



EMPLOYMENT TRIBUNALS

Claimant: Mr Christopher Williams

Respondent: Stow Residential Ltd. T/a Stow Brothers

Heard at: East London Hearing Centre (via CVP)

On: 10, 11, 12 and 13 January 2023

Before: Employment Judge E Fowell

Members: Ms J Houzer
Mr L O'Callaghan

Representation:

Claimant In Person

Respondent Alan Williams, Solicitor, of Peninsula Group Limited

JUDGMENT having been sent to the parties on 16 January 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Introduction

1. These written reasons are provided at the request of the claimant following oral reasons given at the hearing.
2. Stow Brothers is an estate agency. They do sales and lettings, and at the relevant time had about 50 staff working from a number of sites in East London. The business is run by two brothers, the directors, Andrew and Kenneth Goad.
3. Mr Williams joined them in 2016 as a Property Manager and was later promoted to Head of Property Management. Property Management is regarded as something of a back-office function but it is an important part of the business. The Lettings Team are responsible for finding tenants and negotiating the rent. They also provide the new tenants with the necessary paperwork before move-in day. The file is then

handed over to the Property Management team, who issue the tenancy agreement and manage things from then on. They deal with the tenants if there is any difficulty with the property, arrange any checks or repairs, liaise with the landlord, and if need be they are the ones to issue notices to remove the tenants.

4. It follows that the Lettings Team is essentially a sales team, although that term is usually applied to those who negotiate house sales. They earn commission and describe themselves as “front of house”. Throughout Mr Williams’ time at the company the Lettings Team was managed by Mr Nathan Barrow and they both reported to the directors.
5. Mr Williams is a gay man. His case is that he was the only openly gay man at the company, and that this was unwelcome.
6. There was a more significant source of disagreement however. In May 2019 someone was allowed to move into a property (85 Hove Avenue) without the necessary paperwork. Worse still, it was not even the proposed tenants who moved in, it was their daughter. She did not pay the rent, so the landlord was out of pocket. The company ended up paying the landlord substantial compensation. Mr Williams says that this was all the fault of the Lettings Team. He also says that Andrew Goad asked him to put in an insurance claim to cover the lost rent. This could not be done because none of the right paperwork was in place, such as registering the tenancy deposit – again, the fault of the Lettings Team. Without this paperwork the insurance would not be valid. He says he was then asked to create the necessary paperwork but he refused, saying that it would be a fraud. After that, he says, Mr Goad became hostile.
7. That refusal on his part is relied on as protected disclosure, making Mr Williams a whistleblower. He says that after that he was singled out for unfair treatment. In particular:
 - (a) In October 2019 he was the only member of staff not invited to an award ceremony
 - (b) In December 2019 he was the only member of staff not given an annual pay rise
 - (c) He was put on furlough during the first lockdown, along with others, but everyone else was brought back into the office by late 2020, leaving him isolated
 - (d) During that time, disciplinary proceedings were begun against him, mainly over the 85 Hove Avenue incident and for deleting e-mails

8. These are relied on as whistleblowing detriments and also (together with his dismissal) as acts of harassment or direct discrimination on grounds of sexual orientation.
9. These events occurred over a period of time. It was over a year between the failure to give him a pay rise and his dismissal. He says that there was a build-up of events in early 2020. One of his team was moved to another part of the business leaving just two of them in Property Management. He then went off sick with stress in early February. After that, the national lockdown began and he was placed on furlough. There he remained until late 2020 when disciplinary proceedings began against him. A number of issues were raised with his performance or behaviour which ended in his dismissal, not on grounds of gross misconduct or performance, but for “some other substantial reason” – i.e. a breakdown in trust and confidence. He was paid his notice pay.
10. The allegations included the failures in connection with 85 Hove Avenue, for which he was blamed, difficulties at two other properties, and on the morning of the disciplinary hearing a further allegation was added that Mr Williams had been bullying a colleague. Finally, it was said that he had deleted e-mails and other files from his computer before he went off sick.
11. At this hearing, both of the company directors were clear that the breakdown in trust and confidence occurred when they discovered, shortly after Mr Williams went off sick in February 2020, that he had deleted e-mails and files which were of use to the business. (Although confusingly, Mr Andrew Goad said more than once that it was his action in going off sick that was the final straw.) Whatever the correct reason, they were clear that it was at about the time he went off sick and so we will therefore deal with the other allegations more briefly.
12. For completeness, the complaints presented are as follows:
 - (a) unfair dismissal
 - (b) direct discrimination on grounds of sexual orientation
 - (c) harassment on grounds of sexual orientation
 - (d) automatically unfair dismissal for making a protected disclosure
 - (e) detriment at work for making a protected disclosure
13. There is also power to award compensation for a failure to provide an employee with a statement of terms and conditions of employment, if any of these complaints are upheld.

