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# EMPLOYMENT TRIBUNALS

| *Claimant* | | | *Respondent* |
|---|---|---|---|
| **Mr F Garcia** | ` | **AND** | **Vigilant Security (Scotland) Ltd t/a Croma Vigilant** |

## PRELIMINARY HEARING

**HELD AT:** **London Central** **ON:** 1 & 2 May 2019

**BEFORE:** Employment Judge Brown (Sitting alone)

***Representation:***

**For Claimant:** Mr S Irving, FRU
**For Respondent:** Mr R Chaudhry, Solicitor

## JUDGMENT

**The Judgment of the Employment Tribunal is that:**

1. **The Respondent dismissed the Claimant on 13 February 2018.**

2. **The Respondent wrongfully dismissed the Claimant when it failed to pay him 11 weeks' notice pay to which he was entitled.**

3. **The Respondent did not unfairly dismiss the Claimant.**

4. **The Respondent failed to pay the Claimant holiday pay accrued on termination of his employment under the Working Time Regulations.**

5. **The Respondent shall pay to the Claimant £3,583.91 notice pay, in compensation for wrongful dismissal.**

6. **The Respondent shall pay the Claimant £1,569.40 on account of accrued holiday pay at termination of employment, under the Working Time Regulations.**

# REASONS

## Preliminary

1. The Claimant brings complaints of unfair dismissal, wrongful dismissal and failure to pay holiday pay against the Respondent, his former employer.

2. The Claimant confirmed at the start of this hearing that he was not bringing a separate claim for unlawful deductions from wages.

3. The parties had agreed the issues to be decided. The parties agreed that I should determine issues of liability, first, and then if appropriate go on to consider issues of remedy. They agreed that issues regarding contributory fault and Polkey should be determined at the liability stage. The issues for me to decide at liability stage were therefore as follows:

Unfair/Wrongful dismissal

1) Was the Claimant dismissed:

a) expressly at the meeting on 13 February 2018; or
b) on 13 February 2018 in that his contract was wholly withdrawn from him, applying **Hogg v Dover College 1990 ICR 39;** or
c) on 19 March 2018 in that his contract was wholly withdrawn from him?

2) Was the dismissal fair:

a) did the Respondent adequately seek the Claimant's return to the Cavendish Square site;
b) did the Respondent conduct a reasonable search for alternative employment?

3) Did the Claimant's actions contribute to his dismissal and to what extent?

4) Does the Polkey reduction apply, would the Claimant have been dismissed in any event had fair procedures applied?

Holiday Pay

5) For the purposes of calculating the Claimant's entitlement to accrued holiday pay on termination, was the period of 12-19 January 2018 annual leave or not? The Claimant will argue that it was compassionate leave and should not be deducted from his entitlement.

4. I heard evidence from the Claimant. I heard evidence from Mr Paul Brady, the Respondent's Contracts Manager; and from Mr Guy Rampe, the

Respondent's Regional Operations Director. There was a bundle of documents. Both parties made submissions.

**Findings of Fact**

5. The Claimant's continuous period of employment started on 14 April 2006. He transferred pursuant to the TUPE regulations to the Respondents on 4 May 2010.

6. The Respondent provides post room workers, concierges and security staff to clients. At the material times in this case, the Claimant was employed by the Respondent as a post room worker at a large building, 33 Cavendish Square, London, "Cavendish Square". Cavendish Square is owned by a company, GVA, which contracts out various aspects of its management. The Respondent provides post room services to GVA and the Claimant was placed by the Respondent at Cavendish Square pursuant to its service contract with GVA.

7. The Claimant's 3 November 2009 contract, which was the contract on which he was TUPE transferred to the Respondent, had a number of relevant provisions. The contract was renewed on 3 May 2011, page 45, but the contract of 3 November 2009, page 33, provided the detailed terms upon which the Claimant was working. The renewed contract, at page 45, left the relevant provisions blank, but contained the same standard terms.

