Case Number: 3312617/2022

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ravinder Singh	v	Hamble Foods Limited

Heard at: Reading Employment Tribunal **On**: 29-30 November 2023
1 December 2023

Before: Employment Judge Anderson

Appearances
For the Claimant: In person
For the Respondent: J Bromige (counsel)

RESERVED JUDGMENT

1. The claimant's claim of unfair dismissal is upheld.

2. Any compensatory award made by the tribunal under s123(1) Employment Rights Act 1996 will be reduced by 25%, the tribunal having made an assessment of the likelihood of the claimant being dismissed in any event had the disciplinary process been fair.

3. Any basic and compensatory award made under s122 and s123 Employment Rights Act 1996 is subject to a deduction of 50% in accordance with s122(2) and s123(6), the tribunal having considered the matters of the claimant's conduct and whether that was a contributory factor to the dismissal.

4. The claimant was underpaid wages and holiday pay at the time of dismissal in the sum of £2308.63 (gross). The respondent is ordered to pay that sum (less any deductions for tax and national insurance) to the claimant within 28 days of the date that this order is sent to the parties.

5. The claimant's claim for an unpaid bonus and expenses is dismissed.

6. The claimant's claim of automatically unfair dismissal is dismissed.

7. Remedy will be determined at a separate hearing.

REASONS

Background

1. The claimant was employed by the respondent until 1 August 2022 and at the time of his dismissal he worked as an area manager. The start date of his employment is contested. The claimant says his employment began on 25 March 2019. The respondent says the date is 8 February 2020. The claimant brings claims of ordinary unfair dismissal, automatic unfair dismissal (due to making a protected disclosure) and unpaid monies (bonus, expenses, wages and holiday pay).

2. The claim form was filed on 14 October 2022 following a period of early conciliation from 15 August 2022 to 22 September 2022. The alleged protected disclosures are set out in a document filed by the claimant on 10 March 2023 in response to a request for clarification from the tribunal dated 10 February 2023.

3. Case management took place on 31 March 2023 before EJ Postle and an outline list of issues is set out in a case management order dated 11 May 2023.

The Hearing

4. The parties filed a joint bundle of 441 pages and eight witness statements. For the claimant this was the claimant's statement plus statements from Gurwinder Singh Padda and Rad Grigore. The respondent's witnesses were Anshul Khattar, Abid Hussain, Balkar Singh, Amrik Singh and Asad Hayat. All witnesses attended and all gave evidence on oath except Mr Hayat. The claimant said that he did not wish to cross examine Mr Hayat. I explained to the claimant that where a witness was not cross examined on their evidence, the evidence was effectively unchallenged.

5. Both parties sought to adduce further documentary evidence on the morning of the first day of the hearing. Neither party objected to the evidence being included and therefore I accepted it, and it formed part of the evidence before me.

6. Mr Bromige, counsel for the respondent, provided a draft list of issues on the first day of the hearing. He said that the list of issues included in the case management order was insufficiently detailed and noted that he was instructed only two days before the hearing commenced. I discussed the list with the parties and some amendments were made after a short adjournment to give the claimant an opportunity to consider the list. I was provided with an amended final copy on the second day of the hearing, and it is reproduced below. The claimant raised no objections to the final copy. The matters I considered in this case were those set out in the agreed list of issues.

7. Mr Bromige noted that the schedule of loss filed by the claimant included a sum for injury to feelings and a claim for wrongful dismissal. The claimant did not recall any discussion around this matter at the preliminary hearing. I considered the claimant's claim form. The claim is brought only against the

respondent employer and the claimant identifies his claim clearly at box 8.2 as being that he was unfairly dismissed because of a protected disclosure. I explained to the claimant that there was no award for injury to feelings in a claim for automatically unfair dismissal on the grounds of having made a protected disclosure. On wrongful dismissal, I discussed with the claimant that no such claim had been raised in the ET1 or at the preliminary hearing. He said that he had had some advice on drafting the schedule of loss, which was to include that loss. I explained that as he had not brought a claim for wrongful dismissal, he could not claim an award under that heading.

8. As regards the dispute between the parties about the start date of employment Mr Bromige said that the respondent now conceded, where previously it had been disputed, that the claimant had been employed by it for over two years and the tribunal therefore had jurisdiction to hear an ordinary unfair dismissal claim from the claimant. Mr Bromige said the respondent accepted that the claimant was employed by it continuously from 8 February 2020. He said that the only relevance of whether the claimant was employed from 25 March 2019, was to remedy if the claimant is successful.

The Issues

9.

Ordinary Unfair Dismissal – s.98 Employment Rights Act 1996

1. Has the Claimant been continuously employed for a period of not less than two years from the effective date of termination, namely 1st August 2022?

    a. The Respondent accepts that the Claimant has been continuously employed since 8th February 2020, and so therefore has more than two years continuous service.
    b. The Claimant asserts that he has been employed since 25th March 2019. The Respondent accepts that the Claimant's first period of employment commenced on 8th February 2020 and previously he was employed by PJ Eastleigh Limited, a separate company. Therefore did his employment transfer from PJ Eastleigh Limited to the Respondent on or around 8th February 2020?

2. What was the reason or principal reason for dismissal? The Respondent says the reason was conduct. The Tribunal will need to decide whether the Respondent genuinely believed the Claimant had committed misconduct (the first limb of the *Burchell* test).

3. 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:

    a. there were reasonable grounds for that belief (the second limb of *Burchell*);

    b. at the time the belief was formed the Respondent had carried out a reasonable investigation (the third limb of *Burchell*);

    c. the Respondent otherwise acted in a procedurally fair manner;

    d. dismissal was within the range of reasonable responses.

Protected Disclosures – s.43A-C ERA 1996

4. Did the Claimant make one or more qualifying disclosures as defined in s.43B ERA 1996? The Claimant says he made the following disclosures, as per his "Details of Disclosures" document provided in compliance with the order of EJ Antis:

    a. An oral disclosure on or around March 2022 (§4) to Mr Khattar refusing to take half of his wages in cash as it would be tax evasion;
    b. A further oral disclosure on or around March 2022 (§5) to Mr Khattar in the same terms as (a) that paying employees in cash to reduce the amount of wages on their wage slip would be illegal;
    c. A disclosure on or around March or April 2022 (§7) to the Respondent's payroll department about the pension enrolment of a 17 year old employee and stating that he should not have been enrolled in the pension because he was under 18;
    d. An oral disclosure on or around April 2022 (§3) to Mr Khattar stating that it was illegal not to be allowed to take holiday and that the employees were entitled to take holiday but the system had deliberately prevented them doing so;
    e. A further oral disclosure on or around April or May 2022 (§6) to Mr Khattar in the same terms as (b);
    f. An oral disclosure to Mr Khattar and the payroll team in June 2022 (§7) that the 17 year old employee had not received a refund of his pension contributions;
    g. An oral disclosure to Mr Khattar on 9th July 2022 (§8) where the Claimant refused to adjust the hours for the store manager to ensure that he received half his wages in cash, to comply with a PSW Visa because it was illegal;
    h. An oral disclosure on 11th July 2022 (§9) that Mr Amrik Singh was working above the 20 hours per week permitted by his visa which was illegal

5. Did the Claimant disclose information?

6. Did the Claimant believe the disclosure of information was made in the public interest?

7. Was that belief reasonable?

8. Did the Claimant believe that the disclosure tended to show that:
    a. a criminal offence had been, was being, or was likely to be committed (it appears the Claimant relies upon this for all of the disclosures)
    b. a person had failed, was failing, or was likely to fail to comply with any legal obligation (it appears the Claimant relies upon this category for all of the disclosures in the alternative)

9. Was the Claimant's belief reasonable?

Automatic Unfair Dismissal – s103A ERA 1996

10. If the Respondent cannot show that the reason or principal reason for dismissal was conduct, was the reason or principal reason in fact because the Claimant had made a protected disclosure?

