



EMPLOYMENT TRIBUNALS

Claimant:
Mr S Gill

v

Respondent:
RR Impex Limited

Heard at: Reading

On: 16 March 2017

Before: Employment Judge S Jenkins

Appearances:

For the Claimant: In person

For the Respondents: Mr M Stephens (Counsel)

RESERVED JUDGMENT

1. The Claimant was unfairly dismissed.
2. The Respondent breached the Claimant's contract by failing to provide him with appropriate notice of termination of employment.
3. The Respondent made an unlawful deduction from the Claimant's wages by failing to pay him salary in respect of the last periods of his employment.
4. The Claimant's claim in respect of accrued but untaken holidays as at the date of termination of his employment is dismissed.
5. The Claimant's claim for a redundancy payment is dismissed on withdrawal.
6. Consideration of remedy in relation to the findings of unfair dismissal and breach of contract will be stayed in light of potential civil proceedings to be commenced by the Respondent against the Claimant which could impact on further evidential findings needed to decide upon remedy in respect of those matters.
7. In respect of the finding that the Respondent made an unlawful deduction from the Claimant's wages, the Respondent is ordered to pay the Claimant the gross sum of £1,237.75, if not already paid, and to the extent that the Respondent may have paid part of that sum, it is ordered to pay the remaining balance.

8. The Respondent is ordered to notify the Tribunal of the commencement of civil proceedings against the Claimant immediately upon issue. If not issued by 16 May 2017, the Respondent is ordered to notify the Tribunal of that fact on that day.

REASONS

Background

1. The hearing was to deal with the Claimant's claims of unfair dismissal, breach of contract, unlawful deductions from wages and holiday pay, arising out of the termination of his employment on 8 October 2016. In his claim form, the Claimant had also indicated that he was claiming a redundancy payment, but he confirmed at the commencement of the hearing that he was not maintaining that his employment had ended by reason of redundancy and I therefore dismissed that claim on the Claimant's withdrawal.

Preliminary Issue

2. Whilst reading the witness statements of two of the Respondent's witnesses, Mrs Najat Sisodia and Mr Ranjit Sisodia, at the start of the hearing, I noted that both statements contained paragraphs indicating that the Respondent intended to take action against the Claimant, along with Mr Christopher Sisodia, who is Mr Ranjit Sisodia's son and an employee and director, or at the least (the evidence before me was not entirely clear on the point) a former employee and director, of the Respondent, for what were asserted in Mrs Sisodia's statement to be very substantial losses caused by their actions. The statements concluded by asking that consideration of any remedy to be awarded to the Claimant should be deferred to avoid making any findings of fact that might prejudice the civil claims.
3. I also noted that there was within the Bundle (86-90), a copy of a letter from the Respondent's solicitors to the Claimant dated 3 March 2017 under the Civil Procedure Rules Pre-Action Protocol.
4. The Respondent's representative, Mr Stephens, raised this issue at the outset of the hearing. He confirmed that the civil claims involved circumstances not known to the Respondent at the point of termination of the Claimant's employment and which therefore could have no bearing on the issue of liability. However, he contended that if I decided in the Claimant's favour in relation to the unfair dismissal and/or breach of contract claims then the issues to be addressed in the civil claims would be relevant, as he would maintain that the Claimant's compensation should be reduced, or indeed extinguished, by reference to the guidance provided by the House of Lords in the case of W Devis & Sons Ltd v Atkins [1977] ICR 662.

