**Case No: 3313865/2021**

Open

**EMPLOYMENT TRIBUNALS**

| **Claimant** | | **Respondent** |
|---|---|---|
| **Mr. George Abade** | **v** | **Silverbirch Care Ltd.** |
| **Heard at**: Watford | | **On**: 12 – 13 June 2023 |

**Before:** Employment Judge Coll

**Appearances**
**For the Claimant:** unrepresented
**For the Respondent:** Mr. K. Harris, counsel

**JUDGMENT** having been sent to the parties on 21 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

## THE HEARING

1. This judgement and reasons were requested by the respondent, oral judgement having been given on the last day of the liability hearing. In addition to hearing from the claimant, I heard from the following witnesses called by the respondent:

   1.1 Mr. Shandon Aubrey, Regional Head of Operations and the decision maker at the disciplinary hearing.

   1.2 Mr. Abs Latif, Head of HR and Payroll.

2. They adopted their witness statements as their evidence and were also cross-examined by the claimant. I asked some questions and there was some re-examination.

3. The timetable in the case management order dated 10 August 2022 listed the case for two days for liability and remedy if that arose. This had to be revised during the course of the hearing such that at the end of the second day, liability had been decided but there was no time for the remedy hearing.

4. In the ET1, the claimant claimed unfair dismissal and discrimination on grounds of race. He withdrew his race discrimination claim which was then dismissed on withdrawal and to amend his claim to include an automatic unfair dismissal based on a protected disclosure which I will refer to as whistleblowing [pages 109-110].

## BACKGROUND

5. The respondent provides supported living services to young people in local authority care aged 16 and over. The respondent has contracts with about 33 local authorities nationally. The young people in the respondent's care can be vulnerable and have difficult personal histories.

## CHRONOLOGY OF EVENTS RELATING TO DISMISSAL

6. I set out the chronology here since otherwise the allegations, which were the subject of the disciplinary proceedings, will not make sense. I have taken out from this chronology as much of that which is disputed as possible. In other words, I have sought to include only non-contentious, non-disputed facts. Most of these events are taken from the agreed chronology and based on documents in the bundle.

7. The claimant worked first for the respondent on 17 January 2018 as a Bank Support Worker. In the course of cross examination, the claimant accepted that is not when he first became an employee. He was promoted to Care Manager on 6 February 2019 at which point he became an employee of the respondent. The claimant reported to Mr. Aubrey as his line manager.

8. He managed two units, at Perivale and Colindale, with five to six staff across these two units. He had six young people aged 16 - 17 who were in care either under child protection/care proceedings or because they were an unaccompanied minor asylum seeker. Much of this case revolves around the procedure applicable to safeguarding.

9. On 15 June 2021, a Social Worker, Melissa Darby, from the London Borough of Newham, telephoned the claimant at about 5:00 p.m. The content of that conversation is in dispute.

10. On 16 June 2021, which was a Wednesday, at 7am, Ms. Darby again telephoned the claimant.

11. On 16 June 2021 at 9am, the claimant contacted the police to report what he had been told by Ms. Darby.

12. On 16 June 2021 at 10.45am, the claimant reported the incident to Mr. Aubrey [page 38], in an email which has been referred to many times in cross examination of both of the respondent's witnesses and of the claimant .

13. On 16 June 2021, Mr. Aubrey and Mr. Fitzroy Smickle, another manager, attended the unit at about 12:00 p.m. and suspended the claimant with immediate effect [page 39]. They told him of the allegation against him. He asked to see the suspension letter. They did not have one to show him. The suspension letter was drafted by Mr. Latif and dated 16 June 2021.

14. On the same day as the suspension, some 4 hours later, I note an email in the bundle which was not referred to in the chronology or in cross examination [page 40]. It is from a Mr. Peter Nadunda who would seem to have replaced the claimant; he has the title of manager of both units.

15. The weekly report log, 14 June to 20 June 2021, states that a young man

between 4.31pm and 5.37pm attempted to commit suicide by stepping in the path of a car [page 51].

16. On 18 June 2021, Mr. Smickle held an investigatory meeting with the claimant [notes of which begin at page 43].

17. On 23 June 2021, the claimant was invited to a disciplinary hearing [page 55].

18. On 28 June 2021, Mr. Aubrey held the disciplinary hearing with a note-taker in attendance [notes of which are at pages 58-61]. The detail on the notes, which was not challenged by Mr. Aubrey when I asked him about it, was that he adjourned for eight minutes at the end of the hearing to have a discussion with Mr. Latif, Ms, Fowler and Mr. Smickle about what decision he should come to. Mr. Aubrey then returned to give the claimant the decision that he would be summarily dismissed.

19. A letter dated 28 June 2021 confirmed to the claimant that he would be summarily dismissed with effect from 28 June 2021 [page 62]. The claimant did not appeal the decision.

20. The claimant commenced the ACAS early conciliation process. No issue has been taken with the date that he started or the date that it ended on 22 July 2021.

21. On 22 July 2021, the claimant presented his claim to the tribunal [pages 6-18].

## THE ISSUES LIST BASED ON THE CASE MANAGEMENT ORDER

22. *Unfair Dismissal Section 94 Employment Rights Act 1996 ("ERA 1996")*

    22.1 What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")?

    22.2 The respondent asserts that it was a reason relating to the claimant's conduct.

    22.3 If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called "band of reasonable responses"?

23. *Public interest disclosure (PID)*

    23.1 Did the claimant make one or more protected disclosures (ERA sections 43B and 43C to 43H) as set out below?

    23.2 The alleged disclosures the claimant relies on are as follows:

        23.2.1 On 17 June 2021 (or possibly 16 June 2021), the Claimant informed police about an alleged potential crime, namely an allegation by one resident of a sexual offence by another resident. (The Claimant alleges this was done maybe around 7.30am on the day in question following a second call from the social worker; the first such call being 15 June 2021)

23.2.2 On 17 June 2021 (or possibly 16 June 2021), the Claimant sent an email to the safeguarding team, to Karim Lalani, to Karen Fowler and Shandon Aubrey (being the Respondent's employees or agents) and to the social worker (employed by LB Newham) about (a) the alleged criminal offence and (b) the Claimant's actions in contacting the police. (The Claimant alleges this was done shortly after the call to police, possibly around 7.45am on the day in question).

23.2.3 The claimant relies on the follow subsection(s) of section 43B(1) in relation to this alleged disclosure. (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.

23.2.4 If the Claimant was dismissed, was the principal reason for the dismissal that the Claimant had made a protected disclosure?

24. *Remedy for unfair dismissal*

24.1 If the claimant was unfairly dismissed, should reinstatement or re-engagement be ordered?

24.2 If there is a compensatory award, how much should it be?

24.3 What financial losses has the dismissal caused the claimant?

24.4 Has the claimant taken reasonably steps to replace their lost earning, for example by looking for another job?

24.5 If not, for what period of loss should the claimant be compensated?

24.6 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed?

24.7 If so, should the claimant's compensation be reduced and by how much?

24.8 Would it be just and equitable to reduce the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2)? If so to what extent?