    If so, the Claimant will be regarded as unfairly dismissed

Breach of Contract

11. Did this claim arise or was it outstanding when the Claimant's employment ended?

12. Did the Respondent do the following:

a. fail to pay the Claimant a £2000 bonus in January 2022?
b. fail to pay the Claimant expenses of £60 in respect of company car repairs
c. fail to pay the Claimant the sum of £21.95 which the Claimant incurred shopping for goods for the Winchester store

13. Were any of those acts a breach of contract?

Holiday Pay (Working Time Regulations 1998)

14. What was the Claimant's leave year? The parties agree that the leave year was 1st April – 31st March each year.

15. How much leave had accrued for the year by 1st August 2022? The Respondent says that he had accrued 9.46 days (rounded to 10 days) by the EDT.

16. How much paid leave had the Claimant taken in the year? The Respondent says that the Claimant took 11.66 days in May 2022.

17. Were any days carried over from previous holiday years? The Claimant claims that 20 days were carried forward from 5th April 2022.

18. How many days remain unpaid?

19. What is the relevant daily rate of pay? The Respondent says this is £153.84.

Unlawful Deduction of Wages – ss.13 and 23 ERA 1996

20. Were the wages paid to the Claimant between 1st July 2022 and 31st August 2022 less that the wages he should have been paid?

    a. The Claimant says that he was not paid for the period of suspension between 25th July and 1st August 2022. The Respondent says that he was paid in full, as normal for the whole of July 2022 and also received an additional sum in August 2022.

21. If the Claimant was underpaid, by how much?

Relevant Findings of Fact

Start date and References

10. The claimant was employed by PJ Eastleigh Limited from 27 March 2019. There is no evidence of a start date in the bundle, but the respondent has not disputed that date. There is documentary evidence of employment from 13 May 2019. From 8 February 2020 until 1 August 2022 the claimant was employed by the respondent, which was called PJ Winchester Limited on 8 February 2020. It subsequently changed its name to Hamble Foods Limited. At the time of his dismissal, he was an area manager.

11. The claimant claims that he was appointed as a store manager in the Winchester store in January 2020, setting out in his witness statement, *'which was run under a sister company [to PJ Eastleigh Limited] called PJ Winchester Limited. My employment was therefore transferred from PJ Eastleigh to PJ Winchester Limited.'*

12. Mr Bromige, for the respondent, said that the companies were two separate entities, with the same controlling people, and this was not evidence of continuity of service. The claimant had not suggested that there was a TUPE transfer and at it at highest the claimant's case was that the companies had the same controlling people. He said that the claimant knew it was a new company as he completed new starter forms.

13. In his evidence on references (see below), Mr Khattar says of PJ Eastleigh 'we owned the business'. When he says 'we' I understand him to be talking about himself and Mr Hussain, who are directors of the respondent and find that the two companies were controlled by the same persons.

14. The claimant completed a form giving details of two referees, dated 20 January 2021. The first is Gurwinder Singh Padda. The claimant states that he worked with Mr Singh Padda, in a Papa John's store, from 6 November 2017 to 14 February 2020. The second referee is Balkar Singh. The claimant states that he worked with him at a Papa John's store from 6 March 2014 to 5 November 2017. The respondent says these details are wrong and raises the matter in connection with the claimant's credibility. Mr Hussain says, regarding the details the claimant gave about working with Mr Singh Padda, that *'we owned the business, and we do not have any record of employment for him'*. And in connection with Mr B Singh that *'we acquired that business in November 2017, and no such staff records were handed over to us.'* Mr Balkar Singh agrees that he did not work with the claimant during this time. The claimant's argument is that when he filled in the form, he was already an employee of the respondent and Mr Khattar told him it did not matter what he put down. Mr Khattar denied this.

15. The respondent made no submissions about what it did with the form at the time it was requested, i.e. there is no evidence that the referees were asked to provide references. I assume that if they had, then the references would have been disclosed or any discovery at that point that the information was false would have led to events that would have formed part of the pleadings. As it appears that nothing was done in respect of following up the references, I accept the client's claim that he was told that they were of no importance and simply filled in random details. I do not find this is evidence of an attempt to defraud or mislead the respondent.

Bonus

16. On 10 September 2021 the claimant resigned from his job giving notice to end on 26 September 2021. After discussion with Anshul Khattar, head of operations at the respondent's parent company, the claimant received a pay rise and a bonus. He rescinded his notice.

17. In an email dated 30 September 2021 from Mr Khattar to the claimant, Mr Khattar states:

    This is to confirm that we will pay you an annual retention bonus of £2000 on 10/01/2022.

    The bonus will be paid on top of your salary.

18. The bonus was paid in January 2022. The claimant also received a written employment contract on 30 September 2021. This was the first written contract he had received during his employment with the respondent. There is no reference to a bonus in the contract.

Editing time sheets

19. Area managers at times attended meetings with Mr Khattar. One such meeting took place on 18 October 2021. An agenda for the meeting was provided in the bundle along with a link to the meeting which was to take place by Teams. There is no email to which the agenda was attached. The agenda lists item No 10 as 'Reporting edited sheet to operations manager and payroll'. The claimant is one of the addressees. The claimant says that the agenda is not the original agenda, i.e. it has been altered, and the matter of reporting edited sheets was not raised at that meeting. He referred to another agenda included in his additional bundle. This is a photograph of a document on a phone or a tablet. It is undated and it appears to show a message from Mr Khattar setting out a meeting agenda including notes on the agenda items. The claimant states that the fact that the two agendas are different in format is evidence that the document included by the respondent in the bundle is not an original document. The relevance of this is that the claimant was later dismissed and one of the reasons given for this was that he edited a timesheet without reporting this to Mr Khattar or payroll.

20. Balkar Singh, witness for the respondent, gave evidence that he also received the agenda and attended the meeting on 18 October. It was not put to him in cross examination that the disclosed agenda had been amended. He states that he:

    '…consistently reported any edited timesheets to the payroll department or my line manager, as required by company procedures.'

21. There was no evidence to this effect in the bundle. In cross examination he was asked if he reported editing to time sheets. He said that he had not edited a timesheet.

22. Asad Hayat, witness for the respondent was a further attendee at the meeting on 18 October 2021. He states in his written evidence that at the meeting:

    'We were also instructed that any amendments to timesheets should be reported to the operations Manager or the accounts Team. The only acceptable reason for amending timesheets was to correct break times or to account for staff who may have failed to clock in due to an error or system glitch.'

23. The claimant chose not to cross examine Mr Hayat.

24. A series of emails are included in the bundle covering the period 24 February 2022 to 1 July 2022 in which Mr Khattar and the accountant are raising queries with the claimant about time keeping issues in the stores managed by the claimant, mainly about clocking in and out correctly on the system.

25. Gurwinder Singh Padda, witness for the claimant, and his line manager during the relevant time, said in written evidence:

'Mr Ravinder Singh was authorised to make any kind of amendments to Hari [the time recording system] including time sheets and that responsibility was given to Ravinder Singh by me and Mr Anshul Khattar.'

26. He talks about problems with the Hari system, which was the reason for the need to make manual adjustments, as does the claimant. Rad Grigore, another witness of the claimant, who was a store manager for the respondent during November 2020 to April 2022, also refers to problems with the Hari system in his witness statement and states that he regularly had to manually record the staff's hours. Neither witness was cross examined on this point.

27. I find that the agenda for the meeting on 18 October 2021 that was presented in the bundle had not been altered, and that the matter of reporting edits to time sheets was discussed at that meeting. I find that the claimant had permission to edit time sheets where there were issues with the Hari system but, as with all staff that had authority to amend the sheets, the respondent's expectation was that edits would be raised with payroll and management.

