Case Number: 2200098/2020 **(V)**

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr. A El Imam Elalaoui	**v**	**Mrs. Naima El-Alaoui**

Heard at: London Central (by video) **On**: 1 and 2 March 2021

Before: Employment Judge P Klimov, sitting alone

Representation

For the Claimant: Ms. E. McIlveen (of Counsel)

For the Respondent: Mr. A. Ohringer (of Counsel)

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practicable due to the Coronavirus pandemic restrictions and all issues could be determined in a remote hearing.

JUDGMENT having been sent to the parties on 2 March 2021 and reasons having been requested by the Claimant on 10 March 2021, in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Background and Issues

1. The claim arises from unfortunate circumstances of a family dispute over financial matters, in which two siblings not only find themselves on the opposing sides of the family dispute, but also in somewhat unnatural setting of the employment relationship created in order for them to receive carer allowance payments to support their brother who needs special care. The financial dispute led to the termination of the employment relationship, which is the subject matter of these proceedings.

2. By a claim form presented on 10 January 2020 the Claimant brought complaints of unfair dismissal and breach of contract (wrongful dismissal).

3. The Respondent failed to present a response within the time limit. On 10 February 2020, she wrote to the Tribunal saying that she was not the Claimant's employer and therefore not the correct respondent. Further correspondence followed and the matter was finally dealt with at an open preliminary hearing on 11 November 2020. I found that the Respondent was the Claimant's employer and held that if she wished to defend the claim, she needed to present a response and an application to extend time. The relevant facts and conclusions are set out in my judgment of 16 November 2020.

4. On 20 November 2020, the Respondent presented her response denying that the Claimant was unfairly dismissed, together with an application to extend time, which I granted and her response was accepted. The essence of the Respondent's case is that the Claimant was dismissed for misconduct and in the circumstance the decision to dismiss him was fair.

5. In her grounds of resistance, the Respondent submitted that the correct employer of the Claimant was Westminster City Council (the "Council") because they paid the Claimant's wages and determined his hours of work. I decided that the Council should be joined as a party to the proceedings under Rule 34 of the Employment Tribunals Rules of Procedure 2013 (the "ET Rules").

6. The Council presented a response and an application seeking to be removed as a party from the proceedings on the ground that it was only providing funds for the Respondent to employ a carer (the Claimant), but otherwise had no relationship with the Claimant and was not his employer. I sought views from the Claimant and the Respondent, and they both confirmed that they were content with the Council being removed from the proceedings. On 28 January 2021, I made an order removing the Council from the proceedings.

7. The case was heard over two days on 1 and 2 March 2021. Ms E. McIlveen appeared for the Claimant and Mr A. Ohringer for the Respondent. I am

grateful to them for their cogent and helpful submissions and assistance to the Tribunal.

8. I heard from four witnesses for the Respondent and the Claimant. They all gave sworn evidence and were cross-examined. I was referred to a bundle of documents of 181 pages the parties introduced in evidence.

9. At the start of the hearing the Claimant applied to allow present witness evidence of another witness (one of his brothers) and the Respondent sought to introduce an additional document (a psychiatrist report). I refused both applications, as they were presented very late and without any justifiable reasons for such late presentation. I decided that admitting such additional evidence at that stage would be prejudicial to the interests of the other party and might also require postponing the hearing to deal with additional issues arising from such evidence. I was satisfied that without allowing the additional evidence a fair hearing was possible and there were no other compelling reasons not to proceed with the hearing without the additional evidence being admitted. The way the additional evidence were described to me by the parties, they did not appear to be critical to the issues in the case and were only going to supplement other oral and documentary evidence available to the Tribunal.

10. When submitting its response, the Council drew my attention to the fact that there were two individuals involved in this dispute, who were vulnerable adults and proposed that their names were anonymised.

11. At the start of the hearing, I sought views of the parties on this issue. They both agreed that it would be appropriate to anonymise their names, however, because they were members of the same family as the parties to these proceedings, anonymising their names might not prevent them from being identified. Furthermore, I pointed out that their names were already in the public domain by reason of my earlier judgment in this case. It was agreed to revisit the matter if at the end of the hearing I decided to reserve my judgment or if written reasons were requested.

12. At the end of the hearing, I gave my oral judgment and neither party requested written reasons. However, on 10 March 2020, the Claimant wrote to the Tribunal requesting written reasons. I wrote to the parties asking them

to make their submissions on the issue of anonymisation by 19 March 2021. The Respondent replied asking for the names to be anonymised, as was suggested by the Council. However, I did not receive a response from the Claimant.

13. Although I consider that anonymising their names would not fully achieve the desired effect of these two individuals not being identifiable as associated with the proceedings and as requiring special care by reason of their mental health conditions, I have decided that it would still be appropriate for me to anonymise their names in this judgment under Rule 50 of the Employment Tribunals Rules of Procedure to minimise unnecessary interference with their right of private and family life under Article 8 of the European Convention on Human Rights. I, therefore, shall refer to them in this judgment as "FM" and "NEA", respectively.

14. At the start of the hearing the parties agreed on the following list of issues to be decided at the hearing:

(1) When was the Claimant given notice of / notified of his dismissal which took effect on 30 August 2019?

<u>Unfair dismissal</u>

(2) What was the reason or principal reason for his dismissal?

(3) Was the reason of principal reason a potentially fair one under s.98(2) ERA?

(4) Was the dismissal fair in the circumstances under s.98(4) ERA?

<u>Wrongful dismissal</u>

(5) Did the Claimant receive at least four weeks' notice of dismissal?

