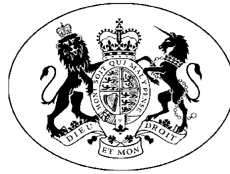

EMPLOYMENT TRIBUNALS

Claimant: **Mr M Connolly**

Respondent: **Tewkesbury (Diamond Chrome) Plating Co Ltd**

Heard at: **Bristol** **On: 23 – 26 July 2018**

Before: **Employment Judge H Oliver**
Dr C Hole
Mr H Patel

Representation
Claimant: **In person**
Respondent: **Ms S Belgrave, Counsel**

JUDGMENT having been sent to the parties on 2 August 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues

1. The issues to be decided in the case were agreed to be as set out in the Case Management Order of Employment Judge Pirani dated 24 January 2018, except that the claim for disability discrimination had been withdrawn by the time of the hearing.

2. In relation to the claim of detriment for making a protected disclosure, the disclosure relied on is the claimant's grievance of 20 May 2016. The claimant relies on the failure of David Curry and/or Peter Opperman to accept the truth of what occurred, and in particular their denial that there was fraud or an attempt to commit fraud. The issues were: (a) whether this happened, (b) whether this constitutes a detriment, and (c) whether it was done on the grounds that the claimant made a protected disclosure.

3. In relation to the claim for unfair dismissal, the main issues were: (a) was there a potentially fair reason for dismissal, (b) did the respondent act reasonably in treating this as a sufficient reason for dismissal, (c) did the respondent follow a fair procedure, (d) if the dismissal was unfair to what extent was this caused or contributed to by the claimant, (e) if a fair procedure had been deployed what are the chances that the respondent would have dismissed the claimant in any event?

Evidence

4. We had an agreed bundle of documents and a small supplementary bundle from the claimant. We read the main bundle to the end of the document giving the outcome of the appeal against dismissal, and we have looked at the other documents where referred to by the parties during the hearing.

5. We took witness statements as read. We heard evidence from David Curry (the Managing Director of the respondent), Peter Opperman (the non-executive Chairman of the respondent), and the claimant. We also had submissions from both parties.

Facts

6. We have taken account of all the evidence and the submissions. We find those facts that are necessary to decide the issues in the case.

7. The respondent is an electroplating company. It is a small company with some eighteen employees. The claimant was a Senior Processing Operative and started work on 17 May 2011. His line manager was Julie Hyatt, the Production Manager. The respondent's Technical and Quality engineer was Andrew Burt.

8. The respondent company processes items for customers. It is accredited by Nadcap and undergoes periodic audits. The quality control process includes running a set of test panels every month to check there are no quality issues with the work.

9. The main incident we are looking at in this case involved the test panels, but there were two previous incidents that are relevant that we will cover briefly.

10. Firstly, there was a mistake in acid concentration levels in an anodising tank in September 2013. The claimant told Mr Curry that Mr Burt had blamed a junior employee for this mistake. Mr Curry investigated at the time and found no evidence of blame, and this investigation included speaking to the junior employee who said did not feel he had been blamed. The claimant subsequently sent calculations to Mr Curry which he says shows Mr Burt was at fault. Mr Curry replied that he didn't find any fault with the maths, but he did not change his finding that there was no inappropriate blaming going on.

11. Secondly, there was an allegation that Mr Burt asked a customer to supply incorrect paperwork with a component in March 2014. The claimant raised this with Mr Curry. He said he had been told this by another employee and the customer was livid. Mr Curry discussed this with Mr Burt and the

customer. They both denied this, and the customer said at the time that he was not upset.

12. The main incident occurred in January 2016. The claimant was asked by Ms Hyatt to sign paperwork with incorrect testing dates on it relating to test panels, and the claimant refused to do this. The background is that test panels were not processed in October, November and December 2015. Some paperwork was produced, including a cover sheet and a three-part work set for each job number. The claimant was asked to sign some of these documents.