8. The 2009 contract provided, at paragraph 3 Job Title, Duties and Place of Work,

> 3.1 "Your job title is **Team Leader** or as subsequently amended in writing. You currently report to the **Security Manager.** This position applies solely to your current site only. In the event that you transfer to another site location for whatever reason, this information will be altered accordingly.
> …
> 3.3 You are currently assigned to **F69 – Cavendish Square**. However, the company reserves the right to change your location to any other Site Assignment in the United Kingdom. All reasonable efforts will be made by us to place you at Site Assignments or locations within reasonable travelling distance of your home and/or place of residence….
>
> 3.5 Your employment at this location remains at all times subject to client approval. In the event that our client requests your removal from site we will fully investigate the events leading up to the request before any action is taken. Action taken may include redeployment to another site or dismissal from the company".

9. Under paragraph 4 Remuneration and Pay, the contract provided:

> "4.1 Your salary will be **£10.35** per **hour** subject to the deduction of income tax and national insurance …

4.2 This rate of pay applies only to your current site assignment and is not transferable. Should you move to a new assignment you will receive the rate of pay applicable to that assignment …"

10. Under paragraph 6 Hours of Work and Working Time Regulations, the contract provided

"6.1 Your normal hours of work in respect of your present Site Assignment are 50 per week. Due to the nature of your role, you may from time to time be expected to work additional hours in order to ensure that your duties are satisfactory completed. Your normal hours of work will vary from time to time depending on your current Site Assignment.

6.2 To meet the requirements of our business you can be asked to work more than an average of 48 hours per week. To enable you to do this we ask you to complete and sign the section below …"

11. Under the paragraph 7 Holidays and Annual Leave, the contract provided

"7.1 The Company's holiday "leave year" runs from 1 April to 31 March each year …

7.2 You are entitled to 5.6 weeks paid annual leave inclusive of paid time off work for all back or public holidays …"

12. It was not in dispute that the Claimant worked 50 hours a week at Cavendish Square during week days, 7am to 5pm, 10 hours a day. It was also not in dispute that the Respondent had a policy, of which the Claimant was aware, requiring employees, including the Claimant, to declare gifts to the Respondent of the value of more than £20.

13. Cavendish Square is a building of 19 floors and has many company tenants. Its tenants include law firms and Breitling, a high-end Swiss watchmaker. It is not in dispute that the tenants of the building would give staff, who worked there, gifts at Christmas time, including chocolates and drinks. Breitling gave chocolates and calendars to post room workers every Christmas.

14. The Claimant told the Tribunal, and I accepted, that, over a number of years, an employee of Breitling, called Mark, who was responsible for Breitling's postal operations, offered the Claimant Breitling-branded promotional items as gifts, including Breitling-branded baseball caps and pens. The Claimant told me that he had not originally accepted these gifts, but that, in 2016, the Claimant's partner told the Claimant that she had seen such items being auctioned on e-Bay for around to £10-£30 each. She encouraged the Claimant to accept the promotional items in future so that she could sell them. Thereafter, the Claimant accepted these promotional items

from Breitling's employee, Mark, and the Claimant's partner auctioned them on e-Bay and received money for them.

15. It was not in dispute that the Claimant sent the relevant items from the post room at Cavendish Square. It appears that he paid the appropriate postage in order to do so.

16. In August 2017, however, Breitling's solicitors wrote to the Claimant's partner, alleging that she was part of a "common design" to breach Breitling's trademark through selling these items. Breitling asked the Claimant's partner for the name of her supplier. After seeking free legal advice, the Claimant's partner was told that the Claimant would be considered to be her supplier.

17. The Claimant went to Breitling on about 6 October 2017. He explained what had happened to them and offered to pay the money that the Claimant's partner had received through sales. Breitling refused and said that they would continue to investigate.

18. Breitling brought High Court proceedings against the Claimant, his partner and its former employee, Mark, alleging common design to breach Breitling's trademark. The proceedings were dismissed on 12 December 2018.

19. However, on 12 January 2018, Martin Arscott, the Respondent's Security Manager, attended a meeting with Ms Jones, Breitling's HR representative, pages 70-71. At the meeting, Ms Jones told Mr Arscott that the Claimant's partner had sold 64 items of Breitling's stock, including caps, underwear, pens and books. She said that the items had been supplied by the Claimant to his partner from Breitling's employee. Ms Jones also said that Breitling believed that the Claimant had profited by over £2,000 by selling the goods and that, although the Claimant had offered to repay that money, Breitling was not happy. Ms Jones said that the Respondent company had appeared not to have taken the matter seriously, as the Claimant remained in his role and the Respondent had taken no action against him.

