Case No: 1601764/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr Keeron John

Respondents: Office for National Statistics

Heard at: **Cardiff**

On: **18 September 2023**

Before: **Employment Judge Vernon**
Mrs A Fine **Mr S Head**

Representation
Claimant: No attendance
Respondent: Mr O James (Counsel)

RESERVED JUDGMENT

1. The Claimant's complaint of unfair dismissal contrary to sections 94 and 98 of the Employment Rights Act 1996 fails and is dismissed.

2. The Claimant's complaint of direct age discrimination contrary to sections 13 and 39 of the Equality Act 2010 fails and is dismissed.

REASONS

Introduction and procedural history

1. The Claimant presented his ET1 claim form to the Tribunal on 11 November 2021. In section 8.1 of the ET1 the Claimant did not tick any of the boxes indicating the type of claim he was making save for the box indicating that he is making another type of claim which the Employment Tribunal can deal with. In the box underneath, the Claimant alleged that he had "*been subjected to direct discrimination in that others who also took extended breaks have been exempt from disciplinary action*". He also asserted that he had suffered "*detrimental treatment because others within the organisation who have family relations in senior positions have been exempt from such investigation and harsh disciplinary procedures*".

2. Following receipt of the ET1, the Tribunal issued the Claimant with a strike out warning. It appeared from the content of the ET1 that the Claimant was asserting that he had been unfairly dismissed. The dates of employment given by the Claimant in the ET1 suggested that he did not have two years continuous service and was therefore not entitled to pursue a claim of unfair dismissal pursuant to sections 94 and 98 of the Employment Rights Act 1996. Accordingly, the Tribunal issued the strike out warning.

3. By email dated 6 April 2022, the Claimant informed the Tribunal that, in addition to his employment with the Respondent between 3 February 2020 and 2 September 2021, he had been employed by the Intellectual Property Office from 10 September 2018 until 31 January 2020 and had therefore been employed within the civil service continuously for more than two years.

4. On 16 May 2022, the Tribunal directed that the Claimant must provide details of the protected characteristic relied upon for the purposes of his complaint of direct discrimination within 7 days.

5. The Respondent's ET3 response form and grounds of resistance were presented to the Tribunal on 9 June 2022. The Respondents denied liability in respect of the Claimant's complaints. At that time, the Claimant had not complied with the Tribunal's directions and had not confirmed the protected characteristic relied upon for the purposes of his discrimination complaint.

Accordingly, the ET3 response was limited to the unfair dismissal complaint. The Respondent asserted that the Claimant had been dismissed for gross misconduct which was a fair and reasonable dismissal arrived at after a fair and reasonable disciplinary procedure including an appeal.

6. By email dated 5 July 2022, the Claimant confirmed that the protected characteristic he was relying upon was age. His email said:

"*I was young and relatively new to the position compared to older staff and family members who had also failed to log their flexi time. My job performance was always at least satisfactory, colleagues who had family members in senior management positions did not have action taken against them were pre-warned and were treated more favourable than myself. Due to my age I was made a scapegoat for the transgressions of older and more experienced staff who's similar actions were overlooked due to their family ties within the Civil Service*."

7. The Respondent subsequently filed an Amended Response. In it, the Respondent also denied the Claimant's allegation of direct age discrimination. The Respondent maintained that the Claimant had been subjected to disciplinary action and dismissed for his abuse of the flexi time system and that the actions taken by the Respondent were not in any way connected with the Claimant's age.

Preliminary hearings and case management

8. On 26 August 2022, a Preliminary Hearing was listed before Employment Judge Brace. Various case management orders were issued to prepare for a final hearing which was then listed to take place over four days from 13 to 16 March 2023. At paragraph 68 of the record of that Preliminary Hearing, EJ Brace identified the issues to be determined by the Tribunal in order to resolve the Claimant's claim.

9. In accordance with the Tribunal's orders, the Respondent filed a Further Amended Response following the Preliminary Hearing. In paragraphs 31 and 32 of the Further Amended Response, the Respondent accepted that the

Claimant had the necessary continuity of service to pursue a complaint of unfair dismissal in light of his employment with the Intellectual Property Office immediately prior to his employment with the Respondent. The Respondent maintained the denial in respect of all of the Claimant's complaints.

