EMPLOYMENT TRIBUNALS

Claimant: **Mr G Hearne**

Respondent: **Summerlands Lodge (Phase 1) RTM Company Limited**

Heard at: **London South Employment Tribunal**

On: **9 and 10 June 2022**

Before: Employment Judge Dyal

Representation:

Claimant: in person

Respondent: Ms Smeaton of Counsel

RESERVED JUDGMENT

1. The Claimant was unfairly dismissed.
2. The basic award is £2,484.75.
3. The compensatory award is nil.

REASONS

Introduction

1. The Claimant complains of, and only of, unfair dismissal contrary to s.94 & s.98 Employment Rights Act 1996 ('ERA').

The hearing

2. Documents before the tribunal:

   2.1. Main bundle running to 504 pages;
   2.2. Transcripts bundle running to 53 pages;
   2.3. Witness statement bundle running to 57 pages.

3. *Witnesses the tribunal heard oral evidence from*:

    3.1. For the Respondent:
        3.1.1. Mr Michael Bingold, Director of the Respondent;
        3.1.2. Mrs Rosemary Rodgers, Former Director of the Respondent.
    3.2. For the Claimant:
        3.2.1. The Claimant;
        3.2.2. Mrs Betty Watts;
        3.2.3. Mr Alan Wright.

Admissibility of transcripts of covert recording

4. The Claimant made covert recordings of a number of meetings during the course of his employment. He disclosed 19.5 hours of recordings to the Respondent in around February this year. Correspondence with the tribunal followed in relation to this. On 14 March 2022, Employment Judge McLaren wrote to the parties and stated: "*The Employment Tribunal will not listen to 19.5 hours of audio recordings. If parts of these recordings are relevant the Claimant must produce a transcript of these parts".*

5. The Claimant is a litigant in person who reports that he has low IT skills. This is relevant to the standard of his work in producing the transcriptions. He sent the Respondent some transcriptions amounting to about 10 pages (many of which were not full pages) by letter dated 30 March 2022.

6. There was further correspondence between the parties and then on 27 April 2022 the Respondent wrote, in error, to London East Employment tribunal seeking further case management orders. The correspondence to London East Employment tribunal did not reach London South Employment tribunal.

7. At the outset of the hearing Ms Smeaton objected to the admission of the transcripts save for p44 – 46 (of the transcript bundle.) She did this on two bases:

    7.1. Firstly, on public interest grounds as described in *Amwell v Dogherty* [2007] IRLR 198 at paras 73 – 74;
    7.2. Secondly, on the grounds that in parts the transcripts were not accurate (in that the Claimant wrote a narrative description of what he said was happening at the meeting rather than simply transcribing what was said) and were incomplete, giving a partial account.

8. On balance neither of these are adequate grounds for not admitting the documents.

9. Firstly, I am satisfied that the documents are sufficiently relevant to be admitted. Indeed in parts they are potentially of great importance.

10. Secondly, the weight of the public interest factor is very light in this case. The recordings in questions relate to a range of meetings: sections of disciplinary meetings at which the Claimant was present; committee and other directors' meetings (the sort of meetings that would ordinarily be noted and the notes

disclosed in legal proceedings where relevant) and a residents' meeting which the Claimant attended. Unlike in *Amwell* and *Williamson* the recordings are not of the private deliberations of disciplinary/capability meetings where the public interest ground weighs heavily. Here, it is outweighed by the apparent probative value of the transcripts.

11. Thirdly, as to the accuracy of the transcriptions, I agree that there are a few passages which are clearly not a transcriptions of a recording but the claimant's narrative description of a passage the relevant meeting. However, for the most part the transcriptions read like transcripts of a recording. The Respondent says that the transcripts are partial, record only bits of the conversation with long gaps and are in parts inaccurate.

12. The difficulty is, obviously, that I have not heard the recordings and it is not feasible for me to do so. The Respondent, on the other hand, has had the recordings for months and it was open to it to consider the parts of the recordings the Claimant had transcribed and any other parts of the meetings recorded it considered relevant. It could then have made corrects or additions to the Claimant's transcript and sought agreement. With some very limited exception, it has not produced any transcripts of its own and it has not sought to agree any passage of the recordings with the Claimant, not even the passages of obvious importance.

13. Naturally, I wish there were accurate agreed transcripts for me to work with. However there are not. Given that the Claimant disclosed the recordings months ago and, as a litigant in person, produced such transcripts as he was able to (also months ago), it would be completely unfair to exclude his transcripts entirely now because the Respondent disputes their accuracy. The Respondent has had every opportunity to gainsay the transcripts. That opportunity continued during the evidence in the hearing. I note that Mr Bingold produced a supplemental statement where he comments on the transcripts and I admitted that evidence.

14. It seems to me that the fairest course was to admit the transcripts into evidence leaving it open to the Respondent to challenge the accuracy in the course of the evidence.

15. For completeness, I also raised the following with the parties. Having read the transcripts I noted that they related in part to pre-termination consideration of whether or not to offer the Claimant a settlement agreement. It seemed to me that there was an issue as to whether those passages were admissible or not given s.111A ERA. I referred the parties to *Faithorn Farrell Timms v Bailey* [2016] IRLR 2016, the leading case on that section.

16. Ms Smeaton, having considered the point, submitted that whilst it may be arguable that s.111A ERA applied, it in fact did not. She submitted that in circumstances in which no offer was actually made to the Claimant and when the discussions were set in context, it would be a significant extension of what was said in *Bailey* to hold that s.111A ERA applied. I am content to accept that submission and admit the transcripts into evidence in full.

17. In any event, having reached my conclusions in the case, I can safely say that the

references to possible settlement with the Clamant do not alter the outcome of the case. The outcome would be the same whether I admitted those reference or not.

18. I also note that the real sting of what is contained in the transcripts is not so much the possible offer of a settlement agreement, but rather the passages (which are proximate) which may suggest an early decision was made that the Claimant's employment would be terminated and/or that he might be managed out of the business. Ms Smeaton accepted that those passages were distinct from the references to possible settlement and would not, for that reason too, be captured by s.111A ERA.

Findings of fact

19. The tribunal made the following finds of fact on the balance of probabilities.

20. The Respondent is one of two management companies for Summerlands Lodge, a development of retirement flats. The Respondent is the management company for 'Phase 1' (some 37 flats). Summerlands Lodge (Phase 2) RTM Company Limited is the management company for 'Phase 2' (some 23 flats) (for convenience I will refer to this company as 'Phase 2').

