EMPLOYMENT TRIBUNALS

Claimant: **Mr M Thomas**

Respondent: **Bespoke Care Group Limited**

Heard at: **Swansea** **On: 26 & 27 September 2022**

Before: **Employment Judge S Jenkins**
Members: **Mr R Mead**
Mr B Roberts

Representation:
Claimant: Mr L Welsh (Consultant)
Respondent: Mr N Henry (Consultant)

JUDGMENT having been sent to the parties on 28 September 2022, and written reasons having been requested by the Claimant in accordance with Rule 62(3) of the Employment Rules of Procedure 2013, the reasons are as follows:

REASONS

Preliminary Issues

1. In the week leading up to the hearing, the Respondent had indicated that it wished to make an application to strike out the claims. The Claimant also indicated that he wished to adduce additional documents to the hearing which were not in the agreed bundle. Both matters were considered as preliminary issues.

Strike Out Application

2. The strike out application was made on two bases. The first was that the claims should be struck out in their entirety, on the basis of non-compliance with Tribunal Orders issued on 10 February 2022 and/or on the basis that the manner in which the proceedings had been conducted by, or on behalf

of, the Claimant had been scandalous, unreasonable or vexatious, as the Claimant's conduct had delayed the provision of the hearing bundle.

3. The second basis related only to the Claimant's claims of detriment on the ground of protected disclosure. The application was based on the assertion that the claimed detriment, i.e. the decision to terminate the Claimant's employment, took place on 6 June 2021, with the employment then terminating at the end of a period of one week's notice on 13 June 2021. Taking account of early conciliation, and the date of the submission of the Claim Form, only matters taking place on or after 12 June 2021 were in time. It was therefore contended that the detriment complaint had been brought out of time and should be dismissed.

4. The Claimant accepted that there had been failings with regard to compliance with Tribunal Orders, albeit pointing out that there had been similar failures on the Respondent's side. The Claimant contended that relevant documents had been in the Respondent's possession, apart from some of the additional disputed documents, for some time. A bundle was now in existence and witness statements had been exchanged.

5. With regard to the application to strike out the detriment claim, the Claimant contended that there had been a number of ongoing detriments up to the provision of a grievance outcome, after the Claimant's employment had ended, on 21 June 2021. It was therefore contended that the detriment claim had been brought in time. It was confirmed that if we concluded that the detriment claim had been brought out of time, there were no points advanced by the Claimant with regard to any lack of reasonable practicability in submitting the claim within time.

Conclusions on Strike Out Application

6. With regard to the application to strike out the entirety of the claims, our focus was on the consideration of whether, notwithstanding any deficiencies or failures, it would be possible to still have a fair trial. We also noted that, following the postponement of the originally intended hearing in May 2022, in advance of which specific dates for compliance with Case Management Orders had been given, no replacement dates had been provided.

7. Whilst we would have anticipated that the parties would have made swifter progress with regard to the management of the case, the Respondent had been in possession of the relevant documents, and there was no indication on the Respondent's side that it would have sought to adduce any other witness evidence had it been in possession of the documents at an earlier stage.

8. We noted that there was a hearing bundle, that witness statements had been exchanged and therefore we considered that a fair trial could proceed. We therefore refused the application to strike out the entirety of the Claimant's claims.

9. With regard to the strike out of the detriment claim, we noted the guidance provided by the Court of Appeal in ***Ministry of Defence -v- Jeremiah*** **[1980] ICR 13**, where Brightman LJ noted, "*I think a detriment exists if a reasonable worker would or might take the view that the duty was in all the circumstances to his detriment*", and where Brandon LJ said, "*I do not regard the expression "subjecting…. to any other detriment" as meaning anything more than "putting under a disadvantage*".

10. In this case, with regard to the grievance outcome, the Claimant had submitted the grievance during the course of his employment and the provision of a response was therefore an anticipated step. We did not consider that the provision of the grievance outcome itself put the Claimant under any form of disadvantage, and contrasted that with the position that would have arisen had the Respondent failed to provide any response, which would then have been a failure which would have put the Claimant under a disadvantage.

11. The response, whilst obviously disappointing for the Claimant in terms of not upholding his grievance, was provided in a comprehensive and measured way, and we did not consider that the provision of the response could be viewed as having put the Claimant under a disadvantage, or could be viewed objectively, from the perspective of the reasonable worker, as a detriment.

