and that the need to improve his utilisation had been discussed with him; he accepted that these issues had been discussed in an appraisal in January 2021 and at a meeting in February 2021.

14. The claimant argued that the transcript of the 28 May 20201 meeting is clear (he covertly recorded this meeting): he was not allowed to be accompanied at the meeting, despite the respondent alleging he had been given this option. The claimant considers he was given an ultimatum – that if he did not accept the offer, the alternative would be a thorough investigation into his lack of patients, and his failure to call them up to arrange appointments.

15. The claimant argued that he was *"shut down"* when he tried to speak, as shown in the meeting recording and transcript. Ms Oates attitude was that this *"would"* be a disciplinary, she was *"abrupt",* there was *"no invitation to a conversation. Whenever I was trying to correct - I was shut down"*. He said that he mentioned during this meeting that he was *"not a phone sales person, I suck at it, and also the ethical aspect of cold-calling patients"*, but that this was not in the notes of meeting. Ms Oates evidence was that the

calls were meant to inform patients that hygiene appointment was needed *"this is something that hygienists do … it was not improper to ask this".*

16. The claimant accepted in his evidence that his utilisation was low and that he was hesitant to 'cold-call' patients. He argued that the 'threat' to him was that he would be found *"guilty as charged"* in a disciplinary process; Ms Oates attitude was *"… not calm or nice, I have a different opinion"*. He said that he was in effect given two options – take the settlement on offer, or face dismissal following a disciplinary. , this was *"very scary".* He pointed out that the respondent's position changed, that the issue was subsequently regarded as a capability issue, not a disciplinary issue (e.g. 194).

Protected disclosure(s)

17. The claimant case relies on historical issues regarding his contract of employment: his case is that he has only ever agreed and signed one contract, in 2008 with the original owner of the business. Following a TUPE transfer, the claimant was given a new contract in April 2016. He disputed the terms of this contract and, he argues, he refused to sign it.

18. The claimant argues that emails from his then Practice Manager to a prospective purchaser (BUPA) show that he had not signed this 2016 contract by 28 July 2016: *"…I have been unable to get [the claimant] to sign a contract. In desperation I told him to write on the contract the changes or parts he did not agree to … but instead he has re-written his contract! … I will wait for him to sign a BUPA contract."* (58).

19. The claimant also points to evidence that he had not agreed his contract by 12 April 2017: he was sent a 'written statement of particulars' on 10 April 2017 and in a follow up email his Practice Manager said *"… as requested by the partners I personally gave you the written statement of particulars".* In response the claimant asked for an electronic copy *"…as I have some suggestions for alterations and we can end up with a contract everyone can accept."* (59).

20. On 10 August 2021, the claimant was told by HR that the practice held a copy of his contract *"… signed by yourself on 21 April 2016, and the copy of the contract you have amended…"* (62).

21. On 13 August 2021 the claimant asked Ms Ferguson to see his personnel file, this was fetched and he was told he could copy what he wanted. When inspecting it he saw a copy of the 2016 contract – this had a signature on it. He contends that while this looked like his signature, it was a forgery. He took copies of the same.

22. The claimant did not immediately inform his employer of his view that his signature had been forged: instead he sent emails, saying he was *"surprised"* about mention of a contract in 2016.

23. In his evidence the claimant said that he then researched the issue; he knew his signature had been forged, and in his research he found the crime of 'use of a false instrument' under the provisions of the Forgery and

Counterfeiting Act 1981. He considered that it was a criminal matter and he contacted the police.

24. The claimant's evidence was that he *"managed to convince"* the police to send someone to check the contents of his personnel file. His rationale for doing so was that it would be harder to prove that forgery had taken place if the contract and associated emails *"should mysteriously disappear"* (paragraph 49 statement).

