CASE NO: 2601632/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr D Whyley

Respondent: Gypsumtools Ltd

Heard at: Leicester
On: 30 and 31 January 2023 and 3 March 2023

Before: Employment Judge R Broughton (sitting alone)

Representation
Claimant: Mrs Zovidavi of Counsel
Respondent: Mr Zaman of Counsel

JUDGMENT

- The claimant's complaint of unfair dismissal is well founded and succeeds.
- The respondent is ordered to pay the claimant the following amounts:
- Basic Award : **£1,067.3** plus
- Compensatory award (including loss of statutory rights of £500 plus ACAS uplift of 25%): **£20,382.62**
- The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 SI 1996/2349 do not apply.

WRITTEN REASONS FOLLOWING EX TEMPORE JUDGMENT

Background

1. The Claimant commenced employment with the Respondent on 23 April 2018 and it terminated on 31 March 2021. The claim was presented on 28 July 2021 following a period of ACAS early conciliation from 18 May 2021 to 29 June 2021. It was identified as a claim of unfair dismissal only.

Summary

2. In summary, the Claimant complains that he was unfairly dismissed from his position as a Stores Assistant/Taping Tool Repair Technician on 31 March 2021.The Respondent

accepts that it dismissed the Claimant, it alleges that it had a fair reason to do so on the grounds of some other substantial reason, because of the adverse impact on the business and on working relationships of a Video which had appeared on social media in which the Claimant was accused of 'grooming' an underage girl (the Video).The Claimant's undisputed evidence is that this Video was taken in March 2016.

3. It is important to make it clear in this Judgment that those allegations made in the Video against the Claimant, were made by two members of the public, two men who as I understand it, seek to identify people they believe to be 'grooming' young people. Those allegations were investigated by the police and for reasons set out in this Judgment, I find on the evidence that a decision was taken by the Crown Prosecution Service (CPS) not to prosecute the Claimant. The Claimant was not found guilty of committing any offence.

Preliminary matters

Identity of the Respondent

4. The claim had been issued against Gypsumtools Ltd and Measom (Dryline) Limited. Both parties confirmed at the outset the hearing that the correct Respondent is **Gypsumtools Ltd**. By agreement Measom (Dryline) Limited was removed as a Respondent pursuant to Rule 34.

Video evidence

5. The Respondent had produced a copy of the Video footage. The Claimant had no objection to it being admitted into evidence. The Video was played. The parties had not provided a transcript.

Witness statements

6. The Claimant did not call any supporting witnesses. The Respondent had prepared witness statements for Jill Horsley, HR Officer; Michael Khan, Group HR Director and Lacey Hoggan, Managing Director of the Respondent. The Claimant objected to the inclusion of Lacey Hoggan's evidence and the calling of her as a witness on the grounds that the witness statements had been exchanged on 8 December 2021 and that he had only received the witness statement for Ms Hoggan on 19 January 2023. The Respondent had responded to the objections by email on 25 January 2023. The parties were given an opportunity to make further oral representations at the start of the hearing. The Respondent referred to the relevant of Ms Hoggan's evidence to the issue of reputational risk.

7. The Claimant's objection principally was that the Respondent was aware of the need to present evidence of reputational damage because this was a pleaded reason for dismissal as set out in the Grounds of Resistance drafted by Counsel.

8. Counsel for the Claimant however accepted that Ms Hoggan's evidence about reputational damage was relevant and he clarified that the Claimant was not taking a 'point on relevance', confirmed that he was not submitting that there was any prejudice to the Claimant from the late admission of this evidence and considered that he could address her evidence in cross-examination

9. I provided my full decision orally to the parties during the hearing, which was in summary to allow the admission of the evidence and to permit Ms Hoggan to give evidence principally because her evidence appeared to be of relevance to the central issues to be determined and would be of assistance to the Tribunal and the Claimant does not assert any prejudice.

Anonymisation

10. Counsel for the Claimant raised that he considered the threshold had been met for a Restricted Reporting Order to be made pursuant to Section 11 of the Employment Tribunal Act 1996 (ETA) because when the allegations had first been made in 2016, they had taken a 'significant toll' on the Claimant's mental health and he was now effectively having to deal with the allegations being raised again. However, Counsel did not make an application for an order, he explained that he was raising the issue because the Tribunal may be minded to do so of its own motion. The Respondent opposed any order on the basis that the Video is in the public domain.

11. Section 11 of the ETA provides as follows :

11 Restriction of publicity in cases involving sexual misconduct.

(1) Employment tribunal procedure regulations may include provision—

(a)for cases involving allegations of the commission of sexual offences, for securing that the registration or other making available of documents or decisions shall be so effected as to prevent the identification of any person affected by or making the allegation, and

(b)for cases involving allegations of sexual misconduct, enabling an employment tribunal, on the application of any party to proceedings before it or of its own motion, to make a restricted reporting order having effect (if not revoked earlier) until the promulgation of the decision of the tribunal…

(6)In this section—…

"sexual misconduct" means the commission of a sexual offence, sexual harassment or other adverse conduct (of whatever nature) related to sex, and conduct is related to sex whether the relationship with sex lies in the character of the conduct or in its having reference to the sex or sexual orientation of the person at whom the conduct is directed,

"sexual offence" means any offence to which section 4 of the Sexual Offences (Amendment) Act 1976, the Sexual Offences (Amendment) Act 1992 or section 274(2) of the Criminal Procedure (Scotland) Act 1995 applies (offences under the Sexual Offences Act 1956, Part I of the Criminal Law (Consolidation) (Scotland) Act 1995 and certain other enactments), and

"written publication" has the same meaning as in the Sexual Offences (Amendment) Act 1992.

12. Rule 50 of the Employment Tribunal Rules provides as follows**:**

***50.**—(1) A Tribunal may at any stage of the proceedings, or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or in order to protect the Convention rights of any person or in the circumstances identified in section 10A of the Employment Tribunals Act.*

(2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.

(3) Such orders may include—

(a)an order that a hearing that would otherwise be in public be conducted, in whole or in part, in private;

(b)an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymisation or otherwise, whether in the course of any hearing or in its listing or in any documents entered on the Register or otherwise forming part of the public record;

(c)an order for measures preventing witnesses at a public hearing being identifiable by members

of the public;

(d)a restricted reporting order within the terms of section 11 or 12 of the Employment Tribunals Act.

…

(6) "Convention rights" has the meaning given to it in section 1 of the Human Rights Act 1998.

13. I also took into account the following cases: ***Vatish v Crown Prosecution Service EAT 0164/11***, ***Fallows v News Group Newspapers Ltd EAT 2016 ICR 801, EAT***, ***A v B 2010 ICR 849, EAT*****,** and ***F v G 2012 ICR 246, EAT*****.**

14. I gave my reasons for refusing to make an Order to the parties orally at the hearing. In summary, I took into consideration the convention rights of the Claimant and in particular Article 8 ECHR however there was no evidence put before the Tribunal, either oral evidence or in the form of any medical evidence, about the likely impact, on the Claimant's mental health of any publicity surrounding these allegations .I also took into account that the Video had been in the public domain for some time although I appreciate attempts had been made by the Claimant to remove it. I determined that taking into account the importance of the principle of open justice, while no doubt these allegations are embarrassing for the Claimant, given that the allegations relate to events back in 2016 and have been the subject of an investigation which did not result in any prosecution, I was not persuaded that the potential impact on the Claimant's convention rights outweighed the principle of open justice in these circumstances.

Issues

15. In clarifying the issues with the parties, the Respondent confirmed that in terms of the reason or dismissal it relies upon two reasons; a breakdown in the working relationships with colleagues and the reputational damage to the Respondent.

16. In terms of the decision makers, the Respondent confirmed that the first decision to dismiss was made by Jill Horsley and upheld by Michael Khan.

17. I also clarified with the parties at the outset that we were dealing with remedy during the course of this hearing. There was no schedule of loss contained in the agreed file of documents however the Claimant did produce one. That remedy would be dealt with as part of this hearing was not objected to by either party.

18. The issues for the Tribunal to determine are:

    i. *what was the reason or principal reason for dismissal?*

    ii. *Was it a potentially fair reason?*

    iii. *Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant, including following a fair procedure?*

    iv. *If the Tribunal considers that it is conduct, the Tribunal will need to decide whether the Respondent genuinely believed the Claimant had committed misconduct.*

v. *If the reason was misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant? The Tribunal will usually decide, in particular, whether:*

vi. *there were reasonable grounds for that belief;*

vii. *at the time the belief was formed the Respondent had carried out a reasonable investigation;*

viii. *the Respondent otherwise acted in a procedurally fair manner;*

ix. *dismissal was within the range of reasonable responses.*

x. *The Respondent says the reason was a substantial reason capable of justifying dismissal, namely breakdown in working relationships and risk to the reputation of the business.*

xi. *Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant?*

Findings of fact

19. All findings of fact are based on a balance of probabilities.

Group Structure

20. The Respondent is part of a group of companies, there are 12 companies in the group which the Respondent deal with. There are 35 companies across the whole group including companies overseas.

Claimant's role

21. The Claimant worked in the warehouse repairing tools. He drove a forklift and unpacked deliveries. He picked and packed for orders in the warehouse. He would also worked on the trade counter, dealing directly with customers. The Claimant worked alongside 3 other employees.

22. Mr. Joe Cooper also picked and packed stock in the warehouse, worked on the trade counter and also worked in the office.

23. Ms Jade Gibson worked in part-time sales and administrative role and worked mainly in the office and assisted on the trade counter and if needed, in the warehouse.

24. The Claimant reported directly into the Operations Manager, Mr. Callum Wilson who was based in the office.

25. Ms Hoggan, is the Managing Director, previously the Marketing Manager.

26. There was reference to a Cynthia in the papers and the undisputed evidence of the Respondent, which I accept, is that she worked for the parent company in the accountants department.

27. Ms Horsley was HR Manager who was line managed by Helen Syson, Group HR Manager who reported into Mr Khan, Group HR Director.

Contracts and policies

28. The Claimant was issued with a contract of employment dated 8 May 2018, which included the following clause (which I shall refer to hereafter as the **Personal Conduct Clause**) [p.46]:

    - *Conduct your personal and professional life in a way which does not risk adversely affecting the employer's standing and reputation.*

29. The Respondent's disciplinary policy and procedure includes the following provisions [Page 41 - 44]:

    "***Investigation***

    ***Prior to taking the decision to invoke the disciplinary procedure**, the Company will ensure that a thorough investigation is carried out. This is a fact finding process and may necessitate the gathering of detailed information as well as the carrying out of formal interviews, taking of written statements, etc.*

    The disciplinary procedure

    At each step in the procedure a disciplinary meeting will be held where all facts will be considered, and any mitigating circumstances discussed. … The employee will also be advised of their right to appeal against the decision to take disciplinary action. …

    Gross misconduct

    The following offenses will be viewed by the organisation as gross misconduct:

    - *Serious breach of rules, policies or procedures, especially those designed to ensure safe operation (Health and Safety Regulations)*

    …

    Appeals

    At every step, the employee has a right to appeal a sanction. If employees wish to appeal they should do so in writing with 5 working days of receipt of the disciplinary outcome setting out the reasons for appeal."

    [Page 43]

The recruitment and selection

30. The Respondent has a recruitment and selection policy [page 57 – 67]. Included within this at page 66 is a policy dealing with recruiting ex-offenders. The Claimant was not an ex-offender however it is relevant to compare how the Respondent commits in its policy to dealing with candidates for jobs who are ex- offenders and the manner in which the Respondent dealt with the Claimant. The policy provides that when dealing with applicants with a criminal record the Respondent will conduct itself as follows [p.67]:

    "*Any disclosure of an offence will lead to an involved and full discussion with the candidate regarding the **relevance of the conviction to the job role** before a decision is made about withdrawal of an offer of employment. A failure by the candidate to produce information about convictions **relevant to the role could** lead to the Company withdrawing an offer of employment. Where the criminal record information reveals details of an offence, the relevance to the job in question should be fully discussed with the applicant before withdrawing an offer of employment. Before withdrawing an offer the HR Department should be consulted.*

    In order to assess whether a criminal record is relevant to the role, the conviction disclosed should be assessed in line with the duties of the role and how the work is carried out. Factors to take into account include, but are not limited to

    - *whether the offence is relevant to the position in question*

- *the seriousness of any offence*
- *the type of offence or offences of the applicant committed*
- *the circumstances and the explanation offered by the applicant*
- *the length of time that has passed since the offence took place*
- *whether the applicant's circumstances have changed since the offending took place*

Tribunal's own stress

11 January 2021 meeting

31. Mr. Joe Cooper carried out a search of the Claimant on the internet using the search engine Google, on 11 January 2021. There appears to have been no particular reason for doing so, rather it was simple idle curiosity about what it may reveal. The internet search brought up the Video and photograph headed: 'The Hunted one'.

32. The Video which lasts about 4 minutes, essentially shows the Claimant being approached while in his car, he is asked to get out of his car and is asked for and hands over his car keys. Certain accusations are then put to him by the two men, namely that he has driven to this location (about 1 ½ hours' drive from his home) to meet a 14 year old girl and that he had been exchanging messages with her of a sexual nature (or with someone he mistakenly believed to be a 14 year old girl) .

33. Mr Cooper informed Mr Wilson, the Claimant's direct line manager, about the Video and photograph. The screenshot of the Video was emailed by Mr. Wilson to his own email account [p.153] at 8:41 am.

34. Ms Hoggan's undisputed evidence which on balance I accept, is that she was made aware of the Video through Joe Cooper, that he had watched the Video following the 'Google' search and informed her and Mr. Wilson about it. Ms Hoggan instructed Mr. Wilson to speak to HR.Ms. Horsley was then telephoned by Mr. Wilson on 11 January.

35. Ms Horsley, HR Officer has 14 years' experience in HR and confirmed under cross-examination that she had been involved in "*too many disciplinary procedures to count".* Ms. Horsley is clearly an experienced HR professional, at least in terms of dealing with disciplinary matters.

36. The Claimant was called to a meeting on 11 January 2021 by his immediate Line Manager, Mr Wilson. Mr. Wilson fosters children in his private life and was very upset by the Video.

37. The Claimant was not told what the purpose of the meeting was and had no idea what was going to be discussed. He was not informed that he had the right to have a companion.

38. Ms Horsley, had arranged the meeting and the intention was for her to chair it.

39. The disciplinary policy refers to an *'informal – pre- disciplinary discussion'* stage [p. 42].

> "*Where appropriate, prior to using the formal aspects of the Company's disciplinary procedure, a pre- disciplinary discussion will be held with the employee".*

40. Ms Horsley gave evidence under cross-examination that she had conducted this meeting ***"prior to** carrying out an investigation*", which would seem to be consistent with the 'pre-disciplinary discussion stage'.

41. Later under cross examination however she gave evidence that it was conducted under the disciplinary procedure as an investigation meeting [p.41]. In any event, the policy refers to the investigation stage as a fact-finding process and provides for a separate disciplinary hearing stage [p.42].

42. The Claimant was called to this meeting without notice and Ms Horsley explained under cross-examination that this was because she was of the view that ***being an investigation*****,** the Respondent was not required to give him any notice, albeit she accepted that there would have been no prejudice to the Respondent to have given him 24 hours' notice of the meeting despite the seriousness of the issues .

43. The Claimant was not given the right to be accompanied because again according to Ms Horsley under cross-examination; "*it was just an investigation".*

44. However, although Ms. Horsley had given evidence that she conducted this hearing under the disciplinary process, when she was asked under cross examination what misconduct she considered the Claimant had potentially committed at this stage, she said she could not recall . When pressed further and it was put to her that she must have considered that there was some misconduct issue at play to have instigated the disciplinary policy, her response was to refuse to answer that question: *"I decline to answer."*

45. At no point, during this meeting, was the Claimant informed that this was an investigation meeting pursuant to the disciplinary policy. Indeed, he was not told what the nature of the meeting was and that has to be seen in the context of it being chaired by an experienced HR professional.

46. In terms of the notes of this meeting, in his evidence in chief the Claimant denied that notes had been taken but had not specifically complained that the notes produced were not an accurate record of what had been discussed. In cross examination he gave evidence that he could not recall certain comments recorded in the notes, including him making a comment that : *"don't want to risk the reputation of the business*" (p. 80) and "*I should have spoken to you about this but very stressful".*

47. It is reflective of a lack of fairness and good HR practice not to have sent the notes to him in a timely fashion for him to check and provide his comments, not least given he would later raise a grievance about the manner in which the meeting had been conducted and he was still not provided with a copy of the notes. Taking into account that any alleged inaccuracies were not put to Ms Horsley in cross examination or dealt with in the Claimant's evidence in chief and taking into account his admission that he was emotional in the meeting (from which I believe it is reasonable to draw an inference that his recollection of what precisely had been discussed may have been impaired), on balance, I find that the notes as presented are an accurate record of what was discussed.

48. The Claimant is recorded in the notes of the meeting, as having been at this meeting a photograph and the Video [page 152] which was circulating on the internet.

49. There is a date on the screenshot of the 'The Hunted one' photograph, of the 31 October 2020. The Claimant informed the Respondent at this meeting that had previously arranged for the photograph to be removed from the internet by his solicitor's . Mr Wilson states that it was reshared on 31 October 2020. He is then shown the Video and is told by Ms Horsley that the Video could be found on Facebook. The Claimant informed the Respondent that the Video was taken in March 2016.

50. The Claimant did not dispute at this meeting that the Video is of him but informs them that it should not be available on the internet and also informs them that the Video was cut and edited and then posted on the internet and that he was physically beaten up at the time by

the two men who confronted him. He informs the Respondent that he had not spoken to the Respondent about the incident before because his solicitor had advised him that he did not need to do so.

51. He is told by Mr Wilson that there is concern that people are searching the internet and that there could be a link back to the Respondent. The Claimant is recorded as stating: "*I can understand your view and took steps and appreciate where you are coming from*". He is told at this meeting that internet searches link him back to the Respondent via his Linkedin account and Mr Wilson informs him that the Claimant will need to remove his LinkedIn account.

52. The Claimant then explains that the incident recorded on the Video was the result of a misunderstanding and that he had been suffering a lot of stress at the time, that he was bereaved and he thought he was communicating with someone over 18. He informs them that he will get the Video and the photograph removed.

53. He informs Mr Wilson and Ms Horsley that the people who had confronted him in the Video had shown the Video conversation to the police. The police had arrested him but had found nothing inappropriate on his 'phone. The Claimant refers to having arranged for a forensic specialist to examine his phone and that the expert had found no evidence of the conversations that the two individuals in the Video had alleged he had had been involved in.

54. The Claimant informs Mr Wilson and Ms Horsley that he had resigned from his previous job due because of stress during what was then a live investigation by the police in connection with the Video. He also informs them that one of the individuals who had confronted him on the Video had been arrested for falsifying evidence, that the two men concerned had been discredited and it had taken him three years to get over the psychological impact.

55. The Claimant informs Mr Wilson that he can provide them an email from his solicitor to evidence that the case was dismissed and that he has a valid DBS certificate.

