EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr B Kristensen	and	Portman Healthcare Limited

Heard at London Central Employment:
Date: 19 – 25 July and 7 – 8 August 2024

Before: Employment Judge Nash
Members: Mr J Carroll
` Ms T Shaah

For the Claimant: In person
For the Respondents: Ms Mellor of Counsel and Mr Wilson, Solicitor

JUDGMENT having been sent to the parties and written reasons having been requested by the claimant in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

History

1. Following ACAS early conciliation from 29 October to 1 November 2021 the Claimant presented his claim form on 23 December 2021.

2. An Employment Tribunal determined that the putative protected disclosure relied upon did not amount to a protected disclosure. The claimant successfully appealed this decision to the Employment Appeal Tribunal which settled the issues as to whether or not the Claimant had made a protected disclosure.

3. At a case management hearing on 21 November 2023 the Tribunal set the agreed list of issues which was agreed to be consistent with the EAT judgment as to the outstanding issues.

This Hearing and Preliminary Issues

4. At this hearing the Tribunal had sight of a bundle to 2203 pages plus a twelve-page supplementary bundle. All references are to these bundles unless otherwise stated.

5. Very considerable difficulties and delays were caused by the bundles. Firstly, the Tribunal was not provided with an index and the index later provided was not accurate. There was an inconsistency in page numbering the between hard and soft bundles. Further, the bundle was compiled in breach of the Tribunal order, notably it was not in chronological order which, as the witness statement page references were incorrect and the bundle index was incorrect, added materially to the length and cost of the hearing.

6. The Claimant requested disclosure of two contractual documents during the hearing. The Tribunal ordered disclosure, and the documents were added to the bundle. The Respondent informed the hearing that in complying with its ongoing duty of disclosure it had located a further contract which was added to the bundle by consent. The Respondent disclosed this on the second day, so the Claimant was able to cross examine in this regard.

7. At one point due to significant issues with technology the Tribunal was required to briefly attend Respondent counsel in a neighbouring room in the absence of the claimant. This was because HMCTS was not able to provide any clerking support. The Tribunal made logistical arrangements for how the hearing might proceed and the claimant was informed of what had occurred and raised no concerns.

8. The Claimant gave evidence on his own behalf. His witness statement did not go to most of the issues. Therefore, at the Tribunals invitation he swore to his witness statement, his claim form and his further and better particulars and he also relied on his witness statement from the preliminary hearing at page 2193. Further, the Tribunal with the parties' agreement examined the Claimant in chief on a small number of issues, including that the Claimant accepted that he had recorded the suspension meeting on 16 August 2021.

9. All Respondent witnesses swore to their witness statements as follows:

Ms K Ferguson, Practice Manager and Claimant Line Manager
Ms L Oates, Investigating Officer and Head of Operations England and Wales
Ms R Stevens, HR People Business Partner South
Mr A Patterson, at the material time Head of People Operation and the dismissing officer
Mr O James, the Chief Operating Officer who heard the appeal

10. Further considerable delays were caused by the Respondent witness statements originally not being provided in an accessible format. When they were made available, the witness references were not paginated correctly. The Tribunal explained that it would not necessarily consider any document which was not accurately referenced to the witness statement unless it was specifically taken to it.

11. The listing proved short for several reasons in addition to the poor preparedness of the parties. Although the hearing was listed for six days, it was listed as floating. It was only possible to source a three-person Employment Tribunal for five days. Fortunately, the Tribunal was able to arrange to sit for a further two days, two weeks later. A considerable amount of the morning of the first day was accordingly lost while the Tribunal was reallocated from another hearing. Some of the second afternoon was lost due to an incident involving the Tribunal which was not related to the case or parties or the hearing. All the morning of the fourth day was lost due to Respondent Counsel that morning testing positive for Covid following the Tribunal's invitation. It then proved extremely difficult to arrange for an isolated hearing.

11. The Tribunal invited the parties to attend on the afternoon of the sixth day part heard, the Claimant in the building and the Respondent remotely. However, despite having pre-tested HMCTS technology in the morning, this failed to function later that day. Despite the best efforts of the Tribunal, the staff and the patience of the parties this could not be resolved. After discussions with the parties, it was agreed that the hybrid set up was not going to work, particularly in light of the time it had taken to establish the situation. It was therefore agreed that judgment would be handed down in person on the morning of the seventh day.

12. The Tribunal was also informed that the morning of the second day had not been recorded due to a HMCTS technical error.

Claims

13. There were four claims before the Tribunal

1. unfair dismissal, so-called ordinary unfair dismissal s.98 Employment Rights Act 1996.

2. unfair dismissal in respect of protected disclosures s.103(a) Employment Rights Act 1996

3. wrongful dismissal - notice pay

4. detriment in respect of a protected disclosure s.47(b) Employment Rights Act 1996

The Issues

14. The issues were as set out at the 21.11.23 case management hearing, with clarifications, as follows; -

1. Time limits
1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 22 September 2021 may not

have been brought in time.
1.2 Were the whistleblowing detriment claims made within the time limit in sections 48 and 111 of the Employment Rights Act 1996? The Tribunal will decide:
1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the acts complained of?
1.2.2 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?
1.2.3 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
1.2.4 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. Automatic unfair dismissal
2.1 Was the reason or principal reason for dismissal that the claimant made protected disclosures?

3. Unfair dismissal
3.1 If the reason was not that the claimant made protected disclosures, what was the reason or principal reason for dismissal? The respondent says the reason was Conduct as set out in the dismissal letter. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.
3.2 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:
3.2.1 there were reasonable grounds for that belief;
3.2.2 at the time the belief was formed the respondent had carried out a reasonable investigation;
3.2.3 the respondent otherwise acted in a procedurally fair manner;
3.2.4 dismissal was within the range of reasonable responses.

4. Remedy for unfair dismissal
4.1 Does the claimant wish to be reinstated to their previous employment?
4.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?
4.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
4.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.
4.5 What should the terms of the re-engagement order be?
4.6 If there is a compensatory award, how much should it be? The Tribunal will decide:
4.6.1 What financial losses has the dismissal caused the claimant?
4.6.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
4.6.3 If not, for what period of loss should the claimant be compensated?

4.6.4 Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?
4.6.5 If so, should the claimant's compensation be reduced? By how much?
4.6.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
4.6.7 Did the respondent or the claimant unreasonably fail to comply with it?
4.6.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
4.6.9 If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?
4.6.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
4.6.11 Does the statutory cap of fifty-two weeks' pay apply?
4.7 What basic award is payable to the claimant, if any?
4.8 Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

5. Wrongful dismissal / Notice pay
5.1 What was the claimant's notice period?
5.2 Was the claimant paid for that notice period?
5.3 If not, was the claimant guilty of gross misconduct? / did the claimant do something so serious that the respondent was entitled to dismiss without notice? The respondent relies on the reasons in the dismissal letter. Following the EAT judgment, the respondent no longer relies on the bad faith allegation.

6. Public interest disclosure
6.1 The claimant had a genuine belief that a crime had been committed by way of a forged copy of his signature being put on a contract of employment dated 21 April 2016 (EAT Judgment paragraph 30);
6.2 The claimant communicated this belief to his employer on 16 August 2021 in the 2020 presence of the police and his employer; this was a disclosure of information (EAT paragraphs 28-30).
6.3 Did the claimant have a genuine belief that this disclosure was in the public intertest. (The claimant argues that paragraph 12 of the EAT judgment supports that he did have this genuine belief).
6.4 Was this belief a reasonable belief?
6.5 If so, it was a protected disclosure.

