



EMPLOYMENT TRIBUNALS

Claimant: Mr L Mundell

Respondent: The African Caribbean Care Group

HELD AT: Liverpool (CVP)

ON: 23 and 24 February 2023
9 March 2023 (In Chambers)

BEFORE: Employment Judge Ainscough
(sitting alone)

REPRESENTATION:

Claimant: Mr O'Callaghan Counsel

Respondent: Ms Ahari Counsel

JUDGMENT

The judgment of the Tribunal is that the claim for unfair dismissal is unsuccessful.

REASONS

Introduction

1. The claimant worked as a Wellbeing Worker for the respondent which provides services to the elderly in the community, for 21 years prior to his dismissal for conduct reasons.

2. The claimant commenced early conciliation on 26 November 2021 and received an ACAS early conciliation certificate on 7 January 2022. The claimant presented his claim of unfair dismissal to the Employment Tribunal on 3 February 2022.

3. On 29 July 2022 the respondent submitted a response denying the claim.

The Issues

4. The parties had agreed the following issues prior to the start of the hearing:

4.1 What was the reason or principal reason for the Claimant's dismissal?

4.2 Did the Respondent have a fair reason for dismissal, namely conduct? (ERA 1996, s 98(1), (2))

4.3 Did the Respondent act reasonably in the circumstances, in treating the alleged misconduct as a sufficient reason for the Claimant's dismissal? (ERA 1996, s 98(4))

4.4 Did the Respondent have a genuine belief in the Claimant's misconduct?

4.5 Did it have reasonable grounds for that belief?

4.6 Had it carried out a reasonable investigation?

4.7 Was the decision to dismiss within the band of reasonable responses?

4.8 Did the Respondent follow a fair procedure? (ERA 1996, s 98(4))

Evidence

5. The parties agreed a joint bundle of 284 pages.

6. At the outset of the hearing, the claimant's representative advised that the claimant and his son, who also submitted a witness statement, were only able to attend the first day of the hearing due to their need to attend a funeral on the second day of the hearing. It was therefore agreed that the claimant and his son would give evidence on the first day and the respondent's witnesses would give evidence on the second day, and the claimant's attendance from the second day would be excused. In any event, the evidence of Akeim Mundell (the claimant's son) was not challenged by the respondent.

7. I heard evidence from the claimant on the first day and from the respondent witnesses Dorothy Evans (the dismissal manager) and Monica Weir (the appeal manager) on the second day.

Relevant Findings of Fact

Claimant's role with respondent and in the community

8. At the time of the claimant's dismissal on 25 October 2021, he was employed by the respondent as a Wellbeing Worker. However, the claimant had worked for the respondent since June 2001 in a variety of different roles which included assisting the service users in travel to the respondent's site and delivering hot meals to service users of the respondent.

9. The respondent offered a variety of services to users of the respondent one of which was the provision of a hot meal in a service user's home for a fee, Monday to Friday.

10. In addition to his employment with the respondent, the claimant also played an active role within the community promoting the needs of those in the community, which included securing funding for day trips. On 10 October 2020 the claimant was awarded an MBE as a result of the claimant's activities in the community during the pandemic.

11. The Manchester Evening News subsequently ran an article on the claimant's activities within the community. It was reported that because the respondent was unable to operate during the pandemic, the claimant had stepped in and provided hot meals for service users.

12. On 14 October 2020, the claimant was asked to attend a meeting with Gary Gillette, a director of the respondent, to discuss the article. It transpired that the claimant had told the publication that because he was unable to conduct trips in the community during the pandemic, he had used the money to provide hot meals to those in isolation. The assertion that he had done so in the absence of the respondent operating this service was a misrepresentation. As a result, no further action was taken against the claimant.