56. The Claimant confirms that at the time he had been working for his previous employer, the investigation had taken a few months, it caused animosity with some work colleagues and he had resigned from that job.

57. The Claimant was asked why he had not raised this with the Respondent before and he explained that he had thought about it, but it was traumatic for him: "*I know I should have spoken to you about this but it is very stressful. I keep off social media and keep a low profile. That is why I did not want my photograph on email and the DOCS (HR system)."*

58. The notes record the Claimant commenting that: "*I don't want this to effect the business or my employment - know it will have an effect somewhere"*. The Claimant informs the Respondent that he will contact his solicitor to see what can be removed and also he refers to removing his Linkedin account, providing a copy of his DBS certificate and showing them a letter confirming there was no prosecution.

Adjournment

59. The meeting was adjourned at 10:31am until 12:52.

60. It is notable that during this first part of the meeting, the majority of the questions are asked not by Jill Horsley, who the Respondent alleges was the soledecision maker, but by the Operations Manager, Mr Wilson who was particularly upset about the Video.

61. It is evident I find from the notes of this meeting, that Mr Wilson had a significant input in how the meeting was managed and what questions were put to the Claimant. It is Mr Wilson who puts forward the evidence, the Video and photograph and expresses concern about the connection that may be made with the Respondent.

62. There is absolutely no mention in this first part of the meeting of any concerns other staff have about working with the Claimant.

63. During the adjournment, Ms Horsley spoke to Mr Vaughan Cooper, the Finance Director She also spoke to 'HR Inform', an external HR advisory service.

64. Mr Vaughan Cooper is in a senior position to Ms Horsley. Mr Khan gave evidence that he had spoken to Mr Cooper and that he was aware Mrs Horsley had spoken to Mr. Vaughan Cooper and that she "*got advice and she followed it"* and the advice was that "*it was a serious matter, needed to be dealt with and get on with it and sort it out."* Beyond that, there is no evidence of what advice was given. The direction to "*sort it out*" I consider may well have encouraged her to expediate the process however there was clearly no prevailing business need to rush to terminate his employment because in the event he remained employed until the end of March 2021.

65. When the meeting of 11 January is reconvened at 12:52 [page 80], the Claimant informs Mr Wilson and Ms Horsley that he has contacted his wife and she is going to speak to their solicitor to have his profile removed from LinkedIn, which is the only connection on social media between him and the Respondent. The Respondent had no reason to doubt that he would take that action.

Clause in contract

66. On returning after the adjournment, Ms Horsley informs the Claimant that:

> "*resulting from today's meeting we need to stress the importance of trust - the trust that we had built up now is broken.* ***You have withheld information*** *from your employer and there would have been opportunities to discussed* [sic] *this, ie especially when asked for a photograph to be used on email and the DOC*". Tribunal's own stress
>
> [Page 81]

67. In terms of the withholding of information, Ms Horsley in her evidence-in-chief (paragraph 7) refers to the Personal Conduct Clause.

68. Ms. Horsley gave evidence under cross-examination however that she considered that the Claimant was **not** under an obligation, pursuant to that Personal Conduct Clause, to tell the Respondent about an allegation which had not been pursued by the CPS. She went on to give evidence that she was **not** criticizing him for not doing so only that the Respondent could have then; "*assisted him in hindsight".* In terms of whether this non-disclosure weighed against him, Ms. Horsley denied that it did, then said it did but it was only a "*minor point*" and then gave evidence that she was "*more disappointed"* that he had not told them.

69. Ms Horsley's evidence about whether she considered that the Claimant had breached this clause and the extent to which this was the reason for the decision to end his employment was, quite frankly, inconsistent and unconvincing. That he had not raised this voluntarily with the Respondent is the first issue that is raised with him after the adjournment (after Ms Horsley had taken advice) and the reason given for the breakdown in trust.

70. Ms. Horsley gave evidence under cross-examination that she could not recall whether she thought about this Personal Conduct Clause at the meeting on 11 January because she could not *"recall that far back"* . She then gave evidence that she had taken the view on 11 January, that the Claimant had had opportunities to raise the issue of the Video with the Respondent but had not done so.

71. Under cross-examination when asked directly whether Ms. Horsley viewed the failure by the Claimant to mention the 2016 incident with the Respondent as a misconduct issue, she answered that she considered that it was: "*not necessarily a misconduct issue*". Her answer as a minimum discloses that she had in mind at the time, that it was at least potentially a misconduct issue.

72. Ms. Horsley under cross-examination could not recall raising with the Claimant at this meeting the Personal Conduct Clause in the contract, or that he was in breach of it. The notes do not record this being raised. I find that although he was told that he had withheld information, Ms. Horsley never raised with him specifically the Personal Conduct Clause. The Claimant was not given an opportunity therefore to respond to any allegation that he had acted in breach of it.

73. I conclude from her evidence that the fact the Claimant had not disclosed the Video was a crucial part of her decision-making process and that she viewed this situation as a misconduct issue hence why she invoked the disciplinary policy. Withholding information was the first point she mentioned when she reconvened the meeting . Ms. Horsley commented that the Respondent could have assisted him had he raised it before without explaining why it was no longer possible to assist him. The Video had been circulating for some months but there was no evidence that any customers had seen it or connected it with the Respondent. When asked under cross-examination about the relevance of that Personal Conduct Clause to the situation, Ms Horsley also said that the clause is highlighted in the contract and;

> *"… in relation to the Video – it's what we met and discussed*".

74. However, in cross-examination she accepted that because the Claimant did not know that the Video was online again, and thus there was nothing to warn the Respondent about, it was "*not fair"* in those circumstances to place weight on the Claimant not raising it with the Respondent. This however is not consistent with what she says in her evidence in chief where she states that she "*stressed"* to the Claimant that he had withheld information from the Respondent and "*the trust the Respondent had in him had been broken." (*para 11)

75. Ms. Horsley in her witness statement (para 8) refers to the Claimant being involved in grooming a 14-year-old girl. The only reasonable interpretation of her words is that she had formed the view that he was guilty of wrongdoing.

76. Ms. Horsley under cross-examination gave evidence that the Claimant told her that one of the men on the Video who had confronted him had been arrested for falsifying evidence and had pleaded guilty and that this had given her cause to be concerned about the reliability of the Video (p.80). He has also told her about the forensic specialist and that the police had found nothing inappropriate on his phone. However, under cross-examination she alleged that the Claimant "*had admitted to it",* by which she accepted she meant grooming and that he had admitted to talking to a 14-year-old girl Online, however she then appeared to try to backtrack later under cross-examination by asserting that while her words *may* have given the impression that she had formed a view that he had committed an offence "*I don't think I concluded that*". Her denial was not convincing, and I find that she had formed a view about his guilt at the 11 January 2021 meeting .

77. I watched the Video several times. While the Claimant appears (although it must be stressed he denies this) to admitting to being in contact Online with a 14-year-old girl and arranging to meet her that day, he does not admit to 'grooming' or to being aware that she was underage when messages with alleged sexual content were exchanged. He admitted to travelling to meet her but alleges he was travelling there any-way and he was going to tell her contact must not continue.

78. I find that it was outside the band of reasonable responses to conclude that the Claimant had admitted in this Video to 'grooming'. Further, by the 11 January 2021 the Respondent was also aware of certain other information; that the Claimant alleges the Video was edited, that one of the men involved had been prosecuted, that there had been an investigation of his phone which had not revealed any incriminating messages but most significant of all, that there had been a police investigation and no prosecution.

79. The Claimant also informs Ms Horsley in this meeting that the Video had been edited, however Ms Horsley had formed her own view that it had not been. She does not share this with the Claimant to alert him to the need to produce evidence of this, perhaps through the solicitors who represented him at the time. I find that Ms Horsley formed a judgment from seeing the Video and because of Mr Wilson's immediate reaction to it, that the Claimant was guilty and her mind was then closed to the possibility of his innocence and this prejudiced the way she dealt with the process and with the Claimant.

CPS email

80. Ms Horsley accepted under cross-examination that she had seen a letter from the CPS stating that they were not taking the matter any further. She could not recall when this was but believed that it was some time after the 11 January meeting.

DBS certificate

81. The Claimant raised in this meeting that he could provide a clean DBS certificate (p.80).The Claimant sent Ms Horsley a link to his clean DBS certificate, however she could not access it and asked Mr Wilson to ask the Claimant to send the actual certificate.

82. The email attaching the link was not disclosed. Ms Horsley believes the Claimant may have sent it on 11 January or the day after. Ms. Horsley did not know when Mr Wilson went back to the Claimant to ask for the actual certificate. There was no copy of the email from Mr Wilson to the Claimant disclosed. It is not alleged that Mr. Wilson complained that the Claimant had not or would not provide it.

Opinion

83. The view which was formed at this stage by Ms Horsley and Mr Wilson before seeing the CPS letter or DBS certificate, was formed without sufficient thought or investigation. It was a knee jerk reaction based on blind prejudice because of the strength of Mr Wilson's feelings over the Video he had seen and in particular the subject matter of the allegations. While it may be an understandable immediate reaction, they were not then able to approach that hearing with an open mind and it was more likely than not that Mr Wilson's strength of feeling (he is a foster parent) on balance was, if not driving the decision to remove the Claimant, it was a significant influence.

Other factors

84. Ms. Horsley at the meeting, only after mentioning the non-disclosure issue, states:" *Resulting from today's meeting, we need to stress the importance of risk of damaging the name of the business and the wider group. .."* and *"other members of the Gypsum Tools'*

team are aware". How important these others factors were to the decision to dismiss is indicated not only by the fact that they were only mentioned after the comments about the withholding of information, but in her evidence in chief she does not mention them as the reason for concluding there had been a breakdown in trust and confidence at the 11 January meeting. She states:

> *"I* ***stressed,*** *that* ***given David had withheld information*** *from the Respondent in relation to the incident, the trust the Respondent had in him had broken down*." Tribunal's own stress.

85. I find that it was the view of the Claimant's conduct which was the reason for the alleged breakdown in the relationship with the Respondent.

Other colleagues

86. Ms Horsley does not explain at the January meeting, which of his colleagues were aware of the Video. At this time she had not spoken to anyone other than Mr Wilson.

87. Ms Horsley refers to the Claimant's experience in his last job, while the investigation was taking place and he is asked "*how would this be with current colleagues?" [p.91],* The Claimant refers to how some colleagues from his last employment had been supportive but that it created animosity with some who had "*assumed the worst*. He says he is happy to discuss the 2016 incident with his current colleagues. She does not comment on this suggestion. Ms Horsley remarks: "*Don't know people react".*

88. At no point does Ms Horsley comment on what the Claimant's colleagues know at this stage, who knows and what their feelings are. Indeed from the remarks she made, the only reasonable conclusion to be drawn is that at this stage she did not know how they would react.

89. Ms Horsley then mentions an agreement to exit the business. The Claimant was I accept upset, and had made it clear he did not want to lose his job. He says that he understands the trust issues and Mr Wilson then states; *"I look at it from a different line - as fostering".* What he means by a different line and what his view is, is not explained or explored by Ms Horsley in the meeting.

90. Ms Horsley gave evidence that the decision was taken at this meeting to end the Claimant's employment. If he did not accept an agreement to exit he would be dismissed. When asked about that decision she referred under cross-examination to two people knowing about the incident and confirmed that she was referring to Joe Cooper and Callum Wilson and in that context: " … *trust had broken down between those people and they had expressed that they were not able to work with him".*

91. However, she did not explain to the Claimant at this meeting the concerns about Mr Cooper and she accepts she had not even spoken to Mr Cooper by this stage. She alleges Mr Wilson had told her how Mr Cooper felt, but it was clear that Mr Wilson had strong feelings himself and yet she did not verify with Mr Cooper how he was feeling.

92. I do not find on the evidence however that Mr Cooper had expressed the view to Mr Wilson that Mr Cooper was not prepared to work with the Claimant. There is no direct evidence from Mr Wilson, who did not attend this tribunal hearing or from Mr Cooper, although both still work for the Respondent.

93. Under cross-examination Ms Horsley gave evidence that : *"Mr Wilson came to me and said, he expressed, he felt* ***he had*** *a* breakdown *in trust with the Claimant."* It is relevant

that she said "***he had** a breakdown in trust"* not that the team or Mr. Wilson and Mr. Cooper had. She also does not in her evidence in chief when dealing with the January meeting, allege that Mr. Wilson had told her that Mr. Cooper was not prepared to work with the Claimant, nor did she mention this in the hearing on 11 January.

94. I do not find on balance, that she was told that Mr Cooper was not prepared to work with the Claimant because there would have been no reason not to mention this when she discussed the breakdown in trust and offered the exit package. Even if Mr Wilson had told her this, it would have been a reasonable step for her to speak with Mr. Cooper herself. It is also not however consistent with what Mr. Cooper would go on to say about his working relationship with the Claimant later during the grievance interview.

95. The Claimant was clearly left with the misleading impression that the whole team had an issue with working with him and on balance I find that this was deliberate, to encourage him to accept an exit package and leave 'quietly'.

Reputation

LinkedIn Profile

96. Under cross-examination, Ms. Horsley also said that there was a reputational risk and that she took all those factors into account when deciding to end his employment. The risk she clarified was the connection on social media between the Claimant and the Respondent because the Claimant's LinkedIn account gave the Respondent's name as his employer. Ms. Horsley accepted under cross-examination that the LinkedIn profile was **the only** online connection between the Claimant and the Respondent and the Claimant in the 11 January meeting, had agreed to remove it.

97. Ms Horsley accepted under cross-examination that she had formed a view, that the Video *"probably"* could resurface even if taken down, albeit she accepted that the Claimant had said he and his wife would monitor it and she accepted that she was not *"that tech savvy to know about it".*

98. Ms Horsley did not explore further with the Claimant what steps he would take to monitor the internet or what the Respondent could do. She did not speak with Ms. Hoggan, who had marketing expertise. Despite not being 'tech savvy', she took no advice from anyone with IT experience on how to prevent the Video resurfacing, what steps could be taken to prevent or alert the Respondent if it did. She did not take any steps to educate or inform herself about the risks and preventative measures that could be taken. I find that this was because the decision had been taken to remove the Claimant, principally because of the immediate reaction to the Video, the disdain felt about the allegations, the failure to have 'come clean' about the 2016 events earlier, the suspicions that he had committed the offence and the feelings expressed to her by Mr. Wilson.

99. In her evidence in chief Ms. Horsley alleged that the Claimant had acknowledged in the 11 January meeting that the incident had damaged the name of the Respondent and wider group. However, on being taken to page 81 which she refers to, she accepted that she could not locate where in the record of that meeting this had been acknowledged by the Claimant. What he is recorded as saying is that he does not wish to bring disrepute on the business.

Ms Hoggan's evidence

100. Ms. Hoggan, the Managing Director of the Respondent gave evidence about the potential impact on the reputation of the Respondent if linked with the Claimant and the Video or photograph.

101. What is important to note however, is that neither Ms Horsley nor Mr Khan, sought any advice from Ms. Hoggan. She was not involved in the internal process, either the decision taken on 11 January or subsequently by Mr. Khan and it is not asserted that these concerns of Ms Hoggan's formed part of their decision-making process.

102. Ms. Hoggan gave evidence, which was undisputed, and I accept, that the Respondent sells its products through its website, various social media platforms including Facebook and Instagram as well as through the trade counter, eBay and tele sales.

103. Her evidence was that there are only four main players in the market and therefore everyone knows everyone by name and company however, under cross-examination she accepted that the Claimant does not wear a name badge at work and that those customers who come to the trade counter would only know him by his first name and when answering the telephone, he would also only give his first name.

104. Ms Hoggan alleged that the Claimant in his role for the Respondent sent emails to customers with advice about certain products because of his specialist knowledge of certain tools and his full name would be visible on the email. However, she accepted in cross-examination that the advice could be sent out via a different email, or his email could include an alternative footer email or signature which would remove that risk of identification.

105. Ms Hoggan in her evidence in chief alleged that if the content of the Video came to the attention of the Respondent's customers/ suppliers, this would impact on the Respondent's reputation and if customers refused to buy from the Respondent, it would go into administration. However, under cross-examination she confirmed that the Respondent is the only business in Leicestershire which offers a full service and to get the same service a customer would have to be prepared to travel to Birmingham and also conceded that there had in fact been no complaints from customers or any indication that any customers or suppliers had identified the Claimant from the Video or photograph during the 10 months it had been online.

106. Ms. Hoggan also alleges in her evidence in chief that given the small team, all of the staff members had become aware of the Video and had begun to express to her that they did not feel comfortable working with the Claimant and stressed that they would not continue to work for the Respondent if the Claimant continued to be employed by it. She refers to the '*significant tension'* this created and in particular refers to Mr Wilson and that he had told her that he would not continue to work for the Respondent if the Claimant remained employed. Ms Hoggan did not record what Mr Wilson had allegedly said to her and under cross-examination gave evidence that this was a '*verbal discussion* ' only and that she told him to follow it up with HR, but she did not know if he had or not and she had not mentioned it herself.

107. I have serious concerns regarding the credibility of Ms. Hoggan's evidence on this issue and more generally.

108. I find that she had exaggerated the risk of the Claimant being identified by customers and suppliers and on balance, given she did not explain until she was cross examined that he was only required to give out his first name and that there was no need for emails to be sent out in his name at all, that the most likely reason for this was an attempt to retrospectively justify the Respondent's treatment of the Claimant. She accepted under

cross examination that it would not have been impractical to require him not to have a name badge or to send emails from a generic email address.

109. I also do not consider her evidence about the views which had been expressed to her by members of the team and particularly that Mr Wilson had said he would leave if the Claimant remained employed, to be credible. Ms. Hoggan did not communicate any of what she now alleges she had been told to Ms. Horsley. She did not explain why, if she felt so concerned about the reputation of the business or the impact on the team, she did not ask to be interviewed or at least communicate her concerns for the business to someone directly in HR.

110. She alleges that she asked Mr Wilson to convey the staff concerns to HR as it was "*beyond her remit as a Managing Director*" and she wanted to ensure that the process was fair and impartial. She failed however to make any record of the alleged serious concerns reported to her or follow up with Mr Wilson to check if he had reported his concerns. It is not credible that given the alleged seriousness of the concerns reported to her, she took no steps to communicate those concerns directly or check if they had been reported.

111. She gave evidence in cross-examination that she did not speak to Ms Horsley about any of this.

112. Ms Hoggan has produced no documentary evidence to corroborate what she alleges was reported to her, she does not in her evidence in chief name the persons who spoke to her and on what date, how that discussion came about and what exactly was said to her. She refers on a number of occasions in her statement to 'staff members' refusing to work with the Claimant, rather than be specific about which members of staff.

113. Further when taken to where she alleged (para 22 w/s) that all the staff were aware of the Video and began to express to her that they did not feel comfortable working with the Claimant, under cross-examination she accepted that this was *"possibly not correct".*

114. Ms. Horsley conceded in cross examination that Ms. Gibson worked part time and they did not work at the same time and to the best of her knowledge Ms Gibson was not aware of the Video.