Part payment in cash

28. The claimant claims that in March 2022 he was (a) asked to accept half of his wages in cash by Mr Khattar and (b) asked by Mr Khattar to tell other employees that they needed to reduce the hours shown on their wage slips and excess hours would be paid in cash. The claimant says he refused to do so, telling Mr Khattar that it would be illegal to do so. The claimant says that Mr Khattar asked him again to accept half of his own wages in cash in or around April/May 2022. Mr Singh Padda states in his witness statement that Mr Khattar asked him to ask the claimant to take half of his wages in cash, and Mr Singh Padda refused to do so as he had previously spoken to the claimant about paying other staff in this way and the claimant had refused to become involved. He maintained in oral evidence that he had been asked many times by Mr Khattar to pay staff in cash. Mr Khattar denies that this took place and set out in oral and written evidence an explanation as to how staff who worked as contractors were paid cash, and some staff worked both as an employee and a contractor. Mr Singh Padda also states that he was asked to take half of his wages in cash and did so as he did not feel that he was in a position to refuse. Mr Bromige asked in cross examination why he had not provided his payslips to evidence this. He said that he was not a professional (which I took to mean it had not occurred to him to do so) and could supply them tomorrow.

29. I find that the claimant was asked by Mr Khattar, on more than one occasion, to accept himself, and to tell others, that part payment of wages would be in cash, and that the claimant objected to this on the basis that it was illegal. The credibility of Mr Singh Padda's evidence was called into question when Mr Singh Padda did not give a truthful answer when first asked about some of the documentary evidence in the bundle. Mr Bromige says this undermines his evidence in general. It was concerning that Mr Singh Padda changed his answers about providing documents for the bundle during his evidence, and

he appeared to be concerned about being in trouble over disclosing the respondent's documents to the claimant for the purposes of this hearing. However, I did not find that this undermined the credibility of his evidence on other matters, and I found his answer about why he had not provided evidence to support the claim that he took half of his wages in cash to be credible.

30. In terms of the conversations between the claimant and Mr Khattar, to which there were no other witnesses, I find that the claimant's evidence throughout the hearing was credible. I note of course that the documentation he produced for his additional bundle was largely composed of screenshots, undated, and it was not clear where it had been sourced. In addition, there were redactions. Mr Bromige made the point several times that the claimant had been asked by the respondent's solicitor to provide original documents. I do not accept that this was a deliberate attempt to mislead the tribunal on any matters before it. On more than one occasion I asked the claimant where documentary evidence was in relation to a point he was making and said that if he had not received it from the respondent, he could have asked for it. He said that he did not know he could do that. From that I find that he did not also know that he could ask the respondent to provide the originals of some of the documents of which he had screen shots. The claimant is a litigant in person. While I have taken a cautious approach to the claimant's documentary evidence, and on occasion have discounted it, I do not think the problems with the documentary evidence call into questions the credibility of the claimant's written and oral evidence.

31. The telephone conversations or one to one meetings between the claimant and Mr Khattar on which the claimant bases his claim of having made protected disclosures, which Mr Khattar says did not take place, on the subjects of cash payments and the other matters set out below, have a common theme, of employment matters not being conducted lawfully. I find that commonality to be persuasive in terms of credibility. With some of the matters (for example cash payments and the pension issue with the 17 year old considered below) there is other witness or documentary evidence that such matters were raised by the claimant.

32. I did not find that Mr Khattar was a credible witness. His account of the investigation and steps take in relation to the disciplinary procedure was evasive and contradictory on occasion (see below).

<u>Pension deductions</u>

33. The claimant claims that in March 2022 he raised with the payroll team that one employee who was 17 years old was having pension deductions made from his wage but did not want to be in the pension scheme. The pension deductions were not refunded and the claimant contacted payroll again on 24 June 2022 to query this. He was initially told there would be no refund and then that it would be made the following month. The claimant said in evidence that there has still been no refund. The documents supporting this claim were two screen shots of messages or emails from the claimant to an unknown person dated 11 and 14 March 2022. There is then a WhatsApp exchange

dated 24 June 2022. The names of the sender and receiver are not shown though the conversation is clearly about the same pension issue and includes the following statement, which I accept is from the claimant:

'How can you submit to HMRC? He is 17 year old. He is not supposed to pay pension until he gives consent. Now pension company said he doesn't even have a record?'

34. The claimant says that he also discussed the matter with Mr Khattar on the telephone in June when Mr Khattar asked him why he needed to mention the law all the time and told him to drop the matter. There is no use of the word law in the documents relating to this issue. The claimant agreed that the comment set out above was as close as he got to mentioning the law in his conversation with the payroll team and Mr Bromige put it to him that this would not have resulted in a call from Mr Khattar in which he said to the claimant that he should stop mentioning the law. The claimant disagreed. Mr Khattar said in cross examination that this matter only came to his notice as part of the legal proceedings and was not a matter that would have been his concern.

35. I find on the basis of the claimant's written and oral evidence, and the documentary evidence, having taken into consideration that the parties involved are not fully identified in those documents, that the claimant did raise with the respondent that there was an issue over the deduction of pension from the wages of a 17 year old employee. I find that the reference to HMRC and having contacted the pension company, if conveyed to Mr Khattar by payroll, are such that they could have elicited a call asking the claimant to stop mentioning the law. I find that that conversation did take place for the reasons set out at paragraphs 30-32.

Holiday Pay

36. Under his contract the claimant is entitled to 28 days holiday per annum including bank holidays.

37. The claimant claims that he raised to Mr Khattar in April 2022 that the respondent was preventing staff from taking holiday and that this was illegal. This matter was not addressed in the witness statement of Mr Khattar or put to him in cross examination however there are documents in the bundle that the claimant relies on as evidence that he raised this matter with payroll. Most of those documents do not show the claimant's name or the name of the responder. One document is an email from Janani Guruprasad, Assistant Accountant, dated 30 March 2022, to the claimant and copied to Mr Khattar. It states:

'As you are aware that we can[t] process any holiday pay as on year end. I am afraid we can't do anything now for the employees having so many accruals left still.'

38. There is also an email from Rad Grigore to payroll asking why his holidays, and those of his colleagues, had been cancelled. He is raising that he was unable to book holidays before the financial year end, because of a problem with the Hari system. He does not say that he had believed that if holidays

were booked before the financial year end and could not be taken they would carry over. Mr Grigore said that he eventually accepted a three day carry over of the four he said he had outstanding for the year to 31 March 2022 and left the company over the way this matter had been dealt with. Mr Grigore refers to a message he sent to Mr Khattar about this matter at the same time as he emailed payroll. There is a copy of the message in the bundle. Neither Mr Khattar nor Mr Grigore are identified by name, but the message starts with the line 'Hello boss!' and recounts exactly those same matters as set out in the email to payroll. The response is *'I have no idea why payroll rejected it. I am going to the office tomorrow and will speak with them and Ravi and let u know'.* I find that this message is between Mr Grigore and Mr Khattar and was sent on or around 7 April 2020.

39. At the same time, the claimant was having problems with booking and taking his own holidays and raised this with Mr Khattar and payroll. It was confirmed by Janani Guruprasad on 5 April 2022 that the claimant would be able to carry over 20 days holiday.

40. I find that there were issues with staff taking holidays towards the end of the financial year 31 March 2022 and that the Hari system would not allow staff to book holidays. I find also that this resulted in staff having to ask for the holidays they had not been able to take to be carried forward. I find that the matter was raised with payroll (Janani Guruprasad) in March 2022. I do not find that there is evidence that the reason that the claimant could not book all 22 days of holiday outstanding from 2021 to 2022 was because of the Hari issue and I think this would be unlikely to be the case, where the matter only seems to have arisen towards the end of the financial year.

41. There is no evidence beyond the claimant's written and oral evidence that this matter was raised by the claimant with Mr Khattar though Mr Grigore states that he knew the claimant was trying to sort the matter out. For the reasons set out in paragraphs 30-32 I find that the conversation the claimant claims took place in April in which he stated that failing to allow employees to take holidays or carry them over was illegal, did take place.

