Case Number: 3324009/2016

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs Anne-Marie Askew	v	Dr C Engelbrecht-Debeer Trading as Apsley Dental Practice

Heard at: Watford **On**: 14 & 15 March 2017

Before: Employment Judge Hyams, sitting alone

Appearances:

For the Claimant: Mr M Cole, of Counsel

For the Respondent: Mr Alex Macmillan, of Counsel

RESERVED JUDGMENT

1. The claim of unfair dismissal fails. The claimant was not dismissed unfairly.

2. The claim of wrongful dismissal fails. The respondent was entitled at common law to dismiss the claimant without notice.

3. The claim for accrued holiday pay succeeds: the claimant is entitled to 13.4 days' pay.

4. The claim of an unlawful deduction from the claimant's wages, in the form of a failure to pay her full pay throughout the period from her suspension on 1 February 2016 to her dismissal on 18 April 2016, succeeds: that failure amounted to an unlawful deduction from the claimant's wages, contrary to section 13 of the Employment Rights Act 1996.

5. The respondent must pay the claimant the issue and hearing fees, i.e. a total of £1200.

REASONS

Introduction; the claimant's claims and the proper name of the respondent

1 In these proceedings the claimant claims that she was dismissed unfairly, i.e. contrary to section 94(1) of the Employment Rights Act 1996 ("ERA 1996"), within the meaning of section 98(4) of that Act. She also claims that she was dismissed wrongfully, i.e. without being given proper notice, that her pay was wrongly reduced from full pay to sick pay before she was dismissed, that at the time of her dismissal she had not been given a statement under section 4 of the ERA 1996 of an amendment to her terms and conditions (i.e. making her the Practice Manager), nor sufficient statements of her pay, and that she is owed accrued holiday pay. The respondent accepts liability for failing to pay the claimant her accrued holiday pay. The precise amount was not agreed, but it was accepted by the respondent that it was 13.4 days' pay.

2 By the end of the hearing before me, the claim of a failure to give the claimant pay statements had not been pressed. The claim of a failure to give the claimant a statement of a change to her terms and conditions sufficient to satisfy the requirements of section 4 of the ERA 1996 was withdrawn as it was the claimant's case that her terms and conditions were not changed in such a way that she became formally the respondent's Practice Manager.

3 The claim was originally made against Apsley Dental Practice ("the Practice"). However, that is not a legal person, and by the time of the case management orders which were made on 15 November 2016 after the respondent's application for a stay of the proceedings was heard and dismissed by Employment Judge Southam, it was accepted that the respondent should be Dr Christa Engelbrecht. By the time of the hearing before me, the respondent's surname had changed to Engelbrecht-Debeer, and with the agreement of the parties I determined that the name of the respondent should be changed accordingly.

4 I state the issues in the law of unfair dismissal and the law of wrongful dismissal as they stood at the end of the hearing before me below, after stating the material evidence. In the course of stating the issues, I refer to some aspects of the applicable law. I then state my conclusions on all of the issues, i.e. those indicated both above and below. In the course of doing so, I refer to further aspects of the relevant law, including aspects of the ACAS code on disciplinary matters.

5 I reserved judgment on 15 March 2017 because (1) I could see that an oral judgment would be given late on that day, (2) the parties agreed that if the claimant's claim of unfair dismissal succeeded, then it would be necessary to adjourn the hearing in any event, to allow the parties to obtain medical evidence, and (3) both parties preferred me to give a reserved rather than an oral judgment. I therefore listed the case for a remedy hearing on 10 July 2017 (the earliest date possible) on a provisional basis, with any matters arising from my reserved judgment which were not capable of agreement being capable of being dealt with at the resumed hearing on that date.

The evidence

6 I heard oral evidence from the claimant on her own behalf, from the respondent and, on the respondent's behalf, from Miss Pam Jordan. I was referred to relevant parts of a bundle of papers which was put before me. Having heard that oral evidence and read the papers in the bundle to which I was referred, I made the following findings of fact.

The facts

7 The claimant was employed by the respondent from 5 July 2010 onwards. She was dismissed summarily on 18 April 2016 in the circumstances to which I refer below.

The claimant's job title and duties

8 The claimant was first employed as a receptionist. There was a copy of a contract of employment in the bundle, in which reference was made to an Appendix A. The Appendix A which was originally attached to that contract was not in the bundle. The respondent said that the original Appendix A had been on a computer which had been stolen.

9 What were the precise duties of the claimant was a matter of contention. The claimant said that she had never formally been appointed to the post of Practice Manager. The respondent gave members of her staff at the practice at Apsley a uniform, and the claimant accepted that the uniform which she wore before she was dismissed had on it the label of "Practice Manager". However, she said that she protested about being given that job title as she had had no training for the role and because her job was that of receptionist with an additional duty of completing a spreadsheet recording materials bought for the practice. That additional duty was carried out by her after the respondent had gone to live in South Africa. That was in 2013. The events from then onwards are material, and I therefore now turn to them.