25. The police and the claimant attended his work address on Monday 16 April and the claimant asked for access to his personnel file. At this point, the claimant informed Ms Ferguson that there is a forged document on his file, Ms Ferguson accepts that he was 'vocalising' to all that a crime had been committed. She said that the police officer came into the office and *"I asked the PC what about and he responded that he was not quite sure, but [the claimant] made a complaint"*.

26. The claimant argues that he would not be the first or the last victim of such forgery by the respondent – that it was likely to have happened, or would happen, to another employee. He accepted that when he said his contract had been forged, he did not refer to any other employee this may have happened to; he said *"I did not know this - I was not thinking of this…".* He argued that when he saw the contract *"I knew forgery had been committed towards me…".*

27. On 27 July 2021 the claimant made what he contends is a whistleblowing complaint in writing to the respondent's CEO Mark Hamburger. This states that he considers a criminal offence had been committed, also one had been covered up. He says that while he does not know who forged his signature, but that Ms Stevens had used a false instrument against him by stating that he had signed a copy of his contract of employment in her email on 10 August 2021.

Submissions

28. Mr Sillitoe argued that there was no undue pressure at the 28 May 2021 protected conversation. The claimant was not told he would be dismissed as an alternative, he was told that there would be a process which would be followed if he did not negotiate an exit: in fact the ACAS Code allows for the potential alternatives to be discussed. That while this may have been interpreted as an ultimatum, there is no evidence that any improper pressure was applied.

29. Did the claimant have a reasonable belief that what he was saying about the alleged forgery was in the public interest? *Chesterton* requires the claimant to have a belief at the time of making the disclosure that it was in the public interest (this does not have to be the predominant reason for making it), and that this belief needs to be a reasonably held belief. Also, while it must be a genuine and reasonable belief that the disclosure is in the public interest, this does not have to be the predominant motivation in making it.

30. In this situation, Mr Sillitoe argued that the claimant's allegation of a criminal offence is not a statement in the public interest. Just because an offence may have been committed does not mean that it is in the public interest to make a disclosure. *"In most cases it may be"*, but in this case there is only one person whose interests are served, as this relates only to the claimant's contract of employment. There must be *"something else"* for this to be in the public interest.

31. Mr Sillitoe argued that *Simpson* is illustrative; that the motive behind this employee's disclosures was a financial concern about his commission payments rather than any regulatory concerns he was referring to in his statements; this could never be in the public interest.

32. Mr Sillitoe argued that it *"does not follow"* that the claimant asserting a criminal offence meant that this was a disclosure in the public interest. The characteristics of the offence alleged may be relevant to determine if the disclosure is of more than the claimant's private interests; here there is no effect on the wider public in this particular allegation, either in the claimant's belief at the time, or in his reasonable belief.

33. Mr Sillitoe argued the same with the 27 August 2021 letter: his only concern is his own personal circumstances, that someone had forged his contract: *"This is a workplace dispute relating only to him; no element is in the wider public interest"*.

34. Mr Sillitoe rejected that argument that a belief that a criminal offence may have been committed in a private workplace dispute may be in the public interest; this was a private interest. He argued that the claimant's belief is in fact a series of assumptions: that the forgery happened recently; it was a deliberate criminal act. *"All this is in the context if his personal situation, and wholly lacking credibility from a reasonable standpoint"*.

35. Strike-out: Mr Sillitoe accepted that this application was contingent on the 1st PID being 27 August – all the alleged detriments prior to this cannot be a whistleblowing detriment if this was the 1st PID. As found above, I accepted that the alleged 1st PID was on 16 August 2020. Mr Sillitoe's application for a strike-out therefore does not proceed.

36. Mr Kristensen argued that the forgery of a signature on a contract is clearly in the public interest as the respondent has committed a criminal offence. The General Dental Council would consider this to be in the public interest – the good reputation of a Dentist – a criminal offence would lead to a strike-off the Dental Register.