5. I explored with Mr Stephens whether it would be appropriate to stay the Claimant's claims generally in light of the civil claim as I did not want to be in a position where the consideration of evidence in the tribunal forum caused any embarrassment to a civil court considering any claims brought against the Claimant by the Respondent. Mr Stephens however was confident that only a stay of consideration of remedy would be required.
6. The Claimant was understandably keen to proceed with the case but agreed that, in the circumstances, a stay of the consideration of remedy in relation to his unfair dismissal and breach of contract claims would be appropriate. I confirmed that I did not see that there would need to be a stay of the consideration of remedy in relation to the Claimant's claims of unlawful deductions from wages and holiday pay if I decided either or both of them in the Claimant's favour.
7. I therefore considered that it was appropriate for me to conclude my decisions on liability in relation to all the Claimant's claims, but to reach any decision on remedy that might be required only in relation to the claims of unlawful deductions from wages and holiday pay, and that any consideration of remedy in relation to the unfair dismissal and breach of contract claims should be stayed. I confirmed however, as noted at paragraph 8 of the Judgment above, that the stay should be limited in point of time.

Issues and law

Unfair Dismissal

8. With regard to the Claimant's unfair dismissal claim, the first issue for me to address was whether there was a dismissal which could form the basis of such a claim, and that issue was in dispute between the parties. This was not on the, not uncommon, basis of whether there was a dismissal effected by the employer or a resignation by the employee, but instead focused on whether there was an actual dismissal by the Respondent or whether the Respondent had simply accepted a repudiatory breach of contract by the Claimant. In this respect, the Respondent's representative referred me to the EAT decision in Rasool v Hepworth Pipe Co Ltd [1980] ICR 494.
9. If and I concluded that there had not been a dismissal, then the Claimant's unfair dismissal claim would be bound to fail, as the provisions of section 95 of the Act, which sets out the circumstances in which an employee is dismissed, would not have been made out.
10. However, if I considered that there had been a dismissal by the Respondent, I would first need to be satisfied that the Respondent had established the reason for dismissal and whether it was a potentially fair reason falling within section 98(1) of the Employment Rights Act 1996 (the "Act").
11. The Respondent's pleadings were not entirely helpful in this respect, with its Response form (Bundle a19) simply noting that the Respondent did not

dismiss the Claimant, and with its subsequent expansion upon its Response document, following a request by the Tribunal (Bundle a24 – a27), again focusing on the assertion that the Claimant had not been dismissed. That document did however note that, in either event, i.e. whether resignation or dismissal, the Claimant's refusal to comply with lawful instructions or to return to work or provide passwords would be relevant to whether or not any dismissal was unfair. I took from that that the Respondent was asserting that if there had been a dismissal by the Respondent then the reason for it would have been the Claimant's conduct. Conduct is a potentially fair reason for dismissal as set out at section 98(2)(b) of the Act.

12. If I was satisfied that a potentially fair reason for dismissal had been established, I would then need to consider the overall fairness of the dismissal decision pursuant to section 98(4) of the Act. In the context of a conduct dismissal, that would involve the application of the well-known test set out in the case of BHS v Burchell [1980] ICR 303, which essentially required me to consider whether the Respondent had a genuine belief of guilt in relation to the alleged misconduct on the part of the Claimant, whether that belief was based on reasonable grounds and whether those grounds were based on reasonable investigation.
13. Having considered the BHS v Burchell test, if I felt that the conclusion in relation to the misconduct was in overall terms fair I then needed to consider the issue of sanction and bear in mind another well-known test set out in the case of Iceland Frozen Foods v Jones [1983] ICR 17, which required me to consider whether the decision to dismiss fell within the range of reasonable responses open to an employer in the circumstances.
14. In addition to that I needed to consider aspects of procedural fairness, both in terms of any of the Respondent's own procedures and the ACAS Code.
15. In relation to the unfair dismissal claim I was conscious that my role was to establish the reasonableness of the employer's actions; it was not for me to step into the shoes of the employer and to take a view as to whether the decision to dismiss was right or wrong.

Breach of Contract

16. With regard to the breach of contract claim the issues were not the same as for the unfair dismissal claim, in that it did not involve any assessment of the hypothetical reasonable employer. In that regard, if I concluded that the Claimant had been dismissed by the Respondent then I would need to be satisfied, on the balance of probabilities, that the Respondent had demonstrated that the Claimant had been guilty of gross misconduct, i.e. conduct which went to the root of the contract, which justified his dismissal without notice.

