EMPLOYMENT TRIBUNALS

Claimant: Mr Hanif Hafejee

Respondent: Vision Care Services Limited

This was a remote hearing, by cloud video platform (V): A hearing in person was not practicable because of the restrictions due to Covid 19.

Heard on 23 and 24 February 2021

Before: Employment Judge D N Jones

REPRESENTATION:

Claimant: Mr Y Lunat, solicitor
Respondent: Mr W Lane, solicitor

JUDGMENT

1. The claimant resigned as a consequence of a fundamental breach of contract of the respondent and was constructively dismissed.

2. The dismissal was unfair.

3. The sole or principal reason for the dismissal was not the transfer and the dismissal was not automatically unfair by virtue of Regulation 7 by the Transfer of Undertakings (Protection of Employment) Regulations 2006.

4. The respondent shall pay to the claimant compensation in respect of the unfair dismissal in the sum of £21,039.56. That comprises a basic award of £3,228, a compensatory award of £14,842.97 and an additional award of £2,968.59 for its unreasonable failure to comply with the ACAS Code of Practice on Grievance Procedures. The award is fully particularised in the schedule below.

5. The recoupment provisions apply. The prescribed element is £7,346.65 and the prescribed period is from 1 June 2020 to 23 February 2021. The total award exceeds the prescribed element by £13,943.24.

6. The respondent acted unreasonably in its conduct of the proceedings. It is just and equitable for a costs order to be made in favour of the claimant. The Tribunal has assessed the amount of costs which the respondent should pay to the claimant in the proportion of 50% of the legal fees incurred. The respondent shall pay to the claimant the sum of £3,681.92 in respect of costs.

SCHEDULE

Basic award		£3,228
Compensatory award		£14,842.97
Comprising:		
Loss of earnings to date of hearing		*£19,261.44*
Future lost earnings		*£7,096.32*
Less mitigation	*[£11,914.79]*	
Loss of statutory rights		*£400*
ACAS Code adjustment @ 20% of compensatory award (0.2 x £14,842.97)		£2,968.59
Total		**£21,039.56**

REASONS

Introduction and Evidence

1. The Tribunal heard evidence from the claimant and from Ms Claire Meade, Managing Director of Claire Meade Care Limited ("CMCL"), and from Mr Usman Amir, employee and director of the respondent.

2. This is a claim for unfair dismissal under general principles and on the ground that the reason or principal reason was a transfer governed by the Transfer of Undertakings (Protection of Employment) Regulations.

3. The case had been considered at a preliminary hearing on 19 October 2020 before Employment Judge Smith, who identified the issues as follows:

(1) Did the claimant have two years' continuous employment with the respondent by 1 June 2020 (the date on which his employment was terminated)?

(2) Was the claimant an employee of CMCL Care Limited t/a Caremark (Bradford) ('CMCL')? If so, when did his employment with CMCL begin? (The respondent denied the claimant was an employee of CMCL but contended if he was, his employment began no earlier than 18 November 2018).

(3) In respect of those questions if the answer is "yes", did the respondent lay the claimant off and subsequently fail to provide him with timely clarification, refusing to allow him to return to work, even as a carer although the respondent was continuing to recruit, and failed to address his grievance raised on 21 May 2020?

(4) If so, did the respondent conduct itself in a manner which was calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the claimant?

(5) If so, did the respondent have reasonable and proper cause to do so?

(6) Did the claimant resign in response to the breach?

(7) Did the claimant otherwise affirm the contract?

(8) If the claimant was constructively dismissed, was the reason or principal reason of a substantial kind to justify dismissal of an employee in a position held by the claimant by reason of an irreparable breakdown of trust and confidence?

(9) If so, was dismissal for that reason reasonable?

(10) Further or alternatively, was the reason or principal reason for the dismissal that the claimant was transferred from the employment of CMCL to the respondent?

The Law

4. The law concerning unfair dismissal is to be found in Part X of the Employment Rights Act 1996. Section 94 of the Employment Rights Act 1996 gives an employee the right not to be unfairly dismissed.

5. Section 95 of the Employment Rights Act 1996 defines dismissal. It includes circumstances in which an employee terminates the contract under which he is employed with or without notice in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct (section 95(1)(c)), and that is known as a constructive dismissal.