<u>15-17 June 2022</u>

42. On 15 June 2022 Michael I'Anson was scheduled to start work at the Totton store. No-one was there when he arrived and it was later confirmed that no-one had been scheduled, by the store manager whose job it was to draw up the weekly rota, to open up and work from 11am to 1pm.

43. At 12:27 pm Mr I'Anson contacted Gurwinder Singh Padda and Abid Hussain using the Hari system. He said he had been waiting since 10:50 and the store was still closed. Mr Khattar sits in the same office as Mr Hussain and said in oral evidence that Mr Hussain had drawn his attention to the message when he received it.

44. The claimant said that he also received a message. No such message was shown in the bundle. Mr I'Anson refers in his statement dated 23 April 2023 to having sent more messages around 11:40. The claimant arrived at around

12:55pm and opened the store. Mr I'Anson clocked in on Hari at 12:56pm. The claimant, who had been working at the Eastleigh store since 11am clocked in at Totton at 1pm.

45. On 17 June 2022 the claimant edited Mr I'Anson's time card to show that he started at 11am. The effect of this was that he was paid for the hours of 11am to 1pm when he had been unbale to work as the store was closed. On 20 June 2022 the claimant edited his own time card to show that he had clocked out of Eastleigh on 15 June at 5pm. The card had previously shown that he clocked out at 12:10pm. It was agreed between the parties that this edit was of no financial gain to the claimant.

46. On 16 June 2022 at 11:59pm Mr Khattar sent the claimant an email as follows:

Who opened Totton yesterday and what time?

The claimant responded at 12:34pm on 17 June 2022 as follows:

It's me. 11am.

47. It is the claimant's case that he saw the message on the 17th, saw that it said yesterday, and so his response was in respect of 16 June 2022. He confirmed in oral evidence that he had opened the Totton store on 16 June 2022. This was not challenged by the respondent.

Investigation 21 June 2022 to 18 July 2022

48. On 21 June 2022 Mr Khattar tasked Farah Amir with investigating the incident of 15 June 2022. He further instructed Farah Amir not to speak to Gurwinder Singh Padda. Mr Khattar said in evidence that the reason for this was that Mr Singh Padda had not reported the matter as he should do, and he was concerned that he would try to cover his own errors in any evidence given in the investigation.

49. Ms Amir produced a one page report on 18 July 2022. As instructed, she did not interview Mr Singh Padda. She states that she interviewed Mr I'Anson by telephone but provided no evidence of that and there is no record of that conversation in the bundle, nor was there such a record in front of Mr Khattar. Mr Khattar said the statement was given by email and was included in the bundle. The statement from Mr I'Anson included in the bundle is dated 23 April 2023, eight months after the claimant's dismissal and more than likely requested in preparation for this hearing. In that statement he refers to Anshul Khattar asking him what happened a few weeks after the 15 June 2022. He makes no reference to having been asked for an account by Ms Amir in July 2022.

50. Ms Amir reports having spoken to Neeraj Saini, manager of the Totton store and Mr Saini saying he had not produced the schedule for the week. She reports he said scheduling was passed to the claimant. There is no statement

from Mr Saini, then or before this tribunal. The schedule has not been disclosed.

51. Ms Amir says in the report that *'I tried reaching Ravi last week a couple of times but he seems to be busy with store visits and couldn't come to the office.'* In her email accompanying the report she says '*I can't get hold of Ravi as he seems busy with some store visits.'* It is the claimant's position that he was never contacted by Ms Amir. Mr Khattar said in evidence, firstly that she did contact the claimant, then he said that he assumed that she tried to contact the claimant with all means possible, although she does not say how she did so in her report. I find that the claimant was not contacted by Ms Amir, nor was he alerted to the fact that she may have been trying to contact him.

Allegations of Working in excess of visa hours

52. The claimant claims that on 9 July 2022 Mr Khattar told him a new manager was to be appointed to the Totton store, one of the stores managed by the claimant, and that he should be paid half his hours in cash as he was on a Post Study Work(PSW) visa. The claimant states that he told Mr Khattar that this was illegal. The matter was not put to Mr Khattar in cross examination, and it is not addressed in his witness statement.

53. The claimant claims that on 11 July 2022 Mr Khattar called him and told him to dismiss the current manager of the Totton store as a new manager was to be appointed. The claimant claims that he asked Mr Khattar if it was his relative Mr A Singh and told Mr Khattar that as Mr Singh was on a PSV visa he could only work 20 hours a week. This was not put to Mr Khattar in cross examination, was not raised in his witness statement. Mr Singh denied that he was a relative of Mr Khattar.

54. For the reasons set out in paragraphs 30-32 I find that these conversations, did take place.

Performance

55. On 14 July 2022 Mr Khattar emailed the claimant referring to a conversation the previous week. He said that as the stores which the claimant managed were not performing as per his expectations and targets, he was asking Mr Singh Padda to step in and assist, and the claimant should focus only on the Eastleigh and Winchester stores (previously having been area manager of five stores).

56. In cross examination the claimant took Mr Khattar to documents in the claimant's additional bundle and made the point that he had received a bonus illustrating that he was performing well. The documents had no context, the claimant claimed that some were his bank statements, that was not clear from the documents, and I have therefore not taken this evidence into account. I note that in any event the documents were from June 2021 which is not relevant to performance in July 2022.

57. The claimant also referred to documents he had put in the main bundle which he said showed that his stores were not underperforming. Again, these

documents did not show the year they referred to or where they had been taken from and I have had little regard to these documents.

58. I find that there is no evidence that the claimant was underperforming in terms of the KPIs not being met in the stores he was managing but I also find that I do not have evidence on which to conclude that there was no problem.

Suspension and disciplinary hearing

59. On 25 July 2022 Mr Khattar emailed the claimant to tell him that he was suspended with immediate effect due to providing false information in that he said he opened the Totton store on 15 June 2022, and for editing the timesheet of Matthew I'Anson.

60. The respondent has a disciplinary policy. Under the heading of 'gross misconduct' there are examples of matters that would normally be regarded as gross misconduct which includes the following;

    - Fraud, forgery or other dishonesty, including fabrication of time sheets;

61. On 27 July 2022 Mr Khattar emailed the claimant saying that he had finished his investigation into the matter and before reaching a decision he would like to give the claimant the opportunity to present his response and thoughts. He invited the claimant to a meeting on 29 July at 2pm. The claimant responded on 28 July suggesting 1 August at 11 am. Also, in that email he states that he

    'will be bringing two of my work colleagues with me as well to take part in this investigation.'

62. No documents were sent by the respondent to the claimant before the meeting commenced. No other emails or letters were sent to the claimant explaining that the meeting may result in his dismissal. There is no clarification from the respondent to the claimant in response to his description of the meeting in his email of 28 July 2022 as an 'investigation'.

63. The claimant attended the meeting at 11 am on 1 August 2022 with two companions, Gurwinder Singh Padda and Balkar Singh. Mr Khattar was chairing the meeting and was not at the venue when the claimant arrived. The claimant messaged him at 11:20 and he arrived, with Mr Hussain, at around 11:30. In oral evidence Mr Khattar said that he had told the claimant before the meeting that it was a disciplinary meeting. He first said that he informed the claimant of this at 11am and the hearing started at 11.30. He then denied that he had said this and said that he had simply said he told him before the meeting. Later in evidence he said that he had told the claimant this over the phone on 29 July 2022 and in the same conversation he had told the claimant that he may be dismissed. The claimant denies this. In oral evidence the claimant said, when asked why he had not referred to his alleged protected disclosures at the disciplinary hearing, that it was because he had a good relationship with Mr Khattar and because he thought that the meeting on 1 August 2022 was just about clarifying what had happened on 15 June 2022.

Any evidence relating to the charges and investigation were given to the claimant at the meeting.

