EMPLOYMENT TRIBUNALS

Claimant: **Michael Hibbert**

Respondent: **Upwards Care Solutions**

Heard at: **Manchester (CVP Hybrid)** **On:** **31st May 2023**

Before: **Employment Judge Greer**

Representation

Claimant: In person
Respondent: Ms Suleman (solicitor)

JUDGMENT

The Claimant's claim for automatic unfair dismissal is not well founded and is dismissed.

REASONS

Background

1. The Claimant was employed as a Maintenance Officer between 16th May 2022 and 30th September 2022. It is not in dispute that he was dismissed by the Respondent.

2. The Claimant started the ACAS early conciliation process on 29th September 2022. The ACAS certificate was issued on 7th October 2022. The claim was presented, in time, on 23rd November 2022.

The Claim

3. The Claimant has claimed unfair dismissal pursuant to Employment Right Act 1996, Section 98 ("ERA"). His claim is that, contrary to the Respondent claim that he was dismissed due to his conduct and capability, the Claimant was dismissed because he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,

The issues

4. At the hearing before me, the parties agreed that the following issue falls to be determined in this case:

> Was the reason or principal reason for dismissal that the Claimant brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety?
>
> If so, the claimant will be regarded as unfairly dismissed.

5. The Respondent's representative conceded before me that the Claimant's expression of his concerns as to the safety of fire doors installed on premises maintained by the Respondent at a supervisory meeting on 23rd September 2022 fell within Section 100(1)(c) Employment Rights Act 1996. However, the Respondent denied that this was the primary reason for the Claimant's dismissal.

6. The parties agreed that, by operation of Section 108 of the Employment Rights Act 1996, if the Claimant was dismissed for another reason, the Appellant could not enjoy the protection from unfair dismissal provided by the Act. This is because he was employed by the Respondent for less than two years.

The hearing

7. The hearing took place by way of a hybrid hearing. I joined the hearing from Alexandra House, Manchester. The other parties joined in from remote locations over the Cloud Video Platform. The Respondent was represented by Ms Suleman, a solicitor. I am satisfied that the participants were able to see and hear each other throughout the hearing

8. I was assisted by a carefully prepared bundle of 181 pages. It was brought to my attention that the Respondent's advisors filed this bundle with the Tribunal some time in the week before the hearing but, for reasons unknown to them, the Tribunal did not receive the bundles. Ms Suleman then sent the bundle and witnesses statements to the Tribunal electronically. I stopped the hearing for one hour to read the witness statements and the documents identified by the parties as essential reading.

9. After returning from the break, the Claimant raised a concern about 2 of the documents in the bundle, namely, the Maintenance Supervision Form at page 101, and the document headed "Below is Michael's dismissal appeal" at page 118. In respect of the document at 101, he said that this document was *fraudulent*, and it should be excluded. As for Page 118, he said that this had commentary added by the Respondent's agents and it gave a false impression. He said that I should exclude this evidence. Having heard submissions from both parties, I determined that it was in the interests of justice for this evidence to be admitted. It appeared to contain important explanatory evidence going to the heart of the issue in dispute between the parties. I explained to the Claimant that I understood that the evidence contained within the documents was not agreed and that he would have an opportunity to ask questions of Amy George-Davidson and make submissions as to the weight I should attach to these documents.

10. I then heard evidence under affirmation from:

    i. The Claimant
    ii. Amy George-Davidson

11. Lianne Fishwick prepared a statement and joined the hearing by video, prepared to give evidence. Ms Suleman indicated that the contents of Ms Fishwick's statement were not in dispute, and it was therefore unnecessary for her to be called as a witness. I took her evidence into account when reaching my decision, on the basis that it was agreed.

12. Prior to Amy George-Davidson giving her evidence, I offered the Claimant additional time to prepare questions. Without entering into the arena, I suggested that the Claimant might wish to put the specific points in the documents at 101 and 118 he believed to be fraudulent directly to Ms George-Davidson. We stopped the hearing for 30 minutes to allow the Claimant to compose his questions.

13. I heard helpful submissions from Ms Suleman and from the Claimant. At the end of the hearing, I reserved my determination.