Unlawful Deduction from Wages

17. With regard to this claim, section 13 of the Act required me to consider what sums were due to the Claimant in respect of salary or wages up to

the termination of his employment; whether any of those sums had not been paid; and, if not paid, whether there was any lawful basis for such non-payment. If there was no such lawful basis, then I would need to assess the amount of money I should order to be paid as compensation for that non-payment.

Holiday Pay

18. In relation to the Claimant's claim that he had not been paid in respect of accrued but untaken holiday up to the termination of his employment, Regulations 13, 13A and 14 of the Working Time Regulations 1998 required me to consider the following:
 - 18.1 What was the Claimant's leave year?
 - 18.2 How much of the leave year had elapsed at the effective date of termination?
 - 18.3 In consequence, how much leave had accrued for the year under regulations 13 and 13A?
 - 18.4 How much paid leave had the Claimant taken in the year?
 - 18.5 How many days remained unpaid?
 - 18.6 What was the relevant daily rate of pay?
 - 18.7 How much pay, if any, was outstanding to be paid to the Claimant?

Findings

19. I heard evidence from Mrs Najat Sisodia and Mr Ranjit Sisodia, both directors of the Respondent; and Mr Lilla Maher, an employee of the Respondent, on behalf of the Respondent, and from the Claimant and Mr Christopher Sisodia on behalf of the Claimant. I also considered those pages within an agreed bundle of documents spanning 94 pages to which my attention was drawn by either party.
20. There were some stark differences in the evidence provided on both sides, with a clear difference between the version of events of the principal day, 30 September 2016, presented to me. In relation to the matters relevant for the purposes of the hearing, I made the findings set out below.
21. Before doing that however, it might assist the parties, and the witnesses who gave evidence, if I set out some general observations about witness evidence. In many cases, parties dispute what happened, and have a picture in their minds of what they believe happened, and which they believe is the only true picture. Parties often then believe that the other party is wilfully lying and that the tribunal, in deciding the case in favour of one side or the other, is deciding that one party is lying and the other telling the truth.
22. That, however, can be a misconception. First, a tribunal can never know what happened; all it can do is decide on the evidence, on the balance of probabilities, what probably happened. As the standard of proof is the balance of probabilities, there could, in any given case, be a strong

possibility, of nearly 50 per cent, that what a tribunal thinks happened did not in fact happen.

23. Second, the fact that someone genuinely believes something with conviction, whilst giving evidence on oath, does not mean that that person's recollection of events is necessarily correct, or that it is more likely to be correct than any other person's recollection. Human memory is fallible; people routinely misconstrue what is done and what is heard; over a period of weeks and months, feelings can turn into specific memories, which may not be entirely accurate; particular perspectives can influence recollection; there is also a normal human tendency to recollect things in a light most favourable to a party's case.
24. Ultimately therefore, a tribunal has to assess the evidence it hears, and I have looked for support for my findings from the contents of documentary evidence and from the inherent probabilities of the situation.
25. Moving to my specific findings, the Respondent is a company involved in the import and export of car parts. The majority of its shares are owned by Mr Ranjit Sisodia, with Mr Christopher Sisodia holding a minority interest. Until recently, both men were directors of the Respondent, although day-to-day management was undertaken by Mr Christopher Sisodia, certainly since Mr Ranjit Sisodia suffered ill health in 2008. I was informed that recently Mrs Sisodia, the step-mother of Mr Christopher Sisodia, had been appointed a director of the Respondent alongside her husband.
26. The Respondent is a small company, employing only three people; Mr Christopher Sisodia; the Claimant, who worked in the office as a sales assistant until 3.00pm each day (to enable him, as a single parent, to look after his primary school aged children after school); and Mr Lilla Maher, who worked in the warehouse.
27. The Claimant started work on 8 August 2011, and no evidence was put before me of any issue until the middle of 2016. By that point, although not directly relevant for my consideration of the Claimant's claims, the relationship between Ranjit and Christopher Sisodia appeared to have deteriorated.
28. Both parties put evidence before me of an incident that occurred between the Claimant and Mr Ranjit Sisodia in June 2016, and although not directly relevant to the Claimant's claim, it is appropriate for me to record my findings in relation to that incident. Mr Ranjit Sisodia and Mrs Sisodia, together with a legal adviser, visited the Respondent's premises unannounced on 14 June 2016, to speak to Mr Christopher Sisodia. A verbal altercation took place between Mr Ranjit Sisodia and Mr Christopher Sisodia, and there then followed an exchange of words between Mr Ranjit Sisodia and Mrs Sisodia on the one hand and the Claimant on the other.
29. This related to the Claimant's departure from the office at 2.45pm that day, He contended that he had agreed this with Mr Christopher Sisodia and had started work earlier that day to make up the time. However, Mr Ranjit