21. According to his contract of employment the Claimant was jointly employed by both those management companies.[1] Both are micro-employers with the Claimant being the only employee. He was employed as Warden from January 2016 onwards.

22. The directors of the Respondent and the directors of Phase 2 tended to be residents at Summerlands Lodge. Whether they were or not, they performed their duties without remuneration. Most were of advanced age. Each company had different directors and the identity the directors changed from time to time.

23. The retirement flats at Summerland Lodge were self-sufficient flats with their own amenities. However, there was a communal lounge which was also a passageway to a communal laundry area.

24. One of the benefits of the Claimant's employment was that it came with tied accommodation in the form of a flat on site.

25. The approximate average age of residents at Summerlands Lodge was 80 years of age. It follows that the residents were highly vulnerable to serious illness and/or death in the event of contracting Covid-19.

26. I accept the Claimant's evidence that over the years he has been very helpful to the residents of Summerfield. On various occasions he went above and beyond his duties to assist them, such as by fitting locks for them to save the cost of a

[1] I note that there are some jurisprudential curiosities (perhaps impossibilities) about joint employment in relation to the same work (see e.g. *Patel v Specsavers Optical Group,* unreported EAT 2019, HHJ Stacey (as she then was)). However, only one respondent has been joined to these proceedings and it accepts it is a proper respondent to the claim. There is no need for me to consider this matter further.

locksmith. I also accept that for the most part he was popular with residents and that even when he got into dispute with the directors more residents took his side than did not. I also accept that, until the pandemic commenced there were no material issues with the Claimant's employment and that it is agreed all around that it proceeded smoothly.

27. However, it is an unfortunate fact that upon the commencement of the pandemic the employment relationship rapidly disintegrated and did so to an extent and at a speed that is unusual and out of all proportion with the relatively low-key disputes that precipitated the breakdown.

28. It is neither possible nor necessary to give a complete account of every incident that has been ventilated between the parties, but it is necessary to set out some key matters.

29. The Claimant returned to the UK in early March 2020 having been on holiday in South America with his partner. Upon his return to work he was told to self-isolate for two weeks either at his flat or at his partner's home (they did not live together). This instruction preceded the legal requirement to self-isolate in such circumstances. However, the Claimant was not overly troubled by it.

30. The pandemic was exceptionally disruptive in myriad ways. Employers everywhere faced enormous challenges in responding to the pandemic. The same was true in the Claimant's workplace. The challenges for employees were enormous too. Additional demands were placed on the Claimant.

31. One of the main reasons that the employment relationship broke down, is because on his return to work following his trip to South America, the Claimant was told he would have to deliver the post to each of the residents' flats. He first discovered this because there was a sign stating it. This was not a care home and each flat was an address in its own right with its own post-box. Thus, the norm was for the Royal Mail postman to deliver the post to each flat. However, one particular postman declined to deliver the mail and this created the issue. While the Claimant was away, the delivery of mail was covered by a director. When the Claimant returned the duty was passed to him.

32. However, the issue was extremely shortly lived and there were only two days on which the Claimant was actually required to deliver the post. Thereafter Royal Mail resumed doing its job.

33. I accept that the Claimant has some good points here. Royal Mail ought to have been making the deliveries. It would have been more polite for the Directors to speak to the Claimant about delivering the post before putting a sign up about it. However, given how short lived the issue was, it is a matter that I would expect an employee to take in their stride albeit with some transitory irritation. That was not the Claimant's reaction. He was truly incensed by the instruction to deliver the post. This was no fleeting matter either: he continued to be incensed by the instruction on a long term basis and his anger about it continued to be palpable in his evidence to me. Surprising though it may be, this matter was a fundamental

one in the breakdown of the employment relationship. The Claimant held a very deep grudge against the directors of the Respondent because of it.

34. Another thing that incensed the Claimant was that at the beginning of the pandemic he was at times given conflicting instructions by the directors. On one of the two occasions he delivered the post, he was told that he needed to do it prior to conducting his cleaning duties. These were new and additional cleaning duties that involved sanitising surfaces. However, the post did not arrive until 4pm and by the time he finished that, there would be insufficient time to carry out the cleaning duties.

35. Plainly the Claimant had a valid point, but the fact of the matter is that these were unprecedented, exceptionally difficult times, particularly in the early days of the pandemic and it was simply inevitable that employment such as his and that of millions (probably billions) of others would not run smoothly. Some frustration was understandable. But the Claimant was incensed beyond all proportion.

36. The Claimant decided that he would go and stay with his partner over the Easter weekend in mid-April 2020. The country went into a national lockdown on 26 March 2020 and by this stage *The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020* had come into force. They required everyone to stay at home save for very limited reasons. Those reasons famously did not include simply going to stay with a partner in another household.

37. The Claimant's weekend plans came to light in a conversation between him and Mr Andrew Hutchinson of Moonstone Management, a property management company that the Respondent and Phase 2 engaged. In practice, Mr Hutchinson was heavily involved in the running and operation of Summerlands and he was influential with the directors. Mr Hutchinson reported the Claimant's plans to the directors. He suggested that the matter may be a disciplinary issue. The Claimant then held this against Mr Hutchinson and his relationship with him was badly damaged.

38. In the course of his closing submissions the Claimant suggested that Mr Hutchinson had some ulterior motive for acting in the way that he did. However, the Claimant's position was that could not say what it was because he did not have evidence to prove it. He cryptically referred to a conversation with an unspecified contractor who he said had told him something significant (though he did not say what). There is thus no evidence of an ulterior motive of Mr Hutchinson's part before me.

39. Ms Ada Smith, Director of Phase 2, then raised the matter of the Claimant breaching lockdown by visiting his partner with the Claimant. I accept the Claimant's evidence that she raised the matter in a rude and inappropriate way. Essentially she saw him outside and shouted to him words to the effect that he should not be staying with his partner. She was concerned that the Claimant would be breaking the law and moreover putting residents at risk by socialising unlawfully.

40. I agree the Claimant has a legitimate point that the matter was not raised politely. However, he also in my view irrationally, considered it to be none of the Respondent's business whether he stayed with his partner or not. Given the nature of the Claimant's job which involved him having contact with a large cohort of elderly, thus highly vulnerable, people it was entirely legitimate for the Respondent to seek his compliance with laws specifically designed to limit the spread of Covid-19. In his evidence the Claimant said that he assumed he was permitted to visit his partner as she was his 'bubble'. I reject that evidence, there was no such concept of a bubble with partners in other households in April 2020; bubbles were introduced later on in the pandemic.