13. Mr Curry was aware at the time that test panels had not been processed for three months. He explained this was due to a breakdown in relations in the management team. He provided extra information in his evidence - the team was under pressure, production had been variable, Ms Hyatt needed help, Mr Burt had been in tears in November about his inability to get test panels done and wanted to leave, Mr Burton and Ms Hyatt did not always get on, and there was also a conflict between quality and production in terms of using the resources available.

14. Mr Curry's solution at the time was to restructure the team by bringing in another manager alongside Ms Hyatt, Mr George Todd. He decided to leave a gap in the records for three months. He explained this was a pragmatic solution, and he was aware it might be questioned by the auditor. He did not immediately report the issue to Nadcap or make any other kind of report, and if any queries were raised they were to be referred to Mr Curry.

15. Mr Curry was clear in his evidence to us that this was his solution to the problem, and he did not authorise and was not aware of any attempt to create inaccurate paperwork. We have considered this carefully and do accept that this was the case. We find that Mr Curry gave a clear and credible explanation of what he did and why, and this was consistent with the documents from the time. He never said he was aware of the issue. He apologised for Ms Hyatt not bringing this to his attention earlier, and he always said he first knew about it when the claimant raised it with him.

16. The claimant argued that this was not correct. He said that Ms Hyatt had nodded when he asked her if Mr Curry was aware of what was going on. He also said it was not plausible that two managers involved would have been conspiring to do this without Mr Curry's knowledge. We have considered this. However, we had an email from Ms Hyatt in the bundle which confirmed that she did not say that Mr Curry knew about this. We also note that in the dismissal appeal Mr Peter Opperman had spoken to Mr Burt and Mr Todd, and they had also confirmed that they had not made Mr Curry aware of this at the time. Therefore, on balance, we accept Mr Curry's version of events on this point.

17. The claimant emailed Ms Hyatt on 23 February. This email refers to falsification of records, and says that his conscience would not allow him to continue waiting for company action. He then spoke to Mr Curry and Mr Michael Opperman on 11 March and a meeting was arranged for 16 March.

In the meantime, he sent an email on 14 March which included information that he had been asked to include incorrect dates on paperwork.

18. The meeting took place on 16 March with Mr Curry, the claimant, Ms Hyatt and Mr Todd. Mr Curry says he apologised to the claimant. The claimant says he only apologised in relation to not being informed by Ms Hyatt. The claimant's own note of this meeting is ambiguous on this point. We do find that there was at least a partial apology. Mr Curry did tell the claimant that refusing to falsely date the documents the right thing to do. Mr Curry did not explain to the claimant details of what had caused the issues or the action that the company had taken in response. This was followed up with a letter on 21 March where Mr Curry said the root cause was complex and was confidential to senior management, and there was no need to alert customers or Nadcap as this was minor in relation to product quality - although he agreed that in other respects it was a major issue. He also said that there was no clear evidence of the technical and quality engineer deliberately setting out to lie and deceive.

19. In evidence Mr Curry explained some more about how he had actually dealt with the issue. His evidence was that the managers involved had a stern or heavy talking to. They were not dismissed. He explained this was a pragmatic solution with key members of the company in circumstances where there had already been a management restructure and tightening of processes to stop this happening again. He knew both managers were struggling due to the rapid expansion of the business. In response to Tribunal questions he confirmed that it could have been gross misconduct with two of the individuals involved, but pragmatically he decided not to dismiss. Mr Peter Opperman gave some more evidence on this point. He thought that there could have been dismissals and he actually persuaded Mr Curry not to dismiss one of the individuals. He felt it was an issue between two people who did not get on, and dismissing two out of the four people in the management team would have "cut the heart out of the business".

20. The claimant was not happy with this response and wanted to know why he had been asked to lie and why false paperwork existed. It was explained to the claimant at the time that any disciplinary action was confidential in relation to other employees and he was asked to accept that the company had dealt with it and it would not happen again. Mr Peter Opperman in evidence also referred to concerns that providing too much information could be used against other employees, and so just a summary was provided. The claimant was told a number of times that the matter was confidential but it had been dealt with.