6. In order for there to be a constructive dismissal, the employee must have resigned because his employer has committed a fundamental breach of contract and

he must not have otherwise affirmed the contract, for example by delaying his resignation and thereby evincing an intention to continue to be bound by the terms of the contract, see ***Western Excavating (ECC) Ltd v Sharp [1978] ICR 221*** and ***Buckland v Bournemouth University [2010] IRLR 445***. The term is not to be equated to a duty to act reasonably. In respect of what is required in the nature of the breach, it is whether the employer, in breaching the contract, showed an intention, objectively judged, to abandon and altogether to refuse to perform the contract, see ***Tullett Prebon PLC v BGC Brokers LP [2011] IRLR 420*** and ***Leeds Dental Team Ltd v Rose [2014] IRLR 8***.

7. There is an implied term in a contract of employment that neither party shall, without reasonable and proper cause, act in a way which is calculated or likely to destroy or seriously undermine the relationship of trust and confidence between the parties, see ***Malik v BCCI SA (in liquidation) [1998] AC 20***.

8. Such a breach may be because of one act or a series of acts or incidents, some of them may be trivial, which cumulatively amount to a repudiatory breach, see ***Lewis v Motorworld Garages Ltd [1986] ICR 157***. If a series of acts, the last event must add something to the series in some way although, of itself, it may be reasonable, see ***Omilaju v London Borough of Waltham Forest [2004] ICR 157*** and ***Kaur v Leeds Teaching Hospitals NHS Trust [2019] ICR 1***.

9. If an employee is dismissed it is for the employer to establish the reason or principal reason for the dismissal and that it is one which falls within sections 98(1) or (2).

10. By regulation 7 of the Transfer of Undertaking (Protection of Employment) Regulations, where either before or after a relevant transfer any employee of the transferor or transferee is dismissed, that employee is to be treated for the purpose of Part X the Employment Rights Act as unfairly dismissal if the sole or principal reason for the dismissal is the transfer.

11. Under section 98(4) of the Employment Rights Act 1996, where the employer has fulfilled the requirements of subsection (1) the determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer, depends on whether in the circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.

Findings of Fact

12. The claimant started working for CMCL on 9 September 2013. The Managing Director of that company is Claire Meade. It is a company which provides care, personal support and home help services to the elderly and vulnerable. The claimant worked as a care and support worker but later was appointed as Recruitment Manager from 29 May 2017. He continued to do some care shifts, principally a Friday night shift and an evening shift for two particular service users.

13. On 16 December 2019 CMCL and the respondent entered into an agreement whereby the respondent took over an economic entity from CMCL which was governed by the TUPE Regulations.

14. The claimant had worked throughout the entire period from 2013 to 16 December 2019 for CMCL. I so find for the following reasons:

(1) It was the evidence of the claimant. He was a straightforward and honest witness. He answered the questions directly and his evidence was largely consistent with any documentation.

(2) I accepted the evidence of Claire Meade that the claimant had been so employed. She too presented as an honest and straightforward witness.

(3) I was provided with wage slips for the last 2 years. These were detailed and included varying sums depending on when the claimant worked different hours. The respondent drew attention to a few anomalies, such as in respect of some shifts and holidays when they were not paid in the following pay period, but in my experience that is not unusual, being rectified in a later month down the line. The alternative proposition, that these documents were forgeries created for the purpose of this hearing, is a substantial and serious accusation which is not made out.

(4) I have a copy of an employment contract which the claimant entered into on 29 May 2019. It is signed by Ms Meade. She gave evidence that that was her signature. The claimant did not sign the copy in the bundle because that was produced by him following the request of the respondent in January 2020. According to Ms Meade, she had provided the original copy with the claimant's personnel file when she met the director of the respondent to have discussions in respect of the transfer. That one was signed by the claimant. The respondent submitted that this was a false document, 'unauthentic', because the signature of Ms Meade differed from a subsequent contract which was provided for another employee, and from the signature on her witness statement. The Tribunal is not an expert in deciphering handwriting nor determining whether there has been a forgery on sight of comparative signatures. That type of allegation would normally involve analysis and assessment by a graphologist or handwriting expert, who would consider the pressure used, the original documents, and the variations in the writing of the individual. None of that has occurred in this case and I have no reason to reject Ms Meade's answer that she has different signatures, as many people do. To the untrained eye, the signatures had a similarity.

