EMPLOYMENT TRIBUNALS

Claimant: X

Respondent: Y

Heard at: Manchester (by CVP) **On: 21 February 2025**

Before: Employment Judge Miller-Varey

REPRESENTATION:

Claimant: Mr B Williams (Counsel)
Respondent: Ms Y Barlay (Consultant)

RESERVED JUDGMENT WITH REASONS

The judgment of the Tribunal is as follows:

1. The complaint of unfair dismissal under Part X Employment Rights Act 1996 is well-founded. The claimant was unfairly dismissed.

2. The compensatory award to be assessed in due course shall include an uplift of 25% pursuant to section 207A Trade Union & Labour Relations (Consolidation) Act 1992 because the respondent unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015.

3. The complaint of breach of contract in relation to notice pay is well-founded and accordingly succeeds.

4. The complaint of unauthorised deductions from pay contrary to Part II Employment Rights Act 1996 is well-founded. The respondent made an unauthorised deduction from the claimant's pay. The respondent is ordered to pay to the claimant the net sum of £1072.12 deducted from pay (noting that there are expressly reserved to a further hearing the question of a separate alleged deduction of 230.5 hours and payment in lieu for untaken leave on termination).

REASONS

1. These reasons make reference to page numbers. Unless otherwise stated, these relate to the correspondingly numbered pages of the hearing bundle.

Restricted Reporting, Privacy and Anonymisation

2. At the outset of the hearing the Tribunal made the following orders:
   a) a restricted reporting order pursuant to s.11 of the Employment Tribunals Act 1996 and rule 49(3)(d);
   b) an order that the hearing should be held in private under r.49(3)(a); and
   c) an order for anonymisation under r.49(3)(b).

3. Those orders are set out in a separate document; the reasons for making them are contained in Annex A.

4. In accordance with the order under r.49(3)(b), I use the initials X, Y and Z and A, B, C and D in place of relevant individuals' names. Two key venues (which I am confident the parties will recognise) are referred to as "the Place" and "Ascot Range Community Centre".

Background

5. By a claim issued on 13 December 2023 X brings complaints against Y of unfair dismissal, wrongful dismissal, and unlawful deductions in respect of wages and holiday pay.

6. X's employment with Y began on 15 March 2018 and ended when he was summarily dismissed on the 1 September 2023. His role was that of personal assistant and carer to the adult child of Y, Z.

7. Z is a young adult male with the disability of autism. All parties agree Z is a vulnerable person. Y is married to A. A is Z's father.

8. Y resists the claim on the basis that X was fairly dismissed on grounds of gross misconduct or some other substantial reason, namely a breakdown in trust and confidence. There are alternative defences that X would have been dismissed in any event regardless of procedure (the Polkey defence), and that compensation should be extinguished because X contributed to his dismissal.

9. On the question of arrears of wages and unpaid holiday pay at termination, the pleaded response runs an essentially factual defence that X has been paid, save for one week (in October 2023) to which there is no entitlement.

THE ISSUES

10. The issues to be determined were identified by EJ Batten at paragraph 48 of the record of preliminary hearing of 1 October 2024. The List of Issues is attached in full at Annex B. I shall return to these in the Discussions and Conclusions section below.

THE HEARING

11. I indicated to the parties that we would deal with liability first to include Polkey, ACAS code adjustment and contributory fault.

Procedure, documents and evidence heard

12. The hearing bundle comprised 193 pages of documents.

13. I decided that Y should lead evidence first. Y gave evidence followed by A.

14. I then heard evidence from X. X had also exchanged a witness statement from Ms Victoria Mitchell, solicitor. Her evidence was not challenged and with the agreement of the parties, I received her statement into evidence without requirement of Ms Mitchell being sworn.

15. Y, A and X gave their evidence by way of witness statement which I had read in full before they gave their oral evidence. They were all cross examined.

16. The evidence and respective submissions concluded at 3.35pm and owing to the limited time available I indicated I would give a reserved judgment with reasons.

FINDINGS OF FACT

17. I make the following findings of fact together with those additional findings noted in the Discussion and Conclusions section below.

18. X was employed under a written contract of employment dated 15 March 2018.

19. X's chief responsibilities included supporting Z one-to-one with day-to-day activities at Y's home, accompanying him within the community, taking him on days out and on short break holidays. As part of X's role, Z also spent time at X's home including overnight stays. X had previously worked for Y undertaking the same activities but alongside another PA/ carer between 2003 and 2013.

Provisions of employment contract relevant to this claim

20. Annex A of X's employment contract sets out a disciplinary process [p.69]. It provides that minor problems will be dealt with informally and *"in cases of more serious problems, the Employer will conduct an investigation of the facts"*. Provision is made for the employer to suspend the employee on full pay during the course of an investigation.

21. There is a three stage process if it is decided that formal action is required:

    a) Stage 1 is the setting out in writing the alleged conduct which has led the employer to contemplate dismissal or taking action.

b) Stage 2 is a meeting followed by the employee being informed of the decision about disciplinary action. That meeting should take place before action is taken, except in the case of a suspension.

c) Stage 3 is an appeal stage. The employee must apply in writing within 10 days of notification of the decision.

22. There is further provision that in the case of gross misconduct, the employee will be told about the complaints against them [pp.70-71]. Examples of gross misconduct include assault on another person [p.71].

23. X was entitled to contractual notice pay in accordance with clause 21.2 of the contract as follows:

"(a) one week's notice if you have continuously been employed for up to two years and then

(b) one week's notice for each completed year of employment up to a maximum of twelve weeks notice ..."

24. Therefore at the time of his termination, X had the benefit of a 5 week notice period.

25. The employment contract provided holiday pay entitlement [p.63] as follows:

7.1You are entitled to 5.6 weeks annual leave...

7.2The holiday year runs from 1st April to 31st March. You will not be permitted to carry over any unused holiday entitlement and there will be no payment in lieu of any unused holiday entitlement...

7.5 On termination of employment holiday entitlement will be calculated to the nearest full month worked. If you have outstanding holiday entitlement the employer may request that you take the leave during notice period or will make payment in your final salary in respect of any outstanding holiday entitlement...

Matters up to 16 June 2023

26. There are matters of disputed fact about whether Y had concerns for Z's welfare whilst in X's care which she raised with X prior to 16 June 2023. Y alleges she had two distinct areas of concern and both were raised.

27. The first is about bruising observed on Z's face on three different occasions when Y says Z was in X's care. Y says in her witness statement that she questioned X three times and, received explanations from X that Z had hit

himself and that a third party had struck Z. On the third occasion she says no satisfactory explanation was forthcoming from X. Y referred in her witness statement to three photographs which show Z with significant bruising to his right under-eye area. These photographs [p.77] are all taken on the same day (20 March 2023) at 8.51am (x 2) and 5.43pm (x 1).