Sisodia would have been unaware of this and asked the Claimant to stay. The evidence on the Respondent's side was that the Claimant at this point became abusive and shouted, "*I'm not your fucking slave*". The evidence of the Claimant was that Mr and Mrs Sisodia had shouted and screamed at him.

30. As I have noted, the witness evidence from each side in relation to this incident was diametrically opposed. However, there was contemporaneous documentation within the Bundle to indicate that the Claimant's version of events was to be preferred. He had submitted a formal grievance on 16 June 2016 about the incident, (Bundle 2-4) and had contacted the police about it (Bundle 68).
31. Mr and Mrs Sisodia's evidence was that they had been away in Morocco dealing with the death of Mrs Sisodia's father when the grievance arrived and had themselves contacted the police on their return. However, the only documentary evidence to support this, a handwritten note dated 15 July 2016 (Bundle 7), referring to a call made to the police, related almost entirely to issues relating to Mr Christopher Sisodia, with the Claimant only being mentioned once alongside Mr Christopher Sisodia as having insulted Mr Ranjit Sisodia and his wife and with the note then referring to Mrs Sisodia protecting her husband by "*crying and screaming*" at Mr Christopher Sisodia to stop attacking her husband. There was no further reference to the Claimant at that point or in any other part of the note.
32. Notwithstanding the state of the documentary evidence however, there was no attempt to take disciplinary action against the Claimant in relation to the alleged shouting and swearing. I considered that such a step would have been likely to have been taken, notwithstanding the issues that had arisen in the lives of Mr and Mrs Sisodia at this time, in terms of Mr Sisodia's health and the deaths of both of Mrs Sisodia's parents, had the situation arisen as they described it.
33. The only other issue to note before the events of 30 September 2016, was that there appeared to have been difficulties in paying salaries in June, July and August 2016, due to cashflow difficulties, with the Claimant not receiving those salary payments when they fell due, although he had eventually received them.
34. The events of 30 September 2016 are the ones which directly led to the termination of the Claimant's employment. Again, there were diametrically opposing views of the events on that day put forward by the Claimant and Mr Christopher Sisodia on one side and by Mr Ranjit Sisodia and Mrs Sisodia on the other. The written statement of Mr Maher appeared, at first reading to support the latter version but, in the event, Mr Maher's oral evidence was rather different, and I discuss that in greater detail below.
35. The Claimant's version of events, which was supported by Mr Christopher Sisodia, was that on the morning of 30 September he attended at work at around 8:35am even though he was not feeling well. Mr Sisodia noted that the Claimant was unwell and told him that he should go home, but the Claimant explained to Mr Sisodia that it was pay day and that he could not

leave until accounts (which I understood to be a reference to an external accountant engaged by the Respondent) arrived to pay the wages as he had no money.

