EMPLOYMENT TRIBUNALS

Claimant: Miss D Hanson

Respondents: 1. Mr M D Oliver
2. Cookson Office Cleaners (a firm)

HELD AT: Liverpool **ON:** 3 – 5 July 2018

BEFORE: Employment Judge Holbrook
Ms H D Price
Mrs J C Fletcher

REPRESENTATION:

Claimant: In person
Respondents: Mr M Oliver, partner

JUDGMENT having been sent to the parties on 19 July 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

INTRODUCTION

1. This case concerns a number of claims made by Miss Dawn Hanson in two separate ET1 claim forms. All claims are made against Miss Hanson's former employer, Cookson Office Cleaners, the second respondent in this case. This is a firm in which the first respondent, Mr Mark Oliver, is a partner. It is accepted that Mr Oliver bears ultimate responsibility for acts done in the name of the firm, and we refer simply to 'the respondent' in these reasons.

2. In her first ET1, Miss Hanson alleges that she was unfairly dismissed by the respondent in October 2017 from her employment as a cleaner at the premises of United Storage in Birkenhead. She says that she was automatically unfairly dismissed by reason of having made protected disclosures earlier that year. Miss Hanson also says that, prior to her dismissal, she had been subjected to a series of unlawful detriments by the respondent because she had made those disclosures. Alternatively,

Miss Hanson makes a claim for 'ordinary' unfair dismissal. She also claims that she was owed accrued holiday pay at the end of her employment.

3. Miss Hanson's second ET1 claim form alleges that she was unfairly dismissed from a separate employment with the respondent, as a cleaner at the Stenna Line ferry terminal in Birkenhead, in February 2018. Again, Miss Hanson asserts that this was an automatically unfair dismissal because the principal reason for it was that she has made the same protected disclosures.

4. The Tribunal heard oral evidence and submissions by the parties over the course of three days from 3 to 5 July 2018. The claimant gave oral evidence herself and called one witness in support, Greg Bailey. Two witnesses gave oral evidence for the respondent: Mark Oliver and Lorraine Jones. Each witness also provided a written statement of their evidence, and the Tribunal was referred to various documents in an agreed hearing bundle.

FACTS

5. The principal facts which are relevant to the issues in this case are summarised below. However, for ease of presentation, additional facts are also set out in the 'Discussion and conclusions' section of these reasons.

6. Miss Hanson began her employment with the respondent (which operates a contract cleaning business) in August 2005. Initially, she worked as an office cleaner for 16 hours each week at the Stenna Line ferry terminal in Birkenhead (Stenna Line being one of the respondent's customers). She had obtained the job via a job centre and it involved early morning shifts cleaning offices, for which she was paid the national minimum wage. Miss Hanson was not provided with a written contract of employment, but she did receive an induction pack setting out the basic terms of her employment. She was paid fortnightly by the respondent by bank transfer and she received pay slips issued by the respondent.

7. Miss Hanson's supervisor throughout her employment was Mrs Lorraine Jones, a senior employee of the respondent. Mrs Jones also supervised the respondent's contract to clean adjoining premises owned by United Storage. In October 2013, Mrs Jones offered Miss Hanson additional work cleaning at United Storage's premises. This involved working 1.5 hours in the evenings on Mondays to Fridays, again for the national minimum wage. Miss Hanson agreed to do this additional work and the total pay she received from the respondent obviously increased to reflect the additional hours she worked. Miss Hanson continued to receive a single fortnightly payment by bank transfer for all the work she did for the respondent, and just one payslip.

8. In late 2016/early 2017, Miss Hanson became concerned and aggrieved that two of her co-workers at the ferry terminal were abusing the fact that their work was largely unsupervised. The individuals in question were employed by the respondent to clean the offices at weekends. However, Miss Hanson believed that they were failing to carry out their duties properly and, indeed, that they were falsifying signing-in sheets to make it appear that they had worked far more hours than was in fact the case. Miss Hanson raised her concerns with Mr Oliver verbally and in emails sent on 10 January and 8 February 2017.

9. Miss Hanson says that, after she initially alerted Mr Oliver to her concerns, he asked her to help him obtain further information to prove any wrongdoing on the part of the individuals concerned. Miss Hanson says that this was why she sent Mr Oliver a number of emails on 8 February. However, Miss Hanson believes that this marked a turning point in her relationship with Mr Oliver. She says that, although they had previously enjoyed a good working relationship, his attitude towards her changed following the disclosures, and that she was thereafter subjected to what amounted to a campaign of harassment.