64. I find that the claimant attended the meeting on 1 August 2022 on the understanding that it was an investigation meeting, though the respondent had not told him it was an investigation meeting. I find that the claimant was unaware that the meeting may lead to his dismissal, and that he had no opportunity to consider the evidence on which the respondent was relying, before the meeting. He was not given a copy of the investigation report, only receiving that directly before this tribunal hearing. I do not accept that Mr Khattar called the claimant on 29 July 2022 as he claimed in oral evidence.

65. The claimant said in the meeting and to the tribunal that as an area manager it was not his job to check the staff schedules for each store, when it was put to him that it was his responsibility to ensure that there was cover. He said he did approve schedules but the work he carried out in approving them was to consider whether the staffing levels were such that any particular store was not over staffed and therefore spending more money on staff than it was supposed to. The respondent's position is that as an area manager the claimant was ultimately responsible for the schedules and it was his responsibility to ensure that opening hours were covered. Mr Singh Padda agreed with the claimant that as an area manager his review of the store schedules would only be for the purpose of checking the stores spend was no more than it should be. There was a job description for the role of area manager in the bundle. It contains the following:

> All roles within the team are multifunctional; if required you will be expected to cover all the responsibilities of the team members, delivery drivers, shift runners and store managers; your extra responsibilities include:
> …
> - Responsible for analysing and interpreting weekly sales, gross profit and operational costs figures. And providing a plan for the next week.

66. The words 'And providing a plan for next week.' do not seem to fit into that bullet point and look like they have been tacked on, however this was not raised in evidence with any of the witnesses and the claimant did not take issue with the document.

67. I accept that in reality the claimant was focussing on the costs figures for the stores and that this may have been common practice among busy area managers, however, I find that the job description is clear that he was responsible for ensuring that the stores were functioning properly and this would have involved ensuring that the staff rotas provide cover for opening hours.

68. Also in the meeting the claimant was challenged about why he had lied in response to Mr Khattar's email of 16 June 2022 asking who had opened the Totton store 'yesterday'. He said he saw the email on 17 June 2022 and

mistakenly thought it was referring to 16 June 2022. He confirmed that he had opened the Totton store on 16 June 2022.

69. After the meeting Mr Khattar asked Mr Singh Padda to stay behind. He asked him why the claimant had not apologised. Mr Singh Padda said that he told Mr Khattar that maybe the claimant did not think he had done anything wrong.

70. The claimant was dismissed after the meeting, with immediate effect, for gross misconduct. The claimant was found to have been dishonest in his account of who had opened the store on 15 June 2022, to have committed fraud in editing the time sheets and to have put the business at risk by not ensuring that there were staff scheduled to open the Totton store.

71. Mr Khattar said that he had not taken long to make his decision as the claimant had admitted what he was accused of. He said that he had taken 48 hours to consider whether dismissal was the appropriate punishment. In fact, the dismissal letter was sent to the claimant dismissing him on the same day as the hearing so this cannot be correct, and I find that he did not give any consideration as to whether a penalty short of dismissal was appropriate.

Appeal 7-10 August 2022

72. The claimant was given the opportunity to appeal in writing. He was also sent a copy of the hearing notes and asked to sign to confirm that the notes were accurate. He did so on 7 August 2022. In oral evidence the claimant said that he was signing to say he had received them. The form he was asked to sign is confusing in that it refers to signing to say that the notes are accurate in the body of the letter, but the actual signature block is a signature acknowledging receipt. The claimant now takes issue with the notes and says they are not a true record of the hearing. He did not raise any issue about the content of the notes at the time or before this hearing commenced. I find that the claimant had the opportunity to review the notes and confirm they were accurate, and he did so.

73. The claimant appealed his dismissal to Mr Hussain, the company director. Mr Hussain had attended the disciplinary hearing and took part in questioning the claimant and he refers to this in his witness statement. When asked why he had then been appointed appeal manager, he said that there was no one else of sufficient seniority to take on the role.

74. In his appeal letter the claimant raises, for the first time, a number of allegations against Mr Khattar, some of which he now relies on as being protected disclosures.

75. The respondent has a written disciplinary procedure which includes the following:

    - We will invite you to an appeal meeting to discuss your appeal. You can bring another team member with you to accompany you at the appeal meeting.

76. Mr Khattar said that lots of appeal meetings for other businesses had taken place on line or by email so they asked him by email, and if he had requested a hearing, they would have invited him to one. He said Papa John's HR had told him an appeal could take place online or by email. Mr Hussain said that the claimant had asked for companions at the disciplinary hearing so he could have asked for an appeal meeting too.

77. Mr Hussain said that he spoke to Mr Khattar, Mr Singh Padda and Ms Amir before reaching his decision on the appeal. He said he was told that the claimant had not raised a grievance and that neither Mr Khattar, Mr Singh Padda nor payroll were aware of the issues raised. He said that the charges had been proven and the claimant had not accepted that he did something wrong. Mr Khattar dismissed the appeal in a letter dated 10 August 2022.

Expenses

78. The claimant claims expenses relating to his company car of £60 and for shopping for the Winchester store in the sum of £21.95. There is a spreadsheet in the bundle recording the car spend of £60. The table does not show an amount of £21.95 and I note that the receipt included in the bundle is dated 5 August 2022, which is post dismissal. Of the amounts shown on the receipts for shopping only one (in the sum of £5.25) is shown on the spreadsheet. The claimant has provided no evidence that he submitted the receipts to the respondent in support of his claim for payment.

79. There is no clause in the contract relating to payment of expenses. The fact that the respondent has a spreadsheet on which it or the employees record their expenses is evidence that whether it was included in the written contract or not there was a practice that expenses incurred are re-imbursed. I find that it is likely that the respondent's practice is to pay expenses where receipts were submitted, and I find there is no evidence from which I can conclude that the receipts were submitted to the respondent. The claimant has not stated that they were.

Unpaid wages

80. The claimant claims that he is owed eight days wages for the suspension period which commenced on 25 July and ended on 1 August 2022. This is a period of eight calendar days. The respondent's position is that this amounts to six days wages as the claimant was contracted to work five days in seven.

81. I find that claimant is entitled to payment for six days for the period of suspension.

Law

Automatically unfair dismissal

82. Section 103A Employment Rights Act 1996 provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure as defined in section 43A ERA.

Protected disclosures ("whistleblowing")

83. The Employment Rights Act 1996 contains the following provisions:

> **43B Disclosures qualifying for protection.**
> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following-
> (a)that a criminal offence has been committed, is being committed or is likely to be committed,
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
> …
>
> **43C.— Disclosure to employer or other responsible person.**
> (1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure —
> (a) to his employer, …

84. In *Kilraine v Wandsworth London Borough Council [2018] EWCA Civ 1436* the court held that 'in order for a statement or disclosure to be a qualifying disclosure... it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in [s43B(1)(a-f)].

Unfair dismissal

85. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111.

86. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

87. Misconduct is a potentially fair reason for dismissal under section 98(2).

88. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case.

89. In misconduct dismissals, there is well-established guidance for tribunals on fairness within section 98(4) in the decisions in *Burchell 1978 IRLR 379* and

Post Office v Foley 2000 IRLR 827. The tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the tribunal would have handled the events or what decision it would have made, and the tribunal must not substitute its view for that of the reasonable employer (*Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23, and London Ambulance Service NHS Trust v Small 2009 IRLR 563*).

