EMPLOYMENT TRIBUNALS

Claimant: Mr M Chesworth

Respondent: Time Specialist Support Limited

HELD AT: Manchester **ON:** 3, 4 and 5 January 2018

BEFORE: Employment Judge Franey
Ms L Atkinson
Ms V Worthington

REPRESENTATION:
Claimant: In person
Respondent: Mr L Murdin, Counsel

JUDGMENT

The judgment of the Tribunal is as follows:

1. Unanimously, the complaint of detriment in employment on the ground of a protected disclosure contrary to section 47B Employment Rights Act 1996 fails and is dismissed.

2. By a majority (Ms V Worthington dissenting), the complaint of unfair dismissal contrary to section 103A Employment Rights Act 1996 is not well founded and is dismissed.

Employment Judge Franey

12 January 2018

JUDGMENT AND REASONS SENT TO THE PARTIES ON
18 January 2018

FOR THE TRIBUNAL OFFICE

REASONS

Introduction

1. By a claim form presented on 16 June 2017 the claimant complained that he had been unfairly dismissed from his post as a support worker with the respondent with effect from 23 January 2017. He asserted that his dismissal, ostensibly because of misconduct, was in truth because of a series of protected disclosures he had made about breaches of data protection. He also complained that he had been subjected to a detriment before being dismissed.

2. By its response form of 24 July 2017 the respondent resisted the complaints on their merits. It said there had been a fair dismissal for gross misconduct and denied that any protected disclosures had been made. Even if there had been any protected disclosures, these had had no bearing on the treatment of the claimant.

3. The matter came before Employment Judge Porter at a preliminary hearing for case management purposes on 30 August 2017. Five alleged protected disclosures were identified and a passage in that Case Management Order sought to identify the detriments about which the claimant complained. The Case Management Order recorded that the respondent no longer contended that the claimant had not been an employee.

Issues

4. We discussed the issues with the parties at the outset of our hearing. The claimant confirmed that he relied on the five disclosures identified by Employment Judge Porter.

5. As to the detriments, we invited the claimant to consider paragraphs 4.4 - 4.12 of the Case Management Order of Employment Judge Porter, and having done so he confirmed that he relied on two detriments from those passages. They were the failure to allocate him any sessions for December 2016, and the failure to allocate him any sessions for January 2017 in breach of a promise to do so.

6. The second of those detriments arose because of an act or deliberate failure to act by the respondent which occurred before the end of December 2016 or very early in January 2017. On the face of it the detriment complaint was therefore out of time because the claimant did not initiate early conciliation with ACAS until 19 April 2017.

7. It followed that the issues as to liability for the Tribunal to determine were as follows:

Protected Disclosures

(1) Can the claimant establish that on any of the following occasions:

(a) he made a disclosure of information;

(b) which he reasonably believed was made in the public interest; and

(c) which he reasonably believed tended to show that a person had failed, was failing or was likely to fail to comply with a legal obligation to which he was subject:

1.1 in a verbal discussion with Mr Haworth during a training session at the start of the claimant's employment;

1.2 in a discussion with Mr Haworth at a six month appraisal in approximately July 2015;

1.3 in an email to Ally Somers of 13 November 2016;

1.4 in a telephone call to the Information Commissioner's Office ("ICO") on 9 November 2016, and/or in an email to the ICO on 15 November 2016; and/or

1.5 in his written grievance of 12 December 2017?

Detriment in Employment

(2) If the claimant made one or more protected disclosures, can he show that he was subjected to a detriment by any act or deliberate failure to act by the respondent:

(a) in not allocating him any work sessions for December 2016; and/or

(b) in reneging on a promise or agreement to allocate him work sessions for January 2017?

(3) If so, can the respondent show that the ground on which any such act or deliberate failure to act was done was not any of the protected disclosures?

(4) Insofar as any of the acts or deliberate failures to act for which the claimant seeks a remedy occurred more than three months prior to the presentation of the claim form, allowing for the effect of early conciliation, can the claimant show that it formed part of a series of similar acts or failures to act of which the last occurred within time?

(5) If not, can the claimant show that it was not reasonably practicable for him to have presented his complaint within the three month period and that it was presented within such further period as the Tribunal considers reasonable?

Unfair Dismissal

(6) Was the reason or principal reason for dismissal that the claimant had made one or more protected disclosures?

Evidence

8. The parties had agreed a bundle of documents which ran to 149 pages. By agreement two further documents were added to the bundle during the hearing and allocated additional page numbers. Any reference to page numbers in these reasons is a reference to that bundle unless otherwise indicated.

9. We heard evidence from five witnesses, each of whom had prepared a written witness statement and answered questions orally. The claimant gave evidence on his own behalf, and called his trade union representative, Michael Moss, who accompanied him at the grievance meeting and dismissal appeal meeting.

10. The respondent called its Operations Manager, Mark Haworth, its Service Manager, Ally Somers, and its Director, Tori Houghton, who dismissed the claimant.

Relevant Legal Principles

Part One: Protected Disclosures

11. A protected disclosure is governed by Part IVA of the Employment Rights Act 1996 ("the Act") of which the relevant sections are as follows:-

> **"s43A: in this Act a "protected disclosure" means a qualifying disclosure (as defined by Section 43B which is made by a worker in accordance with any of Sections 43C to 43H.**
>
> **s43B(1): in this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following:**
>
> **(a) …**
>
> **(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject…**

12. In **Cavendish Munro Professional Risk Management Limited -v- Geduld [2010] IRLR 38** the Employment Appeal Tribunal decided that the disclosure has to be of information as opposed to the mere making of an allegation. Some concrete factual information must also be conveyed, even if that information is already known to the recipient. (Section 43L(3) provides that in such cases the reference to the disclosure of information is treated as a reference to bringing information to the attention of the recipient).

13. Sections 43C – 43G address the identity of the person to whom the disclosure was made. In this case it was accepted that if qualifying disclosures had been made, they were made either to the employer or to the Information Commissioner and therefore protected.

Part Two: Detriment in Employment

14. If a protected disclosure has been made the right not to be subjected to a detriment appears in Section 47B(1) which reads as follows:

> **"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."**

15. The right to go to a Tribunal appears in Section 48 and is subject to Section 48(2), which says this:

> **"On such a complaint it is for the employer to show the ground on which any act or deliberate failure to act was done".**

16. The time limit provision appears in Section 48(3) and is a period of three months beginning with the date of the act or the failure to act, not the detriment, although where the act is part of a series of similar acts or failures, time runs from

the last act in the series. Time can also be extended in effect where the Tribunal considers it was not reasonably practicable for the complaint to be presented before the end of the three month period and it is presented within a further reasonable period.

17. The question of what will amount to a detriment was considered in the discrimination context by the House of Lords in **Shamoon v The Royal Ulster Constabulary [2003] ICR 337**: the test is whether a reasonable employee would or might take the view that he had been disadvantaged in circumstances in which he had to work.