10. It is clear that the working relationship between Miss Hanson and Mr Oliver certainly became difficult during 2017. Mr Oliver made a number of inspection visits to the premises where she worked between May and October 2017 and, whilst there is considerable disagreement about what happened during those visits, it is clear that all was not well between employee and employer. For a period of a fortnight during August 2017, Mr Oliver prevented Miss Hanson from working at the United Storage site and she suffered a reduction in earnings during this period as a result.

11. Matters came to a head on 12 October 2017 when Mr Oliver visited the Stenna Line site while Miss Hanson was working there. He asked Miss Hanson for the keys to the United Storage premises so that he could inspect them. This evidently resulted in an altercation between them, but they subsequently both went to the United Storage site where Mr Oliver carried out the inspection and then told Miss Hanson that she could no longer work there. Nevertheless, Mr Oliver made it clear that Miss Hanson should continue with her duties at the Stenna Line ferry terminal, and she did so for a period of about four months thereafter.

12. In November 2017, Miss Hanson raised a grievance complaining about not being provided with a waterproof coat and about Mr Oliver's treatment of her more generally, which she described as bullying. A grievance meeting was held on 23 November and, on 29 November, Mr Oliver wrote to Miss Hanson rejecting her grievance. Miss Hanson appealed and, at this point, Mr Oliver decided to engage the services of an HR consultant, Ms Sheena Carroll, to deal with the grievance appeal. By this time Mr Oliver had also decided to commence disciplinary proceedings against Miss Hanson because of concerns he had about her conduct, and Ms Carroll was asked to deal with the disciplinary matter as well.

13. The grievance appeal meeting was duly held and, on 2 January 2018, Ms Caroll wrote to Miss Hanson with her conclusions. The majority of the grievance was not upheld, although Ms Caroll did find that Miss Hanson should have been given more notice of the reduction in her pay resulting from her removal from the United Storage assignment. The respondent has since paid Miss Hanson compensation in this regard.

14. As far as the disciplinary process was concerned, Ms Caroll conducted a disciplinary investigation meeting with Miss Hanson on 18 January 2018 and she subsequently prepared a report for Mr Oliver. A disciplinary hearing was held on 13 February and, on 23 February, Mr Oliver wrote to Miss Hanson with his conclusions. The letter recorded that Miss Hanson had sworn at Mr Oliver on 12 October 2017 and that he found that to be unacceptable. Mr Oliver maintained that he had never himself sworn at Miss Hanson, as she had accused him of doing in her grievance. The letter further noted that Miss Hanson had accused Mr Oliver of bullying, which he did not accept, and that her attitude had, in his view, been aggressive. He considered that the

allegations Miss Hanson had made were vexatious and that her conduct had further damaged their working relationship. Mr Oliver concluded that Miss Hanson's actions amounted to gross misconduct meriting her summary dismissal.

LAW

15. Some dismissals are automatically unfair. In particular, a dismissal is unfair if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

16. In addition, a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by her employer done on the ground that the worker has made a protected disclosure.

17. A protected disclosure is a "qualifying disclosure" within the meaning of section 43B of the Employment Rights Act 1996, which is made by a worker in accordance with any of sections 43C to 43H. In particular, a disclosure of information by a worker to her employer is a protected disclosure if, in the reasonable belief of that worker, it is made in public interest and tends to show that a criminal offence has been, or is being, committed.

18. Even if a dismissal is not automatically unfair, it will nevertheless be unfair if it is not for a reason which is potentially fair – and it is for the employer to show what the reason for dismissal was. Conduct (or misconduct) is a potentially fair reason, and if the Tribunal finds that misconduct was the reason for the dismissal, it must go on to consider whether the dismissal was fair or unfair having regard to the reason for it, and this will depend on whether in all the circumstances (including the size and administrative resources of the employer's undertaking) the respondent acted reasonably or unreasonably in treating the reason as sufficient for dismissing the claimant. The burden of proof at this stage is neutral as between the parties and the Tribunal must determine the question in accordance with equity and the substantial merits of the case.

19. In cases concerning conduct dismissals, it is well established following the case of British Home Stores Ltd v Burchell [1980] ICR 303 (EAT) that the Tribunal must be satisfied that the employer believed the employee was guilty of the misconduct in question; that it had in mind reasonable grounds upon which to sustain that belief; and, at the stage at which that belief was formed on those grounds, it had carried out as much investigation into the matter as was reasonable in the circumstances. If the Tribunal is satisfied on each of these matters, then it must find the dismissal to have been fair if dismissal for the misconduct in question falls within the range of responses which a reasonable employer could make in the same circumstances.

DISCUSSION AND CONCLUSIONS

Holiday pay

20. We can deal briefly with the claim for holiday pay. During the course of the hearing, the parties were able to agree that Miss Hanson does have an entitlement to unpaid holiday pay. The amount to which she is entitled was agreed as being £112.50, representing pay for ten days, for each of which Miss Hanson should have been paid for 1.5 hours work at a rate of £7.50 per hour.