Claimant's employment

13. The claimant's contract of employment, which he signed on 8 August 2003, contained a provision at paragraph 21 prohibiting competition with regard to any activities carried out by the respondent which included the involvement in any business or undertaking without the consent of the respondent. Further, on 10 May 2021 the claimant signed a document headed "Conflict of interest disclosure form" confirming that none of the following applied to his circumstances:

- (a) Non profit or for profit boards you and/or your family member is directly involved;
- (b) Any for profit businesses for which you or immediate family members is a director or a shareholder; and
- (c) Any businesses owned by you or a family member.

14. The respondent operated a disciplinary policy and procedure and an employment handbook.

15. The disciplinary procedure operated by the respondent provided for three sanctions should misconduct be proven of:

- first warning,
- final written warning, and
- dismissal or other sanction.

16. Gross misconduct included "failing to follow a reasonable management instruction".

17. The policy provided for an informal discussion in the first instance and thereafter a full investigation. A disciplinary hearing could follow the full investigation and the three sanctions described in the procedure were replicated in the policy. In particular, at paragraph 8.3 - the final written warning (stage two) it is recorded that:

"In cases of misconduct, sufficiently serious not to be tolerated a second time, an employee may be given a final written warning."

18. Within the policy are disciplinary rules. Those rules also define gross misconduct, which includes, at paragraph 23:

“Disobeying a given instruction or reasonable order from a relevant manager (whether in writing or not) or failing to observe operational regulations and standard orders of the ACCG when the consequences are likely to result in danger to service users or staff.”

19. The disciplinary policy (but not procedure) is replicated in the employee handbook. The Tribunal determines that there is a slight difference between the definition of gross misconduct in the disciplinary policy to that defined in the disciplinary procedure. It appears that both the policy and the procedure applied to the claimant’s employment prior to his dismissal.

July 2021

20. On 12 July 2021 the claimant’s son, Akeim Mundell, posted the following post on social media:

“My father and I are proud to have launched our ‘Manchester Meals for the Elderly’ project. Do you know an elderly individual in Manchester who would benefit from a free three course meal delivered to their home? If so, click this link to complete a referral form asap (as numbers are limited).”

21. Included within the post was a picture of the claimant and his son and reference to the claimant and his son launching the initiative. As a result, the claimant was called to a meeting with Dorothy Evans to discuss the post.

22. During that meeting, Dorothy Evans brought the content of paragraph 21 of the claimant's terms and conditions to the claimant's attention, and the claimant confirmed that he understood the meaning of that paragraph. It was put to the claimant that the service he was offering was similar to that of the respondent. The claimant was asked to provide copies of the funding paperwork from Manchester City Council. The claimant agreed to provide the details.

23. It was the claimant's position that he was providing the service to those who had previously used his day trip service. The claimant acknowledged that he had not brought this initiative to the attention of the respondent’s management team. The claimant informed the respondent that he had developed this initiative over the previous 2-6 months but confirmed that he would not do anything to hurt the respondent. It was the claimant's belief that the initiative was not in competition with the respondent. The claimant confirmed that he had formulated the idea in 2020 when he had used the money from his day trips to provide meals to the vulnerable during the pandemic.

24. Dorothy Evans subsequently made enquiries with Manchester City Council about the funding and received a response on 13 July 2021 in which the representative for the Council inferred that it was not an initiative funded by the Council.

25. The claimant met again with Dorothy Evans on 16 July 2021 and was asked whether he had the funding paperwork. The claimant was unable to provide the paperwork and offered to find it over the subsequent weekend.

26. The claimant was asked about the structure of the initiative, and he stated that it was the money provided to his son Akeim for the excursions that was being used to fund the initiative. The claimant confirmed that the meals were provided for free.

27. The claimant was asked why the initiative was promoted on social media and he informed the respondent that the Council had asked the claimant and his son to do this. The claimant confirmed that the initiative would be up and running in the subsequent fortnight.

28. The respondent showed the claimant the conflict of interest document signed by the claimant.

29. On 22 July 2021 the claimant was invited to a disciplinary hearing on 29 July 2021 to deal with allegations that he had:

- (a) made a false declaration on the conflict of interest form; and
- (b) set up an independent service which breached paragraph 21 of the terms and conditions.