28. Y also claimed in her witness statement and to the Tribunal that her concerns about bruising were part of her motivation in reducing X's hours on 29 March 2023 from 32 to 24 per week.

29. The second aspect of X's conduct relates to a concern arising from a report allegedly made to Y by telephone on 5 November 2022. Y said in her witness statement that the day care centre called her on that day to say that one of their staff, B, had seen X "kissing and hugging Z" around a shop. Y says that she queried this at the time with X who denied it.

30. Y referred in her witness statement to what is described as an Interaction Record [p.76]. This is a pro forma document from The Place and takes the form of typed account from a staff member in relation to Z as a service user. It is clear that it relates to events on 5 November 2022 but it is unclear when it was prepared. Inferentially, it could have been prepared on or after 7 November. It says this:

"I was driving through Accrington with my partner on Saturday afternoon.

At the traffic lights where the new home and bargains store is in Accrington I saw Z with his PA. Z kissed him on the lips and cheek was and was hugging him, the PA did not seem to show any resistance or discourage Z from this behaviour.
I attended work at 12pm on 7 November 2022 and advised my team leader/manager and Z's support staff of what I had witnessed."

31. The document is then signed by the manager and the staff member. It is not dated.

32. As to when Y got the copy of the "Interaction Record" from the Place, Y accepted in oral evidence that she only got it a couple of months ago when her solicitors had asked for it.

33. X's position is that none of these matters were put to him. He said he had seen the Interaction Record for the first time when mutual disclosure took place and the contents had never been mentioned to him by anyone.

34. I prefer X's account because I found his evidence to be more reliable and consistent than Y's. I found Y's evidence to be inconsistent, unreliable and implausible both in reference to these particular matters and generally. I will explain why in the paragraphs immediately below. I also find that when cross-examined Y knowingly obfuscated about which parts of the bundle where available to her. She did not have any clear regard for the importance of the proceedings or answering questions directly and truthfully.

35. Y has given three conflicting explanations of why she reduced X's hours. In the text message from March 2023 by which she notified X of the reduction, Y said *"am giving C 2 days wedes and Saturday and you can do Monday, Tuesday and Friday and he goes to the Place on Thursday you have 21 hours a week that's 8 hours a day trying to be fair with everyone C needs a job and he is taking Z he has insurance on his car as well so he can take him out for a drive as well?"*

36. In Y's Grounds of resistance filed on 8 February 2024 Y says that the reason X's hours were reduced was because *"on this occasion there was not enough money in Y's account* [p.41, paragraph 3].

37. The third explanation, set out in for the first time in her witness statement of 12 February 2025, is that it was influenced by concerns about bruising (paragraph 8 refers).

38. Y gave the date of the bruising in her statement as 23 March 2023 when the photographs were both dated 20 March. In her evidence to the Tribunal Y maintained that the bruising reflected in the photograph timed at 5.40pm represented Z's condition when he returned home from a day out to Blackpool on 20 March in X's care. She said that she observed this when Z came back and she went to shave him. However, that same bruising appeared in the photograph taken earlier that morning (timed at 8.51am). When challenged about how therefore this could possibly connect to X, she then said the photograph was from a different day when Z had stayed over at X's. I could find no adequate explanation about why Y should be so confused when preparing her statement over these important dates and times.

39. Y's pleaded case does not refer in any way to concerns about bruising or the report she says in her witness statement that she received by telephone on 5 November 2022. This is so, despite describing that she was "horrified" by the by the report to which I will come, because it was a "second report". In cross-examination she accepted that she had not told her lawyers about the November 2022 telephone report when she instructed them to file the ET3. She accepted that she only mentioned the previous bruising concerns to them a couple of weeks prior to the hearing. Given the obvious, overriding focus of the proceedings is the reason for and fairness of X's dismissal, this serves both to undermine any suggestion of the concerns having been ever previously mentioned to X, as well as whether the concerns were ever genuinely and honesty held.

40. Y's pleaded case included a positive assertion that she did not get X's letter of 6 September 2023 in which she challenged his dismissal [paragraph 7 of the ET3, p.42]. Although she then tried to back track, in her oral evidence she acknowledged that she had read the letter in September when she got it. Her ET3 is therefore actively misleading.

41. Putting this together, I find the first, contemporaneous explanation is the single honest reason for Y reducing X's hours. Relevant here too is that following on from the notification of X's hours changing, an exchange of messages followed in which X was strongly critical of Y's action in unilaterally

reducing his hours by text. Y told him that he could do what he wanted but that she could come and talk to him. If the real reason was a feeling that X had failed in the key duty of protecting Z from physical injury its perverse that Y would not have articulated it and withstood X's criticism of her. It is also unexplained how a one-third reduction in hours alone would adequately deal with the concern when Z would still be spending 24 hours a week in X's care.

42. I also find, with some conviction, that Y did not raise any concerns with X of any sort prior to 16 June 2023. I should also add that A's evidence (which was that when X was questioned about the 5 November 2022 he denied it and was given the benefit of the doubt) did not take matters any further. A accepted in cross-examination that he only knew of this because Y had told him; he had not been present.

43. I deal in the discussions and conclusions section below with what part the underlying allegations (bruising and 5 November 2022 telephone report) had in respect of the reason for the dismissal.

What happened on 16 June 2023

44. There is a further conflict of evidence about the communication that arose between X and Y in relation to an allegation reported to Y on 16 June 2023.

45. Y says that on 16 June, she responded to a missed call from the safeguarding team. When she returned their call, the team informed her that one of the managers at Ascot Range Community Centre, D, had witnessed X kissing Z.

46. Y says she spoke directly to D. In her statement Y did not say when. Her evidence to the Tribunal was that this was after she spoke to X on 16 June. I will return to this below.

47. Y said that when X returned to her home with her son on 16 June she then informed him that safeguarding had telephoned her. She says that without more, X immediately replied *"she's lying"* and kept repeating that phrase. She says she asked X how he knew what she was talking about. She says she asked X to leave and confirmed he was suspended until safeguarding had completed their enquiry.

48. X's evidence was that during the morning of 16 June 2023, and quite out of the blue, he received a telephone call from Blackburn and Darren Borough Council Social Services who informed him that an allegation had been made against him by a complainant. The allegation was that he had kissed Z in the Community Centre and he was told there were witnesses (paragraph 18 of his witness statement refers).