18. As to the causation provision in Section 48(2), **NHS Manchester v Fecitt [2012] ICR 372** concerned a case where whistleblowers had been moved due to a dysfunctional working atmosphere. Their claim failed in the Employment Tribunal. The appeal was allowed by the EAT but the Court of Appeal restored the Tribunal decision and in doing so confirmed that the correct test to be applied is the discrimination test under the Equality Act 2010. Consequently the Tribunal can proceed by way of an inference as to the real reason for the decision as per the guidance given by the Court of Appeal in **Igen Limited v Wong [2005] ICR 931**. In paragraph 41 of **Fecitt** Elias LJ said this:

> **"Once an employer satisfies the Tribunal that he has acted for a particular reason, here to remedy a dysfunctional situation, that necessarily discharges the burden of showing that the proscribed reason played no part in it. It is only if the Tribunal considers that the reason given is false, whether consciously or unconsciously, or that the Tribunal is being given something less than the whole story that it is legitimate to infer discrimination in accordance with the Igen principles."**

Part Three: Unfair Dismissal

19. Section 103A of the Act deals with protected disclosures and reads as follows:-

> **"an employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure".**

20. The reason or principal reason is derived from considering the factors that operate on the employer's mind so as to cause him to dismiss the employee. In **Abernethy v Mott, Hay and Anderson [1974] ICR 323**, Cairns LJ said, at p. 330 B-C:

> **"A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."**

21. In a case within section 103A the Tribunal has jurisdiction over the claim even though the employee has not been employed continuously for two years: section 108(3). However, an employee otherwise lacking the right to bring a claim must prove that the reason or principal reason fell within section 103A: **Smith v Hayle Town Council [1978] ICR 996**.

Findings of Fact

22. This section of our reasons sets out the broad chronology of events necessary to put our decision into context. The primary facts were largely undisputed, but any factual disputes of central importance to our decision making will be addressed in the discussion and conclusions section.

The Respondent

23. The respondent company was established by Miss Houghton and her mother in 2008 and remains a family-run business of which they are the sole directors. It provides support for children with autism, generally undertaking that work on behalf of Local Authorities. It employs between seventy and ninety specialist support workers for that purpose, with a small management/administration team at the office. Each month the support workers are allocated sessions with particular children ("clients") for the following month.

24. For each client there is an electronic document known as the "profile". A sample appeared in the bundle at pages 153-154. The client profile records basic information about the child including personal details such as his or her name, address and family situation. It will also record any details of what the child likes or dislikes, and any other information which might be useful for a support worker to know. Its purpose is to enable a support worker new to that client to be briefed before his or her first session with the child. When the circumstances of the child change the client profile should be updated. The client profiles are emailed to support workers using their private email address; support workers are able to access the client profile on their own laptop or mobile phone.

25. If a session was cancelled by the parent or carer with less than 48 hours' notice, the support worker would still be paid for at least two hours. It was the practice of the administration team to ask the support worker to use that paid time to update the profile of the child in question and to email it back.

The Claimant

26. The claimant applied for a role with the respondent in November 2014 His application form appeared at pages 40-46. He was working as a community mental health support worker for vulnerable adults.

27. The claimant started employment in February 2015. He signed his contract of employment on 25 February (pages 47-55). The contract made clear that he was employed on a zero hours basis and that there was no obligation to allocate him any work. However, clause 2.4 on page 48 read as follows:

> **"Whilst an employee of the Company, you shall not work for any other employer without the prior and express permission of your manager. This permission will only be withheld where the proposed employment is deemed to be a conflict of interest given the business operation of the Company."**

28. The contract also made reference in clause 9 to disciplinary and grievance procedures contained in the staff handbook. Those procedures were not provided to the claimant at the start of his employment.

29. As a support worker on a zero hours contract the claimant tended to work autonomously. He would be involved in re-booking his session with the child for the following month and would let the office know the dates via logging on to the system and updating his calendar. These dates were then entered onto the respondent's calendar and covered by its insurance. The respondent was paid for them.

30. Each month he would also indicate by logging on to his calendar the dates on which he was available for work the following month. The claimant rarely had reason to visit the office.

First Disclosure – Early 2015

31. The claimant's case was that early in his employment he was at a training session run by Mark Haworth at which he informed Mr Haworth that the respondent was breaking data protection law by sending information about vulnerable clients by email to the private mobile phones of support workers. Mr Haworth remembered the training but said he could not recall any such discussion. We will return to this issue in our conclusions.

Second Disclosure – July 2015

32. Mr Haworth and the claimant undertook a six month appraisal of the claimant's work. It occurred in around July 2015. Notes kept by Mr Haworth of that discussion appeared at pages 56 and 57. The second page of those notes recorded the following discussion:

> **"Data protection – profiles. Shouldn't be held by the staff, files should be held by the office, staff could come and view and make notes, but not identifiable ones. Even having phone numbers stored on their phones if problematic. Certainly sending whole profiles over internet and people saving on personal hard drives etc [**is a**] problem. What is the law on this?"**

33. Whether this amounted to a protected disclosure is a matter to which we will return in our conclusions. Mr Haworth took the matter forward: a review of the system was undertaken. He became Operations Manager in October 2015 when Miss Houghton went on maternity leave and from February 2016 the profiles sent by email to support workers were password protected.

July 2015 – September 2016

34. During this period the claimant continued to work as normal. He still had concerns about the legality of the emailing of client profiles, even after the introduction of passwords in February 2016. In his view the passwords were not sufficiently secure as they were simply the name of the file. As a consequence he did not update any profiles and return them by email to the office in this period. That was either because no significant changes were needed to the client profile, or because he made a mental note of any changes as he continued to be the support worker for the child in question. At no stage in this period was he asked to update a profile because there had been a cancellation.

35. In July 2016 Ally Somers was brought in as office manager. One of her tasks was to review the respondent's policies. She saw that there was a disciplinary policy which needed further work: she described it as "half-written".

October 2016

36. In early October 2016 one of the claimant's sessions was cancelled at short notice. The office emailed him on 7 October 2016 (page 61) confirming that he was required to update the client profile. He was asked to send the updated profile as soon as possible.

37. Because of his reservations about the propriety of this the claimant did not comply. Mrs Somers, texted him a number of times between 19 and 26 October chasing him up. She asked him to come in for a meeting for an informal chat. There was no reply. Therefore by a letter of 26 October 2016 (page 64) she asked him to come in for an informal chat on 31 October 2016.

38. The claimant replied by email of 30 October 2016 at page 65. He said he would not be available to come into the office on that day or any other time in the near future. He invited her to call him during working hours but said that if he was with a service user it might not be appropriate for him to answer his telephone. He did not explain why the profile had not been updated or offer any alternative dates for a discussion.

39. A couple of days later the claimant contacted his union representative, Mr Moss, of the trade union Industrial Workers of the World ("IWW").

Letter about concerns – 7 November 2016

40. On 7 November 2016 (page 66) Mrs Somers wrote to the claimant again requiring him to attend a meeting on 14 November to discuss two outstanding issues: the refusal to update the profile and the refusal to come into the office to discuss it. Although he was required to attend, and the meeting would be treated as paid working time, it was still an informal meeting.