24.9 Did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent? If so, is it just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

## LAW APPLICABLE TO THE ISSUES IN DISPUTE IN THE UNFAIR DISMISSAL CLAIM

25. S.98 Employment Rights Act 1996 ("ERA 1996") states:

"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:

> the reason or if there is more than one the principal reason for the dismissal and
>
> that it is either a reason falling within (2) or..
>
> a reason falls within this subsection if it –….(b) relates to the conduct of the employee,
>
> where the employer has fulfilled the requirements of subsection 1, the determination of the question whether dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> depends on whether in the circumstances (including the size administrative resources of the employer's undertaking) the employer acted reasonably and unreasonably in treating it as a sufficient reason for dismissing the employee and
>
> shall be determined in accordance with equity and substantial merits of the case".

*Misconduct*

26. The classic three stage test for a misconduct dismissal is set out in *British Home stores Ltd v Burchell* [1980] ICR 303 EAT:

    26.1 the respondent genuinely believed that the claimant was guilty of misconduct

    26.2 the respondent had in mind reasonable grounds upon which to sustain that belief

    26.3 the respondent carried out as much investigation as was reasonable.

27. The burden of proof is on the respondent to show that it believed the claimant was guilty of misconduct. The burden of proof for the remainder of the test is neutral (section 6 of the Employment Act 1980 and *Boys and Girls Welfare Society v MacDonald* [1996 ] IRLR 129 EAT).

28. Where there are multiple allegations of misconduct, the question for the Tribunal is not whether the acts individually amount to (gross) misconduct, or might be said to cumulatively amount to (gross) misconduct. Rather (per *Governing Body of the Beardwood Humanities College v Ham* UKEAT/0379/13/MC):

> *12…. The focus for the Tribunal to the nature and quality claimant's conduct in totality and impact of such conduct and the sustainability of the employment relationship so the reason for dismissal purposes of section 98 employment rights act is a set of facts known to be put maybe of beliefs held by him, which goes into dismiss the as Cairns LJ famously observed in Abernethy v Mott Hay and Anderson [1974] ICR 662…*
>
> *16… The question is not whether the individual acts*

> *misconduct found by the appeal panel individually or indeed cumulatively amount to gross misconduct. Rather it is whether the conduct in its totality amount to a sufficient reason for dismissal under section 98 (4)".*

29. Generally, misconduct need not be culpable or blameworthy, it may include gross negligence, and there is no need for the claimant to have been subjectively aware of the misconduct (*JP Morgan Securities plc v Ktorza* UKEAT/0311 /16 /JOJ).

30. As the question of whether the claimant's behaviour was gross misconduct:

    30.1 gross misconduct, describes an act that fundamentally undermines the contract (*Wilson v Racher* [1974] ICR 428 CA) or is either deliberate wrongdoing or gross negligence (*Sandwell & West Birmingham hospitals NHS trust v Westwood* UKEAT/0032/09)

    30.2 more recent authorities, however, have moved away from a purely contractual analysis - that is, was the claimant's conduct repudiatory focussing on the question of "grossness". The question is: was the conduct such that it was reasonable to dismiss; not did it amount to gross misconduct (*Hope v British Medical Association* [2022] IRLR 206 EAT)?

    30.3 a series of acts demonstrating a pattern of conduct of sufficient seriousness could undermine the relationship of trust and confidence such that dismissal would be justified even if the employer is unable to point to any particular act and identify that as gross misconduct. The dismissal would be justified by the conduct which undermined the relationship of trust and confidence – not because the series of acts had added up to gross misconduct as such: *Mbubaegbu v Homerton University Hospital NHS Foundation Trust* UKEAT/0218/17.

31. Even if a Tribunal finds that the claimant's misconduct did not amount to gross misconduct, that does not necessarily render the dismissal unfair (per Langstaff J in *West v Percy Community Centre* UKEAT/0101/15/RN at paragraphs 23-24).

32. In terms of what constitutes gross misconduct, I am aware of the following cases.

33. HHJ Eady QC (as she was then) in *Burdett v Aviva Employment Services Ltd* UKEAT/0439/13/JOJ held:

> 33.1.1.1.1. "29. What is meant by *"gross misconduct"* – a concept in some ways more important in the context of a wrongful dismissal claim – has been considered in a number of cases. Most recently, the *Supreme Court in Chhabra v West London Mental Health NHS Trust* [2014] ICR 194 reiterated that it should be conduct which would involve a repudiatory breach of contract (that is, conduct undermining the trust and confidence which is inherent in the particular contract of employment such that the employer should no longer be

> required to retain the employee in his employment, see *Wilson v Racher [1974] ICR 428, CA* and *Neary v Dean of Westminster [1999] IRLR 288* , *approved by the Court of Appeal in Dunn v AAH Ltd [2010] IRLR 709, CA* ). In *Chhabra* , it was found that the conduct would need to be so serious as to potentially make any further relationship and trust between the employer and employee impossible. It is common ground before me that the conduct in issue would need to amount to either deliberate wrongdoing or gross negligence (see *Sandwell & West Birmingham Hospitals NHS Trust v Westwood* UKEAT/0032/09/LA )".

34. The characterisation of an act as "gross misconduct" is thus not simply a matter of choice for the employer. Without falling into the substitution mindset warned against by Mummery LJ in *London Ambulance Service NHS Trust v Small* [2009] EWCA Civ 220, it will be for the Employment Tribunal to assess whether the conduct in question was such as to be capable of amounting to gross misconduct (see *Eastland Homes Partnership Ltd v Cunningham* UKEAT/0272/13/MC per HHJ Hand QC at paragraph 37). Failure to do so can give rise to an error of law: the Employment Tribunal will have failed to determine whether it was within the range of reasonable responses to treat the conduct as sufficient reason for dismissing the employee summarily.

35. The reason for a dismissal will be determined subjectively: what was in the mind of the employer at the time the decision was taken. Whether the dismissal for that reason was fair, however, imports a degree of objectivity, albeit to be tested against the standard of the reasonable employer and allowing that there is a margin of appreciation – a range of reasonable responses – rather than any absolute standard. So if an employer dismisses for a reason characterised as gross misconduct, the Employment Tribunal will need to determine whether there were reasonable grounds for the belief that the employee was indeed guilty of the conduct in question and that such conduct was capable of amounting to gross misconduct (implying an element of culpability on the part of the employee). Assuming reasonable grounds for the belief that the employee committed the act in issue, the Tribunal will thus still need to consider whether there were reasonable grounds for concluding that she had done so wilfully or in a grossly negligent way.