21. There was then a further meeting between Mr Curry and Mr Michael Opperman on 30 March. The claimant's position was that it hadn't been looked into satisfactorily and Mr Curry thought it had. There was a discussion about whether the claimant felt he could remain at work. He was given time to think this over and eventually this resulted in a period of garden leave. The claimant was then signed off with work related stress from 14 April 2016.

22. The claimant sent his full grievance about this matter to the new chairman Mr Peter Opperman ("Mr Opperman") on 20 May. This set out ten concerns.

These include the failure to process the test panels and the fact he was asked about paperwork, the failure to discipline Mr Burt, the failure to apologise to him and the two early incidents involving Mr Burt amongst other matters.

23. There was a meeting with Mr Opperman on 15 June. He had not previously been involved in this issue. In the meantime, Mr Curry had spoken to customers about test panels not being processed. He had also spoken to Nigel Cook from Nadcap at a conference, and this was followed up with an email on 27 June which referred to a history of an employee making unsubstantiated allegations and a latest accusation about processing of test panels. There was a response from Nadcap which referred to how the failure to process had been unnoticed. Mr Curry accepts that he told the customer and Nadcap about the failure to process the test panels, but he did not tell them about any attempts to falsify documents.

24. The meeting on 15 June discussed the claimant's concerns. The claimant said the lack of management trust was blocking his return to work, he could not come back while Mr Burt was working in the organisation, and he did not trust Mr Curry.

25. Mr Opperman provided an outcome letter on 27 June. In relation to not testing the panels Mr Opperman said "The company did what it could to mitigate the effects of this error and at no point was the product in danger of failing on a quality issue". In relation to falsifying the date on the test documents he said that any negative effects had been avoided by the claimant querying this correctly. He also said "we have accepted that this request was not only stressful to you it was also completely wrong and against company principles. You were right to alert us to it and appropriate action was taken with the members of staff involved". He further said that there was no intention to remove either Mr Curry or Mr Burt from their posts, and that appropriate investigation and corrective action had taken place. He confirmed that customers and Nadcap had been spoken to, and the grievance was upheld.

26. The claimant then appealed on 5 July. He said this had not addressed all of his areas of concern and he requested various additional information. An external HR consultant Helen Astell was appointed to deal with this after the claimant did not agree that the company accountant was appropriate.

27. Mr Opperman responded to the claimant's extra points on 25 July. The appeal meeting with Ms Astell took place on 29 July. This lasted for some one and a half hours and it appears the claimant did have the opportunity to put all his points across. The outcome was given on 30 August, and this addressed each of the ten complaints made by the claimant.

28. In relation to the test panels, Ms Astell supported the earlier finding that the claimant had been asked and rightly refused to sign sheets with fictitious dates. She found that the company had not attempted a cover up as the forms had not been fully signed, and December documents were with the unissued test panels. In relation to the failure to discipline the technical quality engineer she confirmed that it was confidential what action had been taken. She referred to changes in roles and responsibilities and that it had

been made clear to those involved that it was an unreasonable request to the claimant to ask him to sign against incorrect dates, and it had been made clear to them how seriously the company considers that matter. She also recommended a written apology in relation to being asked to sign the documents, and a further apology from Mr Opperman about clumsy comments during the grievance hearing.

29. In relation to the first incident with Mr Burt she found no evidence of blame of the junior employee. In relation to on the second incident, she herself had spoken to the client involved who denied being asked to produce misleading paperwork.

30. This was followed by a letter from Mr Opperman on 31 August. He apologised for any misunderstanding with the grievance comments. In relation to signing the documents he gave a formal written apology from the company for having put the claimant in this difficult position. He said the claimant should contact him or Mr Curry when he felt fit do so in order to arrange a meeting to discuss his return.