115. Ultimately she conceded in cross examination that she was actually only referring to Mr Wilson and Mr Joe Cooper and accepted that "*potentially*" her evidence in chief had given a misleading impression. It certainly had.

116. Ms. Hoggan also in her evidence in chief gave evidence that the breakdown in working relationships; "*was impacting on the business operations and would have continued to have an impact if a resolution was not reached*". When asked in cross-examination what impact it was actually having by that stage (given that the Claimant was not even in work) she conceded that it was not having an impact, she was "*foreseeing*" what would happen. Her evidence in chief on that issue had also given a misleading impression.

117. I find on balance that Ms. Hoggan's evidence in chief was in material respects misleading and that this was a deliberate attempt to exaggerate the potential risks to the Respondent.

118. Ms. Horsley does not allege in her evidence in chief that Mr. Wilson had expressed a view that he would not work with the Claimant at the meeting on 11 January 2021. He had made this claim after a grievance was raised against him by the Claimant (including allegations of bullying and discrimination). Mr. Wilson is then recorded in the grievance meeting on 26 January 2021 as saying: "I *don't think I could work alongside him*" and "*me personally I couldn't work with him*". [p.113]

119. Nowhere in the interview with Mr Joe Cooper [p.115] during the later grievance process, does Mr. Cooper express any concern or indeed any opinion about the Video or working with the Claimant or mention having raised any concerns with Ms. Hoggan and nor is he asked any questions about it.

120. The Claimant is told to go home after the meeting on 11 January 2021 to think about an offer which had been made to him. The Claimant asks if there is a right to appeal and he is told flatly; "*No*" (p.83). Ms. Horsley in cross examination accepted that the Claimant was presented with two options, to resign or be dismissed. He was sent home to consider what he wanted to do.

121. By this stage the so-called decision maker, Ms Horsley, has not:

121.1. spoken to the rest of the team
121.2. checked the DBS certificate
121.3. made any further enquiries of his solicitor
121.4. sought any advice from IT or from marketing
121.5. made any meaningful assessment of the risks or potential impact on the business

122. The Claimant had not been given advance notice of the hearing, he had been denied the right to introduce evidence, denied the right to be accompanied. He was also denied the right of appeal.

123. Although Ms Horsley gave evidence that this was an investigation meeting, the Respondent's position is that the decision was made at this meeting to end the Claimant's employment, but he was not formally told this until he was given the outcome of the grievance one month later on 11 February 2021. Only then is he informed by Jill Horsley that his grievance is not upheld and that the *"outcome of the meeting held on 11 January 2021 to dismiss you for some other substantial reason stands …* " [page 123]

Ms Hoggan's evidence

124. Ms. Hogan refers to carrying out some further investigation of her own after being contacted by Mr. Wilson (therefore this must be after the 11 January meeting) and discovered that details of the Claimant's name and location were contained in the description of the Video on a number of social media platforms: Facebook, YouTube, Twitter, and that as the Claimant's LinkedIn profile linked him to the Respondent, she began to become worried about the Respondent's reputation in the industry. She gave evidence that she mentioned this to Ms. Horsley, however she did not record her findings and she only told Ms Horsley one week after she had been shown the Video. Ms Hoggan did not mention having made Ms Horsley aware of finding the Video on various platforms in her evidence in chief and in fact in cross-examination her evidence initially was that she had **not** spoken to Mrs. Horsley at all:

Claimant's counsel:What did you say to Ms Horsley?

Ms Hoggan: Nothing. I did not speak to her about it.

125. Again, given her marketing management experience, it seems incredulous that had she seen the Video on other social media platforms she would not have immediately alerted Ms. Horsley or someone in the business. Mrs. Horsley does not mention being passed this information by Ms. Hoggan and Ms. Hoggan fails to mention it in her evidence in chief indeed she states that other than asking Mr. Wilson to speak to HR about staff concerns,

she had no involvement in this matter other than an update from HR and had no involvement in the grievance process either (w/s paras 25 and 26).

126. On balance, taking into consideration other concerns about Ms. Hoggan's propensity to exaggerate in support of the Respondent's case, I do not accept her evidence that she spoke to Ms. Horsley about the Video being on other social platforms and in the absence of any evidence (only the Facebook screenshot being provided in the bundle) I do not find on balance that it was. The Respondent could have applied to introduce additional evidence during the hearing but did not do so. On 11 January, in any event the only reference is to the Video on Facebook. Further, when Mr. Khan is asked to clarify what platforms it was on when he conducts the appeal, he is not able to confirm :" ***if*** *it is on"* (p.137).

Grievance

127. On 14 January 2021 the Claimant submitted a grievance (p. 84).The Claimant was now absent on sick leave with work related stress, anxiety, and low mood (p.86). He had not been suspended. He complains of numerous instances which he alleges to amount to age discrimination, bullying and lack of training etc. directed at Mr. Wilson however, what he complains about in terms of this claim of his unfair dismissal, is the way the meeting on the 11 January had been conducted:

> "*On Monday 11/01/21 I was called into a meeting with Callum Wilson and* ***Jill Horsley*** *without any notice and with no opportunity to mentally prepare myself* for *what rapidly turned into what felt like a hostile kangaroo court , during which I was asked to clarify an issue that had been brought to Callum's attention… the fact that my colleagues and other group employees have also become aware of the issue had added further pressure and made it very difficult for me to return to my role…" Tribunal stress*

Appointment of investigatory officer

128. What I find remarkable is that the decision was taken by the Respondent to appoint Ms. Horsley herself to deal with the grievance, and more importantly the part of it in which the Claimant was complaining in robust terms about his treatment at the meeting on the 11 January which she chaired.

129. Ms. Horsley, an experienced HR professional did not raise any concern about the fairness of that decision and her ability to be impartial. She accepted in cross-examination that she appreciated there was an issue with her dealing with the grievance but provided no explanation behind the decision to appoint her and did not communicate her concerns.

130. Mr. Khan, HR director who would chair the grievance appeal hearing, defended the decision to appoint Ms. Horsley to investigate her own alleged wrongdoing in cross examination, on the grounds that he would be dealing with the appeal so he "*could make sure it was right".*

131. Mr Kahn alleged that the Claimant had confirmed at the grievance meeting with Ms Horsley on the 16 January 2021 that he was "*happy*" for her to continue to deal with the grievance. That is, I find not correct. What was said is clearly recorded in the Respondent's own written records.

132. When taken to the notes, of the meeting on 26 January 2021 [p.88] Mr Khan was unable to find any record of the Claimant saying that he was happy for Ms Horsley to deal with his grievance. There is in fact no record of him being asked about it or commenting on it.

133. At the meeting Mr. Khan held with the Claimant on 22 February 202, he puts it to him that the Claimant had not voiced any objection to Ms. Horsley dealing with his grievance, not

that he had positively asserted to Ms. Horsley that he was happy for her to deal with it (p. 128) .

134. Later in cross-examination Mr. Khan expanded on his evidence and now asserted that Ms. Horsley had *told him* that the Claimant had said that he was happy for her to deal with the grievance . Mr. Khan does not mention having been told this by Ms Horsley in his evidence in chief. Ms. Horsley did not in her evidence allege that the Claimant had said that he was happy for her to deal with the grievance or that she had said this to Mr. Khan. She conceded that there was an 'issue' with her dealing with it, there would have been no issue to concern her if the Claimant had confirmed that he was happy for her to do it.

135. I would expect a seasoned HR professional attending a tribunal to have reminded himself what is in the notes and if he had been told something like this by Ms. Horsley verbally to have made a record of it at the time, to mention this at the meeting with the Claimant and/or to have included this within his evidence in chief.

136. I find that no such thing had been said by the Claimant or said to Mr. Khan by Ms. Horsley. The written documents, Ms. Horsley's evidence and his own evidence in chief do not support this.

137. I find that on balance Mr Khan was well aware that the Claimant had not stated positively that he was happy for Ms Horsley to conduct the grievance and that Mr. Khan was expanding on his evidence in an attempt to mislead the tribunal.

138. Mr Khan gave undisputed evidence which I accept, that each of the 12 group companies in the UK they deal with, have an MD and operations Director and those directors and senior managers across those businesses conduct grievance and disciplinary hearings. That is potentially 22 senior people Mr Khan could have called upon to conduct the grievance/ appeal. Ms. Syson was absent on sick leave at the time but in the event was present in the interviews as notetaker only.

139. When asked why therefore someone other than Ms. Horsley could not conduct the grievance, Mr Khan mentioned (not in his evidence in chief) that it was during the pandemic, and they were not working from the office and were under a lot of pressure. His response did not present as genuine but as an attempt to put forward a number of possible but not compelling excuses . Mr Khan when I asked whether they could have conducted the interviews via Teams gave the following response.

> "*They didn't have Teams system – or under a lot of pressure or probably didn't have Teams*".

140. By pressure he clarified under cross-examination, that a lot of staff were leaving, some did not want to work from home, but they could not work from the office because of the Covid 19 pandemic and there was also financial pressure on the business.

141. I did not consider it plausible that directors and senior managers did not have or could not have had gained access to Teams. Mr. Khan then attempted to shift the focus of the explanation on to the pressure they were under because of the pandemic . Mr. Khan then gave evidence, again not mentioned anywhere in his evidence in chief or recorded anywhere in the documents, that they had asked (because Ms. Syson was absent for a while) if anyone could help with HR and he believed this was done by Vaughan Cooper just before he spoke to him about the appeal and that Vaughan Cooper had looked at the rest of the organisation to see if someone else could do the grievance . Mr. Khan did not elaborate on who Mr. Vaughan had spoken with and when and again there is no record of this. Ms Horsley when asked why she had conducted the grievance made no mention of attempts to find someone else across the businesses.

142. I was not convinced by Mr Khan's evidence. His first response when asked why someone else did not investigate the grievance was about access to Teams, it would have been more convincing had he mentioned immediately that Mr Vaughan had himself made enquiries about whether anyone else could conduct the hearing, although it would still not answer the question as to why this was not mentioned in his evidence in chief. I did not find Mr Khan's evidence to be credible, I formed the very clear impression that he inventing explanations ' on the hoof' .

143. Mr. Khan in response to a question I put to him, gave evidence that he felt sure Vaughan Cooper himself had HR experience and could not give any reason why Mr Cooper could not therefore have conducted the investigation or grievance appeal allowing Mr Khan to then conduct the investigation (at least as far as it concerned the conduct of the 11 January meeting) or vice versa conduct the grievance.

144. However, when the interviews took place, Helen Syson is present as note taker. It was not explained why Ms Syson could not have decided the grievance even if the investigation was conducted by Ms Horsley.

145. I conclude that there were alternatives to Ms Horsley investigating her own alleged failure to conduct the 11 January meeting fairly and I am not convinced that there was any actual consideration given to whether this was appropriate.

146. Further, Mr Khan exhibited a closed mind himself toward the outcome, in that in his evidence in chief he refers to Ms Horsley as an HR practitioner and she was 'independent'. Ms Horsley was employed by the Respondent and whether she acts impartially in any given case is a matter that needs investigation when it is the subject of a legitimate grievance. It is outside the band of reasonable responses to merely reach a view without any investigation .

147. As an experienced HR professional, it would have been obvious to Mr. Khan (as indeed it was clear to Ms. Horsley who was junior to him) that having someone conduct a grievance into complaints about their own behaviour was an ' issue'. In my judgment it quite obviously offends natural justice.

148. No steps were taken to appoint someone impartial, and I find on balance that the most likely reason for this was because those involved in this process, principally Ms. Horsley and Mr. Khan had formed a view that this process could and would only have one outcome, namely the removal of the Claimant from the business.

149. The explanation for appointing Ms. Horsley is unreliable and unsound and no reasonable employer acting reasonably would have made that decision.

150. I find that there was no consideration given to alternatives and no desire to conduct the process, at least as far as it related to the removal of the Claimant from the business, fairly.

Meeting 26 January 2021

151. The Claimant met with Ms Horsley in connection with his grievance on 26 January 2021, (p.88 – 99). Counsel for the Claimant cross- examined the witnesses only on the grievance as it related to the conduct of the hearing on 11 January, and it is not submitted that the other elements of the grievance are relevant to the fairness of the dismissal.

152. The Claimant refers at this meeting, to feeling bullied and being bombarded with facts which were not correct and that he felt as if he was on trial at the meeting on the 11 January. He refers to the events in 2016 being malicious false allegations that cost him 2

years of his life before they were dismissed by the CPS. The Claimant refers to coming back to work if the grievance is addressed; "it *is if colleagues could accept?"* [p.97]. He is clearly trying to get a sense of what opposition his colleagues would have to his return to work. He is given no clarity.

153. He is asked by Ms. Syson: "*what makes you think colleagues know about your situation?*" . The Claimant remarks that Mr Wilson had said colleagues know at the meeting on the 11 January. Ms Horsley then informs Ms Syson that she would need to check her notes, but they did say a colleague had brought it to Callum's attention [p.97]. She does not say what is recorded in the notes, which is that the Claimant had been told that members of the team know. Either Ms. Horsley could genuinely not recall what had been said at the 11 January meeting or did not want to disclose this to Ms Syson. The Claimant had however not been seen the notes and did not have a copy to refer to. It was unfair not to ensure he had a copy at least when he raised his grievance and the reasoning behind that omission was not explained.

154. The Claimant comments that : *" If able to I would return to role…"*

155. The Claimant is not told that the Respondent would like to see the DBS certificate or requires any further information from his solicitor or direct from the CPS to confirm that there was no prosecution.

Meeting : Mr Wilson : 2 February 2021

156. Ms Horsley then meets with Mr Wilson on 2 February 2021 [p.100] with Ms. Syson again present as notetaker.

157. Mr Wilson is asked by Mr Horsley who chaired the meeting on 11 January, how he felt the meeting had gone and says.*"… You led the meeting I had odd input with photos we had printed off but overall, it went well…"*

158. He is not of course challenged over the extent of his "*odd input"* . The minutes themselves show that prior to the adjournment, Mr. Wilson did not have the 'odd' input, he actually asked most of the questions. He is not challenged on that by Ms Horsley.

159. Despite Mr Wilson telling the Claimant that other team members knew, he now says that not all the team know : "… *obviously only persons who don't know is Jade and Cynthia – they don't know why he is not in the business. The least people know the better*" .However, that his colleagues Jade and Cynthia do not know, is never shared with the Claimant. This however is of course, information Ms Horsley was or should have been aware of.

160. Ms Horsley asks Mr Wilson about the Claimant's desired outcome which is to return to work and asks him about he feels about that, to which he answers.

> *"Me personally with my role outside of work seeing that Video, I take children out of the situation into care, I don't think I could work alongside him". [p.113]*

161. He also mentions Joe Cooper and that ; *"I think it would make our workplace awkward…"*

162. He does not allege that Joe Cooper has refused to work with the Claimant. He is asked further and goes on to say he thinks Joe Cooper would "*dislike it massively*" and he does not think Ms Hoggan would like it either.

163. Not only is this evidence which Ms Horsley should have obtained prior to making the decision to terminate the Claimant's employment but Mr Wilson is expressing an opinion after being so influential in the decision to end the Claimant's employment on 11 January,

he is supporting a decision he was involved in making. He is also expressing an opinion after he has been asked at length about a number of grievances which have been raised about him by the Claimant however, at no point in her evidence before this Tribunal does Ms. Horsley say that she even considered whether Mr. Wilson's opinion about working with the Claimant was in any way influenced by his own involvement in the decision to dismiss him and /or the grievances the Claimant has raised about him, including allegations of bullying.

164. Mr. Wilson refers to the Claimant saying in the Video ; "*yeah I know it was wrong, sorry"* and Mr. Wilson remarks that the Claimant admitted to 'grooming'.

165. I have viewed the Video and what he says in the Video is that he had not realised the age of the person he was ostensibly communicating with, and my impression was that he appears to be saying that once he knew her age he had come to the arranged venue to *" say not interested because it's wrong"* . That those were the words said in the Video was agreed by Respondent's counsel.

166. In the Video when certain alleged messages he sent or received are put to him he replies, "*I didn't realise, no its crap, I'm sorry*" to which the man confronting him says "*no its not crap"* . The "*its crap*" comment may reasonably be interpreted in light of the response to it, as the Claimant disputing that he knew the purported age of the party communicating with him when he entered into those exchanges.

167. While what is said in the Video may be subject to some interpretation, the Respondent knew the Police had conducted their own investigation .Ms. Syson reminds Mr Wilson that the Claimant was never charged with the offence, she also states that (p.113) he has a "*valid DBS certificate"*, that all his equipment was seized, and no evidence was found of any wrongdoing and the CPS never charged him with anything.

168. Mr. Wilson when faced with these facts by Ms. Syson then states: " *I get that*" and he then seeks to argue other issues and refers to his concern about damage to the business. However, it is I find clear that his main objection is that despite him accepting that there is no evidence of any wrongdoing, he makes comments which clearly I find evidence that he has nonetheless formed a fixed view that the Claimant was guilty.

> "…*but it would never have been loaded on there without his intention to meet somebody"; And*
>
> *" something like this is the worst of the worst"*

169. There is no discussion about mediation between the Claimant and any members of the team who have concerns.

Meeting with Joe Cooper (p. 115- 119): 4 February 2021

170. Ms Horsley then meets with Joe Cooper on **4 February 2021.** What is remarkable is that certain elements of the grievance are raised with him, but he is not asked about the Video and how he feels about working with the Claimant despite Mr Wilson being asked how he thinks the rest of the team feel.

171. Mr. Cooper is asked how he gets on with the Claimant and he says :

> "*He is somebody that works with me, no sort of relationship really – just get on with it…" [p.116]*

172. In terms of how much daily interaction they have, his evidence is.

> *"Dave is in back and I'm picking and warehouse or in in [sic] office so paths don't cross*" (p. 116).

173. Mr Cooper is asked if there is anything else he thinks they should talk about, and he replies simply "*no*" (p. 118)

174. I find that had Mr. Cooper had any serious concerns about working with the Claimant in light of the Video, he would have mentioned it. He not only does not raise it, but remarkably he is not asked.

175. Ms. Horsley's explanation for not asking Mr. Cooper how he feels about working with the Claimant, is baffling. Initially under cross-examination she said that she did not raise it with him because she was dealing with the grievance, then she gave evidence that she had raised it with Mr. Wilson because he was the line manager, then said Mr. Wilson had already told her what Mr. Cooper's opinion was already and then eventually admitted that she did not know why she did not discuss it with him.

176. I find it frankly perverse how in circumstances where a man's reputation and livelihood are at stake, and the impact on working relationships is alleged to be a material consideration, an experienced HR professional has no explanation for not asking one of two key colleagues aware of the allegations, how he feels about working with the Claimant but is prepared to accept at face value an opinion given by another employee about how that another employee *may* be feeling.

177. I find that the only plausible explanation is that Ms. Horsley was not really interested in the feelings of the rest of the team and the outcome of her investigation into this grievance was a fait accompli. She had no reliable evidence that Mr. Joe Cooper was in the least bit upset about the Video or that he was not prepared to still work with the Claimant, in fact what he says in this interview would indicate that he had no issue working with him at all.