41. That same day the bookings team at Head Office sent out an email to all support workers inviting them to complete their calendars for December by 14 November so that sessions could be allocated for that month. The email appeared at pages 68 and 69.

42. The claimant could see that the question of updating client profiles could no longer be avoided. Matters were coming to a head. On 8 November 2016 he rang the ICO and made an enquiry in broad terms. He was invited to read the advice on the website and then ring back. He looked at the ICO register and could not see that the respondent was registered.

Fourth Disclosure 9 and 15 November 2016

43. Having considered the website the claimant rang the ICO again on 9 November 2016. He explained what was happening and his concerns about data protection.

44. The claimant put that information in an email to the ICO on 15 November 2016 at pages 78-79. He identified his employer and that sensitive information was kept on client profile pages. He said the profiles were sent out to support workers by email to be received and kept on their own personal devices. He explained that he

did not consider the passwords which had been introduced were good enough. He did not regard the company as holding the sensitive data securely.

45. We will return in our conclusions to the question of whether these amounted to a protected disclosure.

Third Disclosure 13 November 2016

46. The respondent did not know that the claimant was in touch with the ICO. Mrs Somers was aware only that the claimant had not replied to her letter even though it had been sent by email. She texted the claimant (pages 70 and 71) to clarify whether he was attending on 14 November 2016. In a brief text he said that he would not be attending and that he would send an email over the weekend.

47. That email was sent on 13 November 2016. It appeared at page 72. It was addressed to Mrs Somers but copied to Tori Houghton. In the email the claimant explained that he was concerned about the meeting because he thought he might be misquoted. He said that updating the profiles was a very serious issue. It raised two problems. The first was payment for that administrative work. The email continued:

> **"However, more important than this – as I have already told the company, when I started work and also at my appraisal – I believe that sending profiles by email contravenes data protection law and I will not do that.**
>
> **Should a meeting be deemed necessary at some time in the future, then this would need to be during my working time, as indicated by my availability. I would need to fully brief my trade union on the situation with a view to representation.**
>
> **Would you please confirm that the company is registered with CQC ("Care Quality Commission") as I may need to speak to the regulatory authority to clarify my position on a number of issues."**

48. We will return in our conclusions to the question of whether this email constituted a protected disclosure.

49. The same day the claimant returned his booking form with dates for December (pages 75-76).

14 November 2016 – First Detriment

50. At just after 8.00am on 14 November 2017 the bookings team at head office sent an email to the claimant asking him to log onto the system and confirm or reject sessions added to his calendar for December. The claimant did that mid morning and emailed the bookings team shortly before 11.00am to confirm that (page 75). At 1.20pm, however, the claimant emailed the IWW to say that all his appointments for December had been wiped off his calendar. He said it appeared that the respondent was trying to dismiss him unfairly.

51. The position was clarified at shortly before 6.00pm when Mrs Somers responded to his email of 13 November. Her email appeared at page 74. The email expressed her disappointment that he would not attend the informal meeting scheduled for that day. He was invited to lodge a grievance if he wished to pursue the issues he had raised. By way of a response, however, she indicated that:

> **"The Company is fully compliant with Data Protection as all data is password protected and held securely by the Company. This compliance has only recently been re-affirmed by the Information Commissioners Office."**

52. That was a reference to the fact that she had telephoned the ICO that day and explained the password protection for client profiles and how they were stored on the main system; she was under the impression that the ICO regarded that protection as sufficient.

53. Her email concluded with the following:

> **"As a Company, we still have concerns that need to be addressed as stated in my original letter to you. As such, until we have discussed these matters fully, and resolved our issues then we will not be scheduling any sessions for you. You will be aware that under your contract the Company is not obliged to offer you work, nor are you obliged to accept any offered."**

54. The claimant alleged that the decision not to offer him any sessions for December was a detriment on the ground of a protected disclosure and we will return to that in our conclusions.

Email from "Lisa" 28 November 2016

55. In late November Ms Houghton emailed the mother of a client ("Lisa") to tell her that the claimant was not being offered any work for December. She said they would cover any sessions which were required with her son.

56. Lisa replied by email of 28 November 2016 at page 82. She said she had had a reply from the claimant as she had texted him before getting that email. Her email went on as follows:

> **"He has suggested that I can still make private bookings for him and [**my son**]. [**My son**] has a strong bond with him but I am unsure on this. He said it was a dispute with you over data protection. Can you please advise?"**

First invitation to disciplinary hearing 2 December 2016

57. By a letter of 2 December 2016 Mrs Somers invited the claimant to a disciplinary hearing on 15 December 2016. Her letter had been drafted by the respondent's Human Resources Consultant, Mr North, but she approved it. Miss Houghton said in evidence she had seen it too.

58. The letter set out the concerns raised in the letter of 7 November: failing to update a client profile, and refusing to come into the office to discuss matters. It said that there had been a further instance of failure to update a client profile since then.

59. It then went on to raise the issue identified by the email from Lisa. The allegation was that the claimant had approached her offering his services as a support worker but not under the umbrella of the respondent. The letter said:

> **"This concerns me on three initial points:**
>
> - **That you openly tried to solicit the services of a contracted TSS service user without our prior knowledge or consent.**

- **That the service user was confused as to why you made this approach, which does not portray TSS in a professional manner.**

- **You have not made us aware that you operate as a separate legal entity as a support worker, and therefore carry the relevant insurances, clearance and indemnity cover that this would require.**

I fully understand as your contract is on a zero hours basis you are not obliged to accept any work we offer, nor are we obliged to offer you work, and as such, you are free to operate as a free agent. What concerns me though is that this approach was made specifically to an existing contracted service user to solicit this work, without you engaging ourselves in any prior dialogue in this regard.

You should be aware that the allegations made are serious and as such, a possible outcome of our meeting may be the decision to issue you with a warning.

You should refer to the company's disciplinary procedure for further details. Should you require a copy please advise me and I will make this available to you."

60. It is important to note that the disciplinary sanction envisaged by this letter was a warning. There was no mention of gross misconduct or the possibility of dismissal.

61. The claimant did not request a copy of the disciplinary procedure at this stage.

12 December 2016 – Grievance – Fifth Disclosure

62. The claimant did not respond to this letter.

63. On 12 December 2016 Mrs Somers emailed him (page 88) asking him whether he was going to attend the disciplinary hearing on 15 December. Her email also said that it had been brought to attention from external sources that he had left the respondent or that he no longer worked for it. She asked him to confirm the position.

64. The claimant responded by email at just after 2.30pm (page 90). His email enclosed a letter of grievance (page 87). He said he had never received a company handbook, but under the ACAS Code of Practice the grievance should be resolved before the disciplinary matter was pursued.

65. He raised four points in his grievance which are as follows (numbering inserted for clarity):

"(1) Unreasonable request made of me regarding

- **Data protection;**

- **Safeguarding;**

- **Shadowing sessions that I feel are bad practice and fraudulent.**

(2) Insisting that I attend meetings when I have not been available despite previous notification of my availability.

(3) Withdrawing hours that had already been offered to me – as a disciplinary action without a formal disciplinary process – and in turn denying me certain rights under employment law.