30. The claimant was informed that the allegations could potentially amount to gross misconduct which could lead to his dismissal.

31. On 26 July 2021 the claimant sent a response to that invite in which he explained that his son, Akeim, as an ambassador for Manchester City Council, became aware of a pot of funding that could be utilised to assist the elderly in South Manchester.

32. The claimant explained that because the excursions had not taken place during the pandemic his son suggested that the four week meals on wheels project would assist those vulnerable people. The claimant confirmed that the proposal was submitted in March 2021 and was granted in June 2021. The claimant also confirmed that it was the excursion recipients who were directed to this initiative.

33. The claimant attended a disciplinary hearing on 29 July 2021 with the respondent's director, Gary Gillette. Dorothy Evans was also in attendance to present her findings.

34. During the hearing the claimant stated that he did not feel the need to discuss the initiative with the respondent but conceded that perhaps he should have declared it. The claimant said that he did not believe that it was a breach of his contract. The claimant also stated that it was only a four week project and it was putting the respondent to shame. The claimant stated that it was no threat to the respondent and would be done in four weeks. It was the claimant's intention to surprise the respondent with all the additional service users that he would find through the initiative.

35. The claimant was asked to share the details of his contacts with the Council and he replied that he would need to check if he could share such details. The claimant was told that there would be four possible outcomes:

- (1) no case;
- (2) written warning;

- (3) final warning; or
- (4) dismissal.

August 2021

36. Gary Gillette sent a letter to the claimant on 6 August 2021 by registered post issuing a first and final written warning. The letter was received at the house of the claimant at approximately 12:36pm and signed for by "L Mundell". In the letter the claimant was provided with a copy of the minutes from the disciplinary hearing.

37. Gary Gillette determined that the claimant had made a false declaration on the conflict of interest form. It was Gary Gillette's view that the claimant was providing services similar to that of the respondent, and because the claimant had applied for the funding in March 2021 he knew about the initiative when he signed the form.

38. Gary Gillette also determined that the claimant had breached paragraph 21 of his contract of employment because he had set up an undertaking and was involved in a service that was in direct competition with the respondent.

39. In the letter, Gary Gillette told the claimant he should immediately desist from any further involvement with the food delivery service. The claimant was also told that he should not inform Manchester City Council of this outcome because that would be in breach of the confidentiality clause in his contract. The claimant was warned that should there be any repeat of the issues or other misconduct there could be an extension to the final warning or dismissal. The claimant was notified of his right of appeal.

40. The claimant responded to that letter on 11 August 2021 in which he informed the respondent that the initiative was not similar because it was a four week project and the meals were provided for free. The claimant reiterated that he had not set up the service but was rather a volunteer. He also said that his son was able to run the service without his continued assistance and this could not amount to a breach of the claimant's contract.

41. During the course of the four week initiative, the claimant's son posted three tweets on Twitter as follows:

- (1) 31 July 2021: "My dad and I delivered our 1/4 free three course Caribbean meals to the elderly today..."
- (2) 7 August 2021: "What a great Saturday it has been! My father and I have just delivered our 2/4 free three course Caribbean meals to the elderly..."
- (3) 22 August 2021: "Proud moment. Thank you to @mancitycouncil for funding my dad and I's four week, free, three course Caribbean meals on wheels project for the elderly #completed!"

42. The final tweet had a picture of the claimant stood by bags of meals stating, "completed August 2021".

43. On 16 August 2021 the claimant reported sick from his role with the respondent.

September 2021

44. On 15 September 2021 the claimant was invited to an investigation meeting to discuss allegations that:

- (1) the claimant had ignored a direct order from the respondent that he should immediately desist from any further involvement with the food delivery service;
- (2) he had continued to be actively involved in the food service; and
- (3) he had continued to be actively involved in the promotion of the food service.