20. Mr Arscott said that the Respondent company had received no official complaint and that the police had taken no action in respect of the matter. Ms Jones, however, said that Breitling had lost all confidence in the Claimant handling its mail. She said that one baseball cap, in particular, which had been sold on e-Bay, had originally been sent back to Breitling by a client as damaged, but had never reached Breitling. Ms Jones also said that the sheer volume of gifts ought to have made the Claimant question whether Mark was authorised to give these away. Ms Jones said that she was infuriated when she saw the Claimant in the post room, because she believed that he had profited by £2,000 from selling Breitling's stolen goods. She was also infuriated that the Respondent was not supporting Breitling as a client, in the circumstances that the Respondent had taken no action against the Claimant. Mr Arscott told Ms Jones that the Respondent would be suspending the Claimant, pages 70-71.

21. Mr Arscott met with the Claimant on 11 January 2018 and discussed the matters with him.

22. The Claimant was under a lot of stress at the time and told Mr Brady, the Respondent's Contracts Manager, about his unhappiness. Mr Brady, who had a good relationship with the Claimant and was sympathetic towards him, advised the Claimant to take a week off work because of stress. I accepted the Claimant's evidence about this. Mr Brady said he could neither confirm or deny the conversation because he could not recall it. However, I accepted that the Claimant gave honest evidence about the matter. In the circumstances Breitling was unhappy and had made its position clear, it may well have been in both the Claimant's and the Respondent's interests, at the time, for the Claimant not to be present in the work place.

23. The Claimant took a week's leave and told me that, on his return to work, he was given a copy of a Form which employees used to apply for leave. He said that it had been completed by another person on his behalf. The Claimant himself had not applied to use holiday, but had followed Mr Brady's advice to take a week off because of stress. The Claimant told me he did not challenge the Form because he did not believe he needed to, page 69.

24. Again, I accepted the Claimant's evidence about this and found, on the facts, that Mr Brady did advise the Claimant to take a week off because of stress, that the Claimant did not himself apply to take holiday leave and the Respondent processed the Leave Form on the Claimant's behalf. I therefore found that this leave was not holiday leave, but was another form of special leave, which the Respondent had suggested to the Claimant that he take; and which the Claimant agreed to take.

25. On 22 January 2018 the Claimant was suspended from work by letter. The letter said that an investigation would take place, following allegations of abuse of trust in that the Claimant had been in a trustworthy position and had been involved in infringing products for sale, page 72.

26. On 25 January 2018 Fox Williams, solicitors for Breitling, wrote to GVA, owners of Cavendish Square. Fox Williams said that the Claimant was responsible, either on his own, or with others, for the removal of Breitling products from Breitling premises without Breitling's permission and selling those items using the Cavendish Square post room as a base for operations. Fox Williams said that the items sold had a return address given as "F" at Cavendish Square. They said that the e-Bay seller confirmed that the Claimant had provided them with the goods and it was clear that the Claimant had access to the post room and had admitted taking possession of the goods. The letter concluded by saying, "Our client is understandably very concerned and requests that Mr Garcia is denied any further access to the building. Please confirm that you will revoke Mr Garcia's permission to access the building without further delay". The letter included photographs of a baseball cap sold on e-Bay and the package with the return address as "F" at Cavendish Square, pages 74-80.

27. On 30 January 2018 Ms Wright, Senior Facilities Manager at GVA, wrote to Mr Brady and Mr Arscott, saying that she had received a letter from Fox Williams representing Breitling. She said that the letter had been passed to GVA's in-house legal team who had advised that GVA should not allow the Claimant back on site at Cavendish Square, page 82.

28. On 31 January 2018 Mr Brady wrote to the Claimant, inviting him to a disciplinary hearing to be held on Tuesday 2 February that year, page 84. He set out the allegations to be investigated in the meeting as follows, "Providing infringing products for sale.. Abused your position of trust in a trustworthy position .. Obtained at least 62 items which were not yours to sell". He said that the following documents would be used at the hearing, an e-Bay list of 62 items sold, photos of the items sold, photos of packaging sent by the Claimant from Cavendish Square and an email trail from solicitors to the Claimant. He said, "If these allegations are substantiated, we will regard them as gross misconduct. If you are unable to provide a satisfactory explanation, your employment may be terminated without notice". Page 84.

