EMPLOYMENT TRIBUNALS

Claimant: **Mrs J Bailey**

Respondent: **Mundy's Services Limited**

Heard at: **Leeds** **On:** **3 and 4 June 2019**

Before: Employment Judge Bright (sitting alone)

Representation
Claimant: In person
Respondent: Miss Frantzis (Counsel)

RESERVED JUDGMENT

1. The respondent's name is changed to Mundy's Services Limited. Mr Sanderson is dismissed as a respondent.

2. The Tribunal has jurisdiction to hear the claim.

3. The claimant was unfairly dismissed by the respondent. The respondent is not required to pay any compensation to the claimant.

4. The claimant's claim for damages for breach of contract in respect of notice fails and is dismissed.

5. The claim of unauthorised deductions from wages succeeds. The respondent shall pay to the claimant compensation in the sum of £3,792.84.

6. The claimant's claim for holiday pay succeeds. The respondent shall pay to the claimant the sum of £377.30.

7. The respondent's claim for damages for breach of contract succeeds. The claimant shall pay to the respondent damages of £3,600.

REASONS

Claim and counterclaim

1. The claimant brought complaints of unfair dismissal, breach of contract in respect of notice pay, unpaid holiday pay and unauthorized deductions from wages, by a claim form presented on 26 October 2018. The respondent, whose sole director Mr Sanderson is the claimant's brother, defended the claims and presented a contract claim for recovery of damages against the claimant.

Issues

2. It was agreed at the outset of the hearing that the issues to be decided were:

2.1. Does the Tribunal have jurisdiction to consider the claim? Against whom was the claim presented? The respondent says the Tribunal should not have accepted the claim form, because the claims were presented against Mr Sanderson and the respondent's name on the ACAS early conciliation certificate differed from the respondent's name on the claim form to the extent that it could not be classed as a 'minor error'.

Unfair dismissal

1.1. When was the effective date of termination of the claimant's employment?

1.2. What was the reason for dismissal? The respondent says the claimant asked to take redundancy. The claimant says the respondent dismissed her because Mr Sanderson wanted her out of the business following a dispute about their mother's will.

1.3. Was the reason for dismissal a potentially fair reason within section 98(1) or (2) of the Employment Rights Act 1996 ("ERA")? In particular, was there a genuine redundancy situation as defined in section 139 ERA: Had the requirements of the business for employees to carry out work of a particular kind ceased or diminished or were they expected to do so? The respondent says the claimant's position was a 'stand-alone' role caring for their mother, which disappeared when their mother passed away. The claimant says she worked for the business in an operational role and that there was no reduction in the requirement for employees to do that work.

1.4. If the reason for dismissal was a potentially fair one, did the respondent act reasonably or unreasonably in treating that reason as a sufficient reason for her dismissal, having regard to the factors set out in section 98(4) ERA? The claimant says there was no consultation, warning, fair procedure or consideration of suitable alternative employment. The respondent says the claimant requested redundancy and the process followed was fair in the circumstances.

1.5. If the dismissal was unfair, would the claimant have been fairly dismissed in any event if the respondent had adopted a fair procedure? If so, when and/or what was the likelihood? The respondent says the claimant would

have been dismissed in any event.

1.6. If the dismissal was unfair, would the claimant have been fairly dismissed for misconduct for disposing of a company vehicle and failing to account for the proceeds, in any event?

1.7. It was agreed at the outset of the hearing that, if the claimant's unfair dismissal claim was successful remedy, other than the issues set out at 2.6 and 2.7 above, would be considered separately to liability.

Unpaid holiday pay

1.8. What was the claimant's leave year?

1.9. How much of the leave year had elapsed at the effective date of termination?

1.10. In consequence, how much leave had accrued for the year under regulations 13 and 13A of the Working Time Regulations 1998 ("WTR")?