7. Detriment (Employment Rights Act 1996 section 48)
7.1 Did the respondent do the following things:
7.1.1 On 16 August 2021 access to his personnel file was impeded
7.1.2 16 August 2021 Ms Ferguson was rude and acted improperly towards the claimant
7.1.3 The claimant was suspended from work
7.1.4 The disciplinary investigation
7.1.5 The claimant was as side-lined at work in that he was not allowed to attend CPR training

7.1.6 The claimant had patients removed from his books
7.2 By doing so, did it subject the claimant to detriment?
7.3 If so, was it done on the ground that they made a protected disclosure?

8. Remedy for Protected Disclosure Detriment
8.1 What financial losses has the detrimental treatment caused the claimant?
8.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
8.3 If not, for what period of loss should the claimant be compensated?
8.4 What injury to feelings has the detrimental treatment caused the claimant and how much compensation should be awarded for that?
8.5 Has the detrimental treatment caused the claimant personal injury and how much compensation should be awarded for that?
8.6 Is it just and equitable to award the claimant other compensation?
8.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
8.8 Did the respondent or the claimant unreasonably fail to comply with it?
8.9 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
8.10 Did the claimant cause or contribute to the detrimental treatment by their own actions and if so would it be just and equitable to reduce the claimant's compensation? By what proportion?
8.11 Was the protected disclosure made in good faith?
8.12 If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?

<u>The Facts</u>

15. The Respondent is a dental practice. The Claimant started work in 2008 for the then owner a Dr Ward as a Dental Hygienist in the practice at 90 Harley Street. He signed a written employment contract in 2008, at page 2129. He was employed two days a week on a fixed salary. At some stage in about 2012/2013 the owner Dr Ward sold the practice to his three partners. The claimant's contract of employment did not change.

16. On 27 November 2013 the Claimant increased his hours from two days to three days a week, nothing was recorded in writing but there was no dispute that this was an effective contractual variation.

17. When Dr Ward had sold the business to the new owners the Claimant said that he had started making covert recordings. In fact, he later stated that he started making recordings in about 2015. The reason he gave was he felt that the situation was "toxic", and it was only a matter of time before he felt that he would find himself in trouble, so he wanted to be prepared. He was particularly concerned about one of the new owners a Dr Invest. He also felt that the previous practice management was disliked and there was a high level of turnover of staff. The new owners made further attempts to agree contractual variations with the Claimant including a zero-hour contract all of which he refused. They then looked to sell the business.

18. In 2016 the owners again asked the Claimant to sign a new contract - which he refused. The Claimant denied that he ever signed this contract and contended that a later signed version - on which the Respondent sought to rely – was a forgery. At the time of the 2016 contractual negotiations the Claimant went back to his employers with a heavily amended version of the draft contract. He deleted several clauses, for instance in respect of restrictive covenants, but he did not delete a clause in respect of data protection. The Claimant agreed that whilst this was never incorporated into his contract, he had no quarrel with the data protection clause.

19. In contrast, the Respondent's case was the Claimant had signed the contractual variation on 21 April 2016, because this is what it had found when it later bought the business.

20. The Tribunal saw an email dated 28 July 2016 between the then owners (not copied to the claimant) which said in effect that the employer should not worry about the Claimant not having signed the contract. This email was consistent with the Claimant's case that he had never signed the contract on 21 April 2016. According to this contemporary email, the owners seemed to think that they could hold the claimant to the new contract simply because of his carrying on working.

21. Later the business was sold to the Respondent and on 16 June 2017 the Respondent bought the Claimant's employer business. The tribunal understood this to be a TUPE transfer, and the Claimant transferred under TUPE to the Respondent's employment. In any event, there was no dispute that the claimant became a respondent employee on the same terms as with his previous employer and retained his continuity of employment. The Claimant says he told two members of the Respondent's staff that he had not signed the disputed contract in 2016.

22. The Claimant continued to record conversations.

23. In 2020 the country went into Covid lockdown. Dental practices across the country started to reopen in later 2020 following lockdown and the Claimant was told by the Respondent to phone his patients to encourage them back in. The Claimant was happy at first to do this but as time went on, he felt that this became inappropriate, and he was being asked to pressurise patients to come in.

24. As the Respondent opened up after Covid the Claimant suffered from low utilisation i.e. he was not booking enough appointments, so the Respondent was seeking to have him ring round his clients. His utilisation, that is the number of appointments he had versus the amount of downtime according to the Respondent remained unsatisfactory. The Claimant said that one of the reasons was that the Respondent had taken on a self-employed hygienist. She had worked during lockdown and had picked up many patients. Also, she could take direct access patients, unlike the Claimant. Therefore, the Respondent was directing work to her instead of him. Further, the Respondent was, as it accepted, making more money on an hourly basis from the contractor rather than from the claimant as an employee.

25. On 22 February 2021 – during the third national lockdown - Ms Ferguson the Deputy Manager had a conversation with the Claimant. She referred to a report on the Claimant's utilisation since 2019 (in the bundle). She stated that the Claimant's utilisation was only about 39% which was not good. The Tribunal did not accept the evidence of another witness who speculated that when Ms Ferguson said this, she was referring to the Claimant being *not* utilised as 39%. Ms Ferguson herself did not make this suggestion. However, when Ms Ferguson was taken to the agreed utilisation data in the bundle, she accepted that in fact the Claimant's utilisation since 2019 was 67.2% and she was unable to explain her error. Ms Ferguson asked the Claimant if he wanted to go down from three days to one day a week and he refused.

26. The Claimant continued to make recordings including one of Ms Oates on the stairs, Ms Ferguson in another meeting and at a team meeting and at a goodbye party and of Dr Invest.

27. Ms Ferguson had another conversation with the Claimant on 25 March 2021 where she again asked him to go down to one day a week. The Claimant refused. Ms Ferguson and Ms Oates were working on this together and they were concerned about the Claimant's low utilisation.

28. On 6 April 2021 Ms Ferguson informed the Claimant there was a lot of need for dental hygienists and therefore there was plenty of work for him to do. When it was put to her that this was surprising after her having said two weeks earlier that there was not enough work for the Claimant, she said there had been a significant change over that two-week period. The Claimant replied to Ms Ferguson a few days later saying he was pleased that there was a demand for his services.

29. The Respondent - Ms Ferguson and Ms Oates - had a protected conversation with the Claimant, on 28 May 2021. The Claimant covertly recorded this meeting. They said that the Claimant's utilisation was low, and he had failed to ring around patients to build up work. Ms Oates said that the contractor's utilisation was better than the Claimant. However, the agreed utilisation data in fact showed the opposite, the contractor's utilisation was only at 62%.

30. Ms Oates and Ms Ferguson said that they would need to consider the Claimant's conduct in line with their disciplinary procedure and they had grave concern for the Claimant's conduct, utilisation and commitment to the business. In the view of the tribunal this indicated that the respondent was losing faith in the claimant.

31. The Respondent made the Claimant an offer and gave him ten days to consider. The Claimant then raised the possibility of his going down to one day a week. However, this was no more than a suggestion and the Claimant insisted that the respondent would have to expressly offer him this. However, he did not say in terms that he would go down to one day. In the event the Claimant turned down the settlement and continued to work.

32. On 6 June 2021 the Claimant raised a grievance against Dr Invest and stated he relied on a recording of a conversation. Ms Evans and Mr Relf were tasked with the grievance.

33. The Claimant asked to have all the meetings recorded and said he had just bought a Dictaphone. On 11 June 2021 Ms Oates emailed him saying that if a meeting was to be recorded it must be by consent and the Respondent would use Teams as most meetings were happening remotely.