36. The Claimant stated that the accountant had arrived at around 10.00am and informed him that there was no money to pay salaries and that they had been attempting to contact the directors in relation to salaries for the previous two weeks. At this point the Claimant went home, and he was in fact driven home by Mr Christopher Sisodia, with Mr Maher minding the office during the period Mr Sisodia was absent.
37. The Claimant then stated that he was called by Mr Maher at around 10.45am who asked him to speak to Mr Ranjit Sisodia, which he did. The Claimant reported that he had asked Mr Sisodia when he would receive his salary, and that Mr Sisodia replied that the Respondent had no money and that he would be paid when the Respondent was paid. The Claimant stated that Mr Sisodia asked him to return to the office for a meeting which the Claimant indicated he was not prepared to do. He stated that Mr Ranjit Sisodia alleged that he was refusing to return because he had not been paid, but the Claimant stated that he told Mr R Sisodia that he had been sent home by Mr Christopher Sisodia and that he and Mr Maher could confirm that.
38. On the Respondent's side, Mr Ranjit Sisodia and Mrs Sisodia stated that they arrived at the Respondent's premises on 30 September at around 11.00am, accompanied by two friends or advisers, Mr Jamal Boujrad and Ms Nadia Sahir. They stated that their arrival was not previously announced as Mr Christopher Sisodia had avoided meeting with them when meetings had been arranged.
39. The evidence of Mr Ranjit Sisodia and Mrs Sisodia was that the Claimant was present when they arrived at the Respondent's premises but that he refused to speak with them and, in fact, left by the back door and did not return. They stated that they attempted to speak to the Claimant later that afternoon but that he ignored their calls and only answered when called from Mr Maher's phone. They confirmed that during that conversation the Claimant refused to return to the Respondent's premises.
40. As I have noted therefore, the evidence on both sides was entirely contradictory, with the Claimant and Mr Christopher Sisodia providing one version of events and Mr Ranjit Sisodia and Mrs Sisodia providing another. Both pairs of witnesses had vested interests in maintaining their version of events; with the Claimant obviously wishing to present his case in the best possible light, and Mr Ranjit Sisodia and Mrs Sisodia similarly wishing to present the Respondent's defence in the most advantageous way possible. Unfortunately, Mr Christopher Sisodia could also hardly be described as neutral in this case, in light of the dispute between him and his father and step-mother. I therefore considered the evidence of Mr Maher very closely, together with the contemporaneous documentary evidence, and also evidence that might have been expected to have been brought but was not.

41. With regard to that last point, I noted that there were other people in attendance at the Respondent's premises on the day in question; the accountant and the two friends/advisers, who could potentially have provided some relatively independent evidence, and yet none of them was called as a witness. In fact, it was the Claimant who had applied for a witness order for the accountant to attend as a witness, although his application had been refused. Those circumstances suggested that the witness evidence on the Claimant's side was to be preferred.
42. The documentary evidence was itself also contradictory. There was a letter from Mr Ranjit Sisodia to the Claimant dated 4 October 2016, to which I refer further below, in which the Claimant's employment was terminated, which referred to a failure by the Claimant to attend a meeting and also referred to the Claimant having left the premises by the back door. By contrast, there was an email from the Claimant to the Respondent on 11 October 2016 in which he set out a summary of events which was consistent with the evidence he gave before me and in which he refuted the version of events set out by Mr Sisodia in his letter.
43. Turning to the evidence of Mr Maher, his written statement read as supportive of the Respondent's case, as it noted that the Claimant, along with Mr Christopher Sisodia had been rude to Mr Ranjit Sisodia and Mrs Sisodia on 30 September 2016, and that the Claimant had left the premises even though it was not his time to go home. However, on taking his oath before giving evidence it became apparent that Mr Maher could not read English. His standard of spoken English was also not high, his first language being Gujarati. He confirmed, as was obvious from his inability to read English, that, whilst he had signed the statement, he had not prepared it, although he did confirm that he had not been put under any pressure to sign it.
44. I proceeded to receive Mr Maher's evidence via the method of the Respondent's representative reading out the statement line by line and with Mr Maher confirming it as his evidence. However, on several occasions, Mr Maher responded to a sentence read by Mr Stephens with the comment of, "I don't know about this" and it became apparent that he had not approved his statement before the hearing. In particular, Mr Maher commented, "I don't know about this" in relation to the sections of his statement I have noted at paragraph 43 above.
45. Under cross-examination by the Claimant, Mr Maher confirmed that the Claimant had been driven home by Mr Christopher Sisodia on the day in question, and that the Claimant had not been at the Respondent's premises when Mr Ranjit Sisodia and Mrs Sisodia had arrived. Ultimately, whilst Mr Maher's evidence was at times confused, I suspect due to his relatively poor command of English, I was satisfied that his oral evidence under cross-examination was genuinely delivered.
46. Overall therefore, I considered that the evidence put forward on the Claimant's side in relation to the events of 30 September 2016 was to be preferred.