31. The claimant continued to be unwell and was off sick. He attempted to contact Mr Cook at Nadcap to query the comment about failures going unnoticed. He had no reply initially and was then asked for more information. There was then a follow up with Mr Curry about processes in place. The claimant also gave a full account of all events to Nadcap on 29 November, including the fact he had been asked to backdate paperwork. He sent this through the official channels and it was looked at by the Task Group. Nigel Cook came back to the claimant and confirmed they had reviewed the allegation and no further action was necessary. The claimant made a further complaint on 24 January 2017 to the Nadcap Committee, and they replied on 30 January saying they had reviewed his complaint and concluded appropriate actions had been taken and no further action was required.

32. In the meantime, the respondent had brought in some HR advisors. This resulted in new contracts and a new handbook. The handbook included deliberate falsification of records as an example of gross misconduct.

33. There was correspondence between the claimant and Mr Curry about a return to work and a meeting was arranged on 19 April 2017. In the meantime, there was an email from Mr Burt and Mr Todd on 10 April about the claimant. This refers to wanting a meeting to discuss concerns about the claimant returning to work. It describes the claimant's actions as vindictive, bullying and gross misconduct and it was made clear that neither individual seemed to want the claimant to return to work. The claimant was only made aware of this for the first time in disclosure in the Tribunal. Mr Curry's evidence was that he then had a meeting with both individuals and made it clear that the claimant did have a right to return to work when he was fit to do so and the issues raised in the email were not pursued further. Mr Curry recognised that this would be a difficult issue to manage on the claimant's return to work, but we accept that he was prepared to do so through mediation meetings if the claimant was ready to come back.

34. The Tribunal questioned Mr Curry on whether this influenced his ultimate decision to dismiss the claimant. Having considered this carefully we accept his evidence that this was not the reason or part of the reason that he dismissed the claimant - partly based on his oral evidence, and partly looking at what happened during the subsequent meetings and discussions which were genuinely about the possibility of the claimant coming back to work.

35. There was then a meeting on the 19 April at which the claimant, Mr Curry and Mr Todd were present. This lasted for some two and a half hours. Mr Curry explained that new contracts and a revised handbook had been put in place. These had not previously been provided to the claimant, including the confirmation that falsifying documents would be gross misconduct. They were unable to find a way forward at this meeting. The claimant felt his concerns had not been addressed and he was still being lied to, and he said that there was a cultural of lies being tolerated by senior management. The meeting was adjourned until the claimant had finished counselling treatment.

36. By letter of 12 May Mr Curry asked for a medical report from an Occupational Health doctor and the claimant agreed to this. In his reply email he said, "the only way I will be rid of this stress is to rid myself of the root cause of the stress which is the absence of simple basic truth. This is the advice given to me by my GP". It is clear that was the claimant's position then and, having heard his evidence and submissions, that remains his case now.

37. The medical report was provided on 11 June by Dr Hutchinson. This confirms the claimant was suffering from anxiety, stress and agitation. It said the apparent trigger was the belief that Mr Curry denied knowing something that the claimant believes Mr Curry did know. The claimant had appeared frustrated with what become a stalemate. His opinion was that there was no medical diagnosis here and therefore no medical solution, and he said it was difficult to give an accurate prognosis as this is a case of dispute so any return to work should be gradual.

38. On 15 June a letter was sent inviting the claimant to a meeting on 4 July. This was from Mr Curry. He expresses concern about the reference to a stalemate, and said that he was not prepared to reopen the grievance. The letter confirms he was told by Ms Hyatt that she had not told the claimant that Mr Curry knew about the intent to falsify paperwork, or that he had sanctioned it. The purpose of the meeting was said to be to discuss if the claimant felt able to return to work, and this could include looking at mediation or clearing the air meetings. The letter did say that if the claimant was unable to accept the company's decision previous matters were now closed and would not be reopened. The letter said we may need to consider during the meeting whether your employment can be continued, but it also said termination was not the preferred approach. The claimant was offered the right to be accompanied.