The events which led to the claimant's dismissal

10 The respondent now lives in South Africa. She is South African by birth and in 2013 her husband went to work there. The respondent then sought to sell the Practice. When she went to live in South Africa, the sale of the Practice had nearly completed. However, the sale then fell through. The respondent then sought to sell the Practice to a dentist by the name of Stuart Bowen-Davies ("Dr Bowen-Davies"). She did not achieve that sale, and instead entered into an agreement with Dr Bowen-Davies for him to work at the Practice as an Associate. That agreement was made on 9 July 2014. It stated specifically in its opening parts that Dr Bowen-Davies was neither an employee nor a partner of the respondent. In clause 12(a), this was stated:

> "For the better performance of this Agreement, the parties hereto undertake to each other to use reasonable endeavours to further the interests of the practice".

11 Clauses 17 and 18 provided:

> "**Hours**
>
> 17. The Practice Owner shall cause the facilities [as provided for in clause 9] to be available at the following times (except between 12:30 pm and 1:30 pm), except on days agreed by the parties to be holidays and, subject to clause 19 below, the Associate shall use every reasonable endeavour to utilise the facilities for the following times:
>
> | | |
> |---|---|
> | Mondays | from 09:00 to 17:00 |
> | Tuesdays | from 09:00 to 17:00 |
> | Wednesdays | from 09:00 to 17:00 |
> | Thursdays | from 09:00 to 17:00 |
> | Fridays | from 09:00 to 17:00 |
> | alternate Saturdays | from 09:00 to 13:00 |
>
> Where the Associate wishes to provide care to patients outside of the aforesaid hours, they will make a payment for the use of the facilities of £30.00 per hour or part thereof.
>
> 18. Outside the aforesaid hours the Associate shall have reasonable access to the premises for proper purposes connected with the practice of dentistry at the premises (not being the treatment of patients)."

12 Clause 19 of the agreement concerned "Holidays/CPD". Only clause 19(a) is relevant. It was in these terms:

> "In any calendar year the Associate shall not during the operation of this Agreement take more than 110 working days as non-clinical days on which the Associate is not practicing [sic] dentistry at the Premises unless agreed with the Practice Owner."

13 Clause 25 of the agreement was headed "Collection of charges and fees" and was in these terms:

> "(a) The Practice Owner shall supervise the collection by practice staff of payments due from patients to the Associate in respect of dental attendance at the premises.
>
> (b) All sums so collected shall be paid to the Practice Owner on the day of collection.
>
> (c) All bad debts in respect of patients attended by the Associate shall be borne by the Practice Owner and the Associate in the same proportions as the fee apportionment."

14 Clause 44 of the agreement provided for a "Profit share". While it provided for a profit share of 50%, it included an odd power for the Practice Owner to pay money to herself before calculating that 50%.

15 At no time during the period of the claimant's employment with the respondent did the respondent tell the claimant, or any other member of the Practice staff, about the terms of that agreement. However, at some point after it was entered into, the staff came to know from Dr Bowen-Davies that the agreement provided for the use by Dr Bowen-Davies of the Practice facilities outside of normal hours in return for the payment by him of £30 per hour to the respondent.

16 The respondent owns the freehold of the premises from which the Practice operates, and she has never proposed the sale of that freehold. Accordingly, she has since 2013 been proposing the sale of the goodwill of the Practice only.

17 Before she went to live in South Africa, the respondent managed the Practice, so there was no need for a person to have the job title of Practice Manager. When she went to live in South Africa, the respondent gave the claimant the additional duty of reporting to her the financial matters to which I refer in paragraph 9 above. The claimant accepted that additional duty.

18 The normal way for patients to pay for treatment at the Practice was to use the respondent's card payment machine, which was supplied by the bank by the name of Lloyds-TSB. Miss Jordan worked as a receptionist at the practice. She had previously been a dental nurse and practice manager at another practice. She was regarded by the respondent as a Receptionist/CQC

Manager. There were working at the Practice up to 3 dentists, the claimant, Miss Jordan, and Ms Brenda Turner, who was regarded as the Practice's Dental Nurse/CQC Manager, although all three of the support staff (the claimant included) did dental nursing work from time to time.

19 During 2015, the respondent continued to seek to sell the Practice to Dr Bowen-Davies. On 23 March 2015, Dr Bowen-Davies wrote to the respondent (there was a copy at page 80 of the bundle; all references below to page numbers are to pages of the bundle):

> "Please could you make a note that I will need to use the surgery outside of normal working hours on occasion to facilitate some of my treatments.
>
> As per our agreement I will ask Anne-Marie to log the time spent and pay across the agreed hourly rental. It will probably be easier to do this as a deduction from my monthly schedule."

20 In April 2015, the respondent saw that the income of the Practice was beginning to drop. In May 2015 she sent the claimant and Miss Jordan an email (page 84) enclosing sets of what were called in the enclosures "performance indicators" for all three of them. The covering email was in the following terms:

> "Hi Pam / Anne-Marie
>
> Can you to [sic] put your heads together and edit these as you see fit? I know everyones job specifications have changed somewhat. Please cut and paste as you want, I will need updates ones [sic] for all 3. I have looked at this but seeing as you know who does what, its best if you edit? I think most of the job descriptions are there, apart from the CQC stuff?"

21 The claimant never expressly responded to that email.

22 The performance indicators for the claimant included those at page 88, which included these ones:

> "• Supply of accurate financial information to owner on a monthly basis.
>
> • Supplying weekly reports to owner including patient numbers, treatments done and financial statements"
>
> "• Providing accurate, detailed information for bookkeeping".