> **(4) By not following basic disciplinary procedures and practices, the company have left me with a detriment."**

66. That email was addressed to Miss Houghton but a few minutes later the claimant emailed Mrs Somers to confirm he was not leaving employment (page 89).

67. Miss Houghton acknowledged the grievance that evening by email (page 90). Instead of a disciplinary hearing before Mrs Somers, the meeting on 15 December was changed to a grievance meeting before Miss Houghton.

Grievance meeting 15 December 2016

68. The claimant attended this meeting with Mr Moss of the IWW. Miss Houghton was accompanied by Mr North. Notes of the meeting appeared at pages 91-93. They were not signed and were not provided to the claimant at the time for agreement. He did not accept that they were accurate.

69. It was common ground, however, that in the course of this meeting the claimant informed Miss Houghton that he had been in touch with the ICO about his data protection concerns. That was the first time that the respondent was made aware of his contact with the ICO.

70. The claimant and Mr Moss said in their witness statements that the atmosphere changed quickly when this was raised. They said that the meeting was stopped for about 20 minutes, and then when it reconvened it was brought to a conclusion quickly. According to the claimant and Mr Moss, Miss Houghton said the company might have to close and Mr North said that no-one might have a job next month. In her oral evidence Miss Houghton agreed that this was accurate. She had indeed panicked when told that a caseworker from the ICO would be investigating. She did not know about data protection matters and was worried that her company might be closed down. The meeting was brought to an end swiftly so that she could consider the position further.

71. After the meeting she made further enquiries. There was further contact with the ICO. She requested an advisory visit but was told there was a waiting list of at least six months. Nevertheless, it appeared that the position was not as bad as she had feared. The ICO recommended that sensitive data be accessed via a portal with encryption rather then simply emailed.

Grievance outcome 23 December 2016

72. Miss Houghton's conclusion on the grievance was set out in a letter of 23 December 2016 at pages 94-95. She said that since the meeting she had contacted the ICO again and requested an advisory visit. The data protection policy was being reviewed and sensitive data would be encrypted. This part of her letter concluded as follows:

> **"I thank you for raising this matter, however, as I stated when we met, it is somewhat disappointing that you felt unable to contact me directly in this regard, given that you said yourself, we have a good working relationship.**
>
> **In adopting and implementing these recommendations I, therefore, consider that this concludes this aspect of your grievance."**

73. The letter went on to address the other issues raised, including the withdrawal of hours for December. That part of the letter read as follows:

> **"The lack of communication from you prompted us to withhold hours until we could discuss hours with you. As stated at our meeting, there was a genuine admin error made by us when we asked you to confirm hours. This was a mistake on our part for which I apologise.**
>
> **I understand that you feel this has been handled wrongly and you feel you have suffered a detriment by not having hours offered to you in December. As stated you are on a zero hours contract, and, therefore, there is no obligation to offer you work and for you to accept this. In light of us not being able to meet with you to discuss issues, the decision was made to temporarily not allocate hours until matters were resolved.**
>
> **However, in light of our meeting, I believe that we have discussed and clarified matters. As such, it is my decision that I will instruct the payroll provider to pay you for a month's earnings for December. We will pay you the same amount as you earned in November. This will be paid to you on the usual pay day at the end of January.**
>
> **Hopefully, you now feel that the issues raised in this grievance have been resolved and if so please can you update your calendar for availability in January."**

74. The letter ended by giving the claimant the right of appeal.

Appeal Letter 6 January 2017

75. The claimant appealed by a letter of 6 January 2017 at page 98. He was keen to have his sessions for January 2017 reinstated. He said they had been "erased".

76. His letter said he would like to appeal against the outcome of the decision "with regards to the company taking responsibility for its actions".

Data protection action January 2017

77. By email of 6 January 2017 all staff were provided with an updated data protection policy. The appeal appeared at pages 99-100 and the policy at pages 103-105. One aspect of the policy was amended and it was reissued on 10 January (pages 106-110).

78. In addition, on 20 January 2017 the respondent registered with the ICO for a 12 month period (page 150).

Second Detriment – No Sessions for January

79. The claimant was not allocated any sessions for January. We will return in our conclusions to the question of whether this was a detriment on the ground of a protected disclosure.

Second invitation to disciplinary hearing 11 January 2017

80. By a letter of 11 January 2017 Miss Houghton reopened the disciplinary issue by inviting the claimant to a disciplinary hearing before her on 16 January 2017. The letter appeared at pages 111-113. She had taken legal advice.

81. She said that the letter of appeal was not actually an appeal against the grievance decision but rather an expression of a wish that the grievance findings were carried out in practice. There was therefore no reason to delay further the disciplinary meeting. The grievance could be discussed at the end of the disciplinary hearing.

82. Her letter continued as follows:

> **"The purpose of the meeting is to discuss concerns that remain outstanding as outlined in my original request to attend a disciplinary meeting dated 2 December 2016.**
>
> **Following my letter to you dated 2 December 2016, I consider that the following outstanding serious allegations against you remain, namely:**
>
> - **That a service user contacted us regarding an approach made by you to them offering your services as a carer, but not under the umbrella of Time Specialist Support…"**

83. The letter then reiterated the concerns about this issue set out in the invitation letter of 2 December 2016. It added a fourth bullet point to the concerns arising:

> - **"The service user stated that you told them that they could make a 'private booking' with you as you were in dispute with TSS over our data protection. You had not raised any concern with TSS or myself directly regarding this, and irrespective of any reason, it is unacceptable that you have such discussions with TSS service users in an attempt to solicit their business away from TSS as private bookings. This may be construed as a fundamental breach of your contract and as such may be considered as an act of gross misconduct."**

84. Importantly, the possible sanction had changed from a warning in the letter of 2 December 2016 to dismissal for gross misconduct. That change was not explained.

85. The letter also raised a new issue: that the claimant had been openly discussing a cancelled session and had refused to update a profile. That was described as unacceptable behaviour.

86. A copy of the disciplinary procedure was attached. It was a PDF document. Mr Moss later accessed the properties of that document. The screenshot appeared at page 143. It showed that the document had been created on 11 January 2017.

87. The claimant understood this letter to mean that only the allegation about offering private services was outstanding from the earlier letter. That was also the understanding of Ms Houghton according to paragraph 24 of her witness statement.

<u>Run-Up to Hearing 23 January 2017</u>

88. On 13 January 2017 the claimant emailed to say that he was not available on 16 January 2017 (page 114). He did not suggest any alternative date.

89. On 17 January 2017 (page 115) Miss Houghton emailed him to say that the meeting would be on 23 January 2017 and if he did not attend a decision would be made in his absence.

90. The claimant sought to lodge a second grievance on 18 January 2017 by a letter at pages 116-117. He said the refusal to hear his appeal against the first grievance outcome was poor practice and a breach of the ACAS Code. He was therefore lodging a second formal grievance. He said his sessions for January had not been reinstated, there were serious concerns about the company's registration with the ICO, and the issue for the disciplinary hearing had not been adequately investigated. He asked for information of what the company considered to be gross misconduct and all notes and minutes of the previous grievance hearing.