39. The meeting took place on 4 July 2017. The claimant, Mr Curry and Mr Todd were present and we had seen the full transcript of this meeting. The claimant made it clear that he could not trust Mr Curry during this meeting, and he was not happy with the Occupational Health report as it had given no prognosis or diagnosis. Mr Curry attempted to close the meeting so that he could get

clarification from Dr Hutchinson after he had contacted the claimant's GP. The claimant questioned the purpose of this a number of times until Mr Curry eventually said "you're fired".

40. We set out below an extract from the transcript which explains most clearly how this exchange went (bottom of 337 of the bundle).

    Mr Curry " I will be in touch in the next..."

    Claimant "To what end David?"

    Mr Curry "In the next few days".

    Claimant "To what end?"

    Mr Curry "When I have the report from Stuart Hutchinson".

    Claimant "Why drag this on even further. You ignore me for six months then you enquired about my health, you tried to get a doctor to agree that there is nothing wrong with me, you don't have that, you still want to fire me and you won't tell me why".

    Mr Curry "Ok Martin I think we have come to the end of the road".

    Claimant "It's your decision not mine".

    Mr Curry "It is my decision".

    Claimant "Is it finalised am I fired".

    Mr Curry "You're fired".

41. That was the exchange that led to the claimant being dismissed.

42. Mr Curry's evidence was that he hadn't intended to give a final decision at the meeting. However, it became clear that the claimant did not trust him and so he decided to dismiss. He does accept there was no clear medical prognosis at this time. In response to Tribunal questions he also said that he should have waited for the medical report. He felt under attack at the time, so he made a decision perhaps a few days too early.

43. Mr Curry sent a letter confirming termination on 6 July saying that termination was from 7 July 2017 with payment in lieu of notice. The stated reason was, "The reason for termination of your employment is that you have confirmed you are unable to trust me or the Company or to return to work within a reasonable period of time".

44. The claimant appealed against his dismissal. He set out the details in a letter of 17 July. He set out his grounds including appendices, one of which covers the various earlier issues.

45. There is then a further report from Dr Hutchinson on 2 August, after he had spoken to the claimant's GP. It doesn't give details of what the GP said to him, but says his opinion remains the same. The claimant is unfit until he feels able to trust the company. He does not think he will be able to trust the company or return to work without further discussion of past matters because he said he felt he could not draw a line and start afresh.

46. The appeal meeting was on 9 August and was heard by Mr Opperman. It lasted for some two hours. We accept from looking at the content of this meeting and also Mr Opperman's evidence that his aim was to get the claimant back to work. He was prepared to reverse the dismissal if possible, and we accept that this was a genuine process. They went over the incidents set out in the appeal, and the claimant repeatedly said that he wanted honesty and truth.

47. On 28 August Mr Opperman sent a written response to all of the issues raised by the claimant, including the previous historic issues. He explains again the position in relation to the first incident with Mr Burt. This includes stating that Mr Curry had denied that Mr Burt had told him that he had checked the tanks, and the investigation was about whether there was evidence that Mr Burt had blamed a junior employee. In relation to the second incident, both Mr Curry and the independent consultant had checked the position with the client who had denied what was alleged. He also said he accepted that Mr Curry was not aware of the intention to falsify paperwork. Ms Hyatt had had denied he was aware of this. He had also spoken to Mr Burt and Mr Todd, who had also confirmed to him that Mr Curry had not been made aware at the time. He also said there was no cover up by the company in relation to the test panels.

48. The letter then asked if the claimant now feels that he would be able to trust the company and return to work. The claimant responded on 11 September. He said "your letter fails to demonstrate absolute truth and possibly introduces new aspects that add more doubt over what is true and what isn't". He provided responses to the various points made by Mr Opperman over some three pages.

49. Mr Opperman sent his appeal outcome on 18 September. This upholds the decision to terminate employment. It says "it is clear that you remain unfit to return to work and the medical advice that we received is that you will not be fit to return until you feel able to trust the company". It goes on to say "based on the correspondence and representations at the appeal I do not believe you are able to trust the company or Mr Curry again within a reasonable period of time if at all". On that basis the dismissal was upheld.