49. No other information was provided to X. He denied it to the caller. The call was short lasting around 3 minutes.

50. In his oral evidence, X said that when he returned to Y's house he informed Y of the telephone call that he had received. Y indicated that she had received such a call too. When X commented *"she's lying"*, he did so in reference to the person who had reported the allegation to social services. He says he was

asked *"how did you know?"* by Y. He replied it was obvious; he had received a phone call from Social Services, that's how he knew. Thereafter he says there was a bit of a disagreement around what had been said in the phone calls. X indicated that he was going home and left. His next communication was from Y in the form of a text message on 17 June 2023 stating:

"Hi X safeguarding are investigating about what's happened so you won't be working with Z till its all sorted its happened on a few occasion just hope its nothing like you say"

51. I prefer X's account of the interaction between the two on 16 June in all respects. I have already identified how unsatisfactory I have found Y's evidence in relation to the raising of earlier conduct concerns. I also note that X has always maintained since the presentation of the claim that he was told independently of the allegation [p.21, paragraph 15]. Materially, my finding here means:

(a) X did not offer the words *"she lying"* to Y without there being context to his response i.e. he had volunteered to Y that he had independent knowledge of the allegation. Accordingly, the comment was not a marker that he was aware – because it had happened - of some wrongdoing that connected to him; and

(b) he was not informed that he was suspended by Y on 16 June.

The decision to dismiss

52. I find the as matter of timing Y and her husband had made the decision to dismiss X <u>*before*</u> Y reported the matter to the police which she did on Monday 19 June 2024. This was Y's husband's evidence.

53. X did not then receive any further communication from Y until on the 1 September 2023 he received a letter posted by hand through the door from Y [p.104]. The letter was dated 23 August 2023 and informed X that he had been dismissed with immediate effect. The letter also states:

a) that it is further to a disciplinary notice "held" on Friday 9 June 2023;

b) that the matters of concern are "inappropriate behaviour" towards Z;

c) that the explanation given by X at *"the hearing"* was that *"this is all untrue";*

d) that the explanation is confirmed to be unsatisfactory because there are two witnesses;

e) that the writer has carefully reviewed and considered X's responses and has decided that his conduct has resulted in a fundamental breach of his contractual terms, the effect of which was to irrevocably destroy the trust and confidence necessary to continue their relationship, to which summary dismissal is the appropriate sanction; and

f) that X was dismissed with immediate effect and was not entitled to notice or pay in lieu thought that he had the right to appeal the decision within 14 days

of receiving the letter subject to giving full reasons why he believed the disciplinary action taken against him was inappropriate or too severe.

54. Y's evidence was that the reference to the notice being on 9 June was in error; she had intended to refer to 16 June 2023.

55. X wrote to Y on the 6 September 2023, delivering his letter by hand to Y's address [pp.106-115]. The long, handwritten letter set out a that his dismissal was null, there had been numerous breaches of employment law, that Y was obliged still to pay him whilst the matter was sorted out and that he was greatly upset. He also indicated that his information was that social services had closed down the investigation of the concerns on 19 June 2023 [p.113].

56. It also mentioned a number of important matters relevant to the disclosure made to X and Y on 16 June 2023:

    a) X acknowledged some people who he referred to as *"these people"*, were making false allegations which it was good that the police would be investigating.

    b) These people know he works with Z and have an intention to "get him" and stop and bar him from working in the care sector.

    c) That there was an incident at the community centre on Friday which did not involve X but involved Z trying and asking to kiss other people. X said he had spoken to Z about not doing it but Z thought it was funny.

    d) It acknowledges that Z tries to kiss other people and that Y's cousin hugs and kisses Z which tends to reinforce it was alright to do it to other people, and it has now unfortunately become part of Z's behaviour.

    e) It expresses that in time Z will stop doing this but it will require everyone working together.

57. I also find X sent a text message to Y on the 7 September referring to that letter. There was no response to either the letter or the text message. I am satisfied they were received by Y.

58. On the 19 September 2023 solicitors acting for X, Farleys, wrote to Y intimating the claim [p.119]. Among other things they noted that there was no witness evidence pertaining to the allegation against X. They made the point that the dismissal was considered to be pre-determined as well as unfair. So far as the appeal rights referenced in the letter dated 23 August were concerned, it was stated that X considered it futile to progress the appeal given the lack of any fair process. This had caused him to consider an appeal would be nothing more than a sham and unrealistic for both parties.

59. I find Y received the letter and telephoned Ms Mitchell of Farleys confirming safe receipt of the letter. She said to Ms Mitchell that she would respond to it. Y did not do so.

60. These proceedings were issued on 13 December 2023 following a period of early conciliation which began on 24 October 2023.

61. I am satisfied Lancashire Constabulary have been conducting an investigation into the allegation reported to X and Y on 16 June 2023. The investigation commenced in July 2023. X attended the police station once in August and once in September 2023 [p.146]. To date X has not been charged and no witness statements have been served on his legal team. The most recent piece of evidence before the Tribunal relating to the police involvement was a letter of 13 June 2024 confirming the investigation was ongoing and arrangements would be made for X to attend the police station for "further questioning" in due course [p. 48].

62. Y said in her evidence that she had received an email from the police a few weeks prior to the hearing which indicated they were still looking into the matter. She did not seek to place this before the Tribunal.

63. I am satisfied in October 2023 [p.127] Y was seeking statements from the police and did not then have in her possession the Interaction Record of B relating to the events on 5 November 2022.

The "investigation" as alleged by Y

64. This detail was not set out in her witness statement but, in her oral evidence Y said that she wanted to speak to the witness of the incident reported to her on 16 June 2023 before she reported the matter to the police. She therefore rang the Community Centre who said Y could attend on the following Monday and D would speak to her. She says she did this on Monday before calling the police.

65. In her witness statement Y indicates the explanation given to her by D was that D had *"walked in on Z and X kissing in a corner in the hallway which was a camera blind spot*".

THE LAW

66. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), e.g. conduct, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

67. Under s98(4) '*… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case.'*

68. Tribunals must consider the reasonableness of the dismissal in accordance with s98(4). However, tribunals have been given guidance by the EAT in **British Home Stores v Burchell [1978] IRLR 379; [1980] ICR 303, EAT**. There are three stages:

    a) did the Respondent genuinely believe the Claimant was guilty of the alleged misconduct?

    b) did it hold that belief on reasonable grounds?

    c) did it carry out a proper and adequate investigation?

69. Tribunals must bear in mind that whereas the burden of proving the reason for dismissal lies on the respondent, the second and third stages of **Burchell** are neutral as to burden of proof and the onus is not on the respondent **(Boys and Girls Welfare Society v McDonald [1996] IRLR 129, [1997] ICR 693**).

70. Tribunals must decide whether it was reasonable for the respondents to dismiss the claimant for that reason in all the circumstances of the case.