41. The Respondent initially dealt with this matter as a disciplinary issue. Ultimately, no disciplinary action was taken as the Claimant alleged that a director had told him that he should keep his socialising local. In essence he was given the benefit of the doubt.

42. A rational response from the Claimant would have been to consider himself lucky to have had such a lenient outcome to this episode. However, on the contrary he was yet further incensed and considered himself the victim of a grave injustice/unfairness.

43. The Claimant had a more general frustration that his work had become a bit chaotic. New duties (e.g. additional cleaning) were added and the expectations of him were chopping and changing on rather ad hoc basis. The Claimant made the point in this hearing that in his view neither the Respondent nor Mr Hutchinson knew how to respond to the pandemic. I readily believe there is at the least some truth in that but it reflects the unprecedented events of the early stages of the pandemic and was reflected in workplaces up and down the country. The Claimant's expectation that his employment should go smoothly despite the pandemic was unrealistic.

44. In any event, the Claimant felt so wounded by these matters that they really destroyed his working relationship with his employers. His attitude towards them completely changed. The relationship became one of open hostility. Over time the hostility became mutual.

45. In April 2022, after the Easter weekend, Rosemary Rodgers (then a director of the Respondent) asked the Claimant to attend a meeting with her and one other director the following day. The Claimant simply refused. His position was that he needed to meet with all of the directors not just two of them because he was having conflicting instructions. This was obstructive and uncooperative. It was indicative of the attitude the Claimant had developed. His employer was perfectly entitled to ask him to meet with two directors not all of them. There was also no reason why all directors would need to be present to address the issue of receiving conflicting instructions.

46. On 22 May 2020, the Claimant met with the directors some of whom were newly elected. The meeting was in part to discuss his duties. It was a tense meeting. At the meeting it was stated that guests needed to wear face covering and that the Claimant would be provided with PPE including face coverings.

47. On 8 June 2020 there was a meeting of the Respondent's directors which the Claimant was not at, but which he covertly recorded. He made a number of such recordings by hiding his mobile phone in the room and leaving it on record.

48. At that meeting Ms Rodgers said "*The whole committee over there [Phase 2] have all said he's got to go"* [in relation to the Claimant.] She also said "*I was here when he was employed and he was an entirely different person, I'm wondering if he's ill. And if there is any way that we could, because he's retirement age, we could…".* Mr Bingold said "*It's difficult, you know, I'm a lawyer but I'm not an employment lawyer and never have been and I know that if you get the procedure wrong that can be fatal…. But because at the end of the day I'm afraid, the roadmap is "goodbye Gary" I think we all know that now don't we."*

49. There was a further meeting of the directors on 6 July 2020 which the Claimant was not at but covertly recorded it. At the meeting Ms Frances Powell said "*To be honest, I wondered if he's got the onset of dementia".* Mr Bingold said "*He's just got too much trade unionism, barrack room lawyer in him*".

50. There is not the slightest evidence before me to suggest that the Claimant had the onset of dementia but the fact that these are the lines along which some of the Directors were thinking is a measure of how fundamentally the employment relationship had changed.

51. On 22 July 2020, there was a meeting between the Claimant and the directors to try and deal with the tension between the parties. It was a difficult meeting that did not resolve any problems.

52. On 3 September 2020, there was a meeting of residents which the Claimant was present at, as were Mr Hutchinson, and Mr Bingold among others. In the course of the meeting, Mr Hutchinson said "*I contacted several HR companies… nobody wants to get rid of Gary or sack him… the lady from the HR company has Gary's interests as much the companies interests at heart. It's about resolving an employment matter…. Its for the HR company to listen to both parties."*

53. The evidence in relation to this is extremely opaque but it appears and I so find that the Respondent had instructed an HR company to assist and advise in relation to the employment issues between it, Phase 2 and the Claimant. The Claimant never was contacted by this HR company and it is unclear from the evidence presented to me who they were or what they were instructed to do. The Claimant made various efforts to follow up and speak to the HR company but to no avail despite being given assurances by Mr Bingold they would be in touch. This was, understandably, a source of great frustration for the Claimant.

54. On 9 September 2020, a resident, Mr Gray, made a written complaint against the Claimant. He complained that he had insulted the directors at a residents meeting on 3 September 2020 by calling them "liars" and saying "wipe that smile/grin off your face". He further complained that when he tried to raise this with the Claimant on 4 September 2020 the Claimant had dismissed him rudely and told him to take the matter up with the Respondent.

55. On 12 September there was a meeting of the Phase 2 directors which was attended by Mr Hutchinson. The Claimant was not present but covertly recorded the meeting. At the meeting:

    55.1. Ms Abbott (director) said "*I'm pushing for getting rid of him"* (I infer in relation to the Claimant) and later "*I can't take much more of him*".
    55.2. Mr Hutchinson said "*we have had HR advice…. Give him a bag of money…. A settlement agreement….*". It is unclear what the HR advice was and unclear whether the references to settlement/money come from the HR advice. Mr Hutchinson went on "*he may be managed more tightly… How much would it cost to buy your way out…. HR advised employer should follow ACAS Guidelines in Handbook… He is going to be managed more closely… what's the amount you are offering, he has got a reason for constructive dismissal. The insurance will pay… micro-managing is not the grown up way."*

56. On the same day there was a meeting of the Respondent's directors also attended by Mr Hutchinson. The Claimant was not there but covertly recorded the meeting. At the meeting:

    56.1. Mr Hutchinson said "*Gary needs to be managed, he needs to be micro managed…. Either settlement agreement or here on he needs to be managed… there's a chance we can manage him out the door… if he is rude and there is a witness he needs to be investigated…. I think it's about putting pen to paper, this will not end well. We have to actively manage our way out of this and if that means he gets some money, well, in life sometimes you have to pay your way out of a problem… Gary needs to be managed tightly he may well resign… you can't be seen to be trying to persuade people to make a complaint… it must be useful if we could have more of this… that was the strategy for those meetings because Gary cannot hold his tongue…. No option but to manage him very tightly… I'm not going to minute any of this, we're probably moving towards "bye Gary and here's some money"… that's looking inevitable it's better that this is off the record and it's not minuted… I've heard nothing but the Gary protection league. Are we going to ask any more HR advice?"*
    56.2. Mr Bingold said *"to dismiss him without due process is dangerous… I think we should be tougher… I'm not happy with the HR company because all we get is wishy washy advice*". He also said in response to a question from Mr Hutchinson whether they would obtain further HR advice that "*as far as I'm concerned they have not given us any advice."* In response to this Ms Poole said *"I don't think it's worth the money we are paying, I wasn't very keen on what she said".* Mr Bingold also said "*I believe in due process"* to which Ms Rodgers responded "*well, get rid of him".*

57. On 24 September 2020, the Claimant was invited to a performance review meeting. This meeting took place on 15 October 2020.