36. Even if the Tribunal has concluded that the employer was entitled to regard an employee as having committed an act of gross misconduct (i.e. a reasonable investigation having been carried out, there were reasonable grounds for that belief), that will not be determinative of the question of fairness. The Tribunal will still need to consider whether it was within the range of reasonable responses to dismiss that employee for that conduct. The answer in most cases might be that it was, but that cannot simply be

assumed. The Tribunal's task in this regard was considered by a different division of the EAT (Langstaff P presiding) in *Brito-Bapabulle v Ealing NHS Trust* UKEAT 0358/12/1406, as follows:

> "38. The logical jump from gross misconduct to the proposition that dismissal must then inevitably fall within the range of reasonable responses gives no room for considering whether, though the misconduct is gross and dismissal almost inevitable, mitigating factors may be such that dismissal is not reasonable. […]
>
> 39. […] What is set out at paragraph 13 ["Once gross misconduct is found, dismissal must always fall within the range of reasonable responses …"] is set out as a stark proposition of law. It is an argument of cause and consequence which admits of no exception. It rather suggests that gross misconduct, often a contractual test, is determinative of the question whether a dismissal is unfair, which is not a contractual test but is dependent upon the separate consideration which is called for under s.98 of the Employment Rights Act 1996 .
>
> 40. It is not sufficient to point to the fact that the employer considered the mitigation and rejected it […], because a tribunal cannot abdicate its function to that of the employer. It is the Tribunal's task to assess whether the employer's behaviour is reasonable or unreasonable having regard to the reason for dismissal. It is the whole of the circumstances that it must consider with regard to equity and the substantial merits of the case. But this general assessment necessarily includes a consideration of those matters that might mitigate. […]"

37. In terms of fairness a Tribunal must consider whether (i) the procedure and investigation and (ii) the decision to dismiss fell within the range of reasonable responses. In *J Sainsburys v Hitt* [2003] I.C.R., the Court of Appeal clarified that the scope of the reasonable responses test permeates every aspect of the dismissal. The objective standard of the reasonable employer should be applied as to what was a reasonable investigation. The Tribunal should ask

itself whether the investigation into the suspected misconduct was reasonable in all the circumstances.

38. The EAT set out the "correct approach" considering the reasonableness of a dismissal in *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17 EAT at 24-25, specifically:

    38.1 The starting point is the words of section 98(4) ERA 1996.

    38.2 The tribunal must consider the reasonableness of the respondent's conduct, not whether the Tribunal considered a dismissal fair.

    38.3 When judging reasonableness, the Tribunal must not substitute his own views as to what was the right course to adopt.

    38.4 There is a range of reasonable responses within which decisions fall: that one employer might have made a different decision does not render the respondent's decision unfair.

    38.5 The task before the Tribunal is to determine whether the respondent's decision to dismiss fell within that band. If it did, the dismissal was fair.

39. As to the investigation, the Tribunal must assess the reasonableness of what the respondent did do, not what it did not do. Assessment of the scope and nature of the investigation, like all other matters is a question of reasonableness.

## LAW APPLICABLE TO PROTECTED DISCLOSURE CLAIM

40. Section 43B ERA defines a qualifying disclosure as "any disclosure of information" relating to one of the 6 specified categories section 43B(1)(a) to (f). It does not matter if that information was already known to the employer. Section 43B(1)(a) is relevant to this case: *"that a criminal offence has been committed…".* A qualifying disclosure does not have to relate to a relevant failure of the employer that employs the worker making the disclosure. It may, for example, relate to the relevant failure of a colleague, a client or other third party: *Hibbins v Hesters Way Neighbourhood Project* ***[2009] ICR 319, EAT***.

41. Information can cover statements that might also be characterised as allegations, so these are not two mutually exclusive categories. The word information has to be read with the qualifying phrase "tends to show" meaning the worker must reasonably believe that one of the relevant failures has, or is likely to occur. Thus, the disclosure must have sufficient factual content to be capable of tending to show one of the matters listed *Kilrane v London Borough of Wandsworth* [**2016] IRLR 422 EAT** [see paragraphs 38, 41 & 42]

42. *Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening)* **[2018] ICR 731 CA** addresses the issue of whether private employment disputes can raise a public interest. The Court of Appeal noted there may be features making it reasonable to regard the disclosure as being in the public interest as well as personal. Features may include the numbers in the group whose interests the disclosure served, the nature of the interests affected, the nature of the wrongdoing and the identity

of the alleged wrongdoer.

43. There must be a causal connection which consists of two elements: was the worker dismissed by the employer and was the worker dismissed because he or she had made a protected disclosure? The burden of proof is with the employer to show the ground on which any act was done: see *Kuzel v Roche Products Ltd.* **[2008] ICR 799, CA**.

## CLARIFICATION OF ALLEGED UNFAIRNESS

44. At the outset, I asked the claimant to explain in what ways he identified the dismissal as unfair. He said the following:

44.1 *Unfair substantively:* he had been dismissed for reporting the allegation to the police rather than reporting it as soon as possible to the respondent's Management Safeguarding Team. In his opinion, he was dismissed for following a different procedure correctly and that was the correct procedure. Given that the claimant was representing himself, he seemed to categorise this as unfair procedure. On further analysis, the question is more about substantive unfairness: was it within the range of reasonable responses to dismiss for failing to use one procedure when custom and practice in operational units used a different procedure?

44.2 This is distinct from his claim that he was dismissed for reporting the allegation to the police which he describes as a protected disclosure.

44.3 The respondent had failed to follow the requirements of the law correctly in not reporting the allegation to the Local Authority Designated Officer ("LADO") and in not reporting to the police that the accused young person had attempted to commit suicide. The claimant would seem to be proposing that their allegation that he failed to comply with procedure is nullified or weakened because they too failed to comply with procedure.

44.4 *Unfair procedurally:* the investigation was unfair because it was conducted by Mr. Smickle and he had suspended the claimant. This could be labelled as a complaint about "bias"

44.5 *Unfair procedurally:* the disciplinary hearing was unfair because it was conducted by Mr. Aubrey and he had suspended the claimant. This could be labelled as a complaint about "bias".

44.6 *Unfair procedurally and substantively:* Ms. Darby was not invited to take part in the investigation or invited to the investigation meeting or the disciplinary hearing. This in effect concerns whether it was within the range of reasonable responses to dismiss without questioning Ms. Darby or allowing the claimant to question her.

44.7 *Unfair procedurally and substantively:* During the disciplinary hearing, Mr. Aubrey left the room three times and did not on any occasion explain the reason for his leaving. He returned on the final occasion to dismiss the claimant summarily. Given the content of the claimant's policy concern questions and his answer during cross-examination, this could also be seen as being about substantive unfairness. Was it within the range of reasonable responses to make the summary dismissal decision

in the way in which Mr. Aubrey made his decision?

## FINDINGS OF FACT ON CREDIBILITY AND LIABLIITY

45. The standard of proof that I apply when making my findings of fact is that of the balance of probabilities. Where it was necessary to resolve conflicting factual accounts, I have done so by making a judgement about the credibility or otherwise, of the witnesses I have heard from based on their overall consistency and the consistency of accounts given on different occasions compared with contemporaneous documents where they exist. Where it has not been possible to rely on the credibility of any of the witnesses on a particular point, I have relied on the contemporaneous documents, of which there are many in the bundle.

46. I took into account all of the evidence presented to me, both documentary (including the agreed bundle of 314 pages) and oral. I also took account of the closing submissions of both parties.

47. I do not record all of the evidence in these reasons, but only my principal findings of fact, those necessary to enable me to reach conclusions on the issues before me.

### Credibility of witnesses

48. Mr. Aubrey repeated his answers when answering different questions. He could not remember the date of the email from Ms. Darby or whether it had been shown to the claimant. Yet this was used as a very important email in his decision making. At least twice during the hearing, there was a long pause (3 - 4 minutes) whilst he looked at the bundle and before he gave his answer.

49. Mr. Latif did not know whether the reference to safeguarding procedures in the allegation against the claimant referred to the procedure 4.4., 4.6, or 4.8. He could only answer this after being given a clue in re-examination. He was vague at times.