45. On 20 September 2021 the claimant responded asserting that the request to attend the meeting was unprofessional due to his absence from work. He confirmed that he would not be attending the investigatory meeting and would put his submissions in writing.

46. In that letter the claimant informed the respondent that he maintained the position he had taken in the letter of 11 August 2021 and had not been involved in the food delivery service after receipt of Mr Gillette's letter on Saturday 7 August 2021. The claimant also denied being involved in the service after he began his sickness absence on 16 August 2021. Finally, the claimant denied being involved in the public promotion of the service and stated that the tweet on 22 August 2021 brought a close to the project. The claimant took the view that he had to be included in that tweet because he had been unable to tell the Council about the disciplinary outcome. The claimant asserted that the photograph had been taken on 24 July 2021.

47. The investigation meeting was conducted on 20 September 2021 in the claimant's absence. Ammaarah Ahmed used the content of the letter of 20 September 2021 to formulate the claimant's responses to her queries.

October 2021

48. On 6 October 2021 Dorothy Evans invited the claimant to a disciplinary hearing on 18 October 2021 to deal with the following allegations:

- (1) that the claimant had ignored a reasonable management instruction on 6 August 2021 to immediately desist from the food delivery service;
- (2) that he had had continued involvement in the food delivery service in breach of his contract;
- (3) that he had had continued involvement in the food delivery service that was a conflict of interest;
- (4) that he had continued to publicly promote the service in contravention of the reasonable management instructions, breach of contractual obligations and conflict of interest; and

(5) that he had continued to involve himself in the service whilst off sick.

49. The claimant was informed that the respondent considered that those actions potentially amounted to gross misconduct and could lead to his dismissal.

50. The claimant responded to that invite on 17 October 2021 in which he informed the respondent that he would not be attending the hearing because he was off sick with stress but made written submissions.

51. The claimant asserted the position he had taken in his letter of 11 August 2021 – that he had no further involvement in the initiative after receipt of Gary Gillette’s letter on 7 August 2021. The claimant also maintained that he had not discussed the outcome with anybody as requested. It was the claimant’s position that Mr Gillette’s letter had been received by the claimant at 8.00pm on 7 August 2021 when he returned to his home with his wife. The claimant pointed out that the tweet of 7 August 2021 was posted at 6.28pm and therefore the only tweet posted after he had read Gary Gillette’s letter was that posted on 22 August 2021.

52. The claimant reiterated that the funding received for the delivery service required social media updates and had been obtained on the basis that the project be delivered by both the claimant and his son. The claimant said that the funding was provided on the basis that it would be a father and son project.

53. The disciplinary hearing took place in the claimant's absence and the management case was presented by Ammaarah Ahmed. The claimant's letter of 17 October 2021 was used as his submission to that hearing.

54. Ammaarah Ahmed informed Dorothy Evans that the claimant had not provided evidence about the funding from Manchester City Council nor details of those who were involved. Ammaarah Ahmed also confirmed that the letter had been received at the claimant's home at 12.36pm and been signed for, and it was Ammaarah Ahmed’s position that it had been signed for by the claimant.

55. On 25 October 2021 Dorothy Evans wrote to the claimant to inform him that she had determined that he should be dismissed and paid 12 weeks in lieu of notice.

56. Dorothy Evans determined that the claimant did receive Gary Gillette’s letter at 12.36pm on 7 August 2021 and despite this he had gone out and delivered meals as proven by the tweets on 7 August 2021 and subsequently on 22 August 2021. Dorothy Evans also determined that the claimant’s continued involvement was a breach of clause 21 and amounted to a conflict of interest.

57. Dorothy Evans determined that the claimant had also continued to promote the initiative because he had been unable to tell the Council about the disciplinary outcome. Dorothy Evans said she did not accept this as a reason to continue promoting, stating that the claimant could have told the Council that he had a conflict of interest. Dorothy Evans did not find that the claimant had breached any term of his employment by taking part in the initiative whilst off sick because absence for work related stress would not necessarily prevent him from taking part in a non work-related activity.