178. Ms. Hoggan in her evidence in chief refers to Joe Cooper being 'Incredibly distressed' at the time he watched the Video. However, Ms Hoggan was not interviewed by Ms Horsley, this evidence was not before Ms Horsley at the time and even if he was upset, it would seem he was no longer upset by the time of the meeting with him a few weeks later on 4 February. I find however on balance that Ms. Hoggan has exaggerated how upset Mr. Cooper was in her evidence.

Meeting : Jade Gibson [p.148]

179. There are minutes of an investigation meeting with Jade Gibson which are undated. The Respondent was not sure if this was part of the investigation however it was identified in the Respondent's index as an investigation interview. Ms Gibson refers to racking her brains since the call to think what the Claimant may have a put a grievance in about and I find that it is reasonable to infer that this interview was connected with the Claimant's February grievance. [p.149]

180. She is not asked about the Video but comments that:

> "*Yes, all staff get on*"; and
>
> " *we have a good team and a workplace that is a nice environment for everyone*" [148 and 149]

181. There is certainly no indication that she in unhappy working with the Claimant.

Outcome of grievance

182. Ms Horsley is not only tasked with investigating the grievance, but she is also the decision maker.

183. She writes to the Claimant on 11 February 2021 [p.120 – 124] and unsurprisingly dismisses the grievance against her handling of the 11 January meeting.

184. Ms. Horsley deals with the complaint about the way the 11 January meeting was handled superficially . She does not explain why the Claimant was given no notice of the meeting; she does not address which colleagues had been told about the Video and she does not comment on the Claimant being made an offer to exit the business and concludes that.

> *" … there was no intention to make that worse for you nor was this used as an excuse to oust you from the business."*

185. In re- examination Ms Horsley accepted that in terms of the allegation that the Claimant had been bullied into accepting an outcome he felt was unwarranted, Ms Horsley's evidence was that she did **not** consider this.

186. No reasonable employer in my judgment, acting reasonable would have failed to engage with these issues.

187. Ms Horsley does not comment on the fact that Mr Joe Cooper has not said he would not work with the Claimant, that Cynthia and Jade knew nothing about the Video or that the only person who had been spoken to who had any objection to working with him was Mr Wilson .

188. Now 1 month later and for the first time, the Claimant is told in writing that the decision had been taken on 11 January to dismiss him:

> "*… the outcome of the meeting held on the 11 January 2021 to dismiss you for some other substantial reason stands as there is a fundamental and irretrievable breakdown in work relations between yourself and your work colleagues* ***due to your actions****. There is also a risk of reputational damage involved in continuing your employment. There is a breakdown in trust and confidence between you and he company. Your position has become untenable". Tribunal's own stress*

189. In her evidence in chief (w/s para 61) Ms. Horsley states.

> *"The Respondent takes any breaches of its policies extremely seriously. Due to the seriousness of David's conduct relating to the incident, there was an irretrievable breakdown of trust and confidence between David,* ***his colleagues,*** *and the Respondent…" Tribunal's own stress*

190. She confirmed in cross-examination that the **conduct** she was talking about was not telling the Respondent about the Video. That is the conduct which led to the breakdown in trust and confidence between the Respondent and the Claimant. In terms of the breakdown in trust with his colleagues, again there is no mention of which colleagues, and this can only be because I find, Ms Horsley knew that the only person who had expressed strong feelings about working with him was Mr. Wilson. To use the plural was actively misleading and on balance, I find that the most likely explanation for this was that it was deliberate and intended to put the Claimant under pressure to resign.

Recruitment

191. Ms. Horsley was responsible for recruitment. The Respondent's recruitment policy deals with ex-offenders (see above). Ms. Horsley accepted that she had not discussed with the Claimant the relevance of the job to the allegations in the Video and she did not consider it either.

Alternatives to dismissal

192. Ms. Horsley referred to there being 12 companies and as recruitment fell under HR she would have been aware of other and if there had been a vacancy which was not customer facing she would have put the role to him.

193. I asked Ms Horlsey whether if there was a suitable job, and the Claimant had wanted it, she would have offered it to him and she confirmed she would have done so.

194. If the Respondent was prepared to retain the Claimant in its employment, this is not consistent with a position that the relationship had irretrievably broken down because of a breach of trust and confidence. When Ms. Horsley was asked about this, she began to backtrack and replied that she would have "*thought about another role which was not customer facing and ensure the Video was no longer available".*

195. However, if she considered that there was a way to ensure the Video was no longer available, that is also not consistent with her stated concern about the possibility of it resurfacing and needing to dismiss because of the potential impact on the Respondent's reputation if it did.

196. Her evidence about alternative employment was not I find, consistent with the reasons she was alleging were behind the decision to terminate.

197. There was no discussion with the Claimant at the meeting on 11 January or during the grievance, about his role and how much of the time he spends behind the trade counter and Ms Horsley does not mention having looked for or considered whether there were other roles he could be offered.

198. Ms. Horsley confirmed that she knew that the Claimant did not wear a name badge and would only be known by customer's by his first name and in 10 months the Video had been online no customer had raised an issue.

199. In terms of how customer facing his role was, Ms. Horsley did not know how much of Joe Cooper's time was spent working on the trade counter, she thought the Claimant '*may'* spend perhaps 50% of his time on the trade counter but accepted in cross-examination that if the Claimant said it was no more than 10 – 20% she would not know. She did not know I find, because she had no interest in finding out . Had she genuinely been looking at the risk of the Claimant being identified, and the reputational risks associated with that for the business, she would have checked how much of his role involved dealing directly with the public.

200. Ms. Hoggan alleged the customer facing part of the Claimant's was about 60/40% because he was running the trade counter and Mr. Cooper as part of his progression was working in the office more therefore it would be the Claimant who went to the trade counter mostly.

201. The Claimant's evidence which was much more detailed and which I prefer is that those who worked in the main office included Mr Wilson, Ms Gibson and Mr Cooper and that Ms Gibson and Mr Cooper would usually get to the trade counter first because the main office was closer to the trade counter, he described (which was not disputed) how there is a short staircase at the side of the trade counter to a mezzanine level where the office is located. The Claimant worked mainly in the workshop which was located being the warehouse which it itself behind the trade counter. Ms Hogan was occasionally in the office but she was part time.

202. I asked Ms. Horsley whether she considered re-organising the Claimant's work to reduce the customer facing element, her response was that it did not occur to her whether she

could reorganise the Claimant's work with Mr. Cooper to remove him from the trade-counter, but she gave no explanation for not doing so. This could I find, have perhaps been for a temporary period while steps were taken to remove the Video, but this was evidently not considered.

203. Ms. Horsley did not mention considering alternatives to dismissal in her evidence in chief, in her outcome letter or during the meetings and had clearly not informed herself about how much of the Claimant's time was customer facing on the trade desk or how it may be reorganised even on a temporary basis. In my judgment the most likely explanation is that her mind was closed to alternatives to dismissal.

204. I find on balance that Ms Horsley was not being honest in her account of what she considered before dismissing or during the grievance . I find that she did not consider alternatives to dismissal. She gave no thought to whether re- organising his work even on a temporary basis would remove or mitigate any reputational risk which would have been an obvious first step before considering other roles.

205. In answer to a question about what difference it would have made had the Claimant come to the Respondent before or after the Video had resurfaced and told them about the Video and the 2016 incident, her evidence was:

> *"…we could say ok, fine, perhaps it's an opportunity to look at how we can help with the Video and how to get rid of it".*
>
> And.
>
> "*maybe having known, the conversation with him on 11 January maybe, it would be ' I understand your rationale for not having the photo – let's look at other ways we* could *support him".*

206. Her evidence was that in hindsight had he raised it with them before, they would have taken more steps to support him and see if the Video could have been taken down. Ms. Horsley considered a fair summary of the position to be that she was less inclined to help him find ways to remove the Video because it was felt that he had been less open and not come forward about it.

207. Given Ms. Horsley's evidence that it was not fair to place such weight on his failure to disclose what had happened in the past where there had been no prosecution and that she did not consider he was actually under an obligation to disclose, the only explanation for the unwillingness I find to help and support him, is because they believed he had probably committed some wrongdoing.

208. Ms. Horsley's own evidence however is that despite had he volunteered what had happened in 2016, despite the reputational risk to the business, they would have been prepared to take steps to support him and look to retain him in their employment.

209. The Claimant was told he had a right of appeal against the grievance outcome to HR Director, Mike Khan.

Grievance Appeal.

210. Mr Khan confirmed that he has experience of giving evidence in the employment tribunal and confirmed under cross-examination that he understood that redeployment is often a consideration in terms of whether it is reasonable to dismiss .

211. He had seen the interviews Ms Horsley had conducted as part of the grievance process and minutes of the 11 January meeting with the Claimant.

212. Mr Kahn met with the Claimant on 22 February 2021 [p.127]. The first issues raised by the Claimant in the meeting concern Ms Horsley dealing with the grievance and how she conducted the original meeting, how she had had spoken to Mr Wilson and his belief that her opinion was already formed. Those concerns were legitimate. I find that any reasonable person acting reasonably, let alone a seasoned HR professional, would have reviewed the minutes of the 11 January meeting and had very real concerns about the obvious rush to judgment and lack of an adequate investigation . Mr Khan's approach however is to immediately jump to the defence of Ms Horsley and deflect any criticism. He is not prepared to engage with those concerns;

> *"I can assure you that I don't think she will have done that. Jill is a professional HR practitioner and therefore she works impartially. We stay impartial until we need to make a decision so she* ***will not*** *have jumped to conclusions…" Tribunal's own stress*

213. He also comments; *" ..as far at the HR Department is concerned it is completely unbiased*…". This comment of itself, clearly indicates bias.

214. There is I find no willingness to engage with the Claimant's obviously well founded concerns and given how experienced Mr Khan is, I find that the most obvious explanation for his unwillingness to do so was because he was simply not prepared to overturn the decision regardless of whether there was merit in this part of the grievance. He was not interested in carrying out a fair and reasonable process and this is further supported by his evidence under cross-examination.

215. He goes on to assert that the Claimant could have objected to Ms Horsley conducting the grievance but when the Claimant explains [p.128] that he did not object because he was not sure he could object , Mr Khan is quick to confirm that it cannot be changed now. Of course it could have been. Mr Khan could have appointed someone else to conduct a fresh grievance hearing, he never offers or even I find is prepared to consider that as an option.

216. The Claimant again explains about the Video, about it being edited, he refers to having a problem with his hearing and at the time the incident happened he was being shouted and in shock and he refers to the DBS check and his solicitors letter confirming that there was not prosecution. Mr Khan however states;

> *"… looking at the Video you looked guilty*" [p.135]

217. In terms of how the investigation was handled the Claimant says he believes it could have been handled better to which Mr Khan states [p.136];

> "*possibly yet, but people [sic] emotions get the better of them . It was an emotive subject as you say and their reaction was a natural one. They perhaps could have been a bit more thought into it, but it stands. I don't know if the Video has been removed*".

218. Mr Khan is clearly accepting that Ms Horsley and Mr Wilson were emotional in their response to the Video, despite his protestations about the impartiality of HR.

219. Despite the alleged grave concern over reputational risk I find it telling that Mr Khan had not even checked whether the Video was still available Online.

220. Mr Khan then asks why the Claimant had not told the Respondent about the 2016 issue when he first joined the Respondent and the Claimant explains how it upset him and he did not consider he was under a legal or moral duty to do so. Mr Khan does not explain that the Respondent considers that he was under a legal duty but goes on to say; [p.136]

> *"…if we had known about it from you rather than finding it out this way, we might have handled it differently.* ***People do make their own minds up about things and they feel very strongly because it is shocking.****." Tribunal's own stress*

221. I find that the above statement is really what is behind the decision to terminate his employment namely that there had been a rush to judgment, Mr Wilson and Ms Horsley had been shocked and made up their own minds about his guilt or innocence and further, I find their minds remained firmly closed. This is further supported by the following observation Mr Khan makes : *[p.137]*

> *"…told by you voluntarily – it might have been a different situation because of how it might have been handled differently."*

222. The clear indication is that the real complaint is not about the risk to the reputation of the business, but the failure to tell the Respondent about what happened in 2016 earlier and that if he had this may have prevented the initial shocked reaction to the Video which then determined how the situation was handled.

223. Mr Khan also states that : "*even now is causing difficulties in the workplace…"*

224. He does not say what the difficulties are but indicates that the issue is a particular issue for Mr Wilson; "*more so for CW as he looks after children from this situation."* [p.137].

225. Mr. Khan denied under cross-examination that he had approached the case on the basis that the Claimant had done something wrong and that this influenced his treatment of the Claimant but then gave evidence that what was said on the Video "s*uggested guilt".*

226. He went on in his evidence to discuss his view of the Video and it was clear that he had also come to a judgment about his guilt; " *even if we could live with it at the time and I can't see how we could do".*

227. Mr. Khan then under cross-examination gave evidence that he doubted the authenticity of the DBS certificate:

> "… *he says you should know by showing you the DBS certificate that I am innocent – we saw the link, but we never saw the certificate – we needed a password from him – he never presented the DBS certificate".*

228. The clear implication from what he was saying in cross-examination was that Mr Kahn doubted the Claimant's innocence to the extent that he suspected that he did not actually have a clean DBS certificate. However, despite how damning this suspicion was he never raised this with the Claimant. He could have taken the very simple step of asking for the certificate, but he did not. He never made it known to the Claimant that he doubted that he had a clean DBS .

229. The extent to which Mr Khan doubted the Claimant's account of his innocence is further confirmed by evidence Mr Kahn gave in cross-examination that rather than ask the Claimant to provide the certificate, he personally contacted the CPS. He never mentioned that he was or had taken this step to the Claimant (and makes no mention of this in his evidence in chief).

230. The Claimant had produced a letter from the CPS confirming the decision not to prosecute however Mr Khan was still not convinced. I accept his evidence that he contacted the CPS but they would not discuss the case with him because it involved a minor but in terms of his motivation and his thought processes, he mentioned that the letter was provided by the

Claimant and he could have *"got it from anyone"* , he had doubts about its authenticity, and that the Claimant could have.

" … *done it himself…".*

231. Mr Khan was actually therefore harbouring a belief or suspicion that the Claimant may have forged a letter from the CPS exonerating himself. This could only be because Mr Khan had himself formed an opinion that the Claimant was probably guilty.

232. Mr. Khan gave evidence that having information from the CPS would have been *" helpful"* and yet he never explains this to the Claimant and gives him an opportunity to address these suspicions.

233. Mr Khan had I find taken against the Claimant. His mind was closed against the possibility that the Claimant was innocent and he was looking for evidence to prove that and support the decision to dismiss him.

234. I find it incredulous that such an experienced HR Director would as part of his decision making process, take into account which I find he did, that a letter from the CPS confirming that the Claimant was not prosecuted may not be authentic with no reasonable grounds for suspecting that, and then proceed to make a decision which had such profound consequences for an employee without taking any steps whatsoever to raise those concerns with that person to give them a fair opportunity to prove the authenticity of the document. It offends natural justice and evidences an acute bias and rush to judgment which is wholly inconsistent with any reasonable notion of fair play, and this is even more egregious given Mr. Khan's 30 years of HR experience.

235. He confirmed that this suspicion about the CPS letter; " *added to my decision – when I made a* decision *it went through my mind – was it right – it added to my decision."* However, in his outcome letter he makes absolutely no mention of this. He allowed that wholly unfounded suspicion to cloud his judgment, it was a factor in his decision to uphold the termination and that was perverse.

236. The Respondent in its response to the claim, refers to not being able to access the certificate via the link; " *However , the First Respondent was assured by the letter provided by the Claimant that no criminal; prosecution took place." (p.31)* .That however is not consistent with the evidence before this Tribunal. Clearly Mr Khan was not assured.

237. Mr. Khan's explanation under cross-examination for not raising his concerns with the Claimant is that it was for the Claimant to provide the information and the burden was on him to prove his innocence. It is a remarkable statement given there was no evidence of any prosecution and that the Claimant had produced the letter from the CPS and the link to the DBS certificate and had no idea that Mr. Khan did not accept the letter as valid.

238. Ms Syson it seems is the only HR professional involved who highlights during the process that the Claimant was never charged with the offences and no evidence was found of wrongdoing. I find Ms Horsley, Mr Wilson and Mr Khan rushed to judgment based on Video evidence and allowed that prejudice to determine the outcome. They were not interested in following a fair process perhaps because they felt the Claimant did not deserve a fair process. This is regardless of the fact that the police had conducted their own investigation and the outcome was a decision by the CPS not to prosecute.

239. Just how important Mr. Khan considered it was that the Claimant had not been convicted of this offence was clear when he was asked under cross-examination whether his decision would have been different had the Claimant produced something from the CPS

to confirm there had been no prosecution and a clean DBS certificate. His answer was that it would have changed his view and helped him come to a different decision although he commented that he may have ended up at the same place because the staff still did not want to work with him. There was however and remains no credible evidence that anyone other than Mr. Wilson had any objection to working with the Claimant.

240. In the letter confirming his decision dated 2 March 2021 (p.140) in respect of the complaint about the meeting of the 11 January, he refers to the Claimant being arrested for this "*very disturbing incident"* and that:

> *"Your work colleagues found the information online and have made their own judgments. Consequently, your peers* ***unanimously*** *refuse to work with you. The interview also mentions the company name and shows the company name and brand bringing the company name into disrepute… you also admitted to me that your position has become untenable and that you could not return to work in the circumstances, especially with your colleagues refusing to work with you…."* (p.143) . Tribunal's own stress

241. The Claimant's concern that his position was not tenable has to be seen in the context of what he was being told and he had been misled.

242. In his evidence in chief (para 21 w/s) he states.

> *"I explained that* ***his colleagues refused*** *to work with him …… Furthermore, the staff members, made it clear to the* ***Respondent*** *that they would walk out of the business if David continued to work there or come near the Respondent's business premises " Tribunal's own stress*

243. He does not elaborate in his evidence in chief whether and if so, who he had spoken to, in fact he does not actually state that he had personally spoken to any of the staff . I consider it unusual for an experienced HR professional to not be more specific and identify that he had spoken to the staff if he had taken that step.

244. The outcome letter with the use of the word 'unanimous' and his evidence in chief clearly imply that all his colleagues were refusing to work with him. That was simply not true, it was an exaggeration. I find on balance, that the Claimant was being cynically and deliberately given misleading information to put pressure on him to resign.

245. When asked under cross-examination for the evidence he relied upon to come to his conclusion that staff would walk out rather than work with the Claimant , he simply alleged that they "*had done from the beginning*" .He could not identify any supporting documents.

246. Mr. Khan also said in cross examination that the decision has to be seen in the context of how small the team was and that three members of that team did not want to work with the Claimant.

247. The Respondent pleads in its ET3 is that:

> "*The Claimant's* ***three colleagues*** *had seen and / or were aware of the existence of the Video and the allegation contained within the Video.* ***All of them separately*** *stated they could no longer work with the Claimant. The first Respondent further considered there was a risk to its reputation by continuing to employ the Claimant because of the fact the information about the claiming was publicly available and because the Claimant's name was associated with the first Respondent's name and business." Tribunal's own stress*

248. In cross-examination he said the staff he was referring to included Ms. Hoggan however, Ms. Hoggan gave evidence that she did not speak to Ms Horsley and had no involvement in the grievance . He later gave evidence in response to a question I put to him that he

did not speak to Ms. Hoggan about any concerns she may or may not have about working with the Claimant because she was working part time and "*she did not factor*".