10. Following the Preliminary Hearing, the Respondent made an application for an order striking out the claim or, in the alternative, for a deposit order on the grounds that the claim had no (or, alternatively, little) prospects of success. That application was heard by Employment Judge Brace on 27 February 2023. Both applications were refused. The time estimate for the final hearing was reduced to three days and remained listed to take place between 13 and 15 March 2023.

11. Regrettably, on 10 March 2023, the parties were informed that the final hearing was vacated. There had been issues securing a venue for the hearing and, although that issue was overcome, no Judge was available to deal with the final hearing.

12. The Tribunal then re-listed the final hearing to take place between 30 May and 1 June 2023. On the application of the Respondent, those dates were then also vacated, and the final hearing was relisted to take place between 18 and 20 September 2023. The Claimant made a request for the final hearing to be conducted remotely by CVP due to the cost involved in travelling to Cardiff. That request was refused.

Claimant's requests for postponement of the final hearing

13. On 18 August 2023, the Claimant wrote to the Tribunal asking for the final hearing to be postponed until early 2024 as his "representative" was unable to attend. As the Tribunal understands it, the representative referred to was the Claimant's mother. The request was considered by the Tribunal and refused.

14. On 8 September 2023, the Claimant wrote to the Tribunal again asking for the final hearing to be postponed. He indicated that he had commenced a new job on 21 August 2023 and was unable to take time off to attend the final hearing. The Respondent opposed the request and, after consideration, the Tribunal

again refused the request for a postponement. The reasons for the refusal were set out in an email to the Claimant on 15 September 2023 (i.e. the last working day before the hearing).

15. Shortly thereafter, the Tribunal received a further email from the Claimant which read:

"*Further to your email below, please can the hearing continue in my absence as I am unable to take leave from my new job to attend.*"

The hearing and evidence

16. The final hearing commenced on 18 September 2023. The Respondent was represented by counsel, Mr James. As previously indicated in the correspondence, the Claimant did not attend. Out of an abundance of caution, the Tribunal attempted to contact the Claimant. The Tribunal staff were able to speak to the Claimant's mother who confirmed that the Claimant was unable to attend the final hearing.

17. After considering the Claimant's email, hearing submissions from the Respondent on the appropriate course of action to take and considering rule 47 of the Employment Tribunals Rules of Procedure, the Tribunal decided to proceed to hear the case in the absence of the Claimant rather than dismiss it by reason of the Claimant's non-attendance.

18. The Tribunal had been provided with a bundle of documents containing 476 pages. The Tribunal was also provided with witness statements for:

a) The Claimant;
b) Arron Maspero MBE, Head of Corporate IT Services for the Respondent;
c) Chris Penner, Deputy Director of the Cloud Division for the Respondent; and
d) Ceinwen Blake, Divisional Director for Digital Services and Technology for the Respondent.

19. At the request of the Respondent, and in light of the Claimant's nonattendance and in order to manage the final hearing in a manner that was proportionate and consistent with the overriding objective, the Tribunal agreed to hear the evidence of Mr Maspero and Mr Jenner by video. The witnesses (both of whom are based in the midlands) had not been expecting to give their evidence until day two of the final hearing and to have required them to attend in person when the Claimant was not going to be present to cross-examine them was, in the Tribunal's judgment, not reasonable or proportionate. They each confirmed the truth of their respective witness statements. The Respondent did not call the third witness (Ms Blake) to give oral evidence.

20. The Tribunal heard oral submissions on behalf of the Respondent and then reserved judgment to ensure that the Claimant would receive the decision and reasons of the Tribunal in writing.

The issues

21. The issues to be determined were considered at the preliminary hearing conducted by Employment Judge Brace on 26 August 2022. The issues were recorded in the record of that hearing. The Tribunal adopted the list of issues for the purposes of the final hearing.

Facts

22. Before setting out the findings of fact made by the Tribunal, some comment must be made about the approach the Tribunal has taken given the nonattendance of the Claimant at the final hearing. The Claimant had submitted a written witness statement as directed by the Tribunal. His witness statement did not contain any statement of truth and was not signed by the Claimant. As a result of his non-attendance, the Claimant did not provide any oral evidence (nor confirm the truth of his written statement) to the Tribunal under oath or affirmation. Accordingly, the Tribunal has attached little to no weight to the contents of the Claimant's witness statement, particularly on any issues that are in dispute between the parties.