58. Dorothy Evans stated that because the claimant was subject to a final formal warning, he would have to be dismissed with payment in lieu of notice.

59. On 29 October 2021 the claimant responded to the dismissal letter and asserted that he had four children and one may also have been named Leon and signed for the letter on 7 August 2021. He reiterated that the tweet on 22 August 2021 did not show his continued involvement. The claimant denied that he had been asked to provide evidence of the requirements of Manchester City Council or details of the professionals he had spoken to.

60. The claimant made reference to his long service and also to complaints of bullying by Dorothy Evans.

November 2021

61. On 1 November 2021, Monica Weir (the Chair of the respondent) invited the claimant to attend an appeal hearing on 8 November 2021.

62. On 5 November 2021 the claimant declined to attend the appeal but asked that Monica Weir treat his last letter as his written submission.

63. On 12 November 2021 the claimant was informed by Monica Weir that his appeal had been unsuccessful.

64. Monica Weir determined that regardless of whether the claimant had received the letter on 7 August 2021 he knew from the meeting with Gary Gillette on 29 July 2021 that he should desist his involvement. Monica Weir was of the view that the 22 August 2021 tweet meant that he was still involved in the project and that his requirement to be involved in the promotion of the project confirmed that it was in fact his project and there was a conflict of interest. Monica Weir reminded the claimant that he had offered to provide the evidence from Manchester City Council and had failed to do so. It was Monica Weir's view that there was no evidence to suggest that the claimant had been bullied by Dorothy Evans.

Relevant Law

65. The unfair dismissal claim was brought under Part X of the Employment Rights Act 1996.

66. The primary provision is section 98 which, so far as relevant, provides as follows:

- “(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –**
 - (a) the reason (or, if more than one, the principal reason) for the dismissal and**
 - (b) that it is either a reason falling within sub-section (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.**
- (2) A reason falls within this sub-section if it ... relates to the conduct of the employee ...**
- (3) ...**

- (4) Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonable or unreasonably in treating it as a sufficient reason for dismissing the employee, and
 - (b) shall be determined in accordance with equity and the substantial merits of the case".

67. If the employer fails to show a potentially fair reason for dismissal (in this case, conduct), dismissal is unfair. If a potentially fair reason is shown, the general test of fairness in section 98(4) must be applied.

68. In a misconduct case the correct approach under section 98(4) was helpfully summarised by Elias LJ in **Turner v East Midlands Trains Limited [2013] ICR 525** in paragraphs 16-22. The most important point is that the test to be applied is of the range or band of reasonable responses, a test which originated in **British Home Stores v Burchell [1980] ICR 303**, but which was subsequently approved in a number of decisions of the Court of Appeal. The "**Burchell test**" involves a consideration of three aspects of the employer's conduct. Firstly, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case? Secondly, did the employer believe that the employee was guilty of the misconduct complained of? Thirdly, did the employer have reasonable grounds for that belief? If the answer to each of those questions is "yes", the Employment Tribunal must then go on to decide whether the decision to dismiss the employee was within the band of reasonable responses, or whether that band falls short of encompassing termination of employment.

69. It is important that in carrying out this exercise the Tribunal must not substitute its own decision for that of the employer. The focus must be on the fairness of the investigation, dismissal and appeal, and not on whether the employee has suffered an injustice.

70. The band of reasonable responses test applies to all aspects of the dismissal process including the procedure adopted and whether the investigation was fair and appropriate. The appeal is to be treated as part and parcel of the dismissal process: **Taylor v OCS Group Ltd [2006] IRLR 613**.

Submissions

Claimant's Submissions

71. It was submitted on behalf of the claimant that the allegations made could not amount to gross misconduct. The claimant submitted that the investigation by the respondent was insufficient, and conclusions were drawn without the asking of pertinent questions. The claimant submitted that the respondent has accepted that the claimant should have been given the benefit of the doubt.