Unlawful deduction from wages

90. The Employment Rights Act 1996 contains the following provisions:

> **13 Right not to suffer unauthorised deductions.**
> (1)An employer shall not make a deduction from wages of a worker employed by him unless—
> (a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
> (b)the worker has previously signified in writing his agreement or consent to the making of the deduction.
>
> (2)In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—
> (a)in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
> (b)in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

Continuity of Employment

91. The Employment Rights Act 1996 contains the following provisions:

> **218.— Change of employer.**
> …
> (6) If an employee of an employer is taken into the employment of another employer who, at the time when the employee enters the second employer's employment, is an associated employer of the first employer—
> (a) the employee's period of employment at that time counts as a period of employment with the second employer, and
> (b) the change of employer does not break the continuity of the period of employment
>
> **231. Associated employers.**
> For the purposes of this Act any two employers shall be treated as associated if—
> (a) one is a company of which the other (directly or indirectly) has control, or
> (b) both are companies of which a third person (directly or indirectly) has control;

and *"associated employer"* shall be construed accordingly.

Submissions

92. The respondent's submissions were set out in writing. In addition, Mr Bromige said that, on the matter of the fairness of the dismissal, Mr Khattar had instigated an investigation, which showed that he had not predetermined the issue, the claimant would have been alive to the fact that the meeting on 1 August 2022 was a disciplinary hearing and suffered no prejudice in not being told of the potential outcomes of the meeting. The tribunal must not substitute its own decision and the decision the respondent took was a reasonable one that was open to it. The fact that the process was not gold standard does not mean it was unfair. In any event there is no standalone concept of procedural unfairness. Mr Bromige said that an appeal was not a means of ambushing an employer and the claimant could have raised with Mr Khattar that he believed the disciplinary process was a witch hunt or with Mr Hussain that he did not think Mr Hussain was a suitable chair. Mr Bromige said that if I was not with him then contributory faut was an important factor in this case. The claimant accepted his actions looked suspicious; he cannot maintain his claim that he was not responsible for the rota error. He had no permission to pay Mr l'Anson. The respondent's view was that the claimant had deliberately withheld information about what happened on 15 June and this matter could have had serious consequences for the business. Mr Bromige said there were inconsistencies in the claimant's evidence and documents had been tampered with and originals not disclosed. He noted that the allegations about protected disclosures in the claim went further than in the appeal letter to Mr Hussain, and also that disclosures about internal employee disputes do not attract statutory protection. He said that the claimant had not proven that he had continuity of employment with the respondent since 2019 and referred to the new starter forms completed in 2020.

93. The claimant said his disclosures were made in the public interest. They were about not paying staff for untaken holidays, paying wages in cash as well as unlawful pension deductions. In terms of the dismissal the respondent had not followed a fair process. Mr Khattar could not have considered his decision for forty eight hours when he sent the dismissal letter the same day as the disciplinary hearing. He noted that the respondent had maintained that it did not owe him for unpaid holiday and wages until the day before this hearing commenced. While his contract stated that holidays could not be carried forward there were emails in the bundle showing that the respondent had agreed to pay holidays by the end of the tax year. He was still underpaid by one day. The claimant said that he understood now that his documentary evidence was not presented in the way it should be in the tribunal, but he had limited knowledge about the process. He said that he had tried to protect the identities of some of the people named in the evidence he had disclosed. He said that Mr Singh Padda had been asked by the respondent to be a witness against the claimant and had refused. Mr Singh Padda has subsequently been dismissed. Before the respondents instructed a solicitor Mr Khattar was uncommunicative in relation to preparing the case. He said the bundle had been poorly prepared and he had to draw the respondent's attention to a number of errors. He was owed 11 days holiday for the last financial year

during which he worked for the respondent plus 22 carried over from the previous year.

Decision and Reasons

Protected Disclosures

94. All of the alleged disclosures made by the claimant are about compliance with legal obligations or possible fraud, in relation to wages, visa restrictions on working hours, and holidays. All of them were made to his employer.

95. Underhill LJ set out in *Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) 2018 ICR 731, CA* that when considering whether a disclosure was made in the public interest, the tribunal should be cautious about concluding that a disclosure in the context of a private workplace dispute was a qualifying disclosure. He went on to add that he could not say that it would never be the case that a disclosure about such a dispute would attract statutory protection. In considering the allegations of protected disclosure below I have given thought to whether the disclosures are of wider public interest. Such a determination does not rest on the number of people affected. The claimant's case is that he raised matters that were affecting his income and those of other employees where there was a deliberate attempt to ensure that less tax was paid or that visa restrictions were bypassed. I accept that raising matters about tax evasion or breach of the immigration rules is potentially in the public interest and that the claimant had a reasonable belief that they were matters of public interest.

96. Statutory whistleblowing protection previously contained a good faith requirement. That was removed by parliament in 2013. Motive is not the determinative factor when assessing reasonable belief and it was suggested by Underhill LJ in *Chesterton* that it is not necessary for the worker to be even partly motivated by the public interest, so long as he or she reasonably believes that the making of the disclosure serves the public interest.

97. Mr Bromige said that the fact that the claimant did not raise the issues of paying wages in cash, a matter which is also relevant to the PSW visa allegations, is evidence that he did not have a reasonable belief as to those matters and he has adduced no evidence. He did adduce evidence in the form of witness evidence from Mr Singh Padda, and I have accepted that evidence. He also notes in the appeal letter that he had about six or seven disagreements with Mr Khattar and states 'I will list a few of them here'. [160]. The failure of the claimant to list all of the disclosures he relied upon in this case in his appeal letter does not, in my view, show that he did not hold a reasonable belief that the information disclosed was in the public interest.

Alleged Protected Disclosures a, b and e.

98. These three disclosures concern the part payment of wages (both of the claimant and other employees) in cash. The claimant says he was asked to accept part of his wages in cash and to tell others they would be part paid in cash. He says he refused to do so, telling Mr Khattar that it would be illegal or tax evasion.

99. I have found that all of these conversations took place, and whether the claimant used the words illegal or tax evasion, he raised matters that Mr Khattar will have understood to be matters about possible illegality. While the reason for the claimant raising the matters may have been to tell the employer that he (the claimant) was not prepared to be party to these processes, or objected to them, I am satisfied that he held the reasonable belief that the disclosures were in the public interest.

100. These disclosures were qualifying disclosure for the purposes of s43B Employment Rights Act 1996 in that they tended to show that a criminal offence had or might be committed or that there was a failure to comply with a legal obligation.

Alleged Protected Disclosures c

101. This is a disclosure on or around March or April 2022 to the respondent's payroll department about the pension enrolment of a 17-year-old employee and stating that he should not have been enrolled in the pension because he was under 18.

102. The evidence relied upon is two queries to payroll about the deductions. I do not find that these queries constitute a disclosure for the purposes of s43. They are merely queries. Furthermore, I agree with Mr Bromige, that this is an internal employment work place matter and not one of public interest.

103. I conclude that this allegation does not amount to a qualifying disclosure for the purposes of s43B Employment Rights Act 1996.

Alleged Protected Disclosure f.

104. This a further disclosure on the matter raised in disclosure c. An oral disclosure to Mr Khattar and the payroll team in June 2022 that the 17 year old employee had not received a refund of his pension contributions.

105. I find that this second disclosure to payroll and the conversation with Mr Khattar that resulted from it was a qualifying disclosure, as the claimant is now raising the additional issues of pensions contributions having been deducted and not then paid into a pension, and challenging claims that actions have been carried out incorrectly in relation to HMRC.

106. I did not find that the issues raised by Mr Bromige about the claimant not using the word law in his exchanges with payroll was determinative and have found that Mr Khattar did ask the claimant in a conversation in June why he kept mentioning the law.

107. I find that this disclosure was a qualifying disclosure for the purposes of s43B Employment Rights Act 1996 in that it tended to show that a criminal offence had or might be committed or that there was a failure to comply with a legal obligation.

Alleged Protected Disclosure d.

108. An oral disclosure on or around April 2022 to Mr Khattar stating that it was illegal not to be allowed to take holiday and that the employees were entitled to take holiday, but the system had deliberately prevented them doing so.