Procedure and evidence

14. We heard evidence from Mr Williams, and on behalf of the company from Mr Nathan Barrow (Lettings Branch Manager) and the two directors, Andrew and Kenneth Goad.
15. We were extremely impressed by the way in which Mr Williams conducted his case and by his evidence. It may simplify proceedings to say that his account has been detailed, credible and consistent throughout, and has also been consistent with the available documentation. The evidence and case presented by the respondent on the other hand has been very much the reverse and we have serious criticisms to make of their handling of Mr Williams' dismissal and their evidence at this hearing. Mr Barrow was straightforward in his evidence, although he maintained that the lion's share of responsibility for the issue over 85 Hove Avenue remained with the claimant. Both directors were in our view evasive in their evidence and reluctant to address the question or the facts. Instead there were extensive monologues setting out their side of the story. There was also, from each of them, a tendency on the one hand to express concern for Mr Williams and his mental health, or assurances that they had never wanted to replace him, coupled with stinging criticism of his honesty and integrity. By way of example, Andrew Goad concluded his evidence by stating that he thought Mr Williams' intentions had always been malicious.
16. It is also worth recording at the outset that the witness statements presented on behalf of the company's staff were conspicuously brief. In total they were shorter than the evidence of Mr Williams. The evidence from the two directors contained a good deal of verbatim overlap and consisted of legal points already set out in the grounds of resistance. There was little engagement with the facts of the case, and in many cases the only witness evidence we have on the point comes from Mr Williams. Consistent with that approach, the cross examination of Mr Williams was also very brief and centred on the fact that he had a full opportunity during the disciplinary process to put the various points on which he now relies.
17. Against that background, we will set out our findings of fact as briefly as possible, limiting them to those necessary to justify our conclusions.

Findings of Fact

18. Mr Williams was a conscientious and diligent employee. He had previously worked in at large national chain of estate agents and in his first three years he introduced new procedures to streamline Property Management. When he first joined, the company was still using carbon paper. In time however most of the processes were digitised, and the files for each property were moved to a new computer system which had a client relationship management (CRM) system. That meant that during a phone call to a landlord, for example, he or one of his colleagues could note down a record of what was discussed, so that it would always be clear to someone else what was going on that particular file. There was also a facility to link or save e-mails

onto a cloud for storage, although it was still possible to send e-mails directly from an individual's computer without storing it.

19. When he joined he was the only property manager, but as the portfolio grew the company recruited another manager, Tiffany, and so Mr Williams became the Head of Property Management. (For reasons of confidentiality we will simply use first names for other employees who have not given evidence).
20. There was a staff trip to Barcelona in August 2017. The planned arrangements involved Mr Williams sharing a room with a male colleague. This led to comments by Andrew Goad about the safety of the colleague, which were naturally offensive. On the morning of the trip, despite having paid for the flight, Mr Williams decided not to go. It seems to us that he would only have pulled out at the last minute if he was, as he claims, upset by this, and the fact that he pulled out was not disputed. We therefore accept that those comments were made. Mr Goad denied it in his evidence but offered an apology if he had caused any offence; it seems to us more likely that he must have realised that he had done so.
21. Despite this, working relationships seem to have continued without undue difficulty. Mr Williams had good relations with the female staff members in particular. He was close to Alayna who worked as an administrator in the sales department, and with Alejandra, who was married to Andrew Goad. Alayna resigned in July 2018 although she has subsequently re-joined the business. (She is the member of staff who later made allegations of bullying against him.)
22. On 29 April 2019 the issue arose over the tenant at 85 Hove Avenue. This was subsequently investigated in the disciplinary proceedings and Mr Williams was essentially cleared of any wrongdoing, so we need not go into the rights and wrongs in any detail. At paragraph 47 of that report, at page 263 of the bundle, it stated:

“However, on assessment of the information and evidence PB [the author] finds that it has not been substantiated that CW [Mr Williams] was aware of the rental of 85 Hove Avenue prior to the tenant's occupation of the property. PB finds that although he finds CW's assertion regarding his responsibility and remit for verifying that funds had cleared and that a tenancy agreement has been completed and added to the server/property documentation. PB finds no evidence to support that CW or his team were asked by the lettings team to draft a tenancy agreement or that the Property Management team were aware of the move in date for the property and expected funds to be received for this property prior to this date.”
23. Even this is a carefully worded exoneration. We accept the account given in Mr Williams' initial investigation meeting, that the first he knew of this property was when the landlord rang to ask when rent would be received. Very often, the first he would know about a new tenancy would be the receipt of funds into the company account. He would then take steps to find out where they came from and set up a new file

before sending out a tenancy agreement. On this occasion he did not even have that much notice since no funds were received.

24. In his evidence, Nathan Barrow described the overlap between the Letting's team and the Property Management team. He accepted that his team carried out preliminary checks on the landlord and the property, marketed the property and did an inventory. He said there was a shared responsibility for ensuring that deposit money had cleared into the office bank account and that a tenancy agreement was eventually signed. However, he accepted that the keys were normally handed over by a member of his team, and were on this occasion. Suffice to say that we are satisfied that Mr Williams knew nothing about this letting until after the tenant, or in fact their daughter, went into occupation and was not to any extent to blame for the fact that the landlord did not receive any rent or that there was no policy of insurance in place to protect the landlord.
25. Nevertheless, in their evidence, both of the directors said that it was inconceivable that he could not have known, and they disagreed with the findings of the investigation report quoted above, but we were unable to understand how they came to that view. No evidence has been produced about the business procedures in such cases, how it ought to have worked, or about any paperwork or communications in relation to this particular property. On the face of it, the initial dealings with the tenant are all down to the Lettings team, and no reason for that view was given in their witness statements. It therefore seems to us entirely unfair to blame Mr Williams for this situation, but blamed he was.
26. Long afterwards, Nathan Barrow was sent a warning letter about his involvement in this. It was dated 18 March 2021. Apparently that followed a disciplinary hearing on Wednesday 16 February that year, although that was in fact a Tuesday. Mr Williams was very sceptical about this document. All we can say about it is that it was issued after Mr Williams was dismissed and about 21 months after the events in question. Mr Barrow accepted that there had been no investigation involving Peninsula of the sort which Mr Williams had undergone, and there is nothing to show there any further steps were taken save for this outcome letter being issued. Since it seems clear that in fact Mr Barrow's team was responsible for this situation arising, this letter does nothing to dispel the sense of unfairness in blaming Mr Williams.
27. At 0717 on 30 April 2019, the day after the call from the landlord to Mr Williams, Andrew Goad sent him a WhatsApp message asking him to meet early that morning at the office (page 394). It is not disputed that there was such a meeting. Mr Williams says that he was asked to falsify paperwork for 85 Hove Ave so that the business could put in an insurance claim.
28. As things stood they could not do so because none of the preliminary paperwork was in place. Before taking steps to remove a tenant, a process which normally begins with what is known as a section 21 notice, the landlord has to be able to show that

the tenant was provided with an energy performance certificate, gas safety certificate and information about a tenancy deposit before move-in date. None of this was done and so the agency had not complied with its obligations to the insurance company.