34. On 14 June 2021 the Claimant recorded the Head Nurse and the Deputy Manager checking the cleaning of the surgery by the contractor.

35. On 21 June 2021 the Claimant raised a grievance against Ms Ferguson and again referenced having recordings of various conversations. The Claimant raised other grievances between June and September 2021. His grievances related to bullying and abuse, poaching and loss of patients and failure to address these issues by practice management. The Claimant stated that he was being side lined because he had been raising issues about calling the patients and the Respondent had been giving him unsuitable work and was trying to drive him out.

36. During the grievance processes, the Claimant provided two recordings to the Respondent, one it appears of Dr Invest and one of the protected conversation. Mr Relf whilst investigating, asked for the recordings. The Claimant failed to provide them and stated that he felt Mr Ralph was trying to trap him.

37. On 9 July 2021 the Claimant had a meeting with Mr Patterson who was newly appointed. The Claimant covertly recorded this conversation. In the view of the Tribunal Mr Patterson's intent was to sound out if he could have another protected conversation with the Claimant. However, he rapidly concluded that this would not be practicable, and the conversation remained on the record.

38. In finding that Mr Patterson hoped to have another protected conversation the Tribunal was influenced by the fact that Mr Patterson was notably unable to explain why he had the meeting with the Claimant. The Tribunal found that Mr Patterson's intent was to see if the Claimant could be persuaded to exit the business on an agreed basis. During the conversation there was discussion of money including the Claimant wanting £600,000. Whilst this was not stated in terms it was clear that this was the sum that Mr Patterson understood that the Claimant might seek or was at least his opening offer in respect of any negotiation to exit the business.

39. Ms Stevens told the Tribunal that those reporting to her noticed that the Claimant had been saying he had recordings which he was refusing to give to Mr Relf. She consulted Mr Patterson as the Respondent's Head of Compliance. The respondent wrote to the claimant 10 August. The letter told the Claimant in terms that he must stop making recordings without consent and the making of any further recordings without consent would be viewed as gross misconduct. The letter stated that he had signed a contract in April 2016 (the disputed contract) including a data protection policy. The

Respondent told the Claimant he must send all recordings by 12 August (in fact the day he received the letter) otherwise he would be guilty of gross misconduct. As the claimant only received the letter on 12 August, he felt the request was unfair and the respondent had prejudged him.

40. One of the reasons the Claimant gave for failing to provide recordings was that the Respondent wanted the originals in order to remove the evidence from him. However, in the investigatory meeting the Claimant said he had offered copies, and the Respondent said they would accept copies.

41. When the Claimant read at the letter dated 10 August, he said that he did not know about any contract that he had signed in 2016, so he went to see Ms Ferguson to ask to see it. They met on 13 August 2021, and she showed him his file and what purported to be his signature on the contract (at page 1363). The Claimant said he was extremely surprised but did not reveal this. Ms Ferguson told the Claimant he could take copies although not originals and the Claimant took a couple of copies. It was unclear if the claimant agreed that this had happened. The Claimant did not deny taking copies of the contract or documents and agreed that he had been permitted to do so. The allegations as to whether the Claimant did take copies or not was not put to any party in cross examination. On the balance of probabilities, the Tribunal accepted Ms Ferguson's account who made a positive case that the Claimant had taken copies away with him. The Claimant on his own case was very highly motivated to protect this document and he was also in the habit of recording conversations.

42. The Claimant told the Tribunal that he spent considerable time seeking to persuade the police to attend the Respondent the next Monday. The Claimant deliberately did not tell the Respondent that the police were going to attend or that he believed there was a forgery. The Claimant said that he did this to stop evidence, that is the contract, going missing.

43. On 16 August 2021 the Monday the Claimant walked into the office with a police officer to see Ms Ferguson. The Claimant covertly recorded this meeting, and he thought that the police officer did not know that he was being recorded. The Claimant asked in the police officer's presence to see his personnel folder. Without noticing the police officer Ms Ferguson agreed and then realised what was happening and asked why the police were there. She then spoke to Ms Oates, and they agreed that they would not provide the Claimant with sight of his file. It was agreed that the Claimant could make a subject access request under data protection legislation for sight of the file. The tribunal found that the Respondent's attitude changed when the claimant turned up with the police and mentioned forgery.

44. Later that day the Claimant and Ms Ferguson were together in the lunchroom. The Claimant was unhappy that Ms Ferguson did not then approach him. He said that she had been dismissive when he asked to see his file and further after the police officer had left. There was some discussion between them in the lunchroom about access to the file.

45. Later that day the Respondent took the decision to suspend the Claimant. Ms Stevens said that she had discussed this decision with Mr Patterson who agreed. She said that they had already made the decision to suspend the Claimant and then had added the police matter as further grounds during the day on the 16th. The suspension letter referred in terms to the police presence, the allegation of forgery and his failure to hand over the recordings. The Claimant was not allowed to enter the premises without permission. Mr Patterson said that he believed the Claimant had brought the police to the office not because of any concern about forgery but to intimidate the Respondent staff to avoid handing over the disputed recordings.

46. The suspension meeting on 16 August was recorded covertly by the Claimant. There was some dispute between the parties as to this fact. The Claimant had not disclosed the recording or a transcript stating that the Respondent had not made a specific disclosure request and then he said he was not sure whether he had already disclosed the recording. The Claimant had provided transcripts of other meetings. The Respondent's case was that the Claimant first admitted that he had recorded the at the Tribunal hearing. The Tribunal noted the Claimant did not state that he had recorded the meeting in the investigation or the disciplinary or the appeal meetings or in the claim form, further and better particulars, or any witness statement.

47. The Tribunal on the balance of probabilities found that the Claimant deliberately did not provide the recording to the Respondent and the first time the Respondent knew for sure that the Claimant had recorded the meeting was during the tribunal hearing. The Claimant's evidence in respect of this recording was notably vague whereas the Respondents case was clear. Further there was no reason why, when the Claimant had provided transcripts for all the other recordings, he would not have provided a transcript of the suspension meeting.

48. Ms Oates invited the Claimant to an investigatory meeting on 20 August. The Claimant made an enquiry about how to deliver the recordings to the Respondent, and he was provided with a USB stick on 16 August so that he could download the recordings, and the deadline was extended to the 17th. He was reminded that failure to hand over the recordings would be viewed as gross misconduct.

49. The investigatory meeting was rescheduled to the 23 August to permit the Claimant to be accompanied by his Trade Union rep. The Claimant wrote on 19 August to object to Ms Oates running the meeting because he felt that she was not impartial as he had raised a grievance against her. Nevertheless, Ms Oates proceeded. She considered the Claimant's grievances, the documentary evidence, and the statements of Ms Ferguson and the other member of staff present at the suspension meeting.

50. The investigatory meeting on 23 August took place by Teams and at the beginning the Claimant objected to Ms Oates's participation. When Ms Oates asked the Claimant why he had not supplied the recording he stated that the 2016 contract was a forgery and then asked for another letter from the Respondent asking for the recordings. The Union Representative advised the Claimant to answer the question about why he had not supplied the recordings. The Claimant said that he had always offered copies,

however, the Tribunal found no evidence of his having done so and this was inconsistent with the Respondent providing him with a USB stick. Ms Oates stated that, irrespective of the position as to the 2016 contract, the Respondent had a data protection policy, and they needed to have the recordings.

51. The Claimant next said he had changed his mind about providing the recordings because he did not work on the Tuesday - the date of the request - and he was being asked to come in on a Tuesday. The Claimant said that the Respondent was asking for originals and Ms Oates stated in terms that the Respondent did not want originals and copies would be acceptable. The Claimant said that he understood why the Respondent would want the recordings. The tribunal accordingly found that the Claimant was evading the instruction to provide the recordings.