58. On 22 October 20220, Mr Bingold made a diary entry that recorded that the Claimant had called Mr Bingold an 'idiot' and an 'arsehole' in a communal area.

59. On 8 and 21 September 2020, Mr Hutchinson told the Claimant to remind visitors that face coverings were required when they entered the building.

60. On 16 November 2020, the Claimant returned to work following a three week absence for some surgery. He had a return to work meeting with Ms Susan Parratt, a newly appointed director of Phase 2. The Respondent contends that the Claimant was instructed to wear a facemask in all communal indoor areas at this meeting. However, the notes of the meeting record "…*its was agreed GH could wear a face mask in all communal indoor areas and when visiting residents in their flats in both phases*…". A follow up letter the following day recorded the conversation in a similar way. I do not accept therefore that a formal instruction to wear a mask was given.

61. On 20 November 2020, Mr Bingold suspended the Claimant from work on medical grounds. The Claimant had a range of temporary physical restrictions upon his return to work following surgery that meant he could not attend to many of his normal duties. Mr Bingold recorded the suspension in writing on a compliments slip where he wrote "*with immediate effect you are suspended from your duties as you state you are not fit… Please leave by 5 pm tonight…. Please let us have your address and/or email."*

62. The Claimant says that Mr Bingold orally told him that he had to vacate not only his office but also his flat. This is the matter that Ms Watts and Mr Wright gave oral evidence to the tribunal about, broadly supporting the Claimant's position. Mr Bingold denies asking the Claimant to vacate his flat and says it was only his office he was told to vacate. On balance, I prefer the Claimant's evidence. Not only did I find it convincing, but I think the reference quoted above *"please let us have your address and/or email"* supports it. There was no need to ask the Claimant for contact details if he was simply going to be in his flat on-site.

63. In any event, it was rapidly confirmed to the Claimant within about a day that he did not need to vacate his flat and he did not in fact do so. However, I accept that this was an anxious and confusing time for him and that the instruction that he vacate his flat was inappropriate.

64. On 23 November 2020, the Claimant raised a grievance in relation to his suspension – within it he alleged that he had been told not only that he was suspended from work but to leave his home (a flat on site at phase 1). He also posted his account of events in an open letter to residents on a notice board. This was not the first time the Claimant had gone directly to the residents seeking their support in his employment dispute with the Respondent and Phase 2.

65. On 24 November 2020, the Respondent received a complaint about the Claimant from Mr Hughes who was the son or a resident, Ms Hughes:

65.1. He complained that the Claimant was in the communal lounge on 17 November 2020 without wearing a mask and when asked about this by Ms Hughes the Claimant was forceful and aggressive in response.
65.2. Mr Hughes said that he understood that the Claimant had been overheard engaging in conversation with a couple of residents that were insulting and derogatory about other residents.

66. On 25 November 2020, the Respondent received a complaint from Ms E Rogers who is Ms Rosemary Rodger's granddaughter. She said that her grandmother had been called a "*fucking liar*" twice in public by Claimant the preceding day.

67. On 28 November 2020, the Claimant satisfied the Respondent that he was fit to return to his duties and the suspension was lifted following a letter from his consultant. The directors wrote to him lifting the suspension. The letter stated "*You are required to wear a face mask in all indoor communal areas in both Phases at all times, except in the warden's office. It is not necessary to wear a face covering when outside the buildings"…. We have provided you with face masks… please let Andrew Hutchinson know when this stock needs to be replenished".*

68. On 1 December 2020, Ms Leone Bishop raised a written complaint stating:

68.1. The Claimant had been swearing and shouting at residents including some directors;
68.2. The Claimant had recently not been enforcing social distancing measures and on the contrary joining residents in the communal lounge. It was said that he was not even wearing a mask.

69. On 2 December 2020, the Claimant withdrew his grievance.

70. At some point in November or December 2020, the Respondent engaged Ms Mali Smith of Manak Solicitors to advise and assist it in relation to the employment dispute with the Claimant. Following her instruction, the Respondent decided to suspend the Claimant and asked Ms Smith to coordinate a disciplinary process.

71. The Claimant was suspended by letter of 3 December 2020 (received on 6 December) upon disciplinary allegations as follows:

- *Your deliberate acts of bullying and/or harassment towards the Directors and Residents which had the purpose or effect of violating their dignity and creating an intimidating, hostile and offensive environment. This includes shouting, swearing, aggressive behaviour and calling Directors and Residents liars;*
- *Breach of Health and safety Guidelines that endangers the lives of the Directors and Residents by not adhering to the Government Covid19 Guidelines and not wearing a mask in the Communal Lounge.*
- *Aggressive behaviour towards a Resident when asked to comply with COVID19 Guidelines.*
- *Bringing the Organisation into disrepute: A Resident complained to a member of her family about your insulting behaviour towards her and other vulnerable*

Residents. The family member complained to the Organisation demanding investigation into your aggressive behaviour towards vulnerable Residents.

72. On 7 December 2020, the Claimant was invited to a disciplinary hearing to take place on 14 December 2020 at midday.

73. On 7 December 2020, the Claimant raised a further grievance. He complained of harassment and bullying by the directors. He complained that Manak Solicitors were involved. He further requested his original grievance be reinstated.

74. On 9 December 2020, Ms Smith wrote to the Claimant and among other things told him that his grievances would be heard at the hearing of 14 December 2020 prior to the disciplinary allegations.

75. The Claimant instructed Mr Connolly of the GMB, to represent him. Mr Connolly made various representations and requests by letter.

76. The Respondent decided not to send the Claimant the evidence in support of the disciplinary allegations until the morning of the disciplinary hearing. It did this to reduce the risk it perceived of reprisals against witnesses.