(5) I have been provided with a P45 from the end of the claimant's employment with CMCL which includes precisely the same pay information and tax as the payslips in the year 2019. On behalf of the respondent, it is said that this has never been submitted to HMRC but has been created solely for the purpose of deceiving this Tribunal. That allegation could easily be clarified by a query with HMRC. The

suggestion by the respondent that documents which are not authentic, the payslips, a P45 and a contract of employment, and that evidence given on oath by the claimant and Ms Meade, amounts to an allegation of a carefully constructed conspiracy to pervert to the course of justice. That is a serious allegation. I considered the evidence of the two witnesses as credible, and for the reasons given I found the documents highly likely to be authentic. I reject the suggestion there has been forgery or fraudulent activity by the creation of false documents to mislead, as advanced by the respondent.

(6) I accepted the claimant's evidence that he ceased to undertake carer shifts between the end of August 2018 and mid-November 2018 because his wife was in the later stages of pregnancy and gave birth on or about 1 November 2018, after which the claimant became involved in assisting with the new born child as well as assisting in a move when he and his wife bought a new dwelling. It was suggested in cross examination that the claimant's suggestion that he had looked after a particular resident who died in March 2019 was false because there were no shifts recorded in the beginning of 2019. I accept the explanation of the claimant that this coincided with when he was assisting with the house move and the early months of his child's life when he was doing fewer shifts. He continued in his role as recruitment manager throughout.

(7) I am also satisfied from the evidence of Ms Meade that it is likely that a written contract of employment not only existed but was provided to the respondent in the discussions concerning the transfer. An officer from the Bradford Council, a major client, required a number of steps to be followed by Ms Meade, and asked a series of questions. In response, by email of 3 December 2019, she named the claimant as Recruitment Manager. The care sector is regulated by the Care Quality Commission, which would expect to see written particulars at an inspection. For that reason alone, I think it likely there would have been a signed copy in the claimant's personnel file, but in addition the respondent would have been anxious to see it in its due diligence requests concerning employees who transferred.

15. On 26 December 2019 the claimant sent a text to Ghosia Amir, the Managing Director of the respondent. He asked for a discussion concerning work. They had a meeting on 27 December 2019. The claimant informed Ms Amir that he was not trained or experienced in undertaking emergency on-call services; he had noticed he had been rostered on-call. Ms Amir agreed to remove these duties.

16. At a meeting on 3 January 2020 a number of staff from CCML were spoken to by Ms Ghosia Amir and Mr Asim Amin, the Registered Care Manager of the respondent and told that they were not discharging their duties as had been hoped, and that they ought to improve. This upset the claimant and his colleagues.

17. On 7 January 2020 the claimant sent a formal grievance in an email to Ms Amir. He referred to the meeting of 3 January 2020 and the criticisms which had

been made. He said he and others had felt belittled and they were visibly upset. He also referred to a disagreement he had had with Mr Asim Amin about the on-call rota.

18. Ms Amir responded on the same day and invited the claimant to have a chat at a meeting on the Friday. That duly happened, and Ms Amir was sorry that the claimant had felt upset when at the meeting and she reassured him they were all going to work together. The formal grievance of 7 January 2020 was not taken further.

19. The claimant became aware that his new colleague, Rebecca, who also worked in recruitment, knew that he was paid a higher rate. The issue was clarified at the end of the month with Ms Meade, when the respondent took issue with the carer rate. The claimant was then paid at £12 per hour for both his care work and as Recruitment Manager.

20. The claimant was called into a meeting on 11 March 2020 by Ms Amir and Mr Asim Amin. The claimant was handed a letter. He was told it should be treated as an informal warning because he had not performed adequately, specifically in respect of recruitment. A series of targets were set for the claimant to meet. He was informed in the letter that a failure to improve and to maintain performance would lead to formal action under the capability procedures.