<u>Remedy</u>

(6) If the Claimant was unfairly dismissed:

a. What basic award is he entitled to?

b. What financial losses has the Claimant suffered as a consequence of the dismissal?

c. Has the Claimant unreasonably failed to mitigate his losses?

d. Should any compensatory award be reduced in accordance with the 'Polkey principle' considering the likelihood that he would have been

dismissed in any event and/or that his employment would have terminated when he moved to Bournemouth? If so, by what amount?

e. Should any basic or compensatory award be reduced on account of contributory fault by the Claimant and if so by what amount?

(7) If the Claimant was wrongfully dismissed, what damages is he entitled to?

Findings of Fact

13. The Claimant and the Respondent are brother and sister and have seven other siblings in their family. One of their brothers, NEA, requires special assistance due to his mental health conditions. Their mother, FM, also requires special care due to her mental conditions.

14. The Respondent is the nominated person in charge of NEA's and FM's welfare. In that role she is eligible to receive payments from the Council under the Care Act 2014. The Respondent and the Council entered into an agreement, pursuant to which the Council agreed to provide funds to the Respondent and the Respondent to use such funds for the purposes of organising and providing care for NEA. The agreement provided that the Respondent could use the funds to employ a "member of staff directly" for these purposes. The agreement contained Employment Appendix, which explains the Respondent's legal duties as the employer, including that she needed to sign an employment contract with such person and referring her to the ACAS website for a sample contract.

15. The Respondent was also provided by the Council with "*an easy guide*" on "*Things you need to think about when employing a personal assistant*." The guide included the following information:

    (i) **Contract of Employment** — This details what you expect from your personal assistant and what your PA can expect from you. You have to have two copies signed by both of you; one for your records and one for your PA.
    (ii) **Support for staffing issues** — You can contact ACAS or the Citizens Advice for guidance. Your insurance company or payroll provider may also offer support . be contactable for support. Also there is an excellent toolkit here: www.skillsforcare.orq.uk/iflividualemplovers/

16. The Claimant started working for the Respondent as the carer for NEA in or around 24th October 2014. On 14 December 2014, the parties signed a

formal contract of employment. The relevant terms of the contract are as follows (my underlining):

> **10. Notice Period**
> 10.1 Following satisfactory completion of your probationary period you will be required to give the employer the equivalent of 4 working weeks' notice. Notice must be given in writing.
> 10.2 The employer will give the employee notice of 2 working weeks or the statutory minimum (whichever is greater), except in cases of gross misconduct or gross negligence, and the employer may at his/her discretion make payment instead of requiring the employee to work any notice period.
> 10.3 The employer reserves the right to pay you your basic salary equivalent to the notice period, instead of requesting that you work your notice period.
>
> **14. Disciplinary Procedure**
> If the employee behaves unacceptably or is not performing the job to the expected standard, the employer will follow the formal disciplinary procedure as outlined in appendix A.
>
> **Appendix A**
> Disciplinary Procedure
> **1. Purpose and Scope**
> This procedure aims to maintain a standard of conduct and to encourage improvement where necessary. The procedure sets out the action which will be taken when disciplinary rules are broken, aiming to ensure fair treatment of the employee at all times.
> **2. Principles**
> a. The procedure is designed to establish the facts quickly and to deal consistently with disciplinary issues. No disciplinary action will be taken until the matter has been fully investigated.
> b. At every stage, employees will have the opportunity to state their case and be represented, if they wish, by a person of their choice who is agreeable to both parties.
> c. The employer will initially attempt to resolve problems relating to behaviour or performance through informal discussion. The formal procedures described below will only need to be used if informal methods have proved ineffective or been ignored.
> **3. The Procedure**
> **Stage 1 — Improvement Note (Verbal Warning)**
> If behaviour or performance is unsatisfactory, the employee will be given a formal Improvement Note (Verbal Warning), which will be recorded in writing by letter to the employee and remain valid for six months.
> **Stage 2 - Written Warning**
> If the offence is serious, if there is no improvement in standards or if a further breach of rules or unacceptable behaviour occurs, a Written Warning will be given. This will explain the reason for the warning and will remain valid for six months.
> **Stage 3 - Final Written Warning**
> If conduct or performance is still unsatisfactory, a Final Written Warning will be given making it clear that any recurrence of the offence or other serious misconduct will result in dismissal. The Final Written Warning will remain valid for twelve months.
> **Stage 4 - Dismissal**
> If there is no satisfactory improvement or if further serious misconduct occurs, the employee will be dismissed.
> The employer reserves the right to implement any stage of the above procedure where earlier stages are likely to be ineffective or inappropriate in dealing with the matter.
>
> **4. Gross Misconduct**
> If an employee is suspected of Gross Misconduct they will be suspended

immediately until further investigation can be carried out. If Gross Misconduct is confirmed, the employee will be dismissed without notice.
Examples of Gross Misconduct include:

- Theft.
- Damage to property.
- Fraud.
- Incapacity for work due to being under the influence of alcohol or illegal
- drugs.
- Physical or sexual assault or harassment (either whilst at work or
- outside working hours).
- Threatening behaviour (whether to the employer or any third party).
- Gross insubordination
- Breach of confidentiality.
- Deliberately or knowingly endangering the employer's safety.

These are only examples. Gross Misconduct is not limited to the behaviour listed above.

17. The Claimant's duties included: waking NEA up, ensuring he carried out his daily personal care himself correctly, guiding him to be independent, taking him to his various health appointments and regular recreational classes. Spending time with him socially to enable him a good quality of life and to become independent and confident with daily life – using public transport and shops.