77. The Clamant received the pack of documents at around 8.30am. Materially, it contained the following:

    77.1. The Claimant's contract of employment;
    77.2. Statements from Frances Powell alleging among other things:
        77.2.1. that the Claimant had shouted at her on 15 November 2020, p463
        77.2.2. that the Claimant had said *"you fucking directors*" to her on 27 August 2020 and shouted at her "*liar, she's a liar*" on 24 September 2020.
    77.3. Letter of complaint from Mr Gray, complaining about the way the Claimant had spoken about directors and the way the Claimant had treated him when he attempted to talk about it subsequently (as above).
    77.4. Statement from Mr Bingold alleging that:
        77.4.1. The claimant regularly sat with a group of residents in the lounge who ignored covid restrictions prohibiting the same;
        77.4.2. On 3 September 2020 the Claimant had been insulting towards the directors and again on 15 October 2020;
        77.4.3. On 22 October 2020 the Claimant had called him an "idiot" and an "arsehole".
    77.5. A statement from Ms Rita Abbot. She alleged that on 20 November 2020, the Claimant had been rude to and shouted at her. When she asked him not to shout he said "*you haven't heard me shout yet and you are deaf*".
    77.6. A complaint from Emily Rodgers, that the Claimant had called her Grandmother a "fucking liar" twice in public the preceding day (as above);
    77.7. Statements from Rosemary Rodgers;
        77.7.1. She complained the Claimant had been rude when she asked him to deliver the post in March 2020; that he had spent Easter off site with his partner; that his attitude had become unbearable and

she had resigned as a director as a result. She confessed to swearing at the Claimant on one occasion.

77.7.1.1. She further complained that in the week of 30 November 2020, the Claimant had been in the communal lounge on most days socialising with other residents with no mask and walking about the communal areas with no mask.

77.8. Two letters of complaint from Leona Bishop. She alleged that the Claimant sat in the lounge with residents when they ought not to be gathering at all and without wearing a mask.

77.9. Letter of complaint from Mr Hughes of 24 November 2020 (as above):

77.10. He complained that the Claimant was in the communal lounge on 17 November 2020 without wearing a mask and when asked about this by resident Ms Hughes the Claimant was forceful and aggressive in response.

77.11. Mr Hughes said that he understood that the Claimant had been overheard engaging in conversation with a couple of residents that were insulting and derogatory about other residents.

77.12. A letter of complaint from Ms M Whalley, a resident. She alleged that the Claimant brought post to her address and accused her of trying to get rid of him and was in her personal space without wearing a mask. She implied that he had shouted at her.

77.13. Various documents setting out Summerlands Lodge's Covid-19 guidance.

78. On 18 December 2020, the hearings took place. The format was to hear the Claimant's grievance first and then to hear the disciplinary. The grievance hearings started at 12pm. After they concluded there was a break and then the disciplinary hearing followed. Present were Ms Smith (chairing), Mr Bingold, Ms Parratt, the Claimant and Mr Connolly. Mr Baldwin, paralegal, kept notes.

79. The format of the grievance hearings was to consider the Claimant's grievances as expressed in his grievance letters point by point.

80. The format of the disciplinary hearing was to go through the documents in the disciplinary pack, particularly the allegations made against the Claimant, one by one and to take the Claimant's response. The disciplinary hearing adjourned part heard. In the course of the hearing it was put to the Claimant that he had called Mr Bingold an '*arsehole'*. He responded that he considered Mr Bingold to be "*stupid, contemptible and irritating*". The Claimant says that he was merely explaining what the definition of '*arsehole'* is, but I find based upon the notes of the meeting and my general assessment of the dynamics of the case that he indeed said Mr Bingold was those things.

81. The disciplinary hearing adjourned part-heard and resumed on 8 January 2021. In between the Claimant was given the opportunity to provide witness evidence from other witnesses and he did so.

82. The Claimant's response to the allegations against him was mixed. He did not accept any material wrongdoing at all. He accepted that he had used the word 'liar' on occasion but contended it was justified. He denied all suggestions he had been rude to or sworn at directors/residents. Generally he was defiant and on the

offensive.

83. In the course of discussing mask wearing, the Claimant said that he had a breathing problems and implied this may be a reason for not wearing a mask. This was the first time he mentioned that matter. His evidence to the tribunal was that he had an inhaler and apparatus for taking an inhaler. However, his evidence was also that he had almost always worn a mask indoors when required and he reported no problems in doing so. I accept that the Claimant has some sort of breathing issue that requires an inhaler. I do not accept (and nor did the Respondent at the time accept) that this was a barrier to wearing a mask. The Claimant's wider defence to not wearing a mask was that the instructions to him had been unclear and that the occasions he had not worn a mask had been limited to social events that involved drinking coffee.

84. A grievance outcome was promulgated by letter dated 20 January 2021 from Ms Smith. The letter stated that the decision had been taken by Ms Parratt and Mr Walton (director). The Claimant's grievances were rejected save that a complaint that he had not been told his medical suspension was on full pay was upheld.

85. The disciplinary outcome was promulgated by letter dated 25 January 2021 from Ms Smith. According to the letter the decision was taken by the Directors (being the Directors of both the Respondent and Phase 2). It is a detailed and reasoned letter. It goes through each charge, the evidence for it, the Claimant's response and the outcome. The charges were all upheld and the Claimant was dismissed upon notice.

86. On 28 January 2020, the Claimant appealed against his dismissal. All of the directors reviewed the Claimant's appeal and decided to dismiss it. This was communicated to the Claimant in another detailed and reasoned letter from Ms Smith.

87. The Claimant appealed against both the outcome of his first grievance. This appeal was dismissed by Ms Rodgers.

Law

88. By s.94 Employment Rights Act 1996 there is a right not to be unfairly dismissed.

89. The 'reason' for dismissal is the factor operating on the decision-maker's mind which causes him/her to take the dismissal decision (***Croydon Health Services NHS Trust v Beatt*** [2017] ICR 1420). The net could be cast wider if the facts known to, or beliefs held by, the decision-maker had been manipulated by another person involved in the disciplinary process with an inadmissible motivation, where they held some responsibility for the investigation. That person could also have constructed an invented reason for dismissal to conceal a hidden reason (***Royal Mail Ltd v Jhuti*** [2020] All ER 257.)

90. There is a limited range of fair reasons for dismissal (s.98 ERA). Conduct is a potentially fair reason.

91. If there is a potentially fair reason for a dismissal, the fairness of the dismissal is assessed by applying the test at s.98 (4) ERA (the exact wording of which we I reminded myself of). The burden of proof is neutral.

92. In ***BHS v Burchell*** [1980] ICR 303, the EAT gave well known guidance as to the principal considerations when assessing the fairness of a dismissal purportedly by reason of conduct. There must be a genuine belief that the employee did the alleged misconduct, that must be the reason or principal reason for the dismissal, the belief must be a reasonable one, and one based upon a reasonable investigation.