50. The claimant was at times inconsistent. For example, I note that the time of his call to the police on 16 June 2021 in his oral evidence was quite different to that given at the case management at the preliminary hearing (9 am versus 7.45 am). He was also inconsistent as to which Safeguarding procedure he had followed. He was somewhat evasive about what he had said to the alleged perpetrator.

### Allegations in Disciplinary Procedure

51. The allegation was phrased as follows in all the letters written to the claimant in the course of the disciplinary procedure [for example: see suspension letter at page 39]:

> *"On 15 June 2021 you failed to follow the company's safeguarding procedures."*

52. There was no detail.

53. The allegation arose from the same event. A female young person resident in the unit ("the complainant") made an allegation to her youth worker that she had been sexually assaulted by another young person, a young man also resident in the unit ("the alleged perpetrator"). The allegation stated that he had done various things, including principally attempting to kiss her and locking his door. After some days possibly a week, the youth worker told the social worker (Ms. Darby). Ms. Darby told the claimant.

54. In oral evidence, it was accepted by the respondent's witnesses that there had been two telephone calls from Ms. Darby to the claimant, one on 15 June 2021 at about 5:00 p.m. and one on 16 June 2021 at about 7 or 7:30 a.m. to brief the claimant about these allegations although it is in dispute what was said in each telephone call.

**The content of the allegation against the claimant**

55. As result of hearing oral evidence from Mr. Aubrey and Mr. Latif, I find that the allegation in the mind of the respondent broke down into two key components:

    55.1 The claimant had not complied with the Safeguarding Policy for Young People in which he had to immediately contact the Safeguarding Management Team once he knew that there was a safeguarding issue. By "immediately", the respondent meant as soon as the claimant had finished the call with Ms. Darby at 5:00 p.m. on 15 June 2021, he should have called the out of hours telephone number or done something to communicate what he had learnt to the Safeguarding Management Team.

    55.2 The claimant had breached the Safeguarding Policy by telling the young person, who was accused, about the allegations against him. The policy required that the claimed say nothing to the alleged perpetrator.

**Which safeguarding procedures are referred to in the allegation against the claimant?**

56. There is no detail in any of the letters in the disciplinary procedure about which procedure or procedures are being referred to in the phrase "the company's safeguarding procedures".

57. On being questioned, both respondent's witnesses stated that the procedure was in the bundle in a section dealing with "safeguarding policies". The first policy was at page 251 – 280 and entitled "Safeguarding Young People" dated September 2021. The second policy in the bundle was a duplicate. The third policy in the bundle was entitled "Receiving Disclosures of Abuse from Young People Procedure" dated 2 September 2021 [pages 311-314].

58. I find that the policy's title "Safeguarding Young People" could easily be confused with other procedures/policies. For example, on page 253 at section 2.4, a list of other (safeguarding) polices are set out from 4.1 – 4.10. They have very similar titles. I note that in the course of answering questions about which policy was relevant to which situation (that is to the young woman making the allegations and to the young man accused of being the perpetrator), neither of the respondent's witnesses was clear about which applied. Even Mr. Latif who is in Human Resources at a senior level, could not immediately say which policy was relevant to the accused young person.

It was only in re-examination and after there had been a reference to 4.8 by Mr. Harris, that he picked up on which policy it should be.

59. I am not criticizing Mr. Latif for that nor saying that he does not know his job. This shows that these titles are quite confusing because they are only different from each other by one to three words. It would be difficult for a care manager to know which one applied to what situation or whether several should be applied to a situation. This is an important finding in the context of this case because it was the claimant's position that he had used a different but nonetheless correct safeguarding procedure in deciding what to do about Ms. Darby's information.

**Which safeguarding procedure(s) had the claimant used?**

60. The claimant stated (when cross-examining) that he had used the policy on "Receiving Disclosures of Abuse from Young People" to explain the rationale for his questions to the respondent's witnesses [311-314]. This was at 4.6 (in section 2.4, page 253).

61. Later, he said that the policy 4.4 (in section 2.4, page 253) was relevant - "Policy on Safeguarding against Sexual Exploitation". This was not in the bundle. The claimant had taken screenshots of it. After making an application to admit this, which I granted, the respondent and the tribunal were provided with three pages of this screenshot at the hearing. After some further evidence, it emerged that the claimant considered that he had followed the policy at 4.8 (in section 2.4, page 253) - "Policy on Allegations of Abuse against other Young People". Next, the claimant said he had used a policy sent to him electronically , but it never became clear to which policy he was referring. Finally, he said that he had relied on the Children Act 1989.

62. I make several findings about these polices and in particular Safeguarding Young People which it appears from the respondent's witnesses' oral evidence is the one the allegation referred to:

    62.1 It is unlikely that any person specification for a Care Manager would require intellectual ability as essential or desirable. From the oral evidence of Mr. Aubrey and the claimant, I find that a Care Manager needs to be action-orientated with stamina, able to work long demanding hours and with high empathy for all the young people in their care and for their staff.

    62.2 Without a high level of intellectual ability, understanding overlapping polices with unclear titles would not be an easy task for a Care Manager, particularly in the context of a very busy job featuring unpredicted events and crises.

    62.3 I note also that the key point that was made repeatedly in handling the claimant's disciplinary case (that any safeguarding issues must be reported immediately) is buried in this policy. It is at the top of page 257 (some six pages into the document) as one point in a series of bullet points in section 4.7 and again in section 5.5.

63. I also prefer the claimant's account of which policy appeared to him to be the right one to use. He stated that he would be sent an email with the latest

version of any policy. Custom and practice was that he must print it, put it in a folder as a hard copy and refer to that folder as "the Bible" for what to do and how to do it. The claimant said that in the operational units, therefore the first step in applying the Safeguarding Policy was always to call the police and then to fill in the incident report which would go to the Safeguarding Team. I accept that is what he was doing because he gave detailed descriptions of calling the police about a number of incidents and then form-filling.

64. My conclusion is that in order for a Care Manager (that is a manager of an operational unit) to know that:

    64.1 The printed policy in the folder was not to be used

    64.2 The policy to apply was the one referred to by both of the respondent's witnesses and

    64.3 He or she must have in the forefront of their mind that they must immediately report safeguarding issues to the Safeguarding Management Team, they should have had good training.

**Did the claimant receive good training?**

65. The respondent's witnesses stated that:

    65.1 the claimant had had an induction, annual training and refresher training.

    65.2 the training had covered everything that was necessary for the claimant to know which policy applied and how to apply it.

66. I prefer the claimant's evidence in this respect because it is plausible, particularly in the context of a fast-moving practical and operational job. I therefore find that:

    66.1 He had not had any induction course but learned the job over two days through observation and by being introduced to files.

    66.2 I prefer his evidence because it was very detailed and I compare that to the generalised and vague statements of both respondent's witnesses. I have not seen any documents from any training material nor even the syllabus for each training course or timetable to support the respondent's assertions. I have only heard unsupported statements that there was training and that it was effective.

    66.3 Mr. Latif said that all documents (including this policy) were available through SharePoint. I found it revealing that the claimant did not even know what SharePoint was. It seemed to be that there was a divide between what Mr. Latif from Head Office and Mr. Aubrey from his senior managerial position thought was going on and what was actually going on, in the operational units.