Applicable Law

50. **Public interest disclosure**. The applicable law is as set out in Section 47B(1) of the Employment Rights Act 1996 ("ERA") – "*A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.*" The test for whether treatment of a worker by an employer was "on ground" of a protected disclosure is as set out in ***NHS***

Manchester v Fecitt [2012] IRLR 64 (CA). The protected disclosure must "materially influence" the employer's treatment of the worker, meaning it must have been more than a trivial influence.

51. **Unfair dismissal**. The applicable law is set out in section 98 of the ERA. Incapacity and/or some other substantial reason are both potentially fair reasons for dismissal. The test is whether the dismissal was fair or unfair, having regard to the reason shown by the employer, and in particular whether in the circumstances the employer acted reasonably or unreasonably in treating this as a sufficient reason for dismissing the employee (section 98(4)(a)). This is to be judged in accordance with the range of reasonable responses of a reasonable employer, and the Tribunal should not substitute its own judgment for that of the employer. Under section 98(4) the Tribunal should also assess the fairness of the procedures used to dismiss the employee.

52. With ill health dismissals, it can be fair to dismiss even if the employer is wholly or partly at fault for the illness in question. However, the employer may be expected to go the "extra mile" before actually dismissing in these circumstances - ***McAdie v Royal Bank of Scotland Plc*** [2007] EWCA 806 (CA).

53. ***Polkey v AE Dayton Services Limited*** [1998] ICR 142 (HL) confirms that the fact an extra reasonable step would have made no difference to a dismissal does not prevent the dismissal itself from being unfair. However, the consequences of correcting an unfair procedure or failure to take a reasonable step are relevant to assessing the compensation flowing from the dismissal, as confirmed in ***Software 2000 v Andrews*** [2007] IRLR 568 (EAT).

Conclusions

54. We now turn to our conclusions, starting with the public interest disclosure claim. The first issue is whether the claimant was subjected to a detriment by failure by Mr Curry or Mr Opperman on behalf of the respondent to accept the truth of what occurred, and in particular that they denied fraud or intent to commit fraud.

55. The word "fraud" was not used by the claimant at the time, but he explained (and we accept") that he didn't want to use such an extreme term. His position was that it was fraud because documents had been completed with false dates. Mr Curry's position was there was no actual fraud because documents were never completed. The process was stopped by the claimant refusing to do what was asked. However, he did accept in evidence that some of the testing sheets with dates inserted on them were actually fraudulent. Mr Opperman's position was that it was not clear that it was fraud as there was no personal gain for the individuals involved. Both Mr Curry and Mr Opperman did agree at the hearing, as they did at the time, that it was wrong to ask the claimant to do this and the managers should not have asked him to do this.

56. On the issue of not accepting the truth on various other matters raised by the claimant, we have looked at this from a wide perspective by including the historic incidents as well. These were all investigated a number of times, including by an external consultant. The early incidents had been brought to Mr Curry's attention at the time and dealt with at the time as well. The claimant does not accept that they found the truth as he saw it. We do accept that this is his position. However, having considered this carefully, we don't find that Mr Curry and Mr Opperman had failed to accept the truth of what happened. Instead, they had reached a different conclusion after a grievance investigation. We also note that Mr Opperman had in fact looked at everything again during the appeal against dismissal and provided some more information about this to the claimant.

57. The overall situation is that a different decision has been reached to that put forward by the claimant, but this was after a set of thorough processes. We don't find that there was a general failure by either Mr Curry or Mr Opperman to accept the truth of what had happened. It had been looked into a number of times. In relation to the main allegation, processes had been put in place to stop this happening again, and this included falsification of documents being gross misconduct in the new handbook.

58. On the narrower issue of denying fraud, the respondent explained that they dealt pragmatically in relation to the damage actually done to the business. We feel that the claimant's concern was more about the conduct of the individuals and the principle of the matter. In that sense he did view it more seriously than the respondent. However, it is clear that the respondent also took the issue seriously at the time - but they took the approach that the disciplinary situation was confidential in relation to other employees, and they were being pragmatic about the effect of dismissing those employees on the company.