249. When questioned further he could not recall who the third member of the team had been and then conceded that it was actually only two people who voiced any concern, Mr. Wilson, and Joe Cooper.

250. In re-examination Mr. Khan was reminded in re-examination about Bradley Cooper mentioned in Ms Hoggan's evidence in chief, who he then suggested was the third person he was referring to. Ms Hoggan had clarified that her statement dealt with the position as it is now . The Claimant gave evidence that he had no knowledge of Mr Bradley Cooper and that he must have started after he had left which I accept on balance, not least given that there is no reference to Mr Bradley Cooper in the internal meeting notes, Ms Horsley never mentions him in her evidence and indeed the only mention of him is in Ms Hoggan's evidence where she sets out the current structure of the team.

251. Not only therefore do I find that there were not 3 people who were objecting to working with the Claimant, but that after the Claimant had left he was replaced at least in respect of warehouse duties, by Mr Bradley Cooper.

252. In cross-examination Mr. Khan gave evidence is that he went back with questions, and he did this by telephone and on Teams. He alleges that he spoke to both Mr Wilson and Mr Joe Cooper by telephone "*to find out what they said and verified that they still held their views*". He did not speak to Jade Gibson and Cynthia.

253. An experienced HR professional appreciates the importance of keeping records. Despite how sensitive this subject was, he did not however keep any record of those alleged discussions he had with Mr Wilson and Mr Cooper and offers no explanation for not keeping any record. He does not even identify the date it is alleged he held those calls and he does not allege he had anyone with him at the time as note taker.

254. I also take into account that Mr Khan fails to mention in his evidence in chief any telephone or Team calls with Mr Wilson or Mr Cooper. Mr Cooper and Mr Wilson did not attend the hearing to give evidence.

255. I also take into account that there had been a chance to speak to Mr Cooper about the Video in the interview Ms Horsley held with him and not only did she not do so, he gave no indication that he was concerned about the Video.

256. I simply do not find Mr Khan's evidence credible. I do not believe on the evidence that he had any discussion with Mr Wilson or Mr Cooper. I find that he was attempting to mislead the Tribunal and justify his reason for upholding the decision.

257. When asked what role he understood Mr. Wilson had played in the 11 January meeting when the decision was taken to dismiss the Claimant, Mr. Khan gave evidence in response to a question I put to him that Mr. Wilson had been *" just at the side …*". He refuted that Mr. Wilson made the decision to terminate with Ms. Horsley but then said in cross-examination that "*they*" by which he confirmed that he meant both Mr. Wilson and Ms. Horsley, came to the decision to dismiss after the adjournment; " *Yes, I imagine they talked* about *it* …". He was clearly contradicting his earlier evidence and accepting it was a decision Mr Wilson had an active part in.

258. In terms of alterative employment, Mr. Khan gave evidence that it would have been his decision not Ms Horsley's whether to offer alternative work but there were no vacancies because of the pandemic and most of the roles were customer facing.

259. Mr Kahn gave evidence that he had looked at vacancies and "*asked questions*" but there were no roles but in any event he would have had to explain why the Claimant was moving which would be difficult . He then in answer to a question I put to him about the questions he had asked, said that he had to ' go through' Ms Horsley because she dealt with vacancies across the group however, Ms. Horsley never mentioned in her evidence being asked about vacancies by Mr Kahn nor is there any email or other written record. He later in his evidence when I asked when he made enquires gave evidence that it was ; " *when I met him on 22 February. I went away and looked at the recruitment position as a whole – trying to find a way to keep him*…" .

260. Quite frankly I was not convinced that Mr. Khan was giving honest testimony on this issue either. It is difficult to accept that someone with 30 years HR experience who is in the position of HR Director is unable to point to any record of any such search and further, fails to make any mention of having taken this into consideration in his notes of the meeting with the Claimant, in his outcome letter or even in his evidence in chief.

261. His explanation for not mentioning that he had considered alternative employment for the Claimant was that they were having settlement discussions with the Claimant at the time and did not mention it because he did not want to ; " *show his hand*" by which he said he wanted to see what was available and look at the grievance issues and understand why a "*lot of staff would not work with him" .* What I find is more plausible, is that he never considered alternative employment for the Claimant because he was intent on encouraging him to resign.

262. The fact however that the Respondent alleges that it would have retained the Claimant had there been a suitable alternative role, is not consistent with an alleged breakdown in trust and confidence because he had not disclosed the Video voluntarily. In weighing up all the evidence, I find that while Mr. Khan and Ms. Horsley know that this would have been the reasonable and fair thing to have done, they did not do it at the time and are attempting to put a more positive (and untrue) gloss on the way the managed this process.

263. It was put to the Claimant in cross-examination that it was clear from his meeting with Mr Khan that he was keen on leaving the Respondent's employment (p.138) , he refers to suddenly being a pharaoh and refers to approaching a view that he needs to move on. However, I accept that his acceptance of the need to move on is because of the lack of support he had been shown and the impression he has been giving that all his colleagues were refusing to work with him. To actively mislead him into believing no one wants to work with him and then for the Respondent to seek to argue in its defence of its position that he was wanted to leave, is a fallacious argument.

264. I find that on balance Ms Horsley and Mr Khan gave the Claimant a misleading impression about the feelings of all his team members, deliberately to encourage him to leave quietly. This is the most plausible explanation. The failure to carry out an adequate investigation in terms of the feelings of his colleagues could be blamed on oversight and incompetence but for the experience of the HR professionals involved who were managing this process throughout. I would however repeat the observation, that Ms Syson had sought to identify the lack of evidence of wrongdoing by the Claimant but she did not decide on the outcome of the grievance or appeal and played no part in the 11 January meeting. The process may well have been handled differently had she been.

Reason for dismissal

265. Mr. Khan in cross-examination said that the reason for dismissal was that "***none*** *of his colleagues would work with him, issue with the Video being seen by people and really those two things".* He was adamant that it was for two reasons; his colleagues not wanting to work with him and the reputational issue.

266. In his evidence in chief however he mentioned the Personal Conduct Clause and that he considered the Claimant had breached this by his actions in 2016 and this breach of contract was also a reason for dismissing him.

267. In his evidence in chief, he refers to work relations between the Claimant and his colleagues and the Respondent breaking down "*due to his actions*" and he clarified that he meant his actions in 2016.

268. Mr. Khan could not explain how events several years before the Claimant worked for the Respondent, could breach a clause he entered into years later about how he would (not had) conducted his personal life. Nor did he mention this in his outcome letter as a reason.

269. However, Mr. Khan then gave evidence that had the Claimant told them about the Video (which Ms. Horsley said he was under no obligation to mention) and the approach would have been very different.

> " *.. then work with him and have them [Video and photos] removed if not true and do more of that –- try and work to exonerate him and have meeting to say his exonerated but if didn't know no reason to tell them ".*

270. He then in reply to I question I asked by way of clarity, went on to say that if the Claimant had mentioned the Video at the point of recruitment the Respondent would have; "*helped him by removing the data, helped by finding out what was going on* …"

271. When he was asked why he was not prepared to do that ia work to explain to the staff he had been exonerated, Mr. Khan did not allege that it was because the Claimant had breached the contract in not telling them beforehand but because staff would not work with him. His reasoning however was illogical because on the one hand was saying he would work to explain to staff that he was exonerated if he had told them in advance about the Video, but he was also saying that if the staff did not want to work with him, they would not take those steps.

272. Further, he later in cross-examination changed his evidence and accepted that the Claimant was not under an obligation to tell them about the Video but that he understood the Claimant was worried about it, and it was hanging "*on his shoulders*" . He also accepted he never raised this alleged breach of the Personal Conduct Clause with him but only said it would have been "*helpful*" for him to have told them. The Claimant never had a fair chance to respond to this allegation.

273. Mr. Khan accepted that he did not carry out any investigation to establish whether there had been any reputational damage.

274. I find that the prevailing and principal reason for the decision to uphold the decision to dismiss the Claimant was Mr. Khan's judgment about what he saw as the guilt of the Claimant, and it was his feelings about the alleged offence which closed his mind to the possibility of the Claimant remaining in employment. Under cross-examination he stated that he thought looking at the Video:

> *" I felt the Claimant accepted his guilt".*

275. Mr Khan also went on to refer being a father of 3 daughters and that he had formed the view that the Claimant had been guilty of grooming.

276. Mr Khan also alleged that at the date of the hearing the Video is still on Facebook. However, again no evidence in support of this was produced and it was not mentioned in the witness statements. It would have been a simple matter for the Respondent to have shown it on Facebook at the hearing or produced a recent screenshot of it but there was no explanation for the failure to do so. Taking into consideration my concerns generally about the credibility of Mr. Khan, I do not accept his evidence on this.

Outsourcing of Claimant's role

277. The evidence of Mr. Khan was that the Respondent had to wait a long time for the situation with the Claimant to be resolved and they could not replace him until then and that the Respondent had made a loss so it decided to look at a whole management restructure to see if it could make it more profitable and as Mr. Wigley had done the repairs, this was outsourced. This was outsourced I find because the Claimant was not at work and had he been, there is no indication that this reorganisation would have happened. However, I find that another employee was taken on as a warehouse operative, Bradley Cooper and part of the Claimant's role had been to work in the warehouse.

Remedy

278. The Claimant's undisputed evidence is that since his dismissal he has been unable to secure a new permanent role despite applying for over 50 positions. He has also put himself through forklift refresher courses to increase his employability. He is currently on an ongoing agency contract which is expected to last indefinitely. None of this evidence was challenged.

279. The Claimant produced a schedule of loss on the first day of the hearing. This was not challenged either in the evidence of the Respondent witnesses or in cross-examination of the Claimant. No counter schedule of loss has been produced.

280. The evidence of Ms. Horsley was that the Respondent awards annual pay rises.

281. Although counsel for the Respondent was reminded that the Tribunal was dealing with remedy at this hearing at the end of his cross-examination, he chose not to cross-examine the Claimant on his schedule of loss or his attempts to mitigate or on any matters pertaining to the compensation he was claiming.

Submissions

282. The parties sent in written submissions on 14 February 2023. The hearing was reconvened on the 3 March 2022 when the parties made further oral submissions in the morning. The judgment was delivered orally in the afternoon via Cloud Video Platform. The Respondent subsequently made a request for written reasons to be provided.
283. I have considered the written submissions of both parties fully and only briefly summarise them within this judgment.

Claimant's submissions

284. Counsel submits that the Respondent considered that the Claimant may have committed an act of misconduct hence why Ms Horsley in her evidence in chief states that she conducted the meeting on 11 January 2021 in accordance with the Respondent's disciplinary procedure. That it was abundantly clear that the Respondent formed the view

that the Claimant had committed misconduct in failing to tell the Respondent about the existence of the Video and that the Respondent dismissed the Claimant for failing to disclose the Video is an " irresistible one" and thus the reason for dismissal must either by misconduct or SOSR but neither of those reasons is the reason relied upon by the Respondent.

285. It is submitted that whatever the reason for dismissal the process was flawed, "*demonstrably biased*" and fell far outside the range of what might be considered reasonable. He points to Ms Horsley accepting that she presented the outcome of the 11 January meeting as a fait accompli i.e. resign or be dismissed. The Claimant was told there was no appeal process. It is submitted that the decision was arrived at without any reasonable investigation. Ms Horsley dealt with the grievance about how the 11 January 2021 meeting had been conducted and the Claimant was formally informed of his dismissal for the first time in the grievance outcome report on 11 February 2021. There is no contemporaneous evidence that Mr Khan interviewed any colleagues and his evidence on this is "flimsy". It is submitted that he held against the Claimant the fact that he had not brought to his attention the 2016 events and gave evidence from which it should be found that if the Claimant provided a clean DBS certificate and a verified CPS letter, the Claimant would not have been dismissed.

286. It is submitted that both decision makers assumed the Claimant's guilt rather than his innocence and there was no consideration given to ways to retain the Claimant.

287. Counsel referred to **Leach v OFCOM [2012] EWCA Civ 959** and the Court of Appeal guidance that in the context of reputational risk the central question is what it was reasonable for the employer in the circumstances, to do.

288. Counsel then referred to facts he submits were relevant to the central question of reasonableness; the fact the Video had been Online for 10 months and there was no evidence of reputational damage, his role was minimally customer facing, his role did not involve work with children, he did not use his surname in the ordinary performance of his role, there were steps which the Respondent could have taken to mitigate reputational risk and the Respondent was the only company within the area which provided a full range of services.

289. Counsel also referred to the case of **A v Z UKEAT/0380/13** and **Bosher v EUR** Limited **ET 1601207/2017** where the Tribunal held that employers should carry out a balancing exercise and avoid knee jerk reactions and the public must be credited with understanding that a prosecution is not the same as being found guilty.

290. If the Claimant was dismissed for misconduct, for either the failure to inform the Respondent of the Video or the fact of the incident which formed the subject matter of the Video, it is submitted such reason is not sufficient reason to dismiss and perverse given that the Respondent's witnesses gave evidence that the Claimant was under no obligation to disclose it.

291. Counsel also submits that the Respondent failed to follow the ACAS Code in a number of respects outlined in the submissions and argues for a 25 % uplift.

Respondent's Submissions

292. The Respondent counsel submits that the dismissal was fair on the grounds of SOSR and refers to: **Willow Oak Developments Limited (t/a Windsor Recruitment) v Silverwood and Others [2006] EWCA Civ 660** as authority that the Respondent need only establish

that the SOSR *could* justify dismissal and thereafter the burden is neutral: **Boys and Girls Welfare Society v McDonald [1997] I.C.R 693.**

293. Counsel in respect of whether the ACAS Code of Practice on Disciplinary and Grievance Procedures applies and relies on the authorities of: **Jefferson (** Commercial**) LLP v Westgate UKEAT/0128/12** and **Phoenix House Ltd v Stockman & Others [2017] ICR 84.**

294. With respect to whether a dismissal is for SOSR or conduct whether the employee is responsible for the breakdown in working relationships, counsel invites me to consider: **Ezsias v North Glamorgan MHS Trust UKEAT/0399/09** and in terms of the process to be followed**: Treganowan v Robert Knee and Co Ltd [1975] ICR 495 QBD** and **Gallacher v Abellio Scotrail Ltd UKEAT/0027/19 and on the issue of the failure to provide a right of appeal: Moore v Phoenix Product Development Ltd EAT/0070/20.**

295. Counsel also referred to the authorities of : **Leech v The Office of Communications (OFCOM) [2012] EWCA Civ 959 [2012] IRLR 839 (CA)** and **A V Z UKEAT/0380/13.**

296. In terms of considering suitable alternative employment counsel referred to the EAT decision and the guidance of Langstaff P in **USDAW v Burns UKEAT/0557/12/DA.**

297. Counsel submits that the dismissal for SOSR was fair and that the Respondent believed that there had been a fundamental and irretrievable breakdown in work relationship between the Claimant and work colleagues as they refused to work with him following the incident in 2017 (in oral submissions counsel confirmed that the date may have been 2016, he could not recall and counsel for the Claimant confirmed that the date as per the Claimant's evidence in chief was 2016). Counsel submits that the Respondent accepts that the Claimant was not prosecuted by the CPS and charges were dropped and there was no criminal conviction and that "*Mr Khan gave oral evidence in which he suggested that had the Claimant provided more robust evidence to confirm the CPS decision and the DBS certificate, it would have been factored in*."

298. Counsel submits Ms Horsley was forced to deal with the situation and take prompt and effective decisions however the Respondent accepts that the conduct of the 11 January meeting was not a *"text book exemplar*."

299. Counsel submits that the decision was based on two clear reasons and in terms of the first, the breakdown in relations with colleagues, counsel invites the Tribunal to consider this was a small team of 4 individuals and that this had a profound "*and indeed a distressing impact on colleagues who saw the video*" and Mr Khan had given evidence that people gossip and things such as this go around like "*wildfire".* He argues there was no other options available to the Respondent and any alternative roles would have been futile given the gossip. Counsel also submits that the Claimant had admitted to meeting a 14 year old girl in the video and no employer can expect to "*uncritically ignore that fact*" and *"it is apparent that an important part of that breakdown in relationship between the Claimant and the Respondent stemmed form the Claimant's deliberate and considered decision not to disclose the issue when he joined the company"* . Counsel also referred to the Personal Conduct Clause and that the continuing availability of the Video should have directed the Claimant to disclose it to his employer when joining.

300. In terms of the second limb of the SOSR reason for dismissal; the potential impact on business and reputation, he submits that th Video is still accessible and the Claimant's LinkedIn profile gave the respondent sufficient reasonable concern that a link could be made between the Claimant and Respondent, there was no way to control the existence of the Video and those who boycott or stop using a business do not always complain and inform a business in doing so. In terms of steps to mitigate the risks, counsel submits they

are unworkable or impractical and there was a risk of identification in his customer facing role and that concerns were heightened at the time due to the Respondent's financial difficulties. He also refers to the Claimant accepting that there was a reputational risk in the 11 January meeting.

301. Counsels submits that Ms Horsley dealt with the situation "*as best she could*" and it is accepted an option was given for the Claimant to resign or be dismissed. The grievance was handled promptly and sensitively .He was given a right to appeal the grievance and the grievance was "*rolled up with the Claimant's dismissal."*

302. It is submitted given the size of the business and the exceptional allegations, dismissal was within the band of reasonable responses and further, he contributed to it given his failure to disclose the incident when interviewed and employed and if it is held he was dismissed unfairly, absent such unfairness he would have been dismissed in any event.

In oral submissions

303. The parties were invited to make further oral submissions on the morning of the 3 March 2023 and I sought clarity on a number of issues which they addressed before judgment was delivered orally in the afternoon.

304. In oral submission counsel for the Claimant challenged the submissions of the Respondent around the alleged impractical nature of the mitigating steps, referring to the changing of an email address and the Claimant not wearing a name badge not being impractical steps. He also submits that the Respondent counsel failed to address that the issue of the link between the Claimant's LinkedIn account could be resolved by the Claimant simply deleting has LinkedIn account and referred to this as a "*silver bullet*". He referred to the Video having been available for 10 months before the Respondent became aware of it and any suggestion of risk was not born out by the facts. It is not accepted the Claimant acknowledged there was reputational risk but even if he did, that should be seen in the context of that meeting when he was taken by " *surprise and in a spin"* and was told colleagues did not want to work with him but further, there was no evidence before the Responded of such a risk and it took no steps to assess the degree of any potential risk.

305. Counsel for the Respondent confirmed that the Respondent's case is that there were two reasons for the SOSR dismissal and together they formed a composite reasons, together forming the principal reason.

306. Counsel were invited to comment on the application of **Royal Mail Group Ltd v Jhuti 2020 ICR 731, SC** and specifically its application to imputing the knowledge of Mr Wilson to Ms Horsley. Counsel for the Respondent did not argue that Jhuti could not apply as a matter of law but argued only that in fact it had no application as the decision was made by Ms Horsley alone .

