EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103524/2022

Held in person in Glasgow on 27 and 28 October and 8 and 9 December 2022

Employment Judge R Bradley

Mr I Lew-Gorzynski	**Claimant** **In person**
David Cargill House	**Respondent** **Represented by:** **Mr A MacPhail – Barrister**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is that:-

1. The claim of unfair dismissal does not succeed; it is dismissed;

2. The claim for the recovery of damages for wrongful dismissal (notice pay) does not succeed; it is dismissed;

3. The claim for accrued untaken and unpaid holidays does not succeed; it is dismissed;

4. The claim to increase any award for a failure to provide a written statement of terms and conditions of employment does not succeed; it is dismissed.

REASONS

Introduction

1. In an ET1 presented on 27 June 2022 the claimant made claims of unfair dismissal, notice pay, holiday pay, and breach of contract (notice pay). The paper apart made a claim that he had not received a written contract. He sought compensation. The claims were resisted. In accepting that it had dismissed the claimant the respondent relied on conduct as its reason. The

case was initially listed for a three-day final hearing (26 to 28 October 2022) to consider merits and if appropriate remedy.

2. On 22 September 2022 the claimant sent an email to the Tribunal applying for "*an extension of time to submit a claim form*" because, he said, it was not reasonably feasible to submit it on time or alternatively applying to change "*the label of the case*". After sundry case management, that opposed application was heard and decided at a preliminary hearing by EJ McLean on 26 October. The parties were represented at that hearing as they were before me. Bar a minor amendment to paragraph 29 of the ET1 paper apart, the application was refused. The amendment extended to 44 paragraphs. It stated that the claimant sought to bring a claim of indirect discrimination and harassment under section 13 of the Equality Act 2010. He relied on the protected characteristic of race. He is of Polish origin. On 31 October the Tribunal's reasons for its decision on 26 October was copied to the parties following a request made by the claimant. The final hearing started on 27 October but did not conclude in the two days available. It resumed and concluded on 8 and 9 December.

3. A paginated indexed bundle containing 118 entries (extending to 398 pages) had been prepared and lodged. It distinguished (1) Tribunal documents; (2) respondent's documents; (3) claimant's documents and (4) claimant's miscellaneous documents. I also saw a separate indexed bundle of 8 entries and 21 pages which contained a schedule of loss and correspondence between the parties relating to (i) the claimant's application to amend and (ii) applications to include material in the hearing bundle. After discussion, documents which became pages 399 to 401 were added to the indexed bundle. For the December hearing, the claimant produced an updated schedule of loss. I say something about it later. I was also given copies of the claimant's wage slips dated 28 October, 25 November and 23 December all 2021 for work done with the respondent.

4. Both parties had objected to the inclusion in the indexed bundle of material to be relied on by the other. After discussion, all of that material was allowed

into the bundle. As it turned out, a significant amount of material not spoken to by any witness.

5. At the start of the hearing on 8 December, the claimant tendered a schedule of loss dated 7 December. It sought to include two claims for alleged unlawful deductions from wages. The first was for alleged loss of pay for overtime hours in the period of his suspension, from 19 January to 18 April 2022. He sought payment of £1528.80 for 156 hours. The second was for either £7386.60 or £8494.20 being an alleged loss of pay over a period of 10 years. There was no claim for either in the ET1 form or its paper apart. I took the view that the claimant required permission to amend his claim by introducing them on 8 December. There was a short adjournment to allow Mr MacPhail to seek instructions as he had been unaware of the claimant's intentions until the start of the hearing. I summarise the competing arguments on the two claims in turn.

6. On the overtime claim, this had been included in the schedule of loss dated 22 August albeit under the heading of past losses as part of a compensatory award within the claim of unfair dismissal. In the course of the October hearing, I had queried with the claimant its relevance as part of a compensatory award which is "*in consequence of a dismissal*" where it obviously arose prior to this. The claimant had taken account of my comments and relabelled the claim accordingly. He accepted that the claim was not made out in the ET1. But in his view the respondent had been aware of this as a claim he was making since 22 August. In reply Mr MacPhail; noted that he was first aware of the position that morning, 8 December; and emphasised that while it was in the August schedule, the claim had not been properly presented in the ET1 and thus was considerably out of time. The respondent at this stage would be prejudiced in not being in a position to either answer the claim or (at least at this hearing) lead evidence about it.