18. At all material times the Claimant performed his duties diligently and made efforts to extend the range of activities for NEA to help him with becoming more independent and address his health and wellbeing issues, including enrolling NEA in adult education classes, speech and language therapy, advocacy group, yoga and gym classes. That was in addition to taking NEA to his routine and emergency medical appointments and Personal Independent Payment ("PiP") centre classes.

19. There were no major disagreements or issues between the parties as concerned the Claimant's work until the end of 2018, when the Claimant first raised issues with the Respondent concerning financial arrangements for NEA and FM. He wanted to know how much money NEA and FM had and where those were kept in case something happened to the Respondent. He also queried how NEA's and FM's monies were being spent by the Respondent on their behalf.

20. The Respondent did not wish to reveal this information or engage in discussions on this subject, which caused some tension between the

parties. These issues continued to be discussed at various family gathering, creating some relationship problems between the siblings.

21. On 3 July 2019, the Claimant was leaving to go to Turkey for holidays. He called the Respondent from the airport. The conversation turned to the NEA's and FM's money issues and became heated. The Respondent says that during that conversation she informed the Claimant that he was dismissed with the effective date from 30 August 2019. The Claimant says that nothing of the kind was said on the call.

22. On 29 July 2019, the Respondent emailed the payroll company used by the Respondent to process the Claimant's pay informing them that the Claimant end of service for NEA would be on 30 August 2019.

23. Later in July, NEA, FM, the Respondent, and some other family members went to Morocco and returned to London on 30 August 2019. Upon returning from his holidays the Claimant continued to provide care services for NEA.

24. On 11 September 2019, the Claimant telephoned NEA to wake him up and then went to collect NEA from the Respondent's house to take him to his PiP classes. When the Claimant arrived, he found that NEA had already been picked up by another carer.

25. The Claimant drove to the social care centre and was told by a member of staff there that they had been informed by the Respondent that the Claimant was no longer employed as a carer for NEA. Later that day the Claimant sent an email to Mr Paul Melling, the Council's social worker, asking for a copy of his new contract of employment, which he had signed previously.

26. On 12 September 2019, Mr Melling replied saying that he had been told that the Claimant was no longer working with NEA and querying why that was. The Claimant replied explaining what had happened the day before and expressing his confusion and frustration.

27. On 7 October 2019, Ms Lisa Ceglarek, from the payroll company emailed the Claimant saying that they had been instructed that the Claimant had left the employment as a carer of NEA on 23 July 2019.

28. The Claimant was issued P45 showing the leaving date as 2 September 2019.

The Law

29. The law relating to unfair dismissal is set out in section 98 of the Employment Rights Act 1996 (ERA).

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

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

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

(2) A reason falls within this subsection if it –

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

30. If the employer shows that the reason for the dismissal is a potentially fair reason under section 98(1), the tribunal must then consider the question of fairness, by reference to the matters set out in section 98(4) ERA which states:

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.

31. A reason for dismissal is "*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*." (*Abernethy v Mott, Hay & Anderson [1974] ICR 323).*

32. Tribunals should distinguish clearly between an employee's incapability due to an inherent incapacity and his failure to make use of his ability which might more properly be regarded as misconduct; even where an employee was incapable he ought not to be dismissed without any warning, and the employee ought to have been given a chance to explain his conduct (*Sutton and Gates (Luton) Ltd v Boxall 1979 ICR 67, EAT*).

33. Just because there is misconduct which could justify a dismissal does not mean that the tribunal is bound to find that this is indeed the true reason for the employer's decision to dismiss. If the employee adduces some evidence casting doubt on the employer's advanced reason, the employer will have to satisfy the tribunal that its advanced reason was in fact the genuine reason relied on at the time of dismissal (*Associated Society of Locomotive Engineers and Firemen v Brady 2006 IRLR 576, EAT).*

34. Some other substantial reason ("SOSR") under section 98(1)(b) ERA cannot be construed as meaning a reason that is of the same kind as one of the reasons in section 98(2), however, SOSR can include reasons containing elements of conduct or capability (*RS Components Ltd v Irwin 1973 ICR 535, NIRC*).

35. "Loss of trust and confidence" or "breakdown in the working relationship" can amount to SOSR justifying dismissal, especially where the nature of the employment relationship requires complete trust and confidence *(Hutchinson v Calvert EAT 0205/06*).

36. However, tribunals should examine whether the SOSR advanced by the employer is the real reason or is being used by the employer to conceal the real reason for the employee's dismissal. There is an important distinction between dismissing the employee for his conduct in causing the breakdown in the working relationships and dismissing him because those relationships

had broken down (*Ezsias v North Glamorgan NHS Trust 2011 IRLR 550, EAT*).

37. In misconduct dismissal cases, the principles in *British Home Stores v Burchell [1978] IRLR 379* apply. The three elements of the test are:

    (i) Did the employer have a genuine belief that the employee was guilty of misconduct?

    (ii) Did the employer have reasonable grounds for that belief?

    (iii) Did the employer carry out a reasonable investigation in all the circumstances?

38. The test of a fair capability dismissal (aside from procedure) has two elements:

    (i) does the employer honestly believe this employee is incompetent or unsuitable for the job?

    (ii) are the grounds for that belief reasonable? (*Alidair Ltd v Taylor 1978 ICR 445, CA*)

39. In the great majority of cases employers will not be considered to have acted reasonably in dismissing for incapability unless they have given the employee fair warning and a chance to improve (*Polkey v AE Dayton Services Ltd 1988 ICR 142, HL)*

40. If the employer establishes a potentially fair reason for dismissal, the tribunal must then determine whether the employer's decision to dismiss the employee was within the range of reasonable responses which a reasonable employer could come to in the circumstances. It means that the tribunal must review the employer's decision to determine whether it falls within the range of reasonable responses, rather than to decide what decision it would have come to in the circumstances of the case.