23. Two of the Respondent's witnesses attended the final hearing and confirmed the truth of their written evidence under affirmation. By their attendance, they had made themselves available for questioning. As a result of the Claimant's non-attendance, he was not present to cross-examine the Respondent's witnesses. It is not the function of the Tribunal to cross-examine the Respondent's witnesses on behalf of the Claimant in these circumstances or at all. The Respondent's third witness did not attend the final hearing to give oral evidence but had signed the witness statement to confirm its truth.

Findings

24. The Claimant commenced employment with the Respondent in early February 2020. He had previously been employed in the Intellectual Property Office from 2018. He was employed by the Respondent as an IT Infrastructure Engineer. He remained employed by the Respondent until his employment was terminated by the Respondent, without notice, on 2 September 2021.

25. On 28 July 2021, the Respondent wrote to the Claimant informing him that Katie Billinge had been appointed to carry out an investigation into the Claimant's conduct and, specifically, an allegation of "flexi abuse" over a period of 11 days from 10 June to 20 July 2021 equalling 17.5 hours. The letter indicated that, if proven, the conduct may potentially constitute gross misconduct.

26. The reference to "flexi abuse" was a reference to the Respondent's flexible working hours policy. The policy set out the principles of the Flexible Working Hours scheme, the main purpose of which was to provide a flexible system of attendance for employees. The policy stated that a standard working day was 7 hours and 24 minutes and provided that hours for full time employees included one hour for lunch on each full working day. The policy set out details of how flexi time would be recorded and made clear that employees must ensure that their hours were recorded accurately. Under the heading "Abuse", the policy provided that abuse of the scheme would be dealt with through the Discipline policy and procedure.

27. The Respondent's disciplinary policy gave details of how issues of misconduct would be dealt with by the Respondent. It also gave a list of examples of conduct which may be considered to be gross misconduct.
    Those examples included the following:

    a) Theft, corruption or fraud;
    b) Repeated or persistent failure to follow reasonable instructions; and
    c) Significant or repeated breach of the Civil Service Code.

28. The Claimant's recording of his working hours and his compliance with the Respondent's policies on attendance at work and the flexible working hours scheme had been raised with him during a 1-2-1 meeting on 9 June 2021. It was suggested to him that he was away from his desk for significant periods of time during the working day and was not therefore working the full number of hours as required. During that meeting, the Claimant confirmed that he understood the number of hours he should be working each day and how the flexi scheme worked. The Claimant was informed how serious it was to falsely record working time and that if further issues occurred, action might be taken which could include dismissal. The Claimant confirmed that he understood the issue and the seriousness of it. He indicated that he did not require any further information. He was specifically told to ensure that his records were accurate for the following 10 days.

29. A further meeting took place with the Claimant on 23 July 2021. The meeting was between the Claimant and Nino Farrugia, the Claimant's Team Manager. During the meeting, the Claimant was taken through details of a number of days when his recordings of hours worked a) did not appear to accurately reflect the work he had actually done and b) failed to accurately record times when he was away from his desk. It was put to him that during a period of 11 days he was actually out of the building for 17.5 hours in total for which he had claimed work time. When he was asked to explain that apparent discrepancy, the Claimant responded by saying:

    "*I had no idea this* [sic] *it was so bad. I can't explain it. You have it there in black and white I'm embarrassed with myself. Sorry*."

30. Katie Billinge produced an investigation report dated 12 August 2021. Her report set out the scope of her investigation and the disciplinary allegations made against the Claimant. The report also set out what steps had been taken to investigate the allegations including interviewing the Claimant, Nino Farrugia and Graham Willis (Head of Cloud Infrastructure Services, Digital Services and Technology) and examining other relevant documentary evidence including the notes of the meetings which had taken place with the Claimant on 9 June and 23 July 2021 and data regarding the Claimant's attendance at work and time recording.