52. Ms Oates asked the claimant whether he had recordings other than the ones already provided or identified, and he said he had not. He denied in terms recording the suspension meeting although he had his phone out during the meeting. He stated that he had not used his phone to record but he was playing music, and there was some discussion of his having a play list. It was put to him that Ms Ferguson had told him at the time not to record the meeting and he had replied, I don't care. He told Ms Oates that he had said "I get you there" rather than "I don't care". He repeated that he had not recorded the suspension meeting and that he had said, I get you there, rather than, I don't care.

53. Before the Tribunal he accepted that he had said "I don't care" and had therefore not told Ms Oates the truth, as well as not telling the truth about recording the suspension meeting.

54. The Claimant also told Ms Oates he had only made two recordings when in fact he had made at least 15. The Claimant told the Tribunal that he thought that the Respondent was trying to get him to relinquish the originals of the recordings. However, the Claimant knew at least from the date of the investigatory meeting that this was untrue and that he could provide copies.

55. Ms Oates then interviewed Ms Ferguson and Ms Koco again about the details of their suspension meeting and put to them his account of playing music.

56. The Claimant was required and booked to do CPR training in the Respondent's premises but was stopped from doing so because he was suspended.

57. Ms Oates found there was a case to answer and prepared an investigatory report. Mr Patterson was appointed disciplinary officer. She invited the Claimant to a disciplinary hearing on 9 September by a letter dated 2 September. The Claimant was provided with Ms Ferguson's statements, Ms Koco's statement, minutes of the investigatory meeting, the suspension letter, a letter regarding data policy breach, his formal grievance, an email exchange regarding the meeting and the handbook on Managing Behaviour / Disciplinary Procedure. The Claimant was warned of the risk of dismissal and was permitted to bring a companion to the dismissal meeting.

58. The charges against the Claimant were:

1. Repeating or serious failure to obey instructions - he had failed to provide the recordings requested by a letter on Monday 10 August and that this was a concern under data protection law and that this might be considered an act of gross misconduct

2. Making untrue allegations in bad faith against a colleague. This related to the allegation to the police that the Respondent had forged his signature. The claimant had no good reason for making the allegation which appears to have been in relation to the request that he provide the recordings. This might be considered an act of gross misconduct.

   Further, he had brought the police into the practice and therefore that could bring the practice into disrepute which might be considered an act of misconduct.

3. Unauthorised recording of colleagues or serious failure to obey instructions in respect of the Respondent's belief that he had recorded the suspension meeting on Monday 16 August which might be considered an act of gross misconduct.

59. The dismissal meeting was chaired by Mr Patterson on 16 September 2021 with the Trade Union rep attending. The Claimant told Mr Patterson that he had only made two recordings and repeated this twice. When it was put to him that he had referred in his various grievances to having more than two recordings, he said that he had been bluffing about this. Mr Patterson accepted that the Respondent's deadline for the Claimant to provide the recordings by the 12 August was too short, however it was extended. The Claimant said at one stage he was prepared to provide recordings but only on his own terms.

60. The Claimant told Mr Patterson that the Respondent had set him up to fail by making sure that he saw less and less patients and so his utilisation was poor. In respect of the police Mr Patterson said he had been playing games. Mr Patterson asked if the Claimant was aware of the outcome of the police investigation and the Claimant replied, you will discover. Mr Patterson said that he thought that sounded like a threat.

61. In respect of the allegation he had recorded the suspension recording, the Claimant gave a detailed account of how he was listening to music and that was why he had his phone out and he was not recording. He referred to having two telephones. He repeated that he had said - I get you there - rather than - I don't care - several times.

62. After the meeting Mr Patterson spoke to Ms Ferguson, Ms Oates and Ms Stevens but did not go back to the Claimant after this. On 21 September the Claimant handed over a third recording to the Respondent.

63. Mr Patterson made the decision to dismiss the Claimant and informed the Claimant by way of a letter on 30 September 2021. He stated that the reasons were the Claimant had not provided the recordings when he had been told to do so knowing the respondent viewed this as gross misconduct. Mr Patterson found it more likely that the Claimant was not telling the truth in the disciplinary hearing (when he had in effect denied having more recordings) rather than not having told the truth in the grievances (when he said he had more recordings) because he had more motivation not to be truthful in the disciplinary hearing. Further, there was little reason for the Claimant to invent fake recordings. Accordingly, the first charge was upheld.

64. Mr Patterson also upheld the second charge. He particularly relied on the, you will discover, comment about the police outcome. He concluded the reason for the police attendance was the Respondent's requests for recordings and "you will discover comment" shed light on the Claimant's motivation at this regard.

65. In respect of the third charge Mr Patterson found it implausible that the Claimant had said, I get you there, and it was much more likely that he had said, I don't care, i.e, he did not care that he was refused permission to record.

66. Mr Patterson dismissed the Claimant. He said that took into account the seriousness of his conduct and stated he had some regard to the length of service. He stated that he would have investigated the Claimant for lying in the dismissal meeting about the number of recordings, if he had not already made the decision to dismiss.

67. The Claimant appealed his dismissal by way of a letter of 5 October 2021. the grounds were the harshness of the sanction when he had provided a recording. He was invited on 14 October to an appeal meeting on 21 October 2021 in front of Mr James.

68. The Claimant did not raise any comparison or inconsistency grounds at the appeal hearing. There was a further discussion at the appeal hearing as to whether the Claimant had other recordings and the Claimant replied that the respondent would find out. When Mr James put it to him that there must be other recordings, he said, am I bluffing? I will leave it to you to find out.

69. Mr James rejected the appeal on 29 October 2021 stating that the Claimant had now provided three recordings, and it was likely he had not provided all recordings due to his inconsistency and the "bluffing" comments. The Claimant applied to the Employment Tribunal.

70. In total the Claimant accepted that he had made 15 recordings of 13 different people at the respondent's premises.

The Law

71. The applicable law on protected disclosures is found in the Employment Rights Act as follows

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 — S.43B(1)(a)

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

(d) that the health or safety of any individual has been, is being or is likely to be endangered,

…(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1)

47B Protected disclosures

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

103A Protected disclosure.

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

72. The applicable law on unfair dismissal is found in the Employment Rights Act 1996 as follows

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..

(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.

73. The Tribunal's jurisdiction in respect of a wrongful dismissal claim is found in the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 as follows:-

4. Proceedings may be brought before an employment tribunal in respect of a claim of an employer for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if—
(a)the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;
(b)the claim is not one to which article 5 applies;
(c)the claim arises or is outstanding on the termination of the employment of the employee against whom it is made; and
(d)proceedings in respect of a claim of that employee have been brought before an employment tribunal by virtue of this Order.

Submissions

74. Both parties made oral submissions and were provided with the opportunity to comment on the other party's submissions.

Applying the Law to the Facts

Protected Disclosure

75. Tribunal firstly considered whether the Claimant had made a public interest disclosure. It was agreed that the only remaining issue was whether the Claimant had a reasonable belief that the disclosure was made in the public interest. There was no dispute as to the genuine of his belief.

76. The test for reasonableness is a mixed subjective and objective test. The question is whether a person in the Claimant's personal circumstances reasonably believe that this matter was in the public interest.

77. The Tribunal directed itself in line with *Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) 2018 ICR 731, CA*, that " in the public interest" meant no more than that a worker could not rely on a breach of their own contract of employment where the breach was of a personal nature and there were no wider public interest implications. The Employment Appeal Tribunal identified several factors as follows which the tribunal sought to apply to the facts in this case.