41. If the dismissal falls within the range the dismissal is fair: if the dismissal falls outside the range it is unfair. Further, in looking at whether dismissal was an appropriate sanction, the question is not whether some lesser sanction would, in the tribunal's view, have been appropriate, but rather whether dismissal was within the range of reasonable responses that an employer could reasonably come to in the circumstances. The tribunal must

not substitute its view for that of the reasonable employer. (*Iceland Frozen Foods Limited v Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23, and London Ambulance Service NHS Trust v Small 2009 IRLR 563*).

42. When the employee is dismissed for a reason of his conduct, the "range of reasonable responses" tests applies both to the decision to dismiss and to the procedure by which that decision was reached. (*HSBC Bank plc v. Madden 2000 ICR 1283 CA*). However, the correct approach is not to consider these as two separate questions, but as relevant considerations the tribunal must have regard to in answering the single question posed by section 98 (4) ERA (*USDAW v Burns EAT 0557/12*).

43. If the employee is dismissed for gross misconduct, in answering the question posed by section 98(4) ERA the tribunal must also consider whether it was reasonable for the employer to consider the employee's conduct as gross misconduct (*Eastland Homes Partnership Ltd v Cunningham ETA 0272/13*).

44. Even if the tribunal is satisfied that it was reasonable for the employer to characterise the employee's conduct as gross misconduct, it must still consider whether in all the circumstances it was within the range of reasonable responses for the employer to dismiss the employee for that gross misconduct (*Burdett v Aviva Employment Services Ltd EAT 0439/13*)

45. In rare cases dismissal without following any procedure might still fall within the range of reasonable responses where it can be shown that following a procedure would be futile (*Gallacher v Abellio Scotrail Ltd EATS 0027/19*).

46. When assessing what kind of a procedure the employer should have used in dismissing the employee, tribunals must have regard to "*the size and administrative resources of the employer's undertaking*" (section 98(4)(a) ERA).

47. Where there are problems with the disciplinary hearing itself, those can in some circumstances be remedied by the appeal, even if the appeal is not a complete rehearing, however the procedure must be fair overall (*Taylor v OCS Group Limited [2006] IRLR 613)*.

48. In any case where the employer has dismissed for a substantively fair reason but has failed to follow a fair procedure, the compensatory award (but not the basic award) may be reduced to reflect the likelihood that the employee would still have been dismissed in any event had a proper procedure been followed. Such reduction can be reflected by a percentage representing the chance that the employee would have been dismissed. In exceptional cases the award can be reduced to nil if it can be shown that a fair procedure would have resulted in a dismissal anyway (*Polkey v AE Dayton Services Ltd 1988 ICR 142, HL*).

49. Section 122(2) ERA states 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.*"

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

51. In finding contributory conduct the tribunal must focus only on matters, which are "*causally connected or related*" to the dismissal (*Nejjary v Aramark Ltd EAT 0054/12)* and evaluate the employee's conduct itself and not by reference how the employer viewed that conduct (*Steen v ASP Packaging Ltd [2104] I.C.R. 56).*

52. In determining whether to reduce an employer's unfair dismissal compensation on grounds of contributory conduct, the tribunal must consider three questions. Was there conduct by the employee connected with the unfair dismissal which was culpable or blameworthy? Did that conduct caused or contributed to some extent to the dismissal? Is it just and equitable to reduce the amount of the claimant's loss to that extent? *(Nelson v BBC No. (2) 1979 IRLR346)*

53. To determine the question of whether the dismissal was wrongful, that is in breach of the employee's contract, the tribunal should be not concerned with the reasonableness of the employer's decision to dismiss but with the

factual question: Was the employee guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract? (*Enable Care and Home Support Ltd v Pearson EAT 0366/09*)

Discussion and conclusions

(1) When was the Claimant given notice of / notified of his dismissal which took effect on 30 August 2019?

54. On the balance of probabilities, I find that the Claimant was not notified of his dismissal by the Respondent in the telephone conversation on 3 July 2019 and remained unaware of his dismissal until 11 September 2019, when he was told by the Council's social worker that they had been informed that he was no longer employed by the Respondent to care for NEA.

55. I conclude this because on the balance of probabilities I prefer the Claimant's evidence on this issue, as I find them more cogent and consistent with the parties' actions after the purported notification on 3 July 2019. In particular:

    (i) the Claimant continuing to provide his services after NEA returning from Morocco until 11 September 2019, which, in my judgment, was inconsistent with the Respondent's case that the Claimant was dismissed because of "*grave concerns [were raised] regarding the claimants' fitness, competence and professionalism in providing adequate care for [NEA]*". The Respondent in her witness statements said that "*Had the claimant remained in employment, this would have been extremely detrimental to NEA's health and wellbeing*."

    (ii) Further, the Claimant did not raise any complaints about his dismissal on or soon after 3 July 2019. Given that the dismissal was clearly a shock for him, and considering how he reacted after he had learned of his dismissal on 11 September 2019, I would have expected him to protest his dismissal much earlier if he had been told on 3 July 2019 that he was dismissed;

(iii) The witnesses for the Respondent were not clear on the exact date when it was decided that the Claimant should be dismissed. One of the Respondent's witness suggested that FM was told about the decision to dismiss after it had been communicated to the Claimant on 3 July 2019, which contradicted evidence of other Respondent's witnesses, who said that FM was ultimately responsible for approving the decision to dismissal. Witness evidence of the Respondent's sister, Khadija El Imam El Alaoui, was that she was "*part of the decision to dismiss the Claimant on 03 July*", where the Respondent's evidence was that she was not planning to dismiss the Claimant on that date and that it was only because the Claimant happened to have called her, she had decided to communicate that decision to him there and then.