109. I have found that that this conversation took place. I find that this is not a qualifying disclosure. The matter raised is about a system failure for holiday bookings and whether holidays can be carried over, which, although I accept that such a matter can be an allegation about a failure of a legal obligation, and of public interest, was in these circumstances a private workplace dispute rather than a matter of public interest. A systems failure was raised and the respondent's response to that failure was criticised. Although not relevant at the time the disclosure was made, this criticism led to the claimant being allowed to carry over holiday, and Mr Grigore being paid for three of the four days holiday he said he was entitled to.

110. I conclude that this allegation does not amount to a qualifying disclosure for the purposes of s43B Employment Rights Act 1996.

Alleged Protected Disclosures g and h

111. Both of these disclosures are about the terms of use of a PSW visa, the first being an oral disclosure to Mr Khattar on 9 July 2022 where the claimant refused to adjust the hours for the store manager to ensure that he received half his wages in cash to comply with PSW visa requirements, because it was illegal. The second was an oral disclosure on 11 July 2022 that a particular employee was working above the 20 hours per week permitted by his visa which was illegal. I am satisfied that the claimant had a reasonable belief that the information disclosed was a matter of interest to the public.

112. I have found that these conversations took place. These disclosures were qualifying disclosure for the purposes of s43B Employment Rights Act 1996 in that they tended to show that a criminal offence had or might be committed or that there was a failure to comply with a legal obligation.

Dismissal

113. It is the claimant's case that he was dismissed because of the disclosures he made. The respondent states that he was dismissed for gross misconduct. The actions that the claimant took between 15 June 2022 and 20 June 2022 following the late opening of the Totton store, could, under the respondent's policies constitute gross misconduct. The claimant had permission to edit time sheets but had been instructed to notify edits to payroll and management. He failed to do so. He did not have permission to authorise payments to staff members for hours they had not worked. The respondent believed that he had lied about his whereabouts on the morning of 15 June 2022.

114. Following the guidelines in *Burchell,* I find that the respondent had a genuine belief in the claimant's guilt of the offences he was charged with, but that belief was not to based on reasonable grounds formed on the findings of a reasonable investigation. The investigation was not reasonable.

115. There are many ways in which the investigation was poorly conducted. Mr Bromige made lengthy submissions on why this should not lead to a conclusion that the investigation was not reasonable. He referred to the size and resources of the respondent and questioned whether such failures in process as had been raised in the hearing really resulted in any disadvantage to the claimant. While some of the failures did not disadvantage the claimant, I do not agree that none of them did, and there were so many examples of poor practice that some had a follow on effect.

116. Mr Bromige suggested that the fact that the claimant had not been interviewed by Ms Amir did not materially affect the evidence that was before Mr Khattar and the claimant at the disciplinary hearing, as her job would have been to check the facts as to when the store opened, who opened it and whether time cards were amended. However, she states in her report, though without producing any record of interview to support this, that the store manager claimed to have no responsibility for organising the staff rota that week. Had she interviewed the claimant this discrepancy would have become apparent and further investigation may have been warranted. This was clearly something of importance to the respondent as it is referred to in the dismissal letter.

117. I do not accept that the claimant was not disadvantaged by not seeing the investigation report or evidence relied upon by the respondent before the disciplinary hearing and having time to consider it. Mr Bromige said he knew what the charges were from the suspension email of 25 July 2022. I do not accept that that is correct. Had he seen the report or evidence he would have been on notice that there was an issue about who was responsible for the rota. He would not have known this from the email of 25 July as it does not say that, but it is one of the reasons given for his dismissal in the dismissal letter. It may also have given the claimant more of an understanding of the seriousness of this matter. I found his oral evidence to be convincing that he had not raised the disclosure matters at the hearing because he had not understood the true purpose and seriousness of the meeting on 1 August 2022. He did not understand that, because he was not told that it was a disciplinary hearing, being held under the respondent's disciplinary process, and he was not told that one of the outcomes of the meeting might be his dismissal. These are generally accepted to be basic tenets of a fair disciplinary process and are steps recommended under the ACAS code. The respondent employs 100 staff. It is not so small that disciplinary issues will never have arisen previously, and although limited it did have some recourse to HR advice, as is evidenced by it consulting Papa John's HR on the appeal process. Furthermore, it could have sought assistance from an HR service supplier if it was in doubt. Finally, I have found that Mr Khattar failed to give consideration as to whether a penalty short of dismissal was appropriate. The claimant's actions did bring him within the respondent's definition of gross misconduct within its disciplinary policy, but the behaviour was not of such a serious nature (for example criminal in nature or a physical assault) that it would be reasonable to dispense with the consideration of an alternative penalty.

118. Moving on to the appeal process, there are two significant procedural defects. The first is that Mr Hussain, who took part in the disciplinary hearing including by questioning the claimant, was appointed appeal manager. The respondent said that there was no other sufficiently senior member of staff to conduct the hearing. If that was so, and I accept it was, then that was the situation at the time the disciplinary process was instigated, and no explanation was given as to why Mr Hussain did not distance himself from the process when an appeal may be necessary and he would need to be the appeal manager. It is clearly not desirable that a person who hears an appeal was involved in the decision making process of the decision being appealed. Sometimes that may be unavoidable. Here it was avoidable.

119. The second issue was that the appeal, contrary to the respondent's policy, was conducted in writing. The respondent's policy is that the hearing is in person and the claimant would have had the opportunity to bring a companion. Mr Bromige said the claimant had a right of appeal and did not request an in person appeal. Mr Hussain said he spoke to Mr Khattar about the allegations made against him and felt they had no substance.

120. It may be that if the appeal was in person the same conclusion would have been reached by Mr Hussain, or it may be that on hearing the claimant in person on his arguments as to why the decision was tainted by Mr Khattar's views on matters the claimant had raised with him about holidays, cash payments and pension payments, he decided to undertake further investigation than he did e.g. by looking at documents. Such an investigation may have been more likely again if the appeal manager was someone who had not taken part in the disciplinary hearing. We cannot know and I do not find that it is clear that the claimant having only a right of appeal by email was a matter which did not affect the outcome of the process.

121. I do not find the argument put forward by the respondent that the claimant did not request an in person appeal hearing, to be persuasive. The employer is in a position of authority, it has greater resources, and to put the onus onto an employee who has just been dismissed for ensuring the employer carries out a fair process is unacceptable.

122. I have also given consideration as to whether the fair reason put forward for dismissal by the respondent, namely conduct, was the reason for dismissal. It is the claimant's case that the reason was his disclosures. I have found that he did make disclosures that are qualifying disclosures for the purposes of s43B Employment Rights Act 1996.

123. *In Associated Society of Locomotive Engineers and Firemen v Brady 2006 IRLR 576, EAT* the EAT held that just because there is misconduct which could justify a dismissal, it does not mean that the tribunal must find that this is the reason for the dismissal. For example, there may be evidence that in similar circumstances an employer would not have dismissed others. Then, the reason for the dismissal would not be the misconduct at all.

124. In this case I was presented with no evidence that the approach taken by the respondent in disciplining and dismissing him was different to how it might treat

other employees, but I have still considered whether the reason was other than conduct, whether that be because it was a result of the disclosures or some third reason.

125. The first five disclosures relied upon took place in March and April 2022. There was no evidence before me of a problem in the relationship between the claimant and Mr Khattar as a result of those disclosures. The claimant continued to work as normal. The gross misconduct incidents took place from 15 to 20 June 2022, and the respondent asked Ms Amir to commence an investigation into the incident on 21 June 2022. It seems that this was prompted by the claimant's amendments to the time sheets so that Mr I'Anson was paid for working 11am to 1pm on 15 June 2022 and Mr Khattar's belief that the claimant had lied about who opened the store on 15 June 2022. The remaining disclosure allegations are on dates after the investigation began. The respondent's witnesses said they had limited experience of disciplinary matters, which I accept, and which indicates that this was an unusual matter that they found to be of sufficient concern that they needed to implement a disciplinary process. Furthermore, Mr Singh Padda gave evidence that after the disciplinary meeting Mr Khattar asked him to stay back for the sole purpose of asking his view on why the claimant had not apologised. This again indicates the seriousness with which the respondent viewed the claimant's actions and that it was concerned at his lack of remorse.