7. On the second claim, the claimant accepted that it was "*new*" as of 8 December. He said it had arisen out of an exchange with the respondent's solicitor in the period between 28 October and 7 December. That exchange was initially about his pay in the 3 months prior to his suspension. He believed

that 1 month's work has been done "*free*" every year of his employment. He believed that this state of affairs had been ongoing for 10 years. In answer, Mr MacPhail referred to the ET1 page 5 at which the claimant noted that his net take home pay was far in excess of his gross pay. In short, the claimant has had the information necessary to intimate the claim for some time, and certainly at the time of presenting his ET1. He noted that were this claim allowed in these proceedings, it was inevitable that the hearing would require to be adjourned; the respondent would require time to answer it, and further evidence would require to be led.

8. In deciding against the claimant's application to amend I took account of what was said by the EAT in the case of *Selkent Bus Co. Ltd. v Moore* [1996] ICR836. Its guidance is, "*Whenever the discretion to grant an amendment is invoked, the Tribunal should take into account all the circumstances and should balance the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it. What are the relevant circumstances? It is impossible and undesirable to attempt to list them exhaustively, but the following are certainly relevant. (a) The nature of the amendment. Applications to amend are of many different kinds, ranging, on the one hand, from the correction of clerical and typing errors, the addition of factual details to existing allegations and the addition or substitution of other labels for facts already pleaded to, on the other hand, the making of entirely new factual allegations which change the basis of the existing claim. The Tribunal have to decide whether the amendment sought is one of the minor matters or is a substantial alteration pleading a new cause of action. (b) The applicability of time limits. If a new complaint or cause of action is proposed to be added by way of amendment, it is essential for the Tribunal to consider whether that complaint is out of time and, if so, whether the time limit should be extended under the applicable statutory, e.g., in the case of unfair dismissal, section 67 of the Employment Protection (Consolidation) Act 1978. (c) The timing and manner of the application. An application should not be refused solely because there has been a delay in making it. There are no time limits laid down in the Regulations of 1993 for the making of amendments. The amendments may be made at any time — before, at, even after the hearing*

of the case. Delay in making the application is, however, a discretionary factor. It is relevant to consider why the application was not made earlier and why it is now being made: for example, the discovery of new facts or new information appearing from documents disclosed on discovery. Whenever taking any factors into account, the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment. Questions of delay, as a result of adjournments, and additional costs, particularly if they are unlikely to be recovered by the successful party, are relevant in reaching a decision."

9. Both "*amendments*" sought to include new claims. They both would have involved a consideration of new facts. If either or both had been allowed, the hearing would have had to be adjourned; there would have been a delay in concluding the case; new evidence on both sides would have been required; there would have been additional cost to the respondent in answering the claims, preparing its evidence and in legal representation at an adjourned hearing. That is an obvious prejudice. Both claims were significantly out of time. I was not persuaded by the claimant that it had not been reasonably practicable for him to have presented the claims with his ET1, and thus in time. Separately, given the factual bases of the claims it is open to the claimant to raise proceedings in the Sheriff Court seeking payment of what he said is due. While there may a delay in having to start afresh in Court, that delay may not be any more than would have been occasioned by an adjournment of this hearing. In those circumstances I refused the claimant's application to amend in these two claims.

10. In answer to my question, the claimant confirmed that he wished written reasons for my decision to refuse his application. Those reasons are set out above.

Witnesses

11. Evidence for the respondent was taken from Clare Mellor HR consultant, Linda McKenzie-Arnott, the respondent's depute manager, and Abi Jebbari, its manager. The claimant gave evidence. I also heard evidence from his

mother, an employee of the respondent via a Polish translator. By agreement the witnesses were taken out of their nature order as follows; Clare Mellor, Linda McKenzie-Arnott, Ewa Lew-Gorzynska (the claimant's mother); Abi Jebbari; the claimant.

The issues

12. The issues for determination were:-

    a. What was the reason for the claimant's dismissal? The respondent asserts that it was gross misconduct.

    b. If the reason for his dismissal related to his conduct; did the respondent believe in the guilt of the claimant on its basis to conclude gross misconduct? Did it have a reasonable basis on which to make that conclusion? Had it, prior to reaching its conclusion, carried out sufficient of an investigation to justify it?

    c. Was the decision to dismiss the claimant "*fair*" taking account of section 98(4) of the Employment Rights Act 1996?

    d. In summarily terminating the contract on 18 April 2022 was the respondent in material breach of contract? If so, to what damages is the claimant entitled in respect of that breach?

    e. As at 18 April 2022 how much accrued untaken paid leave was due to the claimant? Has the respondent paid the claimant in lieu of that accrued entitlement?

    f. Did the respondent issue to the claimant a statement as per section 1 of the 1996 Act? If not to what compensation (if any) is he entitled?