(iv) I also find Ms Moussaif evidence that she overheard the telephone conversation on 3 July 2019, where her mother (the Respondent) said to the Claimant that she had decided to dismiss him because he had been previously warned that unless his behaviour improved he would be dismissed as from 30 August 2019, somewhat inconsistent with the Respondent's evidence that she was not intending to dismiss the Claimant during that conversation and was planning to do so face-to-face, and it was only during the heated exchange about financial issues she said to the Claimant that he was dismissed.

56. I take into account that in the family setting it is expected that such decisions and actions would have much less formality than in the business environment. Nevertheless, the Respondent as the employer of the Claimant was under the contractual and statutory duty to notify that the Claimant's contract of employment was terminated, and notice of termination must be sufficiently clear.

57. I find that whatever was said in the telephone conversation on 3 July 2019 did not amount to the Respondent's giving notice of dismissal and could not have been reasonably understood by the Claimant as the Respondent giving him notice of the termination of his employment contract. Furthermore, the parties subsequent conduct would not have given the Claimant reasonable grounds to believe that he was dismissed.

58. The Respondent placed particular emphasis on the Claimant's email of 11 September 2019, in which he wrote to Paul Mellish at 21:30 after he had been told by another Council worker that he (the worker) had been told by the Respondent that the Claimant no longer had caring responsibilities for NEA. It is suggested by Mr Ohringer that the email demonstrates that the Claimant knew that he had been dismissed and disingenuously pretended that it was not the case, from which Mr Ohringer invites me to infer not only that the Claimant was told about his dismissal on 3 July 2019, but also take all other evidence of the Claimant with a pitch of salt.

59. Having carefully considered the content of that email, I do not find that it demonstrates that the Claimant was being disingenuous, or that he was trying to hide the fact that he had been told earlier on that day by the Council's social worker that the Respondent had decided to take away the caring responsibilities from him. In that email the Claimant simply enquires about the "*new contract*", which he had already signed, and which he needed a copy of, so he could submit his "*latest timesheet*" using the newly agreed rate. Therefore, it deals with a matter, which had occurred prior to 11 September 2019 and was still relevant whether at the time of writing the email the Claimant knew of his dismissal or not.

60. The Claimant's next email of 12 September 2019 expresses his surprise and frustration with the events of the day before. I find that even by that stage he is not certain of his employment status. There is a great deal of confusion. The information he received about his dismissal comes from someone being told by the Respondent about him no longer being responsible for NEA care, and not from the Respondent herself.

61. In my judgment, it was not unreasonable for the Claimant to be confused. It is not until 9 October 2019 that he receives a confirmation from the bookkeepers that the Respondent had told them that his employment had ended on 23 July 2019, which is, again, a different date from what the Respondent says she told the Claimant in the telephone conversation on 3 July 2019.

62. For these reasons I find that the Respondent did not give the Claimant notice of dismissal, and therefore she was in breach of contract by dismissing the Claimant without notice.

63. It was accepted by the parties that the Claimant was entitled to statutory notice. Initially, he calculated his entitlement as five weeks, however at the end of the hearing Ms McIlveen accepted that based on the length of his continuous service the Claimant was entitled only to four weeks' notice.

Unfair dismissal

(2) What was the reason or principal reason for his dismissal?

64. The Respondent's original case was the Claimant was dismissed for a reason related to his conduct or, in the alternative, for a reason related to his capability for performing the work of a kind he was employed to do.

65. In his opening skeleton arguments, Mr Ohringer introduced another reason, SOSR, which he further developed in his analysis and closing oral submissions so that it has ultimately became the principal reason for the dismissal. The essence of that development was to change the Respondent's case on the principal reason for the dismissal, which in its developed form became the loss of trust by the family in the Claimant acting as NEA's carer making his position untenable, where the cause of that breakdown in trust was not only or necessarily the Claimant's conduct and/or competence but "*deep distrust emerging form a dispute over the management of the family's finance*". Therefore, it was submitted by Mr Ohringer, the dismissal became necessary and in the circumstance fair.

66. I find this to be a significant shift in the Respondent's position and not merely a change of label in reliance on the same facts. I do not accept Mr Ohringer argument that ET3 discloses that the Respondent always relied on SOSR. I do not find that one sentence in paragraph under the heading "Dismissal" ("*Due to a great concern for [NEA's] wellbeing, [FM] and my mother along with her other siblings, decided that the claimant was no longer an appropriate care giver to [NEA]"*), even when read in isolation, makes it clear that the Respondent was dismissed for the reason of the breakdown in trust.

67. Further, reading it in the context of the entire ET3, it is clear that the decision that "*the claimant was no longer an appropriate care giver to [NEA]"* was because of the alleged misconduct and/or incompetence of the Claimant.

The Respondent's ET3 lists 12 events (Appendix A) that the Respondent says led to dismissal, which she describes as including "*neglect, lack of professionalism and actions that had the potential to be very harmful to [NEA's] physical and mental wellbeing*." It clearly states the Respondent's contention (my underlining) "*that the dismissal was fair due to the incompetence of the claimant in his care for [NEA]"*. Therefore, in my judgment, the developed SOSR, namely the breakdown in trust caused by matters not related to the Claimant's conduct or capability, cannot be pursuit as a separate and independent ground, without amending the Respondent's grounds of resistance.