37. Mr Kristensen argued that he knew he had not signed contracts after 2008 *"Then I am told I have signed a contract in 2016, I know this is not the case …. I know I have not signed. I know that a forgery had taken place."* After checking the law he was *"so certain"* that a criminal offence had been committed, that he went to the police because he wanted *"…authority to witness that this paper is in my folder. Without it I would have a weaker case [that this was a forgery]."* He said that page 120 shows that he was concerned about other employees – *"I do not know if others have been tampered with".*

38. On the protected conversation, the issue for him was the amount of times he was expected to call patients; he accepted that there was a dispute between him and his employer on his utilisation, but he argued that his colleagues were being given more patients via reception. He argued that notwithstanding his concerns he was *"left in no doubt"* he would be put through a disciplinary procedure. He said that he was *"aware for months"* he was being managed out. He argued that the meeting constituted harassment, *"the best evidence is that there were no proper notes",* also that he was not given the opportunity to have a union rep resent. The minutes were inaccurate. Also, it was never a disciplinary issue as was later confirmed, again evidence of unreasonable conduct.

39. On the strike-out of the claim, Mr Kristensen said that the respondent was made aware that he had not signed the contract, that this issue was never investigated, that the respondent did not have reasonable belief he had committed acts of misconduct.

40. In response Mr Sillitoe argued that any error in the protected conversation process – e.g. a subsequent decision taken that utilisation was not going to be treated as a disciplinary issue - does not amount to improper conduct, or bad faith *"… to say an employer would lose protection because of a mistake - would make this far less attractive to employers. An innocent mistake does not lose protection."*

The Law

41. Employment Rights Act

43A Meaning of "protected disclosure"

In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

43B Disclosures qualifying for protection

(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. that a criminal offence has been committed, is being committed or is 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

…

111A Confidentiality of negotiations before termination of employment

(1) Evidence of pre-termination negotiations is inadmissible in any proceedings on a complaint under section 111

This is subject to subsections (3) to (5).

(2) In subsection (1) "pre-termination negotiations" means any offer made or discussions held, before the termination of the employment

in question, with a view to it being terminated on terms agreed between the employer and the employee

(3) …

(4) In relation to anything said or done which in the tribunal's opinion was improper, or was connected with improper behaviour, subsection (1) applies only to the extent that the tribunal considers just.

Case Law

Confidentiality of pre-termination negotiations in unfair dismissal cases

42. If anything said or done in a pre-termination negotiation was, in a tribunal's opinion, improper or connected with improper behaviour, confidentially will only apply to the extent that the tribunal considers just (s 111A(4)).

43. *Faithorn Farrell Timms LLP v Bailey [2016] IRLR 839 EAT*, the following guidance was given: The term 'improper behaviour' in s 111A(4) is wider than the term 'unambiguous impropriety' (the without prejudice principle). This allows the tribunal to take a broader approach to the behaviour in question and gives it greater flexibility when exercising its discretion under s 111A(4). The exercise of that discretion involves a two-stage task by the tribunal. The first is that it must consider whether there was improper behaviour by either party during the settlement negotiations, this being a matter to be determined on the particular facts of the case, having due regard to the non-exhaustive list of examples in paragraph 18 of the Code. If there was, the second stage requires the tribunal to decide the extent to which the confidentiality should be preserved in respect of those negotiations.

44. The *ACAS Code of Practice on Settlement Agreements* contains the following guidance: Guidance on what constitutes improper behaviour is contained in paragraphs 17 and 18 of this Code. Where there is improper behaviour, anything said or done in pre-termination negotiations will only be inadmissible as evidence in claims to an employment tribunal to the extent that the tribunal considers it just:

> "What constitutes improper behaviour is ultimately for a tribunal to decide on the facts and circumstances of each case. Improper behaviour will, however, include (but not be limited to) behaviour that would be regarded as 'unambiguous impropriety' under the 'without prejudice' principle."
>
> The Code lists some non-exhaustive examples of improper behaviour, including harassment, bullying, discrimination, and also:
>
> (e) Putting undue pressure on a party. For instance:
>
> (i) Not giving the reasonable time for consideration set out in paragraph 12 of this Code;
>
> (ii) An employer saying before any form of disciplinary process has begun that if a settlement

proposal is rejected then the employee will be dismissed;