23 The claimant was given a pay rise in May 2015. It was not clear to me how much that pay rise was, but the precise amount was not in itself material. The fact of the pay rise was relied on by the respondent as evidence that the claimant had accepted the responsibilities referred to at page 88, so that she received that pay rise in return for an increase in her responsibilities. The claimant's evidence was that the difference in pay was only about 50 pence per hour, but her evidence was that she had been given that pay increase because she was being paid less than Ms Turner and thought that she should not be. She referred in paragraph 19 of her witness statement to the difference in pay between them as being £3.00 per hour.

24 In June 2015, the respondent participated in a mediation process with Dr Bowen-Davies in regard to the proposed sale of the Practice to him. During the summer of 2015 (it is not clear, or material, precisely when), Dr Bowen-Davies started to take money from patients otherwise than using the respondent's card payment machine. Initially, he used an iZettle machine, but then he procured the installation and use of a WorldPay machine at the Practice. The payments which he took using the iZettle and WorldPay machines were made directly to him, and were not made to the respondent. Nor were they stated in any way to the respondent. In effect, they were hidden from the respondent. Dr Bowen-Davies justified these acts overtly, i.e. to the claimant, Miss Jordan and Ms Turner, on the basis that he was simply charging separately for work done during the period when he was working on his own account and renting the Practice facilities at the rate of £30 per hour.

25 When Dr Bowen-Davies used the premises otherwise than for the purposes of the Practice, i.e. when he said that he was relying on his right to use them outside of "normal" hours in return for the payment of £30 per hour, he did not pay the staff himself; rather, he permitted them to be paid by the respondent.

26 In August 2015, the respondent became alarmed at the apparent drop in the Practice's income, which was attended also by a startling increase in the cost of materials. She sent the email at page 108 to the claimant, Miss Jordan and Ms Turner. In that email, the respondent wrote this (all textual errors being reproduced from the original):

> "Ladies
>
> I am becoming increasingly concerned about the cost of materials and the amount spend month on month. This have absolutely skyrocketed in the past 18 months and unfortunately our income in especially the past 5 months have not supported this increase. Basically there should be a balance, if we are doing a lot of treatments generating income, this will reflect in our expenses. Sadly this is not the case, treatments/income has gone down but costs up (especially in the past few months). I have run a report on my accounting software to give you some form of illustration as to what I mean:

> Material expenses 1/8/2012 - 31/7/2013 – £11,281.11
> Material expenses 1/8/2013 - 31/7/2014 – £16,984.04
> Material expenses 1/8/2014 - 31/7/2015 – £27,257.98
>
> I am sure you all can appreciate how difficult this is for me to control as I am not there, but I can not see that cost for materials have increased this much in the past 18 months? If so, please correct me as I feel a bit in the dark here.
>
> All I am asking for is for some control on your side on what is being ordered and when. I am happy to give approval when things are needed, but if you are sitting on lots of stock, please first use what you have available.
>
> Can I perhaps ask for you to do a stocktake for me so I know what is there to use currently, plus a guestimate at the value? There should be a sheet from previous stock takes Brenda and I did you can use to refer to and make it a bit easier? I really appreciate it as this will give me a clearer picture of what is going on."

27 During this period (it is not clear precisely when it started, but the practice grew during the summer of 2015), Dr Bowen-Davies instructed the support staff of the Practice, including the Claimant, not to record the times when he provided treatment purportedly outside his normal hours on the Practice's Exact software, but, instead, to record those times on a spreadsheet, which was kept only on a password-protected USB memory stick. This spreadsheet was referred to by the claimant and Dr Bowen-Davies as the "ES diary".

28 On 22 September 2015, the respondent wrote to the claimant (page 273):

> "Just also wanted to get your take on the low income we have at present. I need to try and get my head round it to see what I can do to help. Highly confidential but S did admit during mediation that he turned on the breaks [i.e. the brakes] on purpose earlier this year ... He did commit to not do it anymore but the lack of income from him worries me. Is his book busy? Is he booking treatments in? Or telling people to come back in 6 months? How many days does he spend at the practice per week? Perhaps send me a log in and password for exact so I can log in myself over the weekend? You know I totally trust you to be able to give me a clearer idea as I really want to believe he is not doing this on purpose. We have to get another dentist in again but can only do so if there is enough work for both."

29 The claimant responded (on the same page):

> "The book itself doesn't look too busy into October. It [is] sporadic unfortunately. Inus was rammed today..... But then the day fell apart just people being ill etc. ..... Stuart is not postponing treatments, he is doing everything as normal .... Some patients are choosing to wait others are booking but then going on holiday which delays it..... I am not really sure why it is like it is except I haven't been on the desk much."

30 Dr Bowen-Davies used the surgery which was downstairs at the Practice. On 19 October 2015, the respondent wrote to the claimant (page 112):

> "Can you please let me know how many hours on average the downstairs surgery is in use? I have logged in and was quite shocked at how few days it is being utilised? This has never been discussed with me and I think we need to consider putting someone in (like the locum) who would be willing to sit around and build those empty days up again."

31 The claimant's response was at page 113. She sent it only on 28 October 2015. She said nothing about the practice of Dr Bowen-Davies of seeing patients in what he told the claimant was his own time. One of the things she wrote was this:

> "The snap shot of the diary is not currently giving a true picture due to holiday and illness, but during August it was on average 20 hours clinical weekly, which again is Holiday season, and difficult to benchmark from."