72. The claimant submitted that the respondent did not genuinely believe misconduct because it made assumptions and jumped to conclusions. The claimant also submitted that the respondent did not have to instigate the disciplinary procedure but could have dealt with the matter informally.

73. The claimant submitted that the respondent has become confused with its own disciplinary procedure and there was no provision for a first and final warning. It was submitted that the Tribunal should disregard the warning given to the claimant because it was manifestly inappropriate. It was submitted that a dismissal based on that warning could not be within the range of reasonable responses.

74. The claimant submitted that the explanation provided on 11 August 2021 was contemporaneous and should have been given more consideration by the respondent. The claimant submitted that the respondent had no clear evidence that the claimant had lied, and the conclusion that he had lied was outside the range of reasonable responses.

75. The claimant contended that he did not receive the letter instructing him to desist until he had returned home after delivery of the meals. The claimant also contended that Monica Weir accepted that the claimant could have been given an alternative sanction had he attend the appeal hearing and she failed to deal with the errors made at the disciplinary hearing.

Respondent's Submissions

76. The respondent submitted that the question for the Tribunal was whether the dismissal was within the range of reasonable responses. The Tribunal was reminded that the disciplinary procedure provided for a final written warning if the conduct was sufficiently serious that it would not be tolerated again. The respondent contended that the warning given to the claimant was valid.

77. In addition, the respondent submitted that an example of gross misconduct was the disobeying of a reasonable management order. It was the respondent's case that the claimant would have known from the first discussion in October 2020 that an application to provide an alternative food delivery service to the respondent would be a conflict of interest.

78. It was the respondent's submission that when the claimant was asked about the initiative, he gave the impression that it was a joint initiative because he talked about "our" and "we". It was the respondent's belief that the poster created for the initiative was contrary to the claimant being a volunteer. It was noted by the respondent that in the hearing in July, the claimant conceded that he should have declared the matter to the respondent.

79. The respondent contended that it was reasonable for the respondent to assume from the tweets that the claimant was still involved in the project.

80. It was also submitted by the respondent that it did have reasonable grounds because it had proof of delivery signed by an L Mundell and tweets after receipt of the letter which suggested the claimant's involvement in the project.

Discussion and Conclusions

A. Reason for dismissal

81. The claimant was dismissed because all except one of the allegations made were proven. The letter of dismissal of 25 October 2021 did not state whether the dismissal was for gross misconduct or misconduct. However, in light of the findings made by the respondent, the reason for the claimant's dismissal was conduct.

82. The evidence given by Dorothy Evans and Monica Weir was that at the time of the claimant's dismissal it was their position that his actions amounted to gross misconduct. The dismissal letter appears to rely on the fact that the allegations had been proven and that the claimant was already subject to a final formal warning, as the cause of the claimant's dismissal.

83. The Tribunal determines that in dismissing the claimant for conduct the respondent's witnesses were clear that it was the claimant's continued involvement in the initiative whilst the final warning was still operative, that led to his dismissal. I therefore determine that the reason given for the claimant's dismissal was fair.

B. Respondent's Belief

84. It was the belief of the respondent's witnesses that the respondent had already raised the issue about a potential conflict of interest at the meeting in October 2020. The claimant was subjected to an investigation and disciplinary hearing in July 2021 which resulted in a warning that should he continue to be involved in an alternative food delivery service, it would amount to a conflict of interest and a breach of his employment contract.

85. The respondent was then made aware of the tweets made by the claimant's son which made reference to the claimant and his son carrying out the initiative.

86. It was therefore reasonable for the respondent to believe that the claimant had continued to take part in the initiative despite being aware of the respondent's issues with the initiative, and that this did amount to misconduct.