31. Ms Billinge set out in section 5 of her report the evidence she obtained relevant to the allegations. The evidence included the following:

    31.1 Mr Farrugia had given the Claimant a tour of the office when he was first employed and explained the system of working hours and the need to clock out of the flexi system when leaving the building or when taking a break of more than 20 minutes;

    31.2 Graham Willis, who sat near to the Claimant in the office, noted that the Claimant was away from his desk for significant periods of time and so investigated the Claimant's working time further. Having done so, he noted a disparity between the time the Claimant was claiming as work time and the time he was actually present in the office. This led Mr Willis to speak to the Claimant about the issue at the meeting on 9 June;

    31.3 Ms Billinge then set out details of the discussion which took place on 9 June as summarised above;

    31.4 During the early part of July 2021, Mr Farrugia and Mr Willis carried out further checks in respect of the Claimant's work and time recording and concluded that there were still discrepancies;

31.5 Ms Billinge then summarised the meeting which took place with the Claimant on 23 July (see above);

31.6 The data held by the Respondent confirmed that between 10 June 2021 and 20 July 2021 the Claimant left the office building but did not clock out of the flexi system and the total time for which he was out of the office was 17 ½ hours over 11 days;

31.7 The Claimant was shown the data both during the meeting on 23 July and by Ms Billinge as part of her investigation. The Claimant accepted that the data demonstrated unaccounted for breaks where he was out of the building but was not reflected in his flexi recordings;

31.8 The Claimant confirmed that there were times when he was away from his desk (including being out of the building) but which were not reflected in his flexi recordings. He also confirmed that his flexi recordings were not 100% accurate;

31.9 The Claimant presented a number of issues in mitigation including a) his doctors investigating whether he has Attention Deficit Hyperactivity Disorder, b) his mother being diagnosed with breast cancer, c) a recent car accident he had been involved in, d) having received notice to leave his accommodation resulting in him moving back in with his parents, and e) the unexpected death of a friend; and

31.10 The Claimant offered to compensate for the unaccounted-for time with his annual leave.

32. In section 6 of the report, Ms Billinge then set out her findings reached as a result of her investigation. This section of the report including the following:

32.1 The evidence obtained demonstrated that the Claimant had been absent from the office but had not “keyed out” which was a violation of the Attendance and Hours at Work Policy;

32.2 The Claimant had admitted not recording his working times accurately and taking breaks outside of the office without clocking out on his flexi system;

32.3 As a result, the work times presented by the Claimant were false and had resulted in him being rewarded in flexi credits for time he had not actually worked which it was reasonable to conclude was fraudulent;

32.4 The issue had been raised with the Claimant in the meeting on 9 June 2021 but his false recording of time had continued thereafter;

32.5 It was reasonable to conclude that the Claimant's time recording called into question his honesty and integrity.

33. The overall conclusion reached by Ms Billinge was that:

"… *there is sufficient evidence to uphold the allegation that KJ has committed 11 days of potential incidents of flexi abuse equalling 17:30 hours from 10 June 2021 to 20 July 2021. Therefore, there is a case to answer in relation to gross misconduct* …."

34. On 20 August 2021 the Respondent wrote to the Claimant inviting him to a "Discipline decision meeting" to take place on 2 September 2021. The letter stated that the meeting would consider the allegations which were the subject of Ms Billinge's report. A copy of the report was enclosed with the letter. The letter informed the Claimant of his right to be accompanied and of the possibility that the outcome of the meeting could be a finding of gross misconduct and dismissal without notice.

35. The discipline decision meeting took place on 2 September 2021 and was chaired by Mr Maspero as decision maker. Ms Billinge was present as the investigating officer and a member of the HR team and a note taker were also present. The Claimant attended on his own without a companion.

36. Ms Billinge presented her report and conclusions. The Claimant made no further comments in respect of the report. After a brief adjournment, Mr Maspero informed the Claimant that he agreed with the conclusions of Ms Billinge. He went on to talk about the mitigating circumstances which had been raised by the Claimant. There was some confusion regarding some of the information provided in respect of the Claimant's mother's ill health which Mr Maspero wanted to consider further. The meeting was therefore adjourned and the Claimant was told that he would be informed of the outcome within 5 days.

37. Mr Maspero then wrote to the Claimant in a letter dated 2 September 2021. The letter informed the Claimant that he had been found to have committed gross misconduct in respect of the allegations. The letter also set out that Mr Maspero had considered the mitigation raised by the Claimant but had concluded that either the issues raised were not relevant or did not amount to sufficient mitigation to alter the decision made. The Claimant was informed that his employment was terminated with immediate effect. He was also told of his right to appeal.