12. In our view, the last detriment was the indication to the Claimant, on 6 June 2021, that his employment was to end. That detriment, and any prior ones, were not therefore brought in time. Mr Welsh, on behalf of the Claimant, accepted that there were no arguments able to be advanced that it had not been reasonably practicable to have brought the claim within time. In the circumstances that claim fell to be dismissed.

<u>Documents</u>

13. We noted that the documents contained in the disputed bundle had been created many months after the events under consideration, primarily involving a referral to Social Care Wales in relation to the issues of concern raised about the Claimant's conduct, i.e. that he was sleeping during a night shift, which he strenuously resisted. The Respondent confirmed that the focus of its dismissal was however not on the sleeping allegation, but on the way the Claimant had conducted himself at a subsequent fact-finding meeting into that allegation. In the circumstances, we did not consider that

the documents in the disputed bundle were relevant and therefore did not agree that they should be adduced.

Substantive Claim

Background

14. The Claimant's claims were of: automatic unfair dismissal by reason of protected disclosure pursuant to Section 103A Employment Rights Act 1996 ("ERA"), protected disclosure detriment pursuant to Section 47B ERA, breach of contract, unauthorised deductions from wages, and failure to pay in respect of accrued but untaken holiday. In the event, as we have noted, we struck out the Claimant's protected disclosure detriment claim on the basis that it had been brought out of time, in circumstances where it had been reasonably practicable for it to have been brought in time.

15. We heard evidence from the Claimant on his own behalf, and from Ms Olivia Quarrell, Director, on behalf of the Respondent. We considered the documents in the hearing bundle spanning 127 pages to which our attention was drawn, and we also considered the parties' representatives' oral closing submissions.

Issues and Law

16. The issues to be decided had been set out in a summary produced by Employment Judge Moore following a Preliminary Hearing on 10 February 2022.

17. The core elements of the Claimant's automatic unfair dismissal claim were (1) whether a protected disclosure or disclosures had been made, and, if so (2) whether dismissal had been by reason of any such protected disclosure.

18. In deciding whether a disclosure as protected by law, a Tribunal has to have regard to:

- Whether there has been a disclosure of information;
- The subject matter of disclosure, in accordance with Section 43(1)(b) ERA;
- Whether the Claimant had a reasonable belief that the information tended to show one of the relevant failures in Section 43(1)(b) ERA; and
- Whether the Claimant had a reasonable belief that the disclosure was in the public interest.

19. With regard to disclosure of information, the Employment Appeal Tribunal ("EAT"), in ***Cavendish Munro Professional Risks Management Limited -v- Geduld*** **[2010] ICR 325**, drew a distinction between the making of an

allegation, which would not be said to disclose information, and the giving of information in the sense of conveying facts. However the Court of Appeal in ***Kilraine -v- London Borough of Wandsworth*** **[2018] ICR 1850**, noted that the two categories are not mutually exclusive, and that the key guidance from ***Geduld*** was that a statement which was devoid of specific factual content could not be said to be a disclosure of information.

20. With regard to reasonable belief, we needed to be satisfied that the information tended to show a relevant failure in the reasonable belief of the worker, i.e. in this case the Claimant. The EAT, in ***Korashi -v- Abertawe Bro Morgannwg University Local Health Board*** **[2012] IRLR 4**, directed that that involved applying an objective standard to the personal circumstances of the discloser. The EAT also noted, in ***Darnton -v- University of Surrey*** **[2003] ICR 615**, that the Claimant does not need to be factually correct and need only demonstrate they have a reasonable belief.

21. With regard to public interest, we were mindful of the guidance provided by the Court of Appeal in ***Chesterton Global Limited -v- Nurmohamed*** **[2017] EWCA Civ 979**, which noted that the following matters would be relevant

- The numbers in the group whose interest the disclosure served;
- The nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed;
- The nature of the wrongdoing disclosed;
- The identity of the alleged wrongdoer.

22. In terms of the reason for dismissal, the Court of Appeal made clear, as far back as 1974, in ***Abernethy v Mott, Hay and Anderson [1974] ICR 323***, that the reason is the reason that operated on the employer's mind at the time of dismissal. That reason must have existed in the mind of the decision-maker.