Employment status and cessation of work at United Storage

21. Miss Hanson has made two separate claims for unfair dismissal. She has done so on the basis that she claims to have had two separate contracts of employment with the respondent – the first relating to her work at United Storage and the second relating to her work at the Stenna Line ferry terminal – and that she was separately dismissed from each: in October 2017 and in February 2018 respectively.

22. The Tribunal must determine whether this is a correct analysis of the contractual relationship between the parties or whether, as the respondent maintains, there was merely a single overarching contract of employment covering all of the work which Miss Hanson was engaged to perform.

23. We find that the respondent's analysis is to be preferred to that of Miss Hanson: there was just one contract of employment between the parties. In coming to this view, we note that there was no separate express contract covering the additional work which Miss Hanson agreed to do at United Storage. It is apparent that Miss Hanson simply agreed to carry out additional work, which was work of a very similar nature to that already been undertaken by her for the respondent, and which was supervised by the same manager: Mrs Jones. There was no change in Miss Hanson's hourly rate of pay and the arrangements by which she was paid are also indicative of a single employment relationship.

24. It follows that the cessation of Miss Hanson's work at the United Storage site in October 2017 did not constitute a termination of a contract of employment. It was not a dismissal. What it was, however, was a unilateral variation of the overarching employment contract by the respondent. There is an obvious question mark as to whether the respondent was entitled to impose such a variation. It could have certainly employed greater sensitivity in its actions in this regard, with better consultation and more notice. However, issues concerning a possible breach of contract in this regard are not for the Tribunal to address in the present proceedings. It is clear that Miss Hanson accepted the variation in her terms of employment – albeit grudgingly – because she continued to perform her duties at the Stenna Line ferry terminal even after the reduction in her hours and pay. She did not resign from her employment and so there can be no question of her having been constructively dismissed.

Protected disclosures

25. It follows from our conclusions about the nature of the employment relationship that Miss Hanson cannot have been unfairly dismissed in October 2017. Nevertheless, we must still consider her claim that she was subjected to various detriments because she had made protected disclosures. Such a claim may succeed without there having been any dismissal.

26. Miss Hanson alleges that she was subjected to a series of detrimental acts. She requested that she be issued with a waterproof coat in March 2017, but was not provided with one until November that year. She claims that Mr Oliver was aggressive in his dealings with her; that he singled her out for a number of inspection visits at work, during which he was abusive and unduly critical of her work; and that he swore at her on a number of occasions. Miss Hanson also alleges that Mr Oliver threatened to dismiss her without due process and that, in August 2017, there was a period of a

fortnight during which she was not permitted to work at United Storage, suffering a reduction in pay as a result.

27. For this element of her claim to succeed, however, Miss Hanson must first establish that she made one or more protected disclosures. The disclosures on which she relies relate to conversations she had with Mr Oliver, and to emails and texts sent to him, in January and February 2017. Although there is some dispute about the number of such communications which took place, it is agreed that some did occur and there is also agreement as to their content: they concerned the matters summarised in paragraph 8 above. The question is whether these disclosures had the status of protected disclosures.

28. Miss Hanson's case is that these were indeed protected disclosures – because they tended to show that a criminal offence was being committed; namely, fraud. However, such a disclosure will only qualify for protection if, in the reasonable belief of the person making it, the disclosure was made in the public interest. We have looked carefully at the content of the disclosures made by Miss Hanson and it does not appear to us that her motivation for making them arose from concerns about the wider implications of the potentially unlawful conduct in question. Instead, Miss Hanson's actions appear to have been motivated by self-interest arising from the fact that the poor performance of the individuals concerned had a knock-on effect for the work which Miss Hanson herself then had to do. The tenor of the emails which she sent to Mr Oliver also suggest a degree of personal animosity on Miss Hanson's part towards the individuals concerned. Consequently, we are not persuaded that Miss Hanson reasonably believed that she was making these disclosures in the public interest and it follows that her whistleblowing claim cannot succeed.

29. Even if we are wrong about the legal status of the disclosures made by Miss Hanson, her protected disclosures/detriment claims would still not succeed, in our judgment. Whilst it is clear that some of the acts complained of did happen (for example, Mr Oliver did make several visits to inspect Miss Hanson's work; he did suspend her from work at the United Storage site for a fortnight in August 2017; and there was a delay in issuing her with a waterproof coat), insufficient evidence has been produced to persuade us that other incidents – such as Mr Oliver being abusive to Miss Hanson – actually occurred. In relation to those of the alleged acts which have been admitted or established by evidence, the respondent offered legitimate explanations. For example, Mr Oliver told us that, initially, waterproof coats were only issued to staff who were required to do cleaning work outside (which did not include Miss Hanson). He denied that she received more inspection visits than other staff did, or that he was ever verbally abusive to her. Miss Hanson had been removed from the United Storage assignment because of complaints by the client about the poor standard of her work. Moreover, even if all of the alleged detrimental acts did occur, it has not been established that the disclosures relied on by Miss Hanson were the cause of those acts.