91. By email of 19 January 2017 at page 118 Miss Houghton said that she would respond in due course inviting the claimant to attend a grievance meeting, but in the meantime the disciplinary hearing would not be delayed for a third time. The claimant was warned again that a decision would be made in his absence if he did not attend.

Sunday 22 January 2017

92. Just after 11.00pm on Sunday evening Mr Moss emailed Miss Houghton to raise concerns about the disciplinary hearing. There should have been an investigatory meeting and the claimant had not been given the evidence against him. He therefore asked for the hearing to be delayed.

Monday 23 January 2017

93. Miss Houghton responded at 10.35 the following morning (pages 121-122). She said that the matter had nothing to do with any disclosures that may have been made and she provided the text of the complaint from the service user about private work. The meeting would proceed at 2.00pm.

94. The disciplinary hearing took place at 2.00pm. Neither the claimant nor Mr Moss attended. A brief note appeared at page 120. Miss Houghton considered the matter and decided to dismiss the claimant.

95. Miss Houghton confirmed that by email at just after 4.30pm that day (page 119). Her email said that the decision had nothing to do with any protected disclosure that might have been made. The facts from which the allegations arose were raised in the invitation of 2 December 2016 before the company was made aware that the claimant had contacted the ICO. The claimant was informed that he was being dismissed with immediate effect for gross misconduct.

27 January 2017 Dismissal Letter

96. Detailed reasons were given in an outcome letter of 27 January 2017 at pages 124-128.

97. After recording the sequence of events leading to the hearing in his absence, Miss Houghton reiterated that the decision was entirely unconnected with any disclosures which the claimant had made. She suggested that any such disclosures were not protected in any event because they had been made in bad faith, but emphasised again that the allegations against the claimant arose before she was aware of any contact with the ICO.

98. Miss Houghton then addressed the allegations. Rather than restricting herself to the allegations in the letter of 11 January 2017, she set out conclusions on those allegations also found in the letter of 2 December 2016. She concluded the claimant had refused to comply with a reasonable management instruction to update a client profile and to attend the office to discuss matters. She found that he had breached confidentiality by discussing the case with a colleague after the grievance meeting.

99. As to the allegation about private bookings, she confirmed on the basis of the email from Lisa that:

> **"…You had been seeking to provide services directly to that service user rather than through our company. That is a fundamental breach of trust and confidence and your obligation not to act for personal gain at the expense of the company. At no point did you approach me or any other member of the company indicating that you intended to offer your services directly to a service user in competition with us because of any data protection reason or otherwise. I find that this allegation amounted to a breach of trust and confidence and was sufficiently serious to amount to gross misconduct…I find that the trust and confidence between you and the company has been materially breached by you and that as such, your actions were sufficiently serious to amount to gross misconduct. It is an implied term of any employee's contract of employment that they will deliver a faithful service to their employer and that they will not seek to benefit at their employer's expense. Your actions in soliciting the business of a service user, using the guise that there were data protection concerns, leaves me to conclude that not only were you seeking to benefit personally, you were seeking to damage the reputation of the company in the process. Again, I focus upon the fact that you did not raise these concerns directly with the company, nor did you tell the company that you intended to approach the service user offering your own services."**

100. Miss Houghton said in her letter she had considered other sanctions but no lesser sanction was appropriate.

Appeal

101. The claimant was given the right of appeal against the decision to dismiss him. He appealed by letter of 3 February 2017 at pages 130-131. He said that the service user had approached him by text and that he explained that he could not do any sessions that month through the respondent. He reiterated that he had made protected disclosures, and said that his disclosure to the ICO had been the motivation for increasing the likely punishment from a warning to dismissal.

102. The appeal was handled by Miss Houghton herself. There was a meeting on 8 March 2017. No notes were produced.

103. The outcome of the appeal was set out in a letter of 31 March 2017 at pages 138-140. Miss Houghton concluded that the claimant had never been instructed to breach data protection law by updating a client profile, and that the evidence in the email from Lisa had been highly relevant and probative of wrongdoing. She reiterated that the invitation to a disciplinary meeting preceded any knowledge of any contact with the ICO.

104. As to the change in the likely outcome, her letter said:

> **"The mention of a warning in the letter of 2 December 2016 was made in error. The nature of the allegations raised in my letter of 2 December 2016 were so serious that nobody could reasonably anticipate that we would be intentionally limiting ourselves to a warning in terms of the sanction to be imposed if the allegations were proven. The**

> **fact that this was corrected in our later letter of 11 January 2017 is indicative of nothing more than the realisation on our part that we had made an administrative error in our letter of 2 December 2016."**

Submissions

105. At the conclusion of the evidence each party made an oral submission.

Respondent's Submission

106. For the respondent Mr Murdin did not address the alleged protected disclosures but concentrated on the causation issue. He submitted that neither the detriment complaints nor the unfair dismissal complaint could succeed. He invited us to accept the evidence given as to why the sessions had been cancelled for December 2016 and January 2017, and submitted that those complaints were out of time in any event. They could not be linked to the dismissal.

107. As for the dismissal, he submitted that the claimant could succeed only if we concluded that Miss Houghton had been a liar, deliberately producing dishonest documents at the time. He invited us to accept her evidence as credible and truthful. She had dealt with the issue of protected disclosures head on rather than seeking to avoid it. She made a number of concessions in her evidence which did not help her, including the admission of errors and her acceptance that she had panicked when told that the claimant had been in touch with the ICO. Further, he invited us to accept that there was a genuine reason for dismissing the claimant unrelated to any disclosure: the fact that he had gone behind the back of the company (as it appeared) in seeking to arrange work privately. As proprietor Miss Houghton was entitled to take a different view from that taken by Mrs Somers, and the claimant had simply misunderstood the reason for the decision even though both he and Mr Moss had given reliable evidence as to the primary facts.

Claimant's Submission

108. With assistance from the Tribunal the claimant addressed each of the matters for determination. We did not ask him to address the protected disclosures.

109. On the first detriment claim he said that the failure to give him sessions for December was a consequence of the concerns about updating profiles and attending meetings, but those concerns in themselves only arose because of the subject matter of his disclosures. On the detriment in relation to January sessions he emphasised that he had entered his details on the calendar and there could be no other explanation save for his protected disclosure. On time limits he submitted that these matters were part of a series of similar acts resulting in dismissal.

110. On the dismissal claim the claimant emphasised that only after the respondent learned that he had been to the ICO was the severity of the allegation increased to gross misconduct. Miss Houghton had seen the letter from Mrs Somers saying it was a warning issue at worse but had not corrected it at the time. That was consistent with the real reason being her awareness that he had gone to the ICO. If he had not lodged his grievance the disciplinary matter would have gone ahead on the lesser basis. There was also inconsistency in the dismissal outcome because the earlier allegations were brought up again at that stage.

Discussion and Conclusions

111. We first addressed the question of whether the claimant had made protected disclosures, then addressed the detriment complaints and finally the unfair dismissal complaint.