1.11. How much paid leave had the claimant taken in the year?

1.12. How many days remained unpaid?

1.13. What was the relevant rate of pay?

1.14. How much pay is outstanding to be paid to the claimant?

Breach of contract/notice pay

1.15. Did the respondent act in breach of the claimant's contract of employment by failing to give and/or pay her for or in lieu of notice? If so, what damages in respect of notice are due? The respondent says it was entitled to offset amounts she owed against her notice pay.

Unauthorised deductions from wages

1.16. Has the respondent made unauthorised deductions from the wages which were properly payable to the claimant?

Employer's contract claim

1.17. Did the claimant act in breach of her contract of employment when she disposed of a company vehicle without accounting to the respondent and/or when she failed to return her company mobile phone?

Procedural matters

2. There was some confusion at the outset of the hearing because Employment Judge Keevash had issued a judgment dated 19 February 2019, dismissing on withdrawal the employer's contract claim in respect of the disposal of the vehicle. However, the recollection of the respondent's representative was that the part of the employer's contract claim which had been withdrawn at

the preliminary hearing was in fact the complaint relating to the repayment of a loan, not the vehicle. The claimant believed that the complaints relating to both the loan and vehicle had been withdrawn and the only complaint outstanding related to the mobile phone. I considered that, as there was a judgment dismissing the complaint relating to the vehicle, that complaint could only be heard at the final hearing if Judge Keevash reconsidered his judgment.

3. I adjourned the final hearing at 2pm on the first day to enable Judge Keevash to hold a short preliminary hearing on reconsideration. Judge Keevash issued a separate judgment on reconsideration varying the previous judgment such that the respondent's complaint relating to the loan was dismissed on withdrawal, but the complaint relating to the disposal of the vehicle was not dismissed and would continue to the final hearing. The final hearing was reconvened at 2.45pm for me to consider the issues set out above.

4. The respondent confirmed at the outset of the hearing that an issue regarding whether the claim had been presented within the statutory time limit was not being pursued.

Evidence

5. The claimant gave evidence on her own behalf, from a written statement dated 28 January 2019. She initially sought to call Miss T Tranmore-Davis, however Miss Tranmore-Davis was not in attendance on the second day of the hearing, when she would have been called to give evidence. The claimant therefore sought to rely on Miss Tranmore-Davis' written statement and a further written statement from Mrs Julie Mason, a neighbour.

6. The respondent called Mr J Sanderson, Managing Director. It also sought to rely on written statements from Ms Anne Groves, Secretary to the Directors, and Mr Peter Brown, the respondent's accountant at Temporal Lennon & Company, neither of whom were in attendance at the hearing.

7. I explained to the parties that it was a matter for me how much weight I attached to the written statements of individuals who were not in attendance to have their evidence tested in cross examination at the hearing.

8. The parties presented an agreed bundle of documents, to which additional documents were added at pages 169 - 179 at the end of the first day of the hearing.

Submissions

9. Miss Frantzis for the respondent made detailed submissions, which I have considered but do not rehearse here in full. In essence, it was submitted that:

9.1. The Tribunal did not have jurisdiction to hear part or all of the claim. The Early Conciliation ("EC") certificate was in Mr Sanderson's name, which also appeared on the ET1. The claimant clearly intended to bring proceedings against Mr Sanderson personally. However, the statutory

claims brought by the claimant cannot be made against an individual.