Dismissal from employment in February 2018

30. Finally, we turn to the question of whether Miss Hanson was unfairly dismissed from her employment with the respondent in February 2018. It is agreed that, on this occasion, she was indeed dismissed by Mr Oliver. The dismissal was not automatically unfair (because, in our judgment, no protected disclosure had been made), and the

respondent maintains that the dismissal was indeed fair when assessed against the ordinary principles of employment law.

31. The respondent's case is that Miss Hanson was fairly dismissed for gross misconduct. The misconduct in question concerned allegations that Miss Hanson had sworn at Mr Oliver during their altercation at the ferry terminal on 12 October 2017; that she was generally insubordinate, refusing to comply with reasonable instructions given by her supervisor (Mrs Jones); and that she had made unfounded allegations of bullying against Mr Oliver.

32. We must consider whether the alleged misconduct was indeed the principal reason for Miss Hanson's dismissal. This requires us to make a finding about whether Miss Hanson swore at Mr Oliver (as he alleges she did) on 12 October 2017. The evidence as to what happened on that day is contradictory and it is impossible for us to know with certainty what happened, or who said what to whom. It appears that Miss Hanson was cleaning a locker room at the ferry terminal when Mr Oliver approached her to ask for the United Storage keys. Miss Hanson says that, in addition to Mrs Jones, the incident was witnessed by a number of individuals who were in the locker room at the time. Unfortunately, Mr Bailey was the only one of those individuals to give evidence at the hearing: he said that he had walked in on a heated conversation between Miss Hanson and Mr Oliver, and that it was Mr Oliver who was being verbally abusive. This was denied by Mr Oliver, however, and Mr Bailey's evidence was also entirely at odds with that of Mrs Jones, who recalls that it was Miss Hanson who was swearing. It is clear that the situation was both difficult and heated and it seems to us not unlikely that intemperate language might have been used on both sides. Nevertheless, we find that Miss Hanson probably did swear at her employer on this occasion and we note that, in the minutes of a disciplinary investigation meeting conducted by Ms Caroll on 18 January 2018, Miss Hanson is recorded as having said "I did call him a bully and to be honest I probably did say 'fucking bully'".

33. The evidence presented to the Tribunal demonstrates a pattern of ongoing concern on Mr Oliver's part about Miss Hanson's work and about her conduct. We are satisfied that it was these concerns that prompted Mr Oliver's inspection visits to her places of work, and that it was Miss Hanson's conduct which was the reason why Mr Oliver ultimately decided to dismiss her. There is no credible evidence that his decision was motivated by other factors, in particular by the disclosures about her co-workers which Miss Hanson had made a year previously.

34. Mr Oliver believed that Miss Hanson was guilty of the misconduct for which he dismissed her. But did he have reasonable grounds for that belief? The answer is clearly yes. Mr Oliver had obviously been directly involved in the incident on 12 October 2017, and he had also been personally involved in monitoring Miss Hanson's work and in dealing with her complaints. He had engaged Ms Caroll to conduct a disciplinary investigation (which she had done) but, in truth, these matters required little detailed investigation given Mr Oliver's direct knowledge of the relevant events.

35. Mr Oliver also had the benefit of Ms Caroll's professional advice and assistance in the conduct of the disciplinary process, and we find that the process itself was basically sound. Any minor irregularities that there may have been were not such as to undermine the fairness of the overall process.

36. We find that summary dis[illegible]nduct of the kind alleged in this case is well within the range of responses which a reasonable employer could make. Mr Oliver was aggrieved that allegations had been made against him which he considered to be without foundation. He also concluded that the employment relationship with Miss Hanson had deteriorated to such an extent that the situation had become irreparable. In the circumstances, therefore, we find that Miss Hanson's dismissal was not unfair and that her claim of unfair dismissal must therefore fail.

Employment Judge Holbrook

Date 22 August 2018

REASONS SENT TO THE PARTIES ON

24 August 2018

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number(s): **2400014/2018**

Name of case(s): **Miss D Hanson** v **Mark David Oliver Cookson Office Cleaners (a firm)**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is:	19 July 2018
"the calculation day" is:	20 July 2018
"the stipulated rate of interest" is:	**8%**

MISS H KRUSZYNA
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at
www.gov.uk/government/collections/employment-tribunal-forms

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.