45. The Code makes it clear that an employer is entitled to set out in "a neutral manner" the reasons leading to the meeting "… or factually stating the likely alternatives if an agreement is not reached, including the possibility of starting a disciplinary process…"/

Disclosures in the "public interest"

46. It is for the claimant to show that his disclosure was in the *public* interest, not just a vehicle for a private grievance. The 2013 amendment added the following words in italics to s 43B(1) which now defines a 'qualifying disclosure' as 'any disclosure of information which, in the reasonable belief of the worker, *is made in the public interest and* tends to show one or more of the following…'

47. The public interest test is that it must be in the reasonable belief of the employee that the disclosure was made in the public interest"

48. *Chesterton Global Ltd v Nurmohamed [2017] ICR 731:* In a case of mixed interests, it is for the tribunal to rule as a matter of fact as to whether there was *sufficient* public interest to qualify under the legislation. ''The statutory criterion of what is "in the public interest" does not lend itself to absolute rules, still less when the decisive question is not what is in fact in the public interest but what could reasonably be believed to be. I am not prepared to rule out the possibility that the disclosure of a breach of a worker's contract of the *Parkins v Sodexho* kind may nevertheless be in the public interest, or reasonably be so regarded, if a sufficiently large number of other employees share the same interest. I would certainly expect employment tribunals to be cautious about reaching such a conclusion, because the broad intent behind the amendment of section 43B(1) is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers – even, as I have held, where more than one worker is involved. But I am not prepared to say never. In practice, however, the question may not often arise in that stark form. The larger the number of persons whose interests are engaged by a breach of the contract of employment, the more likely it is that there will be other features of the situation which will engage the public interest.

"… In a whistleblower case where the disclosure relates to a breach of the worker's own contract of employment (or some other matter under section 43B(1) where the interest in question is personal in character), there may nevertheless be features of the case that make it reasonable to regard disclosure as being in the public interest as well as in the personal interest of the worker…. The question is one to be answered by the Tribunal on a consideration of all the circumstances of the particular case …

"… The four factors adopted are as follows: (a) the numbers in the group whose interests the disclosure served; (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing

disclosed – a disclosure of wrongdoing directly affecting a very important interest is more likely to be in the public interest than a disclosure of trivial wrongdoing affecting the same number of people, and all the more so if the effect is marginal or indirect; (c) the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people; (d) the identity of the alleged wrongdoer – as [counsel for the employee] put it in his skeleton argument, "the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest" – though he goes on to say that this should not be taken too far."

49. *Ibrahim v HCA International [2019] EWCA Civ 207*: The mental element imposes a two stage test: (i) did the clamant have a genuine belief at the time that the disclosure was in the public interest, then (ii) if so, did he or she have reasonable grounds for so believing? The fact that a motivation for making the disclosure may be different: "the necessary belief [of the employee] is simply that the disclosure was in the public interest".

50. *Parsons v Airplus International Ltd UKEAT/0111/17:* The necessary reasonable belief in that public interest may arise on later contemplation by the employee and need not have been present at the time of making the disclosure. Where an employee makes a series of allegations that in principle *could* have been protected disclosures but in fact were made as part of a dispute with the employer, the tribunal was held entitled to rule that they were made *only* in her own self-interest – the fact that an employee *could* have believed in a public interest element is not relevant.

Conclusions

s.111 Protected conversation

51. I concluded that the respondent did not act in an improper way during this meeting. I accept that this was a difficult meeting for the claimant. I accept that he was being told that the respondent was unhappy with his performance and conduct, and wanted to explore his leaving without going through a process. I accept that this strongly suggests the respondent has reached a conclusion about his exit. I also accepted that it was never made clear to the claimant he could leave the meeting if he felt uncomfortable, he was never told he could have a colleague or trade union rep present. I also accepted that the notes were not verbatim, and as was accepted in evidence did not contain all that was said at the meeting.