68. This change came way too late and puts the Claimant at a significant procedural and evidential disadvantage. I also find that the thrust of all Respondent's witness evidence (with a possible exception of one witness – Omar El Imam El Alaoui) was that the Claimant was guilty of misconduct and/or incompetent in performing his caring duties.

69. The Respondent did not put her case on the basis that there was simply an irreparable breakdown in the family relationship to such an extent that it made the Claimant's position as an employee of his sister untenable, and that was irrespective of whether or not he was guilty of the alleged misconduct and of his competence to care for NEA.

70. The Respondent's case and all evidence she put forward in support of it were that the Claimant's conduct and incompetency was precisely the reason for his dismissal. In her witness statement the Respondent says: "*I made it clear that this was due to the repeated incidences of misconduct, despite the warnings that had been given*." One cannot be more clear than that.

71. In my judgment that is very different to saying that the family simply has lost trust in the Claimant due to a disagreement related to a different matter, which had nothing to do with how well or otherwise he performed his work.

72. It is for the employer to show that the reason it puts forward as the principal reason for the dismissal is the real reason. And if it fails to do so, the matter stops there, and the tribunal must find that the dismissal was unfair.

73. Mr Ohringer correctly reminded me that it was for the tribunal, based on the evidence heard, to establish what the real reason of the dismissal was. That is to say, what was on the Respondent's mind when she decided to dismiss the Claimant.

74. Based on the evidence I heard I find that the real reason for the dismissal was the disagreement between the Claimant and the Respondent and possibly other members of the family about financial issues related to NEA's and FM's care, and not the Claimant's conduct or competence in performing his duties as a carer for NEA.

75. I find this because that was the evidence given the Claimant, whom I found to be an open and candid witness. It is further supported by the fact that until he raised financial issues in late 2018, there appear to be no issues ever raised about his conduct or competence as a carer. That was confirmed by the Respondent in her evidence.

76. I am further supported in this view by looking at all the examples put forward by the Respondent of the alleged misconduct and incompetence of the Claimant (Appendix A to her ET3). Some of those incidents, such as the alleged recording of family conversations by NEA, or NEA collecting letters to pass to the Claimant, on the Respondent's own case happened after the dismissal and therefore could not have formed part of the decision to dismiss. Others, such as the flu jab incident or taking NEA to attend advocacy group classes, were the matters, which on the Respondent's own case were discovered after the Claimant had been dismissed. Therefore, they also could not have been misconduct incidents that caused the Respondent to take the decision to dismiss the Claimant.

77. Further "misconduct incidents", such as NEA having a muscle strain due to the alleged strenuous exercise or NEA being "*encouraged [by the Claimant] to eat non-halal meat*", in my judgment, are simply not supported by the facts, and were exposed bare on cross-examinations of the Respondent's witnesses.

78. Similarly, the eye operation, the prescribed medication and having access to those in Spain, on any reasonable view cannot be said to be incidents of misconduct or showing incompetence of the Claimant.

79. I also prefer the Claimant's evidence in relation to the incident with him going on holiday to Turkey, or NEA not wanting to go to Morocco. The latter issue on the Respondent's own case goes back to December 2018, some 7 months before the decision to dismiss.

80. Generally, I find "*the list of the events that raised concern and led to dismissal*" in Appendix A is a list of items assembled by the Respondent, possibly with assistance of some other family members, to justify the dismissal post-factum, and not a true record of the issues that were on the table at the time of the dismissal, and which had been raised with the Claimant before his dismissal.

81. I reject the Respondent's witnesses' evidence that these issues were repeatedly discussed with the Claimant at family gatherings or that he was warned that his conduct might lead to dismissal. None of them were able to give dates or any details of any such discussions. Although all of them said that it was the family decision to dismiss the Claimant, none of them were able to give any details of when and how that decision was taken. Their evidence on this issue were not only vague but also contradicting each other on the timing of the decision and who was ultimately responsible for it.

82. Mr Ohringer says that the Claimant failed to deal with the Appendix A allegations in his witness statement and only gave his answers when forced to do so when being cross-examined. Therefore, his answers were not put to Respondent's witnesses to deal with. Mr Ohringer says the NEA's hurt knee incident is the best example of that and invites me to draw inferences that the Claimant's evidence were unreliable and I must prefer the Respondent's evidence on the "incidents" issues.

83. I disagree. Firstly, the burden of proof is on the employer. It up to the Claimant how he deals with the allegations upon which the Respondent relies to show the reason for the dismissal. In his witness statement the Claimant denies any misconduct, he gives examples of how he diligently cared for NEA and refers to various documents in the bundle in support of that contention.

84. Ms McIlveen took the Respondent's witnesses through all of the Appendix A allegations. On many occasions their answers were vague and inconsistent. She chose not to put the Claimant's alternative explanation to the Respondent's witnesses, and she was perfectly entitled to do so, as Mr Ohringer was perfectly entitled not to ask the Claimant for his explanations of these incidents. He chose to do that, and, in my judgment, the Claimant gave clear and reasonable answers to all of them, and which I find more cogent and convincing than those offered by the Respondent's witnesses.

85. Considering the NEA's hurt knee incident, which Mr Ohringer advances as the best example showing why the Claimant's evidence are not to be trusted. I find this example shows the opposite.

86. First, the Claimant was being accused by the Respondent of encouraging NEA to do strenuous physical exercises, which appears to be untrue and nothing to do with the sustained injury (caused by NEA tripping on stairs at home). He was then being accused of taking upon himself to take NEA to a doctor. I say as a personal care it was what he needed to do, and if he did not do that, he could be accused of neglecting his duties as a carer. The Respondent says it was "appreciated", but then blames the Claimant for not telling that to her sister, Khadija, who then decided to take NEA to A&E. However, Khadija was not the Claimant's employer. She could have asked the Claimant or indeed NEA herself before taking him to A&E.