47. Following the events of 30 September, there was an exchange of telephone calls and messages in the following week between the Claimant and Mr Ranjit Sisodia and Mrs Sisodia surrounding the Claimant's unpaid salary for September and requests by the Respondent for information from the Claimant, including the password to the Claimant's computer.
48. Within the bundle were handwritten notes made by Mrs Sisodia noting attempts to call the Claimant on Tuesday and Wednesday, 4 and 5 October, and calls from the Claimant on Thursday and Friday, 6 and 7 October (Bundle 17-19). The note of the call on 6 October, to Mr Maher, noted that the Claimant stated that he was on holiday for two weeks, and the note of the call on 7 October, of a call to Mrs Sisodia herself, noted that the Claimant was seeking payment of his wages. The Claimant's evidence was that he spoke to Mr Ranjit Sisodia about his salary on 7 October and also received a call from Mrs Sisodia on that day seeking the password to his computer, which the Claimant indicated he provided, and during which he repeated his request for information on the payment of his salary.
49. The Respondent disputed that holiday had been booked by the Claimant, noting that there was no documentary evidence to support it. However, bearing in mind that the Respondent had only three employees, the lack of documentary evidence was not surprising, and I did not consider that it was probative of the Claimant not having booked the holiday.
50. On the Claimant's side, Mr C Sisodia, in his evidence before me, and in an email that he had sent to the Claimant and his adviser in January 2017, noted that he had authorised the Claimant to take the holiday. Also, the Claimant had made reference to the holiday in an email to the Respondent on 11 October 2016 and, when asked by Mr Stephens about the inherent improbability of him taking two weeks' holiday during term time when he was the primary carer for two primary school-aged children, provided a cogent response when he replied that he had arranged the leave to look after his adult daughter who was being released after a period spent in a psychiatric hospital.
51. Finally in relation to the issue of holiday, Mr Maher in his written statement had noted that the Claimant had asked him, during a call on Thursday 6 October 2016, to tell the directors that he was on holiday, with the statement noting that this was a surprise to Mr Maher as the Claimant had not mentioned that at any time before. However, on being questioned on this point, Mr Maher stated that the Claimant had told him previously that he was going on holiday.
52. Overall therefore I preferred the Claimant's version of events regarding the reason for his absence from work in the week commencing 3 October 2016.
53. The final element in relation to events was a letter from Mr Ranjit Sisodia to the Claimant dated 4 October 2016 (Bundle 16), although it was accepted by the parties that it was sent by the Respondent on 7 October and received by the Claimant on 8 October. A draft of this letter had been sent to Mrs Sisodia by Jamal Boujrad by email on 4 October, Mr Ranjit

Sisodia having asked Mr Boujrad to prepare it. In the letter, Mr Sisodia noted that the Claimant had failed to attend a meeting on 30 September as requested and had left the premises by the back door. He went on to say that the Claimant had failed to return a call requesting the computer password. He concluded by saying that, following the Claimant's "*act of insubordination and irresponsible behaviour*", he had been left "*with no choice but to terminate [the Claimant's] position as a part time employee forthwith*". Both Mr Sisodia and Mrs Sisodia confirmed in their evidence that the intention behind the letter of 4 October was to dismiss the Claimant.