Findings in fact

13. From the evidence and the Tribunal forms, I found the following facts admitted or proved.

14. The claimant is Iwo Refal Lew-Gorzynski.

15. The respondent is David Cargill House. It is a registered charity, number SC018250. It is a Registered Society. It operates a registered care home for older adults. It is subject to National Care Standards. It is subject a Code of Practice of the Scottish Social Services Council (SSSC).

16. Prior to 2007 the respondent engaged about 15 or 20 workers as "*bank staff*". They did not have written contracts. In or about that year the respondent decided to issue them with written statements of terms and conditions of their employment. At that time, two copies per statement were issued to each worker. The intention was that one copy should be retained by the worker and the other signed and returned to the respondent.

17. On or about 1 July 2011 the claimant began employment with the respondent. On 18 April 2022 he was summarily dismissed. At the time of his dismissal he was employed as domestic assistant. His normal monthly take home pay (page 5 ET1 form) was about £1124.00. His work included nightshifts, between 11.00pm and 07.00am. In the three months to December 2021 he worked overtime. At the time of his dismissal, the respondent employed about 45 staff at its premises at 6/7 Great Western Terrace, Glasgow.

18. On or about 5 July 2011 the respondent issued to the claimant a copy of its staff handbook (pages 175 to 199). Pages 3 to 7 of the handbook (pages 177 to 181) bear to be an induction checklist. That list, in turn, consists of 8 sessions or modules. Page 181 lists those 8 modules (with two others, 9 and 10). Section/Module 2 is called "*Your Terms and Conditions*." That section (on page 177) in turn lists 20 items. They include items such as "*Statement of Terms of Employment*", "*Holiday Rules*" and "*Police check*." All bar 3 of that list of 20 show a date of 18 July 2011. The 3 which do not show that date include the "*Statement of Terms of Employment*". Various other entries within other sections show the same date.

19. Sometime in or about 2011 or 2012 the respondent issued to its staff written statements of terms and conditions of employment. Ms McKenzie-Arnott believed that she issued them to all staff, including the claimant.

20. The claimant signed a Form ESH1. It is headed "*Employee Confirmation of receipt and content of Employee Safety Handbook*" (page 174). It bears to be page 19 of 19. Pages 156 to 173 of the bundle bear to be pages 1 to 18 of that handbook. The claimant signed page 174 on 14 June. The year reference is illegible. It is likely that he signed it sometime after 2011.

21. The respondent's holiday year coincides with the calendar year.

22. On or about Tuesday 18 January 2022 an employee of the respondent, June McIlveen, telephoned the respondent's depute manager, Linda McKenzie-Arnott. In that conversation, Ms McIlveen described an incident that had occurred at the respondent's premises the previous weekend. Ms McKenzie-Arnott asked that Ms McIlveen follow up the conversation in writing. By email on 18 January, she did so (page 69). In it she said that; on Saturday 15 January she had been standing at the bottom of stairs outside the Day room; she was with another member of staff and a female resident; the resident was in her wheelchair; it was lunchtime; the claimant came over to get the resident; he flipped her wheelchair back; he moved it from side to side "*not gently*". Ms McIlveen described the resident as being; "*terrified*"; and "*clinging onto the chair*." Ms McIlveen said that she had told the claimant to stop; he was scaring her. She said that he continued to do it. Her email reported that she had said, "*You're fucking scaring her*". Her email recognised that she should not have sworn but that she was "*so angry*." Ms McIlveen's email then noted that she was told that that was nothing compared to what else the claimant did but "*gets away with it*" as no-one reports him. She noted that she was told that the claimant makes a fool of residents, calls them lesbians and other names. She noted her opinion that he was "*in the wrong job*." The email did not record the source of the information said to have been told to Ms McIlveen.

23. At 15.19 on 19 January (page 324) Ms McIlveen forwarded her earlier email to Ms McKenzie-Arnott to say, "*I am very sorry I have put down the wrong date it was not Saturday the 15th of January 2022 it was FRIDAY 14th January 2022*".

24. By letter dated 19 January 2022 Ms McKenzie-Arnott suspended the claimant from work on full pay (pages 70 to 71). The stated reason was for the respondent to investigate "*allegations of potential gross misconduct in relation to inappropriate conduct towards to both residents and staff*." The letter noted that the claimant's mother and his girlfriend were employed by the respondent. The letter is marked as having been hand delivered.

25. By email on 19 January (18.13) the claimant wrote to the respondent (page 326). In it he said, "*I would be really grateful if you could provide me with work reference dated 19th January 2022*."