21. On 23 March 2020 the claimant was called into a meeting by Asim Amin and an office worker, Ambreen, and told he was to be laid off. Mr Usman Amir said he was in this meeting. The claimant said he was not. What is undisputed is that the claimant was given a letter which had been sighed by Mr Amir on that day, and the letter gave notice that he was to be laid off 'in accordance your contract with effect from 23 March 2020'. The claimant was informed he would be entitled to a statutory guarantee payment, he was assured that he had not been dismissed, he was required to make himself available for work, if work was available, and that everything possible would be done to inform him of developments and notify him as soon as he was required to return. It was suggested he contact the Benefits Agency to see if he was eligible to claim.

22. I am satisfied that the claimant's account is correct and that Mr Amir was not in the meeting. I found the claimant's evidence preferable to that of Mr Amir because it was consistent. I found Mr Amir's evidence to be inconsistent in a number of respects. At all events, nothing turns upon who was or was not in this particular meeting because it is agreed that the claimant was laid off in the terms set out in the letter. I am satisfied that the claimant said, at the meeting, that he was still available for work as a carer.

23. The claimant then contacted the Jobcentre, which sought clarification as to the meaning of the letter and the effect of his contract. He also sought clarification from Ghosia Amir the following day, but she said he should speak to Asim Amin.

24. On 25 March 2020 the claimant called to speak to Asim Amin and he asked for clarification about the letter. Asim Amin said the claimant would need to speak to Usman Amir, but Usman Amir was out of the office for a few days.

25. The claimant went to the office on 27 March 2020, again to ask for clarification about the letter. He asked Asim Amin if he was still required to work on the Friday nights, his regular shift. Asim Amin brushed aside his request by saying he had to ask Hasnain (the brother of Usman and Ghosia), who was seldom in the office. The claimant spoke to Mr O'Reilly, who works for the respondent in a quality assurance role, who told him he was down to attend. The claimant thought Mr Asim Amin looked uncertain as Mr O'Reilly said this.

26. On 28 March 2020 the claimant spoke to Ronaldus, another carer, who said he was going to have to isolate and so there may be free shifts available for him. The claimant called the office to ask if shifts were available. He was informed they would get back to him as soon as possible. He received no call.

27. On 29 March 2020 the claimant's wage was £300 short and he sent an email to query it. He pointed out that he had called in on a couple of occasions for clarification in respect of the letter laying him off and had been told Hasnain was going to talk him through it. He also said the Jobcentre were unclear about what the letter meant about his contract. He asked where he stood. He received a response from Ghosia Amir the same day within exactly an hour. She said that Usman was on paternity leave and would not be in the office for the foreseeable future, and she apologised for any inconvenience and thanked him for bringing the matter to light. She said, "*I will also send you an invitation, Monday 30 March 2020, to arrange a phone meeting with our HR team to discuss the letter and the current situation*". The claimant heard no more from about it; from the HR team or at all. In her email Ms Amir said the respondent was trying to limit the amount of direct communication because of Government guidelines and the COVID situation and that the lack of response was due to the dramatic reduction of manpower and resources in the organisation because of the Government guidance.

28. In late March 2020 or early April Mr O'Reilly posted a Facebook notice headed "Help Needed"; it stated due to the impact on adult and social care to those who must self-isolate there was a need for support, and anyone with up-to-date DBS certificates who could lend a hand, voluntary or paid, should get in touch with him. Although it is dated 25 March 2020 Mr O'Reilly submitted a witness statement saying this was posted on 2 April 2020.

29. On 3 April 2020 the claimant signed on to the App for care shifts to see if his nightshift was still assigned to him. It was not. He telephoned the respondent's on-call team who said they did not know anything about it and he should ring the following day. He did not do the shift. He rang the following day but did not receive an answer.

30. On 6 April 2020 the claimant telephoned the office twice to ask why he had been taken off the nightshift without notice. He spoke to John O'Reilly who said someone would get back to him. He asked about additional work and was again told someone would get back to him. Nobody did.

31. The respondent says that the claimant had indicated he did not want to do the shift on 3 April 2020 and that he did not want to do any other care shifts. At paragraph 30 of Mr Amir's statement, he refers to the care shift booking system

which showed that the claimant had originally been assigned this shift but it had been reassigned. Mr Amir said the claimant had spoken to Rebecca Walsworth and told her he did not want to carry out the 3 April shift and he did not want to carry out any further carer shifts. The Tribunal did not hear from Ms Walsworth. She had left the respondent a few weeks later.