29. The letter also said that Mr Brady would adjourn after the meeting to consider his decision. Pending that, Mr Brady would also hold a meeting with the Claimant to discuss the client's request to remove the Claimant from site. This would allow the Claimant to give his full explanation and would allow Mr Brady to make formal representations on the Claimants behalf to the client, if appropriate, with the aim of having the Claimant reinstated.

30. Mr Brady also said, "I must warn you that if we are unable to persuade the client to allow you to continue to work on their site and we have no alternative employment for you which can be considered, then even if we do not find that your actions constitute gross misconduct your contract may be terminated. This dismissal would be termed as a "some other substantial reason" (SOSR) dismissal, namely third party pressure. We will seek to avoid this if possible. However, should we have no choice but to dismiss you, you will receive notice pay". Page 85.

31. The Claimant attended the disciplinary meeting held by Mr Brady on 6 February 2018. In evidence to the Tribunal, Mr Brady agreed that, during the Claimant's employment, he trusted the Claimant a great deal; he said that he had a good working relationship with him and was very fond of him. In response to answers in cross examination, Mr Brady said that, after the disciplinary hearing, he still had trust in the Claimant and believed that he could continue to work for the Respondent.

32. At the meeting, the Claimant told Mr Brady that he had been given the relevant items as gifts by Mark, Breitling's employee.

33. On 8 February 2018, Mr Brady wrote to the Claimant, notifying him of the outcome of the disciplinary hearing. He said that, if the allegations against the Claimant had been substantiated, the Respondent would have regarded them as gross misconduct. He said that, at the disciplinary hearing, the Claimant had said that the items had been gifted to the Claimant by a former employee

of Breitling, that everyone received gifts and no one had told the Claimant that he was not allowed to do so. Mr Brady said that the Claimant's partner had sold the gifts on an electronic platform. Mr Brady said that he considered the Claimant's explanations to be unsatisfactory because the assignment instructions which the Claimant had read and signed contradicted his statement and comments. Mr Brady said that the Claimant's abuse of his position meant that Breitling had lost trust in the Claimant. Mr Brady said that he had concluded that the Claimant's actions, whilst serious, did not constitute gross misconduct, but warranted a formal warning in line with the Respondents procedures, page 89.

34. Mr Brady told the Claimant that he would receive a 6 month written warning. He said, "I made formal representations on your behalf to the client with the aim of having you reinstated. We wrote to the client on Tuesday 6 February 2018 and have now received their response. I regret to inform you that they have refused our request". Mr Brady said that the Claimant was now required to attend a further formal meeting on 13 February 2018. He said, "I feel that it is only fair to point out to you that if no alternative position can be found for you then the outcome of this meeting could be the termination of your employment for some other substantial namely third party pressure". Page 90.

35. There was a dispute of fact between the parties about what efforts the Respondent had made to persuade GVA to permit the Claimant to return to his post at Cavendish Square. On 7 February 2018, Mr Brady had emailed Ms Wright, Senior Facilities Manager at GVA, saying, ".. I write this email with the request of Frank Garcia's reinstatement to his role as the post room officer based within 33 Cavendish Square. I understand GVA's concern with Frank's reinstatement to his role but under this circumstance I would ask that you reconsider GVA's stance". Page 87. Ms Wright replied on 8 February 2018 saying that GVA had not changed its position regarding the Claimant's removal from his post.

36. It was put to Mr Brady in cross examination that he had not explained to GVA that he had held a disciplinary hearing and still had trust and confidence in the Claimant. It was put to Mr Brady that he had made minimal efforts to persuade GVA to allow the Claimant to return. Mr Brady told the Tribunal that the request to allow the Claimant to return had been escalated up the chain of command at GVA and Breitling. Mr Brady said that, while he had felt that GVA was in a invidious position, he had explained that the Respondent's trust in the Claimant continued and that he would like them to reconsider. Mr Brady said that he went, in person, to raise the matters but it had got to the point where the Senior Director of the client had told Mr Brady himself that the decision had been made.

37. I accepted Mr Brady's evidence that he did go in person to the client and that the matter of the reinstatement of the Claimant was escalated to Director level, but that the client had told Mr Brady that it would not change its mind. Mr Brady described what had happened in detail to the Tribunal and I found

his evidence credible even though it had not been mentioned in his witness statement.