Protected Disclosures

112. In relation to the protected disclosures, it was not formally conceded by the respondent that the claimant had made protected disclosures. It was necessary for us to address that point, although it did not feature in the oral evidence or submissions.

113. The law is contained in Part IV A of the Employment Rights Act 1996 and a disclosure will be a qualifying disclosure if it is a disclosure of information, not simply a bare allegation, which in the reasonable belief of the claimant tended to show a breach of a legal obligation and which the claimant reasonably believed was made in the public interest. It was conceded in the response from that any qualifying disclosures were protected.

114. The first disclosure was said to have occurred in a training discussion early in the claimant's employment. Mr Haworth said he could not recall any such discussion but accepted it could have happened. The Tribunal accepted the claimant's evidence as set out in the opening sentences of his witness statement. The facts he conveyed by way of information were that the respondent was sending client profiles by email to support workers for them to access on their private mobile phones or laptops. It matters not that this information was already known to the employer. We were satisfied the claimant reasonably believed that represented a failure to protect the data properly in accordance with the Data Protection Act 1998. In particular section 4(4) of that Act obliges a data controller to comply with the data protection principles. Principle 7 is that appropriate technical measures should be taken to protect against the unauthorised processing of personal data. We were also satisfied that the claimant had a reasonable belief this was in the public interest. This affected a large number of clients, and potentially their families. We took into account that those clients would be in a vulnerable position. We were satisfied that the claimant did make a protected disclosure on that occasion.

115. The second disclosure was recorded in the appraisal note at page 57 and for the same reasons we concluded it was a protected disclosure.

116. The third disclosure was said to have occurred in the email of 13 November 2016 at page 72. The information disclosed was again that client profiles were being sent by email. For the same reasons we concluded that was a protected disclosure.

117. The fourth disclosure was said to have occurred in a telephone call with the ICO on 9 November 2016 followed by an email of 15 November at page 78. The information disclosed was broadly the same as in the earlier disclosures, and again we concluded there had been a protected disclosure to the ICO.

118. That left the fifth protected disclosure, which was the claimant's grievance at page 87. In a sense this was academic because it was not part of the claimant's case that any specific detrimental treatment occurred because of the grievance. In

that grievance he did not explicitly set out the information but clearly made a reference back to it when he said that there had been an unreasonable request of him regarding data protection. We are satisfied it was apparent to the recipient of the grievance what this matter concerned, not least because he raised it in his email of 13 November, and again we were satisfied this was a protected disclosure.

119. Accordingly the Tribunal unanimously concluded that the claimant had made a protected disclosure on five occasions.

Detriment Complaints

120. We then turned to the detriment complaints. The claimant has to show that he has been subjected to a detriment by an act or deliberate failure to act by the respondent. If so, the burden then falls on the respondent under section 48(2) to show the ground on which that act or deliberate failure to act was done, and that the protected disclosures had no material influence, conscious or subconscious, on the mental processes of the decision maker.

121. The detriments in question related to the failure to allocate any sessions for the claimant in December 2016 and then January 2017. Even though the claimant was on a zero hours contract with no guarantee of work, we were satisfied he could reasonably see that as a detriment because it reduced his income for those periods, although the December income was subsequently reinstated to the November level. The issue for us was the reason in the mind of the decision maker on each occasion.

First Detriment

122. The first detriment complaint related to work for December 2016.

123. The respondent's case as to the ground for that decision was set out in Mrs Somers' email conveying that decision of 14 November 2016 at page 74. Because the concerns raised with the claimant in the letter of 7 November remained outstanding (his refusal to update a client profile and his refusal to come in to discuss matters), the respondent decided not to allocate work to him until they were resolved.

124. The claimant's case was that the fact he raised a protected disclosure in his email of 13 November was a material influence on that decision the following day.

125. It is evident that the respondent did contact the ICO the day after the claimant's email. Mrs Somers said she had done that after the claimant had raised it, and although she could not be clear about the date she must have done it on 14 November 2016 because she had made reference to it in her email at the end of that working day at page 74. The email recorded that she had been reassured in broad terms that the password protection for client profiles was sufficient and for that reason her email said the respondent was compliant. We inferred that by the time of her email on 14 November the data protection issue was not a big issue in the mind of the respondent's managers.

126. We concluded that the real concern was the impasse. The claimant was refusing to update the client profile and would not come in for a meeting to discuss it. He was on a zero hours contract and there was no formal obligation to allocate him

any work. We concluded that the reason why no work was allocated was because the concerns raised had not yet been resolved; withholding work from him for December would place him under some pressure to cooperate and to attend the meeting to discuss matters.

127. We accepted the claimant's argument that the underlying issue overlapped with the subject of his disclosures, and in a sense his data protection concerns were the whole reason there was a problem at all, but that was not the correct legal test. The fact that the data protection concerns formed part of the background to and the context of this decision does not mean they were part of the mental processes of the decision maker, conscious or subconscious.

128. Further, the fact that the respondent subsequently paid the claimant for December (because there had been an error by other members of the administrative team in chasing him for his availability on the same day as managers decided that he would get no work) was inconsistent with an intention to penalise the claimant for having raised data protection issues in his email of 13 November 2016.

129. For those reasons we unanimously concluded that the complaint about the first detriment failed on the merits.

Second Detriment

130. The second detriment complaint related to work for January 2017.

131. The material disclosure here was that made to the ICO on 9 and 15 November 2016. It was common ground that the respondent first became aware of this at the grievance meeting on 15 December 2016. Miss Houghton accepted that the mention of a complaint to the ICO caused her to panic at that meeting and bring it to a close prematurely so that she could find out more about the position. Her outcome letter of 23 December 2016 at pages 94 and 95 said that the claimant would be paid for December and that he should update his calendar for January so that further work could be allocated. It is clear that no further work was allocated. The key issue was the reason for that.

132. Miss Houghton explained that no work was allocated because the claimant did not update his calendar. She said that she had checked a number of times inf the days that followed but never saw any updated details which would allow work to be allocated.

133. In contrast the claimant maintained in his questions to Miss Houghton, albeit not in his evidence, that he did update his calendar and that sessions were allocated to him and then erased the following day. That position was consistent with his appeal letter of 6 January 2017 at page 98 where he said that those sessions had been erased.

134. In our deliberations we noted the following points.

135. Firstly, the letter offering him work for January 2017 was dated 23 December 2016, which was late in the month, and very shortly before Christmas. In general dates for January would already have been allocated by that stage of the month, so time was clearly pressing.

136. Secondly, we had not seen any email showing that the claimant did update his calendar for January, unlike for December where we saw the email exchange at pages 75 and 76.

137. Thirdly, unlike in late November, there was no reminder to the claimant to make sure his details were on the system because it was not expected that he would be working in January given that he had not been working in December.

138. Finally, we also noted that this issue turned to some extent on the credibility of Miss Houghton. She said that although it was a shock to here that there had been a complaint to the ICO, she welcomed the opportunity to improve the way her business operated. Efforts were indeed made to update policies in the weeks that followed. She said she did not hold this against the claimant. We will return to her credibility when we deal with the question of the reason for dismissal. It was particularly significant here, we concluded, that she agreed to pay him for December. She could have said that the error had been made by the admin team on 14 November but he was still not entitled to be paid. The fact that he was paid was not consistent with a desire to punish him for going to the ICO. Her evidence as to the arrangement for January was consistent with her position on December.