307. Counsel for the Claimant commented that he had considered the application of Jhuti and submits that Ms Horsley was not forthcoming in her evidence when asked where she obtained authority to dismiss and invites Tribunal consider the influence of Mr Vaughan Cooper but also submits that it was clear that Mr Wilson had expressed a view on the viability of the Claimant's employment .

Legal principles

Unfair Dismissal

308. The starting point is the statute: 98 General.

(1)In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a)the reason (or, if more than one, the principal reason) for the dismissal, and

(b)that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2)A reason falls within this subsection if it—
…..

(b)relates to the conduct of the employee,
…..

(3)In subsection (2)(a)—

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

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

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

The reason for dismissal

309. A 'reason for dismissal' has been described as 'a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee' :***Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA*.**

310. What a Tribunal must not do is put itself in the position of the employer and consider how it would have responded to the established reason for dismissal : ***Foley v Post Office; HSBC Bank plc (formerly Midland Bank plc) v Madden 2000 ICR 1283, CA*,**.

311. ***CRO Ports London Ltd v Wiltshire EAT 0344/14*:** what is relevant is the evidence available to the employer at the time of dismissal.

Some other substantial reason

312. **Leach v Office of Communications 2012 ICR 1269, CA** Lord Justice Mummery noted that 'breakdown in trust and confidence' is not a convenient label to stick on any situation in which the employer feels let down by an employee or which the employer can use as a valid reason for dismissal whenever a conduct reason is unavailable or inappropriate.

313. It is important for tribunals to be aware of the distinction between a SOSR dismissal for relationship breakdown and a conduct dismissal for the **employee's fault** in causing that breakdown. In **Ezsias v North Glamorgan NHS Trust** : EAT observed that tribunals should be on the lookout in such cases to see whether an employer is using the rubric of SOSR as a pretext to conceal the real reason for the employee's dismissal. The EAT was satisfied that, on the facts of Ezsias, the tribunal was alive to the refined but important distinction between dismissing the Claimant for his conduct

in causing the breakdown of his working relationships and dismissing him because those relationships had broken down. The tribunal was entitled to find that it was the fact of the breakdown which was the reason for the Claimant's dismissal and that his responsibility for that breakdown was **incidental.**

314. Dismissing an employee because his or her refusal to work with a particular employee has created an impasse may be for SOSR: **Rowe v West Sussex County Council and anor ET Case No.3101926/11**

315. **Driskel v Peninsula Business Services Ltd and ors 2000 IRLR 151, EAT** the employer had made a genuine investigation of D's complaints; had genuinely tried to accommodate D with acceptable employment, even involving promotion; and had genuinely sought to persuade both parties to moderate their position.

316. In **Jefferson (Commercial) LLP v Westgate EAT 0128/12** The EAT held that what is reasonable or unreasonable within S.98(4) ERA depends on the particular circumstances of the case. The tribunal had recognised that there had been a mutual and irreparable breakdown of confidence but failed to consider what, in those circumstances, a further meeting might have achieved.

317. In **Gallacher v Abellio Scotrail Ltd EAT 0027/19** On appeal, the EAT held that this was a rare case where the tribunal was entitled to reach the conclusion that a dismissal procedure could be dispensed with because it was reasonably considered by the employer to be futile in the circumstances.

Reason for dismissal

318. In **Royal Mail Group Ltd v Jhuti 2020 ICR 731, SC**, the Court held that, when a tribunal is required to determine 'the reason (or, if more than one, the principal reason) for the dismissal', it is bound by the decision in **Orr v Milton Keynes Council 2011 ICR 704, CA,** to consider 'only the mental processes of the person or persons who was or were authorised to, and did, take the decision to dismiss'. The Supreme Court noted that, when an employment tribunal searches for the reason for a dismissal, it generally only needs to look at the reason given by the appointed decision-maker. However, where a manager has some responsibility for the conduct of the disciplinary inquiry, it might also be necessary to attribute the manager's knowledge to the employer, even if this is not shared by the decision-maker . Furthermore, when a manager with no such responsibility (but who is nonetheless above the employee in the hierarchy) hides the real reason for dismissal from the decision-maker behind an invented reason it is a court's duty to penetrate through the invention rather than to allow it also to infect its own determination.

319. Although the strict ratio of Jhuti was concerned with the reason for dismissal in the rare circumstances where a dismissing officer unknowingly adopts a reason based on a protected disclosure under S.103A, the Supreme Court indicated that its reasoning as to the meaning of the words 'the reason (or, if more than one, the principal reason) for the dismissal' in S.103A must relate equally to S.98.

320. **Uddin v London Borough of Ealing EAT 0165/19** EAT was of the view that the Supreme Court in Jhuti established that the knowledge or conduct of a person other than the person who actually decides to dismiss could be relevant under both S.98(1) (reason for dismissal) and (4) reasonableness of dismissal.

Conduct

321. In relation to conduct dismissals the leading authority on fairness is the case of **BHS v Burchell [1978]** IRLR **379**, which sets out a three-part test.

322. **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439** :the test which the tribunal must apply is whether dismissal was within the band of reasonable responses that a reasonable employer in the circumstances might have adopted.

More than one reason

323. ***Smith v Glasgow City District Council 1987 ICR 796, HL*.** The House of Lords, held that the tribunal had found that one serious charge against the employee was neither established *in fact nor believed to be true on reasonable ground*s. The Council had failed to show what the principal reason for dismissal was and, in any case, it was not shown that the charge which was not established was neither the principal reason for dismissal nor formed part of the principal reason. Since what was at least an important part of the reason for dismissal was not made out at all, the tribunal should have found that the Council had failed to show a reason and that the employee's dismissal was consequently unfair.

324. In ***Robinson v Combat Stress EAT 0310/14*** The tribunal should have considered not what it would have been reasonable and fair for an employer to have thought, but what the employer actually thought and whether, having regard to the totality of its reasons, dismissal was reasonable.

325. ***Broecker v Metroline Travel Ltd EAT 0124/16* MT Ltd** : Held that the employee was dismissed for all the strands on which the employer relied, not for one or two. It was nothing to the point to consider what MT Ltd would have been entitled to do if it had not acted unreasonably in relying on two of the examples of 'misconduct' which it did in fact rely on.

326. If, however, the employer is alleging different grounds for dismissal and that each ground justified dismissal independently of the others, it will be sufficient if at least one of the grounds is established :***Carlin v St Cuthbert's Co-operative Association Ltd 1974 IRLR 188, NIRC*.**

327. It is for the employer to show, on the balance of probabilities, that the principal reason was one of the potentially fair reasons, and it is then open to the employee to adduce some evidence that casts doubt on whether the reason put forward by the employer was indeed the real reason for dismissal. If this happens, the employer will have to satisfy the tribunal that its proposed reason was in fact the genuine reason relied on at the time of dismissal. ***London Borough of Brent v Finch EAT 0418/11***

328. ***Kuzel v Roche Products Ltd 2008 ICR 799, CA***. The Court there held: '*…. As it is a matter of fact, the identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side.'*

Disciplinary hearing

329. The range of reasonable responses' test applies both to the decision to dismiss and to the procedure by which that decision is reached: **Sainsbury's Supermarkets Ltd –v-Hitt [2003] IRLR 23.**

330. The House of Lords' decision in ***Polkey vAE Dayton Services Ltd 1988 ICR 142, HL*** establishes procedural fairness as an integral part of the reasonableness test under S.98(4).

331. I have also considered the guidance in: ***Taylor v OCS Group Ltd 2006 ICR 1602, CA*** and ***D'Silva v Manchester Metropolitan University and ors EAT 0328/16*** where the EAT upheld an employment tribunal's conclusion that a flaw in the disciplinary process that rendered it 'not ideal' did not render the dismissal unfair.

Appeal

332. ***West Midlands Co-operative Society Ltd v Tipton 1986 ICR 192, HL*****,** :the employer's actions at the appeal stage are relevant to the reasonableness of the whole dismissal process.

Contributory fault

333. Section 123(6) of the Employment Rights Act 1996 (ERA) states that: '*Where the tribunal finds* that *the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding*.'

334. There is an equivalent provision for reduction of the basic award contained in S.122(2) ERA which provides merely that; "*where the tribunal considers that any conduct of the complainant* before *the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal* ***shall*** *reduce or further reduce that amount accordingly"*

335. ***Nelson v BBC (No.2) 1980 ICR 110, CA*****:** provided guidance on the three factors to be satisfied if the tribunal is to find contributory conduct.

Reputational Risk

336. **Leach v Office of Communications 2012 ICR 1269, CA:**

> "*The EAT had taken the view that, when an employer receives information under an official disclosure regime that an employee poses a risk to children, it must in principle be entitled to treat that information as reliable. An employer cannot be expected to carry out its own independent investigation to test the reliability of the information since it will typically have neither the expertise nor the resources to do so. That said, an employer will not be acting reasonably if it takes an uncritical view of the information disclosed; and if it is in a position to question the reliability of the information, it ought to do so. Applying those principles to the instant case, the tribunal's finding that Ofcom adopted an appropriately critical approach in questioning the police about the reliability of their sources was unimpeachable. As for Ofcom's reference to 'breakdown in trust and confidence' as the reason for dismissal, the EAT thought that it was necessary to identify more particularly why the disclosure was said to have made it impossible for Ofcom to continue to employ L. Nonetheless, it was clear what the tribunal had in mind when finding that this was a sufficient reason for dismissal. Ofcom was at risk of serious reputational damage, which would be exacerbated if it emerged that it had been warned by the responsible authorities about L's activities but had taken no action. The tribunal was entitled to regard the dismissal as justified on that basis. Both the Court of Appeal and the EAT acknowledged the injustice to L of Ofcom acting on untested allegations. However, any injustice caused to L was not caused by Ofcom but by those who had accused him and* ***by the police who had given credence to the allegations****. Tribunal's own stress*

337. The EAT in **Lafferty v Nuffield Health EATS 0006/19** expressed the view that it would not be open to an employer to dismiss an employee for reputational reasons just because the employee faces a criminal charge; there must be some relationship between the matters alleged and the potential for damage to reputation.

338. In **Z v A 2014 IRLR 244, EAT:**Mr Justice Langstaff, President of the EAT, acknowledged the difficulty of balancing the issues that arise in cases of unsubstantiated allegations of sexual abuse . Although the duty of an employer concerned with serving children is first and foremost to safeguard those children, that does not remove its responsibility to its employees.

339. **Bosher v EUR Limited ET 1601207/2107** a first instance decision in the Cardiff ET ;

Para 102 " In relation to the criminal charge and ongoing persecution , in my judgment a fear of public opprobrium and reputation harmed cannot be presumed on the basis of a presumed extreme or scaremongering reaction in the press or public. The public have to be credited with an understanding that a prosecution does not equate to a conviction"… and

Para 106: " any reasonable employer would have undertaken a balancing exercise of these kinds of factors that I have identified against any concerns about the risk to the Respondents reputation. To assess only one side of that equation otherwise risks making a knee jerk reaction. There is no evidence that the Respondent did that kind of assessment…."

340. **Baisley v South Lanarkshire Council ET Case No.S/4108518/14:** dismissal was for SOSR, namely the fact of B having been charged with criminal offences of a nature likely to *attract* public opprobrium if publicised, which caused the Council to be concerned for its reputation and for the potential conflict of interest with B's position as a person responsible for law enforcement. The tribunal went on to find that the dismissal was unfair for various procedural reasons including that it had failed to consider redeployment as an alternative to dismissal

341. ***AB v Commissioners for HM Revenue and Customs ET Case No.2502368/19*:** AB was arrested on an allegation of sexual assault on his 15-year-old niece and released on bail pending trial. The tribunal went on to find that dismissal was unfair in the circumstances including because of a failure to assess the risk of the allegations coming into the public domain or to acknowledge that the criminal proceedings were subject to restricted reporting orders and there was no evidence of idle gossip in the workplace and its assumption that the employee could not be returned to the workplace was not well-founded.

Conclusions and Analysis

Credibility

342. Ms. Horsley's recollection of events was at times uncertain and while I accept that in respect of certain events this was likely due to the because of the passage of time, for the reasons as set out in my findings I also found her evidence in material respects not to be credible.

343. I was also not impressed with the evidence of Mr. Khan for the reasons set out in my findings.

344. I considered the Claimant's evidence to be in the main credible and reliable.

a) Has the Respondent shown a potentially fair reason for dismissal under section 98 (1) or (2) on the balance of probabilities?

345. The Respondent at the outset of the hearing confirmed that the reason it relies upon is SOSR for two reasons; the first a breakdown in the relationship with colleagues, not simply only Mr Wilson or with the Respondent but his 'colleagues' and the second reputational damage to the Respondent.

346. Those reasons are consistent with paragraph 17 of the grounds of resistance:

"The First Respondent *considered carefully the position regarding the Claimant's continued employment. The First Respondent is a small employer with only a handful of employees', the Claimant's* ***three colleagues*** *had seen and/or were aware of the existence of the Video and the allegation contained within the Video.* ***All of them separately stated they could no longer work*** *with the Claimant. The First Respondent further considered there was a risk to its reputation by continuing to employ the Claimant because of the fact the information about the Claimant was publicly available and because the* ***Claimant's name was associated*** *with the first First Respondents name and business". Tribunal's own stress*

347. The Respondent is not relying on conduct as a fair reason for dismissal.

348. The Respondent employs a small number of employees in this particular company that is part of a much wider group of companies. The Claimant was 1 of 4 employees working or managing those who worked in the warehouse and in the office; Mr Wilson, Mr Joe Cooper, Ms Gibson and the Claimant.

349. Those who work in HR include; Mr Khan Group HR director, Ms Syson HR Manager , Ms Horsley, HR officer. There is therefore quite considerable HR support and resource available to the business.

350. It is necessary to identify the person or persons who can be taken to have decided on the reason for dismissal on the employer's behalf because I have to determine what was operating on their mind at the relevant time, not now or when the response was prepared but at the time the decision was taken to dismiss**.**

Mrs Horsley : dismissal

351. I have considered the mental processes of Ms Horsley on the 11 January 2021 the person authorised to, and who did, take responsibility for the decision to dismiss.

352. I have also considered Mr Wilson's knowledge as of 11 January. Although not the authorised decision maker, he was the Claimant's line manager and I find that he had some responsibility (albeit not formally designated authority) for the conduct of the inquiry on 11 January and made the decision alongside Ms Horsley to dismiss. I have considered therefore to what extent his knowledge should be attributed to the employer, even if this was not shared by Mrs Horsley and whether she was actively deceived by him:: ***Royal Mail Group Ltd v Jhuti 2020 ICR 731, SC*****.**

353. Mr Wilson did not of course attend or prepare a statement for this tribunal hearing therefore I have no direct evidence of what his knowledge. His knowledge however is particularly relevant in one request, namely his knowledge of the feelings and opinions

which been communicated to him by Mr Joe Cooper about continuing to work with the Claimant following his sight of the Video .

354. I find on the evidence that Mr Cooper had not said that he was not prepared to work with the Claimant prior to or at any time after, the meeting on 11 January. I also do not find on balance, that Ms Horsley had been told this by Mr Wilson at the 11 January meeting that Mr Cooper had said this to Mr Wilson however, even if Mr Wilson had told Ms Horsley that Mr Cooper was not prepared to work with the Claimant, he would have known this to be false information that he was giving Ms Horsley. If this was information/ facts she based her decision on, it would be reasonable to attribute the actual knowledge of Mr Wilson to her because Mr Wilson was part of the decision making process and he was in a position of authority over the Claimant.

More than one reason

355. If the charges/reasons supporting the SOSRS were cumulative, in the sense that they formed a composite reason for dismissal, it would be fatal to the fairness of the dismissal if one of those composite reasons was found to have been taken into account without reasonable grounds.

Composite or standalone reasons?

356. That the two reasons form a composite reason for SOSR rather than separate reasons which the Respondent treated as each justifying dismissal for SORS, is supported by the weight attached to the Claimant's action in not disclosing the Video voluntarily. Both Ms Horsley and Mr Khan gave evidence that had he done so, they may have handled the situation differently including speaking to his colleagues to explain as Mr Khan put it, that he had been 'exonerated'.

357. The decision makers were less inclined as Ms Horsley accepted to support the Claimant because he had not voluntarily come forward and told them about the Video and the 2016 incident in advance (albeit she accepted that as he was not aware that the Video was available Online again, it would have been unfair to hold this view).

358. Neither Ms Horsley nor did Mr Khan, said that the willingness to support him would have been contingent on him having come forward prior to the Video being available to the public Online, only that he had told them about the Video himself. The risk therefore for the business would have been the same or at least not materially different in those circumstances. This indicates that the reputational risk alone would not have been considered of itself sufficient reason to dismiss.

359. Ms Horsley does not say each concern was a standalone reason but treats them together as giving rise to the alleged breakdown in trust and confidence.

360. Counsel for the Respondent in any event confirmed in oral submissions, that the Respondent relies on the reasons as composite reasons. Counsel for the Respondent confirmed that the Respondent's case is not that one of those two reasons forming the SOSR was the principal reason or that they were considered as separate and standalone reasons each justifying dismissal. Counsel confirmed that they together formed the principal reason ergo a composite reason. Counsel for the Claimant did not seek to argue otherwise.

361. On the face of it, the reasons forming the SOSR are potentially fair, if they were the genuine reason. I have therefore gone on to determine however whether those two reasons were in fact the real reason for dismissal.

Real reason

362. I do not have to accept the Respondent's stated reasons for dismissal where supporting evidence is poor or where I suspect that there was an ulterior motive. Furthermore, even where the employer establishes that there were circumstances that would have provided it with a fair reason for dismissal, I am not obliged to accept that that was the real reason for which the employer dismissed.

363. In my judgment the Claimant has produced evidence sufficient I conclude to cast doubt on the Respondent's seemingly SOSR fair reasons.

364. The Claimant as addressed in cross-examination and in written submissions [para 37) submits that the principal reason the Claimant was dismissed was for perceived misconduct namely the events of 2016 and the failure to inform the Respondent of those events and of the Video.

365. The reason Ms Horsley gave in the meeting on 11 January, was not about working relationships or reputational risk but the Claimant's failure to volunteer information about the Video and what had happened in 2016. That is compelling evidence regarding what was actually operating on her mind when she made the decision that his employment must end:

"*resulting from today's meeting we need to stress the importance of trust - the trust that we had built up now is broken.* ***You have withheld information*** *from your employer and there would have been opportunities to discussed* [sic] *this, ie especially when asked for a photograph to be used on email and the DOC*". Tribunal stress

366. This is first reason she gives at that meeting and in her evidence in chief she refers to stressing this reason to him (para 11). She does not say at this meeting on 11 January that his colleagues are refusing to work with him, she mentions merely that team members know and enquires of him what he things the situation would be with his colleagues.