38. The Claimant attended the meeting with Mr Brady on 13 February 2018, pages 91-92. At the meeting, Mr Brady told the Claimant that he had signed assignment instructions stating that the Claimant was aware of the Respondents bribery and corruption policy, but at no point had the Claimant informed his manager that he had received the relevant gifts. Mr Brady said, however, that while the Claimant's conduct warranted a warning, it did not constitute gross misconduct. The Claimant asked if this meant that he could go back to work. Mr Brady replied, "This leads into the SOSR …". Mr Brady said that he had made further representations to GVA but they had not changed their position and that, therefore, the Claimant would be removed from that site with immediate effect. The Claimant then asked, "So have I lost my job?" Mr Brady replied, "No". He said that it was the start of a new chapter and that Mr Brady's colleague, Mr Rampe, had a potential new post in a post room starting at the end of March following a selection exercise. In the meantime, the Respondent had work for the Claimant at Fulham. The Claimant thanked Mr Brady.

39. The next day, Mr Brady wrote to the Claimant, page 93. He said that, while the client had insisted that the Claimant be removed from its site, alternative employment had been found for the Claimant within the company at another site with site details to be confirmed. He said that he understood that the Claimant had accepted the position and would be commencing work at a date to be confirmed and that, in the meantime, work had been offered to the Claimant within the company until that position started. He said there would be no break in service and the Claimant's terms and conditions would remain the same unless otherwise mutually agreed.

40. In evidence to the Tribunal, Mr Brady told the Tribunal that the Claimant was offered the available work at the company. He said that he was offered shift work, working 35 hours a week, 2 hours in the morning and 5 in the evening and that the Claimant was offered fire warden work, working 2 days a week. He agreed, in evidence, that the Claimant did not accept the split shift work.

41. The Claimant told the Tribunal that on 26 February 2018 Mr Brady sent the Claimant a text offering a role working split shifts from 6.30-8.3-am and 5-10pm each day. The Claimant told the Tribunal that the Claimant is a carer for his disabled mother and that the split shifts would not have allowed time for him to sleep between the shifts, or for any other activities than eating, sleeping and travel. The Claimant said the split shifts were incompatible with his caring obligations and with his life in general. He said, however, that in March 2018 he accepted work as a fire warden through the Respondent, working two 12 hour shifts a week.

42. Mr Rampe told the Tribunal that the new post room role which had been raised with the Claimant in the meeting of 13 February would have been available to the Claimant. Mr Rampe nevertheless confirmed that no firm offer

of that new role was ever made to the Claimant; and that the Claimant did not accept the offer of the job. The Claimant attended an interview for that new post room role at premises in Old Street, but was told at the interview that the role would involve working 12 hour shifts from 7am to 7pm. The Claimant immediately indicated that he was not happy to work those longer shifts. As a result, the role was never offered to him.

43. The Claimant also confirmed in evidence to the Tribunal that, even if the had been offered the new post room role, he would not have accepted it because of the longer working hours.

44. The Claimant continued to work as fire warden two days a week, and then one day a week, when the amount of available work reduced, until about 2019.

45. The Claimant gave evidence to the Tribunal, and I accepted, that he was told by the Respondent that he had to sign a casual contract in order to be paid for the fire warden work. He did so on 6 March 2018.

46. The casual contract was in the Tribunal bundle. It said, amongst other things, "I am pleased to confirm the conditions under which Vigilant Security (Scotland) Limited …. may be able to offer you casual work: **Nature of Engagement:** Work will be offered to you on an "ad hoc" basis as and when there is work to be done. You are free to accept or decline such offers of work. You are not guaranteed continuous work and we are under no obligation to offer you further engagements or re-engagement …" Page 58.

47. It was not in dispute that, after his permanent removal from Cavendish Square had been confirmed on 13 February 2018, the Claimant was only paid by the Respondent for the hours that the Claimant actually worked as a fire warden.

48. I accepted Mr Brady and Mr Rampe's evidence that they offered the Claimant the only available work at the time. Indeed, it appears that Mr Brady had contacted Mr Rampe to ask Mr Rampe whether he was aware of other work in the company, in addition to work which might have come available within Mr Brady's managerial sphere.