C. Reasonable Grounds

87. During the July 2021 investigation and the disciplinary hearing, the claimant offered to provide the paperwork for the initiative to the respondent. This paperwork never materialised. The claimant also conceded that he perhaps could have declared the initiative to the respondent. The claimant admitted that the application was made in March 2021 and approval had been given in June 2021. The claimant therefore confirmed to the respondent that he had known about this initiative when he signed the conflict of interest form in May 2021.

88. The claimant also understood the terms of his contract at paragraph 21 but took the view that the initiative did not breach those terms. It was the claimant's position that he was providing free meals on a Saturday. The claimant was not told at the disciplinary hearing on 29 July 2021 that he should desist from volunteering in the initiative but was told he would receive the outcome of that hearing within five days.

89. The respondent ultimately decided that the claimant's actions did amount to a breach of his contract and a conflict of interest, and he was given a final warning and told to desist his involvement in the initiative. During evidence the claimant accepted that the instruction to desist was a reasonable instruction.

90. On 7 August 2021 the respondent knew that the letter telling the claimant to desist was delivered to the claimant's home at 12.36pm and signed for by "L Mundell". The respondent then received information that the claimant had delivered a meal to a service user of the respondent. The respondent then saw a tweet from

the claimant's son stating that the claimant and his son had delivered meals during that day.

91. The letter sent by the claimant on 11 August 2021 reiterated the position he took during the disciplinary hearing and disputed the final warning. That document did not deal with the receipt of the letter or what the claimant did on 7 August 2021. It did set out the claimant's intentions to cease to be involved in the initiative.

92. However, on 22 August 2021 the respondent saw a second tweet by the claimant's son about "my dad and I's four week...project". This tweet was accompanied by a picture of the claimant stood with the meals with the phrase underneath the picture stating, "completed August 2021". The claimant did not attend the investigation meeting on 20 September 2021 but sent a letter denying that he had carried on the project after receipt of the letter on 7 August 2021, and that the tweet of 22 August 2021 had advertised the success of the initiative by using a photograph that had been taken on 24 July 2021.

93. However, there was no explanation from the claimant as to the timing of the receipt of the letter. The investigator therefore, concluded that the claimant had received the letter prior to delivering meals on 7 August 2021 and had allowed his name and picture to be included in the promotion of the initiative thereafter.

94. By not attending the disciplinary hearing on 18 October 2021 the claimant relied upon the submissions made in his letter of 17 October 2021. In this letter the claimant explained that he had only read the letter at 8.00pm on 7 August 2021 after he had returned from delivering the meals. The claimant reiterated that he had to be included in social media at the end of the project because this had been agreed with the Council. The claimant continued to deny that he had been involved in the initiative after 7 August 2021 and particularly after 16 August 2021.

95. The requirement to desist included the requirement to desist in the promotion of the initiative. The claimant had offered to provide paperwork about the setting up of the initiative with Manchester City Council but had never done so. The respondent did not know whether it was a requirement of the funding that the claimant's name and picture be involved in the social media campaign.

96. The respondent was left in a position where the claimant had failed to provide any documentation to evidence the setting up of the initiative and had notice that the receipt of the letter seeking him to desist was signed by an L Mundell at 12.36pm on 7 August 2021. There was no explanation by the claimant in his letter of 17 October 2021 that the letter was signed for by anybody but him.

97. The tweet of 7 August 2021 confirmed that the claimant had been involved in the delivery of food and the respondent had confirmation of that from a service user. Whilst the claimant asserted that he had not been involved after receipt of the letter, the tweet of 22 August 2021 stated that the initiative was that of the claimant and his son.

98. Given the claimant had been evasive about the set-up of the project when questioned about it in July 2021, without any explanation as to who else would have signed for the letter on 7 August 2021, the subsequent tweet seen by the respondent and confirmation that the claimant had delivered a meal on 7 August 2021, the respondent had reasonable grounds to believe that the claimant had ignored the

letter, had ignored the final warning, and continued to be involved in the initiative on and after 7 August 2021.