29. Mr Goad denies making any such request but could give no other explanation for requesting this early meeting, which was just after the issue at 85 Hove Ave came to light. He accepted that they discussed 85 Hove Avenue but said that he was simply looking to Mr Williams to come up with solutions. Given our general view about the credibility of the two witnesses concerned, we accept that this request was made. That is of course a very serious matter.
30. From Mr Andrew Goad's point of view, this refusal left him in a position where the company would have to pay substantial amounts to the landlord, and he was always at risk of exposure by Mr Williams for making this request.
31. Mr Williams' own evidence on this point was that everything changed from this point on, after four relatively happy years at the company. We take the view that from then on the directors, who no doubt shared this information, set about undermining him with a view to removing him from the business. That is the simplest explanation for the events that followed.
32. Andrew Goad did indeed begin to make life difficult for Mr Williams, criticising him in front of others and portraying him as incompetent. Mr Williams realised that he might well be looking at dismissal and began to record some of these interactions. The first of these was on 14 October 2019, when he was told that he needed to use a bit of common sense, "a bit of ducking and diving, I'm afraid." In one of these meetings Mr Williams broke down in tears.
33. One focus of attention which developed over those months, in the second half of 2019, was the reliability of Mr Williams' accounts. He is not a qualified accountant, but he was responsible for reconciling the funds coming in and out with the company's bank account. Stung by comments made to him, he embarked on his own audit of financial transactions going back to 2016 when he joined the company. This involved him spending several hours each evening checking over approximately 40,000 transactions, to the point where he was satisfied that everything was accounted for to the penny.
34. An e-mail from the company's external accountants, dated 8 November 2019, appears at page 403. In it she stated that the reconciliation worked and set out some recommendations to avoid any confusion arising in future. (We note with concern that this e-mail was not disclosed by the respondent in the course of these proceedings, although fortunately Mr Williams had retained a copy.)
35. Then, on 11 October 2019 there was an award ceremony. The company had won an award for the best estate agent nationally, so it was a prestigious event. Mr

Williams was not invited. He felt left out. The company say that they only took senior sales staff to the event. In this context “sales” refers to residential sales rather than lettings, although Nathan Barrow also attended. So did a member of staff called Victoria who dealt with the company’s social media profile. We have to say that in the context of the event in question it is not surprising to us that Mr Barrow attended and that Mr Williams did not. Mr Barrow had been part of the business since it was established and we accept that he was regarded as having made a major contribution to its success. Similarly, it is unsurprising that the person responsible for promoting the company online was invited to an event to celebrate the recognition of their success.

36. By this time the Property Management department consisted of Mr Williams, Tiffany and another member of staff called Donald. The number of properties being managed had grown to about 350 and they were under considerable pressure. Despite this, on 24 October, Tiffany was called into a meeting with Andrew Goad and it was clear that Mr Goad was unhappy with the way things were running. Mr Williams was then called in too. He recorded what followed. There were more general criticisms by Mr Goad of the way the Property Management team was run, to which Mr Williams responded that he had been told not to question Nathan’s decisions – something which appears to follow from the events surrounding 85 Hove Ave. They were told to stop having meetings or chats in the morning as a team and they had to talk things through with Nathan before saying anything to a landlord – presumably that meant anything that conflicted with what Nathan had said. The tone was generally critical.
37. Shortly afterwards there was a further disagreement with Nathan. It seems that on several occasions he sent some pornographic images to the office WhatsApp group. There were a range of opinions in evidence about whether this was hard core or soft porn, or whether it was amusing or not. We record simply that we find it extraordinary that this sort of thing was going on at all in an office environment in 2019. Mr Williams was certainly offended by it. He left the WhatsApp group.
38. On 14 December 2019 there was a pre-Christmas staff trip to Paris by Eurostar. This time Mr Williams did attend but again there were similar jokes made by Andrew Goad about him sharing a room with a male colleague.
39. On their return the annual pay rises were announced and Mr Williams did not receive one. In their evidence at this hearing the directors said that he was not the only one who did not receive a pay rise this year, but we do not accept that. At the preliminary hearing on 22 November 2021 Employment Judge Housego ordered the company to provide a spreadsheet, in redacted form, identifying the pay rises of all staff, so that it could be seen whether he was the only one not to receive a pay rise. They have not done so, and we draw the obvious inference from their failure.