## Relevant Law

### Dismissal and Unfair Dismissal

49. By *s94 Employment Rights Act 1996*, an employee has the right not to be unfairly dismissed by his employer

50. In order for an employee to be able to bring a claim for unfair dismissal, there must have been a dismissal.

51. Where there are ambiguous words, or conduct, by an employer, the test of whether this amounts to a dismissal is an objective one, which involves

considering all the surrounding circumstances, *Sothern v Franks Charlesly & Co* [1981] IRLR 278, *B G Gale Ltd v Gilbert* [1978] IRLR 453, [1978] ICR 1149
.

52. In *Hogg v Dover College* [1990] ICR 39, the EAT held, where an employer had imposed a new contract on an employee, involving wholly new terms and a 50% reduction in salary, that the employee had been dismissed from his original post. The fact that the employment relationship continued with the same employer did not mean that the old contract had not been terminated. In *Alcan Extrusions v Yates* [1996] IRLR 327, EAT, the employer imposed a continuous shift pattern, including Saturdays, Sundays and bank holidays, reduced shift premiums and withdrew overtime pay for weekends and bank holidays. The EAT concluded that the Tribunal was entitled to decide that the new terms were so radically different from the old as to go beyond repudiatory variation of the old contract. The new terms could properly be characterised as removal of the old contract and an offer, by substitution, of a substantially inferior contract. See also *Smith v Trafford Housing Trust* [2012] EWHC 3221, ChD.

53. *s98 Employment Rights Act 1996* provides it is for the employer to show the reason for a dismissal and that such a reason is a potentially fair reason under *s 98(2) ERA*, or some other substantial reason justifying the dismissal of the employee.

54. Where an employer is requested or required to dismiss an employee by a third party, this may amount to SOSR and be fair, even though the employer is reluctant to dismiss and does not agree with the decision. For example, if an employee upsets a major customer who then insists on that employee's dismissal, this may be fair, *Scott Packing and Warehousing Co Ltd v Paterson* [1978] IRLR 166 EAT. The employer must still prove that third party pressure was the reason for dismissal, *Grootcon (UK) Ltd v Keld* [1984] IRLR 302.

55. If the employer satisfies the Employment Tribunal that the reason for dismissal was a potentially fair reason, then the Employment Tribunal goes on to consider whether the dismissal was in fact fair under *s98(4) Employment Rights Act 1996*. In doing so, the Employment Tribunal applies a neutral burden of proof. The ET allows the employer a broad band of reasonable responses. It is not for the Employment Tribunal to substitute its own view for that of the employer, but to consider the employer's decision and whether the employer acted reasonably.

56. In *Dobie v Burns International Security Services (UK) Ltd* [1984] 3 All ER 333, [1984] IRLR 329, [1984] ICR 812, CA, where a security officer at Liverpool Airport was dismissed at the behest of the Merseyside County Council, the Court of Appeal (Sir John Donaldson MR, Slade and Parker LJJ) unanimously held that, in order to act reasonably, when deciding whether to dismiss, the employer should take into account the injustice to the employee. Sir John Donaldson MR said:

"In deciding whether the employer acted reasonably or unreasonably, a very important factor of which he has to take account, on the facts known to him at

that time, is whether there will or will not be injustice to the employee and the extent of that injustice. For example, he will clearly have to take account of the length of time during which the employee has been employed by him, the satisfactoriness or otherwise of the employee's service, the difficulties which may face the employee in obtaining other employment, and matters of that sort. None of these is decisive, but they are all matters of which he has to take account and they are all matters which affect the justice or injustice to the employee of being dismissed'.'

57. However, the test in *ERA 1996 s 98(4)* remains whether the employer has acted reasonably in deciding to dismiss. In *Henderson v Connect (South Tyneside) Ltd* [2010] IRLR 466, EAT, the dismissal of a bus driver at the insistence of the council for which the bus company worked was held to be fair. While the EAT considered that there was a real possibility of injustice to the employee in the dismissal, the employer had tried unsuccessfully to persuade the council to change its mind and, when that failed, had no alternative work for him, so the employer had acted reasonably in dismissing.

58. The employer should make reasonable efforts to find other work for the employee before dismissing, in order to dismiss fairly, *Norwest Construction Co Ltd v Higham* EAT 278/82, *KCA Drilling Ltd v Breeds* EATS 130/00.

59. If the Tribunal determines that the dismissal is unfair the Tribunal may go on to consider the percentage chance that the employee would have been fairly dismissed, *Polkey v AE Dayton Services Limited* [1988] ICR 142.

60. Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it reduces any compensatory award by such proportion as it considers just and equitable having regard to that finding, *s123(6) ERA 1996. Optikinetics Limited v Whooley* [1999] ICR 984: it is obligatory to reduce the compensatory award where there is a finding of contributory fault. The reduction may be 100% - *W Devis & Sons Limited v Atkins* [1977] ICR 662.

**Wrongful Dismissal**

61. Where an employee has committed a repudiatory breach of contract, the employer can accept the repudiation, resulting in summary dismissal.

62. The degree of misconduct necessary in order for the employee's behaviour to amount to a repudiatory breach is a question of fact for the Tribunal to decide. In *Briscoe v Lubrizol Ltd* [2002] IRLR 607, the Court of Appeal approved the test set out in *Neary v Dean of Westminster* [1999] IRLR 288, ECJ, where the Special Commissioner held that the conduct, "must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment."

**Holiday pay Working Time Regulations 1998**

63. Under *Regs 13 & 13A Working Times Regulations 1998* workers are entitled to take paid holidays and to be paid holiday pay. The right under Reg 13 is 4 weeks; the right under *Reg 13A* is 1.6 weeks, meaning that a worker has a right to 5.6 weeks paid holiday. Under *Regulation 14 WTR 1998,* an employee is to be entitled to be paid, at termination of employment, the proportion of holiday that he is entitled to in proportion to the holiday year expired but which has not been taken by the employee during that time.

## <u>Discussion and Decision</u>

### Dismissal and Unfair Dismissal

64. On the facts, I found that the Respondent dismissed the Claimant on 13 February 2018 when it told him that he was permanently removed from the site at Cavendish Square. The contract on which the Claimant was employed was a contract for the Claimant's to work on a full time, not a casual, basis. While the Claimant's contract envisaged that the precise hours and location might vary, it did not suggest that the Claimant was only employed on a casual basis, or that there would be no guarantee of work to the Claimant each week.

65. The Claimant had been employed on the same contract for many years and the contract was renewed by the Respondent on 3 May 2011, page 45, on the same terms. At that time, the Claimant was working full time and had been for many years. The contract envisaged that the Claimant's working hours might well be in excess of 48 hours a week.

66. It was a contract to do work on a permanent basis. It can be contrasted in this regard with the casual contract provided by the Respondent to the Claimant in March 2018, page 58. That casual contract says specifically that work could be offered on an ad hoc basis when there was work to be done and that the Claimant was not guaranteed continuous work. The contract under which the Claimant was originally employed did not say that the Claimant would not be provided with continuous work.

67. I was fortified in my conclusion that the Claimant's original contract was for full time, continuous work, by the fact that this was the Respondent's understanding of the contract. For example, in Mr Brady's invitation to the disciplinary hearing on 31 January 2018, page 85, he said that, if the Claimant were removed from site and the Respondent did not have alternative work for him, his contract may be terminated. This indicated that Mr Brady believed that the Claimant's contract required that the Claimant would be given work by the Respondent and, therefore, if no work was available, the contract would have to come to an end. Furthermore, in the invitation sent on 8 February 2018, to the 13 February meeting, page 90, Mr Brady again said that, if no alternative work was found for the Claimant, the outcome could be the termination of his employment.

68. The Claimant was not offered, and he did not accept, alternative work on 13 February 2018. Various future options were mentioned, but there was no

firm agreement as to the terms of those roles, including the hours and locations of them. At the end of the meeting, the Claimant was not given any alternative work by the Respondent. He was not paid thereafter; he would not be paid unless he accepted another role.

69. What was offered to the Claimant on 26 February 2018 was work working split shifts, morning and evening. In other words, he as offered completely different shifts to the shifts that the Claimant been working at Cavendish Square, and which were incompatible with his caring duties. They involved evening working, which the Claimant had not been undertaking for many years. They also involved fewer hours.

70. The offer of fire warden work in March 2018 involved two days' work a week and was causal work, for considerably less pay.

71. I concluded, applying *Hogg v Dover College* and *Alcan Extrusions v Yates,* that those offers themselves were so radically different from the old contract as to go beyond repudiatory variation of it. They could properly be categorised as the removal of an old contract and an offer, by substitution, of a substantially inferior one.