52. However, the very essence of a protected conversation is that an employer is able to speak bluntly about issues such as conduct or performance and set out the options, one of which may be dismissal after a process (see ACAS Code above). I did not accept that the conduct at this meeting amounted to bullying or harassing conduct.

53. It is very difficult for a long-standing employee to accept this kind of conversation. But I did not accept that the respondent's conduct was improper. I did not accept that it was made clear to the claimant that he

would inevitably be dismissed. The fact that there was a subsequent change in approach, the utilisation would be treated as a capability issue confirms that no definite plan had been made at the meeting. There was nothing in the tone of these present which suggested that this was an improper conversation.

54. Mr Kristensen's evidence was that he was stopped from speaking when he was trying to raise his own arguments in rebuttal, that this amounted to bullying conduct. I accepted that the premise of this conversation was not to have a discussion or debate about performance, but for the respondent to set out in broad terms 'where we are', and the options, one of which was leaving on agreed terms. Accordingly, it was not unreasonable for the respondent to want to stick (broadly) to the script and not to enter into debate. Hence I accepted that the claimant felt shut down, but this was not improper in the context of this first protected conversation meeting.

55. The failure to allow the claimant to have a colleague or rep present did not make this meeting unreasonable; the claimant felt able to argue his case, the utilisation issue was not a surprise to him. He was not being asked to reach a decision on his future during that meeting.

56. Accordingly I concluded that the 27 May meeting retains its protected conversation status under the provisions of ERA 1996 s111A. It cannot be referred to in the claimant's unfair dismissal claim.

Protected disclosure

57. Did the claimant have a reasonable belief that what he was saying about his contract of employment was in the public interest? *Chesterton* requires the claimant to have a belief at the time of making the disclosure that it was in the public interest (this does not have to be the predominant reason for making it), and that this belief needs to be a reasonably held belief.

58. There can be mixed motives: where the disclosure relates to a breach of their own contract of employment of some other 'personal interest', *"there may nevertheless be features of the case that make it reasonable to regard disclosures as being in the public interest, as well as in the personal interest of the worker".*

59. I accepted that throughout, the claimant had a genuine belief that his signature had been forged on the April 2016 contract.

60. The claimant at the time said *"I do not know if any others"* are at similar risk of having their contract tampered with; that the respondent could *"choose"* to put in measures to protect other employees contracts *"or just to mine"* (120).

61. I accepted that the claimant only believed that his contract had been tampered with, that at best he did *"not know"*, if anyone else could be affected. I also accepted that while a potential criminal offence, the Police were evidently not interested in ascertaining if a crime had been committed, despite being led to the alleged crime. The claimant did not want a crime

investigating, he wanted a Police officer to witness what was on his personnel file.

62. I did not accept that the claimant genuinely believed that his contract being forged had any public interest element. It was a private contractual matter, the police were called as a witnesses to what was in his contract. Even if the contract's signature was forged, this at best (or worst) amounted to a breach of the claimant's contractual rights and may go to issues of a repudiatory breach of contract. There is the issue of what was the valid contract and what are its terms and has it been breached. These are all private contractual issues, and at the time I concluded that the claimant simply did not know if they were in the public interest.

63. The same with the grievance of 27 August and other communications with his employer: at its highest the grievance complains about the forgery to his contract, and says that this is a serious issue. It does not refer to other employees, or any wider public interest.

64. The highest the documentary evidence goes "I do not know" if others are at risk of having contracts tampered with.

65. This was not, I concluded, a matter which the claimant believed was in the public interest at the time he made his disclosures. His sole concern was about the impact on him and his contractual rights in what was becoming a protracted dispute with his employer about (amongst other issues) his utilisation.

66. It follows that the claimant did not, either verbally on 16 August or subsequently in writing on 27 August, make qualifying protected disclosures.