14. In reaching my decision, I have carefully considered the oral and documentary evidence, the closing submissions, and my record of proceedings. The fact that I have not referred to every document in the evidence bundle should not be taken to mean that I have not considered it.

15. Where it has been necessary to make a finding of fact in respect of contested matters, I have done so by deciding which version of events is more likely, taking the evidence in the round.

The Facts

16. The Claimant was employed as a Maintenance Officer between 16th May 2022 and 30th September 2022. The Respondent says that the Claimant was dismissed due to his conduct and capability.

17. The Respondent is a limited company in the business of providing residential care homes for vulnerable young people under the care of social services and young people leaving care. The Appellant's line manager was Rachel Youd ('RY'). Amy George-Davidson ('AGD') is an HR and Payroll Officer for the Respondent. The Respondent retained Peninsula to provide advice on Human Resources issues.

18. Gareth Saunders ('GS') is employed by the Respondent in its maintenance department and was the Claimant's team leader. Catherine McKeever ('CM') is an administrative officer for the Respondent, based in the firm's head office. Luka Lucas Phiri ('LLP') is a self-employed joiner, engaged by the Respondent on an ad-hoc basis to perform work outside the expertise of the Respondent's in-house maintenance team.

19. The Claimant commenced his employment on an initial six month probationary period, commencing on 16th May 2022. His probationary period was due to expire on 16th November 2022. According to the contract of employment:

> *If your work performance is not up to the required standard, or you are considered to be generally unsuitable, we may either take remedial action (which may include the extension of your probationary period) or terminate your employment at any time.*

20. The Claimant had concerns over the quality of LLP's work, and in particular the manner in which LLP fitted an architrave upon which a fire door was to be fitted. The Claimant raised those concerns with both GS and CM on or around 26th July 2022 by recording videos of the work and sending those videos to GS and CM by

What's App and by email. The email to GS and CM that accompanied the videos stated:

> *3. The door frame that Lucas repaired has a screw sticking out of the side that the door needs hanging on meaning I could not possible hand a door until this screw has been removed (the head of the screw has been rounded off that much I cannot get a drill bit or screw driver in to remove or put the screw further in).*
>
> *4. Lucas has replaced the damaged side of the frame with a new frame however this has been fitted out of line with the original frame meaning the door will not fit into the frame flush as it should (fitting the further back on the frame could weaken the wood due to the weight of a fire door and leave us back at square one and replacing a damaged frame).*
>
> *5. The rebate on the new piece of frame Lucas has fit is only 38mil and the original frames relate is only 30mil which means the frame itself is 2 different sizes. The fire door itself isn't even big enough to fit the door aa the short rebates would push the door out of line and become weakened due to the stress it would put on the hinges*

21. AGD says, and I accept, that the Respondent performed no specific investigation as to the quality of LLP's work as a result of this correspondence. As AGD explained at the hearing before me, the Respondent took the view that inspections took place as a matter of routine and if there were defects in the work, those defects would be detected at that stage.

22. On 3rd August 2022 the Applicant attended a Supervision Meeting with RY. This was his first supervision meeting during his probationary period with the Respondent. I accept the Claimant's evidence that no concerns as to his capability or conduct had been raised with him prior to this meeting.

23. There is no dispute over the fact that RY did raise a number of concerns over the Claimant's work at this meeting. Those concerns included an incident on 26th July 2022 in which the claimant gave a screwdriver to a looked after young person. The young person caused damage to the property using the screwdriver and the incident required the attendance of the police. I accept that this matter regarded as serious by the Respondent because I have seen a contemporaneous incident report identifying the matter as a safeguarding alert. The notes record this matter being raised with the Claimant at his supervision meeting on 3rd August 2022 and that RY believed that this gave rise to concerns over the Claimant's ability to identify and maintain professional boundaries with the Respondent's service users (Page 93). In addition, the Claimant agrees that RY raised concerns over his use of the company's time management software YRIS and an agreement was reached as to how the system was to be used in future.