72. My primary conclusion, nevertheless, was that, on 13 February 2018, no other work at all was given to the Claimant. That clearly constituted a termination of his previous, permanent, full time employed.

73. If I was wrong in that conclusion, then I found that, either on 26 February, or later, in March 2018, when he was offered split shift work and/or fire warden work, those offers brought the old contract to an end, offering, by substitution, a substantially inferior contract.

74. Having found that the Claimant was dismissed on 13 February 2018, I went on to consider whether the Claimant was unfairly dismissed. It was not in dispute between the parties that the reason for dismissal was "some other substantial reason"; that is, third party pressure. Even the matter had been in dispute, it was clear that the only reason the Claimant was removed from the Cavendish Square site was the client's insistence, which constituted a third party instruction.

75. I then considered whether the Respondent acted reasonably in dismissing the Claimant for that reason. I applied a broad band of reasonable responses test to the Respondent's actions, as I was required to do.

76. I found that the Respondent did act reasonably, within the broad band of reasonable responses. The Respondent held a meeting with the Claimant to investigate the matters and formed a view of the Claimant's actions. The Respondent found that the Claimant was culpable to the extent that he had received and sold items, contrary to the terms of his assignment and in breach of its policy requiring gifts to be declared. The Respondent concluded that it was appropriate to give the Claimant a written warning. That was a reasonable decision, given, first that the Claimant accepted that he was aware

of the policy that required him to declare gifts, but he had not; and, second, that the goods had been sold for a substantial amount of money. The Respondent decided, in the circumstances that the Claimant held a position of trust, that the client's trust was undermined. The Respondent did take into account whether the client's view was just, and whether there was injustice to the Claimant in being removed from the position.

77. Furthermore, I concluded that the Respondent made reasonable efforts to reverse the client's decision. I accepted Mr Brady's evidence that the issue was escalated to Director level, and that Mr Brady went in person to discuss the matter, but was told by a Director that the decision could not be changed. This was in addition to the written request for reconsideration which Mr Brady made following the outcome of the disciplinary hearing.

78. Moreover, I accepted Mr Brady and Mr Rampe's evidence that they offered the Claimant all the work which was available at the Respondent. The Claimant did not accept the split shift work, but chose the fire warden work. I found that it was reasonable for the Respondent to offer the Claimant the work which was available, when it was available. I found that there was no other work available to the Claimant and, therefore, that the Respondent was reasonable in acting as it did on 13 February 2018. That is, the Respondent acted reasonably in telling the Claimant that he had been removed permanently from Cavendish Square and that he would be offered work when that work was available.

79. I therefore found that the Claimant was not unfairly dismissed.

Wrongful Dismissal

80. I concluded that it was quite clear on the facts that the Respondent did not consider that the Claimant was guilty of gross misconduct. Mr Brady still had trust and confidence in him. Mr Brady decided that a first written warning was the appropriate sanction for the Claimant's actions.

81. Furthermore, in its letters to the Claimant, the Respondent said that, in the event that the allegations against him were upheld, they would be considered to be gross misconduct and that he would be dismissed. They also said that, if the allegations were not upheld, but no alternative work could be offered to the Claimant, this would give rise to a "some other substantial reason" dismissal and that the Claimant would be paid his notice pay.

82. The Respondent did not uphold allegations of gross misconduct against the Claimant. It did not decide to dismiss him, but to try to offer him alternative work.

83. I have decided that the effect of the Respondent's actions was to dismiss the Claimant. The Claimant was not paid his notice pay and therefore the Claimant was wrongfully dismissed.

Holiday Pay

84. On my findings of fact, the Claimant did not take holiday in January 2018, but was invited to, and did take, some other form of leave, I therefore considered that that period should not be deducted from any holiday pay which the Claimant should have been paid at the termination of his employment.

85. The Respondent did not consider the Claimant had been dismissed and so they did not make any payment for accrued holiday pay on termination of his employment.

**Remedy**

86. Following discussions between the parties, the parties agreed that remedy judgment should be given in the following terms. The Respondent shall pay to the Claimant £3,583.91 notice pay in compensation for wrongful dismissal. The Respondent shall pay the Claimant £1,569.40 on account of accrued holiday pay at termination of employment, under the Working Time Regulations.

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Employment Judge Brown

Dated: 17 May 2019

Judgment and Reasons sent to the parties on:

21 May 2019

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For the Tribunal Office