367. While there is some discussion about reputation at the 11 January meeting, it is clear I find, that the real reason behind the decision to end his employment, was because Ms Horsley and Mr Wilson's had formed a view that he was guilty of the wrongdoing and but for this, they would not have reacted as they did and given him the option to resign or be dismissed. The non-disclosure of the 2016 incident and Video was given as a reason and I find it formed part of their decision making process and it was probably given such weight because they viewed this as further evidence of guilt.

Breakdown in working relationships

368. By 11 January Ms Horsley, an experienced HR professional had not spoken to the other team members. That she did not consider to necessary to take this step is compelling evidence of just how relatively unimportant immaterial it was to her to establish the potential impact on the Claimant's working relationships.

369. Ms Horsley may have been told by Mr Wilson that Mr Joe Cooper was not happy, however she never took the step of speaking to Mr Cooper herself and she had no statement from Mr Joe Cooper. There had been no prior investigation undertaken. This behaviour by an experienced HR professional begs the obvious question, why did she not interview Mr Cooper? I believe it is reasonable to infer, not least given her experience, that it was simply because she did not attach much weight to the impact this situation may have on his working relationships. This is further supported by her decision not to even ask Mr Joe Cooper about the Video when she met with him as part of the grievance process, before confirming her decision to dismiss on 11 February.

370. I conclude as set out in my findings, that Mr Joe Cooper had not said to Ms Hoggan, Mr Cooper or indeed to Mr Khan or Ms Horsley, that he was not prepared to continue to work with the Claimant .

371. In terms of the alleged breakdown in working relationships with the Claimant's three colleagues, as set out in my findings this was neither established in fact nor believed to be true on reasonable grounds.

372. Mr Khan and Ms Horsley never alleged that Ms Gibson refused to work with the Claimant, indeed they accept she was not even aware of the Video .

373. Mr Khan stressed that the decision to dismiss had to be seen in the context of the size of the team and the numbers within that team who did not want to work with him i.e. that 3 out of 4 objected.

374. Ms Horsley was not in possession of facts which indicated that three colleagues had refused to work with the Claimant, that was simply not established. If she believed that this was the case, than that belief was not a reasonable one based on a reasonable investigation. However, I do not find that she did believe that.

375. Mr Wilson's feelings about the Video was a significant influence on her decision but his reaction alone is not the reason relied on as the potentially fair reason to dismiss.

376. In terms of the failure to disclose the 2016 incidents and the Video, the Respondent does not allege that this alone led to the breakdown in trust and confidence and was of itself the principal reason for dismissal, that is not the pleaded case.

377. The Respondent has therefore failed to show the pleaded SOSR reasons relied on i.e. that part of the real reason was a breakdown in working relationship or the reputational risk to the business.

378. It is however the case that Ms Horsley's evidence was that the failure to disclose the Video and events of 2016 would not constitute a fair reason to dismiss, and further, does not concede that it was even a material consideration.

379. In the outcome of the grievance letter of 11 February 2021, Ms Horsley confirms that the outcome of the 11 January meeting to dismiss for SOSR stands.

380. In the 11 February 2021 letter [p.123] Ms Horsley, refers to a fundamental and irretrievable breakdown in work relations between the Claimant and work colleagues due to **your actions**. Ms Horsley in cross examination confirmed that what she meant by "*Your actions*" was **his conduct** in 2016.

381. What was still operating on Ms Horsley's mind therefore on 11 February 2021, was that the alleged breakdown in the working relationships was because of his conduct rather than the consequences of it i.e. the existence of the Video. I conclude that Ms Horsley considered that his actions had caused the breakdown.

382. She goes on to state; "*There is **also** a risk of reputational damage".* She does not separate out the two reasons but refers to them both in the context of giving rise to a breakdown in trust.

383. I conclude that what was still operating on her mind as the primary concern, was that the Claimant had not told them about the Video and events in 2016 previously and the belief that the Claimant was guilty of wrongdoing in 2016.

384. There were peripheral concerns I accept at this stage about how colleagues may react and whether the Respondent may be linked to the Video hence the discussion about the steps the Claimant should take immediately to remove the Video and his LinkedIn account to mitigate that risk, however the focus is very much on his conduct. Had the primary concerns been working relationships Ms Horsley would have spoken with his colleagues. Had it been primarily about reputational risk, there would have been immediate attempts to consider ways to mitigate and an assessment of the risk.

385. Ms Horsley did not deny that she considered that there was some misconduct at play hence her evidence that she had followed the disciplinary policy when holding the investigation meeting. It is also reasonable to draw an inference adverse to the Respondent from her refusal to answer further questions about what the misconduct was under cross examination.

386. I conclude that Ms Horsley saw the Claimant's conduct as the real issue, this was what was principally operating on her mind and was the operative reason behind her decision to remove him from the business. She along with Mr Wilson, formed a view that he was guilty of inappropriate conduct in 2016 and she considered he should have disclosed the existence of the Video and told them about the 2016 incident earlier. Those were the real reasons operating on her mind and that he was guilty of misconduct for those two reasons.

387. Her evidence however is that it would not have been fair to consider that he was under an obligation to disclose what had happened before he joined the Respondent but if he had they would have taken more steps to support him. This indicates that she accepts that it would not have been fair to dismiss him for what she treated as issues about his conduct.

388. Mr Wilson and Ms Horsley jumped to a judgment about what happened in 2016 after seeing the Video and this contaminated their decision making process. They rushed to judgment and were then unwilling to consider any alternatives other than his removal from the business.

389. Even if the real reason had been a breakdown in his relationship with his colleagues, this was neither established in fact nor believed to be true on reasonable grounds either on 11 January or 11 February**.**

390. The alleged risk of reputational damage was also I find not established in fact nor believed to be true on reasonable grounds. The Respondent carried out no

investigation into what actual risk the Video presented, it did not consider steps to mitigate the risk or its relevance to the Claimant's job . There was an absence of any real consideration or investigation into the risk this may present and how that risk could be mitigated.

391. Ms Horsley and Mr Wilson did not like the nature of the allegations, considered the Claimant should have come clean about his past, and took against him for that reason and were determined that he could not remain working for the Respondent.

Mr Kahn's decision

392. Mr Khan heard the appeal against the grievance. He merely upheld the decision taken on 11 January 2021. He did not carry out any additional investigation with the team or what the reputational risk was and how it may be mitigated. He merely rubber stamped the decision taken on 11 January .

393. For the reasons set out in my findings, his principal reason for upholding the decision to dismiss was also his view of the Claimant's guilt and the failure to volunteer what had happened in 2016 and the existence of the Video footage.

394. If he had genuinely been so concerned about the impact on working relationships within the team, he would have spoken to the team. He was not presented with any evidence that anyone other than Mr Wilson was upset by the Video and his own view was that this was because of his initial shock on seeing it.

395. In terms of reputational risk, he did not even check whether the Video footage was still accessible Online and it was clear that he had not checked what other platforms if any, it may be accessible on. He carried out no assessment of risk, he did not seek IT advice either or consider any steps to mitigate those risks to the business.

396. Where Mr Kahn did put his efforts, was in contacting the CPS to find out if the Claimant had been telling the truth about whether he had been prosecuted. He even held a suspicion which he did not share with the Claimant, that the Claimant may have forged the CPS letter. He prioritised that line of enquiry above concerns about how colleagues may feel about working with the Claimant or what information may still be posing a reputational risk to the business. He did this I conclude, because the Claimant's conduct in 2016 is what upset him the most, as a father of two daughters. The Claimant's conduct in 2016 was what was operating principally on his mind at the time and when upholding the decision to dismiss. He clearly retained his suspicions about whether the CPS letter could have been forged up until this Tribunal hearing regardless of the Respondent's stated position that it accepted there was no evidence of any prosecution, such was the prejudice Mr Khan held and operated under.

397. Regardless of issues of reputational risk however, the Respondent relies on a composite reason for dismissal and part of that principal reason is an alleged belief about a breakdown in working relationships with his colleagues. For the reasons set out in my findings, that cannot be established as a genuine reason. The Respondent has failed therefore to establish its pleaded fair reason and thus not met the requirements of section 98 (1)(2) ERA.

398. It is not for a Tribunal to consider what it would have been reasonable and fair for the Respondent to have thought in the circumstances, but what the decision makers *actually thought* and whether, having regard to the totality of its reasons, dismissal was reasonable.

399. Was it reasonable to dismiss the Claimant because he had failed to disclose the allegations and existence of the Video and because of the allegations which had been made against him in 2016? While not relevant to the issue of whether the reason relied on by the employer meets stage 1, this may be relevant to any argument about contributory fault and I have gone on to address that.

Contributory fault

400. Counsel for the Respondent in written submissions [para 37] touches on this very briefly. He submits that the Claimant contributed to the outcome given his failure to disclose the incident when interviewed and employed for the job. He does not submit that his conduct in 2016 contributed, although he suggests that appearing to know that he was meeting up with someone who is 14 years of age would be something no reasonable employer could critically ignore but does not suggest that this alone would be a fair reason for dismissal or makes submission on the extent to which this contributed. I will address this briefly here and return to this later in the judgment.

401. Breach of an important contractual clause may amount to misconduct or non-disclosure give rise to a breach of trust and confidence and may be blameworthy.

402. However, before going on to consider the process, I conclude that this allegation that he had acted in breach of the Personal Conduct Clause was also neither established in fact nor believed to be true on reasonable grounds. Ms Horsley, accepted not disclosing something which had happened before he worked for the Respondent and for which he was not prosecuted could not amount to a breach. It must necessarily follow on the Respondent's own evidence that this was not a potentially fair reason for dismissal and could not in terms of contributory fault, be deemed blameworthy.

403. The Claimant was not a manager or director of the business which may have held him to a higher standard with fiduciary obligations. He worked in the warehouse and repaired tools principally. He was also not working in an environment with children or other vulnerable people.

404. The Respondent also set out contractually what it expected in terms of standards in private life and had it considered it important to the contractual relationship to require employees to disclose any past conduct, it could have stated that but it chose not to. It did not alleged that any questions were asked about past conduct at the interview stage. Ms Horsley accepted it was unfair to have expected him to disclose the Video when he was not aware that it had resurfaced. His conduct in no disclosing it I do not accept was blameworthy but it did form part of the real reason for dismissal.

405. Section 98 (4) ERA requires me to consider whether the dismissal was fair or not, where the employer has fulfilled the requirements of section 98 (1) and then to determine the fairness having regard to the reasons as shown by the Respondent. I shall go on to address the process that was followed, despite the Respondent failing to show that its pleaded reason was the real reason for dismissal or that the real reason (i.e. conduct) was a potentially fair reason pursuant to the requirements of section 98 (1) (2) ERA .

(b) was there a fair process?

Misconduct: if the reason was misconduct

406. The real reason for dismissal was the Claimant's conduct i.e. the judgment formed that he had or had probably committed some wrongdoing in 2016 and the failure by the

Claimant to disclose voluntarily what had happened in 2016 and the existence of the Video.

407. Even if I had concluded that the reason was as pleaded namely the impact on working relationships and reputational risk, that does not necessarily mean that it was properly labelled as SOSR and not conduct.

408. It is important to be aware of the distinction between a SOSR dismissal for a relationship breakdown and a conduct dismissal for the **employee's fault** in causing that breakdown.

409. On the evidence, even if the principal reason had been the breakdown in working relationships and reputational risk, the Respondent held the Claimant responsible for that breakdown. It was his *conduct* I conclude which was the reason and not the *fact* of any breakdown itself.

410. His conduct was **not** incidental to the alleged breakdown in working relationships, hence the focus on his failure to disclose the incident in 2016, the personal views expressed about how guilty he looked in the Video and the fact both Ms Horsley and Mr Khan gave evidence that the approach would have been different and more support offered had he volunteered the information.

411. That it was his conduct and not the fact of a breakdown in working relationship, would explain the abject failure to establish the views of anyone other than Mr Wilson. The evidence did not support that 3 colleagues were not prepared to work with him. The Claimant was seen as responsible for any ill feeling. This belief that the Claimant was to blame**,** explains the lack of interest in supporting him.

412. In terms of reputational risk, again there was no real attempt to carry out any meaningful assessment of risk. There were a number of steps which could have been taken to mitigate any association between the Respondent and the Claimant and Video but none of those were considered. There was no attempt to explore alternatives. There was no attempt to take IT advice on how to prevent or monitor the Video Online. On 22 February 2021 no steps were taken to check what was still Online.

413. Those involved were seasoned HR professionals. Ms Horsley was in charge of recruitment and aware of the recruitment policy for offenders, she knew that fairness required in the case of previous offenders, to consider the relevance of the criminal office to the nature of the role. She accepted that she did not consider that.

414. It is reasonable to draw an inference from those failings, that what was really behind the reason for dismissal (even if I had concluded that the operative clause was reputational risk and a breakdown in working relationships) was the view that the Claimant was responsible for the situation because of his conduct.

415. I now turn to address the process now both with respect to real reason as I have found it to be and the pleaded case (had the Respondent actually persuaded me that it had genuinely dismissed for the pleaded SOSR reasons).

Conduct

416. The real reason or dismissal was the Claimant's conduct in failing to disclose the existence of the Video and the 2016 events and the view formed that he was guilty of wrongdoing.

417. In my judgment, even if the Respondent had established that it had dismissed the Claimant for the pleaded SOSR reasons, I also conclude on the evidence, that this

should have been dealt with as a conduct issue, because they considered the Claimant was to blame for the alleged breakdown in working relationships and the reputational issue because of his misconduct.

418. Dealing then with the process in the context of a conduct reason for dismissal:

Investigation : 11 January 2021 meeting – was it a reasonable investigation

419. Ms. Horsley gave evidence that she conducted the meeting on 11 January 2021 as an investigation meeting under the disciplinary process. The meeting however resulted in the decision that the Claimant's employment would end, he would be dismissed, or he could choose to resign on terms.

420. The Claimant was not given a chance before the decision was made, to produce any evidence at that meeting including any evidence from his solicitor about the steps and measures which could be taken to remove the Video or about the circumstances around the allegations including the action taken against one of the men who confronted him, any evidence about the impact on his health to explain his reluctance to disclose what had happened etc.

421. If as alleged Ms Horsley was concerned about the impact on his colleagues she took no steps to interview anyone other than Mr Wilson and understand what if any concerns they had and how they may be addressed whether through mediation or otherwise.

422. If Ms Horsley was concerned about reputational damage, she took no steps to investigate the potential risks and ways to mitigate them.

423. There was no meaningful investigation but a rush to judgment.

424. The investigation process was deficient in material respects and it was outside the band of reasonable responses: **Sainsbury's Supermarkets v Hitt [2003] IRLR 23.**

Decision to dismiss

425. In breach of the Claimant's own polices, the ACAS code and natural justice, the meeting on 11 January turned into a disciplinary hearing without the Claimant being warned that it was a disciplinary hearing or otherwise a hearing which may result in his dismissal.

426. Mr Wilson who clearly was bias and had formed a view about the Claimant's guilt which was instrumental in the decision to dismiss although the Respondent did not disclose this to the Claimant and he was not the authorised decision maker . He was one of the alleged staff who was refusing to work with the Claimant and hence was a potential witness and yet he was also part of the decision making process.

427. The same people carried out the investigation and the disciplinary part of the hearing.

428. The Claimant was given no right to be accompanied.

429. The Claimant was not notified in writing what he was being charged with and given a chance to produce evidence or time to reflect and provide a considered response. It was not made clear what the charges were before the decision was made to remove him from the Respondent's employment.

430. He was never told that the Respondent considered that he had breached the contract of employment or that the Respondent had formed a belief that he was guilty of the offences in 2016. He was not told that working relationships had broken down, only that members of the team knew.

431. He was not allowed reasonable time to prepare his case in full.

432. He was confronted with a fait accompli; the option of resign or be dismissed and told there was no right of appeal.

433. The way that meeting was conducted offended natural justice. It offended the basic fundamental principles of fair treatment; the Claimant was denied a fair hearing and the matter was not decided by someone who was impartial.

434. I find that there was a rush to judgment, there was a knee jerk reaction by Mr Wilson and Ms Horsley to what they saw on the Video and this blind prejudice drove the decision to dismiss the Claimant without any real thought, investigation or consideration of the circumstances. For counsel for the Respondent to refer to the process as not 'textbook' is to significantly downplay the fundamental and egregious flaws in the process.

435. Ms Horsley admitted under cross-examination that it was not fair to allege the Claimant had breached the Personal Conduct Clause when he was unaware the Video had resurfaced and he was under no obligation to disclose them what happened in 2016 when there had been no prosecution and he was not employed by the Respondent at the time. Matters I find she did not take into account at the 11 January 2021 meeting.

436. It was not even formally confirmed to the Claimant that the decision had been made on 11 January to dismiss him until 11 February 2021, when it was confirmed in the outcome letter to his grievance.

Grievance

437. The Claimant was told that he could not appeal the options given to him at the 11 January 2021 meeting and when he challenged this through the grievance process, the unfairness was perpetuated.

438. Ms Horsley, although I find there were alternatives to her doing it, investigated and determined the fairness of her own process. Not only that, she did not even go through the motions of a fair process. When she had Mr Cooper sat in front of her in an interview, she never asked him how he felt after seeing the Video. That speaks volumes about what we really motivating the removal of the Claimant and it was not any concern about whether Mr Cooper or Ms Gibson had any issues about working with him.

439. Ms Syson for whatever reason, did not replace Ms Horsley in deciding the grievance although present in the meetings, her role was limited to notetaker. Ms Syson however showed some appreciation for the unfairness of Mr Wilson's stance that the Video made the Claimant look guilty, she pushed back and referred to the absence of any evidence of wrongdoing, resulting in Mr Wilson dropping that argument and moving on then to talk about reputational risk to the business. However, Ms Syson was not the decision maker.

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Appeal

440. There was no appeal against the decision to dismiss but there was an appeal against the grievance and Mr. Kahn considered the action Ms. Horsley had taken as part of that process.

441. As set out in my findings, I find that Mr. Khan had a closed mind from the outset.

442. He started the meeting batting off legitimate concerns about the impartiality of Ms. Horsley, would not consider whether she had shown any bias because she was an HR professional and then proceeded to accuse the Claimant of looking guilty in the Video.

443. Such was Mr. Khan's prejudice, that he believed the Claimant was guilty and took steps to establish this without telling the Claimant, by contacting the CPS. When he had no joy there, rather than ask for information from the Claimant he allowed himself to operate in the belief that without any reasonable grounds for believing it, the Claimant had failed to establish his innocence. He doubted the authenticity of a letter or email from the CPS even considering that the Claimant may have forged it, this was a highly prejudicial view of the probity of the Claimant which was not based on reasonable grounds.

444. He also considered that the Claimant had not shown a DBS certificate.

445. Mr. Khan proceeded to approach the matter on the basis that the burden was on the Claimant to produce evidence that he was innocent of the allegations in 2016 and prove that he had not been prosecuted but the Claimant was not asked by him to produce his DBS certificate and Mr Khan's suspicions are wholly inconsistent with the Respondents own pleaded case (para 13 grounds of resistance (p.31)).

446. Mr Khan was not I find on balance, truthful when he alleged he had spoken with Mr Wilson and Mr Cooper. I find that Mr Khan took no steps to interview any witnesses.