23. The issues in relation to the Claimant's pay claims had narrowed prior to the commencement of the hearing. With regard to the breach of contract claim, it was agreed that the Claimant had been served with one week's notice. The Respondent contended that its dismissal of the Claimant took place within his probation period, within which he was contractually only entitled to one week's notice. The Claimant contended that the probation period had expired the day before notice of his dismissal was given, and that notice had therefore been given outside the probation period, where the contract specified that one month's notice was to be given.

24. With regard to the unauthorised deductions from wages and holiday pay claims, the Claimant had been suspended for four weeks, which included

the one week whilst he served notice. All those weeks were without pay, which the Respondent had accepted was an error. He had however booked holidays during the same period, and was paid in respect of them. The practical outcome therefore in terms of remedy was ultimately the same. Either the Claimant received salary during his period under suspension and thus had less to claim in respect of that, but had holiday pay to claim, or the Claimant had not received salary and therefore had a claim for salary during the entire suspended period, but had already been paid in respect of holiday entitlement.

Findings

25. Our findings of fact, reached on the balance of probability where there was any dispute, were as follows.

26. We made the preliminary observation that the only witness called by the Respondent was Ms Quarrell, who only joined the Respondent in November 2021, i.e. some time after the events giving rise to this claim. Neither of the persons to whom the Claimant contended he had made protected disclosures were called to give evidence, even though it was confirmed that they remain employed. The employee who dismissed the Claimant, and therefore the person who formed the underlying reason for the dismissal, was also not called. It was noted that she had left the Respondent's employment in February 2022, but in our view that would not have prevented her being called as a witness.

27. There was therefore no primary witness evidence put before us by the Respondent, and indeed there was limited cross-examination of the Claimant on the evidence advanced in his witness statement. We did however bear in mind the primary documentary evidence advanced by the Respondent, in the form of the notes of the meeting with the Claimant which formed the background to the decision to dismiss, the dismissing email, a grievance outcome letter, and the letter from the Respondent's Managing Director in response to a letter before action from the Claimant's advisor.

28. We also bore in mind that, due to the Claimant's limited period of continued service, the burden was on him to satisfy us that he had made a protected disclosure and that he had been dismissed as a result.

29. The Respondent provides residential care and employment training to vulnerable young persons, broadly between the ages of 15 and 19. The young persons cared for by the Respondent are disadvantaged and vulnerable.

30. The Claimant was employed as a Support Worker at one of the Respondent's care homes, commencing employment on 7 December 2021.

He was one of some 20 – 25 employees working at the home, working on a shift system to provided round the clock care and supervision. Employees working nights are expected to be awake throughout their shift.

31. The Claimant provided evidence that there were problems with rat infestation at the home, and that was not disputed by the Respondent. Some limited attempts were made to control the infestation but it persisted for some time.

32. The Claimant stated in evidence that he had reported his concerns about the rat infestation to his managers at the home. In the advance of any evidence opposing the Claimant's affirmed evidence, we accepted it.

33. The Claimant also provided evidence that there were problems with residents returning to the home under the influence of drugs and alcohol. He contended that those issues were, at one time, recorded and reported to Care Inspectorate Wales, but that, after an adverse audit, which led to restrictions being placed on the home, he was told by his managers that the issue was nothing to do with him and not to raise those issues. Again, those facts were not opposed by the Respondent and we therefore accepted the Claimant's affirmed evidence.

34. A particular incident arose in May 2021, when a "shank" a homemade weapon, was found in a resident's room. It was found during a period when the Claimant was not at work, but he became aware of it during the subsequent shift handover on his arrival. The Claimant contended that he had asked one of his managers if the incident had been reported, and was again told that it was nothing to do with him. The Respondent appeared to accept that a weapon had been found, and no evidence was adduced to undermine the Claimant's affirmed evidence, which we accepted.

35. In May 2021, the documentary evidence indicated that a concern existed at the Respondent around night shift staff being asleep at work. Although we did not hear any evidence on the matter, it appeared that one of the senior workers at the home raised a concern to the Respondent's HR Manager, Sonia Cooper, and the responsible individual, Paula Campbell. It was not entirely clear, but it was understood that those concerns existed generally and not only about the Claimant.

36. The documentary evidence indicated that Ms Cooper visited the home at 4.00am on 16 May 2021, and observed, and took pictures of, two individuals, one of them the Claimant, lying on sofas with the television on in the background. Ms Cooper asserted that the two individuals had been asleep and challenged them about that. Both denied they were sleeping and asserted that they had been watching the television. The photograph in

the bundle did not, to our mind, appear conclusive about the issue one way or another.