38. On 13 September 2021 the Claimant sent an email to the Respondent (to Chris Penner who had been identified as the appeals manager) to appeal against his dismissal. In summary, the issues raised in the Claimant's email were as follows:

    38.1 The outcome was too harsh;

    38.2 A consistent approach had not been taken as there are others employed by the Respondent who have taken extended breaks;

    38.3 Another member of the team took extended breaks and has not been investigated or dismissed;

    38.4 The Claimant questioned whether some or all of the other staff had been investigated as he felt he had been targeted;

    38.5 He had great difficulty sharing details of his mental health struggles with others and had been working at home for a prolonged period of time without appropriate support;

38.6 As a result of his dismissal he has been left with nothing and had not been given chance to improve, make amends or resign.

39. On 20 September 2021 Mr Penner responded to the Claimant and sought clarification of the grounds of appeal and the outcome the Claimant was seeking from the appeal process. The email explained that, under the Respondent's discipline policy, an appeal would normally be made on one or more of the following grounds and the Claimant was asked to confirm which of them he was relying on in making his appeal:

39.1 A procedural error had occurred;
39.2 The decision is not supported by the information/evidence available; or
39.3 New information/evidence had become available which should be taken into account.

40. The Claimant responded the following day and confirmed that he was relying on the second and third points. He repeated his assertion that others had also taken breaks. He said he feared reprisals from colleagues and management whilst the matter was being investigated and did not want to name and shame others in senior positions. As for the desired outcome, the Claimant said it was "*to have the opportunity to resign with a clean record so that I am able to gain future employment*".

41. The Respondent wrote to the Claimant on 23 September 2021 to invite him to an appeal meeting on 1 October 2021. The letter informed the Claimant of his right to be accompanied. It also explained that the meeting would be used to examine the decision-making process and decide whether it was reasonable. The Claimant was informed that the appeal was not a full rehearing.

42. The appeal meeting took place on 1 October 2021. The meeting was chaired by Mr Penner and was again attended by a member of the Respondent's HR team and a note taker. The Claimant again attended alone. Mr Penner asked the Claimant what new evidence he wished to present. The Claimant named a colleague who he alleged had also been taking extended breaks who was

related to one of the managers. He said the other person had “got away with it". He also complained about being targeted. He asked if others would be investigated and also whether he could resign instead of being dismissed.

43. Mr Penner wrote to the Claimant on 6 October 2021 with the outcome of his appeal. Mr Penner’s decision was to reject the appeal and uphold the decision to dismiss. His letter responded to each of the points that the Claimant had raised and concluded that either they were not relevant to the decision taken to dismiss the Claimant, were not reasons to overturn the decision made by Mr Maspero or would be looked into separately. As for the Claimant’s wish to resign, Mr Penner explained that the Respondent’s discipline policy provided that in the event of a resignation during an investigation into misconduct, the investigation must still continue and, if internal fraud was found, the Respondent was obliged to report it. As that had been the conclusion reached by the investigation and accepted by Mr Maspero, the Respondent was obliged to submit details to the Civil Service Internal Fraud Database.

44. Finally, Mr Penner confirmed that he was content with the findings of the investigation and the conclusion that the Claimant’s actions constituted gross misconduct.

The applicable law

Unfair dismissal

45. Unfair dismissal claims are governed by the provisions of Sections 94 and 98 of the Employment Rights Act 1996.

46. Consideration of claims under section 98 ERA 1996 involve a two-stage process. Firstly, Section 98(1) provides that the Respondent bears the burden of proving a) the reason for dismissal and b) that the said reason falls within one of the potentially fair reasons for dismissal set out in Sections 98(1) or 98(2).

47. Section 98(2)(b) provides that a reason which relates to the conduct of the employee is a potentially fair reason for dismissal.

48. If the Respondent is able to discharge the burden under section 98(1), the Tribunal must then consider whether the decision to dismiss the Claimant for that reason, is fair or unfair pursuant to the provisions of Section 98(4) of the 1996 Act. Section 98(4) ERA 1996 provides that, in deciding whether a dismissal is fair or unfair (having regard to the reason for which the Claimant was dismissed), a tribunal must consider whether the Respondent acted reasonably in treating that reason as a sufficient reason to dismiss the Claimant bearing in mind all the circumstances, including the size and administrative resources of the Respondent, equity and the substantial merits of the case.

49. The burden of proof when considering the issues arising under section 98(4) is neutral (**Boys and Girls Welfare Society v MacDonald [1995] ICR 693**).