93. However, the ***Burchell*** guidance is not comprehensive, and there are wider considerations to have regard to in many cases. For instance, wider considerations of procedural fairness and of course the severity of the sanction in light of factors such as the offence, the employee's record, length of service, attitude to the allegations and mitigation.

94. In ***Iceland Frozen Foods v Jones*** [1982] IRLR 439, the EAT held that the tribunal must not simply consider whether it personally thinks that a dismissal was fair and must not substitute its decision as to the right course to adopt for that of the employer. The tribunal's proper function is to consider whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted.

95. The range of reasonable responses test applies to all aspects of dismissal. In ***Sainsbury's v Hitt*** [2003] IRLR 23, the Court of Appeal emphasised the importance of that test and that it applies to all aspects of dismissal, including the procedure adopted.

96. The fairness of a disciplinary process should be judged at its conclusion. It is possible for unfairness an early part of the process to be corrected at a later stage of the process, for instance, at the appeal stage. In any event not every aspect of unfairness will make a dismissal unfair overall. An assessment in the round is required in the manner stated in ***Taylor v OCS Group Ltd*** [2006] IRLR 613.

97. There are some circumstances in which a dismissal can be fair even in the absence of any disciplinary procedure. This might happen where to follow such a procedure would be future or would serve no purpose, see e.g. ***Gallacher v Abellio Scotrail*** Ltd UKEATS/0027/19/SS.

98. By s.207 TULR(C)A the tribunal is required to have regard to *Acas Code of Practice on disciplinary and grievance procedures* in a case of this kind since many of its provisions are relevant. It sets out some well-known basic principles of fairness in disciplinary and grievance processes. Giving an employee a right of appeal and determining the appeal are features of this code.

Re-instatement/re-engagement

99. If the Claimant is unfairly dismissed, if the he expresses such a wish, the tribunal

may make an order for reinstatement or re-engagement: s 112(3), 113 ERA.

100. An order for reinstatement is an order that the employer shall treat the complainant in all respects as if he had not been dismissed: s 114, ERA. An order for re-engagement is an order, on such terms as the tribunal may decide, that the complainant be engaged by the employer, or by a successor of the employer or by an associated employer, in employment comparable to that from which he was dismissed or other suitable employment: s 115, ERA.

101. In exercising its discretion under s 113, the tribunal shall first consider whether to make an order for reinstatement and in so doing shall take into account (a) whether the complainant wishes to be reinstated, (b) whether it is practicable for the employer to comply with an order for reinstatement, and (c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his reinstatement: s116, ERA.

102. If the tribunal decides not to make an order for reinstatement it shall then consider whether to make an order for re-engagement and, if so, on what terms: s116(2), ERA. 25. In so doing, the tribunal shall take into account (a) any wish expressed by the complainant as to the nature of the order to be made, (b) whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement, and (c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his re-engagement and (if so) on what terms: s 116(3), ERA.

103. Practicable in this context means more than merely possible but '*capable of being carried into effect with success'*. It is the duty of the tribunal to consider the consequences and employment realities of the situation: ***Coleman v Magnet Joinery Ltd*** [1975] ICR 46 [A/2], per Stephenson LJ at 52B-H.

104. The question is: is it practicable to order *this* employer to re-instate or as the case may be re-engage *this* claimant: ***United Lincolnshire Hospitals NHS Foundation Trust v Farren*** [2017] ICR 513. At this stage a provisional assessment is required.

105. Re-employment has very limited scope and will only be practicable in the rarest cases where there is a breakdown in confidence as between the employer and the employee. Even if the way the matter is handled results in a finding of unfair dismissal, the remedy, in that context, usually be compensation: ***Crossan Wood Group Heavy Industrial Turbines Ltd v Crossan*** [1998] IRLR 680. The position may be different in some cases where there is a larger employer and there is scope e.g. for the claimant to work on a different site with different management.

106. An employee's lack of confidence in, or distrust of, his employer is a relevant factor when deciding whether reinstatement or re-engagement are practicable or whether discretion should be exercised to make such an order: ***PLA v Payne*** at 570F-G; ***Rembiszewski***, per Slade J at [46].

Polkey

107. In ***Polkey v A E Dayton Services Ltd*** [1987] IRLR 503, Lord Bridge said this:

> *'If it is held that taking the appropriate steps which the employer failed to take before dismissing the employer would not have affected the outcome, this will often lead to the result that the employee, though unfairly dismissed, will recover no compensation or, in the case of redundancy, no compensation in excess of his redundancy payment. Thus, in* Earl v Slater & Wheeler (Airlyne) Ltd *[1973] 1 WLR 51 the employee was held to have been unfairly dismissed, but nevertheless lost his appeal to the Industrial Relations Court because his misconduct disentitled him to any award of compensation, which was at that time the only effective remedy. But in spite of this the application of the so-called* British Labour Pump *principle [*British Labour Pump Co Ltd v Byrne *[1979] IRLR 94, [1979] ICR 347] tends to distort the operation of the employment protection legislation in two important ways. First, as was pointed out by Browne-Wilkinson J in* Sillifant's *case, if the [employment] tribunal, in considering whether the employer who has omitted to take the appropriate procedural steps acted reasonably or unreasonably in treating his reason as a sufficient reason for dismissal, poses for itself the hypothetical question whether the result would have been any different if the appropriate procedural steps had been taken, it can only answer that question on a balance of probabilities. Accordingly, applying the* British Labour Pump *principle, if the answer is that it probably would have made no difference, the employee's unfair dismissal claim fails. But if the likely effect of taking the appropriate procedural steps is only considered, as it should be, at the stage of assessing compensation, the position is quite different. In that situation, as Browne-Wilkinson J puts it in* Sillifant's *case, at 96:*
>
> > *"There is no need for an 'all or nothing' decision. If the [employment] tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a percentage representing the chance that the employee would still have lost his employment."*
>
> *An example is provided by the case of* Hough and APEX v Leyland DAF Ltd *[1991] IRLR 194 where the EAT upheld an [employment] tribunal decision that the compensatory award should be reduced by 50% in circumstances where there was a failure to consult over redundancies but the tribunal concluded that such consultation might have made no difference'.*

108. The ***Polkey*** principle is not confined to cases of procedural unfairness but has a broader application. The tribunal's task is to apply ERA 1996 s 123(1) and award 'such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer'). See e.g. ***Lancaster & Duke Ltd v Wileman*** [2019] IRLR 112.