9.2. If, in the alternative, the ET1 was treated as being brought against Mundy's Services Ltd ("the Company"), there was no EC certificate naming the Company. The claim should therefore have been rejected on presentation under Rule 12(1)(f) of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (the "ET Rules"). A judge's decision under Rule 12 meets the definition of a case management order under Rule 1(3)(a) ("an order or decision of any kind in relation to the conduct of proceedings, not including the determination of any issue which would be the subject of a judgment") and is therefore an "order or other decision of the Tribunal" under Rule 1(3). The Tribunal therefore has the power under Rule 29 to vary, suspend or set aside the earlier decision not to reject the claim, where it is necessary in the interests of justice, and in particular, where a party affected by the earlier order did not have a reasonable opportunity to make representations before it was made. In this case, the respondent did not have an opportunity to make representations because the claim had not been served at that stage. The Tribunal should vary the decision not to reject the claim, on grounds that the difference between the name on the EC certificate and the name on the claim form could not be characterized as a 'minor error' under Rule 12(2A). The claimant deliberately named Mr Sanderson to ACAS and it was not therefore an error at all. In **Giny v SNA Transport Ltd** UKEAT/0317/16 the Employment Appeal Tribunal ("EAT") upheld a tribunal's decision that a difference in names was not a minor error and the claim should be rejected. The interests of justice would be served by narrowing down the claim to the breach of contract claims.

9.3. The reason for dismissal was redundancy. The evidence shows that for the last 18 months of her employment, the claimant's role was unique because she was acting as personal assistant to her mother. Any contact with clients or other work she carried out was on behalf of her mother, not a discrete role. The claimant had other business interests and asked for redundancy because it suited her.

9.4. There were discussions between Mr Sanderson and the about what would happen when their mother passed away. It was clear to the claimant that there would not be a role for her at the Company, so it was not a surprise when redundancy was discussed in the meeting with the accountant in June. The claimant requested redundancy and the procedure was fair in these circumstances.

9.5. If the dismissal is found to be unfair, it would not be just and equitable to award compensation. Any more formal procedure would have made little or no difference to the outcome because redundancy was what the claimant wanted. The claimant would certainly have been dismissed for failure to account for the company car and/or she and Mr Sanderson were plainly not able to work together.

9.6. The Company was entitled to set off against the claimant's 12 weeks' payment in lieu of notice the value owing in respect of the claimant's company car.

9.7. The termination of the claimant's employment was on 8 July 2018, and any monies paid after that time were intended to be payment in lieu of notice, and cannot therefore be the subject of a claim for unauthorised deductions from wages.

9.8. The holiday year was January to December, the claimant was entitled to 28 days' holiday per annum and took three weeks' holiday prior to the termination of her employment. She had therefore used up her holiday entitlement and no further payment in lieu of accrued but untaken holiday was owed.

9.9. The respondent's counterclaim is in respect of the value of the company car and for the company mobile phone.

10. Mrs Bailey chose not to make significant oral submissions, but it was clear from her claim form and evidence that her arguments were, in essence, that:

10.1. Mr Sanderson unfairly dismissed her from her employment because he wanted her out of the business following a dispute about her mother's will.

10.2. Although she acted as personal assistant for her mother, her employment for the Company was a wider role, involving contact with clients, cleaning, providing quotes and other duties. Her role was not therefore redundant.

10.3. She had not wanted redundancy and the first time she heard mention of it was at the meeting on 5 June 2018 at the accountant's office. There was no warning, consultation or consideration of suitable alternative employment.

10.4. She was owed 12 weeks' notice pay, holiday pay and/or unpaid wages, as shown in the wage slips in the bundle. The respondent was not entitled to withhold payment.

10.5. The car did not belong to the Company, it was a gift from her mother and she was entitled to sell it and was not obliged to account for it to the respondent.

10.6. The mobile phone was a private one and was not the respondent's property.

Findings of fact

Relationships

11. Mr Sanderson and the claimant are brother and sister. Their parents, Mrs Patricia and Mr Clive Mundy, set up the respondent, Mundy's Services Ltd in 1997. It is a small business, presently employing around 35 employees, providing commercial and domestic cleaning, pest control and locksmith services. Mr Sanderson became Managing Director of the Company when Mr Mundy died. Mrs Mundy was diagnosed with a terminal illness in March 2018 and died on 29 May 2018, leaving Mr Sanderson the sole director. Mrs Mundy apparently left a 90% shareholding in the Company to Mr Sanderson and 10%

to the claimant, but as her will is the subject of litigation elsewhere, neither shareholding has yet vested. The claimant and Mr Sanderson fell out over their mother's estate, resulting in open hostilities, probate litigation and even the involvement of the police.