71. I remind myself that my proper focus should be on the claimant's conduct in totality and its impact on the sustainability of the employment relationship, rather than an examination of the different individual allegations of misconduct involved **(Ham v the Governing Body of Bearwood Humanities College UKEAT/0397/13/MC)**.

72. I have also reminded myself that the central question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for me to substitute my own decision of what I might have done in the Respondent's position.

73. The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. (**Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA**).

74. I also accept that when considering the question of the employer's reasonableness, I must take into account the disciplinary process as a whole, including the appeal stage. (**Taylor v OCS Group Limited [2006] EWCA Civ 702**).

75. Ultimately the question is whether the employer had a reasonable belief that the employee committed such serious misconduct that instant dismissal was justified. Just because the claimant has committed gross misconduct, does not mean the dismissal was fair. I accept that the usual approach under

s98(4) must be followed and the use of the label gross misconduct and the fact of summary dismissal is a factor to be considered along with all the other circumstances.

76. In this case, I asked either side if they wished to refer me to any specific authorities which deal with the situation in which there is an allegation of this kind or a criminal investigation. They did not refer me to any caselaw.

77. I myself noted the decision in **Scottish Special Housing Association v Cooke and ors 1979 IRLR 264, EAT.** In that case the EAT rejected what it considered to be a 'very dangerous doctrine' that the charging of the employee with a criminal offence of itself was sufficient grounds for the employer to conclude that the employee had committed the offence and therefore to dismiss him.

78. I have also had regard to **Leach v OFCOM [2012] IRLR 839, CA** . That was a case in which the Metropolitan Police Child Abuse Investigation Command (CAIC) had told the employer that the employee was a continuing potential threat or risk to children and that there was a risk of media exposure. It is clearly different from this case in a number of respects: with respect to the origin and nature of the information received, because the employee in Leach did not work directly with children, still less with the vulnerable person at the heart of the allegation and (related to that) the principal reason for dismissal was the risk of reputational damage leading to a breakdown in trust and confidence.

79. However, the Court of Appeal in **Leach** endorsed the EAT's decision (upholding the ET) in a number of respects that I consider to be of potential relevance to the question of necessary investigation where the employer relies upon misconduct or a upon loss of trust and confidence, as a result of a safeguarding disclosure which comes from a third party. The EAT ([2010] IRLR 844, [2010] ICR 849) noted that:

    a) an employer who receives information from CAIC or a similar body, under an official disclosure regime, that an employee poses a risk to children must, in principle and subject to certain safeguards, be entitled to treat that information as reliable and cannot, in such a case, be expected to carry out his own independent investigation in order to test the reliability of the information provided by a responsible public authority (paragraph 27)
    b) an employer would not be acting reasonably however if he took an uncritical view of the information disclosed (paragraph 29).

80. In respect of the latter point, the EAT said this:

> *Mistakes do sometimes happen; and the consequences when they do are devastating for the employee.* ***The employer ought therefore always to insist on a sufficient degree of formality and specificity about the disclosure before contemplating taking any action against the employee on the basis of it.*** *He will sometimes be in a position, either from his own knowledge or from information obtained*

from the employee, to raise questions about the reliability of the disclosed information: in such a case he ought, in the interest of fairness, to put those questions to the authority providing the information and to seek credible reassurance that all relevant information has indeed been taken into account.

Some Other Substantial Reason (SOSR) - A loss or breakdown in trust and confidence

81. Generally speaking, in order to rely upon a breakdown in trust and confidence as a substantial reason justifying a dismissal, it must be the act of the employee that brings about the breakdown. It may be possible to rely on the "fact of" rather than "the cause of" the breakdown.

82. In **L v K [2021] CSIH 35, [2021] IRLR 790** the Court of Session upheld a dismissal on grounds of SOSR where the conduct - possession of indecent images of children - was denied by the teacher but the right to prosecute had been reserved. It was also not disputed that the indecent images were on the teacher's computer. Thus the school said the employee was deemed to present an unacceptable risk to children, with the potential for reputational risk such that there was a breakdown in the trust and confidence which the employer required to have in the teacher. Whilst endorsing the concerns expressed by Mummery LJ in **Leach** that a breakdown in trust is not a mantra to be mouthed if there are difficulties in establishing a more conventional reason, the Court of Session said this:

An employment contract is a bilateral relationship. Cases such as the present throw the parties' respective interests into acute and direct conflict. Nonetheless, however the case may seem from the perspective of the employee, particularly if in fact he is blameless, ***once a substantial and genuine reason in terms of s 98(1)(b) is established****, the statutory test in sub-s 4 must be applied.*

83. In those circumstances the Tribunal must then determine as the only remaining question whether 'the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee', a matter to be determined in accordance with the substantial merits of the case.

84. As to what amounts to gross misconduct, following **Sandwell & West Birmingham Hospitals NHS Trust v Westwood UKEAT/0032/09** it involves either deliberate wrongdoing or gross negligence. The questions for the Tribunal are to consider both the character of the conduct and whether it was reasonable for the employer to characterise the conduct as "gross misconduct" (as per HHJ Hand at paragraph 113).

85. Any compensatory award I make must be what is just and equitable in all the circumstances *"having regard to the loss sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer"* (s.123(1)) The principles established in **Polkey v AE Dayton Services Limited [1987] UKHL 8** and developed further in **Software 2000 Limited v Andrews [2007] ICR 825; W Devis & Sons Limited v**

Atkins [1977] 3 All ER 40; and **Credit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604** provide that if the dismissal is procedurally unfair or the Claimant could otherwise have been fairly dismissed for another reason, an adjustment should be made to any compensatory award to reflect the possibility that a claimant would have been dismissed in any event.

86. There are further reductions that may be made under s.122(2) and s.123(6) ERA.

87. Section 122(2) of the ERA provides out that:

"Where the Tribunal considers that any conduct of the complainant before the dismissal (or where the dismissal was with notice before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly".

88. Section 123(6) of the ERA provides that:

"Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding".

89. The decision in **Nelson v BBC (No.2) [1980] ICR 110** relates to a substantially similar predecessor legislative provision and remains the lead authority on what action of a Claimant may warrant a reduction under this provision. Brandon LJ said this:

"It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or tort. It includes, no doubt, conduct of that kind. But it also includes conduct which, while not amounting to a breach of contract or tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody-minded. It may also include action which, though not meriting any of those more pejorative ……, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessary, culpable or blameworthy; it must depend on the degree of unreasonableness involved."

90. In reaching my decision, I must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. A failure by any person to follow a provision of the Code does not however in itself render her liable to any proceedings.