67. The claim of automatic unfair dismissal is therefore struck-out.

ORDERS

Final hearing

1. The hearing has already been listed for 7 days. In light of significant parts of the claim being struck-out, the claim which proceeds is one of 'ordinary' unfair dismissal and a claim of wrongful dismissal (notice pay claim). The respondent is calling 4-5 witnesses. I therefore reduced the listing to a 4 day hearing which will take place on **Tuesday 5 - Friday 9 September 2023**. The case will be heard by an Employment Judge. The hearing will start at 10.00 am. You must arrive by 9.30 am (or be online if it is a video/online hearing).

Hearing timetable

2. The hearing timetable is likely to be:

Day 1	2 hours	Tribunal reading and preliminary matters
	3 hours	Claimant's evidence
Day 2	3 hours	Claimant's evidence
	2 hours	Respondent's evidence
Day 3	3 hours	Respondent's evidence
	2 hours	Submissions
Day 4	3 hours	Tribunal making decision and giving Judgment
	2 hours	Dealing with compensation or other remedies if necessary

3. If you think that more or less time will be needed for the hearing, you must tell the Tribunal as soon as possible.

Claims and Issues

4. The claims and issues, as discussed at this preliminary hearing, are listed in the Case Summary below. If you think the list is wrong or incomplete, you must write to the Tribunal and the other side by **14 November 2022**. If you do not, the list will be treated as final unless the Tribunal decides otherwise.

Documents

5. By **14 November 2022** the respondent must send the claimant copies of all documents relevant to the issues listed in the Case Summary below.

6. By **28 November 2022** the claimant must send the respondent copies of any other documents relevant to those issues. This includes documents relevant to financial losses. By 28 November 2022 the claimant must request from the respondent any documents he believes are missing from the respondent's documents.

7. Documents includes recordings, emails, text messages, social media and other electronic information. You must send all relevant documents you have in your possession or control even if they do not support your case. A document is in your control if you could reasonably be expected to obtain a copy by asking somebody else for it.

8. Documents includes recordings, emails, text messages, social media and other electronic information. You must list all relevant documents you have in your possession or control even if they do not support your case.

File of documents

9. By **16 December 2022** the claimant and the respondent must agree which documents are going to be used at the hearing.

10. The respondent must prepare a file of those documents with an index and page numbers. They must send a hard copy to the [claimant/respondent] by **16 January 2023**.

11. The file should contain:

1. The claim and response forms, any changes or additions to them, and any relevant tribunal orders. Put these at the front of the file.

2. Other documents or parts of documents that are going to be used at the hearing. Put these in date order.

12. The claimant and the respondent must both bring a copy of the file to the hearing for their own use.

13. The respondent must bring [two/four] more copies of the file to the hearing for the Tribunal to use by 9.30 am on the first morning (or provide copies electronically if an online hearing).

Witness statements and updated schedule of loss

14. The claimant and the respondent must prepare witness statements for use at the hearing. Everybody who is going to be a witness at the hearing, including the claimant, needs a witness statement.

15. A witness statement is a document containing everything relevant the witness can tell the Tribunal. Witnesses will not be allowed to add to their statements unless the Tribunal agrees.

16. Witness statements should be typed if possible. They must have paragraph numbers and page numbers. They must set out events, usually in the order they happened. They must also include any evidence about financial losses and any other remedy the claimant is asking for. If the witness statement refers to a document in the file it should give the page number.

17. At the hearing, the Tribunal will read the witness statements. Witnesses may be asked questions about their statements by the other side and the Tribunal.

18. The claimant and the respondent must send each other copies of all their witness statements by **31 March 2023**. The claimant must sent a copy of his updated Schedule of Loss by the same date.

19. The claimant and the respondent must both bring copies of all the witness statements to the hearing for their own use.

20. The respondent must bring two more copies of the witness statements to the hearing for the Tribunal to use by 9.30 am on the first morning. If the hearing is by video, the respondent must send an electronic copy of the hearing file and all the witness statements to the Tribunal for the Tribunal to use.