32. There is no documentary record of the claimant requesting not to work on 3 April, or indeed, not to work at all. The only documentary record is the screenshot in which the shift was reassigned, but it does not include any information about why. I asked Mr Amir how he knew this was the position, that is that the claimant did not want to do any shifts, and he said it is what he had been told, and it was known in the office.

33. I accept the claimant's evidence, not only because I found him frank but also because it was consistent with the rest of the circumstances. Firstly, his repeatedly expressed concern that he was not working and he wanted to work. There is no reference in any of the claimant's communications to suggest this is only about the Recruitment Manager role. Secondly, it is extraordinary that the respondent did not ask him to work care shifts or reconsider his stance in response to his many emails asking to work, at a time it was sending out a call for assistance on Facebook because of a shortage of staff and increased demand for carers.

34. On 5 May 2020 the claimant emailed again asking to return to work and asking for confirmation his pay would be maintained for the period he was asked not to work. There was no reply.

35. The claimant sent a further email on 13 May 2020 to Mr Amir, Ms Amir and Debbie Ramsden (subject: return to work), and he said he had not heard from them about his return to work and he asked to be told urgently where he stood. He said he believed he was still employed and he was concerned because he had not received his wages. He said he had made it clear he wanted to be allowed back to work. There was no response.

36. The claimant emailed again on 21 May 2020 at 13.52. He raised a formal grievance. He sent that email to Ms Amir and Mr Amir. The claimant said he had no alternative but to raise a formal grievance. He said he had been side-lined and ignored and he was not allowed to come back to work nor been paid any wages. He said he had sent emails to Ghosia and Usman Amir and to their legal adviser on 5 and 13 May but he had been ignored. He said he had been treated very poorly, which he believed stemmed from his transfer from CMCL and his previous salary. He asked to return to work on the Monday and said, “I trust all my pay since my suspension will be paid to me and the month in hand for February that I am still owed”.

37. Ghosia Amir responded the same day at 17:06 and stated she hoped he was well, they were currently working with limited resources due to the coronavirus pandemic and they would reply by the end of the week on Friday. That was the following day. Mr Usman Amir replied on Friday, 22 May at 17:10 and stated:

> *"I am a little surprised and shocked by the letter, the contents of which are completely false and untrue. On 23 March 2020 I had a meeting with you to tell you that due to the COVID-19 we had to lay the office off. Both you and fellow office members were laid off so the allegation of singling you out if false. The business is not currently recruiting and we are looking at the function of the business going forward. We fully understand you[r] position and at this point and are aware as a company you have the right to claim redundancy and if you wish to exercise this right please inform the company. At this point I am unable to tell you where the company will be looking to recruit, and as I suggested we are looking at the potential restructures within the business. Thank you for your cooperation."*

38. The claimant resigned on 1 June 2020 having heard nothing further. He said in his resignation letter that he was shocked to read Mr Usman Amir's email and that he believed he had been sacked on 23 March 2020 otherwise they would have contacted him to require him to return to work.

39. Mr Usman Amir responded to the claimant's resignation on 1 June 2020 by email of 4 June 2020. He said he was surprised and repeated that the contents of the claimant's letter were false and untrue. He said that the claimant and the office staff had to be laid off due to COVID. He repeated part of the earlier email of 22 May, including the comment about redundancy and that the claimant had not been dismissed.

Conclusions

40. Upon my findings of fact, which are set out above, the claimant was employed by CMCL, the transferor, and was transferred to the respondent. He had more than 2 years of continuous employment.

41. The claimant was laid off on 23 March 2020. His contract contained no lay off provision. The claimant was not provided with timely clarification, in response to repeated queries about what this meant and the respondent refused to allow him to return to work, even as a carer.

42. Mr Usman Amir said that he had laid the claimant off on 23 March 2020 upon advice from their contracted HR legal advisers. There was no written contract of employment of the claimant provided by the respondent, which I found odd given that the respondent disputed the authenticity of the one which the claimant had provided and that it is an obligation of the respondent to provide written terms and particulars. If it disagreed with the document the claimant had provided in January or early February, it had a statutory duty to provide him with the correct particulars of employment. It is surprising because in the letter of 23 March 2020 express reference is made to the right to lay off under the claimant's contract of employment. There was no such right.