139. Putting these matters together the Tribunal accepted that the respondent had shown that the ground for the decision not to allocate the claimant work in January was Miss Houghton's belief that he had not provided calendar information as he had been required to do in her grievance outcome letter. This had nothing to do with the protected disclosure to the ICO; that played no part, consciously or subconsciously, in her decision.

140. As a result we unanimously dismissed the complaint of detriment in employment under section 47B Employment Rights Act 1996 on its merits. That meant that we did not need to consider the question of time limits in detail. There was no link between these matters and the dismissal and they were out of time in any event.

Unfair Dismissal

141. The unfair dismissal complaint turned on a sole issue: was the reason or principal reason for dismissal that the claimant had made a protected disclosure?

142. The test for causation was not the same as in the detriment complaint. It would not be enough for the protected disclosure simply to have had a material influence: it had to be the sole or the main reason for dismissal.

143. Further, as he did not otherwise have the right to complain of unfair dismissal, the burden was on the claimant to prove on the balance of probabilities that one of his protected disclosures was the principal reason for his dismissal.

144. The claimant's case was that the awareness on 15 December 2016 in the grievance meeting that he had made a complaint to the ICO was the real reason he was dismissed just over a month later. He said that was evident from a combination of the following factors:

(a) the reaction to that news during the meeting itself;

(b) the flurry of work caused for the respondent in early January 2016 in producing policies and registering with the ICO;

(c) the fact the respondent reneged on the promise to give him work for January;

(d) the fact that in the second disciplinary invitation of 11 January the likely punishment was upgraded from a warning to a dismissal for gross misconduct, and not properly explained;

(e) a number of procedural flaws in the way the dismissal was handled; and

(f) the fact that the second disciplinary invitation of 11 January 2017 said the only outstanding issue from 2 December 2016 was the private bookings issue, yet those other issues formed part of the dismissal letter.

145. The claimant maintained that the dismissal letter was in truth an effort by Miss Houghton to cover her tracks. The sanction was upgraded, and the other matters revived in the decision letter, so as to bolster the apparent case for dismissal to hide the fact the real reason was the protected disclosure to the ICO. On his case the allegation of seeking to make a private booking could only have merited a warning at worst.

146. In contrast the respondent's case was based not on any challenge to the primary facts, but simply on the reason for the ultimate decision. Each of those individual matters could be explained and the claimant had reached the wrong conclusion. The respondent's case hinged on the credibility of Miss Houghton's evidence as to the reason in her mind for dismissing the claimant.

147. We decided to approach this by considering in turn each of the six main factors on which the claimant's case was based, before considering Miss Houghton's credibility and reaching a conclusion as to the reason or principal reason.

(a) Reaction 15 December 2016

148. The first factor relied upon by the claimant was the reaction in the meeting on 15 December 2016 to news that he had made a complaint to the ICO.

149. Miss Houghton accepted that she had panicked and there was an adjournment so she could speak to Mr North, and then the meeting ended fairly swiftly. A comment was made about the possibility of the threat this posed to the business overall and the initial reaction was of serious concern.

150. However, it is right to note that the initial serious concern about this issue was assuaged in the days that followed when Miss Houghton and her colleagues looked into matters further, and by the time of the grievance outcome letter of 23 December 2016 matters were being seen in a somewhat different light. There was work to be done but no threat to the business.

(b) Data Protection Activity

151. The second factor was the flurry of activity resulting from that disclosure.

152. The respondent had to produce an amended data protection policy on 6 January 2017 (pages 103-105). That policy was itself amended a few days later on 10 January 2017, and for the first time the respondent registered with the ICO with effect from 20 January 2017 (page 150). The claimant was right in his contention that the disclosure he made to the ICO caused the company a lot of work over the Christmas and early New Year period.

(c) January 2017 Work

153. The claimant relied on the suggestion that the respondent reneged on a promise to arrange work for him in January 2017, but for the reasons explained above we concluded unanimously this was not influenced in any way by the protected disclosure. This point did not support the claimant's case.

(d) Sanction Upgraded

154. The fourth factor was the upgrading of the likely punishment from a warning to dismissal for gross misconduct. The Tribunal did have a number of concerns about the way this happened.

155. The letter of 2 December 2016, we concluded, accurately represented Mrs Somers' view (on Mr North's advice) as to how serious the private bookings issue was. She thought it was a warning matter at worst. Miss Houghton accepted in re-examination that she noticed this when she saw the letter, but she took no action to correct it and allowed the claimant to proceed believing that the disciplinary issue was not any threat to his job. She could have corrected it at any time by means of an email or a further letter, or could have explained at the grievance meeting on 15 December 2016, which was to have been the disciplinary meeting, that she took a different view from Mrs Somers. Surprisingly Miss Houghton took none of those steps.

156. We also noted the respondent had not produced the disciplinary policy which was sent to the claimant on 11 January 2017, and we inferred that there was no example of gross misconduct in that policy which exactly fitted the allegation against the claimant.

157. We noted, however, that the letter of 11 January 2017 had some different content. The fourth bullet point on page 112 was a new matter which highlighted the commercial concerns about the claimant soliciting business away from the respondent as a private booking. That commercial concern was not expressly raised by Mrs Somers in her letter.

158. In the same paragraph was an explicit reference to the data protection dispute, apparently recording what the service user's mother, Lisa, said in her email of 28 November 2018 at page 82.

159. Further, the letter itself offered no explanation as to why the likely punishment was now upgraded, and we noted that the explanation was only given at the end of

the appeal process and even then was not accurate. This was not an administrative error. The letter was correct in representing Mrs Somers' view when it was written. The reality was that Miss Houghton had taken a different view from Mrs Somers as to how serious this allegation should be treated, and had not explained it to the claimant until after dismissal. That informed our conclusions below.

(e) Procedural Flaws

160. The fifth factor relied upon by the claimant was a series of procedural flaws. Mr Murdin was right to submit that this was not a case where procedural flaws alone could lead to a finding of unfairness. That would only be the position if the claimant had the right to bring an ordinary unfair dismissal complaint. However, those matters were still relevant in so far as they shed any light on the real reason in Miss Houghton's mind for dismissing the claimant.

161. We noted that there was no investigation in the sense of speaking to Lisa to get more details of what exactly had happened between her and the claimant. The respondent proceeded on the basis of Lisa's email alone. We noted, however, that the email was clear and it can be understandable on occasion that an employer does not wish to involve clients in internal disciplinary matters.

162. We also noted there was no investigatory meeting with the claimant, a point which was made by Mr Moss on his behalf, although it is right to say the ACAS Code of Practice recognises that investigatory meetings are not always necessary. In this case the time for the claimant to provide his account was going to be at the disciplinary meeting.