12. It was clear to me from the evidence heard in the course of the hearing, that there was considerable blurring of lines around the family businesses. The claimant and, at times, Mr Sanderson appeared to confuse directorship/ownership of the Company, the pre-/post-probate ownership and/or control of the Company, the activities of the Company and the claimant's own business, business/private property and company/personal finances. That confusion on the part of the witnesses meant that the evidence of both was, on occasion, confused and/or unreliable.

Claimant's employment

13. The first area of confusion was whether the Claimant was employed by the Company or Mr Sanderson and whether the Company or Mr Sanderson was therefore responsible and/or liable for the termination of her employment. I find from her evidence that the claimant viewed Mr Sanderson and the Company as one and the same for the purposes of her employment. I find from the claimant's wage slips and other evidence that her employer was the Company. In his dealings with her for the purposes of her employment, Mr Sanderson was acting in his capacity as Company director.

Claimant's role

14. Another area of dispute was the extent to which the claimant worked for the Company purely as assistant to her mother or whether she had her own distinct operational role.

15. It was not disputed that the claimant had worked for the Company from June 2007, initially looking after a cleaning contract for a law firm. Mr Sanderson said that, although the claimant was paid a full-time wage, she only worked up to 10 hours per week on that contract. The claimant disputed that, without being able to offer any clear indication of her workload for the Company. It was agreed that the cleaning contract came to an end in 2013. There was insufficient evidence for me to determine what the claimant's hours of work were nor what the claimant did for the Company between 2013 and 2015 but there was evidently an ongoing employment relationship. It is also agreed that the claimant took on an active role assisting their mother from 2015.

16. I find, from the evidence available to me, that the claimant's role from 2015 was primarily to assist and act on behalf of her mother, but that she also did some operational work on her own account as an employee of the Company. In addition, the claimant ran her own company, Sanderson Janitorial Consumables Ltd ("SJC Ltd"). I was not able to determine from the evidence the balance of the various activities and, I suspect that, in reality, the balance shifted from time to time, depending on the health of Mrs Mundy and the demands of the Company's business and that of SJC Ltd and their clients. It was agreed that the respondent had sent the claimant on two ACAS courses and that the claimant was involved with a contract for the NHS ("the Stockdale House contract"). I accepted the claimant's evidence that her involvement in

that contract involved training new starters, standing in for holiday absence, responding to email correspondence, providing quotes, and generally managing the contract. However, the extent to which she did all of that because it formed part of her duties, or because she was assisting her mother, was not clear to me.

Redundancy situation

17. Mr Sanderson accepted that the Stockdale House contract continued after the termination of the claimant's employment and that there was no reduction in the requirement for employees to provide quotes, respond to email correspondence or manage that contract and others. Mr Sanderson told me that in the 3 to 6 months after his mother died the Company expanded and it was one of their best years so far. It is obvious, however, that on the death of Mrs Mundy, there was no longer any requirement for employees to assist Mrs Mundy to carry out her duties and care for her.

Consultation

18. I find that, in the weeks leading up to Mrs Mundy's death, there must have been conversations between the claimant and Mr Sanderson about what would happen thereafter. Those conversations are not documented, however, and there was insufficient evidence for me to find that the claimant was warned or consulted about the risk of redundancy or possible alternatives to the termination of her employment. Whatever the relationship had been between Mr Sanderson and the claimant prior to Mrs Mundy's death, I find it deteriorated rapidly afterwards. The claimant accused Mr Sanderson of assaulting her, while he accused her of stealing property from their mother's house and stealing the charity donations made in connection with their mother's funeral. Both brother and sister accused the other of making threats and the police eventually became involved.