26. On 19 January, the respondent obtained statements from 13 employees to do with its investigation about the claimant.

27. On 24 January (00.09) the claimant sent an email to the respondent (page 328). It attached a letter also dated 24 January (page 335). In the letter the claimant asked that; the investigation be carried out objectively; that Ms McKenzie-Arnott be excluded from it as her presence "*does not guarantee impartiality*". The letter said that Ms McKenzie-Arnott was "*a side*" before the Employment Tribunal in a case brought by his mother against the respondent, a case in which he was a witness. Ms McKenzie-Arnott replied that day (page 328). She said that the respondent was satisfied that the investigation was being carried out correctly and as per ACAS and the respondent's procedures. She said that the claimant's investigation was entirely separate from any ongoing legal proceedings.

28. By 24 January, the respondent had obtained statements from another 27 employees. One of them was June McIlveen, on 24 January. In hers, Ms McIlveen; gave further information concerning the incident with the wheelchair; advised that the colleague with her at that time was Tracy Armstrong; and provided information concerning other incidents of name-calling of female residents and pushing a male resident. Ms McKenzie-Arnott's investigation meeting with Ms Armstrong was on 20 January.

29. On 25 January, the claimant replied to Ms McKenzie-Arnott's email of 24 (page 329). He reiterated his objection to her involvement in the investigation.

He expressed his opinion that both she and Abi Jebbari (the respondent's manager) should remove themselves "*from any documents relating to employees*"; and that "*any evidence collected will be vitiated by a defect*."

30. In the period between 24 January and 7 February the claimant was certified by his doctor as being unfit for work.

31. By 26 January the respondent had obtained statements from a final 3 employees. Accordingly, by that date it had obtained statements from 43 of its staff. Each was typewritten. None was signed. Each of them (with the exception of Ms McIlveen's) records the same first question; "*we are investigating an allegation against a member of staff. As part of this investigation, we need to ask you if you personally have ever seen or heard this member of staff being inappropriate with any staff, residents or about the establishment. The staff member is Iwo*." Each statement bears to be a verbatim exchange between Ms McKenzie-Arnott and the employee. The statements bear to contain the employee's answer to that question and further questions from her.

32. On 16 February 2022 Ms McKenzie-Arnott wrote again to the claimant. It noted that his mother had indicated his intention to return to work after the expiry of his "*current fit note*". It advised that on that expiry the claimant's suspension would continue unless a further sick note was received. It advised that when he was well enough, he would be invited to a meeting as part of the investigation process. It is likely that the claimant was absent from work by reason of illness until at least 16 February.

33. By letter dated 22 February 2022 (pages 73 and 74) Ms McKenzie-Arnott required the claimant to attend an investigation meeting with her. It was to take place on Tuesday 8 March at 2.00pm at the respondent's premises. It set out its purpose, for him to provide an explanation to "*matters of concern*." The matter was said to be "*inappropriate conduct towards residents and staff*". It then specified allegations as:-

    a. Inappropriate treatment of residents

b. Racist comment made to a resident

c. Homophobic remarks made about a resident and a relative

d. Inappropriate manner with staff

34. The letter of 22 February did not enclose any of the statements from the staff.

35. The claimant attended the investigation meeting. Notes were taken at it. A typewritten version was produced (pages 76 to 83). It bears to be a verbatim account of questions and answers between Ms McKenzie-Arnott and the claimant. The notes reflect that at the claimant's request, Ms McKenzie-Arnott provided details of all of the allegations before he responded to any. In doing so, she provided details of the names of individuals. She did not provide details of the dates of the alleged incidents. The notes record that the claimant began by saying; in answer to the allegations in the letter of 22 February, all employees should have problems dealt with promptly, consistently, equally and impartially; there was no training of staff on areas of care of residents; the respondent lacked "*correct*" staff; some residents assaulted staff; other staff have assaulted residents or locked them in rooms against their will; he was being treated inconsistently in comparison with other staff; other staff who made complaints about their treatment were treated unfavourably as a result; and he has done extra work above and beyond that which was expected of his role. The notes record that in discussion with Ms McKenzie-Arnott, he denied the allegations. He alleged that the individual in the wheelchair was not a resident, but another member of staff. The note records that; Ms McKenzie-Arnott sought from the claimant a copy of notes from which he had read; he was not willing for them to be copied, saying that they were his "*own personal notes*". Instead he handed to Ms McKenzie-Arnott an A4 sheet of paper. It was page 75 in the bundle. In it the claimant; repeated his request to exclude Ms McKenzie-Arnott from the investigation, and cited a specific allegation impugning her honesty; referred to his previous 11 years' service without any issue; alleged that the allegations were devoid of reason, offensive, affected his dignity, made in bad faith, dictated by bias, suggested national and racist prejudice, and suggested behaviour which was

contrary to the standards by which he lived as a result of his family history and university education; and suggested that evidence had been arbitrarily and selectively given "*as a rematch*" for a claim made against the respondent by his mother.