    66.4 I note that there is a document concerning "outcomes of training" in the bundle but the outcomes do not take this any further because they seem focus essentially on how to identify instances of abuse or other

safeguarding issues rather than on how to report these instances.

66.5 I also accept that the claimant was influenced by the training that he had had; he took away a simple message from it that he should focus on the best interests of the young person, that procedures sometimes got in the way and where there was a conflict, the young person's best interests came first. In his view, that meant calling the police first.

**Key documents**

*Claimant's email to safeguarding team 16 June 2021 10.45am*

67. This stated [38]:

> *"Please be advised has been allegation made against KO by another resident for sexual assault. Staff received a call from the YP's [young person's] social worker yesterday evening to inform staff that the YP had confided to social services that KO had lured her into his room and tried to kiss her and offered her money. She also claims that KO groped her and locked his door from inside and was terrified by his behaviour. I have spoken to KO and has denied that nothing of the sort happened and that the YP had come to his room to ask for food and left immediately and did not touch or try to kiss her. She also mentioned that KO had offered to give her money. Police have been notified and the reference is CAD 25181/06/21. The piece of notified staff that they will be visiting the placement at 1630 today".*

*Email from Karen Fowler to the alleged perpetrator's social worker 16 June 2021 4.14 pm*

68. Ms Fowler, Placements Manager and Safeguarding Lead, confirmed that to safeguard both young people, the alleged perpetrator would be moved internally to the respondent's home in Hendon West [40].

*Conference call meeting record between the alleged perpetrator's social worker and support worker and the alleged perpetrator 17 June 2021 1.15 pm*

69. The record states that the alleged perpetrator said that the complainant had entered his room two weeks before (i.e., on or about 3 June 2021). He had just finished eating and the complainant told him that his food smells nice and she wanted to eat. She came into his from and requested to have some of the food he was eating and he served her. She ate in his room. The complainant told him that the food was too spicy and left his room immediately.

70. He was reminded that he was warned to stay away from the female, young person's in-house, nor enter their rooms. He was advised to speak to the internal psychologist because he was stressed and threatened to hurt himself. He had only been trying to help the complainant. He had not entered her room [42].

71. He said that he was informed a week later (i.e., on or about 10 June 2021) that an allegation had been made against him. The only reference to the claimant in this record was "*he told George that if he had sexually assaulted YG, she will have screen for everyone to hear".* I note that there is no

reference to who told him about the allegation a week before the conference call, or when the claimant had spoken to him.

*Young person's weekly report, 14 June 2021-20 June 2021*

72. This relates to the alleged perpetrator who is described as "*an unaccompanied minor from Iraq who arrived at the placement on 14 January 2021"* [50-54]. The entry for 16 June 2021 states:

> *"In his room sleeping and left placement at 9.16am for college, returned from college at 2.30pm, on return, went to his room. Invited to office by staff and had a brief chat with SBC operation manager (Mr. Aubrey) concerning his being moved to another placement, and he was unhappy about the discussion. Left the placement at 4pm and was supported by SBC operation manager in his car, to view another placement for him to move to. Return to placement at 4.23pm and was seen crying. He told staff he was not wounding another placement because he wants to stay here. Rushed out of the placement at 4.31pm and continued crying on the road and staff followed to calm him down. Informed staff that he was going to kill himself if he had been taken to another placement and staff continue to encourage him to calm down and advised them to come back to placement views, and staff pleaded with him again and again. He complied after a while, and returned to placement with staff and on his return, he sat on the floor outside the door while crying and staff encouraged him to come inside placement so that staff could have a good discussion with him and he complied. Staff encouraged him to calm down and explained to him that move to other placement is temporary, and he would return to placement after investigations carried out. He rushed out of office again and went to main road outside placement to get knocked down by a moving car. However, driver stops while he stood in the mid of the road, staff rushed out with him and encouraged him not to hurt himself and assured him he will be staying at the placement".*

*Email from Ms. Darby on 23 June 2021 [56]*

73. Ms. Darby forwarded an email dated 15 June 2021 at 4.11pm from the complainant's youth worker [57]. This explained that the young person in question had told the youth worker during a visit to the placement on 14 June 2021 that she had been sexually harassed by the alleged perpetrator. The youth worker said that they had spoken about it before, but according to the complainant, it had been getting much worse. I note that the youth worker took about a day to get in touch with Ms. Darby.

74. Ms. Darby explained that she had spoken to the complainant on 15 June 2021 to "*gather some facts and this is what she relayed, which I then shared with George Abade on 15 June 2021*" [56]. I note that Ms. Darby identifies both the complainant and the alleged perpetrator, but she makes no reference to a conversation on 16 June 2021, with the claimant. She neither confirms nor denies that she "gather(ed) some facts." and "shared these with George Abade" on the same day.

> *"[] informed me that on one of the days she returned to the placement after having spent time at her boyfriend's, she took a shower and went to her bedroom. She came out of her room and was met by []. He asked her if*

*she had left her jewelry in the bathroom to which she replied yes and he told if she wanted, she would need to come and get it in his bedroom. She went straight into his bedroom and grabbed it on the table and as she tried to leave, he was blocking her way and came very close to an attempt to give her a French kiss. She told him that she was not interested and she tried to leave his room, but as she went to the door, she realised he had locked it and she told him to open up and he offered her money to sleep with him. She told him no and turned down his advances and that she had a boyfriend. After pleading with him to open the door, he then whispered in her ear. "No one will believe you in this house if you say anything as they all like me here."*

*"[] also said she did not tell staff or feel confident to tell staff due to the nature of her relationship with staff and she felt they would not believe her. George confirmed that this is the first time the placement/staff had heard about the incident. George advised that they would inform the police and follow necessary steps as according to your company's policies and procedures".*

**Was there a dismissal?**

75. It is not in dispute that there was a dismissal.

**Was it for a potentially fair reason?**

76. It would appear that the parties are in dispute on this issue. The conduct as put by the respondent however consisted of failure to follow the required procedure (report safeguarding issues first to the Safeguarding Team). The conduct as put by the claimant consisted of departing from the required procedure and following a different procedure which entailed first disclosing the safeguarding issue to the police. I find that these are two sides of the same coin and therefore, there is no dispute. The reason for dismissal was conduct.

**Was there procedural unfairness from bias of Mr. Smickle and/or Mr. Aubrey?**

77. The claimant did not take me to any documents relating to the suspension or respectively the investigation or disciplinary hearing which supported bias in respectively Mr. Smickle and Mr. Aubrey. Although this is a sizeable employer, with some 33 local authority contracts, the decision to use both Mr. Smickle and Mr. Aubrey in the suspension was consistent with operational demands. There was no evidence produced by the claimant to show for example that there were other senior managers available to carry out the suspension instead of Mr. Smickle and Mr. Aubrey.

**Was there procedural unfairness from the failure of Mr. Smickle to obtain any evidence from Ms. Darby for the investigation?**

78. The investigation record [43-49] contain notes of the investigation meeting between Mr. Smikle and the claimant on 18 June 2021. No time of meeting is recorded.