126. I find that the reason for the claimant's dismissal was conduct. I find that he was not dismissed because he had made protected disclosures and the claim for automatically unfair dismissal is dismissed.

127. I find that the process that led to the dismissal was significantly flawed to the extent that those flaws may have affected the outcome and I find that the claimant was unfairly dismissed.

Continuity of Service

128. On the evidence before me at I find that the two companies PJ Eastleigh and PJ Winchester (now Hamble Foods Limited) are associated companies as defined at s231 of the Employment Rights Act 1996 and therefore find that, in accordance with s 218(6) Employment Right's Act the claimant's employment with the respondent commenced on 27 March 2019.

Reductions to Compensation for Unfair Dismissal

129. The amount of any compensation awarded must be that which is "just and equitable" based on the loss arising out of the unfair dismissal (*section 123(1), ERA 1996*). In *Polkey v AE Dayton Services Ltd [1987] IRLR 503*, the House of Lords stated that the compensatory award may be reduced or limited to reflect the chance that the claimant would have been dismissed in any event and that the employer's procedural errors accordingly made no difference to the outcome.

130. While the respondent had a clear belief in the claimant's guilt and may have dismissed him after a fair process, the number of process failures is such that I cannot conclude that dismissal would have been the outcome. The claimant did not have time to prepare for the hearing as he was not aware of the

contents of the investigation report, and did not know that he was facing possible dismissal. He may, for instance, have made mitigatory submissions about personal circumstances. Had he understood the seriousness with which the allegations were viewed by the respondent then he may have expressed remorse or offered an apology. Had the appeal hearing been chaired by someone independent of the disciplinary hearing, other investigations into the appeal points may have been carried out and had the claimant had the opportunity to put his case in person at an appeal hearing, then again the outcome may have been different. I accept of course that the claimant did carry out acts that the respondent was entitled to view as gross misconduct which is a matter that must also form part of this consideration.

131. Despite the claimant's admission that he edited the time sheets and had not checked the rota, I find that the disciplinary process was so flawed that although dismissal after a fair process was a possible outcome, I cannot say with certainty that it was the most likely outcome. My assessment is that there should be a 25% reduction in the compensatory award.

132. I must also consider whether there should be a reduction to the basic and compensatory awards due to contributory fault, in accordance with s122(2) and s123(6) Employment Rights Act 1996. Where any such deduction is made this is applied after any deduction made under the Polkey principle.

133. In assessing any reduction for contributory fault, a tribunal must consider in isolation whether the claimant's conduct was blameworthy and not be influenced by the respondent's conduct. In *Steen v ASP Packaging Ltd UKEAT/23/13*, Langstaff P said: 'The question is not what the employer did. The focus is upon what the employee did. It is not upon the employer's assessment of how wrongful that act was; the answer depends on what the employee actually did or failed to do, which is a matter of fact for the Employment Tribunal to establish and which, once established, it is for the Employment Tribunal to evaluate. The Tribunal is not constrained in the least when doing so by the employer's view of wrongfulness of the conduct. It is the Tribunal's view alone which matters.'

134. I have found that it was within the claimant's job description that he have overall responsibility for the rotas of the stores which he was managing. No cover was scheduled for the Totton store for 11am until 1pm on 15 June 2022. I have found that the claimant was told that timesheet edits should be reported to pay roll and management. The edits carried out after the 15 June were not so reported, and one of them resulted in payment to an employee for hours he had not worked. The issue here was not so much that the payment would not have been made to the employee if the matter had been raised with management but that the claimant did not ask, and simply made the amendment which resulted in the payment. On the matter of lying about where he was on 15 June 2022 at 11 am, I do not agree with the respondent that the claimant was lying, although I accept that it was entitled to conclude that he was. I found the claimant's evidence that he thought the email, sent at 11:59pm on 16 June 2022 and read by him on 17 June 2022 was referring to 16 June 2022 to be persuasive.

135. Of the allegations against the claimant (not checking a rota, editing a time sheet to pay someone for work when he had tried to work but could not through no faut of his own, and lying) lying is the most serious of these allegations, and I do not find that he did.

136. I conclude that the claimant's conduct before the dismissal was such that it is just and equitable to reduce the basic award and that his conduct was blameworthy and culpable (*Nelson v BBC (No.2) [1979] IRLR 346 (CA)* such that it contributed to his dismissal.

137. Having reached that conclusion I reduce any basic and compensatory awards to the claimant by 50%.

Bonus

138. The claimant had no contractual entitlement to a bonus. The email of 30 September 2021 refers to an annual retention bonus. The claimant was not retained until 30 September 2022, or 10 January 2023 (the anniversary of the first payment). The email does not set out that on leaving the payment would be pro-rated.

139. The claimant's claim for payment of a bonus of £2000 is dismissed.

Expenses

140. There is no clause in the claimant's contract entitling him to payment of expenses. The respondent clearly did, as evidenced by an expenses spreadsheet in the bundle, have a process for claiming expenses, and Mr Khattar's evidence was that receipts were required. The receipts were in the bundle but the claimant did not say that he had submitted them to the respondent at the relevant time.

141. The claimant's claim for unpaid expenses in the sum of £81.95 is dismissed.

Unpaid wages

Suspension period

142. The claimant's wage was £40,000 per annum. There are 260 working days in a year. Dividing £40,000 by 260 gives a daily rate of pay of £153.84. This is the figure used by the respondent in its calculations, and the daily rate figure was not disputed by the claimant.

143. The claimant claims that he was underpaid during the period of his suspension. Suspension began on 25 July 2022 and the claimant was dismissed on 1 August 2022. 1 August is the date given by the claimant for his dismissal in the ET1. At the hearing he said he was notified on 2 August 2022. No evidence of this was supplied and I have taken 1 August 2022 as the final day of his employment. The claimant says he should have been paid for 8 days. I agree with the respondent that where the claimant's contract was for a five day week, pay due for an eight day period would be for six of these days. At a day rate of £153.84 the total is £923.04.

Holiday pay

144. The claimant has no contractual right to carry over holiday. Statute does not provide for this either except in some specific circumstances that do not apply here. The claimant says he should have 22 days carried over from the financial year 2021 to 2022. There is evidence in the bundle that the respondent agreed to a carry over of 20 days for 2021/2022 and therefore he is entitled to payment for those 20 days where not taken before his dismissal.

145. At the time of his dismissal on 1 August 2022 the claimant had taken 11.66 days of holiday in the 2022/23 holiday year as illustrated in his pay slip for May 2022. He received holiday pay of £1794.87. If this figure is divided by the daily rate of £153.84, the number of days holiday taken comes out at 11.66. He had worked for four months of the 2022/2023 so would have been entitled to 9.33 days (which the respondent has rounded up to 10).

146. Subtracting the 11.66 days taken from the total of 30 (20 days 20/21 and 10 days 22/23) gives 18.34. The total amount of holiday pay due at dismissal was £2821.42.

147. In August 2022 the claimant was paid holiday pay of £1435.83. He should have been paid £2821.42 and in addition, pay for the suspension period of £923.04. He is therefore owed £2308.63 in unpaid wages and accrued holiday pay.

148. Mr Bromige said that as the respondent was acknowledging this amount (albeit his figures differ from mine by around £50) and consent to pay it , it should be recorded as an agreement rather than an adverse judgment. The claimant noted that the respondent could have agreed to and paid the money at any time since his dismissal but was only now admitting there had been an underpayment. I agree. The claimant's claim of unpaid wages is upheld in the sum of £2308.63.

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Employment Judge Anderson

Date: 19 December 2023

Sent to the parties on: 18 January 2024

For the Tribunal Office