37. Ms Cooper's contemporaneous statement indicated that she informed the two individuals that they would be suspended without pay pending a full investigation. She recorded that the Claimant said to her, "*We know what this is fucking about, don't we?*".

38. Ms Cooper then wrote to the Claimant the following day, 17 May 2021, confirming that he was suspended without pay pending a full investigation. He was required to attend an investigative meeting the following day, 18 May 2021, and was informed that he did not have the right to be accompanied to that meeting. He was also told that he was required to remain available during his suspension so that Ms Cooper could contact him if the need arose.

39. Prior to these events, the Claimant had booked a period of two weeks annual leave, from 18 May to 2 June 2021.

40. The Claimant replied later that day, noting that he was unable to attend a meeting on 18 May due to waiting on replies from his union representative and solicitor. Ms Cooper replied on 18 May 2021 noting that there was no legal right to be accompanied at an investigative meeting, but confirming that the Respondent would rearrange the meeting for the following week.

41. On 24 May 2021 the Claimant submitted a grievance to the Respondent about his treatment, complaining that he had been harassed.

42. On the following day, 25 May 2021, Ms Campbell wrote to the Claimant, inviting him to a meeting, "*to discuss your current situation*", on Friday 28 May 2021. The Claimant replied on 27 May 2021, noting that his grievance should be dealt with first, and that the same person should not deal with both the grievance and the disciplinary issue.

43. Ms Campbell replied soon after, noting that the Claimant had not been invited to a disciplinary meeting but to an investigative meeting. She stated that the Claimant's grievance did not supersede any investigation, and that both could be run together. She confirmed that she would book the Claimant in for a meeting on 4 June 2021. The Claimant replied on 1 June 2021, noting that he would attend the meeting and that his trade union representative would join him for the grievance meeting after the fact-finding meeting.

44. The meeting took place as scheduled. Ms Quarrell, who obviously was not present at the meeting, confirmed in her witness statement that the trade union representative was not allowed to attend the meeting due to a failure

on his part to show any credentials, and an unwillingness to sign a non-disclosure agreement. However no reference to any such matter was made in the notes of the meeting, and those notes commenced with a record of Ms Campbell saying that the parties were only there to do a fact-finding meeting. As we have noted, the Claimant appeared to have previously accepted that he would not be accompanied to the fact-finding meeting.

45. In the meeting, the allegation that the Claimant had been asleep when the house was visited by Ms Cooper was discussed, as was an allegation that the Claimant had been asleep on previous night shifts, with reference made to statements from other staff. The Claimant responded that he could obtain statements, and had photographs of other employees sleeping.

46. The meeting then switched to discuss an assertion that the Claimant had stated that he was not going to let the home's residents back into the home that night, which the Claimant confirmed related to a proposal that the young persons be required to knock the door to enter in order to be searched before going to their rooms, the shank having been discovered the day before.

47. Ms Campbell then stated that two male young persons had indicated that they had been searched on their return to the home, with one asserting that his penis had been touched during the search. The Claimant, in our view somewhat understandably, reacted adversely to the allegation, describing it as nonsense and saying, "*It's fucking beyond*". He went on to say, "*You're trying to harass me now by false allegations and getting kids to make statements*", to which Ms Campbell replied that she did not accuse the Claimant of anything, she had just read statements.

48. Ms Quarrell, in her witness statement, stated that during the investigative meeting the attitude and tone of the Claimant's responses was felt to be uncooperative and aggressive. However the notes of the meeting do not support that assertion.

49. The Claimant certainly put his perspective on the allegations against him, both the sleeping allegation and the inappropriate touching allegation, which had been raised with him for the first time in the meeting, and strenuously denied the allegations. However, the notes record Ms Campbell bringing the meeting to a close by saying, "*Perfect. Is there anything else you want to add?*", to which the Claimant replied that he had been harassed and discriminated against, and to which Ms Campbell in turn replied that that would be taken up in the Claimant's grievance.

50. The discussion then returned to Ms Cooper's visit to the home on 16 May 2021, before Ms Campbell said that she had nothing else to add. She then asked if the Claimant had anything else to add, and he replied that he was

disgusted with the false allegations put on him because he had put a grievance in. Ms Campbell then replied that it was nothing to do with the Claimant's grievance, which the Claimant maintained that it was. The notes indicate that the notetaker asked if anything more needed to be said and then record, "*Everybody said no, so the meeting was closed*".