40. A few days before Christmas that year, Donald was moved out of Property Management to start a new role in the New Homes department. Both Mr Williams and Tiffany were surprised and alarmed by this. They raised the fact that New Homes were not busy over Christmas whereas this was one of their busiest times of the year, dealing with broken boilers and burst pipes together with their existing heavy workload.
41. So it was that on 10 January 2020, Tiffany submitted her own resignation. That left just Mr Williams as the sole employee in the Property Management team. No steps were taken to return Donald to the team, and Mr Williams soldiered on, attempting to find a replacement for Tiffany. He wrote to the directors on 17 January to confirm that he had interviewed 14 candidates by then but he also made clear that he felt that he was being managed out of his job and that at times he had felt forced to resign because of the unfounded allegations of poor performance and the stress at work which had not properly been addressed. He received no response.
42. He asked for a meeting with Andrew Goad at about this time, to which Andrew responded with the words "I'm free!" in imitation (we find) of the John Inman character from *Are You Being Served?*
43. As might have been expected, the pressure of work had become unsustainable. Mr Williams went to see his GP on Monday 3 February 2020 and was signed off sick with stress. However, rather than act on this medical advice he stayed at work for the rest of that week, trying to get someone else in place. Tiffany's last day was Wednesday that week, and on Friday he packed up his desk and left. There is an e-mail from him to Andrew Goad at 1442 that day on page 76. He simply attached a copy of his GP's letter, signing him off for three weeks with stress, and said that he would return to work on 25 February. He left his keyboard, mouse and bank card on the desk.
44. This of course left no one in Property Management, and no doubt that left the respondent in a very difficult position. Again, it did not prompt a move for Donald to return to Property Management, but a new employee, Elena, was in the course of recruitment.
45. It is hard to accept however that his departure was anything other than welcome to Mr Andrew Goad. On Tuesday 4 February, while Mr Williams was still in post, Mr Andrew Goad contacted Peninsula with a view to dismissing Mr Williams. A record of that conversation, made by their adviser, is at page 140. It notes that Mr Goad thought that Mr Williams was building a case against him, that there were performance issues but the employee was not taking the criticisms on board and so Mr Goad was looking to "move forward" and felt that "this employee's time is up." He was advised however the risks were high and a settlement was recommended rather than a formal performance management process.

46. It is clear to us that Mr Goad had no intention of allowing Mr Williams to return to work after he went off sick. On the Monday of that week he had already contacted Donald for feedback on Mr Williams, which can only have been an attempt to obtain some negative information. In his e-mailed reply that day (page 70) Donald said that he did not see himself doing Property Management in the long run and made no criticisms of Mr Williams.
47. Tiffany was also contacted the day after Mr Williams left, for her feedback on him. Her e-mail, at page 77, refers to the breakdown of the property team becoming clear last year when communication dropped and the atmosphere became tense. She said that Mr Williams' heart wasn't in it anymore and he became difficult to approach. However, there were other issues, particularly the fact that Donald left so quickly with no handover, causing her stress. Overall however she said that she had enjoyed her time with the company and was open to a return. (This contrasts with the respondent's case that two employees resigned from the Property Management department because of their concerns about Mr Williams' behaviour.) Understandably, given the position they were in, Tiffany was then approached by the company and offered more money to return, which she agreed to do.
48. The company was not open to a return by Mr Williams however. He contacted them on 28 March 2020 to say that he was ready to return to work, but that request was refused by Mr Kenneth Goad without explanation – “we cannot allow you to return from home at the moment.” His evidence was that this was because of a combination of concern for Mr Williams' mental health and COVID risks, but there is no reason to believe that Mr Williams was not well enough to return to work.
49. A few days later he was sent a letter by the company placing him on furlough. This is despite the company still being open during lockdown and them being particularly short staffed in the Property Management team. Indeed, Tiffany and Elena were being paid to work there while Mr Williams was on furlough. Apart from the obvious implication that they did not want Mr Williams to return, his continued exclusion appears to be a clear abuse of the furlough scheme.
50. We have no documentary evidence on the point but it seems that Tiffany had essentially been given his job, although it is not clear on what date she returned to work there. That is despite an order from Employment Judge Housego that the company disclose who was furloughed and when, and who was recruited for what jobs and at what salary, between the end of December 2020 to August 2021.
51. From then on, Mr Williams was entirely ignored. There was even a Zoom call for all employees on 25 April 2020, but which did not include him. The next, and someone surprising contact, was an e-mail from Andrew Goad on 7 May 2020, at page 100. Mr Williams had only been receiving statutory sick pay by the end of his time off sick and asked for a breakdown. The response included the following:

“...you are still a Stow Brothers employee and I would expect the common decency to respond in a timely fashion when it relates to a department which you are responsible for.

This has made the situation in the Property Management department very difficult. We have had multiple complaints and furthermore no staff members to deal with the workload.

I’m not sure what your intentions are with all this. My intentions are and always have been for you to be a content, happy and productive a member of staff, heading up a thriving Property Management department.

I’m sure you know as well as I do, my conscience is clear. Could you say the same about yours?”

52. It is not clear what Mr Williams is being accused of in this passage and no criticism had been put to him since he went off sick. At that point in time relations were clearly strained but had not reached this point of outright hostility.

53. That exchange reinforces the view that he would not be allowed to return to work, and that is also apparent from an e-mail sent Mr Kenneth Goad to a client on 29 June 2020, at page 114, which states:

“Thank you again for bringing this to our attention.

Fully investigating this has been quite difficult as Chris is no longer working with us and has not been forth coming with information.”

54. The same line was taken with another client on 6 August 2020 (page 132):

“Chris is no longer with the company which makes investigating this more difficult for us however I will continue to do this.”

55. Not only does this make the company’s position abundantly clear but it is highly unfair since no request for information had been made of Mr Williams.

56. In due course steps were taken to resolve his employment situation. The company decided to engage Face2Face, which is part of the Peninsula group, to carry out an investigation and to make recommendations. They would not of course necessarily have been aware of all this information.