32 Miss Jordan's evidence was that towards the end of 2015, the claimant and Dr Bowen-Davies told her that when she was at the reception desk, she should not keep the ES diary spreadsheet open, as the respondent might log onto the network and see it. The claimant's evidence was that Dr Bowen-Davies had said the same thing to both her and Miss Jordan in that regard. The claimant said that she is a trusting person who sees only the good in people, and that she believed that what he was saying was justified by the fact that he was paying the respondent the £30 per hour to which I refer above. Implicitly, she accepted that she herself told Miss Jordan not to keep the ES spreadsheet open on the Practice's networked computer at the reception desk.

33 Treatment given to patients by Dr Bowen-Davies outside what he regarded as normal hours, which was recorded in the ES diary, the payment for which was taken on the WorldPay machine and not the Lloyds-TSB machine, was, however, recorded on patients' dental records.

34 Miss Jordan's evidence included this, in paragraph 4 of her witness statement:

> "I became concerned about the practice during late 2015 when Christa [the respondent] sent emails regarding finances. A second card machine had been fitted at the practice and payments for patient treatment were taken on this machine. I asked Anne-Marie about this but she waved away my concerns and told me to carry on taking payments on the new card machine."

35 When that was put to the claimant by Mr Cole (i.e. adducing it as part of the claimant's evidence in chief), it was put in this way. She was asked about the last sentence, and asked: "Tell us what instructions you gave Miss Jordan?" The claimant's response was in these terms:

> "I did not instruct her at all. All of them came from Stuart and were addressed to all of us."

36 During December 2015 and January 2016, the respondent saw that the income which was being reported to her had dropped even more than previously, while the costs of the practice had continued to rise. It was the respondent's evidence (not supported by any financial records) that she was in danger of becoming bankrupt by reason of the growing insolvency of the Practice. Without needing to make a finding in that regard, I accept that there was a growing financial deficit at the Practice and that that deficit resulted from the increasing use by Dr Bowen-Davies of the WorldPay machine instead of the Lloyds-TSB machine for taking payments from patients at the Practice premises. It was the claimant's evidence that Dr Bowen-Davies also paid for the materials used in treating the patients from whom he took payment using the WorldPay machine. However, I saw no financial records which supported that assertion. Equally, however, I was not shown the financial records of the Practice, i.e. the respondent's financial records relating to the Practice. The respondent said that she had had a forensic accountant carry out an investigation and make a report, and there were at pages 116-117 some extracts from that report. They did not show what occurred in regard to materials used in treatment, i.e. whether or not Dr Bowen-Davies paid for them from his own pocket.

37 At no time did the claimant tell the respondent about the use by Dr Bowen-Davies of a separate payment machine for taking payments from patients whom he treated at the Practice premises. The respondent first became aware of that on 20 January 2016, when Mr Mark Brown, her "computer support", reported to her that there was a second credit card machine at the Practice, sending her a photograph of it. (This was recorded in the letter of 4 February 2016 at page 129, to which I return below.) On or around 25 January 2016, independently, Miss Jordan responded to a message from the respondent by saying that she had concerns about the Practice and needed to speak to her. The respondent then telephoned Miss Jordan, who told her about the spreadsheet set up for, and used by, Dr Bowen-Davies for his "out

of hours" treatment of patients, and that it was password-protected and kept only on a USB memory stick.

38 On 1 February 2016, the claimant was interviewed by the respondent over the telephone. The interview was recorded and subsequently transcribed. The transcript was at pages 133-148. At page 140, this exchange was recorded:

> "I [i.e. the respondent]: have you received any payments from Stuart [i.e. Dr Bowen-Davies]?
> R [i.e. the claimant]: Christmas bonus, thank yous, yes.
>
> I: Yes, do you know how much?
> R: No
>
> I: How does he pay you?
> R: By cash as a thank you, I suppose that yes, I could be admitting ... no it's [something unclear said and therefore not recorded] on a, you know, on a certain time or a day or something, then he's done that, but not for ..."

39 In oral evidence, the claimant accepted that she was given money from time to time by Dr Bowen-Davies by way of a Christmas bonus and separately (on other occasions) by way of a "thank you" for the hard work that she had done for him. She said that she could not recall how much money she was given by him. She said that this was because she is "the type of person who is more grateful for a 'thank you' than any amount. It means nothing; it is not a value like that to me." She said that what was important to her was the fact that "someone [had] recognised the work done" by her. She said that Dr Bowen-Davies had, similarly, given a bottle of champagne to Ms Turner.

40 Ms Turner was interviewed on the same day (1 February 2016) and in the same way by the respondent, and the recording of that interview was also transcribed. There was a copy of the transcript at pages 128A-128H. At page 128D, Ms Turner was recorded to have said that she had received payments from Dr Bowen-Davies. The exchange continued:

> "I: Okay, do you have roughly an idea how much?
> B: No. I can't have a ball park figure, no.
>
> I: How did he do it, how did he pay you?
> B: Cash in an envelope.
>
> I: And what did he say it was for?
> B: For our help, as a thank you.
>
> I: You never thought it strange?
> B: I did it's a bit odd, but we have been working back to back and ...

I: Okay. You just accepted it as a gesture of goodwill?
B: Yeah."