79. The investigation meeting looked at what the claimant had been told on by

Ms. Darby in each of her telephone conversations with him and what he had done in response and why. The claimant stated that the reason for Ms. Darby's telephone call on "*that particular day, Tuesday*" at 5.00pm was about the complainant's medication for which she urgently needed to attend the GP to get a prescription. The claimant added that Ms. Darby had asked if the complainant had returned to the unit and mentioned an allegation of sexual allegation that she had "*received and that she does not have the details, she will let me know as soon as she gets full details about the allegation*". I note that by referring to Tuesday, it would have to have been Tuesday, 15 June 2021.

80. The claimant continued: "*so she called me again that morning that was on the 15 June and informed me that I needed to call the police… That I need to call the police immediately"* [43]. Having spoken to Ms. Darby in the late afternoon on Tuesday 15 June 20, 21, the conversation "that morning that was on 15 June" had to have been on Wednesday, 16 June 2021 in the morning. I note that Mr. Smickle does not pick up this mistake, but perpetuates it by repeatedly referring to 15 June 2021 as the date of the second telephone conversation.

81. The claimant referred to the "incident procedure" which stated "*that we call police first, we send an email to the placements and social worker, Karen [Fowler] and my operations manager, which is Shandon [Mr Aubrey]. That procedure, so on that procedure when you done that you send a brief explanation then send over an incident report. I think within 24 hours*".

82. The claimant's oral evidence was that he did not know enough to report this allegation to the police or the Safeguarding Team on 15 June 2021. This was consistent with what he told Mr. Smickle: *"yes, she gives me both the names of the young people*" in the conversation at around 7.00am. The only conversation at around 7.00am, was on 16 June 2021.

83. The claimant's email of 16 June 2021 [38] did not state that he knew the identity of the complainant or alleged perpetrator on 15 June 2021. Therefore, after the investigation meeting, Mr. Smickle had not read or heard enough to conclude that the claimant had sufficient information from that conversation of 15 June 2021 to report the allegation to the Safeguarding Team.

84. No reasonable employer would have failed to obtain any evidence from Ms. Darby who could have clarified what she said at the conversation on 15 June 2021 as opposed to the conversation on 16 June 2021.

**Was there procedural unfairness from the failure of Mr. Aubrey to invite Ms. Darby to the disciplinary hearing?**

85. Mr. Aubrey received an email from Ms. Darby dated 23 June 2021. He did not invite her to attend the hearing nor did he make any further enquiry of her, in the form of, for example, written questions.

86. This was procedurally unfair because:

    86.1 The claimant had no opportunity to clarify anything in Ms. Darby's email with her and Mr. Aubrey did not do this for him.

86.2 The claimant was unable to question Ms. Darby about her email and any inconsistencies between his account and hers. Similarly, Mr. Aubrey had not examined the inconsistencies and raised questions in order to make the hearing fair.

86.3 In particular, the claimant was not able to put his case that:

86.3.1 He had insufficient information after the telephone call on 15 June 2021 to report the allegations to the Safeguarding Team.

86.3.2 Delaying a few hours to report the allegations to the Safeguarding Team was not critical or important because the complainant's own Youth Worker had delayed days, even a week from when she first known of problems.

86.3.3 The complainant had left the unit soon after the incident with the alleged perpetrator, she had been gone for about five days and had not returned until 11 am on 16 June 2021, by which time the claimant had reported the allegations to the Safeguarding Team.

**Was there procedural unfairness from Mr. Aubrey's leaving the disciplinary hearing room three times without explanation?**

87. Mr. Aubrey does not dispute that he left the hearing room three times nor that he gave no explanation. In itself, I do not find Mr. Aubrey's behaviour unfair. It may be impolite to leave so often or to leave without any explanation as to the reason. This is because it may convey to the individual that the decision maker is distracted or has little concern for their feelings. It did not however of itself prevent the claimant having a fair hearing. The claimant has provided no evidence to show that Mr. Aubrey was distracted or unfeeling in his conduct of the hearing whilst he was in the room.

**Was there procedural unfairness in the respondent's not reporting the allegations to LADO?**

88. The allegations were reported to the claimant by Ms. Darby. It was therefore already known to her local authority. I asked the claimant a number of times to clarify why this was relevant to his claim but he gave me no plausible explanation. I do not find this omission to be a procedural unfairness.

**Was there procedural unfairness in the respondent's not reporting to the police that the alleged perpetrator had attempted suicide?**

89. I asked the claimant to explain why this was relevant to his claim. His explanation was long. His argument impliedly was that he should not be penalized for a failure to follow procedure when the respondent had failed to follow procedure. I do not find this constitutes procedural unfairness in the test I have to apply, although I can appreciate that the claimant found this unfair.

**Did the respondent undertake a reasonable investigation?**

90. In the investigation meeting, the claimant admitted that he had called the police first and contacted the Safeguarding Team second. He denied that he had spoken to the alleged perpetrator [47]. He said that the alleged

perpetrator was still asleep and left for college at 9.30am. I note that the timing is consistent with the log (which puts his departure at 9.15am).

91. Mr. Harris submitted that the investigation was within the range of reasonable responses because Ms. Darby's email dated 23 June 2021 was consistent with the claimant's email dated 16 June 2021. I remind myself that the email from Ms. Darby was not before Mr. Smickle, dating from a week later. The respondent's witnesses agreed that it was not part of the investigation meeting.

92. When asked why there was nothing from Ms. Darby for the investigation meeting, Mr. Latif said that it was not considered necessary. He did not explain any further why it was considered unnecessary.

93. Mr. Smickle interviewed the claimant at the investigation meeting. There is no reference to his having interviewed anyone else or requested or received anything in writing from anyone else.

94. I therefore find that Mr. Smickle did not interview other key people who could be thought to have been involved such as Ms. Darby and the social worker for the alleged perpetrator. He did not include them in any way e.g., by requesting a written account or by emailing them questions.

95. I find that it was not open to a reasonable employer to conduct the investigation process in the way that it did because:

    95.1 Mr. Smickle failed to hear orally or in writing from the social workers for both the young people involved in the allegations.

    95.2 This meant that he did not provide a context for any actions admitted by the claimant.

    95.3 He could not test the claimant's assertion that Ms. Darby encouraged him to report the matter to the police.

    95.4 The respondent failed to turn their mind to interviewing Ms. Darby, having judged it unnecessary without any more enquiry. I conclude that this was because they did not approach the investigation with an open mind.

96. For these reasons, I find that the investigation was not within the range of reasonable responses.

**Did the respondent have a genuine belief in the claimant's guilt?**

97. The respondent had a genuine belief in the claimant's guilt based not on a reasonable investigation but on the claimant's admissions in the investigation hearing that:

    97.1 he had not contacted the Safeguarding Team first and

    97.2 had spoken with the alleged perpetrator about the allegation.

**Was the decision to dismiss within the range of reasonable responses?**

*Failure to follow the correct safeguarding policy in relation to the complainant*

98. The disciplinary hearing took place on 28 June 2021, the record of which is at pages 58-59. Mr. Aubrey explained the focus of the allegation against the claimant; the failure to follow the correct procedure on 15 June 2021 [58]. He explained that he wanted to focus on discrepancies between information in the claimant's email of 16 June 2021 and the email from Ms. Darby of 23 June 2021.

99. The claimant confirmed that he had had two conversations with Ms. Darby, on 15 June and 16 June 2021 to which Mr. Aubrey replied: *"the social worker sent an email and said that she spoke to on the 15th, but there was no mention of the call on the Wednesday"* [59].