36. By letter dated 17 March (pages 84 to 86) the claimant was required to attend a disciplinary hearing. It was fixed for 24 March at 2.00pm. The letter advised that the meeting would be chaired by Mr Jebbari. The letter said that it enclosed; a copy of the respondent's disciplinary procedure; the witness statements; and the minute of the meeting on 8 March. The letter alleged (i) inappropriate treatment of residents (with 10 examples); (ii) the making of a racist comment to a resident; (iii) the making of homophobic remarks about a resident and a relative (with 2 examples); and (iv) inappropriate manner with staff (with 6 examples). Therefore there were 19 allegations. The letter advised that the respondent considered the allegations to potentially amount to gross misconduct, and that an outcome could be the claimant's dismissal. The letter advised the claimant of his right to be accompanied.

37. On 24 March the claimant emailed the respondent (page 329). He said that he would not be attending the hearing that day due to medical reasons.

38. On 25 March the respondent wrote to the claimant (pages 88 and 89). It acknowledged receipt of a self-certificate which had advised that the claimant was unfit for work. It invited him to a reconvened meeting fixed for 31 March at 11.00am. It offered alternatives to personal attendance. They were; to conduct the meeting by telephone; or for the claimant to provide a written submission. It enclosed a copy of the letter of 17 March. It asked for immediate confirmation of attendance at the meeting.

39. On 28 March an employee of the respondent provided a handwritten statement (page 107).

40. On 29 March the claimant emailed the respondent (page 330). In it he; acknowledged receipt of the invitation to the meeting on 31 March; informed that he would not be participating in it "*in any form due to the reasons I have presented during the investigation hearing*"; and invited the respondent to take

action "*in your own scope without my presence*." On 30 March Mr Jebbari replied (page 330). He; acknowledged the email advising of the claimant's non-attendance; advised of the respondent's decision to appoint an independent HR consultant to chair the disciplinary hearing; advised that the hearing fixed for 31 would therefore not proceed; and told him that he would receive another invitation with the arrangements for it. The claimant's opinion was that the decision to appoint an independent HR consultant did not guarantee impartiality. It was his opinion that it would still have been biased. In his opinion the only fair way to have conducted the process would have been to redo the investigation exercise with an external consultant and have the disciplinary hearing chaired by Ms Rosemary Walker, the respondent's management consultant.

41. On 1 April 2022 the claimant began work in other employment. In it he earns £466.84 (gross) £338.89 (net) per week (as per his schedule of loss at 7 December 2022). He ordinarily works about 40 to 45 hours per week.

42. On 4 April 2022 (at 15.54) the respondent emailed the claimant (page 92). It is headed "*second reconvened disciplinary hearing*". It invited him to attend a disciplinary hearing fixed for 7 April at 3.30pm via Zoom. It advised that the hearing would be chaired by Clare Mellor, HR consultant. It invited attendance via Zoom or written submissions. It reminded him of his right to be accompanied. It shows an attachment. It was a letter also dated 4 April. It is a verbatim replica of the email attaching it. On 7 April (08.42) Mr Jebbari emailed to the claimant a link to a Zoom meeting fixed for 3.30pm that day (page 93).

43. Ms Mellor is a Fellow of the Chartered Institute of Personnel and Development (FCIPD). She was engaged by the respondent to chair the hearing on the recommendation of its solicitors.

44. On 7 April 2022 the disciplinary hearing duly took place. A typewritten minute of it was prepared (pages 94 to 97). Ms Mellor read it at about that time. It was a fair representation of the meeting. It recorded that Jacqueline Auld, the respondent's administrator, took the minute. The claimant was not present.

45. In advance of the meeting, Ms Mellor had seen; anonymised versions of the 44 witness statements; the email from Ms McIlveen of 19 January (page 324); the investigation meeting notes (pages 76 to 83); the claimant's letter of 8 March (page 75); and the letters from the respondent which (i) set out the allegations against the claimant (pages 84 to 87) and (ii) convened the meeting on 7 April (pages 90 and 91). She was aware of the claimant's decision not to attend and his emailed reasons for not attending. She conducted the meeting from Taunton. She knew that Ms Auld was in Glasgow.

46. The minutes noted that Ms Mellor had had access to the paperwork from the investigation meeting and the witness statements. It noted that the matters of concern were those set out in the letter of 17 March (pages 84 to 86). The minute set out each individual allegation. It recorded a summary of the evidence which Ms Mellor saw as relevant to each. It noted that Ms Mellor; had seen 44 statements; and was of the view that 28 of them "*had issues*" while 16 did not. It noted that she would consider all of the evidence and inform the respondent of her decision.