57. The appointed investigator was a Mr Matthew Fordham. He produced an initial report which is at page 186. It followed a telephone discussion with Mr Williams on 1 October 2020. There is a transcript of that discussion which was very full and detailed. Mr Williams was not provided with any paperwork or an agenda for the discussion but he was able to give a full and consistent account, entirely in line with the evidence presented at this hearing. The allegations which had been raised were under the following headings:

- (a) That Mr Williams had deleted a lot of e-mails including sent items and files on his computer, making it hard for work to be picked up in his absence
- (b) 85 Hove Avenue and how it was managed.
- (c) De Vere Gardens (a disagreement with another landlord)
- (d) Work allocation
- (e) 21 Penrhyn Crescent (again, another property issue)

58. It is clear from the record of the investigation meeting that this was the first Mr Williams had heard about his e-mails being deleted. He explained that he had been told by Mr Hunt, the IT manager, to delete old e-mails, i.e. to remove them from his deleted folder. He also explained that the main server was located in his office, that everything should be accessible there and he was happy to help locate or identify any document. Afterwards, Mr Williams thought that everything had gone well and that would be the end of the matter.

59. Despite this full and clear explanation Mr Fordham decided that there was a case to answer for each of these allegations. In each case he appears to have gone back to the directors for their view, which contradicted that of Mr Williams, and so he concluded that a disciplinary hearing was needed. Some of the exchanges with the directors are instructive. Having just read the transcript of the investigation meeting, Andrew Goad e-mailed Mr Fordham (page 145) to say

“I suppose a lot of it is hear say [sic] anyway. We always knew it would be tricky to pin him down on something.

Lest [sic] hope the fear that he might have to return to the office and face up to his colleagues is enough for him to buckle!”

60. As already stated, the case presented by the company at this hearing was that it was only the first of these issues, relating to the e-mails, that caused the breakdown of trust and confidence. Mr Fordham followed this up with Kenneth Goad, (page 178). He asked whether the deleted e-mails were recoverable and the response was:

“Yes they are, this was not the real issue, just unnecessary, the real issue was all the files stored on his hard drive that he deleted, which could not be recovered. The computer was completely wiped. Not only deleting his inbox but sent items and deleted e-mails shows a clear intention of wants to causing further disruption.”

61. This appears to be the first time, about nine months after Mr Williams went off sick, that it was suggested that the computer was completely wiped. It is also the first time it was suggested to Mr Fordham. Even in its initial response to this claim the company’s pleaded case was that there were a number of conduct issues including

deleting e-mails and this was subsequently amended during the course of these proceedings to add the words “and methodically wiping the computer clean.”

62. We have come to the conclusion that there is no truth in this allegation. It was certainly never raised with Mr Williams. The very clear evidence from the two directors at this hearing was that they discovered within a day or two of Mr Williams leaving that he had wiped his computer, and from then on all trust had gone. It is very difficult in those circumstances to understand why they did not simply raise that with him immediately as a conduct issue, or at least raise it when he told them that he was ready to return to work. No satisfactory explanation could be given for this except that they should have dealt with it differently and have learned lessons from the process. Nor is there any satisfactory explanation for why it took many more months for this to be mentioned at all and for it to emerge in this piecemeal fashion in or about the beginning of November.

63. We are reinforced in that view by the lack of contact with Mr Williams and the disingenuous account given by the company about that failure. On 7 May 2020 Andrew Goad sent an e-mail to Mr Williams, at page 420, stating:

“I would appreciate a response from the numerous text messages, e-mails and telephone calls that we have made to you over the last 12 weeks, mainly regarding Property Management department issues. You have not responded to a single work related question, the majority being emergency issues.”

64. We are satisfied that this is an attempt to lay a false trail. Mr Williams responded that day to firmly refute this. There had been no such attempts. Employment Judge Housego also directed the company to provide:

“Dates, times and documentation demonstrating the text messages, e-mails and telephone calls the Respondent alleges to have made [to and from the Respondent and the Claimant] between 4 February 2020 and 7 May 2020.”

65. Mr Andrew Goad accepted that nothing had been sent in response to that order despite a follow up order from the tribunal. The inescapable inference therefore is that nothing was sent and that his account of this is untrue. This alone seriously undermines the credibility of his account.

66. In an event it would be a straightforward matter to demonstrate by evidence from a suitably qualified computer engineer that a particular desktop computer had been wiped. No such evidence has been produced. The only supporting evidence is an e-mail from the IT manager Mr Hunt dated 4 January 2021 (page 245), i.e. about a year after Mr Williams went off sick, in which he told the directors that Mr Williams “has intentionally deleted vast quantities of e-mails from the business e-mail account.” It said, for example, that all Sent messages were permanently deleted and were not recoverable and a large number of files were not copied onto the company server and were removed or deleted by him. This is at odds with the statement from

Kenneth Goad (above) that they were able to recover e-mails, and strikingly it does not state that the entire hard drive of the computer had been wiped, as is now suggested.