19. The claimant accepted that she and Mr Sanderson attended a meeting with the Company's accountant, Mr P Brown, on 5 June 2018. I accepted Mr Sanderson's evidence that, during the meeting, the termination of the claimant's employment was discussed. Mr Sanderson accepted in cross examination that any discussion of the claimant's redundancy was "an ad hoc thing". I accepted his evidence that the claimant told Mr Brown "I can't work with our Jim". I find from the evidence that there was an agreement reached that the claimant would be leaving, with a payment akin to a redundancy payment, and notice. That arrangement is consistent with the text message Mr Sanderson sent to the claimant after the meeting (page 153). I accepted Mr Sanderson's evidence that he did not consider and there was no discussion of alternative employment for the claimant, because he understood that she wanted her employment with the Company to terminate. I accepted his evidence that the claimant asked to take her accrued holiday.

Agreement about redundancy

20. There was a print out in the bundle of the text message exchange between Mr Sanderson and the claimant (page 153) which reads:

> Claimant at 14.44: "you've got cover for it great."

Mr Sanderson at 14.57: "I'll get the accountant to sort your redundancy out for after your holiday".
Claimant at 14.58: "thanks think it's best all round".

21. The claimant gave evidence that her final texted comment above was a response to Mr Sanderson having organized cover for a shift at Stockdale House. However, I find that the timing and wording of the messages suggests it is more likely that the claimant was responding to Mr Sanderson's comment about redundancy. The claimant gave evidence that this was the first time she had heard mention of redundancy and that it came as a shock. However, I agreed with Miss Frantzis' submission that, had that been the case, the claimant would have responded with surprise. The claimant's response suggests that, not only did she know about the possibility of redundancy, but that she had either actively sought or did not object to it.

22. The evidence of Mr Brown (an email dated 15 November 2018 (pages 141) and his witness statement) recorded his recollection of the claimant's comment that she had no wish to work for Mr Sanderson and would take redundancy. That recollection is consistent with the email at page 126 from the accountants confirming the claimant's redundancy calculation. Mr Brown also reported that the claimant contacted him on 9 July 2018 after receiving her redundancy payment and that, at that time, her main concern was around the payment of her redundancy payment from the Company's account, not the fact that her employment had terminated. Although Mr Brown was not present at the hearing to have his evidence tested in cross examination, I took his evidence into account because I accepted that he is a registered accountant and a third party to the dispute in question. There was insufficient evidence produced by the claimant to support her contention that he had a conflict of interest and that his evidence was biased against her.

23. Separately, it is implausible in my view that the claimant, having accused Mr Sanderson of assaulting her on 20 April 2018, would have wanted to continue working for or with him. Her evidence that they had a "fantastic" relationship despite the alleged assault was unconvincing. I find that the claimant and Mr Sanderson had reached an agreement in principle that her employment with the Company would terminate because she did not want to continue working with Mr Sanderson.

24. I accepted Mr Sanderson's evidence that, in any event, he would not have been prepared to continue employing the claimant because of his low opinion of her work ethic and because of their personal antipathy. I find that he genuinely believed that their professional relationship could not continue because of a breakdown in trust and confidence between them.

25. Although I accepted that there was an agreement that her employment would terminate, I find from Mr Sanderson's evidence that there had been no real discussion, and certainly no agreement, between her and Mr Sanderson about how or when her contract would terminate, how she would be paid or what would happen to the company car or mobile phone. Mr Sanderson accepted that she was expecting to return to work for the Company after her holiday on 9 July 2018.

26. However, Mr Sanderson visited her at home on 8 July 2018 and handed her a

letter containing a P45 and a cheque for £5,145, representing a statutory redundancy payment. Mr Sanderson's witness evidence was confusing (paragraph 23 of his witness statement) in that he mentioned a cheque for a 'statutory redundancy payment' only, but then stated, "notice and payment of the SRP was made on 9 July 2018 and I understood from the advice received from our accountant that the Claimant would remain an employee for a further 12 weeks. Alternatively, I could make a payment to her in lieu of that notice period. I had intended to pay the Claimant a lump sum for the pay in lieu."