47. On 18 April Ms Mellor wrote to the claimant (pages 98 to 106). She said she was writing to confirm her decision that he was summarily dismissed for gross misconduct. It set out the background to the convening of the meeting on 7 April. It noted that Ms Mellor had conducted further investigations after 7 April to understand some of the issues referred to and the processes in operation at the respondent's premises. In summary, of the 19 allegations, she upheld 15. 11 of those 19 were of inappropriate treatment of residents. Ms Mellor upheld 8 of those 11.

48. In Ms Mellor's view the most serious allegations of misconduct upheld by her related to the treatment of residents. Of particular concern for her was the treatment of the resident in the wheelchair. In her view, it was a major concern. She recognised that the incident had been witnessed by two members of staff. It was "*very, very serious*." She considered alternatives to dismissal. In deciding on summary dismissal, her opinion was that the claimant, if not dismissed, may repeat the conduct. In her opinion there was

a very high risk of repetition. She formed that opinion based on the claimant's apparent unwillingness to accept responsibility for his actions and his attempt to apportion blame on the respondent (evidenced from what was said by him in the investigation meeting). She took account of his length of service and previous record. She was aware of them from his letter of 8 March. She took account of the opinion of others that he was "*hardworking dedicated and flexible*", noted from the investigation notes (page 80). Notwithstanding those factors, her decision was to summarily dismiss him.

49. Ms Mellor's letter advised of the claimant's right of appeal. The claimant chose not to exercise that right.

50. On or about 28 April the respondent paid to the claimant (gross) the sum of £1,307.90 (page 399). Of that sum, £1091.20 was a payment in lieu of accrued and untaken holiday in the holiday year to 18 April 2022.

Comment on the evidence

51. The claimant did not accept that the note of the investigation meeting (pages 76 to 83) was a fair reflection of it. He was not able to identify any particular passage which was not fair. He did not identify anything allegedly said by him which had not been recorded. He accepted that his own notes from which he had read at the meeting were not within the bundle. He agreed in cross examination that towards the end of the meeting, he had handed to Ms McKenzie-Arnott the letter which became page 75.

52. The claimant's evidence was occasionally interrupted by interventions by his mother. During his evidence she spoke in Polish and loud enough to interrupt the flow of questions. The claimant was able to understand what she was saying. I asked him to remind her that; her presence in the room was as an observer; as such she should remain silent; and she should not be assisting or giving the impression of assisting him in his evidence. He did so.

53. The evidence of the claimant's mother was not relevant to the issues that I had to decide.

Submissions

54. Mr MacPhail made an oral submission. The claimant's submission was in writing, extending to 12 pages. I mean no disservice to either by not repeating or summarising them here. To the extent necessary I have commented on them below.

The statutory framework

55. Section 1 of the Employment Rights Act 1996 provides that an employer shall give to a worker a written statement of particulars of employment. Prior to 6 April 2020 it was required no later than two months after the employment began. Section 38(3) and (4) of the Employment Act 2002 provides "*If in the case of proceedings to which this section applies—(a) the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and (b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 (in the case of a claim by an worker) under section 41B or 41C of that Act, the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead. (4) In subsections (2) and (3)—(a) references to the minimum amount are to an amount equal to two weeks' pay, and (b) references to the higher amount are to an amount equal to four weeks' pay*." Schedule 5 to the 2002 Act lists the proceedings to which section 38 applies.

56. Section 98(1) of the Employment Rights Act 1996 provides that "*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*."

57. Section 98(4) of the Act provides "*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."

58. Article 3 of the Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994 provides that "*Proceedings may be brought before an employment tribunal in respect of a claim of an employee 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 Scotland 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; and(c) the claim arises or is outstanding on the termination of the employee's employment*."

59. Regulation 14 of the Working Time Regulations 1998 provides for compensation related to entitlement to leave on the termination of employment. It sets out (paragraph 3) the means by which that compensation is to be calculated.

60. I took account of the law (statutory and caselaw) to which reference was made in submissions and other case law to which I refer below. I also took account of the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) and (as the claimant appeared to refer to a part of it in his submission) the ACAS Guide on Discipline and Grievances at Work (2020).

Discussion and decision

61. In my view, the respondent has shown that its reason for dismissing the claimant related to his conduct. It was thus a "*fair*" reason as per section 98(2) of the Employment Rights Act 1996.