67. At the risk of labouring the point, no motive has been suggested as to why Mr Williams would do such a thing to his desk computer before going off sick. This was at a time when he was labouring to fill the gap in the Property Management team by recruiting someone new, when he left in a courteous and professional manner and gave a return-to-work date. Sabotaging his own computer would have made it impossible for him to carry on working afterwards and would clearly have been discovered.
68. During the course of this hearing it was suggested that two documents in particular were of vital importance to the business and were deleted by the claimant. One was an editable version of their terms of business and the other was the company fee structure. Again, we do not accept this. Both had already been provided to others and were in general use throughout the business but in any event he could simply have been contacted for a copy if need be.
69. Against this background he was invited to a disciplinary hearing on 23 December 2020. This was to be held by another consultant from Face2Face, Mr Paul Baker. The invitation was received the day before and Mr Williams was unable to arrange anyone to accompany him. It immediately became clear that he had not received the necessary evidence and Mr Baker readily agreed to adjourn it to the New Year, on 6 January. However, he then explained that an allegation of bullying had just been received. This was in the form of an e-mail from Alayna to Kenneth Goad (page 241). It ended with her asking Mr Goad to contact her to let her know what he thought of it. Mr Baker then read this out.
70. This was effectively an ambush – the e-mail had only been sent that day. Mr Williams responded by saying that he had had plenty of friendly contact with Alayna. He located some of her previous messages and read them out. Before the hearing concluded Mr Baker also took the opportunity to discuss the e-mail situation again in some detail. This time the allegation was put that he had wiped the computer, which Mr Williams firmly denied.
71. It is not clear to us how the discussion went when it resumed in January. For some reason there does not appear to be a copy of the minutes in the bundle. Instead there are two copies of the discussion on 23 December 2020. And rather surprisingly it is not referred to at all in any of the witness statements. Presumably however there was some discussion about the allegation of bullying.
72. Summarising the relevant e-mail, Alayna complained of controlling and condescending behaviour, said that Mr Williams was a vindictive and scheming individual who would portray himself as calm and collected and charming but was

in fact patronising and belittling and would tell her how to do her job. She said that he used to make her feel uncomfortable in the workplace, that others thought the same, and she ended by saying that if she was to come across him over again she would cross the road to avoid him.

73. That contrasts with the very friendly WhatsApp messages Mr Williams had received from her. They appear at page 393. Clearly they were close at one point in time. In January 2018 she had written to him to say that she loved him very much and she was sorry that she hadn't been a nice person recently. The most recent entry was on 17 January 2020 when he contacted her to say that he had organised leaving drinks for Tiffany and invited her along. She replied by saying "I'll defo be there! Thanks Chris" with a smiley face emoji.
74. Summarising the outcome report, at page 252, Mr Baker starts by saying that he also interviewed Tiffany and Donald together with Mr Kenneth Goad and Alayna, although there are no records of those interviews, and later on he notes that he was unable to contact Donald because he had left the business. Nevertheless, with the small exception of an issue relating to Penryth Avenue, he concluded that Mr Williams was guilty of misconduct in relation to all of the allegations, including in relation to 85 Hove Avenue, and two other properties.
75. The 85 Hove Avenue conclusion is particularly surprising given that he was effectively exonerated at the investigation stage. It is in fact very difficult to make sense of the conclusions. At paragraph 47 (page 263) he repeats the findings of the investigation stage practically word for word:
 47. However, on assessment of the information and evidence PB finds that it has not been substantiated that CW was aware of the rental of 85 Hove Avenue prior to the tenant's occupation of the property. ... PB finds no evidence to support that CW or his team were asked by the lettings team to draft a tenancy agreement or that the property management team were aware of the move in date for the property and expected funds to be received for this property prior to this date.
76. Mysteriously, in the next line, the report then goes on to find him responsible:
 48. Therefore, after full and thorough consideration of the evidence and information PB partially upholds this allegation in regard to failing to ensure relevant documentation is in place or passed across to tenant's (expired gas certificate, EPC, How to Rent Leaflet, TDS info).
77. It is unclear how that conclusion was reached since all that documentation was to be provided prior to move-in date and was the responsibility of the Letting's team. That paragraph then goes on, in a further switch, to excuse him from any responsibility for the failure to evict the tenants:

"... PB does not however find CW or his team's actions as substantiated as for the reason for an inability to issue a S21 notice."

78. Then finally:

49. After consideration of ACAS guidelines PB upholds the substantiated elements of this allegation as misconduct.

79. With regard to the alleged bullying he said that he had spoken to Alyana to understand why she had presented her witness statement about two hours before the disciplinary hearing was due to start, and concluded on balance that her e-mail “reflected how she felt” and that Mr Williams had not provided “sufficient mitigation” to explain why she would make this statement if it had no merit and so that allegation too was upheld.

80. This outcome was then passed to Mr Andrew Goad in the form of a recommendation for dismissal – not on grounds of gross misconduct but because of a breakdown in the relationship of trust and confidence. That led to an e-mail from Andrew Goad on 4 February 2022, at page 297, which endorsed those recommendations and dismissed him.

81. There was then an appeal hearing on 13 February 2021, when the same ground has gone over again, with the same result. Once again, the outcome was accepted, this time by Mr Kenneth Goad. It was suggested to us that two decision makers applying their minds to the case made it a fairer process, but in the circumstances we find that that adds no weight. The appeal hearing itself was not referred to at this hearing and so there is nothing to be gained by summarising that further discussion.

Applicable Law

Unfair Dismissal

82. We turned to the applicable law starting with unfair dismissal. This important right is set out in s.94 Employment Rights Act 1996 (ERA), and by s.98, the employer has first to show a fair reason for the dismissal, in this case not conduct or capability but “some other substantial reason” i.e. a breakdown in trust and confidence.

83. Such cases are relatively rare. In **McFarlane v Relate Avon Ltd** 2010 ICR 507 a relationship counsellor was dismissed for objecting to giving sex therapy to same-sex couples, and Relate lost trust and confidence in him because he was not willing to adopt their ethical policies. Mr Justice Underhill, then President of the Employment Appeal Tribunal, commented that referring to trust and confidence in this context was unhelpful as in almost all cases where an employee is dismissed for something he or she has done, the employer will have lost trust and confidence in him or her. It was more helpful to focus on the employee’s specific conduct rather than use such general terminology.