54. There was no attempt on the part of the Respondent to carry out any form of disciplinary process in relation to its concerns over the Claimant's conduct, nor was he afforded any opportunity to appeal against the dismissal decision. When asked why they had not thought to hold a hearing of any sort, both Mrs Sisodia and Mr Ranjit Sisodia replied that they had not thought it was necessary.
55. There continued to be some contact between the Claimant and the Respondent after 8 October 2016 by email and telephone regarding the Claimant's wages and the computer password, I did not consider that it had any relevance to the issues I had to consider.
56. The only other factual issues for me to record related to the Claimant's salary for the month of September and the position relating to the Claimant's holiday entitlement.
57. With regard to salary, a concession was made by Mr Stephens, at the commencement of the evidence before me, that the Respondent accepted that it had an obligation to pay the Claimant his salary for the month of September and that it would do so within seven days of the hearing.
58. With regard to holidays, Mr Ranjit Sisodia and Mrs Sisodia both confirmed that they had no knowledge of the Claimant's entitlement as such matters were handled by Mr Christopher Sisodia. Both the Claimant and Mr Christopher Sisodia confirmed that the Claimant had been issued with a contract of employment at the commencement of his employment, with the Claimant confirming that his entitlement was to 20 days' holiday per year, which I took to be in addition to public holidays. Both witnesses confirmed that the contract had not said anything about the leave year applicable to the Claimant.

Conclusions

Unfair Dismissal

59. In relation to the issues identified above, I first considered the Respondent's contention that it had not dismissed the Claimant, but had, instead, simply accepted the Claimant's repudiatory breach, such that he could not bring an unfair dismissal claim. Having considered the Rasool case in detail, I have to say that I found the Respondent's contention, based upon that case, rather strange.

60. My reading of the case is that it confirmed that, even where a claimant has committed a repudiatory breach of contract, a respondent's election to accept that breach nevertheless amounts to a dismissal. As noted in the headnote of the case report, "*If an employer elects to treat an employee's repudiation of the contract as discharging the employer from further performance of the contract, it is the employer rather than the employee who terminates the contract within the meaning of para. 5(2)(a) of Schedule 1 to the Trade Union and Labour Relations Act 1974*". That legislation has long since been repealed, but the wording of the paragraph under consideration is very similar indeed to the wording currently found at section 95(1)(a) of the Act. As a consequence, and applying the guidance provided by the Rasool case, regardless of my conclusion as to whether or not the Claimant in this case had committed a repudiatory breach, I could not accept the Respondent's contention, and concluded that there was a dismissal of the Claimant by the Respondent, the fairness of which would need to be considered by reference to section 98(4) of the Act.
61. Looking at that issue, I was satisfied, although it had not been expressly pleaded, that the Respondent had established that its reason for dismissing the Claimant related to contentions regarding his conduct, as the Respondent's letter of 4 October 2016 referred to allegations regarding the Claimant's "*insubordination*" and "*irresponsible behaviour*".
62. I then considered whether dismissal for that reason was fair in all the circumstances, applying section 98(4) of the Act and the guidance provided by the Burchell case, and also looking at procedural aspects. In light of my findings above, I reached my conclusions on the question of fairness without difficulty, and can express them quite succinctly.
63. Looking at procedural issues first, as I have recorded at paragraph 55 above, there was no attempt made by the Respondent to hold any form of disciplinary hearing in relation to the allegations raised regarding the Claimant's conduct, nor was he given the opportunity to appeal against the decision to dismiss him.
64. I was not provided with a copy of any disciplinary procedure that might have applied within the Respondent, and presume therefore that one does not exist. However, it is a fundamental expectation within the ACAS Code that a hearing will be held before disciplinary action is taken, with the provision of information in writing to the employee about the allegations before any such hearing in order that the employee should have an opportunity to defend themselves. The ACAS Code also requires that an employee against whom disciplinary action is taken should have an opportunity to appeal against that decision, and there was no attempt made by the Respondent to hold any form of appeal in this case either. It was a therefore a straightforward conclusion for me to reach that the dismissal of the Claimant was unfair on procedural grounds.
65. I was also satisfied however, that the dismissal of the Claimant by the Respondent was unfair on substantive grounds. Applying the Burchell test to my findings above, and noting that I preferred the evidence provided on