43. In the week commencing 23 March 2020 many businesses, large and small, were in a state of shock. The Prime Minister had placed the nation into lockdown. This had immediate consequences for everyone in employment. Certain categories

of worker were defined as key workers, and that definition would embrace the respondent and its employees. Nevertheless, all workplaces had a duty to ensure its staff were safe and considerable problems, in respect of health and safety and in respect of new legal obligations, were thrust upon employers who had to react with speed. The fact that the respondent had no legal right to lay off the claimant has to be seen in that context. Nevertheless, the advice was wrong. I do not know why the advice did not refer to the furlough scheme, a scheme which huge numbers of employers put into effect whereby employees were required not to work but paid a percentage of their income (80%) which was reimbursed by the Government. HMRC issued a number of directives. This required employees to consent in writing and was not based upon the contract of employment. This was not a lay off in terms of section 147 of the Employment Rights Act 1996.

44. If an employee was not placed on furlough, and I am not told of any reason why that could not have occurred with the claimant, the contract of employment continued to have effect. Under the claimant's contract of employment he was entitled to be paid if he was available and willing to work. He may not have been able to work in the office, because the employer was required to make its place of work safe and that may have meant that the respondent would have to reduce the number of staff there. Mr Lunat submits that the respondent has failed to demonstrate that, and I think there is force in that argument because I have been given no detailed information as to the number of staff who continued to work at the office nor the distances between everybody nor any plan of the office or the facilities available to the respondent in various rooms to cater for different staff. Mr Amir says that the respondent did require other members of staff to work from home, albeit it seems that some continued to work from the office, albeit not Mr Amir according to the email of his sister of 29 March 2020.

45. In their request for extra time to submit a response in September 2020, the respondent’s representative said that the office staff were working from home, and it does appear peculiar that such an arrangement was not put in place for the claimant. It was said data protection precluded that. I was not satisfied that the respondent could not, in a reasonable period of time, have put into effect measures which would satisfy the GDPR, certainly by the time the claimant was making repeated requests six weeks later about when he would return to work. In other words, I am satisfied the respondent could have made arrangements to return the claimant to work, either in the office or alternatively at home, by May 2020.

46. The respondent refused to allow the claimant to return to work, and I am satisfied the respondent failed to provide the claimant with timely clarification as to his working circumstances after 23 March 2020, by not responding to his emails and telephone calls. The respondent failed to provide the claimant with care work notwithstanding care shifts were available: a colleague had said he was self-isolating in late March and Mr O’Reilly requested carers on Facebook. I draw the inference that the only reason the respondent did not ask the claimant to work was because he was paid £12 an hour, and that he was more expensive than other members of staff. That inference is drawn not only from the differential itself but also from the unsatisfactory evidence which I have heard from Mr Amir as to why the respondent did not deal with the claimant's requests to work, allow him to work from home and

the challenge which had been made about the carer rate the claimant had been paid with CMCL, until it was clarified by Ms Meade.

47. In respect of the grievance, the last relevant matter before resignation, the respondent simply failed to address it. The claimant had raised his concerns repeatedly by telephone and email. He had called into the office and been passed from one to another. He was told he would have to take up the matter firstly with Usman Amir then with others (Usman's brother) and then had his emails ignored. By the time he raised a grievance, he must have been at his wit's end.

48. I accept an employer has to appoint a decision-maker, arrange a meeting and facilitate attendance, all of which takes time, as Mr Lane submits. The response of Ghosia Amir later that day was a reasonable holding response. She promised a reply the next day, the Friday. But the response of Mr Amir, on the Friday, was unacceptable. He summarily rebuffed the complaints that the claimant had been side-lined and ignored, not allowed to come back to work nor paid any wages. Mr Amir stated they were false and untrue. I find they were not false but true.