84. It is very difficult in this case to find anything substantial that Mr Williams has done wrong. For the reasons already given we find that he was not at fault in relation to

85 Hove Avenue, which was the main issue which arose in the conduct of his duties. We have also rejected the claim that he deliberately deleted items from his computer to damage the business, which the company insisted was the act which caused them to lose trust in him. The other allegations are of secondary importance. Clearly bullying is a serious allegation but the points raised by Alayna in her e-mail are rather vague. There are no particular dates or occasions or even particular behaviours referred to beyond being condescending or patronising. Some weight also has to be given to the fact that she eagerly took up Mr Williams' invitation to attend leaving drinks in January that year. That indicates that whatever had gone on between them there was no serious rift. We did not hear evidence from her. It appears that Mr Baker only spoke to her to check that this was a genuine complaint on her part and to understand why it was made so soon before the disciplinary hearing. That is a point that was never really explained. There was, for example, no general investigation into working relations within the team and nothing from Tiffany or Donald to support that view. We also bear in mind that Alayna was working in a different team and was not reporting to Mr Williams. Our overall impression is that this is a series of largely manufactured allegations designed to justify Mr Williams' removal from the business. We find therefore that there was no substantial reason for his dismissal.

85. Even if we are wrong in that conclusion, the process followed was unfair. It is clear that the company had already decided to dismiss Mr Williams even before he went off sick, as shown by the initial discussion with Peninsula. That is reinforced by the refusal to allow him to return to work, even though others were carrying on his duties and were shorthanded, and the other measures to exclude him.
86. The next factor is the extreme delay in dealing with these matters. That reinforces the view that a decision had already been made. The directors were quite candid that it was easier to leave him on furlough rather than deal with the situation. Further, the investigation largely involved asking him for his point of view and then consulting with the directors to see whether they agreed. There was little or no independent investigation among other members of staff beyond the few steps described. We do not suggest that Mr Fordham or Mr Baker were aware that the decision had been made long before to dismiss Mr Williams, let alone that there had been no attempt to contact Mr Williams about missing e-mails, or that clients had been told that he had already left the firm. The decision was one made by Andrew Goad, and it seems to us was not dependent to any extent on the contents of the disciplinary report.
87. In those circumstances we find the dismissal substantially and procedurally unfair and we see no satisfactory basis for any finding of contributory fault or any other deduction. It is clear that there was never any prospect of a different outcome.
88. We also have to give consideration to the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015). This sets out principles for handling disciplinary procedures in the workplace, principles with which employers are expected to

comply. The main elements are set out of paragraph 4 of the introduction, and the first of them is that employers should raise and deal with issues promptly and should not unreasonably delay any stage of the process. There is also an obligation to act consistently, to carry out any necessary investigations, and to inform employees of the basis of the problem and give them an opportunity to put their case in response **before** any decisions are made [emphasis added]. Here, the two main failures are the delay and the predetermined nature of the decision.

89. These are serious failings. Although Mr Williams was able to raise his side of the arguments, and although the process is well-documented, it was nevertheless essentially futile. Damages may be uplifted by up to 25% for a failure to comply with the Code. Since that is the maximum, it should be reserved for those cases where the Code is completely disregarded, such as an instant dismissal. On that view, we cannot set the uplift so high, and conclude that the figure of 15% is appropriate.

Discrimination

90. We turn to the allegations of harassment and discrimination. There is some evidence here of discriminatory behaviour. There are the remarks made how about sharing a room during the trips to Barcelona and Paris; there is the “I’m free!” comment; and there is also the pornography. It is not clear whether this was in any way aimed at making Mr Williams feel uncomfortable as a gay man or whether this was simply a normal practice at the company. The latter seems more likely. It does not appear that Mr Barrow was disciplined over this, and no training was given on equality or diversity. The question we have to pose ourselves is whether his sexuality is the reason why Mr Williams was not invited to the awards ceremony, or did not receive a pay rise, or was left on furlough, or was subjected to disciplinary proceedings?
91. There is a particular provision at paragraph 136 of the Equality Act 2010 dealing with the burden of proof:
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
 - (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
92. This was considered by the Court of Appeal in **Ayodele v CityLink Limited** [2017] EWCA Civ 1913, where the Court explained that this involved a two-stage approach: in the first stage the claimant has to prove facts from which the Tribunal *could* conclude, in the absence of an explanation from the respondent, that discrimination had occurred; and if so, there is a second stage, when the respondent has the burden of proving that this was not the case. This is in keeping with the guidance in **Madarrassy v Nomura** [2007] ICR 867 which established that it is not enough a claimant to show that he had a protected characteristic and was dismissed - “something more” is required.

93. In considering that first stage the tribunal has to hear evidence from both sides. Here, there are essentially two possible explanations for this treatment; either it was on grounds of Mr Williams' sexuality or it was because of the dispute over making an insurance claim on 85 Hove Avenue. It could of course be a combination of the two but we see no reason to look beyond the insurance issue.
94. Mr Williams had worked at the company for over three years at that stage without any awkwardness or strained relations. If there was any animosity towards him because of his sexual orientation it would be surprising that nothing occurred to give any hint of that between the trip to Barcelona in 2017 and late 2019.
95. More importantly however his own evidence was that there was a clear change in the attitude towards him in April or May 2019. He told us that "I had four very successful years working for the respondent, all of a sudden it changed." His closing submissions began with a statement that:
- "Nearly four years have passed since the respondent asked me to undertake a fraudulent insurance claim. When I refused, the respondent began to undermine and belittle me."
96. That change fully explains the subsequent events. Alternatively, it leaves nothing unexplained for which "something more" is required. Hence, there is no requirement for further explanation from the respondent and the complaints of harassment and discrimination must be dismissed.