78. Firstly - the number in the group whose interest the disclosures served. This was on one view, only the Claimant because the disclosure related only to his contract. However, the Claimant argued that there was a wider relevant group because the

Respondent was a dental surgery, a regulated profession. Any forgery by them was of a wider public interest.

79. Secondly - the nature of the interests affected and the extent to which they were affected by the wrongdoing disclosed. In view of the Tribunal this was that a regulated profession such as dentists should not forge documents. There might be issues as to patient records and trust and confidence in the profession in general. Whilst the Claimant did not make it clear he believed a dentist personally had been responsible for the forgery, it was a forgery that had occurred in a dental practice. In respect of the nature of the wrongdoing, forgery is a serious issue albeit only one that related only to the Claimant.

80. Thirdly - the identity of the alleged wrong doer, a dental practice, a profession in which it was important that the public could have confidence.

81. When the Claimant made his disclosure on 16 August, he knew that the police had agreed to attend. This can only have reinforced the Claimant's belief that this was a matter of public interest

82. Accordingly, the Tribunal found that the Claimant did reasonably believe that the disclosure was in the public interest. It related to a forgery in a professional setting and the police were willing to attend in respect of his allegation.

83. Therefore, the claimant had made a qualifying protected disclosure on 16 August 2021 that the Respondent had forged a copy of his signature on a contract of employment dated 21 April 2016.

<u>Unfair dismissal s.103A Employment Rights Act – Public Interest Disclosure</u>

84. The tribunal had to decide whether the reason or, if more the one, the principal reason for dismissal was that the claimant made a protected disclosure. The test in causation for unfair dismissal is stricter than the test in a detriment claim (see *Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372, CA,* below). It is not sufficient that any protected disclosure materially influences the decision-maker, it must be the principal reason.

85. Applying *Maund v Penwith District Council 1984 ICR 143, CA*, because the claimant had more than two years qualifying service, the burden of proving the reason for dismissal was on the respondent.

86. Tribunal considered the dismissing officer's motivation. How - if at all – did the protected disclosure come to operate - consciously or subconsciously - on Mr Patterson's mind?

87. The Claimant's case was not focussed solely on the protected disclosure as the reason for dismissal. In his further and better particulars, he focussed on his refusal to telephone patients after lockdown and the Respondent's negative reaction to this. He

also indicated that the Respondent had preferred consultants to employed hygienists for reasons of flexibility and cost. Further, he argued that he enjoyed an advantageous contract of employment that the Respondent had sought to change.

88. Prior to Mr Patterson joining the respondent on 28 May, the Respondent had sought to exit the Claimant from the business via a protected conversation. There was a suggestion that he might be prepared to go down to one day, but he did not commit to this. Neither party followed this up. This followed on from two earlier conversations on 22 February and 25 March where the Respondent sought his agreement to reduce his contractual entitlement from three days to one.

89. Following these attempts to exit the Claimant, he then raised several grievances. The Tribunal accepted Mr Patterson's evidence that the Respondent was displeased because it had an employee who they wanted to exit and who was taking up management time. The Respondent then discovered that the Claimant had been making covert recordings in the workplace. The Tribunal accepted the Respondent had genuine concerns that the Claimant had been covertly recording and then seeking to rely on these against his colleagues or managers. However, the Tribunal also found that the Respondent who had thus far failed in its attempts to exit the claimant, sought to take advantage when it found something which could be used against him.

90. The Respondent had known about the Claimant making covert recordings since June yet took no action till mid-August. This did not fit with the respondent seeing the recordings in and of themselves as crucial.

91. Although the Respondent had instructed the Claimant not to make recordings in June, it put nothing in writing till August. The instruction in August showed a change of approach. The respondent informed the claimant in terms that any future recording would be viewed as gross misconduct, and that he would be seen as guilty of gross misconduct if he did not provide the existing recordings within a manifestly unreasonable deadline.

92. On 16 August the Claimant made his protected disclosure, when he attended with the police. The Respondent suspended him, and charged him, altering its suspension letter to include his allegations of forgery as a further reason. The Respondent then invited the Claimant to an investigatory meeting on charges including that he had failed to hand over the recordings and that he had recorded the suspension meeting.

93. The letter inviting him to the investigation meeting did not reference the police and the forgery allegation. Ms Oates in the investigatory meeting did not raise the forgery. It was the claimant who raised the issue of the forgery and the police.

94. The Claimant's account on his conduct in the suspension meeting was highly implausible and inconsistent. He claimed that he had not said - I don't care - when he was told not to record and in fact had said - I get you there. He later admitted to the tribunal that this was untrue. Both witnesses, Ms Oates and Ms Koco disagreed with his account.

95. From the investigation meeting onwards, the Claimant spent a good deal of time concentrating on his allegation of forgery. The tribunal found that Mr Patterson became frustrated, if not angry, that the claimant had called the police and alleged forgery without, from his point of view, any rationale. Mr Patterson could see not a logical reason for any forgery - there appeared no benefit to the Respondent.

96. The Claimant claimed to have offered the Respondent copies of the recordings when he had in fact failed to do so. He told the Tribunal that he was being deliberately misleading in the investigation meeting.

97. At the disciplinary meeting the Claimant continued to refuse to provide the recordings, although he did later provide one more. The Claimant claimed that he had been bluffing when he had previously said he had more recordings, that is, he told Mr Patterson that he had previously lied. Mr Patterson thought it more likely that the claimant was in fact lying in the disciplinary meeting and had been telling the truth when he said he had a number of recordings. In any event, Mr Patterson knew that the claimant had lied, even if he could not be certain when.

98. When the claimant was asked about the police outcome, he said - you will discover. The tribunal accepted Mr Patterson's evidence that he took this to be a threat. Because of this and because Mr Patterson knew that the claimant had lied about the recordings, the Tribunal accepted that he saw the forgery allegations and the police attendance as part and parcel of the Claimant's attempts to avoid providing the recordings.

99. Drawing this evidence together, the tribunal found that there were several factors which led Mr Patterson to dismiss the Claimant. The protected disclosure – the forgery allegation - was one of the factors. Mr Patterson was concerned by the allegation of forgery and the police coming onto the premises. Although the forgery and police allegation were not raised at the investigatory stage, Mr Patterson raised them at the disciplinary stage.

100. Nevertheless, the Tribunal found that the protected disclosure was by no means the principal reason for disclosure. It formed only one part of the respondent's reasons. The Respondent had sought since May to exit the Claimant and had sought to reduce his hours significantly since February. The Claimant had then raised a number of grievances. He had made recordings without consent and continued to do so even when he was told it would constitute gross misconduct. He had told his employer that he had lied about the recordings. Mr Patterson saw him as playing a game. Mr Patterson believed, based on evidence, that the claimant was lying about recording the suspension interview. It was clear that the Claimant did not trust the Respondent and Mr Patterson concluded that he simply could not trust the claimant anymore.

101. Accordingly, the protected disclosure was not the principal reason for the decision to dismiss. Therefore the s.103A unfair automatic unfair dismissal claims fails.

Detriment s47B Employment Rights Act 1996

102. According to the House of Lords in *Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL*, "detriment" means suffering a disadvantage of some kind. Whether something that amounts to a detriment must be assessed from the point of view of the victim. It is not necessary for there to be physical or economic consequences. An action or failure to act may amount to a detriment.

103. The tribunal went on to consider whether the claimant was subjected to a detriment on the ground that he had made a protected disclosure. The tribunal directed itself in line with *Fecitt and ors v NHS Manchester (Public Concern at Work intervening) 2012 ICR 372, CA*. A tribunal must determine whether the protected disclosure materially (that is more than trivially) influences the decision-maker who subjected the claimant to any detriment.

104. The case law recognises that it is relatively rare for an employer to admit that it has subjected a worker to detriment for making a protected disclosure. On many occasions a tribunal will be invited to draw inferences to this effect. The Employment Appeal Tribunal under its President in *International Petroleum Ltd and ors v Osipov and ors EAT 0058/17* set out at paragraph 115 the correct approach to the burden of proof as follows:

(a) the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he or she is subjected is a protected disclosure he or she made.
(b) By virtue of s.48(2) ERA 1996 , the employer (or other respondent) must be prepared to show why the detrimental treatment was done. If they do not do so inferences may be drawn against them: see *London Borough of Harrow v. Knight* at paragraph 20.
(c) However, as with inferences drawn in any discrimination case, inferences drawn by tribunals in protected disclosure cases must be justified by the facts as found.

105. The Tribunal considered the first detriment, failing to give the Claimant access to his file on 16 August.

106. The Claimant was given access by Ms Ferguson on the 13th and had taken copies. He then attended on the 16th with the police and made the protected disclosure. Ms Ferguson called the Respondent which advised her to refuse the Claimant access.

107. The Claimant was not provided with access to his file on the 16th. He had been given access and copies on the 13th, and further access was not impeded permanently because the Claimant was invited to make a subject access request. Nevertheless, there was a delay and this delay amounted to a detriment from the claimant's point of view because he sought immediate access to the original in the presence of the police.

108. The Tribunal considered what had changed from the Friday to the Monday. The Tribunal found that the respondent's attitude changed because the police had attended, and the Claimant was making an allegation of forgery. This was an out of the ordinary event at a dental practice.

109. The Respondent, in the disciplinary, treated the Claimant's allegation of forgery as gross misconduct whereas it treated the attendance of the police only as misconduct. Accordingly, the Respondent saw the attendance of the police as somewhat less significant than the forgery allegation. The Tribunal found that the allegation of forgery was a material influence on the Respondent's refusal to permit the Claimant access to his file on the 16th. For the avoidance of doubt, the Tribunal did not find that the Respondent's failure to permit the Claimant or the police to take the file was a detriment caused by the protected disclosure because the Respondent would not have permitted this in any event.

110. The Tribunal then considered the second detriment - on 16 August 2012, Ms Ferguson was rude and acted improperly towards to the Claimant.

111. The difficulty for the Tribunal was that this allegation was fundamentally unclear, even following cross examination. The Claimant said that Ms Ferguson was in some way hostile. He said that she did not approach him. In answer to the Tribunal's question, he said that her attitude and the way that she walked into the room was not good. He was unhappy that she failed to do something, that is she failed to start an investigation or show some interest in the forgery allegation. The Tribunal reminded itself that failure to act may amount to a detriment and that it must consider the worker's point of view. Would a reasonable worker take the view that the conduct was to his detriment?

112. The Claimant had just accused his employer of forgery and brought the police unannounced onto site. Accordingly, things might plausibly be strained between him and Ms Ferguson. However, the Tribunal could not find that this was sufficient to amount to a detriment, in light of the lack of specificity. The claimant was simply not clear about what it was about Ms Ferguson's conduct, that he objected to. There was no suggestion for instance, that Ms Ferguson was rude to him, or even that she changed her usual behaviour in a minor way – say, that she had not offered to make him a cup of tea contrary to her usual practice. For the avoidance of doubt, the bare fact that Ms Ferguson did not immediately somehow follow up the forgery allegation in an informal setting, without referring to management, could not reasonably be seen as a detriment.

113. The Tribunal went on to consider the third detriment - the Claimant being suspended from work.

114. Prior to the protected disclosure, in its letter of 10 August the respondent had told the Claimant that it would be considered gross misconduct if he failed to comply with an unreasonable deadline. He failed to contend to comply with that deadline and the respondent granted him an extension. Then he made the protected disclosure and brought the police onto site. That day he was suspended.

115. The claimant was at this time not in breach of the respondent's request to provide the because the Respondent had extended the deadline to the 17th. The suspension letter said that he was suspended due to the recordings and, in light of his actions that morning with regards to concerns of fraudulent behaviour. There was a reference to protecting both the claimant and the Respondent thus making a suspension is suitable.

116. The Tribunal was satisfied that it was not the method of disclosure, that is the attendance of the police, rather than the protected disclosure itself which led to the suspension. The Respondent treated the allegation of forgery as gross misconduct, but not the police attendance. Taking into account the wording of the suspension letter the tribunal could not but find that the forgery allegation - the protected disclosure - was a material influence on the decision to suspend.

117. The Tribunal went on to consider the fourth detriment - the disciplinary investigation.

118. When the Respondent told the Claimant of its decision to suspend, it suspected but did not know that the Claimant had recorded the suspension meeting, he had committed what it considered to be gross misconduct. The claimant then failed to comply with the extended deadline to provide the recordings. In view of the Tribunal the best evidence as to the Respondent's motivation for starting the disciplinary investigation was its invite to the investigation meeting on 18 August 2021. This referred expressly to the recordings and the failure to provide them, and the recording of the suspension meeting. The invitation letter did not refer to the forgery allegation or the police.

119. The Respondent investigated the recordings issue. The Tribunal was satisfied that Ms Oates in the investigatory meeting was trying to concentrate on the recordings. It was the Claimant who introduced the forgery allegation and the police attendance in effect as a defence to the investigatory charges. Further, the investigatory report concerned the recordings issue. The forgery allegation and the attendance of the police were referred in the context of being the claimant's explanation for his failure to provide the recordings, not as free-standing matters.

120. By the time of the disciplinary meeting, Mr Patterson viewed the forgery allegation as potential gross misconduct and the police attendance as potential misconduct. It was the Claimant referring to the protected disclosure and the police that brought the protected disclosure into the ambit of the investigation. Accordingly, the Tribunal could not find that the protected disclosure was a material influence on the way that the Respondent carried out the disciplinary investigation and/or its decision to start the disciplinary investigation.

121. For the avoidance of doubt, the tribunal did not go on to consider if the protected disclosure was a material influence on the decision to dismiss. The law does not permit a Claimant to rely on a dismissal as a detriment. The question of the influence of the protected disclosure on the unfair dismissal was considered under s.103A Employment Rights Act which is subject to a different test of causation.

122. The fifth detriment was the Claimant was side-lined at work. It was agreed that this was only referred to his not being permitted to attend CPR training.

123. The Tribunal found that this was a direct result of the suspension and not the protected disclosure. The claimant was not permitted access to the site and the training occurred on site. Had the claimant been suspended for another reason, the respondent would not have permitted him access to the site.

124. The sixth detriment was that patients were removed from the Claimant's books whilst on suspension.

125. This, as with the CPR training, followed as a direct result of the suspension and not the protected disclosure.

126. Accordingly, the Tribunal found that the Respondent had subjected the Claimant to unlawful detriment by impeding the access to his file on 16 August and by suspending him later that day.

Unfair dismissal s.98 Employment Rights Act

127. The first issue was whether the Respondent had a potentially fair reason for dismissal. The Respondent relied on Mr Patterson's findings of misconduct as set out in the dismissal letter of 30 September 2021.

128. The Tribunal considered what was the reasoning in the Respondent's mind when it made the decision to dismiss. For the reasons set out above there were several reasons operating in the Respondent's mind when it made the decision to dismiss. The Respondent had wanted to exit the Claimant since May, at the latest, following two unsuccessful attempts to reduce his days from three to one.

129. Whilst the Claimant accepted that he was underutilised, the Tribunal found that the Respondent was overstating its case. It sought to persuade the tribunal that the Claimant's utilisation was 30%, whereas according to the evidence of the Respondent, it was well over 60% - and better than that of the contractor. The Tribunal for the avoidance of doubt did not accept the Respondent's case that the Claimant's utilisation was sufficiently poor in late March 2021 to require the Claimant to go down from three days to one, then recovered significantly by April, and then worsened in May so much to make it sensible for exit the Claimant. This was inherently implausible, especially as the Tribunal was not taken to any corroborating evidence as to demand.

130. The Tribunal found that the Respondent preferred the self-employed hygienist for several reasons. She represented better value for money because she was not being paid when she was not working. It was not in dispute that on an hourly basis she was more profitable for the Respondent. She was direct access and could take more patients than the Claimant. The Respondent viewed the Claimant as uncooperative because he had refused to take sufficient steps to improve his low utilisation, by chasing patients over the phone.

131. The Respondent then tried to exit him via two protected conversations - in May and July - without success. There was no dispute that Mr Patterson and the Claimant discussed Claimant wanting £600,000 in compensation. Mr Patterson concluded that the Claimant was not going willingly and there was no realistic prospect of an acceptable settlement. The Claimant then raised other grievances and became in effect more time consuming to manage.

132. The Respondent then discovered that the Claimant had been making covert recordings. He then failed to provide the recordings despite saying he would do so being provided with a means of doing - a USB. He provided inconsistent and different explanations as to why he refused to do so. The Tribunal accepted that Mr Patterson genuinely believed that the claimant brought the police onto site in order to intimidate the Respondent out of chasing the recordings. The Tribunal accepted his evidence that he could see no good reason why the Claimant would think it appropriate to call the police over a private contract matter, particularly where the alleged forgery provided no clear benefit to the Respondent and was contained in a document dated years prior to the transfer of the business to the Respondent. Mr Patterson was influenced by the timing of the claimant's allegation. He made the forgery allegation and invited the police just as the Respondent was putting on pressure to obtain the recordings.

133. The Tribunal therefore accepted Mr Patterson's evidence that he believed that the Claimant was raising the forgery issue in order to intimidate and was doing so in bad faith.

134. The Claimant had been specifically told not to record the suspension meeting and that any such recording would be viewed as gross misconduct. Mr Patterson believed that he nevertheless did record the meeting and then lied about it.

135. In view of the Tribunal the Respondent may well have taken advantage of the Claimant's misconduct to rid themselves of somebody they viewed as a troublesome employee. The original deadline to provide the recordings on 10 August was entirely unrealistic and deeming a failure to comply as gross misconduct was entirely unreasonable. Nevertheless, the Respondent quickly backtracked and extended the deadline and gave the claimant a USB in order to facilitate the transfer. Although it was clear to the Claimant that the Respondent was only seeking copies and not originals, the claimant failed to provide all the recordings by the time of the dismissal. In any event, the respondent had not sought to dismiss the Claimant prior to the recordings issue.

136. Whilst there were other reasons, the principal reason in the employer's mind at the time of dismissal was misconduct. As the Respondent had a potentially fair reason for dismissal, the tribunal went onto consider reasonableness.

137. The Tribunal firstly considered the procedure. It considered the so-called *Burchill* test - did the Respondent have a reasonable and genuine belief in the Claimant's culpability based on a reasonable investigation, with the caveat that the burden of proof is now neutral. When a Tribunal comes to consider the reasonableness of a Respondent's investigation, it may not substitute its view of the reasonableness of the

investigation for that of the Respondent. The Respondent need only show that the investigation came within a band of investigations available to a reasonable employer in the circumstances. This is often referred to as the "band of reasonable responses test."

138. The Tribunal found that there were flaws in the investigation. Ms Oates was the subject of grievances by the Claimant. She had previously been involved in trying to reduce his hours. However, this was a relatively small organisation, and the Tribunal was concerned that an employee should not be able to in effect choose their investigating officer by taking people out of the picture by grieving against them. The Claimant was informed of the charges against him and was permitted to have a union rep in attendance. Witnesses including the Claimant were questioned and the Claimant was given a full opportunity to know the case against him and to make his case. Considering the investigation in the round, the involvement of Ms Oates was insufficient to take this investigation outside of a range of investigations available to a reasonable employer in the circumstances.

139. The Tribunal then considered whether this investigation led to a reasonable and genuine belief in the Claimant's culpability. The reasonableness of the Respondent's belief is also subject to the so-called band of reasonable responses test. The tribunal must determine if the belief of the Respondent comes with a range of beliefs available to a reasonable employer in the circumstances.

140. In respect of the first charge, the Respondent knew that the Claimant had refused to provide recordings, and it believed that there were more recordings that the Claimant had not provided. Mr Patterson simply did not believe the Claimant when he said, I was bluffing, that is, that he did not have more recordings, especially when immediately after meeting the Claimant provided another recording. The Claimant's account of the number of recordings was highly inconsistent and unsatisfactory.

141. In respect of the forgery and the police, the Respondent relied on the timing of the forgery allegation. For Mr Patterson, it was suspiciously convenient for the Claimant - who was under pressure to provide the recordings - to then discover a forgery and bring in the police.

142. In view of the Tribunal, it was reasonable for Mr Patterson to believe that the Claimant did this in bad faith and in order to intimidate. This is so, even if we now know this was not the claimant's motivation. Mr Patterson could see no apparent benefit to the Respondent in any forgery. The Respondent had not sought, for instance, to take advantage of the temporary zero hours clause in the contested contract, which might have provided a logical motive for the forgery. The Respondent, as Mr Patterson pointed out, only relied on the contested contract in respect of the data protection clause, which was contained in another document, which was not contested.

143. In respect of the third charge Mr Patterson believed that the Claimant had recorded the suspension meeting and had lied about it. The claimant's account of his conduct in the suspension meeting was not plausible. There were two witnesses against the Claimant who gave a very detailed account of his having a phone. The context was

the Claimant having previously recorded colleagues without consent. The Respondent believed the Claimant had at the time said he did not care about the prohibition of recording. The Tribunal found that Mr Patterson reasonably believed that he had not said, I get you there. It was not likely that two witnesses would have misheard. In any event, I get you there, was a much less likely thing to say in context, than I don't care. The tribunal, again, could not take into account the fact that before the hearing, the claimant admitted that he had not told Mr Patterson the truth about this.

144. Accordingly, the Tribunal found Mr Patterson had a reasonable and genuine belief that the claimant had committed the three acts of misconduct.

145. The Tribunal went on to consider whether the Respondent had otherwise followed a fair procedure. The Tribunal may not substitute its view of what constitutes a fair procedure for that of a Respondent. The question is whether the procedure adopted by this Respondent came with a range of procedures available to a reasonable employer in the circumstances.

146. The Tribunal found that this was an unexceptional procedure. There had been an investigation producing an investigatory report. The Claimant had seen the documents including the report and all witness statements before the dismissal meeting. He was accompanied by a union representative in both meetings. He was warned of the charges and the possibility of dismissal.

147. Between the investigatory stage and the disciplinary stage, a new charge was added in respect of forgery and the police. The Tribunal found that this was not enough to take the procedure outside of a reasonable range. The Claimant was well aware of the circumstances of the new charge. The facts – that the claimant alleged forgery and brought the police on site - were not in dispute. It was only the Claimant's motivation. He had a full opportunity in the dismissal meeting to defend himself from this new charge.

148. The tribunal identified one potential flaw in the disciplinary procedure; after the meeting Mr Patterson spoke to other witnesses and did not give the claimant a chance to deal with this new evidence. However, the Tribunal was not able to identify anything specific that disadvantaged the Claimant. The tribunal, accordingly, found that this was insufficient to take the procedure outside the reasonable range.

149. If, however, the procedure did fall outside of the reasonable range, this flaw was cured on appeal. The Claimant was given a full and fair appeal and had possession of all the evidence. Accordingly, the dismissal was procedurally fair.

150. The Tribunal went on to consider sanction. Again, a Tribunal must not substitute its view of an appropriate sanction for that of a Respondent. The question is - did the sanction of dismissal fall outside of a range of sanctions available to a reasonable employer in the circumstances?

151. The circumstances were that the Respondent genuinely and reasonably believed - following a reasonable investigation - that the Claimant had made covert recordings of his colleagues which he had failed to hand over, that he had sought to intimidate the respondent out of obtaining the recordings by bringing the police on site and making a forgery allegation, and that he had recorded the suspension meeting knowing that this would be regarded as an act of gross misconduct, and then denied doing so.

152. The Claimant was specifically warned not to record any further meetings by way of the letter of 10 August and that the Respondent would view such action as gross misconduct. However, he went ahead and did so. The Respondent's view was it simply could no longer trust him and it could not trust him not to do it again. Further, the Claimant did not show any remorse or any intention of changing his behaviour. For instance, when he was asked about the police investigation, he said - you will find out. Whether or not this was intended as a threat, this led the Respondent to conclude that that he did not take their concerns seriously.

153. In circumstances where an employer has found its employee untrustworthy and when the employee has made covert recordings in the knowledge that this would be viewed as gross misconduct, the Tribunal could not but find that the decision to dismiss came within the reasonable range.

Wrongful Dismissal

154. This claim involves very different legal questions to that of unfair dismissal. The respondent must show that the Claimant was guilty of gross misconduct, that is he did something so serious that the Respondent was entitled to dismiss without notice. The respondent must show that the claimant's conduct was such that it repudiated the contract. Such conduct is often described as going to "the root of the contract" between employer and employee. See *Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA* and *Neary and anor v Dean of Westminster 1999 IRLR 288*.

155. The Respondent relied on the reasons in the dismissal letter. However, following the Employment Appeal Tribunal judgment the Respondent no longer relied on the charge relating to bad faith / forgery as an act of gross misconduct. Therefore, the Tribunal had to consider whether the two remaining acts amounted to a fundamental breach.

156. The Claimant knew that a failure to provide the recordings would be regarded as gross misconduct. He failed to provide the recordings. The Claimant had told the Respondent that he did not have any more recordings. He told the respondent that he had been bluffing when he said he had more recordings, that is he told Mr Patterson that he had earlier deliberately misled his employer. In fact, he was not telling the truth to Mr Patterson and was deliberately misleading his employer at the dismissal meeting. Secondly, he had recorded the suspension meeting when he had been told this would be viewed as gross misconduct. He again did not tell the truth about this and deliberately misled Mr Patterson. The Claimant carried out an act he knew would be

regarded as gross misconduct and then deliberately misled the employer by saying he had not done so.

157. The Claimant told the employer things he knew to be untrue in the investigatory and dismissal meetings about this in order to conceal what he had done. In the view of the Tribunal this must go to the root of the contract between an employer and an employee. The tribunal accepted that this conduct breached the fundamental duty of mutual trust and confidence implied into every employment contract.

158. Accordingly, the Claimant was in fundamental breach of his contract of employment and the Respondent acted lawfully in dismissing him without notice.

Limitation

159. The Tribunal has found that the respondent subjected the claimant to unlawful detriment when it impeded his access to his file on 16 August 2021, and further when it suspended the Claimant that same day. The tribunal considered whether these claims were started within the statutory time limits.

160. The tribunal firstly determined when time started to run. There was no dispute that the respondent had refused access to the file on 16 August. The Tribunal considered whether the detriment of suspension was limited only to 16 August. The Tribunal had found that it was the act of suspension on that day which constituted the detriment following the protected disclosure. The next step which was the letter containing the charges made no reference to the protected disclosure or the police. It was the Claimant who bought the protected disclosure back into consideration. Accordingly, the Tribunal was satisfied that time started to run from the date of the suspension that is from 16 August 2021.

161. According to s.48 Employment Rights Act 1996, a claimant must take the first steps in Tribunal proceedings, that is starting ACAS conciliation, within three months less one day of the act relied on. The claimant had contacted ACAS on 29 October 2021, that is within three months less a day of 16 August 2021. The issue was the date on which he presented the tribunal claim, 23 December 2021.

162. In effect, there are two routes to a claim being made in time taking into account the operation of ACAS early conciliation. By the first route the Claimant must have made his claim to the Employment Tribunal by 15 November 2021 (the original time limit) - plus the time spent in conciliation (the extended time limit). By 15 November the ACAS early conciliation period had ended. Adding the period of the ACAS early conciliation to the 15 November 2021, the time expired no later than 19 November 2021. Accordingly, the claim was out of time by just over one calendar month.

163. There is a second route. A claim is made in time if it is presented within a month of the date of the ACAS certificate, in this case 1 November 2021. Therefore, the claim would have been in time if it had been presented by 1 December 2023. As the claim was presented on 23 December 2021, the Claim was out of time by just over three weeks.

164. The tribunal went on to consider firstly whether it was reasonably practicable for the claim to be made within the time limit. The burden of showing this is upon the claimant.

165. The test of reasonable practicability is one of fact and not of law. Reasonably practicable means reasonably feasible, see *Palmer and anor v Southend-on-Sea Borough Council* 1984 ICR 372, CA. When considering if it was reasonably practicable to comply with a time limit a tribunal must apply a liberal test in favour of the claimant. If a claimant says that he was unaware of his rights or of time limits, the correct test is not whether the Claimant knew of his rights, but whether he ought to have known of them, see *Dedman v British Building and Engineering Appliances Ltd* 1974 ICR 53, CA and *Porter v Bandridge Ltd* 1978 ICR 943, CA.

166. In *Palmer* the Court of Appeal also confirmed that the existence of impending internal appeal is not in itself enough to justify a finding it was not reasonably practicable to present a claim in time.

167. The Tribunal took the view the reason the Claimant did not promptly start the Employment Tribunal process in respect of the detriments was that he was still employed and undergoing an investigation. Taking into account in particular the industrial knowledge and experience of its lay members, the tribunal could not see how it would be in the interests of good industrial relations to penalise a Claimant who fails to bring a claim to a Tribunal because he has been suspended and the investigatory and disciplinary process is ongoing.

168. This point was nevertheless not of assistance to the Claimant because he received the appeal decision on 29 October 2021, the date he started ACAS early conciliation. This was more than a month before the time limit expired. It was also difficult to see how it could not be reasonably practicable to present the claim before the outcome of the appeal when the claimant told the appeal officer in terms that he did not believe the appeal would succeed. From the claimant's point of view at the time, there was nothing to lose in starting the tribunal process.

169. Time limits in a multiple detriment case are not entirely straight forward for a lay person and the claimant brought his claim before the expiry of the time limit for his dismissal. However, the claimant was an educated man. He had long been worried, if not suspicious, about his position at work, as shown by his recording his colleagues and his belief that a contract had been forged. In these circumstances, the claimant had not discharged the burden on him of showing that it was not reasonably practicable to comply with the time limit in circumstances when it was open to him to seek advice or research the law.

170. Accordingly, the Tribunal does not have jurisdiction over the claims in respect of the detriments which occurred on 16 August 2021.

Employment Judge Nash

Dated: 14 October 2024

Sent to the parties on:

23 October 2024

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For the Tribunal Office