59. It is not clear to us that the disagreement in relation to whether this was fraud or not at the time is necessarily a detriment. But, in any event, this point is resolved by our findings on the next issue - was this done on the grounds that the claimant made a protected disclosure?

60. The test is whether the fact the claimant made a protected disclosure "materially influenced" the decision in the sense of being more than a trivial influence. In a strict causation sense, the situation was partly caused by the disclosure – the whole issue came to light and was opened up because the claimant had put in his grievance. However, that is not the test that we are looking at here. We are satisfied that any disagreement between the parties over the truth of what happened, or whether there was fraud or not, was not on grounds of the claimant's protected disclosure. Instead, it was on the grounds that the respondent genuinely believed that it dealt appropriately with the issues and had done a sufficient investigation. The claimant genuinely believed that they had not done so, but this does not mean the claimant was subjected to a detriment for raising these issues.

61. In relation to the claimant's main disclosure about falsification of records, the respondent immediately accepted that the claimant should not have been asked to do this, provided apologies, and ultimately gave an apology in

writing which was very clear. We have also looked at the timeline of events. In relation to the wider issue about not accepting the truth of the claimant's allegations, a number of these allegations and the respondent's response to them happened before the whistleblowing disclosure of 20 May 2016 - for example, the first and second allegations in relation to Mr Burt, and also the decision to deal with the test plates issue by restructuring. As Mr Curry in particular was already taking this approach before the protected disclosure was made, this approach cannot have been on grounds of the protected disclosure because it was already underway. In effect, Mr Curry and the respondent never accepted the claimant's version of these events, even before he blew the whistle officially in his grievance.

62. We would like to make the point that we do accept that the claimant has been telling us throughout what he believed to be the truth. However, we find that doesn't necessarily mean that the respondent is lying or covering anything up by not agreeing with him. We note in particular the number of times that this had been looked into, and that includes by an external consultant and again by Mr Opperman in his appeal against dismissal. We also note that the claimant reported the full version of events to Nadcap, including the falsification allegation, and they have confirmed they have investigated and no action is required. We are also satisfied that the respondent accepted that the claimant was right to blow the whistle in relation to the falsification of documents and they did not treat him badly at any point because of or on grounds of the fact that he had blown the whistle in this way. That means that the claim for detriment fails and is dismissed.

63. Turning to the unfair dismissal claim, the first issue is what was the reason for dismissal? The respondent's case is that it was inability to return to work within a reasonable period of time, and that is put as either incapacity or some other substantial reason. This is the reason given in both the dismissal letter and the appeal. The medical advice says that illness was caused by a dispute with the respondent, including the later opinion that the claimant would be unfit until he was able to trust the company. Looking at which category this falls into, we find that the reason is incapacity. The failure to be able to return within a reasonable period of time was due to the claimant's genuine illness. This was caused by him feeling that he was not able to trust either Mr Curry or the respondent more widely. We find that this falls within the category of an ill health dismissal, against the background that this was caused by an inability to trust the company.

64. The next issue is - was this a potentially fair reason for dismissal? We find that it was, as incapacity is well established as a potentially fair reason. The key issue is whether the respondent acted reasonably in treating this as a sufficient reason for dismissal. We are mindful this is judged according to the range of reasonable responses. It is not for us to substitute our judgment for that of the employer.

65. The claimant was off for a considerable period of time - well over a year. Medical opinion gave no prognosis on when he would be able to return, as it was bound up with his dispute and lack of trust in the company. The employer can fairly reach a point where it cannot be expected to continue employment.

We have also found there was a thorough investigation of his concerns, and the respondent did attempt to resolve the lack of trust issue.

66. Looking at the cause of the illness, we do find the respondent was partly at fault - in that it was triggered by the act of the claimant's line manager in asking him to falsify records. That triggered all of these events and caused the claimant distress at the time. We have found that the respondent did act correctly after the claimant blew the whistle. However, the original request to him from his line manager to falsify records was clearly wrong, and that was a trigger at least partly to the claimant's illness.