100. At the disciplinary hearing, the claimant confirmed that he did not have enough information "*the full scale of the incident*" on 15 June 2021 to report the allegations [59]. He admitted therefore that he had not reported these allegations on 15 June 2021.

101. It was open to a reasonable employer to find that he did not report the allegation made by the young person to the Safeguarding Team immediately on 15 June 2021 or even on 16 June 2021, without delay, if that is considered the more relevant date.

102. Given these admissions, it was within the range of reasonable responses for the respondent to conclude that the claimant had failed to follow the Safeguarding Procedure in relation to the complainant by his actions and this misconduct was proved.

*Failure to follow the correct safeguarding policy in relation to the alleged perpetrator*

103. At the disciplinary hearing, Mr. Aubrey compared what the claimant said at the investigation meeting with the claimant's email dated 16 June 2021. In the investigation meeting, the claimant had denied speaking to the alleged perpetrator in the morning of 16 June 2021. Mr. Aubrey put to the claimant that his email had said that he had spoken to the alleged perpetrator [59]. The claimant admitted that "*it is possible that I could have spoken to him because I would have spoken to him. Because that morning there was so much going on… I have written that email, then obviously I must have spoken to him about it*."

104. Given this admission, it was within the range of reasonable responses for the respondent to conclude that the claimant had failed to follow the Safeguarding Procedure in relation to the alleged perpetrator by his actions and this misconduct was proved.

105. Having regard to the law stated above, I asked myself the following questions with regard to each of the two allegations:

105.1 whether the conduct was such as to be capable of amounting to gross misconduct?

105.2 Was this one of a series of acts demonstrating a pattern of conduct of sufficient seriousness which could undermine the relationship of trust and confidence such that dismissal would be justified even if the respondent were unable to point to any particular act and identify that as gross misconduct?

106. In this section, it is relevant to answer the question at 105.1 first with regard to each allegation and to answer the question at 105.2, taking both allegations together as they are interconnected.

*Were these breaches gross misconduct?*

107. I find that it was within the range of reasonable responses for the respondent to conclude that these breaches were gross misconduct because:

107.1 Effective Safeguarding was central to the success of the respondent's business and the welfare of their residents.

107.2 As manager, it was the claimant's responsibility to make himself aware of the respondent's safeguarding polices and to apply them.

*Was it within the range of reasonable responses to dismiss for either allegation?*

108. It was however not within the range of reasonable responses to dismiss summarily/dismiss for these breaches because:

108.1 Awareness of Head Office and Senior Management about the scope and effectiveness of training seemed to be lacking.

108.2 Awareness of Head Office and Senior Management about competing safeguarding practices which had evolved on the "front line" seemed to be completely lacking.

108.3 The polices were not well enough drafted to avoid confusion, especially in the heat of the moment when there was relatively little time to decide on appropriate actions.

108.4 The entire situation was not examined in context and as a whole. The respondent relied on the following documents to make the case against the claimant and to make their decision – the claimant's email dated 16 June 2021, Ms. Darby's email dated 23 June 2021, the conference notes made by the alleged perpetrator's social worker on 17 June 2021 and the weekly log.

108.4.1 Ms. Darby's email dated 23 June 2021 was accepted in its entirety. It was not within the range of reasonable responses to ignore the fact that there was something odd about the dates in her account. There was no reference to her conversation with the claimant on 16 June 2021. There was no consideration of whether Ms. Darby had conflated the two dates together or in fact meant 16 June 2021 rather than 15 June 2021.

108.4.2 The respondent deprived themselves of the opportunity to hear the claimant's reactions to these documents because:

108.4.2.1. These documents were not provided to him in advance of the hearing to allow him to absorb their content and prepare.

108.4.2.2. These documents, apart from Ms. Darby's email, were not even shown to the claimant at the hearing.

108.5 The disciplinary charge concerning the alleged perpetrator consisted of two connected limbs and were presented as such to the claimant:

108.5.1 The claimant had breached the procedure by speaking with the alleged perpetrator and

108.5.2 In so doing, he had caused the alleged perpetrator to attempt suicide.

108.6 In finding the second limb was made out, Mr. Aubrey did not examine the weekly log nor question the claimant about its contents. If he had, he would have seen first, that the alleged perpetrator went to college at 9.30am, only returning between 2.00pm and 2.30pm; at 9.30am the claimant was on the telephone to the police. There was no attempted suicide in this period of about 5 hours since the conversation with the claimant. Secondly, Mr. Aubrey would have noted that the suicide attempt was only after the alleged perpetrator had returned to the unit from college, been taken by Mr. Aubrey to a new unit intended to be his new home, and got back to the unit between 4.00pm and 4.30pm. The log recorded that he was observed to be very upset and at a later point he rushed outside and put himself in the path of a car which fortunately stopped.

108.7 It was outside the range of reasonable responses for Mr. Aubrey to find the claimant's actions caused this young person's attempted suicide. From the log, it is much more likely that the conversation with Mr. Aubrey about moving to a new unit was the catalyst, given the chronology. For that reason, Mr. Aubrey's conclusion was not logical or evidence based.

108.8 I have to ask myself what was in the mind of the decision maker (Mr. Aubrey) when he made his decision to understand how he made his decision. Mr. Aubrey told me that he could not tell me because he said it had been a decision with all four of them together (Mr. Latif, Ms. Fowler, Mr. Smickle and Mr. Aubrey). The quality of decision making was not within the range of reasonable responses because:

108.8.1 The decision maker (Mr. Aubrey) made a group decision with managers who had not been present at the disciplinary hearing and who had also taken part in the decision to move from investigation meeting to disciplinary hearing.

108.8.2 The appointment of a Care Manager to replace the claimant immediately after his suspension was not consistent with keeping an open mind. If the replacement had had the title "acting care manager", I would have regarded his swift appointment in a different light.

108.9 There was little or no consideration of mitigation:

108.9.1 Although the documents relied on by Mr. Aubrey showed that the claimant knew enough after the telephone conversation with Ms. Darby on 15 June 2021 to report the allegation to the Safeguarding Team, Mr. Aubrey did not listen to the claimant's mitigation that it was difficult to get hold of anyone on a) the out of hours telephone number which operated in the evenings b) on the telephone before normal working hours in the day.

108.9.2 The confusion in the unit about Safeguarding Procedures and the discrepancy between Head Office's expectations and the reality in the unit.

108.9.3 The claimant's track record was unblemished.

108.9.4 The fact that on any reasonable analysis, the claimant reported to the Safeguarding Team 3 hours 15 minutes' late (from 7.30am to 10.45am on 16 June 2021) or at most 17 hours 15 minutes' late (from 5.30pm on 15 June 2021 to 10.45am on 16 June 2021).

108.9.5 The claimant's relationship with the alleged perpetrator. I accepted his evidence that he spoke with him about his well-being and forthcoming day, as he always did in the morning before college (i.e., before 9.30am).

*Pattern of conduct and mitigation*

109. The respondent's case in the alternative is that these two disciplinary charges related to a series of acts demonstrating a pattern of conduct of sufficient seriousness which undermined the relationship of trust and confidence such that summary dismissal was justified.