109. In ***Hill v Governing Body of Great Tey Primary School*** [2013] IRLR 274, the EAT said this:

> *A 'Polkey deduction' has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. Although Ms Darwin at one point in her submissions submitted the question was what a hypothetical fair employer would have done, she accepted on reflection this was not the test: the tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand…*

110. Guidance as to the *Polkey* exercise was given in ***Software 2000 -v- Andrews*** [2007] IRLR 568 which must be read subject to the repeal of Section 98A, but which otherwise speaks for itself. Similarly, in ***Scope -v- Thornett*** *[2007] IRLR 155,* Pill LJ said as follows at paragraph 34:

> "*... The employment tribunal's task, when deciding what compensation is just and equitable for future loss of earnings will almost inevitably involve consideration of uncertainties. There may be cases in which evidence to the contrary is so sparse that a tribunal should approach the question on the basis that loss of earnings in the employment would have continued indefinitely but, where there is evidence that it may not have been so, that evidence must be taken into account ...*"

Contribution

111. The basic and compensatory award can each be reduced on account of a claimant's conduct according to the different statutory tests at Section 122(2), Section 123(6) ERA.

112. The impugned conduct need not be unlawful so as to justify a reduction but it must be blameworthy. Blameworthy conduct includes conduct that could be described as 'bloody-minded', or foolish, or perverse. See further ***Nelson -v- British Broadcasting Corporation (No. 2)*** [1980] ICR 110. In the case of Section 123(6), the blameworthy conduct must also cause, or partly cause, the dismissal.

Discussion and conclusions

The reason for the dismissal

113. This is a case in which identifying the reason or reasons for the dismissal is not entirely straightforward for a number of reasons.

114. The first is that there is powerful evidence in the covert recordings that there was a will for the Claimant's employment to terminate prior to a significant number of the matters that became disciplinary allegations occurring. That is plain even taking into account the shortcomings of the transcriptions the Claimant has produced (they are short, they capture only fragments of lengthy conversations and so on). Those recordings also evidence some desire on the Respondent's and Mr Hutchinson's part to find a way of dismissing the Claimant or secure his resignation in the future.

115. A second problem is that in his oral evidence, Mr Bingold said he was confused about who had taken the decision to dismiss the Claimant. At one stage he said that it had not been him. In re-examination he was reminded of what he said in his witness statement – that the Directors of the Respondent and Phase 2 took the decision to dismiss – and he re-adopted (as it were) that evidence.

116. Having considered all of the evidence before me, I have come to the following conclusion. There was no ulterior motive to dismiss the Claimant in the sense of the Respondent or Phase 2 wanting to dismiss him for reasons other than conduct and the correlative breakdown of the employment relationship. However, it was recognised, particularly by Mr Bingold who has a legal background (in conveyancing) that a decision to dismiss had to be evidence based. The Respondent had genuine concerns about the Claimant's conduct and his relationship with the directors, and it resolved to solidify those with specific allegations from complainants who were prepared to put their complaints in writing. It probably did, therefore, invite such complaints to be made and that probably does explain why there was a flurry of written complaints around the back end of 2020. However, in so doing it was not inviting false complaints to be made. It was not a question of 'framing' the Claimant or anything of that nature. It was proactively obtaining a body of evidence that reflected existing concerns since it appreciated that without evidence nothing could be formally addressed.

117. On balance I do accept that the reason for dismissal was 'conduct', namely the matters alleged in the disciplinary charges as found proven on the basis of the evidence considered at the disciplinary hearing.

118. As regards who the decision maker was, it was in my view the directors of both the Respondent and Phase 2, albeit that they had a lot more help in structuring and constructing their decision from their solicitor than is normal. That said, they also needed more help than is normal. None of them are professional directors. They are volunteers who have agreed to be directors effectively of their places of old age residence.

Reasonable belief and reasonable investigation

119. The Claimant's position is that there ought to have been a discrete investigation stage to the disciplinary process. In this regard the ACAS code of practice says this:

> *5. It is important to carry out necessary investigations of potential disciplinary matters without unreasonable delay to establish the facts of the case. In some cases this will require the holding of an investigatory meeting with the employee before proceeding to any disciplinary hearing. In others, the investigatory stage will be the collation of evidence by the employer for use at any disciplinary hearing.*

120. In this case, I am satisfied that it was within the range of reasonable responses to take the approach the Respondent did, which was to collate the evidence and use it a disciplinary hearing without a separate investigation stage.

121. I had some concern that the Claimant was not given the materials until 8.30am on the morning of the disciplinary hearing. This gave him about 3.5 hours with the material before the grievance hearing commenced at midday. There was then a break prior to the disciplinary hearing but it cannot have been very long. However, while not ideal, I again consider this was within the range of reasonable responses.

122. Firstly, the disciplinary pack was short and the Claimant has not suggested there was insufficient time to digest it or deal with it. Secondly, the disciplinary hearing went part-heard for several weeks and this meant that prior to it concluding there was plenty of time to consider the material and make representations about it. The Claimant had a skilled representative in Mr Connolly who was able to assist him to do this. In short, I do not think the rather late provision of the material prejudiced the Claimant's defence.

123. In this case, the essence of a fair investigation was to put the allegations to the Claimant and give him a fair opportunity to respond through his own evidence and/or through further evidence he may wish to adduce. I am satisfied that happened here.

124. The format of the disciplinary hearing was to go through the evidence piece by piece and invite a discussion and response. The Claimant was represented by a trade union representative who assisted him to respond. Further, between the two disciplinary hearings the Claimant was given the opportunity to provide evidence from other witnesses and he did so.

125. Overall, I am therefore satisfied that there was a reasonable investigation in the sense that although it was far from a gold standard it was in the band of reasonable responses taking into account the size of the employer and its administrative resources.

126. I am also satisfied generally that based upon the evidence before it the Respondent could reasonably conclude that the Claimant was guilty of the disciplinary charges that were laid. The Respondent's reasons and reasoning are set out with cogency in the disciplinary outcome and appeal outcome letters.

127. It is true that there were multiple disputes of fact many of which turned upon one person's word against another's. However, there was an accumulation of complaints against the Claimant that tended to corroborate each other. That has to also be seen in combination with the direct experience of working with the Claimant that the directors had. It meant that the conclusions reached were reasonable in the sense of being within the band of reasonable responses.