41 Miss Jordan was also interviewed on 1 February 2016 over the telephone, and the recording of her interview was also transcribed. The transcript was at pages 128J-128N. She said that she too was given payments by Dr Bowen-Davies. That was recorded on page 128L, where when asked what reason he gave for the payments she said that he said it was a bonus and because the staff did not ever get a "thank you". She is recorded there to have estimated the amount at "probably £700 maybe, probably about £100 a month and he always said, 'It was on the interest', like money he'd made like sort of from his treatments, it was like a bonus from the interest kind of thing. Which was a bit weird, but yes we did accept it." Miss Jordan is also recorded (at the top of the next page) to have said:

> "As I said I'm willing to pay tax on it if it's declared, I'm quite willing to sort it out."

42 On 4 February 2016, the claimant was suspended by the respondent. The letter stating that she was suspended, and why, was at pages 129-131. Within a short period of time, a matter of days, the claimant became unwell. She was (as recorded in the letter of 8 March 2016 at page 164) "initially seen and referred to the Crisis Team on the 8th February 2016". She was admitted to the local Acute Day Treatment Unit ("ADTU") on 12 February 2016, as recorded in the letter dated 25 February 2016 at page 160. She was diagnosed (as recorded in the letter dated 8 March 2016 at pages 165-166), to have an "Adjustment Disorder". Such a disorder was stated in the letter at page 165-166 not usually to exceed 6 months from the point of onset "except in the case of a Prolonged Depressive Reaction". In the letter of 8 March 2016 at page 164, it was said that it would be "advisable to wait till she [i.e. the claimant] is considerably better to continue with the investigations you are undertaking."

43 On 25 February 2016, the respondent wrote to the ADTU (page 159) that the claimant "is currently on suspension with full pay pending the outcome of a disciplinary hearing which was originally scheduled for Monday, 15 February 2016". The respondent continued: "Her family have subsequently written to us to inform us that she is too unwell to attend." "We have asked her family to get a letter from you, her doctors, confirming that she is unwell and giving us your view on how we can best discuss these issues with Anne-Marie."

44 The claimant's entitlement to sick pay was stated in a document entitled "Appendix 2" at pages 58-60. She had a right to 3 weeks at full pay, and 5 weeks at half pay. After being informed that the claimant was unable to attend an interview, the respondent paid the claimant only her sick pay entitlement, and not full pay.

45 As a result of the claimant's mental state, at the request of the claimant, the respondent did not carry out any further interview of, or hold any further meeting with, the claimant. The respondent instead sent a series of written questions to the claimant to which the claimant replied in writing, after which there was a further series of questions and answers. Those questions and answers were at pages 170-195. The claimant repeatedly wrote to the effect that she thought that the use of a second payment machine was not wrong, and that it followed on from arrangements agreed between the respondent and Dr Bowen-Davies of which the claimant knew nothing other than what she had been told by Dr Bowen-Davies. By way of example, at page 179, the claimant wrote this:

> "I did not come to you [about the card machine] because it was explained to me in such a way that I did not have any concern that anything untoward was going on."

46 However, the claimant said in the passage immediately following that sentence:

> "However on a couple of occasions I overheard Pam laughing with Brenda about how stupid you were to rent the practice to Stuart for such a little amount and had you not thought about costs, payments etc. I thought that you must have thought about it all when setting up the agreement with Stuart and would have informed us if there was anything else that you had wanted reporting to you."

47 At page 180, the claimant wrote:

> "I do agree that the income was seen to be going down in this time [i.e. after the introduction of the second card payment machine.]"

48 At no time did the claimant ask the respondent about the terms of the agreement between her (the respondent) and Dr Bowen-Davies. She explained her thinking in that regard in this way at page 181:

> "I can only explain that I did not know what was in the contract and the way that it was explained to us I didn't think anything about the situation was unusual. We all followed the instruction given so I did not knowingly partake in diverting any practice sums away from you. However, I did overhear Pam discussing with Brenda that you should have thought more about what was included in the £30 an hour; I ignored her comment and thought that you must have specified more between you and Stuart when the agreement was set up but that it was a confidential agreement so I didn't ask any more about it, I am not management so I did not feel that it was my place to do so. All members of staff at the practice partook in the taking of payments."

49 The respondent then dismissed the claimant with immediate effect on 18 April 2016. The letter of dismissal was at pages 196-197. The first two substantive paragraphs stated the reasons for the dismissal, namely:

> "I regret to say that I believe, on balance, that you are guilty of gross misconduct; specifically that you decided not to discuss with me that substantial sums of income were being diverted by Stuart from the practice accounts to his own. I am therefore ending your employment with immediate effect.
>
> You were my practice manager. Although I was out of the country, we were in regular communication. You allowed Stuart to divert over a hundred thousand pounds of practice income from the practice. I have lost a substantial amount of money. You never said anything or referred to it. You never gave me any indication that anything was amiss."

50 The claimant appealed against her dismissal. Her appeal letter was at pages 198-199. At page 199, the claimant wrote this:

> "My illness, diagnosed as adjustment disorder, was caused as a severe stress reaction brought on by the way I was treated by you."

51 She also wrote this:

> "You said you believe the natural answer was Stuart was using the practice for his own income, I reported the figures to you including his extra hours each month that I was told to, and as far as I knew, you were aware of the arrangement. You also say everyone knew it was commercially ridiculous, I thought the agreement had been made between the two of you, because you did not pass on any and all changes to us, your staff, directly we were not aware of all of the details surrounding the agreement of extra hours, if you were unaware why did you not ask me what the extra hours were for when I began reporting them."