Hearing preparation

21. By **4 August 2023**, the claimant and the respondent must both write to the Tribunal to confirm that they are ready for the hearing or, if not, to explain why.

22. The respondent must prepare and try to agree:

    1. a neutral chronology, listing the key events and when they happened. The chronology should refer to page numbers from the file;

    2. a list of people involved in key events and their job titles;

    3. a list of the key documents in the file, with the page numbers, that the Tribunal needs to read at the start of the hearing.

23. The respondent must bring one copy to the hearing for the Tribunal (or supply electronically if a video hearing) to use.

24. All you need to know about preparing for hearings by video is in a separate document. Please read the guidance and information carefully.

Variation of dates

25. The parties may agree to vary a date in any order by up to 28 days without the Tribunal's permission, but not if this would affect the hearing date.

About these orders

26. These orders were made and explained to the parties at this preliminary hearing. They must be complied with even if this written record of the hearing arrives after the date given in an order for doing something.

27. If any of these orders is not complied with, the Tribunal may: (a) waive or vary the requirement; (b) strike out the claim or the response; (c) bar or restrict participation in the proceedings; and/or (d) award costs in accordance with the Employment Tribunal Rules.

28. Anyone affected by any of these orders may apply for it to be varied, suspended or set aside.

Writing to the Tribunal

29. Whenever they write to the Tribunal, the claimant and the respondent must copy their correspondence to each other.

Useful information

30. All judgments and any written reasons for the judgments are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimants and respondents.

31. There is information about Employment Tribunal procedures, including case management and preparation, compensation for injury to feelings, and pension loss, here: *https://www.judiciary.uk/publications/employment-rules-and-legislation-practice-directions/*

32. The Employment Tribunals Rules of Procedure are here: *https://www.gov.uk/government/publications/employment-tribunal-procedure-rules*

33. You can appeal to the Employment Appeal Tribunal if you think a legal mistake was made in an Employment Tribunal decision. There is more information here: *https://www.gov.uk/appeal-employment-appeal-tribunal*

CASE SUMMARY

The claimant was employed by the respondent for 13 years until his dismissal on grounds the respondent characterises as misconduct and gross misconduct. The claimant contends that the respondent did not have a reasonable belief in misconduct, and that this was not the genuine reason for his dismissal. The claimant claims notice pay.

The Issues

1. **Unfair dismissal**

    1. Was the claimant dismissed?

    2. What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

    3. If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:
        a. there were reasonable grounds for that belief;
        b. at the time the belief was formed the respondent had carried out a reasonable investigation;
        c. the respondent otherwise acted in a procedurally fair manner;
        d. dismissal was within the range of reasonable responses.

2. **Remedy for unfair dismissal**

    1. Does the claimant wish to be reinstated to their previous employment?

    2. Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

    3. Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

    4. Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and,

if the claimant caused or contributed to dismissal, whether it would be just.

5. What should the terms of the re-engagement order be?

6. If there is a compensatory award, how much should it be? The Tribunal will decide:

    a. What financial losses has the dismissal caused the claimant?
    b. Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
    c. If not, for what period of loss should the claimant be compensated?
    d. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
    e. If so, should the claimant's compensation be reduced? By how much?
    f. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
    g. Did the respondent or the claimant unreasonably fail to comply with it?
    h. If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
    i. If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?
    j. If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
    k. Does the statutory cap of fifty-two weeks' pay apply?

7. What basic award is payable to the claimant, if any?

8. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

3. Wrongful dismissal / Notice pay

1. What was the claimant's notice period?

2. Was the claimant paid for that notice period?

3. If not, was the claimant guilty of gross misconduct? / did the claimant do something so serious that the respondent was entitled to dismiss without notice?

Employment Judge Emery
1 November 2022

JUDGMENT SENT TO THE PARTIES ON

02/11/2022
FOR THE TRIBUNAL OFFICE