128. Further, the Claimant's account of his mask wearing and reasons for not wearing a mask were somewhat inconsistent through the disciplinary hearing and contrary to the evidence. For instance his position was that he had never been given clear instructions on wearing a mask. That was contradicted, from 28 November 2020 onwards, when he was given a crystal clear written instruction. Further, there was evidence the Respondent was entitled to accept that even after that date the Claimant had continued to not wear a mask when gathering socially with residents in the communal lounge and around the building. Further still, the Claimant implied at the meeting that he had a breathing problem that was relevant to whether he could or could not wear a mask. That was not a credible explanation for any of the complaints about not wearing a mask on specific occasions.

129. All in all, notwithstanding the factual disputes that there were, it was within the range of reasonable responses to find the charges to be proven.

Sanction

130. The Respondent having found the disciplinary allegations proven, I am satisfied that the sanction of dismissal of itself was well within the band of reasonable responses. The substance of the disciplinary charges were very serious. The reality of the situation was that the Claimant did not accept any wrongdoing. He was defiant. There was no question of him returning to work and normal relations resuming; it was clear by then that that was an impossibility. The relationship had irretrievably broken down. In reality there was no scope for a sanction short of dismissal. Given the position reached factors in the Claimant's favour such as his length of service and previous good character could not alter the analysis.

Other matters of procedural fairness

131. There are two particular matters of concern that relate in a broad sense to natural justice:

131.1. Firstly, the Directors who took the decision to dismiss were in many senses not independent of the disciplinary allegations that led to dismissal. They had been involved in managing the Claimant all year, had discussed his conduct including in the manner set out in the Claimant's transcripts and were in some cases witnesses/complainants in relation to the underlying factual allegations behind the disciplinary charges.

131.2. Secondly, the self-same directors determined the Claimant's appeal and, though this is a further separate point, there was no appeal hearing.

132. As to the first point, the Respondent is such a small employer that it was inevitable that all of the directors would have played some role in dealing with the Claimant through the course of 2020. Further, it was inevitable that they would have observed him around Summerlands, had experience of interacting with him and seen / heard how he behaved / spoke at meetings and in other situations. The only way, then, of having independent decision makers deal with the disciplinary process would have been for a third party to take the decision.

133. In my view, it was within the band of reasonable responses to keep the decision-making in-house. The dismissal or otherwise of an employee is a very important and sensitive matter. It is all the more so where the employment is of the intimate kind that the Claimant's was. It was within the band of reasonable responses in my view for the Respondent to retain the decision-making responsibility in relation to the Claimant's employment.

134. I am troubled however by the fact that the same cohort of directors dealt with both the decision to dismiss and the appeal. The ACAS code of Practice provides:

> *26. Where an employee feels that disciplinary action taken against them is wrong or unjust they should appeal against the decision. Appeals should be heard without unreasonable delay and ideally at an agreed time and place. Employees should let employers know the grounds for their appeal in writing.*
>
> *27. The appeal should be dealt with impartially and, wherever possible, by a manager who has not previously been involved in the case.*
>
> *28. Workers have a statutory right to be accompanied at appeal hearings.*
>
> *29. Employees should be informed in writing of the results of the appeal hearing as soon as possible.*

135. The Respondent's internal disciplinary policy provides:

> *The appeal procedure will normally be conducted by two Directors not previously connected with the process or an external agent, so that an independent decision into the severity and appropriateness of the action taken can be made.*

136. I of course bear in mind the fact that the Respondent and Phase 2 were micro-employers with limited resources. However, in my view, particularly given the terms of the Respondent's own internal policy and particularly given that it was clear at a fairly early stage that matters were likely to come to a head with the Claimant in

due course, any reasonable employer in its position would have taken care to ensure that it arranged its affairs so as to ensure that two directors recused themselves from the decision to dismiss so that they could remain fresh for any appeal.

137. That did not happen in this case, the reason for that has not been explained, and in my view it was a point of significant procedural unfairness that rendered the dismissal unfair overall.

Remedy

138. The Claimant indicated that if his claim succeeded he would wish to be reinstated. In my judgment it would be wholly in appropriate to re-instate or re-engage the Claimant. It would be entirely impracticable for the Respondent to comply with either order.

139. The employment relationship between the Claimant and the Respondent completely broke down. There is no prospect of harmonious relations resuming. If the Claimant were re-employed I have no doubt that the problems between him and the directors would resume where they left off. The strength of bad feeling was palpable throughout the hearing. The passage of time has done nothing to calm the waters.

140. In short, trust and confidence between the Claimant and the Respondent has irretrievably broken down and it would be a recipe for disaster for me to order the re-employment of the Claimant whether through reinstatement or reengagement. There is a deep seated and mutual enmity between the parties.

Polkey

141. In my judgment, although the dismissal was unfair, if the Respondent had acted fairly, I am sure that it could and would have dismissed the Claimant in any event. I am sure that the dismissal would have taken place at the same time that it in fact did and sure that it would have been fair.

142. Even if two directors had recused themselves from the decision to dismiss and heard the Claimant's appeal I am sure that they would have reached the same decision. There was a strong disciplinary case against the Claimant and his continued employment had become untenable. Further, this was a situation in which no sanction short of dismissal would have been effective in the circumstances given the breakdown of the employment relationship, the miniscule size of the employer and the Claimant's defiant attitude.

143. I think it is so thoroughly implausible that the decision to dismiss would have been overturned on appeal that this theoretical possibility can in practice be entirely discounted. I therefore make a *Polkey* reduction to the compensatory award of 100%.

Contribution

144. The compensatory award has been reduced to nil by *Polkey,* it therefore cannot be further reduced by any blameworthy conduct.

145. In principle, the basic award could be reduced on account of blameworthy conduct if I considered it just and equitable to do so. However, having considered the matter carefully, I do not think it would be just and equitable to reduce the basic award.

146. The Respondent relies upon the conduct that led to the Claimant's dismissal as the blameworthy conduct that would merit a reduction. Even if I were myself to find, on the balance of probabilities, that the Claimant had done some or all of that conduct and that it was blameworthy, I do not think it would be just and equitable to reduce the basic award. I therefore do not need to engage in that fact finding exercise.

147. First of all, those matters have already weighed very heavily upon remedy. They played an important role in the breakdown of the employment relationship that make re-employment impracticable and they played an important role in the assessment of *Polkey*.

148. Secondly, the basic award in this case is fairly modest and if it is reduced by a material amount it will become a pretty trivial sum. I do not think that would be just and equitable in all the circumstances of this case. There was a significant procedural unfairness and it is in my view just and equitable that it is marked with a basic award.

Employment Judge Dyal

Dated: 14 June 2022