52 The appeal was eventually determined by Dr Hennie Muller, a dentist friend of the respondent, on paper. Dr Muller recommended (see his letter at pages 204-207) that the respondent dismissal the appeal. Dr Muller's response to the claimant's grounds of appeal referred repeatedly to, and relied on, the conclusion of the respondent that the claimant "deliberately refused to let [the respondent] know that substantial sums of money were going to Stuart's account and that there was a second credit card machine."

53 It was the claimant's evidence that if anyone asked to speak to the practice manager at the Practice, then she would say to them: "We don't have one; you will have to make do with me."

The relevant law and the issues which I had to determine in regard to the claims of unfair dismissal and wrongful dismissal

(1) Unfair dismissal

54 The parties agreed that the reason for the claimant's dismissal was her conduct. As Mr Cole submitted, the reason for the claimant's dismissal fell to be determined by reference to the dismissal letter and the two paragraphs in it which I have set out in paragraph 49 above. Mr Cole relied on the *Burchell* test, i.e. that in paragraph 2 of the decision of the Employment Appeal Tribunal in *British Home Stores v Burchell* [1978] IRLR 379, which has been subsequently approved on many occasions. While I bore in mind that the test throughout is reasonableness, as characterised in *J Sainsbury plc v Hitt* [2003] ICR 111, i.e. whether or not what was done was within the range of reasonable responses of a reasonable employer, I bore in mind also the value of applying the following passage in paragraph 2 of *Burchell*:

> "What the Tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case."

55 It was the claimant's case that the respondent did <u>not</u> have proper grounds, i.e. reasonable grounds, for believing that the claimant was guilty of the conduct described in paragraph 49 above. It was also the claimant's case that the investigation of the matter should not have been carried out by the respondent. Furthermore, it was the claimant's case that the decision to dismiss her was already taken by the time that she was suspended, as was evidenced by the letter suspending her at pages 129-131. In addition, it was the claimant's case that the failure to show her the forensic accountant's report to which I refer in paragraph 36 above was unfair. Equally, it was submitted, the failure to show the claimant a copy of a statement made by

Miss Jordan on the contents of which the respondent relied when deciding to dismiss the claimant was unfair.

56 In addition, it was the claimant's case that her dismissal was outside the range of reasonable responses of a reasonable employer. The claimant was not guilty of any contributory fault, it was submitted, because she did not know about the details of the agreement between the respondent and Dr Bowen-Davies, and could therefore not be blamed for not telling the respondent about the use by Dr Bowen-Davies of a separate card payment machine and the failure by him to account to the respondent for the payments taken on that machine.

(2) Wrongful dismissal

57 The issue for me was whether or not the claimant had committed such conduct as to justify (in the law of contract) her summary dismissal. Thus, if she had committed a fundamental breach of her contract of employment, or if she was in repudiation of it (i.e. she had shown an intention no longer to be bound by the terms of that contract in some essential respect), then the respondent was entitled to dismiss her without giving her notice or pay in lieu of notice.

58 In deciding that issue, I had to consider whether or not the claimant had breached the implied term of trust and confidence, i.e. the obligation on an employer and employee not, without reasonable and proper cause, to act in a way which is likely seriously to damage or destroy the relationship of trust and confidence which exists, or should exist, between them as employer and employee. I also had to consider whether the claimant had breached any other term of that sort such as the implied obligation of loyalty, as considered by the Court of Appeal in *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] 1 All ER 350.

59 In deciding whether or not the claimant had committed a breach of the implied term of trust and confidence, it was necessary to take into account what Elias J (as he then was) said in paragraphs 55 and 311 of his judgment in *Hagen v ICI Chemicals and Polymers Ltd* [2002] IRLR 31. There, respectively, he said this:

> "Ms Booth [for the defendant] accepts (subject to an argument that I address below) that it is in principle possible for even negligent conduct to constitute a breach of this implied term, but she submits that it would have to be a rare case, coming close to recklessness, before that term could be engaged. I accept that submission. Lord Steyn emphasised in *Malik* [i.e. *Malik v BCCI* 1998 AC 20] that in order to constitute a breach of this term, the conduct had at least seriously to undermine trust and confidence. It seems to me that the negligent conduct would have to demonstrate a real and unacceptable disregard for the interests of the

employee before this term could successfully be invoked. It would have to be the kind of conduct that would justify the employee treating it as a repudiatory breach."

"[I]n my judgment there is no liability for this misrepresentation in the action pleaded in contract. It is impossible to say that there was in the circumstances a breakdown of trust and confidence arising from the negligence of ICI. There was no wanton negligence bordering on recklessness or gross indifference."

My conclusions

(1) Was the claimant dismissed unfairly?

60 I concluded that, contrary to Mr Cole's ably-presented submissions, the respondent did have reasonable grounds for concluding that the claimant had committed the misconduct for which she was dismissed. This is for the following reasons.

60.1 The claimant was, if not in terms the respondent's practice manager, in practice responsible for sending the respondent some financial information every week. Whether or not the claimant's job title was "Practice Manager" was not determinative. What mattered was the extent to which she was responsible to the respondent for reporting things to her, in the circumstance that the respondent's business is a small one.

60.2 The claimant accepted at face value what she was told by Dr Bowen-Davies about what was in the contract between him and the respondent governing his position of Associate at the Practice, namely that he was entitled to use the Practice's premises at any time that (according to him) was not within his contracted hours for the payment only of £30 per hour to the respondent.