67. As that is the case, we think that the respondent is expected to go the extra mile before dismissing for incapacity, and we find that Mr Curry failed to do so. In particular, we have considered the dismissal meeting where he said he intended to adjourn to obtain extra medical advice by asking the occupational health adviser to speak with the claimant's GP. We find in the circumstances this was a reasonable step that the employer would be expected to take. However, Mr Curry then felt under attack and made the decision to dismiss immediately. Mr Curry himself admitted in evidence that he should have waited. We also note Mr Opperman's evidence to the Tribunal that, from the transcript, he understood how Mr Curry had been pushed into that position - but he did not think that the claimant should have been dismissed at that meeting. Having seen the facts of the meeting and the transcript, the Tribunal also does understand why Mr Curry may have made that decision at that point. But, we find that in all the circumstances he acted too soon by not waiting for the further medical opinion. In making the decision to dismiss at that point in time the respondent was not acting reasonably, considering the fact the respondent was partly responsible for the claimant's illness.

68. Turning to a fair procedure, we find that overall (aside from the medical report issue which we have already dealt with) there was a fair procedure in this case. There was an invite to a meeting to discuss the issue before dismissal, a right to be accompanied even though it wasn't a disciplinary matter, the claimant was able to explain his position, and there was an appeal to a different person who met with the claimant to consider all the points raised. We find there was a very thorough process. Overall, we are satisfied that there was a fair procedure. We also note that the ACAS Code does not apply in any event as this wasn't a disciplinary issue.

69. These findings mean that the claimant was unfairly dismissed, as the respondent failed to wait for the further medical report before deciding to dismiss.

70. One of the issues in the case was - if the dismissal was unfair to what extent was this caused or contributed to by the claimant? This wasn't argued in the respondent's submissions and didn't appear to be argued in the ET3 either. We also note that we found the original illness was at least partly triggered by the attempt by the claimant's line manager to get the claimant to falsify documents. We accept that the claimant was genuinely unwell at the time of these events and therefore we don't think its appropriate to make any reduction for contributory fault.

71. Finally, there is the ***Polkey*** issue. This is a point about the extent of compensation – if a fair procedure had been deployed, what are the chances that the respondent would have dismissed the claimant in any event?

72. We have found that Mr Curry should have waited for the further medical opinion. This opinion said that the claimant's illness had been caused by a lack of trust and this was ongoing. Once this medical opinion had been received, we find that it was clear that there was no reasonable prospect of the claimant returning to work in the near future. This is also shown by the appeal conducted by Mr Opperman, which looked at the same issues - including that medical report - and came to the same conclusion. We find that the respondent had done all it could by this point to resolve the trust issue, including not only the grievance outcome but also the new processes and the handbook. There was a difference of opinion between the parties and this was an ongoing stalemate - and that was leading to the claimant continuing to be unwell and unable to attend work. The further medical opinion ultimately made no difference to the decision to dismiss, and in fact it actually reinforced the fact that the claimant was going to be unfit for work until he felt able to trust the company.

73. Under ***Polkey***, there is still an unfair dismissal even if the extra step would have made no difference. We have therefore considered when it would have been reasonable to dismiss the claimant, having had that extra information. We find that point would have been reached after receipt of the medical report that was provided on 2 August, taking into account some additional time for a final meeting and confirmation of decision. We therefore find that the claimant could have been dismissed fairly within one month after the original dismissal on 7 July 2017.

74. That concludes the reasons of the Tribunal on the liability issue. In light of our finding that there was an unfair dismissal and the claimant would have remained employed for one further month, we discussed remedy with the parties and determined that the claimant was entitled to a basic award only as he would have remained off sick on no pay for this further period.

____

Employment Judge Oliver

____

Date 22 September 2018

REASONS SENT TO THE PARTIES ON

....

....

FOR THE TRIBUNAL OFFICE