49. The ACAS Code of Practice on Discipline and Grievance Procedures provides that it is important to deal with issues fairly, promptly and in a way that allows the employee to put his case at a meeting. An employee is entitled to have a considered assessment of his concerns. An immediate response from the Operations Director, that the complaint was completely false and untrue, was wholly incompatible with those principles. To make matters worse, they were not untrue. The claimant could have no faith in his employer, in the light of this conduct. Mr Amir did not inform the claimant that his grievance would be processed, with the appointment of a decision-maker. The only reasonable inference from this response was that the matter was closed. I reject the suggestion that an employee in the claimant's position could reasonably anticipate that the grievance would continue to be processed. He waited a week before resigning and heard nothing. In fairness to Mr Amir, in his evidence he accepted that that would be an inappropriate response to a formal grievance. He thought there had been some other reply. After a search, only his sister's holding email came to light.

50. The suggestion that the claimant had the right to redundancy had no basis in fact or law. It is not the employee who determines whether there is a redundancy situation but the employer. The claimant was not in a position to determine that the requirements of the business for employees to undertake work of a particular type had reduced or diminished, and therefore the suggestion he had a right to claim redundancy and that the respondent would pay it was not correct. The very mention of it indicates that the respondent was anxious to lose the claimant's services.

51. It seems to me that letter would, and did, deliver a shattering blow to the claimant's confidence in his employer. To fail to deal with the grievance in the circumstances was a serious departure from acceptable conduct. I am satisfied, on the facts of this case, that it was action which was intended, not just likely, to destroy trust and confidence. To lay off the claimant when it had no contractual right to do so, not to pay him, to fail to respond, repeatedly, to pass the claimant from one manager to another when he raised perfectly proper questions to which he never received any answers, to fail to provide him with any work and to reject, summarily,

his grievance was a shocking course of conduct. It destroyed the claimant's trust in his employer on any objective analysis. It was likely to do so and, in the circumstances of such repeated actions was, I am satisfied, calculated to do.

52. None of this conduct was with reasonable and proper cause. It was well below what any employee could have expected.

53. Mr Lane reasonably recognises that no issue of affirmation would apply to this case.

54. It follows that I find that the claimant was dismissed because he resigned in response to a fundamental breach of contract, namely the implied term of trust and confidence. It also follows from my findings earlier that the respondent has not established a substantial reason of a kind to justify dismissing an employee of the kind held by the claimant, because I am not satisfied the claimant made himself unavailable for care work. It follows, therefore, that the dismissal was unfair.

55. The other issue which arises is as to whether it was automatically unfair. That is a more complex question. I have indicated that I was satisfied that the respondent did not offer the claimant care work because he was paid at £12 per hour, and the reason the claimant was paid at £12 per hour rather than the rates the respondent had been paying was because he had been inherited from his previous employer and the respondent was obliged under TUPE to maintain the claimant's previous contractual terms.

56. The language of regulation 7 of TUPE is that the dismissal would be automatically unfair if the sole or principal reason is the transfer. I am satisfied that the rate of pay was a contributory factor to the actions of the respondent, particularly in respect of not offering the claimant care shifts, but I am also satisfied that the events took the turn they did in March because of the pandemic. I am not satisfied, for example, the unlawful lay-off, which followed advice, was because of the transfer and so, although I am more than satisfied that it was a significant contributory reason, it was not the only or main reason for the breach of the implied term.

57. I find that the claimant was unfairly dismissed by the respondent, but I do not find that that was pursuant to regulation 7.

Remedy

58. The evidence of the claimant about his mitigation or attempts to mitigate were not challenged. The full award is set out in the schedule above.

59. I have increased the compensatory award by 20% because of an unreasonable failure of the respondent to comply with the ACAS Code. Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 provides if there has been an unreasonable failure of an employer to comply with a relevant Code to which the Tribunal shall have regard, the Tribunal shall consider whether it is just and equitable to increase any award by up to 25%. On the findings I have made, the claimant's concerns in a formal grievance were rebuffed by a summary rejection that what he was said was untrue. That is a flagrant breach of the ACAS

Code. Paragraph 32 encourages employees to resolve matters informally, which the claimant had tried to do, but paragraph 33 states, "Employers should arrange for a formal meeting to be held without unreasonable delay after a grievance is received". I do not regard it as reasonable for the respondent to have responded on the Friday in the terms I have just described, which was to give every impression that there was never to be a meeting, and a further week passed by before the claimant resigned and nothing had happened.