87. In any event, whatever confusion there might have been, I cannot see how on any reasonable view this incident could be described as misconduct by the Claimant or as showing that he was incompetent.

88. In my judgment, what it really shows is that the Respondent was trying post-factum to assemble all kind of "incidents" to justify the decision to dismiss the Claimant for misconduct and/or incompetence, knowing full well that it was not why she dismissed the Claimant.

89. As to the question of credibility of the Claimant's evidence as a whole, as I said earlier, I found him an open and candid witness. It would be perverse for me to find that the Claimant's evidence should be disbelieved on the basis that he did not spell out in his witness statement his version of events with respect to the injured knee incident.

90. I do not accept Mr Ohringer characterisation of the Claimant as "evasive" or "trying to avoid answering direct questions in the fear of being caught out on the specifics". I do accept that on many occasions the Claimant was far from being succinct in his answers. However, I do not accept that the reason for that was him trying to avoid answering questions that are being put to him. I find he was simply trying to tell his story and provide the relevant context. He was responding to Mr Ohringer more as to an interlocutor than as to a cross-examiner, which is not that uncommon to see from claimants giving witness evidence to an employment tribunal.

91. In short, I find that the Respondent's case on the misconduct dismissal does not get off the ground and falls on the very first and indeed all three hurdles of the *Butchell* test (see paragraph 37 above).

92. And for the same reasons I find that the Respondent did not genuinely believe that the Claimant was incompetent, and she had no reasonable grounds to do so. On all the evidence I have heard and seen, it would be perverse for me to find that the Respondent could have reasonably believed that the Claimant was in any way negligent or otherwise incapable of performing his duties. I find that he was more than capable to perform his duties and went about them with all due care and attention.

93. For completeness, I should say that even considering that the Respondent was not a business or an organisation with an HR function or other support resources, she was still the employer of the Claimant (and indeed had previous experience employing personal carers), and as such was bound by the employer's statutory duties, including to follow a fair procedure in dismissing for conduct and capability matters. In the circumstances, she was expected to follow at least a minimum reasonable process, such as for example putting to the Claimant the allegations, as set out in Appendix A of ET3, and giving him a reasonable opportunity to answer those. She did not do that.

94. The employment documents the Respondent signed with the Claimant contained a clear disciplinary procedure to follow. Further, she was given by the Council "Direct Payments an easy guide", which informed her that for support for staffing issues she could contact ACAS or the Citizens Advice.

It also referred her to other sources of employment advice, including an online toolkit. She chose not to avail herself to those resources.

95. I consider that in putting family members into employment relationship as a condition for the responsible person getting carer payments, the Council should have done more by explaining to the parties their rights and obligations and by giving more proactive support and guidance to the Respondent. However, the lack of such additional proactive support, in my judgment, cannot excuse the Respondent's total failure to follow any procedure in dismissing the Claimant.

96. I do take into account that Respondent is not a professional employer, but this, in my judgment, is not sufficient to strip the Claimant of any procedural safeguards when it comes to such a serious matter as him losing his job, especially the job that he was attached to not only professionally but by deep personal sentiments for his brother.

97. Further, I find that the Respondent's failure to follow any procedure in dismissing the Claimant for the purported reason of misconduct and/or incompetence, supports my view that it was not the real reason for the dismissal. As I found, the real reason for the dismissal was the dispute over the management of the family finances, and the decision to dismiss the Claimant had nothing to do with the Claimant's conduct in caring for NEA or his capability to do so.

98. Therefore, I find that the Respondent has failed to prove that the real reason for the dismissal was a reason related to the Claimant's conduct or capability and therefore the dismissal was unfair.

(3) Was the reason of principal reason a potentially fair one under s.98(2) ERA?

(4) Was the dismissal fair in the circumstances under s.98(4) ERA?

99. Even if the dismissal were for reason of misconduct or incompetence, I find that it would still be procedurally unfair, falling outside the range of reasonable responses open to a reasonable employer bearing in mind the Respondent's position and the circumstances of the case. My findings in paragraphs 76 to 92 are equally applicable to my conclusion on this issue.

100. Further, the Respondent failed to follow even a bare minimum of a fair process, which, in my judgment, makes the dismissal procedurally unfair. I find that it was not one of those rare cases where it can be said that it would be a totally futile exercise. Based on the evidence I heard, my findings are that the position at the date of dismissal was far from being as characterised by Mr Ohringer: "*everything that could have been discussed had already been discussed*". I find that it was a great deal more of what needed to be discussed with the Claimant to make the process fair. I will return to this issue when dealing the *Polkey* question.

101. While that is sufficient for me to determine the liability issues and I can now turn to deal with remedies, for completeness I will deal with the SOSR matter raised by the Respondent. I have already decided that it was not open to the Respondent to change her case at the late stage of the proceedings, and that change was much more than just applying a different label to the same facts.

102. However, if I am wrong on that, I do accept that a breakdown in the working relationship, especially in the family setting as in this case could be a SOSR. However, in my judgment, in the present case the breakdown was not irretrievable. The Respondent appears to be happy for the Claimant to continue to care for NEA even after she, on her own case, had given him a verbal notice of dismissal. Even taking into account intervening holidays, that still left a considerable period of time when the Claimant attended on NEA and indeed spent time with the Respondent and other family members at her home.