51. The notes record Ms Campbell, or the notetaker, it is not clear which, feeling, just before the end, that they felt that it was time to close the meeting down as the Claimant was becoming confrontational, but that was the only suggestion in the note that the Claimant had behaved inappropriately.

52. Ms Quarrell, in her witness statement, noted that the Claimant left the meeting and that Ms Cooper, or the notetaker, asked the Claimant to return, and that the Claimant responded that he would not return and that the Respondent should take matters up with his Trade Union Representative, who then went into the building and spoke on behalf of the Claimant. However there was no evidence whatsoever of those matters, and no record was made of that exchange in the meeting notes.

53. We considered that had matters developed as suggested then a record would have been taken, and the issue would have been referenced in subsequent correspondence, when it was not. We also noted that the notes of the meeting gave no suggestion that it was to continue. On the contrary, they stated that the meeting was closed. On balance therefore, we did not consider that the events happened as described by Ms Quarrell, who, as we have noted, had no personal knowledge of the matters at all.

54. On Monday 7 June 2021, the Claimant emailed Ms Cooper asking for an update on the meeting of 4 June 2021. She replied saying that Ms Campbell was dealing with the matter and would be in touch later that day with the notes and the outcome via email.

55. Ms Campbell then sent an email to the Claimant on the afternoon of 7 June 2021. She stated, "*Due to a mutual breakdown in trust and confidence between the Employee and Employer caused by a variety of issues being investigated by Social Care Wales and circumstances the employer's [sic] has given notice to terminate his employment on 7 June in line with clause in the contract of employment*".

56. Ms Campbell then extracted the clause from the Claimant's contract relating to the probation period. This provided that the Claimant was subject to an initial probation period of 6 months, and that if the Claimant's performance in that period was not up to standard the Respondent could either take remedial action, which could include the extension of the probation period, or could terminate the Claimant's employment subject to one week's notice.

We noted that the provisions in the Claimant's contract regarding notice generally, i.e. outside the probation period, were that he was entitled to one month's notice after being employed for one month.

57. The Respondent, in its Tribunal Response, noted that the decision had been reached following advice from Social Care Wales. However no evidence of that was before us, and we doubted that such an organisation would have provided advice to a care provider as to how to deal with its employees.

58. Ms Campbell concluded her email by saying that the Claimant would receive a final payment, including £660 as a payment in lieu of notice, covering the period 7 to 13 June 2021, when the Claimant was not required to attend work. We observed that that sum was higher than the Claimant's average weekly pay of £462 gross, due to the way the shift system worked. The payment was also to include £217.13 in respect of outstanding holidays, covering 18.83 hours, taking into account payment made for holidays from 19 May to 2 June 2021. No reference was made to any right of appeal.

59. The Claimant submitted a further grievance later the same day, raising a number of concerns about the process followed and the decision reached, again complaining that he felt that he was being harassed and victimised.

60. The Claimant's two grievances were subsequently considered together and addressed by the Respondent's Compliance and Practice Manager, albeit seemingly without a meeting, with the outcome being provided on 21 June 2021.

61. The Respondent subsequently reported the Claimant to Social Care Wales in relation to the sleeping allegation, which we understood did not lead to any further action. No referral was made, whether to Social Care Wales or the police, regarding the inappropriate touching allegation. Ms Quarrell's explanation for that was that the young person involved was subsequently spoken to and did not want to progress matters. We noted that Social Care Wales in their communications with the Claimant noted that they had been informed that he had resigned.

62. On 6 July 2021, the Claimant's adviser wrote a letter before action to the Respondent's Managing Director raising a number of concerns, including that it was contended that the Claimant had raised protected disclosures in relation to the shank, the rat infestation, and young persons returning under the influence of alcohol, and asserting that on raising those concerns the Claimant had been instructed not to complete incident reports. It was also contended that the Claimant's probation period had concluded on 6 June

2021 and therefore that he had been entitled to receive one month's notice of termination when notice was given on 7 June 2021.

63. The Respondent's Managing Director replied to the adviser's letter and stated, "*Your client may have raised concerns to his former Manager/RI however those concerns were never forwarded to myself until the internal investigation meeting, where your client refused to hand the information and photographs over to the company representative, thus not completing the whistleblowing*".