99. When Monica Weir dealt with the matter on appeal, she had the claimant's response of 29 October 2021 which she used as his grounds of appeal. In that letter the claimant gave an explanation that he had left the property before 12.36pm and that he had four children, one of which was named Leon, and inferred that his son Leon had signed for the letter.

100. I did not hear any evidence from a Leon Mundell (junior) nor did I hear evidence as to whether Monica Weir knew that the claimant had a son called Leon Mundell. It in fact transpired during evidence that the claimant does not have a son called Leon Mundell but rather a daughter called Lisa Mundell.

101. Notwithstanding, it was Monica Weir's position in evidence that the claimant had known from the hearing on 29 July 2021 that he must desist, and therefore it was inconsequential as to when he received the letter.

102. In fact, Monica Weir was wrong about this because the claimant did not know of the outcome of the disciplinary hearing until he was in receipt of that letter.

103. In rejecting the appeal, Monica Weir was of the view that the tweet of 22 August 2021 did still amount to promotion of the initiative. However, she also stated that she had never been provided with any paperwork to suggest that such promotion was necessary to secure the funding.

104. Monica Weir explained in evidence that she concluded that there was no evidence to suggest that anyone other than the claimant had signed for the letter and the subsequent social media posts suggested that the claimant was not only continuing to promote the initiative but was also actively involved.

105. Given the lack of evidence from the claimant about why he needed to be included in the social media posts, and any evidence as to who signed for the letter, Monica Weir had reasonable grounds for believing that the claimant had continued to be involved in the project and therefore was in breach of his contract and had a conflict of interest with the respondent.

106. Monica Weir admitted in evidence that she had not investigated the allegation of bullying beyond Dorothy Evans, but this had no bearing on Monica Weir forming her own view that there were reasonable grounds for believing the claimant's conduct.

D. Range of reasonable responses

107. In evidence Dorothy Evans maintained that the claimant's receipt of the first and final warning was in accordance with the disciplinary procedure because where the conduct was so serious that only a final warning would do, it should be given. Having considered the policy and procedure, I do determine that it provides for the provision of a final warning in such circumstances. I therefore do not accept the position that procedurally, the respondent could not issue such a warning such to make it invalid.

108. In deciding to dismiss the claimant, Dorothy Evans knew that the issue of an alternative food delivery service had originally been raised with the claimant in

October 2020 and again in July 2021 which resulted in the final warning. The respondent had reasonable grounds for believing that the claimant had, despite being in receipt of the instruction to desist, continued his involvement in the project at the very least by allowing his name and picture to be used in social media and promoting the successful completion of the project.

109. The evidence from the respondent was clear that by being involved in this project there was a real concern that there would be confusion as to whether the service was being provided by the respondent or the claimant. The respondent was equally concerned that the claimant was receiving funding which could have properly been given to the respondent to provide additional services. The claimant's contract of employment specifically prohibited competition and the claimant had signed a conflict of interest form that, whilst there was some debate over the technical terms used, provided that employees should refrain from being involved in any undertaking (whether for profit or not) which conflicted with the interests of the respondent.

110. In light of the issuing of a valid final warning, and the respondent's belief based on reasonable grounds that the claimant had ignored that warning and the instruction to desist, the dismissal of the claimant was within the range of reasonable responses.

111. During evidence Monica Weir said that had the claimant attended at the appeal hearing she might, having heard from him, offered an alternative sanction. This concession does not invalidate the decision made by Dorothy Evans. The claimant did not attend the appeal hearing. The claimant made written submissions both prior to the disciplinary hearing and the appeal hearing and they were both considered in detail by Dorothy Evans and Monica Weir before the decision to dismiss was reached and approved.

Conclusion

112. The claimant's claim of unfair dismissal is unsuccessful and is therefore dismissed.

Employment Judge Ainscough

Date: 19 May 2023

JUDGMENT AND REASONS SENT TO THE PARTIES ON

31 May 2023

FOR THE TRIBUNAL OFFICE

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