50. Where the reason relied upon by the employer is conduct, the following issues fall to be considered as set out in **BHS v Burchell [1980] ICR 303**: a) did the employer have a genuine belief that the employee was guilty of the conduct in question, b) was the belief held on reasonable grounds and c) was the belief held on those grounds after as much investigation as was reasonable in the circumstances.

51. In deciding whether a particular decision to dismiss was reasonable or unreasonable, the question which a Tribunal must ask is whether the employer's decision fell within the range of reasonable responses which a reasonable employer might have adopted (**Iceland Frozen Foods Ltd v Jones [1983] ICR 17, EAT**).

52. It is important to note that in deciding whether an employer has acted reasonably or unreasonably, the tribunal must not substitute its own view for that of the employer i.e. the Tribunal cannot say a dismissal is unfair simply because the Tribunal would have done something different in the circumstances. The question is not what the tribunal would have done in the

circumstances but whether what the employer did was reasonable (**Foley v Post Office; HSBC Bank plc v Madden [2000] ICR 1283, CA**).

Direct age discrimination

53. Section 13(1) of the Equality Act 2010 states as follows: -

(1) *A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.*

54. The protected characteristic relied upon by the Claimant is age. Age is a protected characteristic under the Equality Act 2010. Section 5 of the Act provides:

"(1) In relation to the protected characteristic of age –
(a) A reference to a person who has a particular protected characteristic is a reference to a person of a particular age group;
(b) A reference to persons who share a protected characteristic is a reference to persons of the same age group.
(2) A reference to an age group is a reference to a group of persons defined by reference to age, whether by reference to a particular age or to a range of ages."

55. The Tribunal should ask itself whether the Claimant has demonstrated facts from which the tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed, or is to be treated as having committed, an unlawful act of discrimination (s.136 Equality Act 2010).

56. As a first stage, it is for the Claimant to prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed, or should be treated as having committed an unlawful act of discrimination **Igen Ltd v Wong [2005] IRLR 258**.

57. If it is proven that there was differential treatment, the second element of the burden of proof requires the Tribunal to consider whether the Respondent had

a neutral reason for its conduct in relation to each allegation. The Tribunal can consider firstly whether the Claimant would have been treated in the same way 'but for' the fact that he was aged 19, and then turn to consider the 'reason why' the Respondent treated him so (**B v A [2007] IRLR 576**). In order to demonstrate that the reason for the treatment was because of the Claimant's age, it should be more than a minor or trivial part of the cause (**Villalba v Merrill Lynch Co Inc [2007] ICR 469**).

58. Although the tribunal may look at all of the information globally when considering the second limb (see **Madarassy v Nomura International plc [2007] ICR 867]**), this does not negate the need for the tribunal to be satisfied that there are facts from which it could be established that the claimant was treated less favourably because of their protected characteristic, absent an explanation from the respondent (**Hewage v Grampian Health Board [201] ICR 1054**).

Analysis and conclusions

Unfair dismissal

59. The Respondent's Further Amended Response concedes that the Claimant has the necessary period of qualifying service to be entitled to the right not to be unfairly dismissed. There is, therefore, no longer any issue about the Claimant's ability to pursue a complaint of unfair dismissal pursuant to sections 94 and 98 ERA 1996.

60. The initial burden of proving the reason (or principal reason) for the decision to dismiss the Claimant and that it is a potentially fair reason for dismissal rests upon the Respondent. The Tribunal is satisfied that the Respondent dismissed the Claimant because the Claimant had taken breaks from work (including time spent outside of the building and/or breaks of more than 20 minutes inside the building) which were not reflected in his flexi time recordings and therefore resulted in the Claimant receiving flexi time credits for time that he had not

actually worked. The Respondent concluded that such behaviour was a serious breach of the Respondent's policies, was probably fraudulent and amounted to gross misconduct.

61. The Tribunal is satisfied that the evidence of the Respondent establishes those matters. Mr Maspero's unchallenged evidence is that he was the person who made the decision to dismiss and that those were the reasons for his decision. His evidence is consistent with the fact of and contents of a) the investigation undertaken by the Respondent, b) the notes of the disciplinary meeting and c) the disciplinary outcome letter. It must also be remembered that the Claimant admitted the conduct alleged against him during the investigation and at no time sought to resile from that admission throughout the disciplinary process.

62. The Tribunal is also satisfied that the reason for the decision was a reason related to the Claimant's conduct and was, therefore, a potentially fair reason for his dismissal.