Unlawful deductions from earnings

91. Section 13 enshrines the right not to suffer an unauthorised deduction from wages other than in prescribed circumstances. So far as relevant to the issues in this case, it provides as follows:
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.
.....
(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

92. As to wages:
27.— Meaning of "wages" etc.
(1) In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—
(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,

DISUSSION AND CONCLUSIONS

The reason or principal reason for the dismissal

93. I find the reason for dismissal was that Y believed X had committed misconduct in reference to the single allegation shared with her by Safeguarding of 16 June 2024.

94. I am not satisfied that at the time of dismissal Y had any genuine belief that X had committed any wider or other misconduct. I have in mind here the concerns which I find she did not ever raise with X about bruising, and the allegation she claims was reported to her on or around 5 November 2022. Over and above the fact of not raising or investigating such profound concerns contemporaneously, I am highly circumspect about their complete exclusion from mention in these proceedings until disclosure and exchange of witness statements. This is not allayed by the fact Y has produced some ostensibly supportive evidence in the form of the photographs and the Interaction Record.

95. The photographs did not advance Y's case because no connection was made, even circumstantially, with X's care of Z. Despite Y choosing which photographs to exhibit to her statement she could not credibly articulate how these connected to X's care. Both X and Y agree that as a result of his condition and symptoms Z, sadly, does hit himself. There is also the fact that the letter of 23 August does not refer to bruises or a failure to adequately protect but to "inappropriate behavior" which is quite different. I also note that

part of the basis on which Y infers bruising of Z related to C's care is that in the time since X's employment ended Z has apparently not had any such bruises. Necessarily, that is very much after the fact and could not have been a factor in her mind at the time.

96. As a piece of documentary evidence, the Interaction Record more convincingly bolsters the idea that there was a concerning interaction in November 2022 witnessed by B. It thus lends apparent credence to Y's account that a verbal report was made to Y at the time and hence on 16 June this represented a second report. However, I have already found that it was not raised with X. Of itself, that is a powerful indicator that Y did not have concerns in November 2022. It is also somewhat difficult to understand how the Place, whose strapline indicated that it supports adults with learning disabilities would consider this was a serious enough interaction to document but that it was resolved by a phone call to Z's mother only. That sits uneasily with the formality of the record and my expectations of safeguarding practices. It is also right to mention the unchallenged evidence of X, which I accept, is that the writer of the statement is a long-standing friend of Y. She was not called by Y as a witness in these proceedings. I also return to the point that there remains no satisfactory explanation of why if this was genuinely a factor in the decision to dismiss X it was not raised in the ET3. I cannot accept its omission is simply oversight given the similarity in the alleged misconduct. .

97. Ultimately, in relation to the unfair dismissal claim, I do not need to reach a conclusion on the veracity of the November 2022 Interaction Record. What I am concerned with is Y's reason for dismissal in which she bears the burden of proof. In all, I find that if (and I do stress <u>if</u>) what is alleged in the Interaction Record was reported to Y during X's employment, it was not the operative reason for the dismissal in the mind of Y. It is not coincidence but perfectly telling in my view that this conforms entirely to the primary pleaded case put forward in the ET3.

98. The allegation of 16 June 2024 is different. Both parties agree that the Safeguarding department of the council had received an allegation in reference to X; that was how it was X and Y each came to be independently contacted on 16 June 2023. This was expressly raised by both parties in their discussion of that day. Despite the grave concerns I have about the reliability of Y, on the balance of probabilities I am prepared to accept that Y believed this reported allegation was soundly made and therefore that X had committed misconduct. On that point, it is right to acknowledge Mr Williams, quite properly, did not make submissions mirroring his client's stated suspicion that the allegation made to safeguarding in June 2023 originated with Y. Rather he put the case on the footing that the best that could be said for Y and A was that they felt so compelled by parental need to protect their child, they forget themselves and decided to dispense with process. I agree with that submission.

99. I can certainly accept the contact from safeguarding would have been a source of real concern for Y as Z's mother. However, I reject that as a result of the allegation reported on 16 June 2023 her trust and confidence in X as personal assistant was so damaged as to constitute "some other substantial

reason of a kind such as to justify the dismissal of an employee holding the position which the employee held" for the purpose of s.98(1)(b). The information she had was simply not at that threshold. It was the report of an allegation, the detail of which she did not fully then know and which had been denied by X. It is quite distinct from a case in which an employer responsible for a vulnerable person(s) receives formal disclosure from CIAC or other authoritative source under an official disclosure regime confirming an actual risk of harm. Even then, following **Leach**, disclosure of that quality and status would require some critical examination by the employer before proceeding to dismiss.

Were there reasonable grounds for the belief?

100. There were no reasonable grounds for the belief. The telephone call from Safeguarding was some basis for that belief but it was a hearsay report. The only other information Y had was received directly by her from X and constituted a denial. Consistent with my findings, it was no sense a suspicious, revealing or unprompted denial.

101. X was someone who had worked with Y's son over two lengthy periods spanning his childhood into early adulthood. He had a clean disciplinary record. Y had no reasonable basis to form a belief that whomever had complained to Safeguarding was correct and X was being dishonest to her.

At the time the belief was formed had the respondent had carried out a reasonable investigation

102. At the time the belief was formed (before contact with the police on 19 June) and right up the dismissal itself, I am not satisfied Y received any other information from that which I have described above. She had no written information at all from Safeguarding or any other source.

103. On the balance of probabilities I am not satisfied Y did go to see the maker of the allegation, D, at the Community Centre on 19 June 2023. There is no evidence that she did, other than Y's oral evidence which I did not find convincing. Y did not seek to call D to confirm that they had met on 19 June. I can identify no barrier to that. Her text message to X of 17 June 2023 was clear that Safeguarding were investigating. She mentioned nothing at all about her own inquiries.

104. Even allowing, as I must, for the fact that Y was not acting in the course of business and seems, at most, to employ only two staff, this was not within the range of reasonable responses. I find Y never wanted to or saw any reason why she should investigate at all. Y's unrepentant position in cross-examination was with the exception of the safeguarding, the police will do the investigation for her.

Did Y otherwise act in a procedurally fair manner?

105. Y acted without any identifiable degree of procedural fairness at all and a degree of active procedural unfairness in respect of the contents of the letter dated 23 August 2023.

106. Y did not give X details of the allegations (barring the brief conversation on 16 June). She did not conduct a hearing to get his account of the events. She did not tell him he was even being put through a disciplinary process as such. There was no attempt to conform with the three stages set out in Annex A of the employment contract.

107. Y took the decision to dismiss, informed the police then did nothing further. She told the Tribunal quite starkly that she had not had a meeting with X and did not want to do so.

108. She notified X of his dismissal in a document which falsely referred to a hearing having taken place at which he had been given the opportunity to give "an explanation" and "responses". This was not a remotely fair characterisation of the exchange on 16 June 2023.

109. She offered him an appeal that was to herself, not a neutral other person, and then, I find, deliberately ignored his letter of response which could only be reasonably interpreted as a challenge to the correctness of decision.

110. She further compounded this by maintaining in these proceedings that she had not received X's letter until she was asked in cross-examination.

Was dismissal within the range of reasonable responses?

111. Dismissal was well beyond the range of reasonable responses. A reasonable response having regard to Z's vulnerability and the nature of the allegation may have been to suspend X in accordance with the disciplinary policy, pending the outcome of any Safeguarding enquiry and/or her own investigation, whichever ended sooner. Y could also have looked into alternative arrangements for X working with Z alongside another PA so there would be an element of chaperoning.

112. I do not say Y should necessarily have refrained from contacting the police. In her capacity as Z's mother she was entitled to do that albeit I am bound to say, the advantages for Z's safety above the effects of halting unsupervised contact between X and Z and a safeguarding enquiry, are not wholly obvious. Phoning the police was certainly not the product of any advice she received from Safeguarding.

113. The important point however is that Y did not simply call the police but deliberately chose to make the police investigation a belated proxy for her own employer's investigation. That is not reasonable but having done so, it is not then within the reasonable range of responses to dismiss X on 1 September 2023 in the very early stage of that investigation, when she herself has done nothing further.

Polkey - 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?

114. Ms Barlay relies on Polkey. I asked whether she submitted a time period or percentage reduction reflecting the likelihood of dismissal. She submitted that with a fair procedure X could have been dismissed on 16 June 2024.

115. Mr Williams makes the point that there simply has not been a watershed moment Y can point to where she can maintain she could fairly dismiss the Claimant. He submits that any Polkey argument is last minute, not supported by evidence and opportunistic.

116. With respect to Ms Barlay, I cannot see any basis upon which X could have been fairly dismissed for misconduct or SOSR with a fair process at the time of his dismissal. I am required to consider what would have happened. What I can say with confidence is that any hearing offered by Y in summer 2023 would have proceeded without any statements or documents supporting wrongdoing in reference to the single material allegation which is the reason for dismissal. X is also certain to have protested his innocence whilst, by way of context, to have advanced details of the kind set out in his letter of 6 September. Against that backdrop, dismissal would not have been a reasonable response.

117. I also find Mr Williams' point is sound insofar as Y basis to dismiss for misconduct is no more within the reasonable band of responses today than it was in August 2023. The complexion has not changed. Y has not advanced any new or different evidence that makes good her only real reason for dismissal. It is a matter of some conjecture quite what information or evidence the police may hold and indeed what X would, given a fair hearing, say in reply. No charge has been brought and none may ever be brought.

118. Although no specific submission was made by Ms Barlay, I am required fairly to consider the likelihood that X would have been dismissed for some other reason. I have rejected that there was SOSR at the time of dismissal. I have reflected upon but do not consider the fact of the ongoing police investigation until at least June 2024 would, at some point sooner than then, have fairly entitled Y to dismiss on the grounds of loss of trust and confidence. In the particular circumstances of this case, I am not persuaded it does. Five points are relevant:

(a) The fact of a police investigation prompted at Y's behest cannot of itself be a genuine and substantial reason to lose trust in X. The context is critical. Y knows exactly why and how that investigation started. It was not Social Services who triggered it. Y knows it's remit.

(b) The fact the police investigation is ongoing for a lengthy period is not an independent marker that the allegation is well-founded. I can and do take judicial notice that the police can often take a substantial amount of time to

investigate potential crimes. More to the point, Y is aware it is going quite slowly and has enough information to exclude that this signifies deeper concerns.

(c) From the police emails of February and March 2023 it appears two statements have been obtained about inappropriate behaviour but these have not yet even been sent to the CPS to consider a charging decision. That may not necessarily happen. The evidence will require to be put to X first. This is some way off the situation in **L v K** where part of the loss of trust and confidence converged on the right to prosecute having been expressly reserved. I do take into account that the allegation in this case does not give rise to a generalised risk of harm to the employee's service users but a particular risk of harm to the only individual who Y requires X to deal with. Also, that X works with Z on his own. X's position undoubtedly calls for a very high degree of trust and confidence. However, Y does have X's denial and, in this Polkey-scenario, X's important letter of 6 September 2023.

(d) In envisaging what would have happened if there had been no earlier dismissal, I must also consider what Y would have done. I consider she would have maintained exclusive reliance on the police investigation and persisted with her uncritical acceptance of the 16 June 2023 allegation. I find that with confidence given the defiant stance she took about still not wanting to meet with X to this day. It follows that she would not have investigated X's account about Z's propensity to kiss others and the potential bad faith of the accuser. In those circumstances I do not consider it would have been open to her to dismiss X for SOSR. This would be a situation of invoking the mantra to avoid the proper course of proving misconduct.

(e) Consistent with there being no fair consideration of a suspension by Y, and no actual suspension, I received no evidence or submissions from Y that a paid suspension period of X of many months' duration would not have been feasible. I note in any event, the cost associated with employing X was effectively sponsored by Social Services.

Did the respondent or the claimant unreasonably fail to comply with the ACAS Code of Practice on Disciplinary and Grievance (the Code)?

119. There were numerous and varied unreasonable failures to comply with the Code, particularly paragraph 5 (establishing the facts in an investigatory stage/ meeting), paragraph 7(the investigatory meeting should not by itself result in any disciplinary action), paragraph 9 (notifying the employee of the case to answer), paragraph 10 (notifying of the disciplinary meeting time and venue – here it was misrepresented that there had been a hearing), paragraph 12 (allowing the employee the opportunity to set out their case, answer allegations and present evidence), and paragraph 27 (providing an impartial appeal).

120. I record that I do not think there were any unreasonable failures by the Claimant to comply with the Code. Y's actions fully justified X's position that

an appeal would be a gratuitous process not worth him engaging in. No opportunity was lost in the avoidance of this claim by him not pursuing that course.

By what proportion, up to 25% it is just and equitable to increase X's award?

121. The scale of Y's failures means it is just and equitable to increase X's award by the full maximum of 25%.

Did X cause or contribute to dismissal by blameworthy conduct?
and
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?

122. I take these two issues together acknowledging that there is an element of causation in the first issue that is not present in the second. The ET3 submits that the Claimant caused or contributed to his dismissal. I have not identified any culpable or blameworthy conduct of X that caused or contributed to his dismissal. He denied the allegation promptly. He later set out material of potential relevance to how an incorrect allegation might arise. He did so at a time when it was open to Y to reconsider her decision. He did not hold relevant information back that I can see.

123. I similarly cannot identify any reason of X's conduct that would make it fair in this case to reduce the basic award.

Wrongful dismissal – notice period, payment and gross misconduct?

124. X had the contractual right to 5 week's notice which he was not paid. There are no grounds justifying non-payment since in my judgment X did not commit an act of gross misconduct. I accept that, in principle, engaging in consensual kissing with Z would constitute gross misconduct but there is no sufficiently persuasive evidence before me that X did do this. I do not place any real weight on the Interaction Record as indicating a propensity by X to the misconduct alleged. I found X an honest witness and accept his denial. X was wrongfully dismissed.

Did the respondent make unauthorised deductions from the claimant's wages?

125. The Claimant's case is that he was not paid his wages for July 2023.Clearly this relates to the period before his dismissal.

126. It is common ground that Disability Positive run the payroll. They receive the money from social services to pay for the care of Z and in turn remitted this to X. They also provide payslips to Y for issuing to X. The amounts of pay are determined from X's weekly time sheets which Y approves and posts on. Wages are clearly paid monthly in arrears.

127. Y has produced payslips which show that £1072.12 was due on or around 27 July 2023, £1072.12 was due on 24 August and £1194.80 was due on 27 September. Y maintains that whilst August and September wages were paid late, all of those three sums have been paid and there are no arrears.

128. Y's belief in payment appears to rest on information from Disability Positive but I have not been provided with evidence of actual payment by them. I do not regard the payslip that has been provided as evidence of that. There is nothing to suggest the payslip would only be sent to Y by Disability Positive when the payment was made or if it had been irretrievably set in motion.

129. As against that I find that on or around 24 August 2023 X sent a message to Y pointing to the fact that only one payment had been received (a reference, I find, to the sum due in August). X went on *"still not been paid the outstanding amount for July..."*. Y replied *"there isn't enough money in account so you will have to wait until they have sort it out"* [p.101].

130. X has also produced evidence tending to show he was is contact with HRMC about the missing payment in early August [p.105]. He has been consistent in these proceedings that he did not receive the amount. I believe and accept his evidence and find there has been an unlawful deduction of earnings in the net sum of £1072.12

131. In respect of holiday pay, there is some difficulty in separating the liability and quantum issues. I am reserving both matters to the remedy hearing (if they cannot be agreed).I do so chiefly because I did not receive submissions from the parties as to the entitlement of the Claimant to carry over leave and it seems that his claim for 100 hours at the rate of £12 per hour (his witness statement at paragraph 53(iii)) *may* depend on this.

132. In the time available the parties inevitably did not have a great deal of time to address me about this. The evidence of Y was that she did not ever tell X that he could not carry over leave. However, it does seem clear from the timesheets I have seen that paid holidays were taken by X at times [e.g. p.170].

133. This case is clearly prior to the coming into force of the Employment Rights (Amendment Revocation and Transitional Provision) Regulations 2023/1426 which only took effect from 6 April 2024.

134. I note from paragraph 102 of **Smith v Pimlico Plumbers No.2 [2022] EWCA Civ 70** that:

> *A worker can only lose the right to take leave at the end of the leave year (i**n a case where the right is disputed and the employer refuses to remunerate it**) when the employer can meet the burden of showing it specifically and transparently gave the worker the opportunity to take paid annual leave, encouraged the worker to take paid annual leave and informed the worker that the right would be lost at the end of the leave year. If the employer cannot meet that burden,*

> *the right does not lapse but carries over and accumulates until termination of the contract, at which point the worker is entitled to a payment in respect of the untaken leave.*
>
> ***[****My emphasis****]***

135. I consider therefore that if the parties require the Tribunal to resolve this issue, I will need some brief submissions.

136. For now I make the following non-binding observations which I hope will be of some assistance.

137. I have not been able to work out from the time sheets that 100 hours of holiday pay arises in the period from 1 April 2023. The last in time of these sheets is dated 30 January 2023 [p.172] which is prior to the commencement of the leave year in which X left.

138. Looking at the payslips, these tend to show that holiday pay has been taken as follows:

April 2023 – 64 hours
May 2023 - 0
June 2023 – 12 hours
July 2023 - 0
August 2023 - 0
September 2023 – minus 8 hours have been applied when Y made a deduction.

139. As to the hours worked, Y's holiday entitlement spreadsheet [p.188] suggests that since 1 April 2023, 741.50 hours were worked, giving rise (it appears by applying the usual percentage of 12.07%) to 89 hours holiday. Y then says that 76 hours have been taken as paid leave. This would appear to leave 13.499 hours outstanding. Pausing there, I rather wonder this fits with the figure Y was trying to recall during the hearing when she acknowledged (contrary to her pleaded case) that "thirty" odd hours were due.

140. Either way, I observe that I cannot currently see how Y is able to resist liability for that. I would also observe that the 76 hours holiday pay "taken" seems not to take into account an adjustment of "- 8 hours" shown on p.192.

141. It is also not clear to me whether holiday pay of 64 hours paid on 6 April 2023 is/was deemed to be taken, whether as to part or in whole, in March 2023. I note Y says there were 32.3 hours unused in the 2022-2023 leave year [p.188]. I appreciate Y argues they cannot be taken forward but that is a somewhat different matter.

142. I am also reserving the question of liability for the 230.5 "underpaid" hours as I was not specifically addressed about this either. In her witness evidence Y has sought to deal with an acknowledged previous underpayment by reference to X's hourly rate. It remains unclear to me whether this may be part of the issue at which X is driving or whether it all connects to the reduction in hours made in March 2023 or indeed something else.

143. I have made directions accordingly which will come to the parties under separate cover.

Approved by Tribunal Judge Miller-Varey
acting as an Employment Judge
11 March 2025

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE

ANNEX A

REASONS

IN RESPECT OF ORDERS MADE UNDER RULE 49 AND S.11 EMPLOYMENT TRIBUNALS ACT

1. Of its own initiative the Tribunal raised the issue of whether having regard to the vulnerability of Z, and the nature of the underlying misconduct allegation, a restricted reporting order (RRO) under r.49(3)(d) may be mandated because of the statutory right to anonymity conferred on Z by the Sexual Offences Amendment Act 1992. Alternatively, the Tribunal considered that an order(s) may be warranted under Rule 49(3) in order to protect Z's Article 8 right to respect for his private and family life. The Tribunal noted the Claimant's concern about reputational impacts and thus that he may have a competing wish to have the benefit of a publicly available judgment.

2. Mr Williams helpfully took the Tribunal to the decision in **Damilare Ajao v Commerzbank AG and Others: [2024] EAT 11**

3. The Judge provided this by open-source link to Ms Barlay to consider. Both sides were given an opportunity to take instructions.

4. The Tribunal noted that a member of the public had joined the remote hearing.

5. Mr Williams indicated the Claimant had no concerns about his identity being anonymised and was supportive of protecting Z's privacy. He submitted that the wishes of Z's parents must be afforded significant weight.

6. He further submitted that in the circumstances, the proper consideration and application of the available orders under r.49 may make it unnecessary to reach a definitive conclusion on whether an RRO was required because the same outcome would be achieved. On whether it was mandated, this was at the very lower end of the mandated power taking into account the scant detail of the allegation.

7. He submitted that the observer would not be caught by an RRO however such that anonymisation would be necessary. This would necessarily have to be done on an encompassing basis because of the significant potential for "jigsaw identification".

8. Ms Barlay confirmed the Respondent and her husband considered Z's interests required that he be protected from identification and this included by someone "joining up the dots".

9. On the question of the practicalities, the Tribunal noted the challenges of the parties' representatives conducting the case using 4 initials for all of the main protagonists who are likely to need to be referred to. Mr Williams submitted that I could consider an order under r.49(3)(a) for the hearing to proceed in private.

10. By this point the Judge had enquired of the observer whether he was willing to disclose his purpose in attending the hearing, stressing to him that consistent with the principle of public open justice, there was no requirement upon him to do so. He volunteered in a typed message that he was just wanting to understand how cases are conducted because he has his own employment tribunal case ongoing. The observer also commented in the chat that he understood the situation and would go.

11. I determined to make a restricted reporting order pursuant to s.11 of the Employment Tribunals Act 1996 and rule 49(3)(d). This is because:

    (a) the misconduct alleged to entitle the Respondent to terminate the Claimant's employment appears to falls within the definition of s. 2(1) of the Sexual Offences Amendment Act 1992 (the 1992 Act);

    (b) a complaint has been made to Lancashire Police about the allegation and there is an email from Lancashire Police to the Respondent in the bundle that shows that as at 14 March 2024, police inquiries were ongoing. Within that email reference is made to "sending the incident to the CPS" [p.128];

    (c) Following **Damilare Ajao v Commerzbank AG and others: [2024] EAT 11** the automatic lifelong anonymity provided for under the 1992 Act attracts under s.1(1) of the 1992 Act to a formal allegation made in the context of potential criminal proceedings, where a criminal charge may be brought (paragraph 77). There is no requirement that the allegations be made by the victim; a parent raising the issue for a child may be sufficient (paragraph 74)

    (d) Further, following Damilare at paragraph 82:

    "82. The cross-reference to the 1992 Act in the definition of "sexual offence" in section 11(6) of the 1996 Act, the rule making provision which (together with section 7 of the 1996 Act) authorises the making of rule 50, suggests that parliament had in mind the possibility that the protection of the 1992 Act could apply in cases where the same conduct is alleged as a criminal matter and in employment tribunal proceedings. It appears that, in such a case, any privacy order would be made under rule 50. Obviously, a tribunal in such a case would want to avoid any clash with the criminal law, disclosure of a protected person's identity being an offence under section 5 of the 1992 Act.

    (e) an RRO would be in furtherance of avoiding that clash with the criminal law. It is therefore appropriate to protect Z's identity from disclosure.

12. I also determined to make an order for anonymisation under r.49(3)(b). This includes key people and places as set out further in the order. This will protect Z's identity in relation to any documents entered onto the Register, or which otherwise forms part of the public record. This is in furtherance of the statutory right arising under the 1992 Act.

13. I also determined that the hearing should be held in private under r.49(3)(a).

14. In making that order, I gave full weight to the principle of open justice and the convention right to freedom of expression.

15. I concluded that that nothing short of holding the hearing in private would secure the proper administration of justice and the protection of Z's article 8 right to respect for his private and family life.

16. The interests of justice are served by the timely and efficient disposal of this case which has been ongoing since December 2023, in which a stay has already been refused and which the time available for final hearing was limited to one day. The issue of non-identification/privacy had not been noted sooner and the parties' representatives had not prepared their questioning or submissions in a way that reflected the anonymisation. This, allied to the scale of anonymisation, meant the flow and pace of the proceedings would be negatively impacted with a real risk of inadvertent naming. It was just and proportionate therefore to exclude members of the public.

ANNEX B
List of Issues

1.What was the reason or principal reason for dismissal?
The respondent says the reason was conduct or some other substantial reason. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.
1.2 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:
1.2.1 there were reasonable grounds for that belief;
1.2.2 at the time the belief was formed the respondent had carried out a reasonable investigation;
1.2.3 the respondent otherwise acted in a procedurally fair manner;
1.2.4 dismissal was within the range of reasonable responses.

2. Remedy for unfair dismissal
2.1 Does the claimant wish to be reinstated to their previous employment?
2.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?
2.3 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.
2.4 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.
2.5 What should the terms of the re-engagement order be?
2.6 If there is a compensatory award, how much should it be? The Tribunal will decide:
2.6.1 What financial losses has the dismissal caused the claimant?
2.6.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?55
2.6.3 If not, for what period of loss should the claimant be compensated?
2.6.4 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?
2.6.5 If so, should the claimant's compensation be reduced? By how much?
2.6.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
2.6.7 Did the respondent or the claimant unreasonably fail to comply with it?
2.6.8 If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
2.6.9 If the claimant was unfairly dismissed, did he cause or contribute to dismissal by blameworthy conduct?
2.6.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
2.6.11 Does the statutory cap of 52 weeks' pay apply?
2.7 What basic award is payable to the claimant, if any?

2.8 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?

3. Wrongful dismissal / Notice pay
3.1 What was the claimant's notice period?
3.2 Was the claimant paid for that notice period?
3.3 If not, was the claimant guilty of gross misconduct? i.e. did the claimant do something so serious that the respondent was entitled to dismiss without notice?
4. **Holiday Pay (Working Time Regulations 1998)**
4.1 Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?
4.2 What was the claimant's leave year?
4.3 How much of the leave year had passed when the claimant's employment ended?
4.4 How much leave had accrued for the year by that date?56
4.5 How much paid leave had the claimant taken in the year?
4.6 Were any days carried over from previous holiday years?
4.7 How many days remain unpaid?
4.8 What is the relevant daily rate of pay?
5. Unauthorised deductions
5.1 Did the respondent make unauthorised deductions from the claimant's wages?
5.2 If so, how much was deducted/how much wages are owing to the claimant?
6. Breach of Contract
6.1 Did this claim arise or was it outstanding when the claimant's employment ended?
6.2 Did the respondent do the following:
6.2.1 Fail to pay the claimant's expenses.
6.3 Was that a breach of contract?
6.4 How much should the claimant be awarded as damages?