163. However, there was, in our view, a serious procedural flaw in failing to give the claimant full details of the allegations in writing in good time before his disciplinary meeting. The text of the email upon which the disciplinary allegation was based was only provided to him on the morning of the disciplinary hearing, and only because Mr Moss had emailed Miss Houghton late the previous evening to raise a number of concerns. An employer acting fairly would have provided the claimant with those details with the allegations letter itself.

164. We also noted that the respondent rejected the request by the claimant to delay the disciplinary hearing because of his second grievance, which was lodged on 18 January 2017 at pages 116-117. However, the disciplinary hearing had been delayed once already because of the earlier grievance and once because the date was not suitable. In our judgment that was not a significant flaw in the procedure. We also considered it was reasonable to proceed in the absence of the claimant. He had been given a fair chance on more than one occasion to attend the disciplinary hearing.

165. Finally we noted that the appeal was heard by the same person who made the decision to dismiss. Although this was a small company, there was more than one director and this represented a failure to accord with best practice. Paragraph 27 of the ACAS Code of Practice says that wherever practicable the decisions should be taken by different people.

166. Overall, therefore, we concluded that there were some real issues about procedural fairness and especially the failure to give the claimant full details of the

case against him. The question for us was the extent to which those matters shed light on the reason in Miss Houghton's mind when she decided to dismiss the claimant.

(f) Earlier Concerns

167. That left the final one of the claimant's six factors: the inclusion in the outcome letter of matters which had been regarded as resolved at the time of the disciplinary invitation of 11 January 2017.

168. It was clear from Miss Houghton's evidence (paragraph 24 of her witness statement) that she did not intend these matters to be part of the disciplinary hearing and yet they did reappear in the dismissal letter, although that letter made it clear that the private bookings issue was the most significant matter and the one which on its own amounted to gross misconduct. Miss Houghton explained this by saying that these matters were part of the picture and that she would have discussed them with the claimant if he had attended the hearing but that they were not the main issue.

Conclusions

169. The task for the Tribunal overall was to put these matters together with our view of the credibility of Miss Houghton as a witness to make a determination about the reason or principal reason for dismissal, and on that matter the Tribunal was not able to reach a unanimous conclusion.

Majority Conclusion

170. The view of the majority, Employment Judge Franey and Ms Atkinson, was that the principal reason was the private bookings issue, not the protected disclosures. The majority of the Tribunal found Miss Houghton to be a credible witness. She made a number of concessions in her evidence (as summarised by Mr Murdin in his submission) which were consistent with her being a candid and truthful witness. Those concessions included a ready acceptance that errors had been made, and admission that she had panicked when first told of the ICO complaint.

171. In the view of the majority, although news the claimant had complained to the Information Commissioner was a shock for Miss Houghton, the company moved quickly to address it and it became apparent within a day or so that it was not as serious as it appeared on 15 December 2016. There was some work to do to improve policies and to register with the Information Commissioner, but those tasks were rapidly addressed and those matters were in place by early January 2017. Miss Houghton explained that the company still regarded itself as a growing company and it was willing to accept that there were areas for improvement. She confessed to being unaware of data protection requirements prior to this episode. It was seen as an opportunity to learn, not something for which the claimant should be penalised. The majority accepted this evidence.

172. The majority was also satisfied that Mrs Somers and Miss Houghton genuinely took a different view of the seriousness of the allegation the claimant had contacted a client to make a private booking. That difference of view was explained by two factors. Firstly, Mrs Somers was the office manager who had started employment only in July 2016, whereas Miss Houghton was the proprietor of the

business who had set it up and was effectively running the company. She had a different perspective on the seriousness of a support worker appearing to solicit private bookings. Secondly, Miss Houghton took legal advice whereas Mrs Somers took advice only from Mr North.

173. It is right to say that Miss Houghton was at fault for not communicating the fact she was taking a different view. The claimant should have been made aware of this as soon as it became apparent to her that the invitation letter of 2 December 2016 was incorrect. It could have been corrected at that time because the letter was copied to her, or at the latest that could have been made clear to the claimant in the meeting on 15 December 2016. However, when the second invitation letter was issued on 11 January 2017 Miss Houghton did provide some substantive content to show why she had taken a different view, that being the new paragraph on page 112 which emphasised the commercial aspects of soliciting business which would otherwise be business for the company.

174. The failure to correct the misimpression any earlier was consistent with Miss Houghton concentrating on the grievance in mid December, and not looking again properly at the disciplinary issue until mid January when the grievance appeared to have been dealt with because the claimant, in her view, had not identified any real grounds for appeal in his appeal letter.

175. We concluded that the procedural flaws in the process reflected the fact that this was not a company experienced in dealing with such matters, and of course the claimant was not an employee who had been there for two years with the right to bring an ordinary unfair dismissal complaint.

176. Importantly the majority considered that the fact that Miss Houghton reinstated pay for December was inconsistent with her having any desire to punish the claimant or "get back at him" for having complained to the ICO. We concluded the inclusion of earlier matters in the dismissal letter reflected the general lack or rigour in the process, as did the fact that Miss Houghton heard the appeal against her own decision, but that did not undermine the main point that she genuinely believed that competing with the company for private bookings was gross misconduct. We were satisfied that she genuinely took this view even though neither the contract nor the disciplinary procedure spelled out expressly to the reader that such conduct would be gross misconduct. It hardly needed saying.

177. By a majority, therefore, the Tribunal concluded that the principal reason for the dismissal of the claimant was the belief that he had solicited private bookings from the service user whose mother was Lisa, and therefore the complaint that this was a dismissal because of a protected disclosure failed and was dismissed.

Minority Conclusion

178. The minority view of Ms Worthington was that the claimant had proven from the timeline, and from the host of flaws and discrepancies which we have considered above, that the principal reason was the fact he had complained to the ICO. In the view of Ms Worthington it was inexplicable that the error as to the sanction was not corrected by Miss Houghton prior to or at the grievance meeting on 15 December 2016 when she had noticed the error at the time, and it was not even mentioned in the letter of 23 December 2016.

179. The procedural flaws, including in particular the failure to give full information to the claimant, were explained by the desire to get rid of him for having gone to the ICO, and that too explained the decision in January 2017 to upgrade the likely punishment from a warning to dismissal for gross misconduct. In reaching that conclusion Ms Worthington was influenced in particular by the fact that in the key additional paragraph on page 112 there was express reference to the data protection matter. That reference showed that the ICO complaint and its ramifications were in the mind of Miss Houghton when she turned the allegations into gross misconduct and said dismissal was possible.

180. That desire to get rid of the claimant because he had complained to the ICO was also, in the view of the minority, the reason why the decision outcome letter was bolstered by the inclusion of matters which she had indicated on 11 January 2017 had already been resolved. It was also significant that the dismissal letter said that the claimant had been "using the guise" of data protection concerns to solicit private bookings, suggesting a view that his concerns were not genuine even when they had been acting upon them after the grievance meeting and contact with the ICO.

181. For those reasons the minority concluded that the protected disclosure to the ICO was the principal reason for dismissal, and would have found that the claimant was unfairly dismissed.

182. By a majority, however, the unfair dismissal claim was dismissed.

Employment Judge Franey

12 January 2018