Conclusions

64. Applying our findings to the issues we had to consider, our conclusions were as follows.

Unfair dismissal

65. We first addressed the question of whether the Claimant had made protected disclosures, considering the point raised in paragraph 3.1.1 of the List of Issues, in relation to the three asserted disclosures, namely (1) Did the Claimant disclose information to his employer? (2) Did he reasonably believe that any such disclosure tended to show a criminal offence had been, was being, or was likely to be committed, or that the health and safety of any individual had been, was being, or was likely to be endangered? and (3) Did he also reasonably believe that any such disclosure was made in the public interest?

66. With regard to the shank, we noted that the Claimant was not at work when the shank was discovered and did not therefore bring the matter to his manager's attention. In his evidence he stated that he had asked if the incident had been reported and was told that it was nothing to do with him. He did not however indicate that he had said anything which we felt could be described as a disclosure of information which tended to show that a criminal offence had been committed or that health and safety had been endangered. His focus appeared to be on the question of whether the discovery had been reported. On balance we did not consider that that amounted to a protected disclosure.

67. Turning to the rat infestation, we noted that the Claimant stated in his evidence that he had raised concerns about rat infestation to his manager on numerous occasions. We were satisfied that he had raised such concerns and that they would have amounted to protected disclosures. The concerns about rat infestation would have been, self-evidently in our view, about the possible endangerment of health and safety, and we felt that it was reasonable for the Claimant to hold the view that health and safety was being endangered. We also considered, whilst referable only to a single

house, that the Claimant reasonably believed the disclosure was in the public interest, when the care of vulnerable young persons was at issue.

68. We formed a similar view in relation to the return of young persons under the influence of alcohol and/or drugs. We again noted that the Claimant had stated that he had reported this to his manager on numerous occasions and had been told not to do any reports when such matters had been previously recorded. We considered that concerns about young persons being under the influence of alcohol and/or drugs would, again self-evidently, have been about the possible endangerment of health and safety and/or the commission of criminal offences, and that the Claimant reasonably believed that he was raising concerns of that type. We were also satisfied that the Claimant reasonably believed those disclosures were in the public interest, again noting that the care of vulnerable young persons was at issue.

69. Having concluded that the Claimant had made protected disclosures, we moved to consider whether dismissal had been for that reason or if there had been more than one reason, whether the principal reason had been the protected disclosures.

70. We noted the context of the Respondent having received an adverse audit, which had led to restrictions being placed on its activities. We felt therefore that the Respondent's managers could have been motivated to limit the circulation of any further issues of concern, and would have been concerned that any of its staff were seeking to raise issues about the way the home was being run.

71. We also noted that the Claimant appeared to have been singled out for investigation in relation to the sleeping incident. No-one else was investigated or referred to Social Care Wales about the incident. The Respondent, as a submission without evidence, attempted to indicate that the Claimant's colleague, who was with him on the relevant night, had also been investigated but that that had not been pursued because he had resigned. The submission went further, stating that the individual had been serving his notice at the time. However, regardless of that, the Respondent had referred the Claimant to Social Care Wales about sleeping on the job, notwithstanding that his employment had ended, but had not made such a referral in relation to his former colleague.

72. We also noted the conflicting and contradictory approaches of the Respondent to the allegations against the Claimant. He was investigated about the sleeping incident, with then an allegation, which if substantiated would have been extremely serious, of inappropriate touching, being added, out of the blue, in the investigative meeting. In the end however, the Claimant was not dismissed, or even disciplined, for those matters. Instead he was dismissed for an asserted breach of trust and confidence arising

from the way he behaved in the meeting on 4 June 2021. The Respondent confirmed that that was the reason, and the only reason, for the dismissal. However the email from Ms Campbell referred to a "*variety of issues…and circumstances*", and made no reference to the Claimant's behaviour at the meeting.

73. Also, as we have noted, the minutes of the meeting did not, in our view, indicate that the Claimant had behaved aggressively or obstructively in the meeting. He had certainly taken umbrage at the allegations, particularly the entirely new allegation of inappropriate touching, but we did not find that at all surprising, and the meeting appeared to have ended in a measured way.

74. We also noted the reference in the Respondent's Managing Director's letter to his perception that any whistleblowing had not been completed due to the fact that the Claimant had not handed over information or photographs. That showed a fundamental misunderstanding of what is involved in any protected disclosure. More importantly however, the reference to the Claimant having raised concerns to his former manager was, in our view, a tacit acceptance that disclosures had been made.