63. The Tribunal must next consider whether the decision to dismiss the Claimant for that reason was fair or unfair taking into account the matters referred to in section 98(4) ERA 1996. The Tribunal is not entitled to and must not substitute its view for that of the Respondent. The Tribunal is satisfied that the Respondent's decision to dismiss the Claimant was a fair decision and fell well within the range of reasonable responses open to the Respondent. In coming to that conclusion, the Tribunal considers the following matters to be significant:

63.1 The Respondent, in the form of Mr Maspero, had a genuine belief in the Claimant's guilt of the conduct in question and that belief was based on reasonable grounds. The Tribunal accepts the evidence of Mr Maspero for all of the reasons already set out above as to his belief. The evidence gained and conclusions reached during the disciplinary process also provided reasonable grounds for that belief;

63.2 The Respondent conducted a reasonable investigation. Ms Billinge obtained evidence from the witnesses who could provide relevant

evidence and considered other documentary evidence as well. She interviewed the Claimant to obtain his account and he made certain admissions to her;

63.3 The disciplinary procedure followed by the Respondent was reasonable. The process appears to have followed the procedure set out in the Respondent's own policies. Further, the Claimant raised no concerns regarding the procedure either during the disciplinary process or as part of his tribunal claim;

63.4 The conclusion that the conduct admitted by the Claimant amounted to gross misconduct is a conclusion a) consistent with the Respondent's own policies, b) consistent with the warnings given to the Claimant in the informal meetings he had in June and July 2021 and c) that was reasonably open to the Respondent on the evidence available.

64. The Tribunal is also satisfied that the issues and mitigating circumstances raised by the Claimant during the disciplinary process were considered by the Respondent. The Tribunal accepts the evidence of Mr Maspero and Mr Penner as to that. Their evidence is also consistent with the contents of the notes of the meetings they held with the Claimant and with the letters they wrote setting out their decisions. The approach taken to those issues by both of them was an approach that was within the range of reasonable approaches which could have been adopted.

65. For all of those reasons, the Tribunal is satisfied that the dismissal of the Claimant was fair and that, accordingly, his complaint of unfair dismissal fails and must be dismissed.

Direct age discrimination

66. The initial burden of proof in respect of the complaint of direct age discrimination rests upon the Claimant. He must establish facts, on the balance of probabilities, from which the Tribunal could conclude that there has been an unlawful breach of the Equality Act 2010.

67. For the reasons set out below, the Tribunal concludes that the Claimant his not discharged that burden of proof:

67.1 In light of the Claimant's non-attendance at the final hearing and his witness statement being a) unsigned and b) not confirmed as true by either a statement of truth or by oral evidence under oath or affirmation, the Claimant has in fact placed no evidence before the Tribunal to which any weight can be attached to indicate that his age had anything whatsoever to do with the Respondent's decisions to subject him to a disciplinary process or to dismiss him;

67.2 Further, and in any event, when considered carefully, the Claimant's evidence does not in fact support any such contention. In particular, the Tribunal notes the following:

a) At no time during the disciplinary process did the Claimant assert that the actions of the Respondent and the decisions made had anything to do with his age;

b) When submitted initially to the Tribunal, the Claimant's ET1 contained no allegation that the Respondent's actions were in any way connected with the Claimant's age;

c) The Claimant's witness statement contains conflicting assertions as to the basis of the discriminatory treatment alleged by the Claimant. On the one hand he refers to the fact that he is younger than other employees who were treated differently to him. However, he also goes on to assert that he suffered detrimental treatment because others who had family relations in senior positions were exempt from disciplinary action. The latter assertion is not an allegation of age discrimination but instead reflects the allegation of "nepotism" which was specifically included in the Claimant's ET1.

67.3 The Tribunal also concludes that, even had the Tribunal been able to take a different view than that set out above, the Respondent's evidence would have satisfied the Tribunal that the Claimant's age was not a factor in the decisions taken by the Respondent to subject the Claimant to a disciplinary process or to terminate his employment.

68. For all of those reasons, the Claimant's complaint of direct age discrimination also fails and must be dismissed.

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Employment Judge Vernon

Date: 19 September 2023

JUDGMENT SENT TO THE PARTIES ON 22 September 2023

FOR THE TRIBUNAL OFFICE Mr N Roche