24. The manager's comments at the end of the Maintenance Supervision Form state:

> *Michael understands that he has a lot to do in order to clear the backlog of work quickly and effectively. He is going to work on his time management and ensure he is using the time at the end of the day to plan and order resources for the next jobs.*

25. I accept the Claimant's evidence that this does not refer to a backlog of work caused by the Claimant working slowly, rather, this refers to a backlog of work within the organisation which existed before the Claimant began working for the Respondent.

26. At that meeting, the Claimant indicated that he wished to undertake specific training to enable him to fit fire doors. RY left it in the Claimant's hands to find a suitable course, which the Claimant would be allowed to undertake during his working hours. I accept the Claimant's evidence that no deadline was agreed by which the Claimant was required to undertake this training and that this was seen as a matter of professional development, rather than a necessary step to address a perceived weakness in the Claimant's capability for his job. The Claimant did not specifically raise his concerns over the quality of LLP's work at this meeting, but I accept that he had this in mind when he indicated his wish to undertake training on the installation of fire doors.

27. It was agreed at this meeting that the Claimant would manage his own time and would be entitled to set his hours flexibly. He would choose which of the outstanding jobs to attend to and in what order. The exception to this rule was if GS directed the Claimant to attend to urgent work. I find that it was rational for the Claimant to interpret this direction as an indication of the Respondent's satisfaction with his working habits.

28. On 22nd September 2022 the Claimant was asked by CM to install a fire door at one of the Respondent's buildings in Cheetham Hill. The Claimant refused to perform this work, believing himself to be unqualified to perform this task. I accept the Claimant's evidence as to his reasons for declining to perform this work. I have no reason to disbelieve the Respondent's claim that this work was performed by an external contractor, owing to the fact that none of the Respondent's in-house maintenance team had the requisite expertise to fit a fire door.

29. On 22nd September 2022 the Claimant attended to other work in Derby, completing this work at around 2pm. He received a message from the Respondent's head office directing him to repair a fence as a matter of urgency. The Claimant contacted GS and told him that there was not enough time remaining in the working day to complete that task, owing to his location at that time and his distance from the job. GS agreed with the Claimant's assessment and told the Claimant to attend to a maintenance job in Crewe instead. I accept that the Claimant was entitled to decline the instruction from head office and follow GS's instructions, this chain of command having been agreed with RY at the meeting on 3rd August 2022. I have no reason to disbelieve that the fence was repaired by an external contractor.

30. At 4pm on 22nd September 2022, RY invited the Claimant to a supervision meeting the following day. On 23rd September 2022 the Claimant attended a Supervision meeting with RY. AGD was also present at the meeting. I accept AGD's evidence that she did not attend such meetings as a matter of routine and that she attended this meeting on RY's invitation. I find that the reason for this invitation is that RY had determined in advance of the meeting that she was considering dismissing the Claimant and that she wished for someone from Human Resources to be present as a witness, to take a note of the meeting and to offer advice.

31. I find AGD's claim in her evidence that the typed note at 109 is a word-for-word record of the meeting is an exaggeration. AGD says that she made a handwritten note during the meeting, and then typed her notes into a word-processed document on 26th September 2023. The original handwritten notes have not been disclosed. I find that AGD has summarised the discussion to portray the Respondent in the best possible light. However, I would not go as far as to find, as the Claimant asserts, that the transcript is *fraudulent*. The Claimant did not put any specific alleged falsehoods to AGD during the hearing. I find that the notes broadly reflect the topics that were discussed at the meeting, albeit from a perspective flattering to the Respondent.

32. In any event, I find that the core of the accounts of what was said at the meeting are largely not in dispute. Both sides agree that RY raised several concerns about the Claimant's work. Specifically, RY mentioned the Claimant's punctuality, his relationship with CM and his failure to complete training in the installation of fire doors. Of particular concern to the Respondent was the Claimant's comments about the Respondent to third parties, and the Claimant's openly expressed concerns about the propriety of such work being performed by a private company, for profit. These comments were said to be contrary to a confidentiality agreement. The notes reflect, and the Claimant does not dispute, that he did express the views attributed to him and he does not resile from them.

33. AGD agreed, and I so find, that the Claimant raised his concerns about the standard of LLP's installation of fire doors. This matter was discussed very briefly, and after the other concerns as to the Claimant's performance had been discussed. On AGD's account, which I accept, no more than 30 words were said on the topic. I find that brevity of the discussion over the Claimant's health and safety concerns reflects the fact that RY had already decided because of the matters discussed in the conversation that preceded that disclosure, to dismiss the Claimant. By this stage of the meeting, RY and AGD were longer interested in hearing what the Claimant had to say. There then followed a short break during which RY and AGD took advice from Peninsula by telephone. RY and AGD returned to the meeting and informed the Claimant that he was to be dismissed.

34. In a letter dated 23rd September 2022, AGD wrote to the Claimant in the following terms:

> *Further to the supervision meeting held on 23rd September 2022 I am writing to confirm the company's decision.*
>
> *As you are aware, when you started work with us we had high hopes and expectations that you would meet the standards we require. Unfortunately, this has not proved to be the case.*
>
> *We have given careful consideration to your responses in the meeting but reached the conclusion that you have failed to demonstrate your suitability for your role during your probationary period.*
>
> *It is with regret that I confirm that your employment was terminated with immediate effect. You will be paid in lieu of notice.*

The Law

35. Section 108 of ERA excludes those who have been employed for less than 2 years from the protection from unfair dismissal under Section 94. Exceptions to that rule are contained in Section 108(3) and includes those dismissed for a reason under Section 108. Section 108(1)(c) provides:

> *100 Health and safety cases.*
>
> *(1)An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that—*
>
> *...*
>
> *(c)being an employee at a place where—*
>
> > *(i)there was no such representative or safety committee, or*
> >
> > *(ii)there was such a representative or safety committee but it was not reasonably practicable for the employee to raise the matter by those means,*
>
> *he brought to his employer's attention, by reasonable means, circumstances connected with his work which he reasonably believed were harmful or potentially harmful to health or safety,*

36. In such cases, the focus of the tribunal's inquiry will be on establishing, on the evidence, whether the prohibited reason was the reason or principal reason for dismissal. If it was, then the tribunal must find the dismissal unfair.

37. If the claimant did not have two years' continuous employment, it is for the claimant to prove that the Tribunal has jurisdiction to hear the claim. The claimant must therefore prove on the balance of probability that the reason or principal reason was the automatically unfair reason which will establish that the right to bring a claim arose: **Maund v Penwith District Council [1984] ICR 143 (Court of Appeal).**

38. In **Smith v Hayle Town Council 1978 ICR 996, CA**. Lord Denning MR said that tribunals should weigh the evidence according to '*the proof which it [is] in the power of one side to have produced and in the power of the other side to have contradicted'*. In other words, once an employee has presented some prima facie evidence that he or she was dismissed for the prohibited reason, it is up to the employer to produce evidence to the contrary

39. In **H Goodwin Ltd v Fitzmaurice and ors 1977 IRLR 393**, the EAT held that tribunals should deal with an employee's alleged reason first but should not dismiss the claim without hearing evidence of the employer's stated reason because if the latter reason was unproved it could bolster an employee's otherwise weak allegation.

40. In **ABC News Intercontinental Inc v Gizbert EAT 0160/06,** G, a news reporter, had indicated to his employer an unwillingness to travel to war zones in Iraq and Afghanistan. When he was made redundant following budget cuts, G contended

that the dismissal was automatically unfair under S.100(1)(c). An employment tribunal concurred, concluding that the principal reason for selecting G for redundancy was his refusal to travel to war zones. Allowing ABC's appeal, the EAT held that such a reason cannot fall within the purview of S.100(1)(c) because it does not relate to the employee bringing a health and safety matter to the employer's attention. On the tribunal's findings, the reason for G's dismissal was that he would not go to war zones, and ABC needed reporters who would.

Conclusions

41. The Respondent accepts that the Claimant brought his health and safety concerns over LLP's installation of fire doors on premises managed by the Respondent to RY's attention at the supervisory meeting on 23rd September 2022. The Respondent's representative accepted that if this disclosure was the primary reason for the Claimant's dismissal, then the Claimant must succeed in his claim. The question for me to determine is whether this disclosure was the primary reason for the Claimant's dismissal.

42. I accept that the Claimant genuinely believes that he was dismissed for expressing his health and safety concerns to RY. From the Claimant's perspective, this is a reasonable inference to draw from the way he was treated by the Respondent. This was the final topic to be discussed before RY and AGD left to take advice from Peninsula on whether they could lawfully dismiss the Claimant. Whatever concerns RY held as to the Claimant's capability and conduct; these concerns were not brought to the Claimant's attention outside of supervision meetings. On the contrary, RY and the company management left the Claimant to go about his business, allowing these concerns to accumulate until they were ventilated at supervision meetings. I have no doubt that the Claimant was, as he says in his statement, shocked when he learned of the decision that he was to be dismissed. He had no warning that this was about to happen.

43. Although this was a reasonable inference for the Claimant to draw, in my judgment this inference is not, by itself, sufficient to made out a prima facie case to the required standard. Aside from this inference, there is no evidence before the Tribunal to suggest that this disclosure is what motivated the dismissal.

44. On the contrary, the evidence demonstrates that the Respondent dismissed the Claimant owing to its subjective view that the Claimant was generally unsuitable for the role, whether or not this view was objectively well founded. Whilst the accuracy of the transcripts is not agreed, it is agreed that at each of the 2 supervision meetings with RY and the Claimant, a series of matters relating to the Claimant's capability and conduct were put to the Claimant. Although the Claimant does not agree with the Respondent's view of his capability and conduct, he does not dispute that the comments made in the letter of 23rd September 2023 represent the Respondent's own subjective view of his work.

45. On the facts, as I have found them to be, the Respondent began contemplating dismissing the Claimant no later than 1 week before the Claimant made the disclosure during the meeting on 23rd September 2022. I find this to be the case because the Respondent began taking advice on the Claimant's position from an external Human Resources advisor on 16th September 2023. The Respondent

arranged for an HR official to be present at the supervision meeting in the knowledge that there was a prospect that the Claimant was to be dismissed at that meeting. Had dismissal not been in the Respondent's contemplation prior to the disclosure, neither step would have been taken.

46. This view is supported by the fact that the Claimant raised similar health and safety concerns to GS and GM in July 2022. No action was taken against the Claimant at that time. Had the Respondent wished to dismiss the Claimant for making disclosures relating health and safety, it could have done so much earlier. I find that the evidence suggests that the Respondent was wholly indifferent to the Claimants concerns as to the quality of LLP's work.

47. I therefore find that the primary reason for the Claimant's dismissal is that the Respondent formed the view that the Claimant was generally unsuitable for the role due to its assessment of his capability and conduct. It was not the Claimant's expression of concerns over health and safety matters.

48. Bearing in mind the Claimant's length of service, I have no jurisdiction to consider whether the Respondent's views of the Appellant's capability and conduct were reasonably held and whether a fair process was followed. I refrain from doing so. From the photographs of the Claimant's work within the bundle, it is apparent that the quality of his work was of a high standard. From the text messages and emails that I have seen, it is clear to me that the Claimant was proud of his work and went about it in a conscientious manner. He cared deeply about the wellbeing of the Respondent's service users and built a good rapport with those that he encountered. It is very much to his credit that he did not perform work that he felt was above his capabilities and that, if performed poorly, would create a health and safety hazard. It is admirable that he wished to undertake training to increase his skills. If the Respondent expected the Appellant to work differently, it is difficult to see how they imagined he would have divined this; they dismissed him immediately after they brought their criticisms to his attention. He had no difficulty in finding work after his dismissal and I have no doubt that he is an asset to his new employer. Suffice to say, had the Claimant been employed by the Respondent for longer than 2 years, the outcome of these proceedings might well have been different. But this is matter over which this Tribunal no jurisdiction.

49. For these reasons, the Claimant's claim must fail.

Employment Judge Greer
Date 1st June 2023

JUDGMENT & REASONS SENT TO THE PARTIES ON
9 June 2023

FOR THE TRIBUNAL OFFICE