62. In *Abernethy v Mott Hay and Anderson* [1974] ICR323, the following guidance was given by Lord Justice Cairns, "*A reason for the dismissal of an employee*

is a set of facts known to the employer, or it may be of beliefs held by him which cause him to dismiss the employee." Those words were approved by the House of Lords in *W Devis & Sons Ltd v Atkins* [1977] AC931. In *Beatt v Croydon Health Services NHS Trust* [2017] IRLR748, Lord Justice Underhill observed that Lord Justice Cairns' precise wording was directed to the particular issue before that court, and it may not be perfectly apt in every case. However, he stated that the essential point is that the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which caused him or her to take that decision – or, as it is sometimes put, what 'motivates' them to do so. In this case the decision maker was Ms Mellor, an "*external*" individual to whom the respondent had delegated the responsibility of chairing the disciplinary meeting and determining; whether the allegations were well founded; and if so the sanction (if any) that should be applied.

63. The three-part test which Tribunals and courts apply in cases of alleged misconduct is well known, derived as it is from *British Home Stores v Burchell* [1980] ICR303. "*First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case*." Equally well known and often cited is what was said in *Iceland Frozen Foods Ltd v Jones* [1983] ICR17. The Tribunal "*must not substitute its decision as to what was the right course to adopt for that of the employer*." And "*The function of the employment Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted*." The band of reasonable responses applies to the consideration of the investigation by the Tribunal as well as the decision to dismiss (*Sainsbury's Supermarkets plc v Hitt* [2003] IRLR23.

64. In my view the decision-maker, Ms Mellor, believed in the guilt of the claimant on the allegations which she upheld. She had a reasonable basis on which to do so. Her belief was formed based on the material available to her at the time of her letter of dismissal. The claimant's perspective was limited to what had been noted in the investigation meeting and his letter of 8 March. Ms Mellor's information included what she had learned by asking questions of the respondent after the disciplinary hearing. That was, in my view, a reasonable thing for her to do. A number of points occurred to her which required further information. She sought and got it. That was, to use the expression from *Iceland Frozen Foods*, within the band of reasonable responses open to her. She regarded the allegations to do with the treatment of residents as a major concern. She concluded that those actions constituted gross misconduct. She was particularly concerned about the incident involving the resident and the wheelchair. The original source of information about it was Ms McIlveen. Ms Mellor concluded that Ms McIlveen's account was supported by a statement from another employee. She had a reasonable basis to conclude that the incident had occurred. It was reasonable for her to conclude that this allegation had not been made by the respondent in bad faith. There was no basis to find that the respondent had initiated the allegation or "*made it up*". It was reasonable for her to conclude that the other allegations had not been made by the respondent in bad faith as they had been based on evidence from other members of staff. In cross examination she was taken to page 310, part of a staff handbook dated 17 December 2021 (pages 286 to 310). The handbook was indexed as one of the claimant's documents. In cross-examination, Ms Mellor identified "*maltreatment of residents; by neglect, omission and/or commission*" as an example of an offence which would normally be deemed as gross misconduct. Ms Mellor reasonably concluded that the incident on 14 January 2022 was an act of gross misconduct. Ms Mellor considered alternatives to dismissal. She concluded that there was a risk of repetition if a sanction short of dismissal was imposed. That conclusion was not outside the range of reasonable responses available to her. The respondent operates a registered care home for older adults. It is subject to National Care Standards. It is subject to Scottish Social Services Council

(SSSC) Code of Practice. Care for its residents is integral to what it does. Lack of care is a serious matter. Maltreatment of them is self-evidently a serious matter.

65. The investigation meeting note recorded the claimant saying that he is not treated like other employees. There is a suggestion that he was being treated inconsistently with others. Ms Mellor had no more information about this than was provided in the notes. The respondent relied on the decision of the EAT in the case of *MBNA Limited v Jones* UKEAT/0120/15/MC at paragraph 22. "*If it was reasonable for the employer to dismiss the employee whose case the ET is considering, the mere fact that the employer was unduly lenient to another employee is neither here nor there. That is why arguments about disparity must be considered with particular care*…" Ms Mellor had no meaningful information which suggested a disparity in treatment between the claimant's circumstances and those of other members of staff. It was, in the circumstances, beyond the range of reasonable responses to expect her to enquire of the respondent as to that possibility.

66. The claimant questioned Ms Mellor's authority to dismiss him. He referred to page 312, part of an employee handbook. He relied on paragraph G). It sets out four levels of authority for disciplinary action. Those levels ranged from (1) formal verbal warning to (4) dismissal. For each the "*office*" with that authority is "*Manager/Company Secretary*". That authority is caveated with the possibility of a higher or lower level of seniority depending on suitability or availability. I do not accept that the delegation of responsibility to Ms Mellor rendered his dismissal unfair. I took account of paragraph 6 of the ACAS Code which provides that, "*In misconduct cases, where practicable, different people should carry out the investigation and disciplinary hearing*." On 25 January, the claimant had suggested that neither Ms McKenzie-Arnott nor Mr Jebbari should be involved in the process. He questioned their impartiality. It was, therefore, reasonable for the respondent to delegate the consideration of the allegations to an independent external HR function. Page 312 does not prohibit delegation in this way.