60.3 That payment was plainly not enough to cover the cost to the respondent of running the Practice, and the claimant was (given her own answers set out in paragraphs 46 and 48 above) aware of that, or at least aware of the strong possibility of that.

60.4 The respondent sought information from the claimant in the manner shown in the extracts set out in paragraphs 26, 28 and 30 above. Those extracts show that, objectively speaking, something was going very wrong at the Practice. The claimant's failure to tell the respondent at that time about the introduction by Dr Bowen of a second card payment machine was such as to give rise to a reasonable suspicion of dishonesty on the claimant's part. (Whether or not she was in fact

dishonest in that regard is not relevant to the question of the fairness of her dismissal.)

60.5 The words of the claimant set out at the end of paragraph 45 above show that she took what she was told by Dr Bowen-Davies about the card payment machine at face value and did not check with the respondent that it was correct, despite the queries of the respondent set out in paragraphs 26, 28 and 30 above and despite the fact that, as I record in paragraph 47 above, the claimant knew that the Practice's income was going down during the period after the introduction of the second card payment machine.

60.6 The giving by Dr Bowen-Davies of payments to the staff of the respondent, as described in paragraphs 38-41 above, was not conduct which one would have expected. It was odd in the circumstances. To the objective observer, it would have suggested that Dr Bowen-Davies might be acting against the interests of the respondent.

60.7 The fact that the claimant said that she could not remember how much she had been given and that it did not matter since what was important to her was the fact that she had been thanked, did not sit well with her desire (recorded in paragraph 23 above) to be paid at a rate commensurate with that of Ms Turner. That desire showed that the claimant was indeed conscious of the value of money and pay. The money was also not recorded and subjected to the deduction of income tax and national insurance contributions, which was in itself a factor which would have alerted an honest employee to the possibility of wrongdoing on the part of Dr Bowen-Davies.

60.8 While the claimant's failure to raise with the respondent the fact that Dr Bowen-Davies had introduced a second payment machine was an omission which could be regarded as incompetent, so that the reason for the claimant's dismissal could be said to have been inadvertent incapability, in my view the respondent had a reasonable suspicion that the claimant had seen the risk that what Dr Bowen-Davies was doing was wrong, and had decided consciously not to alert the respondent to it. In coming to this conclusion I found the passage set out in paragraph 48 above of particular relevance, in particular the claimant's words: "I ignored her comment".

61 Secondly, in my judgment, given the resources and size of the respondent's business, it was within the range of reasonable responses of a reasonable employer for the respondent herself both to carry out the investigation and make the decision that the claimant should be dismissed. In this regard, I took into account paragraph 6 of the ACAS code of practice concerning disciplinary investigations, which refers to what is "practicable". I also applied the words of

section 98(4), which require consideration of "the size and administrative resources of the employer's undertaking".

62 Thirdly, I did not come to the conclusion that the respondent had made up her mind before hearing from the claimant. That certainly was a possibility, but I concluded on the balance of probabilities that that did not happen here. In fact, I concluded that the respondent struggled with the situation and came to the conclusion that the claimant was guilty of such misconduct as to justify her dismissal only reluctantly and slowly.

63 Fourthly, in my view the failure to show the claimant the forensic accountant's report which the respondent had obtained, and a copy of any written statement which Miss Turner had made to the respondent before the claimant was dismissed, was not outside the range of reasonable responses of a reasonable employer. In this regard, I took into account paragraph 9 of the ACAS code concerning disciplinary investigations, which is in these terms:

> "If it is decided that there is a disciplinary case to answer, the employee should be notified of this in writing. This notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting. It would normally be appropriate to provide copies of any written evidence, which may include any witness statements, with the notification."

64 Here, the respondent gave the claimant many opportunities to respond to the substance and detail of the reasons why she was eventually dismissed, if only in the sequence of documents referred to in paragraphs 45-48 above.

65 As for the reasonableness of the claimant's dismissal, the fact that neither Miss Jordan nor Ms Turner was dismissed, and that they were not even disciplined, at first sight suggested an unreasonably different approach towards the claimant. However, the claimant was treated by the respondent as the practice manager, and she was the main reporter of financial matters to the respondent during the period after the respondent went to live in South Africa. The circumstances of the claimant were therefore in my view sufficiently different from those of Miss Jordan and Ms Turner for it to be within the range of reasonable responses of a reasonable employer (bearing in mind what the Court of Appeal said in *Paul v East Surrey District Health Authority* [1995] IRLR 305) to treat the claimant differently. In coming to this conclusion, I bore in mind in particular the passage set out in paragraph 28 above.

66 For these reasons, the claimant's claim of unfair dismissal does not succeed. The claimant was not dismissed unfairly. If I had concluded that the claimant was dismissed unfairly then I would have concluded (applying sections 122(2), 123(1) and 123(6) of the ERA 1996) that because of the conduct to

which I refer in paragraph 60 above it was not just and equitable that she should receive a basic award or compensatory award for the unfair dismissal (bearing in mind that a basic award is in the nature of an award for length of service, so that different considerations apply in the application of sections 122(2) and 123(1)), and (separately) that her conduct had caused or contributed to her dismissal to such an extent that the compensatory award should be nil.

(2) Was the claimant wrongfully dismissed?