the Claimant's side relating to the events of 30 September 2016, and that the Claimant was on prearranged annual leave in the following week, I was not satisfied that the construction placed by the Respondent on the events of 30 September 2016 had been substantiated. I did not therefore consider that the Respondent had reasonable grounds for concluding that the Claimant had committed an act of gross misconduct, and the decision to dismiss was therefore substantively unfair on that basis.

66. Notwithstanding that my decision on remedy in relation to my conclusion that the Claimant was unfairly dismissed is to be stayed, I considered that it would be appropriate for me to provide guidance to the parties in relation to aspects of any remedy decision relating to that conclusion which will not be influenced by any evidence advanced by the Respondent regarding knowledge acquired after the dismissal of what might be alleged to have been gross misconduct on his part prior to dismissal.
67. I can therefore confirm that, in light of my findings, I do not consider that it will be appropriate to apply a deduction from any unfair dismissal compensation awarded to the Claimant through the application of the "Polkey" principle, i.e. on the basis that the dismissal could potentially have taken place fairly, notwithstanding the procedural deficiencies. I also do not consider that there will be any deduction on the grounds of any contributory conduct by the Claimant.
68. To clarify therefore, subject to any issues that might be taken regarding the Claimant's mitigation of his losses arising from the dismissal, the only factor to be taken into account regarding compensation will be any issue arising from any evidence relating to conduct of the Claimant discovered after the dismissal, applying the Devis v Atkins principle.

Breach of Contract

69. Having concluded that the Claimant had not committed an act of gross misconduct, he had consequently not committed any repudiatory breach and therefore the Respondent's failure to pay him in respect of his notice period amounted to a breach of contract. Therefore, again, subject only to any issues regarding misconduct of the Claimant discovered after the dismissal, compensation will need to be awarded in respect of the Claimant's notice period.

Unlawful deductions from wages

70. In light of the Respondent's concession regarding the payment of the Claimant's salary for September, the Respondent is required to pay, and I hope by the time this judgment has been issued, will have paid, the gross sum of £980.00 to the Claimant in respect of his salary for September. However, the Claimant's employment was not terminated until 8 October 2016, and he was entitled to be paid salary until that date. I therefore order that the Respondent should pay the Claimant in respect of that period, a gross sum of £257.75, making a total gross sum of £1,237.75.

Holiday Pay

71. As the evidence indicated that the Claimant's contract was silent on the question of the Respondent's leave year, my consideration of the Claimant's entitlement to holiday pay therefore had to apply the provisions of the Working Time Regulations 1998. Regulation 13(3)(b) stipulates that, in the absence of any other indication, an employee's leave year commences on the date of the commencement of his employment. In the Claimant's case, that was 8 August, which meant that the leave year applicable to him commenced on that date.
72. The most recent leave year for the Claimant therefore commenced on 8 August 2016. In light of the fact that the Claimant's employment terminated on 8 October, that meant that two months of his leave year had elapsed by then. At the rate of 1.66 days' per month, that meant that he was entitled to 3.5 days' holiday in the leave year 2016/2107, no bank holidays having fallen within that period. However, the Claimant, by his own evidence, took holiday for the week commencing 3 October 2016, for which, pursuant to my conclusions at paragraph 70 and paragraph 7 of my Judgment above, he will ultimately be paid. The Claimant had therefore taken his holiday entitlement for the relevant year and had, in fact, slightly exceeded his entitlement. There was therefore nothing further to award in respect of the Claimant's holiday entitlement, and his claim in respect of that was dismissed.

Employment Judge Jenkins

Date: ...4 April 2017.....

Reserved Judgment and Reasons

Sent to the parties on:

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For the Tribunals Office