110. I do not find that this applies because I do not find that there was a pattern of conduct. These allegations both concern a breach of the Safeguarding procedures/polices and relate to the same incident, namely one set of allegations made by one resident against another.

111. The respondent therefore did not act reasonably as treating these two disciplinary charges, separately or cumulatively, as sufficient reason for summarily dismissing the claimant.

**Summary of Conclusions on Unfair Dismissal Claim**

112. The dismissal was not fair in all the circumstances. In making this decision, I have taken all of the above into account. In addition, this was quite a sizeable employer; they had 33 local authority clients. They had a structure directed from a Head Office; they had a sophisticated HR department and they based what they did on an investigation which I found was not reasonable. Whilst recognising the seriousness of allegations of sexual assault and harassment, and the need to implement and be seen to implement effective safeguarding procedures, the respondent's decision to dismiss was unfair procedurally and outside the range of reasonable

responses.

113. With regard to procedural failures. I must ask myself whether I can say confidently that these procedural failures made no difference to the outcome. In other words, were these procedural issues so substantive that had it been done properly, there would have been no dismissal?

114. I find that it would not have made a difference to the outcome as showing the claimant all the documents relied on in advance of the hearing and including more evidence from Ms. Darby (either as a witness at the disciplinary hearing or requiring answers to questions about her email), would not have changed the respondent's mind about the claimant's admissions. Namely that he:

114.1 Failed to report the complainant's allegations to the Safeguarding Team before reporting them to the police;
114.2 Failed to report the complainant's allegations to the Safeguarding Team immediately;
114.3 Spoke to the alleged perpetrator in some way about the allegations.

## REDUCTION FOR CONDUCT

115. Under s122 and s123 ERA respectively the basic and compensatory rewards can be reduced (see list of issues). In order to decide this, I must make findings as follows on each of the two allegations:

115.1 Was the claimant guilty of the conduct relied on by the respondent?
115.2 Was it culpable to some extent?
115.3 Did it contribute to the dismissal (e.g. was it part of the reason for dismissal)?
115.4 Is it just and equitable for a deduction to be made?

*Failure to follow the correct safeguarding policy in relation to the complainant*

116. Based on the documents and the claimant's oral evidence, he failed to follow the correct safeguarding policy in relation to the complainant. He should have informed the Safeguarding Team first and with the minimum of delay. He could have sent an email on 15 June 2021 in the early evening with a summary of Ms. Darby's conversation. I accept, however, that he had little detail and did not have both names and that it was not unreasonable to consider that an email would only be informative when he had details. Regardless of that, he could have sent an email to the Safeguarding Team on 16 June 2021 soon after speaking with Ms. Darby i.e. at about 7.45am. He did not send any email until 10.45am. The claimant was therefore guilty of the conduct of failing to follow the correct Safeguarding Policy.

117. His evidence was confusing and internally inconsistent. On one version, he relied on a different policy (which turned out to be the one relating to alleged perpetrators). On his second version, he relied on a policy on his mobile telephone (which was not in the bundle and of which we only had extracts). On his third version, he relied on principles encapsulated in the Children Act 1989. I therefore find this changeability reflects that the fact that

he did not apply any of the respondent's official Safeguarding polices but rather something that had grown up through custom and practice in the unit and was held in the unit folder.

118. The claimant came across as genuinely caring about the young people in his units so I do not doubt that his actions came from a place of sound motivation. Yet, the claimant did not seem to question himself at any stage as to whether he had made the right judgment. Even in the oral hearing, he appeared sure that he had taken the correct action.

119. On his own email of 16 June 2021, he had enough information on 15 June 2021 to know that the Safeguarding Policy identified as the correct one by the respondent was triggered (had he been in the habit of referring to company Safeguarding policies and procedures), even though I accept that he did not have sufficient information to make any email meaningful. It was his job to know these policies, regardless of the inadequate training and the lack of understanding from Head Office and Senior Management of what was really happening in the unit.

120. The claimant was therefore culpable to some extent.

121. This contributed to his dismissal as failure to follow the correct Safeguarding Policy was the reason for dismissal.

122. It is just and equitable to make a deduction from both the basic and compensatory awards because first, the claimant was a manager who should have known the importance of following company Safeguarding procedures. Secondly, the claimant was working with vulnerable young people in a regulated industry where conformity to procedure is important.

*Failure to follow the correct safeguarding policy in relation to the alleged perpetrator*

123. Based on the documents and the claimant's oral evidence, he failed to follow the correct safeguarding policy in relation to the alleged perpetrator. He spoke to the alleged perpetrator about the allegations in the morning of 16 June 2021, on his evidence before 9.30am.

124. The claimant was therefore guilty of the conduct of failing to follow the correct Safeguarding Policy.

125. It was not clear that he was following any policy. He referred repeatedly to principles in the Children Act 1989 and he seemed to have been guided by those and his past experience (before joining the respondent) in dealing with the alleged perpetrator.

126. The claimant was therefore culpable to some extent.

127. I do not find that his breach of the relevant Safeguarding policy caused or contributed to the alleged perpetrator's suicide in the late afternoon of 16 June 2021.

128. I note that he was not terribly forthcoming in oral evidence about what he had said to the alleged perpetrator and his account did change slightly. As

these events happened two years ago, I do not read anything into this. I bear in mind that the claimant was unnerved by everything that had happened, being concerned to look after the best interests of both the young people. I am also aware that people do not always tell the same account over time.

129. Nevertheless, this contributed to his dismissal as failure to follow the correct Safeguarding policy was the reason for dismissal.

130. It is just and equitable to make a deduction from both the basic and compensatory awards because first, the claimant was a manager who should have known the importance of following company Safeguarding procedures. Secondly, the claimant was working with vulnerable young people in a regulated industry where conformity to procedure is important.

*Conclusion*

131. The conduct of the claimant (failure to adhere to the respondent's Safeguarding polices in both these instances) was such that it would be just and equitable to reduce the amount of the basic award by 65% under section 122(2) ERA. The claimant contributed to the reasons for dismissal and it is just and equitable to make a deduction of 65% from the compensatory award under s123(6) ERA.

132. I have not decided whether there were breaches of the ACAS code of practice and if so, whether there should be an uplift or reduction applicable and if so, at what level. I will need to be addressed on this at the remedy hearing.

**Automatically unfair dismissal – dismissal for the reason or principal reason of making a protected disclosure**

133. The claimant disclosed to the police that a young person had been the victim of sexual assault by another young person in his care. In the claimant's view, this was a protected qualifying disclosure. His disclosure was to a third party concerning a criminal offence which had allegedly been committed. For this reason, the claimant's disclosure could be said to amount to a protected qualifying disclosure. The claimant considered that his protected disclosure was the reason for his dismissal.

134. As these necessary elements of the claim have been proved on the balance of probabilities by the claimant, the burden shifts to the respondent to prove that the protected disclosure was not the reason or principal reason for dismissal.

135. I refer to my findings on the reason for dismissal in paragraphs 76 and 97 – 108. I am satisfied that the respondent has proved that the (only) reason for dismissal was the claimant's failure to follow the respondent's Safeguarding policies.

Employment Judge Coll

Date: 18 August 2023

Judgment sent to the parties on

.....21 August 2023.....

.....
For the Tribunal office