75. We also noted that the only onward referral made by the Respondent had been to Social Care Wales in relation to the sleeping incident. No referral, whether to Social Care Wales or the police, was made in relation to the inappropriate touching allegation. We considered that had that been a genuine concern about that then the Respondent would have progressed it and would have recorded the outcome, even if the young person involved ultimately indicated that they did not wish to pursue it.

76. Overall, we considered that the reference to dismissal on the basis of a breakdown of trust and confidence was a spurious one, and that the underlying reason, the set of facts which led to the decision to dismiss, was the disclosures made by the Claimant and the fact that he was something of a thorn in the side of the Respondent's management. His claim of unfair dismissal pursuant to Section 103(a) ERA therefore succeeded.

<u>Notice pay</u>

77. We then moved to consider the Claimant's pay claims and first considered his claim related to notice pay. We felt that a common sense interpretation of the probation period provision in the Claimant's contract was that it ran for six months from the commencement of his employment, and therefore expired at the end of the day which constituted the last day of that six-month period. The Claimant's employment commenced on 7 December 2020, and therefore the six-month period expired at the end of 6 June 2021. If it had expired only at the end of 7 June 2021 that would have been a period of six months and one day.

78. We therefore considered that the Claimant's probation period had ended at the end of 6 June 2021. There had been no indication that it was to be extended, nor did we consider that there was any indication that it had been impliedly extended. The Claimant was therefore entitled to one month's notice of termination when he was only paid in respect of one week, albeit at a higher amount than the Respondent would have been contractually obliged to pay, such that the excess needed to be taken into account. We noted that the Claimant's salary was £462 per week gross, which equated to £24,024 per annum gross and £2,002 per month gross. Taking into account the £660 paid in respect of notice, that left a gross sum of £1,342 to be paid in respect of the balance of the notice period.

Unauthorised deductions/holiday pay

79. With regard to the Claimant's wages and holiday pay claims, the Respondent accepted that the time spent under suspension, from 17 May to 13 June 2021, had been without pay and that the Claimant had been entitled to pay during that period. The last week of that four-week period was the Claimant's notice period, and was therefore covered by the notice payment, which left three weeks unpaid.

80. The Respondent contended that the Claimant had taken, and had been paid for, two of those weeks, as holidays. We did not consider that any such payment was validly made in respect of holiday, as the Claimant was expressly told to be available whilst suspended, which we felt was antithetical to him being able to take holidays.

81. However, in our view the position was as broad as it was long. Whilst the Claimant was, in our view, entitled to pay in respect of accrued but untaken holiday of a larger amount, reflecting the fact that he had two more weeks outstanding than indicated, he had received pay for those two weeks, which meant that his claim in respect of wages for the unpaid suspension would be correspondingly less.

82. In our view therefore the Claimant's unpaid wages claim should be limited to one week's gross pay, i.e. £462, but his claim in respect of accrued but untaken holiday should have reflected an additional two weeks, i.e. £924.

Compensatory Award

83. Finally, with regard to the unfair dismissal compensatory award, we noted that the Claimant was claiming for a period up to 4 August 2021, on the basis that he had mitigated his loss from then on. Taking into account the fact that we have awarded an increased notice period, that left a 13-week

period, with a net weekly wage of £385, i.e. a total loss of £5,005. Set against that were earnings of £2,997.07, leaving a sum of £2,007.93.

84. We were satisfied that there were breaches of the ACAS Code, notably in relation to the dismissal taking place without a proper disciplinary hearing and there being no ability on the Claimant's part to appeal the dismissal decision. We considered those breaches justified a 25% increase of the compensatory award, leading to a total compensatory award of £2,509.91. We did not consider it appropriate to make any award for loss of statutory rights as the Claimant was some way short of gaining those rights with the Respondent.

Conclusions on compensation

85. In conclusion, the total sums to be paid by the Respondent to the Claimant were as follows:

£1,342.00 gross in respect of notice;
£462.00 gross in respect of wages;
£924.00 gross in respect of holiday pay;
£2,509.91 in respect of the unfair dismissal compensatory award.

The total sum to be paid was therefore £5,237.91, although tax would need to be deducted from three of the constituent elements of that sum.

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Employment Judge S Jenkins
Dated: 23 November 2022

REASONS SENT TO THE PARTIES ON 24 November 2022

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche