EMPLOYMENT TRIBUNALS

Claimant:	Mr A Hayat
Respondent:	Islamic Educational And Recreational Institute
Heard at:	Watford Employment Tribunal (In Public; In Person)
On:	22 to 25 May 2023
Before:	Employment Judge Quill;
Members:	Ms S Johnstone; Mr P Hough

Appearances

For the claimant:	In Person
For the respondent:	Mr A Burgess, consultant

JUDGMENT having been sent to the parties on 30 June 2023 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The respondent is a place of worship. It is a religious charity, a mosque and Islamic school.

2. The claimant was an employee from no later than October 2014 with the exact start dates to be determined at a remedy stage. He had been an active volunteer for many years previously. He was dismissed in December 2021.

3. The respondent was governed by a Board of Trustees. There were seven Trustees at most of the times relevant to this dispute and the claimant gives the following description of those seven which we accept is sufficiently accurate:

    1.1. Group "A": Mr M Asghar, Mr. A H Bhatti, Mr. Hanif Khan & Mr Ashraf Khan (those are referred to as "4 Trustees" in the claimants' side's statements).

1.2. Group "B": Mr A R Bhatti, the late Mr. A Rauf, and Mr. S Khurram and those are mentioned as "3 Trustees" in the claimants' side's statements.

2. It is common ground that Group B did not vote in favour of certain decisions, including the claimant's dismissal, and the claimant's prior suspension. Both parties agree that there were these two rival groups of Trustees, and the relevance of that will be discussed in more detail in our reasons below.

The Claims and The Issues

3. Two claims were presented.

4. The first was on 22 November 2021 following early conciliation from 19 October to 19 November 2021. That claim form alleged whistleblowing detriment (during employment) specifically that in August 2021 the claimant had been paid SSP rather than a higher amount and also that:

> "I enquired many time about my holiday pay with my employer, they never replied me until now in Nov.2021, refusing to allow me to take holidays or pay for my unspent holidays".

5. Thus, to the extent that these were complaints about detriments occurring on or after 20 August 2021, they were in time. Furthermore, we are satisfied that that claim form raised a freestanding complaint about failure to allow holidays to be taken.

6. The second claim was presented on 27 February 2022 following early conciliation from 4 January 2022 to 1 February 2022. Thus, in relation to any complaints which were not raised in the first claim, the complaints in the second claim about acts and omissions occurring on or after 5 October 2021, were in time.

List of issues

7. There was a list of issues produced at a preliminary hearing dated 17 August 2022. That list appears in the bundle through pages 104 to 108. As per the orders at that hearing, the parties were to write to the Tribunal if they disagreed with it, and neither side did.

8. At the outset of Day 1 of the hearing, the parties agreed the list was still correct and accurate as far as they were each concerned. Following our pre-reading, we raised the issue that potentially a claim for notice pay (as breach of contract) should be added. This was a claim alluded to in the claimant's schedule of loss, and in the second claim form. The respondent did not object, and so this was a complaint to be added to the list of issues.

9. As discussed during submissions on Day 3, the list of issues did not include a freestanding complaint that paying SSP (as opposed to either full pay, or

80% of full pay) in August 2021 had been an unauthorised deduction from wages, or indeed a breach of contract. There had been no application to amend (either prior to the hearing or during the hearing), and the claimant had not included this as a separate item in his schedule of loss.

10. In terms of the documents for this hearing, we had a bundle of about 506 pages including the index. There was a supplementary bundle of 145 pages and then further items were added to the supplementary bundle taking it from pages 146 up to page 156.

11. In terms of witnesses, on the claimant's side the claimant gave evidence himself and also called Mr Rashid Bhatti. Each of them had produced a written statement. They gave evidence confirming the statement was true and was cross examined about it. The claimant had also produced a statement from Mr Shahzada Khurram which we read and we have given it such weight as we see fit. He did not attend and we were told that the reason for this is that he was overseas. No application for a witness order had been made to us and the claimant told us he only found out that Mr Khurram was overseas, or would be overseas for this hearing, once he had already left.

12. On the respondent's side there were two witnesses each of whom had produced a written statement and testified to the accuracy of the statement and answered questions. They were Mr Hafiz Bhatti and Mr Mohammed Asghar.

13. The hearing took place entirely in person.

The Law

4. The law which we have to take into account is as follows:

Unfair Dismissal

5. Section 98 of the Employment Rights Act 1996 ("ERA") deals with fairness of dismissals.

> **98.— General.**
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

6. The respondent has the burden of proving, on the balance of probabilities, that the claimant was dismissed for the reason which the respondent is relying on. The reason in this sense is the set of facts known to the person taking the decision on behalf of the employer (or the set of beliefs held by that person) which cause the employer to dismiss the employee. See the court of appeal decision in Abernethy v Mott [1974] I.C.R. 323.

7. Furthermore, the employer must also satisfy us that this factual reason, the Abernethy reasons, falls within at least one of the definitions in either section 98(2) or section 98(1)(b).

8. In this case, the respondent alleges that the reason was "conduct" as defined by section 98(2)(a) ERA or, in the alternative "some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held" ("SOSR") as defined in section 98(1)(b).

9. "Conduct" can refer to the actions of an employee - whether done in the course of employment or not – that potentially affect the employer/employee relationship. The fact that the "conduct" did not occur during working time and/or did not occur at the workplace does not take it outside the definition in

section 98(2)(b), although those factors might well potentially be relevant to the analysis of fairness under section 98(4).

14. In considering whether the dismissal reason was indeed within the some other substantial reason definition, the word "other" is significant. In other words, if the reason is "conduct" then it is not some other substantial reason. However, there is nothing to prevent an employer arguing that a particular facts that was the reason for the dismissal could be categorised as EITHER within the conduct definition or else within the "some other substantial reason" ("SOSR") definition, and leaving it to the Tribunal to decide which is more appropriate.

15. Provided the respondent does persuade us of (a) the dismissal reason and (b) that it falls within one of the categories in s.98, then the dismissal is potentially fair. That means it is then necessary to consider section 98(4) ERA. In doing so, we take into account the respondent's size and administrative resources and we decide whether the respondent acted reasonably or unreasonably in treating the employee's conduct, as it found it to be, was a sufficient reason for dismissal.

16. For conduct dismissals, we take into account, amongst other things, the guidance in British Home Stores v Burchell. Did the employer have a genuine belief that the employee had conducted himself as alleged; if so, did it have reasonable grounds for that belief. Did the employer carry out a reasonable investigation prior to forming the belief.

17. In terms of the sanction of dismissal itself we must consider whether this particular respondent's decision to dismiss this particular claimant fell within the band of reasonable responses in all the circumstances. The band of reasonable responses test applies not only to the decision to dismiss but also to the procedure by which that decision was reached.

18. It is not the role of the Tribunal to assess the evidence and to decide whether the claimant should or should not have been dismissed. In other words, it is not our role to substitute our decisions for the decisions made by the respondent.

10. The band of reasonable responses test is a wide one, but it is not infinite. In an appropriate case we could decide that the respondent had acted outside the band of reasonable responses and that dismissal was not an appropriate sanction for the actual conduct which it had decided had been proven.

11. For SOSR, provided the respondent does show to us that the reason, in the Abernethy sense, does fall within some other substantial category, then we must go on to analyse whether the respondent had a reasonable basis to believe that that state of affairs was indeed a sufficient reason to dismiss the employee. Again, the mere fact alone that the respondent has decided that there has been a relationship breakdown or a breakdown in trust and

confidence and that therefore the employee cannot continue to work for the employer, that does not mean that we have to accept that the respondent's decision was one which a reasonable employer might reach. We can take into account all of the circumstances including what had caused that state of affairs to exist.

12. Regardless of whether the dismissal was for conduct or for SOSR, if we do decide that there has been any unfairness at the original stage at which the dismissal decision was made, then we might potentially decide that that had been cured as a result of what had happened during the appeal process. That depends on all the circumstances of the case; it depends upon the nature of the unfairness of the first stage and it depends on the nature of what happens at the second stage, at the appeal stage and it depends on the equity and substantial merits of the case. We take into account the guidance in Taylor v OCS Group [2006] IRLR 614.

Dismissal because of protected disclosure

19. Within Part X of the Employment Rights Act, s.103A specifically deals with dismissal where the principal reason is that the employee has made a protected disclosure.

> An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

20. The requirements that need to be satisfied for the definition of protected disclosure in s.43A of the Employment Rights Act to be met are that there needs to have been some disclosure within the meaning of the Act. That disclosure has to be a qualifying disclosure and that disclosure has to have been made by the worker in a manner which is set out at sections 43C through to 43H. The disclosure must contain information and it must be sufficient information to tend to show that one of the types of wrongdoing (as I will call them loosely) within s.43B(1) have occurred.

> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
>
> (e) that the environment has been, is being or is likely to be damaged, or

(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

21. Providing it does so and then we have to analyse whether the employee actually believed that the disclosure tended to show one of those things, (a) to (f) in section 43B(1); we have to decide whether the employee's belief was reasonable; we have to decide whether the employee actually believed that the disclosure was being made in the public interest and if they did actually believe it was in the public interest we have to decide whether that belief was a reasonable one.

22. In terms of looking at the employee's beliefs, we analyse what was actually in his mind (which is the subjective part of the test) before going on to deciding whether that belief was reasonable or not. In relation to public interest part of the criteria Chesterton Global Limited v Nurmohamed [2017] EWCA Civ 979 addressed the type of factors that a Tribunal will typically have to consider when deciding whether a disclosure had been made in the public interest. Parliament has deliberately not created a specific definition, but it may often be useful to consider

22.1. the number in the group affected by the wrongdoing;

22.2. how the wrongdoing affected people and the extent to which they are affected;

22.3. the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

22.4. the identity of the alleged wrongdoer.

23. Where a qualifying disclosure is made to an employer, it is a protected disclosure. (Section 43C). Similarly, if a qualifying disclosure is made to the person responsible for the wrongdoing, it is also a protected disclosure. (Also Section 43C).

24. When it is made to a prescribed person (in relation to a particular type of wrongdoing for which that person is the correct prescribed person) then it is a protected disclosure. (Section 43F)

25. Where the disclosure is not made to the person, or in the circumstances, set out in any of Sections 43C to 43F, the Tribunal has to either be satisfied that sections 43G or 43H applied or else the disclosure (even if it is qualifying) is not a protected disclosure.

43G.— Disclosure in other cases.

(1) A qualifying disclosure is made in accordance with this section if—

(b) the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(c) he does not make the disclosure for purposes of personal gain,

(d) any of the conditions in subsection (2) is met, and

(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) The conditions referred to in subsection (1)(d) are—

(a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,

(b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer,

or

(c) that the worker has previously made a disclosure of substantially the same information—

(i) to his employer, or

(ii) in accordance with section 43F.

(3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—

(a) the identity of the person to whom the disclosure is made,

(b) the seriousness of the relevant failure,

(c) whether the relevant failure is continuing or is likely to occur in the future,

(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,

(e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure,

and

(f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

43H.— Disclosure of exceptionally serious failure.

(1) A qualifying disclosure is made in accordance with this section if—

(b) the worker reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(c) he does not make the disclosure for purposes of personal gain,

(d) the relevant failure is of an exceptionally serious nature, and

(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to the identity of the person to whom the disclosure is made.

26. Section 43G(1) sets out four conditions (b), (c), (d) and (e). In addition at least one of the conditions in subsection 2 have to be met which include that the worker has previously made a disclosure of substantially the same information to the employer or in accordance with s.43(F). The Tribunal also has to decide whether it was reasonable for the worker to make the disclosure having regard to the identity of the person to whom the disclosure is made, the seriousness of the relevant failure and whether the relevant failure is continuing or is likely to occur in the future amongst other things.

27. Section 43H includes a requirement that the wrongdoing ("the relevant failure") is exceptionally serious.

28. When there is an allegation that the dismissal reason fell within s.103A (and particularly in cases where the employee does in any event have two years qualifying service), it is for the respondent to prove what its reason was for dismissing the employee. In other words, the respondent has an onus to seek to prove that the principal reason for the dismissal was something other than the protected disclosure. That being said, even if the Tribunal decides that the dismissal was not because of the reason put forward by the employer it does not necessarily follow that the employee succeeds by default. It is open to the Tribunal to decide that the dismissal was not for the reason alleged by the employer but was not because of the protected disclosure either (see Kuzel v Roche Products Ltd).

29. The Supreme Court decision in Royal Mail Group Ltd v Jhuti [2019] UKSC 55 states that where the real reason for dismissal is hidden from the decision maker, the dismissing officer, because there is an invented reason, put forward by an investigator or senior manager, and that senior manager or investigator was motivated by a protected disclosure that the claimant had made, then the investigators or senior manager's motivation can be attributed to the employer as the dismissal reason. In other words, that is a potential route for a claimant to succeed under s.103A.

30. In a case where a claimant seeks to argue that there was an overall plan involving several people to remove a whistleblower from an organisation (because of their whistleblowing), then, if the Tribunal decides that there is evidence to support the assertion that there was such a plan, then, in accordance with the usual principles of drawing inferences, it might be prepared to decide that the evidence supports the theory that decision maker was acting in accordance with such a plan.

31. However, the mere fact alone that a claimant has made a protected disclosure and that one or more colleagues might have been aggrieved by it and/or complained about it, is not necessarily enough for the claimant to succeed in

showing that their later dismissal fell within section 103A. In the absence of the Jhuti type scenario, the opinions or beliefs of people other than the dismissing officer are not necessarily relevant to the Tribunal's decision about what was the "real reason" for the dismissal. It will be up to the Tribunal to analyse the actual decision maker's reasoning and to decide whether that decision maker made the decision to dismiss (for the reasons which they have claimed or for some other reason or) because of the protected disclosure.

Protected Disclosure Detriment

32. S.47B of the Employment Rights Act 1996 deals with protected disclosures and the right not to be subjected to detriments.

> **47B.— Protected disclosures.**
>
> (1) A worker has the right not to be subjected to any detriment by anyact, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
>
> (1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—
>
> (a) by another worker of W's employer in the course of that other worker's employment, or
>
> (b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.
>
> (1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.
>
> (1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.
>
> (1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—
>
> (a) from doing that thing, or
>
> (b) from doing anything of that description.

33. The test, in a detriment case, has been described by the court of appeal as being whether "the protected disclosure materially influences (in the sense of it being more than a trivial influence) the employer's treatment of the whistle-blower" – NHS Manchester v Fecitt and others [2012] IRLR 64. Importantly, this is distinctly different from the test under Section 103A. S.103A requires the protected disclosure to be the principal reason for the dismissal but under s.47B the protected disclosure does not have to be the principal reason for the detriment.

34. As per s.48(2) ERA, it is for the employer to show the ground on which any act or deliberate failure to act was done. Thus, once all the other necessary elements of a claim have been proved on the balance of probabilities by the claimant, the burden may shift to the respondent to prove that the worker was not subjected to the detriment on the ground that he or she had made the

protected disclosure. However, there needs to be some prima facie evidence that the protected disclosure might have been an influence. If an Employment Tribunal can find no evidence to indicate the ground on which a respondent subjected a claimant to a detriment, it does not follow that the claim succeeds by default (see Ibekwe v Sussex Partnership NHS Foundation Trust EAT 0072/14).

35. A detriment is something that a reasonable worker in the claimant's position would or might consider to be to their disadvantage. Something can be a detriment even if there are no physical or economic consequence. However, an unjustified sense of grievance is not a detriment.

Holiday Entitlement

36. In terms of holiday entitlement, the Working Time Regulations 1998 ("WTR") provide employees (and other workers) with a minimum statutory entitlement to paid time off.

37. Regulation 15 sets out a mechanism by which the worker can inform the employer of the intention to take a period of leave (and also the employer's opportunity to say "no" to that). It also provides a mechanism by which the employer can instruct the employee that they must use their entitlement to paid time off on specified dates.

38. Regulation 14 sets out the formula for calculating how much leave an employee has in the last leave year and what payment in lieu is to be made on termination.

39. The combined effect of Regulations 13(1) and 13A is that an employee is entitled to 5.6 weeks per year as paid time off (that includes any such paid time off on public holidays). This is subject to an overall maximum of 28 days per year.

40. Paragraphs 9 to 13 of Regulation 13 specify:

> (9) Leave to which a worker is entitled under this regulation may be taken in instalments, but–
>
> (a) subject to the exception in paragraphs (10) and (11), it may only be taken in the leave year in respect of which it is due, and
>
> (b) it may not be replaced by a payment in lieu except where the worker's employment is terminated.
>
> (10) Where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under this regulation as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society), the worker shall be entitled to carry forward such untaken leave as provided for in paragraph (11).

(11) Leave to which paragraph (10) applies may be carried forward and taken in the two leave years immediately following the leave year in respect of which it was due.

(12) An employer may only require a worker not to take leave to which para (10) applies on particular days as provided for in regulation 15(2) where the employer has good reason to do so.

(13) For the purpose of this regulation "coronavirus" means severe acute respiratory syndrome corona-virus 2 (SARS-CoV-2).

41. As enacted, the legislation specified that leave to which the worker is entitled had to be taken in the leave year in respect on which it is accrued and cannot be replaced by a payment in lieu (other than on termination of employment). Sub paragraphs 10 to 13 were added came into effect on 26 March 2020 and were added because of the coronavirus pandemic; they allow entitlement to be carried over from the year in which the leave accrued into a later year, in the circumstances set out in those paragraphs.

42. Regulation 13(10) deals with the situation where it is not reasonably practicable for a worker to take some or all of the leave to which they are entitled as a result of the effects of coronavirus. In the regulation itself it specifies that the effects include the effects on the worker, the employer or the wider economy or society. In those circumstances the employee is entitled to carry forward the untaken leave and it can be taken in either of the two leave years immediately following the leave year in which it had been due but had been untaken because it was not reasonably practicable.

43. As per Regulation 17, while WTR sets out minimum entitlements, if an employee's contract provides a right which is more beneficial to the employee, then the employee may enforce that right instead.

44. In terms of contractual entitlement to annual leave, it is not the case that Tribunals should assume that there is a right to carry over holiday entitlement from one year to the next, it is a matter of interpreting what the contract actually says.

45. If claiming holiday entitlement, or pay for holiday entitlement, in the Tribunal relying on the Tribunal's breach of contract jurisdiction, then the time limit for the claim is 3 months from the end of employment. (And such a contract claim cannot be brought during employment, it has to be presented after employment terminated).

46. If claiming holiday pay rights based on WTR, rather than contract, then a claim for a failure to pay the correct amount for holiday actually taken, can potentially be brought as a claim under Part II of the Employment Rights Act; in other words a claim for unauthorised deduction from wages. If it is brought in that manner then the time limits which apply are those set out in sections 23(2), 23(3) and 23(4) of the Employment Rights and the restriction on how far back the claim can go in 23(4)(A) also applies.

47. However, if based specifically on of the Working Time Regulations 1998, the time limits are set out in Regulation 30 and subject to any early conciliation extension, the claim must be presented within 3 months of

    (a) the date on which the exercise of the right should have been permitted or, as the case may be,

    (b) the date on which the payment should have been made.

48. Those time limit may only be extended if the Tribunal is satisfied that it was not reasonably practicable to submit the claim in time.

Breach of Contract and Notice Pay

49. In terms of breach of contract and the Claimant's notice pay argument, the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 gives the Employment Tribunal jurisdiction to consider certain complaints of breach of contract.

50. In accordance with the ordinary principles for breach of contract claims, this jurisdiction allows the Tribunal to interpret the relevant contractual provisions and assess what the employee's contractual entitlement was to notice pay for example as well as holiday entitlement.

51. When a Tribunal is considering a wrongful dismissal claim (in other words a claim that the dismissal itself was in breach of contract) then the analysis is entirely different and separate to the analysis of whether the same dismissal was fair or unfair.

52. Where the employer terminates the contract without good cause, or without providing the employee with sufficient notice, the Claimant might have grounds to succeed in a claim for wrongful dismissal.

53. The amount of notice to which an employee is entitled is determined by the contract but subject to the statutory minimum. Again, in other words, if the contract allows the employee more notice than the statutory minimum then the employee is entitled to bring a claim for that period of notice but the contract cannot insist that the employee has less notice than the statute would allow, generally one week for every year up to a maximum of 12 years.

54. For the employer to prove that there has been conduct by the employee which entitles it to dismiss without notice then the conduct must be such that it must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in employment (see Neary v Dean of Westminster [1999] IRLR 288). The jargon phrases "gross misconduct" and "gross negligence" are sometimes used. There is no clear dividing line between them and, in any event, the decision is whether the contract has been breached and

whether the employee has acted in such a way that they are deemed to be ignoring their contractual obligations, and/or showing that they do not acknowledge that they are bound by them. Gross misconduct is often used to refer to things which an employee has done deliberately. Gross negligence, however, also includes serious failure to carry out their contractual duties even if that is because of an inability to comply with the contractual obligations.

55. In defending itself against a claim that it is required to pay damages for failure to give notice to an employee which it dismissed, the employer is entitled to rely upon facts not known at the time. In other words, the employer is not only entitled to rely on the reasons that caused it to dismiss the employee; it is entitled to rely on any other repudiatory breach that it later discovers. (That is another difference compared to unfair dismissal.)

The facts and our analysis and conclusions

56. It is convenient to first of all analyse the facts and evidence relating to the protected disclosures and our decision about whether they are or are not protected disclosures.

1. Did the Claimant disclose the following information:

a. Reporting the Respondent to the Charity Commission on 17 June 2020 regarding the Respondent breaching Covid-19 guidelines by allowing congregational prayers and overnight communal gatherings during April-May 2020;

b. Reporting the Respondent to the Metropolitan Police on 25 September 2020 regarding the Respondent breaching Covid-19 guideline by allowing congregational prayers and overnight communal gatherings during April-May 2020;

c. Reporting the Respondent to the Charity Commission on 9 October 2020 a safe-guarding concern regarding the Respondent's Trustee, Mr Mohammed Asghar, being held in prison for 3 months, during his time in the United Arab Emirates; and

d. Reporting the Respondent to the Disclosure and Barring Service on 13 October 2020 a safe-guarding concern regarding the Respondent's Trustee, Mr Mohammad Asghar, being held in prison for 3 months, during his time in the United Arab Emirates.

2. Did the information-above tend to show one or more of the relevant failures in accordance with section 43B(1)(a) to 43B(1)(f) of the ERA 1996, in particular section 43B(1)(a), (b) & (d)?

3. Was that the Claimant's reasonable belief?

4. Was/were the disclosure(s) made in the public interest?

57. The first item in the list of issues refers to a report to the Charity Commission on 17 June 2020. That is an email which appears at page 147 and 148 of the bundle. The respondent concedes that this was a protected disclosure. We note that the Charity Commission is a prescribed person.

58. In the email, the claimant identifies, the respondent's charity number. He speaks about being on furlough and, amongst other things, at paragraph 5, he speaks about the covid rules and regulations and says there has been a breach of those rules.

59. Following that communication to the Charity Commission (which was not copied to the respondent or the trustees), the Charity Commission contacted the respondent by letter which appears at page 476 of the bundle and is dated 14 July 2020. This letter received and read the same day. It was the first time the respondent knew that anybody had made a complaint or raised an issue with the Charity Commission. Not surprisingly, the letter does not mention the claimant by name or give any specific identifying information about the claimant.

    59.1. At paragraph 7, it refers to having received an allegation of an ongoing dispute within the Trustee Board.

    59.2. Paragraph 8 refers to having received an allegation that the charity had ignored covid 19 lockdown rules and regulations and that some Trustees had allowed people to attend the mosque to pray up to five times a day throughout the months when places of worship were ordered to close by the government and it asked for a response to that.

    59.3. Paragraph 9 asks for more general information about how the mosque was being operated in compliance with covid 19 safety protocols.

60. The claimant had been on furlough since April 2020.

61. The claimant had written to the respondent on 9 July at page 150 of the bundle. He had received a response to that at page 151. In the response, Mohammed Khan, the Chairman, had said that the claimant must not be doing any sort of work.

62. The claimant replied again on 11 July with the heading "Complaint". In this item he spoke about the mosque having opened its door on 10 July for the first time after three months. He made various complaints about breach of covid rules in that item (pages 152 and 153). On the second page, he spoke about Mr Ashraf Khan, who, he said, was the main person responsible (with other Trustees' consent) who organised and participated in prayers and gatherings in the mosque throughout the lockdown from March to June 2020, breaking lockdown laws which was said to be a very irresponsible and dangerous exercise. In other words, there was a similarity between the contents of this item and the Charity Commission's letter received by the Trust a couple of days later.

63. The claimant then sent a further email to the employer on 12 July at page 154 of the bundle. Specifically this was a reply to what the respondent had written on 11 July. It asserted that the claimant was not working but also asserted the right to potentially socialise or talk to other people at the mosque. In other

words, the Claimant was making plain that he did not necessarily accept that what he had been told on 11 July required him to modify his behaviour. Amongst other things, in this item, the claimant said that while he was at the Respondent's premises, if he saw any breach of the covid 19 rules by anyone - including Trustees - it was his legal duty as a member of the public, congregation member, and staff member, to raise concerns and report it to the authorities if required.

64. The claimant sent a further email on 13 July which is at page 156 of the bundle and it was addressed to "all Trustees" and he said that he was being harassed by Mr Asghar due to the complaint he made of breaches of covid 19 safety rules by the Trustees and he said that he had the intention to take the matter further to the appropriate authorities if this was not stopped immediately. He also suggested that Mr Asghar wanted the claimant to stay away from the mosque to hide the irregular breaches of covid 19 rules by the Trustees.

65. The Trustees held a meeting on 16 July 2020. The minutes of that meeting - which we accept are accurate - appear in the supplementary bundle at pages 50 through to 52. Although we accept they are generally accurate the list of attendees at the top is potentially not accurate given that Mr Khurram is referred to in detail throughout the notes as somebody who was present.

66. The respondent relies on this item as part of its evidence for saying that they did not believe that the claimant was the person who had made the report to the Charity Commission.

66.1. The items on the agenda included number 2, the letter from the Charity Commission which had been received on 14 July and number 3 the letter from the claimant with reference to 11 July letter, the complaint.

66.2. By the time they came to discuss the Charity Commission letter Mr Rashid Bhatti, the claimant's witness in at these tribunal proceedings, had left the meeting. Mr Asghar had (according to the minutes, which we accept as accurate, in recording that he said this) expressed a view, which stated or implied that Mr Rashid was likely to have been behind the letter to Charity Commission.

66.3. However, as well as that comment, the minutes also record that there was then a general discussion about files and other bits and pieces as to who may have complained. The minutes go into no further detail about what was said, or which possible names were floated, but the very next item on the agenda was a letter from the Claimant in which Mr Asghar read out.

67. We take into account and it seems to be common ground in any event between the parties that as the claimant himself says there were two groups within the Board; a group of four and a group of three. Mr Asghar and Mr Hafiz Bhatti (the Respondent's two witnesses for the tribunal hearing) were included in that group of four. Mr Hafiz Bhatti not actually being present at this particular meeting, but we do think that that group of four did discuss things within themselves (and they do not say otherwise). Likewise, the group of three discussed things between themselves.

68. We do not think it a binary decision if they believed it was the letter to the Charity Commission might well have been sent (or was probably sent) by Mr Rashid Bhatti then they must have believed that it could not have been sent by the claimant. It is perfectly plausible that the respondents might have come to the conclusion that it was sent either by Mr Rashid Bhatti alone, by the claimant alone or by a combination of people which included Mr Rashid Bhatti and the claimant. Given the contents of the minutes of the meeting, and the fact that they were about to discuss the letter from the claimant immediately after the Charity Commission letter, given the fact that they had received all these items before the meeting, including the letter from the Charity Commission and the letter from the claimant, and given the similarity of the contents of some of the things the claimant said and some of the things raised by the Charity Commission, we are satisfied on the balance of probabilities that Mr Asghar and Mr Hafiz Bhatti did form the view that the claimant was in some way connected to the disclosure to the Charity Commission, whether by means of being a joint signatory to a letter, a sole signatory to a letter, or otherwise.

69. It is convenient to move straight to item 3 of the alleged protected disclosures because that is also to the Charity Commission. As we say the Charity Commission is a prescribed person. This is page 189 of the bundle and it is dated 9 October 2020. In it, the claimant describes himself as somebody responsible for safeguarding children. He says that one of the Trustees (and he names Mr Asghar) spent around six months in jail in Dubai for criminal charges. He says that, on his return to UK, the trustee was supposed to have informed the Charity Commission about the situation to get an all-clear. The claimant says that the all-clear was potentially needed (in his opinion) because large funds were involved and also young children were involved. The communication goes on to ask for advice.

70. It is our view that when the claimant sent this email he did think it tended to show a breach of a legal obligation, the breach of a legal obligation being (according to the claimants genuine belief) that the Charity Commission needed to be informed of Mr Asghar's situation and that they had not been informed. We are satisfied that that was the claimant's actual belief and that it was not unreasonable for him to hold that belief. We are also satisfied that the claimant actually believed that the disclosure was in the public interest, taking into account the fact that this is a charitable fund, potentially serving a large section of the community, perhaps several thousand people and also taking into account the need to safeguard those funds. It was not unreasonable for the claimant to believe that this was in the public interest. The fact that the claimant asks for advice in the letter, (including "is he allowed to be a charity trustee" and also "please advise me [the claimant] if he [Mr Ashgar] can carry on as normal") does not prevent it being a protected disclosure. The information conveyed is clear enough in the email. The he supplied to the Charity Commission was that Mr Asghar had allegedly been in jail and had not informed Charity Commission. Whether the Claimant was right or wrong about that (and whether the Charity Commission had this information previously or not) is irrelevant to the issue of whether it is a

protected disclosure. They were the correct prescribed body to receive details of this type of perceived breach of legal obligations.

71. We were told, in terms of how the Claimant came by the information, that the claimant received the information and also a related document from Mr Rashid Bhatti. He says that Mr Rashid Bhatti received the information from somebody directly connected with the events. We do accept Mr Asghar's evidence that - in fact - what actually happened was that he was the innocent victim of somebody else's wrongdoing. A cheque had been written in his name by somebody else, by a fraudster, and that cheque had bounced and that is what had led to him being detained potentially for a short while until the matter was cleared up. It was not necessarily unreasonable for the claimant to rely on the information that he received. We do take into account that the document he received was originally written in Arabic and a photograph of a crumpled document was taken and then overlaid with some English text. The claimant does not know who added the English text, but the accuracy of that text (although we have received no expert evidence on the point) has not been disputed in these proceedings. Therefore, in the circumstances we are satisfied that 9 October 2020 email to the Charity Commission was a protected disclosure. Importantly, we are not satisfied that it was brought to the respondent's attention that the claimant had sent this disclosure, or this information, to the Charity Commission.

72. In the supplementary bundle at page 153 there is an email from the claimant to the respondent dated 9 October 2020. In the email the claimant says it is vital that Mr Asghar reports the relevant matter to the Charity Commission. The respondent sent a reply on 13 October 2020 from the chairman, Mr Khan, which said that the Board was mindful of its safeguarding obligations and informed the claimant that they were satisfied that everything was in order. However, on the claimant's own account the information that he received himself was from Mr Rashid Bhatti and the respondent had no reason to think that any further contact from the Charity Commission was instigated by the claimant as opposed to Mr Rashid Bhatti who had originally acquired the information.

73. The next alleged protected disclosure is to the Police on 25 September 2020. We have the report which the claimant made via the website, starting at page 177 of the bundle. It refers to the claimant having previously sought to raise the matter with Southall Police station and not got a response. That earlier report (said to be in June according to the claimant) has not been alleged to be a protected disclosure. Within the September item, the claimant says that it is a matter which affects health and safety. He says that he is reporting a crime. He refers to the crime and/or the breach of a legal obligation as being a breach of Covid-19 rules by offering congregational prayers without social distancing. He says that Trustees can be seen in the crowd participating in the breach. He names Mr Ashraf Khan and also Mr Hanif Khan as alleged perpetrators.

74. We are satisfied that this disclosure is made in the circumstances described in section 43G of the Employment Rights Act. It is a disclosure of information that had previously been supplied to the employer (and also to a regulator, a

prescribed person, the Charity Commission). It is not unreasonable to supply information to the Police regarding an alleged crime. The claimant believed that what he wrote in this report did tend to show a breach of a legal obligation and/or a criminal offence. It was not unreasonable for him to hold that belief. He believed it was in the public interest; given the safety to members of the public - including the congregation as well as the wider public who might come into contact with anybody who became infected with Covid-19 via onward transmission - it was not unreasonable for the claimant to believe that making this report was in the public interest. We are not satisfied that it came to the employers' attention that the claimant had made this report to Police. We have not been made aware of any contact from the Police seeking to investigate this particular alleged crime. The claimant did receive an acknowledgement from the Police, but that is not sufficient to demonstrate that they contacted the Respondent, or that any information conveyed by police to the Respondent would have been a reason for the Respondent to infer that it was the Claimant who had disclosed the alleged wrongdoing.

75. The other alleged disclosure is to the DBS. The claimant specifically refers to a disclosure on 13 October, pages 196 and 197, which is his email to the DBS. In it, he writes that he wants to find out if a person is not fit for the role of School Governor, due to having spent time in jail and then having not disclosed that on return from jail. He asks and who can he, the claimant, complain to in that scenario. That is what he specifically says on 13 October. The correspondence continued after that date. The DBS replied on 19 October and the claimant supplied more information on 19 October. The email exchange finished on 28 October when the claimant supplied a document which named Mr Asghar as the person involved.

76. The first item at 13 October is probably too general. It does not contain sufficient information to be a qualifying disclosure. It does not identify any particular charity or particular organisation. In addition, it is more as a question about how to make a disclosure rather than as a disclosure of information. If we take the email trail as a whole, including the email and attachments on 28 October, that would supply enough information to be a qualifying disclosure. However, even the trail as a whole is not a protected disclosure.

77. The DBS is not a prescribed person for these purposes. The correspondence from the DBS made that clear to the claimant. They made it clear that they were not the appropriate body for him to be raising these things with. The claimant knew that he could write to the Charity Commission (and indeed he had done so) if he wished to raise things with a prescribed person. Taking account of the fact that the Claimant was told by the recipient that they were not the appropriate body to receive the information, our decision is that it would not be reasonable to treat the emails to DBS as falling within either 43G or 43H. In any event, it does not, in our judgment, fall into the exceptionally serious category as set out in 43H.

78. Although we are not finding this correspondence with DBS to be a protected disclosure, even if it had been, it would not have led to a finding in the Claimant's favour on the detriment and/or the dismissal complaints. We are

not satisfied that it came to Mr Asghar's attention or the Respondent's attention, or any of the 4 Trustees' attention, that the claimant had made this contact with the DBS.

79. We turn now to our analysis of the alleged detriments.

> 9. Was the Claimant subjected to the following detriments:
>
> a. The Respondent restricting the times the Claimant was allowed to use its premises for work and prayer on 11 July 2020;
>
> b. The Respondent restricting the Claimant from social contact with its congregational members on 18 July 2020;
>
> c. The Respondent sending a new contract of employment to the Claimant in or around the middle of April 2021;
>
> d. The Respondent ignoring the Claimant's holiday pay requests;
>
> e. The Respondent not paying the Claimant furlough pay for 10 days during isolation in August 2021;
>
> f. The Respondent putting the Claimant on notice of potential redundancy on 14 September 2021, due to the lack of students;
>
> g. Suspending the Claimant on 24 September 2021;
>
> h. The Respondent refusing to provide the Claimant with a parking permit on 1 October 2021;
>
> i. The Respondent changing its locks to its bookshop in or around 4 October 2021;
>
> j. The Respondent reporting the Claimant to the police on 6 October 2021 for causing criminal damage to its property;
>
> k. The Respondent informing the Claimant on 26 October 2021 that he would be entitled to accrued and unspent holiday for 2021, in the event that he is dismissed; and
>
> l. The Claimant not receiving holiday pay from the Respondent.
>
> 10. Was the Claimant subjected to a detriment because he made a protected disclosure? That is to say, can the Claimant prove, on the balance of probabilities, facts from which a tribunal could conclude, in the absence of an adequate response, that the Respondent subjected him to a detriment which resulted from him making a protected disclosure?

80. Item 9(a) is the respondent restricting the times at which the claimant was allowed to use its premises for work and prayer on 11 July 2020. Page 151 of the bundle is the item which contains this alleged detriment.

81. It is accurate that the letter restricts the time the claimant is allowed to use the premises for. The reason that he is restricted in what he can do at the workplace for work is because the claimant was on furlough. He was not supposed to be doing any work at all. The respondent was reiterating its position that he was not supposed to be working and the reason it was reiterating its position was that it was seeking to protect its own position in relation to the Government's coronavirus job retention scheme ("CJRS"). The respondent would have been acting unlawfully if it allowed the claimant to do work and it was reasonable for it and appropriate for it to reiterate its position.

It was not doing so because any protected disclosure had been made by the claimant. Apart from anything else, although the disclosure had been made on 17 June, the respondent did not receive the Charity Commission letter until 14 July and had no way of knowing - and did not, in fact, know - that the claimant had sent the email to the Charity Commission prior to 11 July.

82. In terms of what the letter says about prayer, it is factually accurate that the letter says that the claimant must leave the building after prayer. It also says that, when using the mosque as a member of the public, the claimant should be limited to coming in to pray around public prayer times. Again, this restriction had nothing to do with the fact that the claimant had contacted the Charity Commission on 17 June. Again, as we have already said the respondents were not aware as of 11 July the claimant had contacted the Charity Commission. Secondly the letter itself makes clear it is responding to the claimant's 9 July letter.

83. Furthermore, we are not satisfied that the letter is a detriment to the claimant as a worker. In relation to what it says about work issues, it is just telling him that he remains on furlough, as he had already been prior to this letter, and just reiterating what those furlough arrangements were. In terms of information about using the premises for praying, that was not something connected to his duties as a worker; in any event, it was simply telling the claimant that he, the claimant, had to comply with the same restrictions as other members of the public. It told him he could pray around public prayer times and also that he should not pray at other times.

84. The claim in relation to that detriment therefore fails.

85. In terms of 9(b), the respondent restricting the claimant from social contact with its congregational members on 18 July 2020, this is a reference to the letter at pages 158 and 159 of the bundle. [There is also an 18 July letter to the claimant on page 157 but that is on a different topic. The 157 letter is specifically stated to be an acknowledgement of the claimant's letter of 11 July, that is the one that was headed complaint, and the one that was going to be discussed at the Board meeting or had been discussed at the Board meeting on 16 July]

86. The 158 letter is a reply to the claimant's 12 July communication (page 154) and also his 13 July communication (page 156). Both of those contained assertions by the claimant that suggested the claimant was not necessarily going to comply with the instructions contained in the 11 July letter. By implication the claimant's communications were asserting a right to meet and stay and talk to friends while at the mosque. The communications deny (as well) that the claimant's actions should be interpreted as working.

87. It is factually correct that the Respondent letter on page 158 did purport to restrict the claimant in having social contact with others in the mosque. Our finding is that the reason for that is as genuinely stated in the letter. The reasons were not that the claimant had made protected disclosures. The letter was simply repeating and amplifying information the claimant had already been given. The Claimant had already been given this information

on 11 July, which was before the respondent knew about the Charity Commission's concerns.

88. The letter on page 158 emphasised that the claimant was free to use the mosque for prayers, but only for prayers, since he was not working at the moment. The letter stated (accurately) that the claimant and other people were not allowed to socialise before or after prayers and that they should leave promptly after prayer times. The claimant was not being treated differently to other users of the mosque. As the letter says, the respondent genuinely believed that allowing socialising would have been contrary to the Government regulations that were in place at the time. Even if the respondent had an unreasonable or incorrect belief about the requirements of the regulations, it was their genuine belief, and that genuine belief was the reason for the letter to the claimant. The letter was not sent to the claimant because he had made any protected disclosures. In any event, the claimant has not shown to us that the respondent did have an unreasonable or incorrect belief about the regulations or that what is stated in the letter was an incorrect interpretation of the regulations. He has also not shown that he was having different rules applied to him than were applied to other people.

89. Detriment 9(c) is the respondent sending a new contract of employment to the claimant in or around the middle of April 2021.

90. The respondent had received advice from the Charity Commission that it might be necessary to take steps to ensure it was complying with legislation in relation to employment contracts. Although the claimant already had a written employment contract, some other employees did not. For that reason the employer engaged an external adviser, Peninsula. The reason that Peninsula produced standard contracts which were then sent to all employees was to seek to comply with employment law requirements and to seek to introduce standard policies and procedures.

91. The documents that were sent to the claimant on 22 March 2021 included the proposed new contract which appears at page 141 of the bundle. That document was not sent to the claimant because of the fact that the claimant was the person who had made, or was believed to have made, any protected disclosures. In other words, it was not sent to him because of any suspicion that he had been the person who had contacted the Charity Commission the previous year, about 9 months previously.

92. The respondent was not intending to subject the claimant to any detriment by its proposed new policies and procedures and proposed new contract. The respondent was not intending to give the claimant any lesser rights, or worse conditions, than he had under his existing contract of employment. The new contract included approximately the same start date as his existing contract. The new item suggested that his employment had begun on 26 September 2017 (page 141 of the bundle) whereas the earlier contract had said that the start date was 1 October 2017 (page 122 of the bundle). In other words, there is not much difference but, in any event, the minor difference was in the claimant's favour.

93. The new contract said that annual leave would be 28 days for full-time employees and pro-rata for part-time. The claimant was going to be full-time according to the contract. The contract specified 4 specific bank holidays which were included within that 28 day allowance and those are set out on page 142 of the bundle. The old contract said that the holiday entitlement was for 4 weeks and then went on to say that in addition bank holidays would be paid as normal. The implication therefore, although not stated outright in the old contract, is that there would be no obligation to work on bank holidays and they would be paid even though the employee had not worked. Thus again, the new contract is not less advantageous in terms of holidays. The two are approximately the same (and, on some interpretations, they might be exactly the same) but if either one is more advantageous then it is probably the new one which gave more flexibility. Both of the contracts stated that the holiday had to be taken in the leave year in which it accrued.

94. The respondent was willing to engage with the claimant and propose some changes to the written contract wording to address points which the claimant had raised. Ultimately the claimant declined to sign the new contract and the respondent did not purport to either discipline him for not signing it or to dismiss him and reengage (or dismiss at all). It did not purport to insist that the new contract terms had taken effect. It did not say that the employment contract had been varied. The respondent, in effect, allowed the claimant to remain on his existing contract of employment, the one signed by him on 26 September 2017 as per page 129 of the bundle.

95. The latest dates by which the respondent sought to persuade the claimant to accept the new written contract appear to be 28 May 2021 and 12 July 2021, pages 201 and 202 of the bundle. In relation to the second of these, the claimant sent an email on 13 July page 203 of the bundle. There does not seem to have been any reply to that; there is not a reply contained in the bundle. It would have been reasonable (and best practice in this Tribunal's opinion) for an express reply to have been sent to the claimant answering the four points he made in that email. Only two of those four points have raised detriment arguments in this litigation and so it is only those two that we will comment on: start date and holiday entitlement

96. Although there was no express reply to the 13 July query/response, the new contract did not vary the old one in terms of start date or holiday entitlement. The old contract had been written and signed by the claimant long before any protected disclosures had been made. The lack of specific reply to this particular email about the new contract is not alleged to be a detriment and in any event the respondent ceased to try to persuade the claimant to sign the new contract. However, and in any event, had the respondent sent a reply about the start date or about holiday, it would have been perfectly reasonable for the respondent to point out to the claimant that the claimant was wrong if he thought that the proposed new contract was different to the old one in terms of either start date or holiday date.

97. So there would not have been a detriment even if the new contract had been implemented. It was not, in fact, implemented. The reason for the proposed implementation had nothing to do with the Claimant's protected disclosures.

98. Item 9(d), refers is an allegation of the respondent ignoring the claimant's holiday pay requests.

99. The claimant did contact the employer in May 2021 about "unpaid holiday pay" as he called it in the subject line of his email. That email is on page 200 of the bundle dated 17 May 2021. This was not necessarily the first time the claimant had sought to raise the issue about holiday entitlement. He had previously written to the respondent's accountant on 3 January 2021 (page 198 of the bundle). However, in relation to that particular email, we are not satisfied that it was actually brought to the respondent's attention. It is conceivable that it was, but there is no evidence that it was. The claimant does not seem to refer back to it in the specific emails that are in the bundle that he later sent directly to the respondent.

100. In terms of the 17 May email, the claimant addressed it to the Chairman and all Trustees and he said: *"Since I started to work as an admin in the trust I was not paid any holiday pay except for once, for only 2 weeks. Here I request you to calculate all my previous and present holiday pay and issue me a cheque for the full amount. Please note that according to my contract I am entitled to 28 days holiday per annum, excluding bank holidays. Looking forward to receive the payment as soon as possible".*

101. It is notable that the claimant is not accurately stating the holiday entitlement as per either the old or new contract. [Nor did he do so later, on 13 July 2021, where he referred to a month per year plus bank holidays.] It is also notable that the claimant is specifically asking for a payment, rather than asking for time off.

102. The claimant does not allege in this email that there are any particular periods when for which he was absent and for which he did not get paid. He does not allege in this email that there are any particular requests for time off that he had made and which had been refused.

103. The claimant did not get any specific response to this email. The first time he got any response at all - on this "holiday pay" point - was the 26 October 2021 email (page 269), which was sent after the claimant had sent some further correspondence on the topic.

104. In that email on 269 Mr Asghar stated that in the event of termination of employment the claimant would be entitled to any accrued and unspent holiday from the holiday year. In that email (which we will return to it later), Mr Asghar said that the respondent maintained that the claimant had had ample opportunity to take annual leave.

105. To the extent that the claimant sought a payment in lieu of holiday entitlement and he sought that to be paid to him by cheque, then the claimant was not entitled to receive a payment in lieu of holiday. For that reason there was no detriment by failing to pay the claimant in lieu of holiday by cheque or by other means, either in response to his 17 May request, or at all.

106. The 3 January request for completeness, was for the entitlement to be calculated rather than for a payment to be made.

107. It was a detriment to the claimant that there was such a lengthy delay in sending any response to him about the holiday issue. We are satisfied that the detriment was not on the ground of protected disclosure.

108. There were various sources of friction within the Trust and it is common ground that the claimant was regarded by the 4 Trustees in the majority as being within the faction that included the 3 minority Trustees. That had nothing to do with any protected disclosures the claimant had made. Furthermore, on the evidence presented to us, the arrangements for holiday for all employees were very vague and ambiguous at around this time. There was no formal procedure for employees to request holiday, no formal procedure for a holiday to be recorded (in terms of remaining entitlement or at all) and there was no encouragement to the claimant or to any other employee to use up their holiday entitlement. Mr Hafiz Bhatti's statement suggested that there was encouragement, but, upon being asked by the panel what that actually entailed, he simply said "well if somebody asked for holiday then they didn't say no". That does not amount to encouraging people to use up their holiday.

109. In submissions the claimant suggested to us, that when he wanted to use holiday, he would mention it to Mr Khurram; in other words to one of the claimant's own witnesses (albeit he did not attend the hearing) and one of the group of 3 Trustees in the minority. The claimant said in submissions that Mr Khurram would seek approval from the Board.

110. However, his witness evidence contained no examples of that and nor did he cross-examine the respondent's witnesses as to whether or not Mr Khurram had ever brought such requests to the Board. There was no suggestion actually made in evidence that the claimant had had specific requests refused.

111. Our finding is that the respondent had a haphazard and not satisfactory approach to the way in which it dealt with paid annual leave for all employees, including in relation to its statutory obligations for employees to have paid annual leave. The respondent's witnesses stated, and we have no reason to doubt them on this point, that since the employees have returned to work after the pandemic and since the implementation of the policies created by Peninsula - following the Charity Commission's suggestions - the situation has improved. However, at this time when the claimant made the request in May 2021, the old, inadequate procedure (or, more accurately, lack of procedure) was in place.

112. It would have been reasonable and appropriate for the respondent to reply to the claimant specifically, to clarify any misunderstanding on the claimant's behalf. The claimant was clearly of the opinion that he could receive a cheque for holiday pay. The respondent's current position as adopted in this litigation is that, had the claimant made a request for holiday during his furlough, then that would have been appropriate or that would have been granted, but that,

if he did not make a request for holiday during his furlough, then he lost his holiday entitlement at the end of the leave year. It is highly unreasonable in those circumstances for the respondent to fail to write to the claimant or notify the claimant that that was its position. The respondent had not told the claimant that that was the situation at the start of the furlough period or at any time during the furlough period.

113. However, in its treatment of the claimant, although unreasonable and unsatisfactory, the respondent was not treating the claimant any differently to other employees. We are satisfied that the way that they treated him in relation to holiday, and by the lack of response about holiday, was not because the claimant was suspected of having contacted the Charity Commission, or for that matter the Police or the DBS. This allegation of detriment fails.

114. The next item of detriment is 9(e), the respondent not paying the claimant furlough pay for 10 days, during isolation in August 2021.

115. In relation to this there is an email at page 152 of the supplementary bundle dated 2 August 2021. Mr Asghar told the claimant that the claimant was temporarily coming off furlough, and that he would be required to work up to 2 hours per day Saturday 7 to Friday 13 August and only those dates. In paragraph 33 of the claimant's witness statement the claimant says that on 13 August the respondent emailed him and told him that he should work for a further week without any advance notification. The parties agree that the claimant was actually paid SSP in August and that the first time the claimant knew about getting SSP (rather than either normal pay, or else furlough pay) was when he received his payslip for the month of August which showed SSP. On around 22 September 2021 the claimant raised a grievance about this. That is on page 214 of the bundle, and paragraphs 1 and 5 of that letter refer.

116. This matter was subsequently investigated by an external grievance officer, Peninsula's Sarah Reid. Her report dealing with the matter commences at page 244. One of the people she interviewed was Mr Asghar and she reports what he said to her in paragraph 27 of that report, page 249 of the bundle. The conversation between Mr Asghar and Ms Reid was in October 2021; in other words it was around 2 months after the incident in question and was when matters were much fresher in his mind in comparison to when he gave his evidence to the Tribunal in May 2023, around 18 months later.

117. We think it is reasonable and appropriate to rely on what Mr Asghar said to Ms Reid at the time, in October 2021. In making that decision, we take into account that that version is largely consistent with what the claimant says as well. There is a difference of opinion between the claimant and Mr Asghar, in that Mr Asghar implied that the reason the claimant was going to be required to work from 14 August onwards was that the claimant had asked for the enrolment process (the specific task that necessitated his temporarily coming off furlough) to be extended, whereas the claimant says that the respondent had insisted that the claimant work from 14 August and that that was contrary to the claimant's wishes.

118. We do not need to resolve the dispute about whose idea it was that the claimant would work from 14 August. We do not need to resolve or consider in detail the position of the Coronavirus Job Retention Scheme. We certainly do not express any doubts about the proposition that employers were allowed to use flexible furlough, provided the situation was properly declared to HMRC. As far as we are aware, there was nothing contrary to either the employee's contract of employment or the rules of the Coronavirus Job Retention Scheme for the employer to have told the claimant he was expected to attend work during the week of 14 August 2021 (and then presumably return to furlough afterwards, once the task was complete). In any event, regardless of any of that, we are satisfied that the respondent had told the claimant he was required to be at work that week and that the claimant knew that the respondent had told him this.

119. By an email dated 14 August, the claimant informed the employer that he would not be able to work that week. We have no reason to doubt the truth of the information contained in the email, which was that the claimant had become aware that somebody he had been in close contact with had tested positive for Covid and that under the rules that were in existence at the time he was, he believed, therefore, required to self-isolate and that, therefore, se he was not able to attend work. The claimant also gave another reason for not attending work and that was that he said inappropriate notice had been given to him about the requirement to stay back at work from 14 August, rather than returning to furlough.

120. Our decision is that the employer made a genuine attempt to interpret the respective rights of employer and employee in accordance with both the contract and the legislation and that, having done so, the employer reached a genuine decision that they should pay SSP rather than 80% of normal salary (or alternatively full salary). The Respondent thought that that was the Claimant's entitlement in circumstances in which he could not attend work for the reasons given by him.

121. It was a detriment to the claimant that he would receive SSP because that payment was lower than the amount he would have received otherwise. We are satisfied, however, that the respondent's reasons for making this SSP payment is that they thought it was appropriate at the time given that the claimant had informed them he was not available for work.

122. We do not need to decide whether the respondent interpreted the legislation correctly or not because we are satisfied that they believed that they had interpreted the legislation correctly; that that was their reason for making the SSP decision and they were not influenced by any protected disclosure that the claimant had made or the respondent thought he might have made. The respondent did not have to make similar decisions for any other employee, because it did face not similar circumstances with any other employee. The claimant was the only person who self-isolated when otherwise due to be at work (or indeed otherwise on furlough, as far as the Respondent knew). SSP was not paid to any other employee. There is nothing inherently suspicious about the fact that the claimant was the only person who was paid SSP given that he was the only person who informed the Respondent of self-isolation.

123. Item 9(f) is that the respondent put the claimant on notice of potential redundancy on 14 September 2021 due to lack of students.

124. On 13 September a meeting was called which the claimant attended, as did other employees. The employees were told that the respondent was contemplating redundancies. A letter went to the claimant on 14 September and that appears at pages 207 and 208 of the bundle. We accept the truthfulness of the contents of that letter. The respondent did believe that there was anticipated to be a significant reduction in the number of students. It believed that when the school reopened, following the 18 month Covid closure, it might have a reduced need for employees. We are satisfied that that was the reason for calling the meeting and that was the reason for sending this particular letter.

125. The proposals were not targeted at the claimant specifically. As things turned out the respondent did not go ahead with the redundancy proposals and it did not dismiss anybody. This was because of a combination of two things: two members of staff decided that they would not return to work when the school reopened; after the letter had been sent, the student numbers did, in fact, pick up. However, the redundancy exercise was genuine at the time it was proposed and it was not proposed on the grounds that the claimant had made any protected disclosures.

126. Item 9(g) is about suspending the claimant on 24 September 2021.

127. The claimant was suspended and the letter dated 24 September 2021 is at page 219 of the bundle. Our finding is that the reasons for suspending the claimant are as stated in the letter.

128. The reasons as stated initially were vague. It was simply said that there was an allegation of bringing the respondent into disrepute. However, we accept that the things the respondent had in mind were the things which were brought up in that category during the investigation. They included the social media post at pages 227 and 228 of the bundle, which is undated. The claimant admits that the name on that post is one that he was known as by people at the mosque and we are satisfied that the respondent did have reasonable grounds - at the time of the suspension – to suspect that it was the claimant who had written this post, and that it did, in fact, suspect that he had written it, and that that was part of the reason for the suspension.

129. During the subsequent investigation the claimant neither confirmed nor denied that he made the post. During this Tribunal hearing he says that it is true that he did publish this item on social media; he says it is not authored in his own words and he copied and pasted it from somebody else rather than writing it from scratch all himself. He also says he believed the contents are true. He accepts the item does not state or imply that he is simply quoting somebody else. Our decision is that the respondent had reasonable grounds to suspect that the claimant had written this item (if indeed, it would have made any difference to them that he was supposedly posting a quote somebody else rather than authoring the comments himself).

130. The other part of the suspension reason mentioned in Mr Asghar's statement (paragraph 34) is the flyer which appears on page 265 of the bundle. It is a document signed "Friends of Abu Bakir Masjid".

131. There was a document which the respondent received on 10 September, which appears at page 205 of the bundle, that was signed as being from "Friends Of Abubakr, Southall". That particular item was received electronically and its metadata which suggested to the respondent that the claimant was the author of that document.

132. At the time of the suspension, the respondent had reasonable grounds to suspect that the person or persons who produced the flyer might be the same as the person or persons who produced the 10 September letter; it also had reasonable grounds to suspect that the claimant produced the 10 September letter. [The claimant denies having been the actual author of the 10 September letter; he says it was sent to him by email and he downloaded and printed it.]

133. The reason that the respondent suspended the claimant is that it was commencing disciplinary action because of the contents of the items just mentioned and, in particular, the social media post. The social media post referred to "untrusted Trustees" and that a "dirty trick" was being played on the congregation. It referred to the Trustees as a "gang of losers" and said that if they had a shred of honour in them they would have resigned. It finished by saying justice will be done.

134. The suspension was not motivated, even in part, by the protected disclosures from a year earlier. In our view, there is no evidence that the respondent took a considered view as to whether suspension was strictly required, given that the claimant was on furlough at the time. However, we accept that preparations were being made by the Respondent for furlough to end (and CJRS was also ending) and arrangements were being made for individuals to return to work. Whether it was reasonable to suspend or not, we are satisfied that an employee who had been suspected of the same alleged misconduct as the claimant but who had not made protected disclosures, would also have been suspended.

135. The suspension was not a detriment on the grounds of protected disclosures.

136. Item 9(h) is the respondent refusing to provide the claimant with a parking permit on 1 October.

137. It is common ground between the parties that the local authority had provided the respondent with a number of parking permits and that the intended use of those was for worshippers on a short-term basis whilst the person was actually praying at the mosque.

138. Mr Hafiz Bhatti's evidence seems to suggest that permits would be kept at the mosque and as and when each worshipper required them they would borrow a permit for the period they were praying and then return it at the end of their visit. It is common ground between the parties that that was how they

were supposed to be used and that the local authority had not issued permits to be used for any other purpose.

139. It seems to be the case, however, that, in practice, the respondent was using the permits for the benefit of their employees, whilst the employees were attending work rather than praying.

140. The claimant had had access to a parking permit for a considerable length of time throughout the period of his employment and he had not used it just when praying; he had used it whilst working also.

141. On or around 1 October the respondent made clear to the claimant that they were not going to issue him with a new parking permit, one that he could keep and hold on to at all times. The respondent's assertions about the reasons for this are that, he was suspended, and that he did not need the employee parking permit.

142. As we have said, permits were not supposed to be used by employees. Nonetheless this reason for not supplying the Claimant with a permit that he could hold onto at all times, and use for any reason, not just when praying at the mosque, was the genuine reason for not giving him the permit at this time.

143. The respondent had fallen into the habit of using permits for employees. Because the claimant was suspended, the Respondent believed that there was need for him to have one permanently during the suspension. Mr Hafiz Bhatti states, and we accept his evidence, that had the claimant asked for a permit when he came to visit the mosque to pray on the same basis as they were available to other people (ie that he would hand it back as he was leaving having finished his prayers), the claimant would have been given one.

144. However, the claimant did not ask for a parking permit on that basis. His 1 October 2021 email at page 253 of the bundle, speaks for itself. The respondent did not give in to that request and we have no reason to doubt that had the suspension been lifted, the permit would have been supplied to him again for his use as an employee (even though that was an improper use of it).

145. In cross-examination, Mr Bhatti said they did not wish to encourage the claimant to spend more time at the mosque than was necessary for praying while the claimant was suspended. He said that they did not wish to encourage him to be there too often and that was part of their reason for not giving him a permit (which he could keep at all times and hold on to). However, as mentioned above, we accept that the Claimant would have been allowed to have temporary use of a permit while praying (had he asked, which he did not). The Respondent was not seeking to discourage the claimant from attending the mosque for the purposes of praying, and what Mr Hafiz Bhatti said in cross-examination was just a reiteration of the respondent's stated position (which he agreed with) that the claimant was suspended, therefore, he had no business being at work and should not have been at the premises for the purposes of seeking to work (or for any reason other than

prayers) and for that reason had no need to have the parking permit permanently.

146. In any event the reason for not giving the claimant the permit on 1 October 2021 was not that the claimant had made protected disclosures. The reason was, that he was suspended from work activities at the time and the respondent did not think he needed or should be given a parking permit in those circumstances.

147. Item 9(i) is the respondent changing its locks to its bookshop on or around 4 October 2021.

148. The respondent did do this and the reason it did it was the respondent wanted to have access to the bookshop. The claimant had the only key, and the shop was locked and the respondent had been unable to gain access. The respondent had requested that the claimant give the key to it whilst he was on furlough. He had been told that the key would be returned to him once his furlough ended, but the claimant had refused to return it. By 4 October, the claimant had been suspended and the key had still not been returned to the respondent and that is why the respondent decided to change the locks. It did so in order that it could gain access to the premises. The decision had nothing to do with any protected disclosures the claimant had made.

149. Item 9(j) is reporting the claimant to the Police on 6 October 2021 for causing criminal damage to its property.

150. The reason that the Police were called on 6 October is that the respondent had recently changed the locks to the bookshop so they would have access to the items inside and to the office. On 6 October, the claimant - who was suspended from duties at the time - was seeking to change the locks again. The claimant was seeking to do so, so that he, the claimant, and the 3 Trustees would have access. The 3 Trustees supported and encouraged this course of action. The 4 Trustees knew that the 3 Trustees were purporting that the claimant's suspension was not valid and that they (the 3 Trustees) could still instruct the claimant to come off furlough and to do work. On 6 October, the claimant drilled the lock and the existing lock was rendered damaged and unusable by the Claimant's actions. The claimant's position is that he was going to put in place a new lock and therefore what he did to the existing lock does not amount to criminal damage. (Effectively, his position is that before he started there was a working lock on the door, and after he finished he intended that there would be a working lock on the door, and so there was no criminal damage). The Claimant also argues the fact that he was authorised by the 3 Trustees (and that he regarded that authorisation as valid), also means that there was no criminal damage. In cross-examination, he also implied that the value of the lock was low and that might also be a defence to criminal damage charges.

151. We do accept that the claimant may well have had various defences to any criminal charges that had been made against him. We do not have to decide on the merits of such defences, and the issue we are considering is not whether a crime was actually committed and/or whether the Claimant committed and offence.

152. The issue that we have to consider is whether the reason for calling the Police was because of any protected disclosure. In our judgment, it was not.

153. The Police came and the Police told both sides that they were not proposing to take any action because the Police regarded it as a civil matter. We do not accept the claimant's assertion that the respondent in general or Mr Asghar in particular (who is a solicitor) knew in advance that the Police would decline to take action. It is far from implausible that the Respondent might regard deliberately breaking a lock which belonged to the Respondent as criminal damage. In any event, we are satisfied that the respondent's reasons for making the report to the Police, were that the respondent genuinely believed that the claimant had acted unlawfully. The Claimant was suspended at the time, and did not have permission as far as the Respondent (or the 4 Trustees, at least) was concerned to even be on the premises other than for praying. He was not supposed to be doing any work, and he did not have permission from the Respondent (in the opinion of the 4 Trustees) to drill a hole in the lock and damage it beyond repair.

154. In terms of item 9(k), that is the respondent informing the claimant on 26 October that he would be entitled to accrued and unspent holiday for 2021 in the event he was dismissed.

155. That is a reference to the document on page 269 which we have already referred to. It is the 26 October email from Mr Asghar to the claimant. The claimant says in his witness statement that this was a response to his own request for holiday pay. The claimant had sent an email (page 266 of the bundle) on 21 October. That said:

> Despite many requests and reminders over the years, The trust did not respond to me about the payment of my Holiday Pay. Since I started the fulltime job since Oct. 2017, 1 was only paid 2 weeks of Holiday pay.
>
> Please arrange to pay my dues as soon as possible before I take this dispute further.

156. The subject heading was "holiday pay". Our finding is that the email was, in express terms, a request for payment, not a request for time off.

157. The email sent by Mr Asghar responded to the claimant's request and says that, in the event of termination of employment, the claimant would be entitled to any accrued and unspent holiday from "this holiday year". The claimant argues that the reason it refers to "this holiday year" is that it was intended as an implication that he was going to be dismissed. He also says that it is

evidence that the outcome of his disciplinary had already been prejudged by the time this 26 October email was sent.

158. It is our view that it would have been preferable, as we have already said, that the claimant should have been given a proper explanation for holiday arrangements. He should have been given a clear explanation much sooner (in response to his previous communications) and he should have been told that if he wanted paid time off, then he could request it. It should have said that if he did not make such a request, then – as far as the Respondent was concerned - he would lose the entitlement.

159. Now that an explanation was being given, this particular 26 October email should have told the claimant that he could book holiday whilst on furlough or whilst on suspension and what the arrangements for doing that were. It would also have been preferable if the email had avoided the phrase "this holiday year", as the claimant came to believe that that implied termination was something that might happen in the near future, as opposed to merely being an explanation that pay in lieu of entitlement was something that would, hypothetically arise, if and only if there was termination of employment, hypothetically, at any point in time. A more accurate and potentially more acceptable phrasing might have been something like "in the event of termination part-way through any holiday year" the Respondent would make a payment in lieu.

160. All that being said, the specific reply which Mr Asghar sent on 26 October answered the claimant's specific queries, as per his 21 October email (page 266). The claimant had been specifically seeking a payment of "holiday pay". In those circumstances it was not unreasonable for Mr Asghar to mention that the claimant was not entitled to a payment in lieu of holiday unless employment terminated. As we have said, he should have commented on related issues too, about holiday entitlement in the broader sense, but, specifically making the observation that payment in lieu of holiday entitlement was a right which only arose on termination was not unreasonable, and was not on the ground that the Claimant had made any protected disclosure.

161. The claimant replied to Mr Asghar the next day, 27 October at 17:25 (page 269). What the claimant says in that particular email is a fair and reasonable criticism of the way the respondent had treated the claimant generally in relation to holiday. However, the treatment the claimant is describing did not only start after the claimant's protected disclosures and did not start only after his suspension from employment. The claimant in that email did not suggest that he was treating the 26 October email as an indication that his dismissal had been predetermined.

162. It was not a detriment for the respondent to send that particular 26 October email. It was not a detriment to state within it that the claimant would be paid in lieu of holiday on termination, but would not be paid in lieu of holiday

otherwise. In any event, the email was not sent because of any protected disclosures the claimant had made, and nor was the refusal to make a payment in lieu of holiday entitlement.

163. Item 9(l) is that the claimant has not received any holiday from the respondent.

164. The respondent has no justifiable reason for failing to pay the claimant the sum which it believed to be the correct sum, in accordance with whatever calculation it performed in an attempt to work out its WTR obligations following the Claimant's termination.

165. The claimant was told in January 2022 that he was going to receive a cheque for the holiday pay but he never did. As we have just discussed, he was told in October 2021 that he would be paid in lieu on termination that did not happen.

166. We acknowledge that there has been a dispute between the parties in the County Court. We do not have the full and specific details of that, but we note that the Respondent purports to say that part of its reason for not making the payment in lieu of holiday to the Claimant is that there was a wider dispute in which it (at one time) alleged that the Claimant owed some money.

167. It seems to be common ground between the parties that the claimant made a claim against the respondent and the respondent made a counter claim against the claimant and that the County Court decided that both claims failed.

168. We would not necessarily regard the Respondent's belief that the Claimant owed it some money (and/or the existence of County Court proceedings) as a valid excuse in Employment Tribunal litigation for a failure to pay a former employee a sum to which the employee had a statutory entitlement. However, even that could ever have been a hypothetically valid excuse, once the County Court litigation ended (around March) the claimant should have been paid (what the respondent regarded as) his correct statutory entitlement then. By the time that the County Court litigation ended, the Respondent knew that there was not going to be an award in its favour against which it could purportedly set off any entitlement to holiday pay. (We are not implying that the Respondent would actually have had the right to set off; we are merely analysing the Respondent's purported reasons for not making the payment, from its subjective point of view).

169. The fact that the claimant had already brought an Employment Tribunal claim for holiday pay by the time the County Court litigation ended for holiday pay is not a valid excuse for making no payment. If the respondent had a belief that the claimant was entitled to a certain sum, then they should have paid that sum to him and if the Tribunal decided that that was too little, then the

Tribunal would have awarded a higher sum. There is no excuse for simply paying zero, pending the Tribunal's decision.

170. Although the Respondent's stance by its failure to make the payment in lieu of holiday entitlement (and its purported excuses for the failure) was an unreasonable approach for the employer to have taken, we are satisfied that it is the same approach that the respondent would have adopted, had the claimant acted in exactly the same way but had not made the protected disclosures.

171. The various disputes between the parties have been acrimonious. There have been other disputes about what money is owed by one side to the other, including allegations about what the claimant had received/retained by way of donations. We are satisfied that the existence of the other money disputes, and the bad feeling generated by them, was the actual reason that the respondent has not yet paid the claimant his holiday entitlement, by the time of this tribunal hearing. The Respondent was not motivated, even partially, by the Claimant's protected disclosures.

Dismissal

172. The unfair dismissal allegations are dealt with in the list of issues:

13. When did the Claimant commence employment with the Respondent?

a. The Respondent contends that the Claimant was employed from 1 October 2017;

b. The Respondent accepts that the Claimant was a volunteer from 2007 until 1 October 2017;

c. From the Claimants ET1 Claim Form (3323010/2021) he states he was employed with the Respondent from 1 July 2014; and

d. From the Claimant ET1 Claim Form (3302431/2022) he states he was employed with the Respondent from 1 July 2008.

14. When was the Claimant's effective date of termination?

a. The Claimant was summarily dismissed by the Respondent on 21 December 2021.

15. What was the reason; or principal reason for the Claimant's dismissal and was it a potentially fair one in accordance with Section 98(1) and 98(2) of the ERA 1996?

a. The Respondent relies upon gross misconduct in pursuant to Section 98(2)(b) of the ERA 1996, namely:

i. The Claimant wrote and distributed materials within the community that brought the Respondent into disrepute;

ii. The Claimant sent WhatsApp message to the "South Res Community" Group, which were likely to bring the Respondent into disrepute;

iii. The Claimant broke the terms of his suspension by attending the Respondent's premises , without advanced authorisation from the Respondent to do so;

iv. The Claimant drilled the lock to the Respondent's bookshop; and

v. The Claimant took payments from parents/students, which was not accounted for.

b. In the alternative, the Respondent will say that it dismissed the Claimant for some other substantial reason of a kind to justify its dismissal of the Claimant in pursuant of Section 98(1)(b) of the ERA 1996, namely:

i. Following from the acts above, there was a breakdown in the mutual trust and confidence between the Respondent and the Claimant.

16. Did the Respondent hold a genuine belief in the Claimant's misconduct and was there a reasonable investigation into the Claimant conduct?

a. The Respondent contends that it conducted a thorough and reasonable investigation into the Claimant's conduct above;

b. Further to conducting a thorough and reasonable investigation, the Respondent maintained its reasonable belief that the Claimant had commented the above acts;

c. The Respondent avers that the Claimant was offered numerous opportunities to state his case and present evidence to maintain his position.

17. Was the decision to dismiss a fair sanction, which was within the band of reasonable responses open to a reasonable employer when faced with these facts?

a. The Respondent's position is that the Claimant's dismissal fell within the reason of reasonable responses open to it; and

b. The Respondent submits that a lesser sanction was not appropriate, and the Claimant's conduct fell below the standards the Respondent expected from him.

18. If the dismissal was unfair, did the Claimant contribute to the Dismissal by way of his own culpable conduct?

a. It is the Respondent's position that the Claimant contributed to his dismissal to a very significant extent. Namely, the Claimant unreasonably refused to attend his disciplinary meeting on 1 December 2021

19. In the event that the Respondent's procedure was unfair, can the Respondent provide that if it had adopted a fair procedure, then the Claimant would have been fairly dismissed in any event, and if so to what extent and when?

a. The Respondent contends that its procedure was fair and that it adopted a fair procedure, namely:

i. Writing to the Claimant on 24 September 2021 to highlight allegations and to suspend the Claimant;

ii. Instructing an impartial Face2Face Consultant to take conduct of the investigation meeting on 18 October 2021;

> iii. Delaying the Disciplinary Meeting by 5 days, at the Claimant's request;
>
> iv. Instructing an impartial Face2Face Consultant to take conduct of the disciplinary hearing on 1 December 2021; and
>
> v. Instructing an impartial Face2Face Consultant to take conduct of the appeal hearing on 13 January 2021.

173. We do accept that the factual reasons for the claimant's dismissal are those as stated in the dismissal letter dated 21 December 2021 (page 369), which referred to 5 particular allegations, which had been upheld.

> 1. It is alleged that you wrote and distributed inflammatory materials within the community in September 2021, thus bringing the Company into disrepute which may constitute defamation
>
> 2. It is alleged that you wrote inflammatory posts to the "South Res Community" WhatsApp Group in September 2021, thus bringing the Company into disrepute and that may constitute defamation.
>
> 3. It is alleged that you broke the terms of your suspension and caused damage to Company property in respect of drilling the lock to the shop in the Madrassa to gain access on 6th October 2021
>
> 4. It is further alleged that you continued to break the terms of your suspension by attending work on 16th October 2021, whereby the Police were called to remove you from the premises.
>
> 5. It is further alleged that whilst suspended, you took payments from parents, and did not bank the payments and the money you received has not been accounted for in accordance with the organisation's standard procedures.

174. The dismissal decision was taken by the Board. It was taken following consideration of a report produced by Ms Baynes of Peninsula. Her report is dated 8 December 2021 at pages 349 to 365 of the bundle.

175. After the suspension, there had been investigation by Anna-Lisa DeVoil of Peninsula Face to Face. The Respondent's dismissal decision was taken upon also considering the investigation report produced by Ms DeVoil (pages 278 to 279 of the bundle.)

176. The majority accepted Ms Baynes' recommendation. The majority did believe that the claimant had behaved in the way that was described in the dismissal letter, and the majority did decide that the Respondent should dismiss him for that behaviour.

177. Given the factual content of the dismissal reasons, it is our decision that it was a conduct dismissal, and that not a some other substantial reason dismissal. That does not mean to say that there was no breakdown in relationships or lack of trust and confidence, and it does not mean to say that that such a state of affairs could not have been a good enough reason for dismissal. However, since the dismissal reason was "conduct", it was therefore not some <u>other</u> reason.

178. The dismissal was not automatically unfair as the Respondent has shown that the dismissal reason was genuinely that he was believed to have done what was stated in the letter. The dismissal reason was not the fact that the claimant had made any protected disclosures.

179. The investigator's report at pages 279 to 328 accurately records the information the investigator was given, and she has laid that out in her report. The investigator's recommendations were clearly explained. The claimant had declined to meet her but had written to her and she took into account what the claimant supplied to her.

180. After that report was concluded, page 333 of the bundle shows an invitation letter sent to the claimant on 23 November, proposing a meeting on 25 November. That letter accurately records the allegations against the claimant and it accurately records the information supplied to the claimant with the letter. It tells him of the right to be accompanied and tells him he may be dismissed as a result of the meeting. As a result of a request by the claimant, there was a postponement and page 336 is the invitation to the 1 December meeting and, amongst other things, that letter included a copy of the investigation report.

181. The claimant does not dispute receiving those letters.

182. Both of the letters said that the meeting with the Peninsula consultant would be by video and that a link would be supplied on the day of the meeting.

183. Page 338 is a letter to the claimant dated 26 November refusing his further postponement request. Page 347 is a further email to the claimant dated 1 December at 11.17am, which refused postponement. That email was sent in the morning of the day on which the meeting was due to take place in the afternoon.

184. The claimant knew the disciplinary meeting was due to be on 1 December. He knew about the grievance and investigation meetings and he had received the promised links that were being sent to him for each of those.

185. On 1 December, according to the Claimant, he could not see a link to the meeting in his inbox. The claimant did not check his junk mailbox to see if any emails had gone to junk mail and he did not contact the respondent.

186. At 10.00pm on the evening of 1 December, he wrote to the respondent without commenting on the alleged lack of link (345 to 347).

187. The following day, page 345 of the bundle, Mr Khan replied to the claimant's email of 10.00pm. Mr Khan pointed out that the things the claimant mentioned in that email had already been addressed. He said that the hearing with Ms Baynes had already gone ahead in the claimant's absence.

188. The claimant sent further replies on 2 and 6 December but did not expressly ask for a further chance to meet Ms Baynes or expressly say he would attend if there was such a further chance. The respondent's Board met and decided

to accept the recommendations made by Ms Baynes and the letter which appears at page 369 was sent to the claimant.

189. The claimant appealed and he had an appeal hearing and he had the chance to raise, at that hearing with the Peninsula appeal officer, anything that he wanted to say.

190. Following the appeal meeting, the actual decision to reject the appeal, although it was based on Peninsula's advice, was made by Mr Asghar. Mr Asghar had been part of the original decision to dismiss.

191. In our judgment, one defect in the procedure prior to the original decision is that no one telephoned the claimant on 1 December. The respondent did become aware that the claimant was saying later on that he had not received the link, but the respondent rejected that argument. They accepted the evidence from Ms Baynes that the link had been sent to him, and decided that that disposed of the Claimant's claim to have not received it.

191.1. Our view is that, generally speaking, even if there is a suspicion that an employee might be being difficult, it is often preferable to give a further opportunity to attend a hearing at which dismissal is a potential outcome, if the employee puts forward a proposed reason for their absence. This is because dismissal is such a serious outcome.

191.2. In the particular circumstances of this case, we do take into account that the claimant already had one postponement granted and he had been told he would not get another one. Furthermore, he had made further requests for a postponement and had had those further requests refused; the Claimant knew they had been refused before the hearing was due to start. It is also reasonable for the respondent to take into account that the claimant had not attended the investigation meeting, despite the opportunities to do so. (As we have already said, we accept the claimant did correspond with the investigator, but the point is that he did not attend the meeting with her despite receiving the link.)

191.3. Not only had the claimant failed to attend the earlier grievance meeting with Ms Reid, he said that the repeated attempts to contact him to give him a chance to attend, were harassment.

191.4. In the circumstances it was not necessarily unreasonable for the respondent or Ms Baynes to take the view that they were not obliged to make a further attempt at 2.00pm on 1 December to get the claimant to engage, once it became clear that he had not joined the meeting, and was not going to do so.

191.5. Ms Baynes and the respondent were entitled to take the view that the claimant had made a conscious decision to not attend the meeting.

191.6. In any event, in all the circumstances, it was not so unreasonable that it was outside the band of reasonable responses, for the respondent to decide that no further opportunity for a hearing would be offered.

191.7. As we have said, the respondent did have reasonable evidence from which a reasonable person could have concluded that the link had been sent to the claimant but the claimant had decided not to attend. They did not expressly address the claimant's suggestion that it may have gone to junk, but nor did the claimant expressly request a reconvened hearing.

192. In our judgment, there is another defect in that the respondent did not have an independent person decide the appeal; it was decided by Mr Asghar.

192.1. However, we do accept that there was nobody suitable within the organisation itself, who could have done so. There was nobody who is going to be more senior than the Board who had not already been involved in the original decision.

192.2. There are, of course, possible solutions to that situation such as potentially appointing somebody external to be the decision maker for the appeal. However, that is not a strict obligation that all employers have in all circumstances and this was a charity with limited funds.

193. Taking the two defects together, we do not find that these rendered the process as a whole to be outside the band of reasonable responses. Overall, the respondent conducted a fair investigation, which gave the claimant every opportunity to put his side across and they took his comments into account.

194. Furthermore, we do not consider that the decision to dismiss was outside the band of reasonable responses. There were some arguments for why a sanction less than dismissal might have been appropriate including whether (on 6 October and 16 October) the claimant was acting under any misunderstanding about whether he was following his employer's instructions based on information/instructions given to him by the minority 3 Trustees.

195. However, even though some reasonable employers might have decided that dismissal was too harsh, there are some reasonable employers who would have decided that dismissal was appropriate. The dismissal was not outside the band of reasonable responses.

196. We said above that the dismissal did not fall within section 103A ERA. It was not unfair for that reason. It was not unfair contrary to section 98 ERA either.

197. In terms of the notice pay argument:

197.1. The respondent does not seek to allege (in the dismissal letter at least) that there was gross misconduct on 16 October (item 4 breaking the terms of suspension). The claimant's argument that he had in fact been attending work between 1 and 15 October in any even without problem is not something he put in his written statement. In any event we would be satisfied that if he was doing attending in breach of the terms of his suspension. He had been informed repeatedly, including by receiving the copy of the resolution of 5 October that he was not supposed to be attending work, so if – as he claimed – he attended work between 1 and 15 October then that was not because the Respondent had lifted the

suspension or amended the terms of it; it was just because the Respondent did not know.

197.2. In terms of item 5 in the dismissal letter, it has not been proved to us that the claimant was acting in any way dishonestly. It has not been proven that it was out of the ordinary for him to receive cash (subject to the fact that he was suspended, as far as the Respondent was concerned). In terms of collecting the money and paying it to one of the Trustees rather than directly into a bank account, we have not been satisfied that the claimant was doing anything different to what he usually did and that, at the most there might have been some misunderstanding. It would not have been gross misconduct, so as to justify summary dismissal.

197.3. Item 3, we have discussed as it was one of the alleged detriments was calling the Police because of the conduct. Item 3 is the alleged criminal damage on 6 October. In our judgment, the claimant was demonstrating, by no later than 6 October, that he did not intend to be bound by the instructions he was given by the respondent. He was not intending to stay on suspension. He had refused to hand back the key, which meant the Respondent had to change the lock, and as soon as the respondent did change the locks, the Claimant destroyed the new lock. The low value of the item and the fact that the claimant was proposing to put a new lock of his own on the door are not excuses for this conduct. It amounted to a repudiatory breach of the terms of his contract of employment.

197.4. In relation to item 1, we have not been satisfied that the claimant did produce the leaflet. It might have been him, but the respondent has not proven to us, on the balance of probabilities, that he wrote or printed the leaflet which encouraged people to stop donating to the Respondent.

197.5. For item 2, the Claimant did, however, on his own admission make the social media post. Regardless of whether he copied and pasted it, the choice of contents were his own and he published it. He said to the Tribunal that he believed the contents are true. In the post itself, he makes clear that he does not have trust and confidence in his employers, and he does not have any respect for them.

198. We are satisfied that the claimant demonstrated that he was not intending to be bound by the terms of his contract. He was not intending to carry out the instructions of the Board, reached by a majority decision and in those circumstances the respondent was not obliged to give him notice of dismissal. They were entitled to treat the contract as having been repudiated by him and to accept that repudiation by terminating it with immediate effect

199. In terms of holiday pay, the list of issues says:

20. When does the Respondent's annual leave run from/to?
21. How many days holiday had the Claimant accrued in 2021?
22. How many days holiday did the Claimant use in 2021?
23. Has the Respondent paid the Claimant for his 2021 holiday entitlement?

24. Is the Claimant entitled to claim holiday pay from previous leave years?

25. If so, how many days holiday is the Claimant entitled to?

26. Has the Respondent paid the Claimant holiday pay from the previous leave years?

NB The Claimant relies upon a contractual right to holiday pay, the Working Time Regulations 1998, and the Working Time (Coronavirus) (Amendment) Regulations 2020

200. It is our decision that the claimant made it clear enough to the respondent that he was seeking clarity over holiday.

201. It is true that the claimant did not specifically write in any request that said in express terms that he would like a particular period to be taken as holiday, but the respondent knew that he wanted to be paid for holiday, and knew that (it was intending that) unless he requested holiday during the year, he would not be paid for holiday (because he would lose the entitlement), but if he did request it he would be paid normal pay (not 80%) for the period.

202. The claimant misunderstood the legal situation. The respondent caused that misunderstanding by not having a written variation of contract in relation to furlough and by ignoring the claimant's repeated attempts for clarity over the holiday situation.

203. For those reasons, it was not practicable for the claimant to take holiday during the period commencing with the start of furlough in April 2020. His holiday from those leave years therefore carries over to later year.

204. Following our liability decision, the parties reached an agreement about remedy.

Employment Judge Quill

Date: 14 August 2023

Sent to the parties on: 17 August 2023

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For the Tribunal Office