67. The decision to dismiss the claimant in the circumstances known to Ms Mellor was not outside the range of reasonable responses open to her. The decision to dismiss him was not unfair.

68. A significant element of the claimant's case before me relied on his assertion that there was evidence which suggested that he did not mistreat the resident on Friday 14 January. His case (before me including in his written submission) went as far as suggesting that he was not at work at the relevant time and thus could not have done so. I heard evidence about two versions of a staff rota for week commencing 10 January 2022. They were pages 364 and 400. The claimant's point from that evidence was that one of them (page 364) showed that he worked a late shift and thus was not at work at lunchtime, the time of the alleged incident. He went further and suggested that the initial evidence (from Ms McIlveen) was false and fabricated and came from an unreliable witness. But crucially, this material and those assertions were not part of the material which Ms Mellor had before her decision on 18 April. It is not for me to say that based on this material her findings on the allegation were incorrect. That would involve me substituting my decision for hers, based on material which she did not consider at the time. That would be an error of law if I were to do so. The claimant did not appreciate that important distinction. The point is equally made in the context of the claimant's criticism (noted in his written submission) that the respondent should have spoken to the resident herself. This was not suggested prior to the decision to dismiss him.

69. The claimant's written submission suggested a number of misunderstandings on his part. I do not repeat them all. But the following examples are illustrative of a fundamental misunderstanding of the relevant law of unfair dismissal and of the Tribunal's role in deciding this claim. He asserted that the dismissal was unfair as the respondent had not complied with the "*statutory dismissal procedures*." He referred to section 98A(1) and (2) of the Employment Rights Act 1996. As I pointed out to him, those procedures have been repealed. He appeared to believe that there was a statutory catalogue of examples of gross misconduct. On the contrary and as is obvious from both the ACAS Guide

and one of the handbooks referred to in evidence, there is no all-embracing exclusive list of acts which constitute gross misconduct. Separately, he suggested that his dismissal was "*initiated by Linda and Abi's prejudice*." There was no evidence at all which supported the conclusion that either initiated the course of events which led to his dismissal. There was no evidence of prejudice. He went further and suggested that Ms McKenzie-Arnott "*encouraged the dismissal of the claimant*." This is a serious allegation of impropriety for which there was no evidence.

70. On the claim for damages for breach of contract, I do not agree with the respondent's primary submission which was that it had shown a material breach by the claimant which justified summary termination. Put shortly, I had no primary evidence that would have supported that finding. The more relevant point is, however, that in the period in question the claimant has mitigated his loss entirely. The period claimed is 12 weeks. By my reckoning, by the date of his summary termination (18 April 2022) the claimant had 10 years' continuous service. Absent a written contract showing a longer period, the claimant was entitled to statutory notice of 10 weeks. He claimed a loss of £333.20 net per week, including overtime. His schedule showed that since 1 April, he was earning £338.89 net per week. He had thus more than mitigated any damages arising for the alleged breach. There are thus no damages due to him for a breach of contract.

71. The claimant asserted that he was owed pay for 1 day of accrued and untaken holiday. It was agreed that the holiday year coincided with the calendar. In his schedule of loss the claimant asserted that he had taken 3 days holiday in 2022. He also asserted that he had been paid out for 3 days. His calculation was based on a claim for a daily rate of £107.80. The respondent's unchallenged evidence was that the claimant was paid £1091.20 (gross) in lieu of accrued and untaken holiday (page 399). That amount, using the claimant's daily rate, equates with about 10 days' pay, far in excess of the one day claimed. It appears, therefore, that no sum is owing for accrued and untaken paid leave. This claim does not succeed. It is dismissed.

72. The claimant's case was that he had not been issued with a statement of terms of employment. He sought 4 weeks' statutory pay for that alleged failure. As no award is made in terms of section 38 of the Employment Act 2002, there is not award which is liable to any increase as per that section. The claim for 4 weeks' pay does not succeed. It is dismissed. In the circumstances, I did not require to find as fact whether or not a statement was issued to him.

73. The claims do not succeed and are dismissed as per the judgment above.

Employment Judge: **R Bradley**
Date of Judgment: **21 February 2023**
Entered in register: **22 February 2023**
and copied to parties