Public Interest Disclosure

97. The next question is whether Mr Williams was a whistleblower? Section 43B Employment Rights Act 1996 provides that:
- (1) ... 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—
98. There is then a list which includes criminal offences and failure to comply with other legal obligations. But there has to be a disclosure of information. Simply being asked to commit a criminal offence or breach a legal obligation and refusing is not sufficient. We were not referred to any cases on the point, but it seems a sufficiently fundamental point not to require any legal authority. If that had been the intention of the Act, it could easily have been stated. Here it seems that Mr Williams preferred to act with discretion. He did not send any e-mails about it. He did not tell any of his colleagues. In fact, the first mention we can find of it is in his appeal letter. It follows that the complaints of detriment and of automatically unfair dismissal must also be dismissed.

Statement of employment particulars

99. The final point on liability concerns the failure to provide Mr Williams with a statement of employment particulars, something which is admitted by the company. In those circumstances, absent exceptional circumstances, the Tribunal must award two weeks' pay and may award four weeks' pay. Here, the failure is particularly surprising since this was a well-established business with about 50 staff. Mr Williams was managing a small team and had been there for several years. The failure also seems to have been widespread, although we heard evidence that this has since been rectified. Nevertheless in those circumstances we conclude that an award of four weeks' pay is fully justified.

Conclusions

100. For all of the above reasons the claim is upheld on this last aspect and for unfair dismissal. It remains to assess compensation which is now limited to financial loss.

Compensation

101. Mr. Williams was on a gross annual salary of £35,000. That is therefore the upper limit permitted for his compensation.

102. That corresponds to a monthly salary of £2,916.67 or £673.08 weekly.

103. Applying the normal deductions for tax and National Insurance the net figure is £2,295.31. That is slightly higher than the figure in the claim form which is the net figure after employee pension contributions have been deducted. It is however only tax and National Insurance which should be taken away.

104. There is also the employer's pension contribution to consider. The exact percentage is not altogether clear from the few pay slips available since they were not for typical months but we take it that the correct figure is the statutory minimum of 3%. That increases the net monthly package by £87.50 to £2,382.81.

105. The starting point is the basic award. Mr. Williams had four complete years' service at the date of dismissal and given his age he is entitled to four weeks gross pay, subject to the statutory limit of £544, i.e. £2,176.00

106. Mr. Williams began consultancy work in a self-employed capacity from 13 December 2021. That makes any future losses difficult to calculate but he waived any claimed for compensation beyond that date. No evidence was produced to show that he had failed to mitigate his loss within that and so we accept that he is entitled to recover those losses.

107. The period from 4 February 2021 to 13 December 2021 is of 10 months and 9 days. The net loss over that amounts to £24,535.09.

108. There is then a 15% uplift for breach of the ACAS code of practice, which amounts to £3,680.26, increasing the compensatory award to £28,215.35.
109. We also award £500 for loss of statutory rights. Although Mr. Williams did not start work with another employer his decision to work on a freelance basis is a reasonable one and he has still lost a valuable benefit, the right not to be unfairly dismissed. That increases the total to £28,715.35.
110. This is below the statutory cap. There is no need to consider grossing up the award for tax since the compensatory award is less than £30,000.
111. Hence, the total award for unfair dismissal comprises:
- | | |
|------------------------|------------|
| (a) Basic Award | £2,176.00 |
| (b) Compensatory Award | £28,715.35 |
| (c) Total Award | £30,891.35 |
112. The final element is the four weeks' pay for failure to provide a statement of employment particulars. Using the gross pay figure, this is £2,692.32, bringing the overall total to £33,583.67.

Financial Penalty

113. We conclude that this is an appropriate case for the award of a financial penalty although we recognised that such a step is rare. Section 12A of the Employment Tribunals Act 1996 allows a tribunal to order the employer to pay a penalty to the Secretary of State where it concludes that the employer has breached any of the worker's rights and the breach has one or more aggravating features.
114. There are a number of aggravating features here but the main consideration is that this was a manufactured complaint against Mr. Williams. We note in particular that we find that there is no basis for the allegation that he completely wiped his work computer before going off sick. We also have in mind the e-mail from Andrew Goad informing him that he had failed to respond to numerous calls and texts and e-mails about work matters during his absence. That was entirely untrue and intended to manufacture a case against him. That places this case well outside the normal range.
115. Subsection 2 requires us to have regard to the employer's ability to pay. Having given the respondent an opportunity to consider that point, no such objection was raised.
116. By subsection 5 the amount of the penalty shall be 50% of the amount awarded in compensation, subject to upper and lower limits which do not apply.

117. Then, by subsection 10, the employer's liability is discharged if 50% of the amount of the penalty is paid no later than 21 days after the day on which notice of the decision to impose the penalty is sent to the employer. 50% of the sum awarded is £16,791.84 and so that liability is discharged if £8,395.92 is paid within the required time scale.
118. This is 50% of the total award, not simply the award for unfair dismissal. The term used in section 12A throughout is "the financial award" and for example at subsection 7 refers to "a financial award on any of the claims".
119. We were urged to take care to avoid any double penalty since we have already awarded an uplift for failure to comply with the ACAS Code of Practise and in respect of these statement of terms and conditions. The latter point is entirely separate. As to the ACAS Code, the uplift was awarded for the delay and the predetermined outcome. It is one thing to have a closed mind and to disregard the evidence; it is another thing altogether to manufacture that evidence. We see no double punishment in that approach. Consequently a penalty in the sum named above will be issued.

Employment Judge Fowell
Date 20 January 2023