447. Mr Khan could not even identify the third colleague who he alleged objected to working with the Claimant. That is because he did not carry out any investigation. He was not interested in whether or not the Claimant's work colleagues were refusing to work with him. He upheld the decision because he suspected that the Claimant had committed some wrongdoing in 2016 and his decision making was perverse as a consequence.

448. On his evidence, he would not have upheld the dismissal if the Claimant had produced a clean DBS certificate and a letter from the CPS which he considered was authentic: *" it would have helped me come to a different decision I think."* And yet he did not raise this with the Claimant and this is inconsistent with the pleaded reasons for dismissal.

449. The Respondent gave no consideration to ways to retain the Claimant in its employment .

450. Mr Khan and Ms Horsley gave evidence they considered alternative employment, however I have find that this was not the case but it is indicative of their understanding that it would have been a reasonable step to have done so. There was also no consideration given to reorganising his customer facing duties even on a temporary basis while the Video was removed.

451. There was no discussion by Ms Horsley or Mr Khan I find about other steps that could have been taken such as changing his email footer etc. The Claimant offered to talk to his colleagues who knew about the Video and explain the circumstances but there was no engagement with that proposal.

452. Mr Syson had some semblance of success at the grievance interview with Mr Wilson in challenging his view of the allegations by reminding him of the absence of any evidence of any prosecution. There was however no discussion about the possible benefits of mediation.

453. No steps were taken to consider alternatives because there was no desire to retain the Claimant.

454. In summary, he reason for dismissal I conclude was the failure to disclose the existence of the Video and the fact of the 2016 incident itself and no reasonable employer acting reasonably would have treated that as a fair reason to dismiss in the circumstances. The dismissal was outside the band of reasonable responses.

455. The decision makers formed a view that the Claimant was in breach of the Personal Conduct Clause and was probably guilty of 'grooming' in 2016, however they did not have reasonable grounds based on a reasonable investigation, to support that belief.

456. He produced evidence that he had not been prosecuted for the events of 2016 and any belief that he was guilty was based on an extract from a Video. There was a failure to take into consideration what he said about the circumstances around the Video including the absence of any evidence of wrongdoing on his phone etc. Mr Khan's suspicions around the DBS certificate and CPS letter were unreasonable and the Claimant never had a chance to respond to them.

457. In terms of the grievance appeal process and the process generally, it was not conduct outside the band of reasonable responses.

458. The ACAS code of course applies to disciplinary dismissals relating to conduct or performance and therefore is not directly applicable to SOSR dismissals.

459. Counsel for the Respondent refers to **Jefferson (Commercial) LLP v Westgate UKEAT/0128/12 :** where it was found that having a further meeting or discussion in order to resolve the issues where there was a breakdown in trust and confidence was fair where it would have been futile to do so: a "meaningless charade" and **Phoenix House Ltd v Stockman & Others [2017] ICR 84**

460. I have also been referred to **Gallacher v Abellio SCcotrail Ltd UK**/EAT/0027/19: where the EAT held this was a rare example of a case where following procedures could be considered futile and that in many cases a total lack of procedures would usually lead to a conclusion that dismissal was outside the band of reasonable responses.

461. I have also considered the case of **Moore v Phoenix Product Development Ltd EAT /0070/20**.

462. Had the Respondent established that its real reason for dismissal was for SOSR (a breakdown in working relationships and reputational risk), then applying section 98 (4), even if it was reasonable for the Respondent to treat the offences as SOSR outside the conduct process, the process which was followed was still outside the band of reasonable responses and unfair.

463. Although a small employer the Respondent has significant HR support. Mr Kahn stressed that the decision by 3 people not to work for with the Claimant must be seen in the context of how small the team was however, there was no reasonable belief at the relevant time that there was 3 people unwilling to work with the Claimant. Had there been a proper investigation, disciplinary and appeal process that would have been

apparent and the Claimant in a position to challenge what was being said to him. Such further meetings would not have been meaningless or a charade, if conducted fairly.

464. Further, there were alternatives to dismissal which were not explored including taking steps to mitigate risk, mediation and re-organisation of his role. A process to properly explore those alternatives would not have been meaningless, if conducted fairly.

465. Indeed Mr Kahn explained how if the Claimant had volunteered what had happened, steps could been taken perhaps to explain to staff that he had been exonerated. There is no evidence to suggest that this would have been a futile exercise.

466. In terms of reputational risk, this is not given as a standalone reason for dismissal but even if it were, there was no engagement with alternatives and steps to mitigate the risk.

467. Mr Khan and Ms Horsley gave evidence that had he volunteered what had happened they would have taken further steps to support him and see what could be done to remove the Video, compelling evidence that further investigation and consideration of alternatives would have been helpful if conducted fairly and may have changed the outcome.

468. Whether the reason should be properly categorised as conduct or SOSR, the process was fundamentally flawed. I accept the submissions of counsel for the Claimant that it was demonstrably biased and fell outside the range of reasonable responses.

469. No employer acting reasonably would have conducted the process in the way in which the Respondent did and a fair process involving a proper investigation and fair disciplinary process, would not have been futile.

(c) Would the sanction of dismissal have been fair, applying s.98(4) ERA 1996?

Reputational risk

470. Both counsel refer to **Leach v The Office of Communications (OFCOM) 2012 EWCA Civ 959** : and the EAT's reasoning that:

" to justify the Claimant's dismissal on the basis of reputation risk in the absence of any established misconduct may involve a grave injustice to him. But what is essential to bear in mind is that under section 98 the central question is ***what it was reasonable for the employer, in the relevant circumstances to do."***

471. The following are relevant considerations from the findings:

471.1. I have not found that the Video is still accessible Online

471.2. The Claimants financial pressure was not a reason put forward by Mr Khan or Ms Horsley for the need to remove the Claimant but in any event, that does not negate the need for the Respondent to act reasonably. The Video had been accessible for 10 months since March 2020, there was no evidence that this had had any impact or that any customers or suppliers were aware of it.

471.3. While I accept counsel for the Respondent's point that it may not be possible to know if someone has boycotted the Respondent, the fact remains they had no reason to believe anyone had. The Respondent is also the only firm who provides a full service in Leicestershire which counsel for the Respondent accepts probably makes it less likely that customers would cease to use their services.

471.4. I prefer the Claimant's evidence that only about 10 – 20 % of his time was working on the trade counter and there was no consideration given to whether that could be adjusted even for a temporary period.

471.5. The Claimant did not use his full name on the telephone or on the trade counter and there was no need to do so.

471.6. Steps could have been taken to mitigate the risk such as using an alternative email address when the Claimant contacted customers.

471.7. Counsel for the Respondent refers to the Claimant not going on social media and this would be difficult for him to monitor the existence of the Video however as the Claimant pointed out he can regularly conduct a search without actually himself being on social medal platforms.

471.8. The Respondent took no steps to investigate with IT specialists what steps could be taken although but said they would have been willing to look at other ways to support him had he disclosed voluntarily the Video.

471.9. In terms of relevance to his job; the Claimant did not work with children or vulnerable people. In **Leach v Office of Communications 2012 ICR 1269, CA.**

472. I have considered the authorities and guidance in **Leach v Office of Communications 2012 ICR 1269, CA**, **Lafferty v Nuffield Health EATS 0006/19**, **Z v A 2014 IRLR 244, EAT, Bosher v EUR Limited ET 1601207/2107** , **Baisley v South Lanarkshire Council ET Case No.S/4108518/14 and AB v Commissioners for HM Revenue and Customs ET Case No.2502368/19 .**

473. The Claimant was not subject to a live investigation and there was no police advice that he was risk. The nature of his work is not relevant to the allegations. He was not working with vulnerable or young people.

474. The allegations had been investigated and there was no prosecution. The Claimant is and remains innocent until proven guilty of any criminal offence.

475. In conclusion, the sanction of dismissal was not within the range of reasonable responses open to a reasonable employer at that time taking into account all the circumstances.

476. Further, any concerns over reputational risk was not the sole principal reason relied on by the Respondent. It formed only part of the composite principal reason.

Working relationships

477. Even if, Ms Horsley had been right to treat the dismissal as an SOSR, she failed to take any reasonable steps to establish whether or not the break down in relationships

was properly to be regarded as irretrievable and had taken no reasonable steps to improve those relationships: ***Turner v Vestric Ltd 1980 ICR 528, EAT*.**

478. I consider that part of a reasonable process, necessarily involved consideration of the actual views of his colleagues and whether or not mediation was potentially viable.

479. The Claimant in the course of the disciplinary investigation made it clear that he was amenable to explaining the circumstances to his colleagues. No steps were taken to engage with that suggestion or consider alternatives.

480. Disruption among employees can be harmful to an employer's business interests and may justify dismissal but there was no evidence of any actual disruption. Ms Hoggan conceded that she was only foreseeing that there may disruption be if colleagues were not prepared to work with him. It was not reasonable without speaking to his colleagues or take steps to address the initial reaction Mr Wilson had to the Video, to form any reasonable view of what, if any disruption may arise.

481. It is not the tribunal's task to substitute its view as to whether it was reasonable to dismiss, where the employer's view falls within the band of reasonable responses and has been reached following a fair process. But there was no fair process and the Respondent has not established evidence that there was in fact a breakdown in the working relationship with his colleagues, other than Mr Wilson.

482. I conclude that the sanction of dismissal was not within the range of reason responses open to a reasonable employer at that time because of a breakdown in relationships with colleagues and/or because of reputational risk.

Conduct

483. It was accepted by the Respondent witnesses that the Claimant was under no obligation to disclose the facts of the 2016 incident or the Video to them . There had been a police investigation and the Claimant had not been prosecuted for the events of 2016.

484. Dismissal for those alleged acts of misconduct would also have been outside the band of reasonable responses.

Conclusion- summary

485. The Respondent has failed to show the SOSR reasons as pleaded were the real reasons for dismissal. It has not therefore satisfied section 98 (1)(2). ERA

486. The Respondent failed to act within the band of reasonable responses in its failure to follow a fair procedure and in dismissing for the pleaded reasons.

487. Both the process and the reason for dismissal were unfair for the purposes of section 98 (4) ERA.

ACAS

488. In **Lund v St Edmund's School, Canterbury 2013 ICR D26 EAT** the EAT concluded that the Code applied to a dismissal which was not based on the employee's conduct per se but on the effect of his conduct, which amounted to SOSR. The EAT held that the Code applies not only in circumstances where disciplinary proceedings are invoked against an employee but in circumstances where they should have been, as it is not

the outcome of the process which determines whether the Code applies but its initiation.

489. I have reached a finding that the real reason for dismissal conduct and thus the ACAS code applied.

490. Even if I had found that the real reason for dismissal was SOSR as pleaded by the Respondent, the ACAS code would nonetheless apply because those reasons are based on the Claimant's **conduct.**

491. I conclude that there was a failure to follow the ACAS Code of practice in the following respects:

6. In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing.

7. If there is an investigatory meeting this should not by itself result in any disciplinary action.

12. Employers and employees (and their companions) should make every effort to attend the meeting. At the meeting the employer should explain the complaint against the employee and go through the evidence that has been gathered. The employee should be allowed to set out their case and answer any allegations that have been made. The employee should also be given a reasonable opportunity to ask questions, present evidence and call relevant witnesses. They should also be given an opportunity to raise points about any information provided by witnesses. Where an employer or employee intends to call relevant witnesses they should give advance notice that they intend to do this.

13. Workers have a statutory right to be accompanied by a companion where the disciplinary meeting could result in:

- *a formal warning being issued; or*
- *the taking of some other disciplinary action*
- *the confirmation of a warning or some other disciplinary action (appeal hearings)*

14. The statutory right is to be accompanied by a fellow worker, a trade union representative, or an official employed by a trade union. A trade union representative who is not an employed official must have been certified by

18. After the meeting decide whether or not disciplinary or any other action is justified and inform the employee accordingly in writing.

22. The employee should be informed as soon as possible of the reasons for the dismissal, the date on which the employment contract will end, the appropriate period of notice and their right of appeal.

43. The appeal should be dealt with impartially and wherever possible by a manager who has not previously been involved in the case. [grievance appeal]

492. The breaches of the Code as set out above were serious and numerous.

Acas Code – legal principles

493. The ACAS Code was applied to some extent, in that there was an investigation meeting (albeit not adequate) and a grievance and appeal process.

494. Ms. Horsley and Mr. Khan however were very experienced and seasoned HR experts who also had access to external support and in my judgment they willfully and knowingly conducted the procedure unfairly and in breach of the ACAS code.

495. The Claimant was not even formally notified of the decision to terminate his employment on 11 January until 1 month later. A very experienced HR professional who had conducted what proved to be in effect a disciplinary hearing, was appointed to adjudicate complaints about her own failings in circumstances where she knew this gave rise to 'issues'.

496. At the appeal stage there was no meaningful attempt to engage with the concerns raised about the obvious conflict of interest.

497. The Respondent was in receipt of legal advice during these tribunal proceedings and represented by counsel at the hearing, and has nonetheless continued to maintain that it had carried out a fair process albeit not 'textbook'.

498. The breaches of the Code are matters which would not have occurred had the Respondent approached the case with an open mind and a willingness to treat the Claimant fairly.

499. These were not breaches arising from a lack of understanding of the correct process in circumstances where the intention was nonetheless to treat the individual fairly and where the essential ingredients of impartiality and an open mind were present.

500. The failings were basic issues of fairness and the allegations were serious and potentially career ending for the Claimant, thus it was even more incumbent on the Respondent to approach this process with the seriousness and fairness it deserved.

501. There was a disregard for fairness as evidenced in the inadequate investigation, the failure to carry out further investigation, the refusal to offer an appeal, the rush to judgment and the 'closed mind' the decision makers retained throughout the process. These were serious and unreasonable breaches of the Code.

502. I have however limited my consideration when assessing the amount of the ACAS Uplift to the breaches of the Code, rather than taken into account the Respondent's conduct outside of those breaches in terms of the broader issues of fairness and in doing so conclude that an award of **25 %** is an appropriate Acas Uplift, to reflect the degree of default, the deliberateness of it and the extent of it.

Polkey Principle : section 123 (1) ERA

503. I have considered what decision the Respondent would have reached had a fair procedure been followed.

504. There were not only serious failings in the investigation process, but the Claimant was also given misleading information to encourage him to resign. Ms. Horsley, Mr. Wilson and Mr. Khan were motivated by blind prejudice and had from the outset of the 11 January meeting approached the situation with a closed mind. The decision was taken to dismiss him at what Ms. Horsley described as a fact-finding meeting or investigation meeting.

505. The Respondent's handling of this case offended their own policies, the ACAS code and natural justice.

506. Had a fair process been carried out, I do not find that on the evidence available, there is a realistic prospect that his employment would have been terminated fairly for the SOSR reasons pleaded or the real reasons relating to his conduct.

Contributory fault : section 123 (6) ERA and section 122 (2) ERA

507. I have applied the guidance in: Nelson v BBC (No.2) 1980 ICR 110, CA.

508. I do not find that the Claimant was under any contractual obligation to disclose to the Respondent the events of 2016. I do not consider that outside of any legal obligation the failure to do so is conduct which should reduce the compensation to be awarded.

509. The Claimant was advised by his solicitor (evidence which was not challenged) that he did not have to disclose those events. Given the impact at the time of the police investigation and the understandable concerns over the impact on his employment, and the lack of relevance to the job he was undertaking, I do not consider that his conduct in not disclosing this information was blameworthy or otherwise conduct which should be taken into account to reduce the basic or compensatory award.

510. The Claimant was not prosecuted and found guilty of any offence. I do not find that the evidence as presented on the Video amounts to evidence to support a finding of blameworthy conduct. Certainly, it was not blameworthy conduct which I consider caused or contributed to his dismissal. The events took place in 2016 and he was subject to an investigation at the time and no prosecution was brought. Regardless of the outcome of the police investigation, the decision makers in this case formed a view about his conduct in 2016 but even on their evidence, had he disclosed the incident or produced a clean DBS certificate, and they were content that the CPS letter was authentic, their evidence is that they would have dealt with it differently. In circumstances where there was no obligation to disclose what happened and there was no request from him for further evidence that there had been no prosecution, I do not consider that it is just or equitable to make any reduction because of his conduct in 2016.

511. Submissions from counsel for the Respondent do not really engage with this issue but in any event I am not persuaded to exercise the discretion to make any reduction on the grounds of contributory fault.

Remedy

512. The Claimant's claimed losses as set out in the schedule of loss were not challenged by the Respondent.

513. The calculation of the basic award set out in the schedule of loss was not challenged and that sum is therefore awarded pursuant to section 119 ERA.

514. The Claimant has lost important statutory rights on dismissal including statutory notice pay and the qualifying service for protection from unfair dismissal. I am not satisfied that he would shortly have been fairly dismissed from his employment anyway and consider that a sum of £500 would be just and equitable in recognition of the loss of those rights. That sum is not challenged by the Respondent.

515. The Claimant has claimed for loss of earnings from the date of dismissal

516. The Respondent has not sought to challenge the loss of earnings or the period for which they are sought. This was not addressed in any evidence from the witnesses for the Respondent, the Claimant was not cross examined on his efforts to mitigate or otherwise on his schedule of loss at all. No submission was made on the compensation figures the Claimant has put forward. No submissions were made either around the possibility that he may have been made redundant by the Respondent.

517. On the evidence I find that had he not been off work between 11 January 2021 and the date of dismissal, the re-organisation of his role is unlikely to have been undertaken but that in any event, he was replaced by Mr. Cooper. In the absence of evidence from the Respondent that Mr. Bradley Cooper's role was a different role to the Claimant's or that he his salary is less than the Claimant was paid, on balance I conclude that the Claimant would have been retained in his role or a role which was not materially different and received the same pay and conditions. It is not submitted otherwise.

518. The Claimant's undisputed evidence is that since his dismissal he has been unable to secure a new permanent role and is currently on an ongoing agency contract which is expected to last indefinitely. None of his evidence was challenged. He has sought losses from the date of termination (1 April 2021) to the 30 January 2023 capped at 52 weeks taking into account he sums he earned though agency work. The Claimant is 55 years of age. He has taken acted steps to improve his employability by taking a forklift refresher course.

519. The Respondent did not cross-examine the Claimant on his schedule of loss or his attempts to mitigate.

520. I am satisfied that the Claimant's claim for loss of wages from the date of dismissal reflects the actual losses that he suffered as a consequence of being unfairly dismissed and that it would be just and equitable in all the circumstances having regard to the losses sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer (S.123(1) Employment Rights Act 1996 (ERA) to award him his losses as set out in his schedule of loss.

Conclusion

521. The Respondent is ordered to pay the Claimant the following sums:

1. Basic award : £1,067.31
2. Loss of statutorily rights : £500
3. Compensatory award:
4. Capped at 52 weeks : £16,720.20
5. ACAS uplift : £4,569.37
6. Less mitigation of £1,369.95

522. He is awarded the total sum claimed of **£21,449.93**

523. The Claimant was not in receipt of any benefits. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 SI 1996/2349 do not apply.

Employment Judge R Broughton

Date: 15 May 2023

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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