60. I have not awarded the full uplift of 25% in recognition that the respondent was not a large employer with a full time in-house human resource function and it was dealing with a difficult situation concerning the pandemic which placed it under managerial pressure. A 20% increase is appropriate.

61. The recoupment provisions apply as explained in the accompanying documentation.

Application for Costs

62. Rule 76 states, "A Tribunal may make a costs order or a preparation time order and shall consider whether to do so where it considers that a party or that party's representative has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings or the way that the proceedings (or part) have been conducted, or any claim or response has no reasonable prospect of success".

63. In this case the claimant applies for costs. He engaged his solicitors on a damages-based agreement, at 35% of the award I have made. The claimant submits that the respondent has acted vexatiously and unreasonably in its conduct of the proceedings in failing properly to disclose material, in not calling appropriate witnesses, in alleging extensive fraud and forgery, and in defending a claim which Mr Lunat submits had no reasonable prospects of success; conduct which he says, collectively or individually, is vexatious or unreasonable.

64. Mr Lane says that the costs jurisdiction is one which is the exception rather than the rule and that Tribunals are devised to be a forum in which costs do not normally follow the event, and he refers me to **Shell v Gee**. He says that the respondent successfully resisted a complaint of automatically unfair dismissal and that because the Tribunal preferred the evidence of the claimant and Ms Meade to that of Mr Amir is not a justification for awarding costs.

65. There are, in my judgment, two aspects to this which pass the threshold of unreasonable conduct of the proceedings. One relates to the argument the respondent ran right to the end of the case that the claimant had never been employed by CMCL. That argument was hopeless. The attack which was made on the authenticity of the documents came nowhere near a sufficient evidential base to justify it. The evidence on this issue was stacked against the respondent. Very serious accusations have been made in this case that documents have been fabricated by the claimant, by Ms Meade and by her accountant, without evidence in support. No enquiry has been made of HMRC to check the veracity of the P45 or payslips. Were such serious accusation found to be true, this might be a matter for

the police to investigate. But there was no credible evidence to support them. An inconsistency between the claimant's payment of holiday and shifts in a particular pay period was woefully short of supporting that allegation. The accusations could be made free from the risk of a defamation suit because of the absolute privilege of the proceedings.

66. I have had cases in which false wage slips have been produced. But the combination of the wage slips, the P45 and the contract of employment defeated any case of fabrication of documents in the absence of a handwriting expert or other evidence from HMRC. I regard the allegation that there was no employment at all by CMCL, and that there had been fraud to establish there was, as unreasonable.

67. Secondly, I regard it as unreasonable to maintain the position that the respondent had acted properly and reasonably over the period from 23 March to 1 June given the fact the respondent did have a human resource facility, albeit external, and could have corrected the problems if mistakes had been made in the week of 20 March, such as a failure to place the claimant on furlough and/or providing him with care work. For the reasons I have given I am satisfied the respondent doubled down on its damaging actions. The respondent should have recognised that its defence of the constructive dismissal claim had no reasonable prospect.

68. I then turn to the question as to what (if any) order I should make. I do not have to make an order even if the threshold is crossed. I am satisfied however it is in the interests of justice to make an order. Mr Hafejee has had to come to the Tribunal and pursue his case and be accused of being a liar and committed fraud, and engaged solicitors to assist him. On the other hand, I do not think I should make a full award. Mr Lane rightly says that there does not need to be strict causation between the unreasonable conduct and the cost, and I bear in mind that the claimant brought a racial harassment claim, which he withdrawn in early course, and also did not succeed ultimately on the automatically unfair dismissal complaint. There are wider issues than simply those which I have categorised as unreasonably presented which the Tribunal was invited to consider, for example, the claimant withdrew a claim for pension loss and the respondent was quite entitled to challenge that.

69. Taking all of those factors into account the interests of justice are met by the respondent paying 50% of the claimant's costs.

70. I should add for completeness that, in respect of disclosure of documents I do not know what did and did not exist, so I did not find unreasonable conduct in a failure to disclose. In respect of witnesses, again I do not feel it right to make a judgment about which witnesses should or should not have been called, although I am not with Mr Lane's suggestion that Mr Lunat should have called them because I would not have let him cross examine a witness who would not assist the claimant.

Employment Judge D N Jones

Date 4 March 2021