67 While the test for determining whether or not the claimant committed a fundamental breach of her contract of employment was not the same as that for determining whether or not the respondent had reasonable grounds for concluding that the claimant had committed (here) gross misconduct, the evidence which needed to be taken into account in deciding those questions was the same.

68 Standing back, looking at all of the factors to which I refer in paragraph 60 above, I came to the conclusion that the claimant had indeed acted in a way which was likely seriously to damage the relationship of trust and confidence between her and the respondent, and that she had done so without reasonable and proper cause. Whether the claimant had breached the implied term of trust and confidence by "wanton negligence bordering on recklessness or gross indifference" (to use the words of Elias J set out in paragraph 59 above), or by deliberately (in a Nelsonian way) shutting her eyes to the possibility of wrongdoing on the part of Dr Bowen-Davies, in my view, viewed objectively, her conduct was a breach of that term. In coming to this conclusion, I did not conclude that the claimant had acted in conscious bad faith. The claimant was to an extent a victim of what I concluded was Dr Bowen-Davies' wrongdoing (bearing in mind clause 25(a) and (b) of the agreement between him and the respondent, which is set out in paragraph 13 above) towards the respondent, but in my view the claimant's failure even to ask the respondent whether what was on its face a highly disadvantageous arrangement financially for the respondent had been agreed to by her, let alone to alert the respondent to the fact that Dr Bowen-Davies had introduced his own card payment machine, was, objectively speaking, a breach of the implied term. Thus, the claim of wrongful dismissal does not succeed.

(3) Was there an unlawful deduction from the claimant's wages?

69 The amount by which the claimant's sick pay paid during her suspension was less than the claimant's full pay was not the subject of evidence, and at this stage, I was asked only to determine the question of liability in principle, namely whether the shortfall should be paid by the respondent to the claimant, or whether the respondent was entitled to pay the claimant only sick pay once it was apparent that the claimant was too unwell to attend a disciplinary hearing.

70 There was nothing in the express terms of the claimant's contract of employment which addressed the issue. I am aware of no case law concerning the issue directly, but it is bound to arise on many occasions. The discussion in paragraphs [6]-[9] of *Harvey on Industrial Relations and Employment Law* is helpful, if only to show that, as stated in italics at the end of paragraph [9], "no work does not necessarily justify no pay". However, that statement was made against the background of rather different circumstances from those in issue here. The paragraph is in these terms (the words in italics being in the original):

> "This issue of whether an 'impediment' to working has been 'unavoidable' is clearly not confined to the situation where an employee is arrested or remanded in custody. It is also relevant to any other circumstance preventing the employee from working such as an accident, a mechanical failure such as a commuter train breaking down or an unexpected volcanic ash cloud disrupting travel plans. Whatever the relevant circumstances, an employer considering stopping an employee's wages should make appropriate enquiries about what has taken place before making any such decision. Certainly they should not automatically assume that employees need not be paid if they cannot attend work: *no work does not necessarily justify no pay*."

71 Here, the claimant was initially absent from work because she was suspended on full pay. She was never required to return to work. She was, however, required to attend a disciplinary hearing, and the respondent was informed (as recorded in paragraphs 42 and 43 above) that she was too unwell to do so. The medical advice was as recorded at the end of paragraph 42, namely that it would be "advisable to wait till she is considerably better to continue with the investigations you are undertaking". At no time was it said specifically that the claimant was too unwell to work, but the circumstances to which I refer in paragraphs 42 and 43 above are consistent only with an inability to work because of sickness. It would therefore be possible to say that the reason for the claimant's absence from work was then sickness so that her claim for unpaid wages should fail. However, the operative reason for her absence throughout the period from her suspension to her dismissal was the respondent's inability to trust her. At no time did the respondent require the claimant to attend work.

72 It is possible to analyse this situation by reference to the implied term of trust and confidence. If the claimant had been determined by the respondent not to have been at such fault that she should be dismissed, then the respondent would have required the claimant to return to work. The claimant might then have said that she was too unwell to do so while she recovered from her adjustment disorder, and then sick pay would have been payable unless it had previously been exhausted. But if it had been exhausted then it would have been so because of the claimant's illness during her suspension, which

had been caused (or so it seems; I did not hear medical evidence to this effect, but as I record in paragraph 50 above, it was asserted by the claimant to be so) by her suspension.

73 Given that

73.1 the respondent afforded the claimant time to recover from her illness in order to be able to attend a disciplinary hearing, but then proceeded in her absence in the manner described above,

73.2 the implied term of trust and confidence governed the manner in which the respondent treated the claimant during the period of her suspension, and

73.3 the respondent did not require the claimant to return to work and any express requirement to do so would have been insincere since the respondent did not want the claimant to attend work, so that the operative reason for the claimant's absence from work was truly the fact that she had been suspended for disciplinary reasons,

in my judgment the claimant should have continued to be paid pay at the full rate, and not treated as being entitled only to sick pay.

Tribunal fees

74 Given that the claimant obtained a benefit from making the claim for an order for the payment to her of accrued holiday pay (since at no time before the hearing before me did the respondent accept that such an order should be made), I concluded that she should be paid by the respondent the issue and hearing fees of the case. That conclusion was reinforced by my conclusion that the claimant's claim for unpaid wages also succeeded.

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Employment Judge Hyams

Date: 29/03/2017

Sent to the parties on: 29/03/2017

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For the Tribunal Office