103. Also, the alleged breakdown was not "in the working relationship" between the Respondents as the employer and the Claimant as her employee, but in their family relationship due to the on-going dispute between them and other family members. I find that dispute was peripheral to the employment relationship and on any reasonable view could not be said to have made the Claimant's position as an employee of the Respondent, whose job was to provide care not for her, but for their brother, untenable. Therefore, I find that on the facts there is a fundamental difference with the case of *Hutchinson v Calvert UKEAT/0205/06* (where

the employer was the disabled person to whom the employee provided personal care services), which the Respondent's relies upon.

104. Furthermore, the Respondent did not put to the Claimant that if he did not stop asking about financial issues he would be dismissed, and therefore she failed to give him any warning that his job was at risk and that, in my judgment, was unfair.

105. Finally, SOSR dismissal still requires the employer to follow a fair procedure unless that would be a totally futile exercise. In the circumstances of this case, I do not find that any fair process was followed by the Respondent or that it would have been futile to do so. It is for the Respondent to prove that, and in my judgment, she failed to do so.

106. Therefore, even if the Respondent were to be allowed to rely on SOSR as the principal reason for dismissal, I find that dismissing the Claimant in those circumstance for that reason, namely the breakdown in trust due to a dispute over the management of the family finances, would still fall outside the range of reasonable responses open to a reasonable employer.

Remedy

a. What basic award is he entitled to?

107. Turning to remedy issues, the first question is what basic award the Claimant is entitled to. His basic award should be calculated by reference to the statutory formula: 1.5 (age factor) x 4 (years' service) x £507.69 (gross weekly pay) = £3,046.14.

b. What financial losses has the Claimant suffered as a consequence of the dismissal?

108. The Claimant submitted a schedule of loss claiming financial losses in the total amount of £26,899.88. The Claimant also seeks 25% uplift to a compensatory award for the Respondent's unreasonable failure to follow ACAS Code of Procedure. I accept his calculations as the basis for assessing a compensatory award, subject to my findings on mitigation and other remedy issues.

109. I find that the Claimant should be awarded £400 for loss of statutory rights.

c. Has the Claimant unreasonably failed to mitigate his losses?

110. I find that the Claimant has failed to take reasonable steps to mitigate his losses. I find this because it appears that he made no attempts to find another job.

111. While I appreciate that the dismissal was a big shock for him, the medical evidence he put forward showing him attending cognitive behavioural training are not sufficient for me to conclude that he was not capable for medical reasons to seek a suitable alternative job.

112. Equally, I do not find that his age is a barrier for him to find another job as a carer or to use his skills as a digital photographer. No evidence were presented to show that he tried.

113. As to his decision not to look for another job until the pandemic is over, it is of course his choice, but the resulting ongoing loss, in my judgment, cannot be laid at the Respondent's door.

114. Considering the Claimant's skills and experience, I find that if he had used reasonable efforts to mitigate his losses, he would have found a similar paid job as a carer or in another sector within 12 weeks of being dismissed. Therefore, I assess his compensatory award on that basis. My detailed calculations are set out in my judgment of 2 March 2021.

d. Should any compensatory award be reduced in accordance with the 'Polkey principle' considering the likelihood that he would have been dismissed in any event and/or that his employment would have terminated when he moved to Bournemouth? If so, by what amount?

115. I find that if a fair procedure had been followed, the overwhelming likelihood is that the Claimant would not have been dismissed.

116. Firstly, if the Appendix A allegations had been put to him, I find that he would have been able to deal with those and respond with answers he gave to the tribunal. In those circumstances a decision to still dismiss him would clearly be outside the range of reasonable responses.

117. Similarly, if he had been told that he would lose his job if he continued to ask about the management of the family finances, on the balance of probabilities, I find that he would have chosen to keep his job.

118. He is clearly attached to NEA as his brother and very much enjoyed caring for him. I accept his evidence that it was more than a job for money for him. I accept his evidence that Bournemouth is his second seaside home and the move there was not on the cards before his dismissal. Therefore, on the balance of probabilities, I find that if a fair process had been followed, he would have still been employed as a carer for NEA.

e. Should any basic or compensatory award be reduced on account of contributory fault by the Claimant and if so by what amount?

119. The Claimant certainly contributed to his dismissal by raising and insisting on understanding financial arrangements for NEA and FM. That what, in my judgment, was the real reason for his dismissal. However, I do not find, that his conduct was culpable or blameworthy. In any event, he was raising those questions in the context of family affairs not as an employee demanding from his employer to show him the employer's bank account statements. In those circumstances, I find that it would not be just and equitable to make any reduction to his basic or compensatory awards.

Is it just and equitable to increase the amount of compensation by up to 25% to reflect any unreasonable failure by the Respondent to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures?

120. Finally, I find that Respondent has unreasonably failed to follow the ACAS code of practice. My findings in paragraphs 93 to 100 and 105,106 above explain my reasons for this conclusion. Taking into account that the Respondent was a person without sufficient experience or support in these matters, I find that it is just and equitable to award 15% increase on the compensatory award.

Wrongful dismissal

5. Did the Claimant receive at least four weeks' notice of dismissal?

7. If the Claimant was wrongfully dismissed, what damages is he entitled to?

121. I find that the Respondent failed to give the Claimant notice of dismissal on 3 July 2019 or thereafter (see paragraphs 54 to 63 above). It follows that the Claimant is entitled to damages for wrongful dismissal assessed as his net pay for four weeks: £1,530.24.

_____
Employment Judge P Klimov
London Central Region

Dated: 6 April 2021

Sent to the parties on:

06/04/2021

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For the Tribunals Office

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