27. The letter dated 8 July 2018 (page 127) read, "Dear Joanne, as per conversation I have enclosed your P45 and a redundancy cheque of £5,145.00". It did not give a date of termination nor indicate that termination was with immediate effect, although the P45 showed the last date of employment as 29 June 2018. There was no mention of notice or a payment in lieu of notice in the letter and I accepted the evidence of Mr Brown that this P45 was cancelled because it did not include the claimant's 12 week notice period and that the claimant was reinstated to the company's payroll. I find that the letter of dismissal was ambiguous about when the claimant's employment would terminate. The claimant herself was unclear whether she continued to be employed or not.

28. Mr Sanderson appeared, in his evidence, to be confused about whether he intended to give her notice or not. Miss Frantzis submitted that the effective date of termination was 8 July 2018, but the only suggestion that the letter of 8 July 2018 constituted notice of immediate termination was the inclusion of the P45 dated 29 June 2018. However, a further P45 was later issued giving 21 September 2018 as the termination date. Mr Sanderson and the accountant, as well as the claimant, appear to have considered that she was still employed until 21 September 2018, as Mr Sanderson asserts in his witness statement. Perhaps the most persuasive evidence was the copies of payslips in the bundle, which were generated for the duration of the claimant's notice period, up to 21 September 2018. Further, by an email dated 19 October 2018 (page 138) the claimant was informed that her leaving date had been 21 September 2018. Although she did not work between 8 July 2018 and 21 September 2018, I find from these documents and Mr Sanderson's evidence, that the respondent intended that she had been dismissed with notice, that her final date of employment would be 21 September 2018 and that she was on 'garden leave' for the duration of her notice period.

29. The events of 8 July 2018 caused the relationship between the claimant and Mr Sanderson to deteriorate. Mr Brown's statement refers to a phone call from the claimant on 9 July 2018 raising concerns about the redundancy payment being made of the out of the Company's account, which the claimant apparently viewed as being part of her inheritance under her mother's will. However, the claimant also called ACAS on 9 July 2018 to query her rights and sent Mr Sanderson a text message telling him "I will see you in court". There was a burgeoning dispute about the Company car, mobile phone and a start-up loan or investment of £25,000 made by the Company to SJC Ltd. From the timing of the claimant's calls to Mr Brown and ACAS I find that, although the claimant had agreed in principle to leave her employment, when issues arose over the money she began to dispute the termination of her employment.

Company car

30. I found the claimant's evidence in cross examination regarding her various cars confusing. She did not appear to appreciate the difference between a private vehicle and one purchased by the Company. She maintained that the original vehicle was a gift from her mother and that amounts paid over and above the used car trade-in value for later vehicles were also gifts from her mother. However, I find from the evidence of the Company's accounts, that the claimant had the benefit of a Company car, a Citroen DS3, which was listed as an asset of the Company. The Company paid the insurance and servicing costs and the claimant received a Class 1A national insurance charge in respect of the vehicle (evidenced by the form P11Ds in the bundle). An email from Mr Brown (page 131) also identifies that this was a Company vehicle. Although the respondent produced a part exchange valuation of £6,340 for the Citroen DS3, it was not disputed that it was in fact part exchanged at a value of £3,600 towards the purchase of a Suzuki Jimni in February 2018, in the claimant's name. The Suzuki was subsequently replaced with a Cactus, which the claimant sold. I find that the Company had assets of £3,600 tied up in the Cactus. It is agreed that the claimant did not account to the Company for any of the proceeds of the sale of the car. There was no express oral or written contractual term requiring the claimant to return the Company car. However, I conclude from the evidence of the accounts and the normal practice in relation to company vehicles that it was an implied term of the claimant's contract that the car was Company property and would be returned on termination of employment.

31. I accepted Mr Sanderson's evidence that, had the claimant's employment not terminated for redundancy, the claimant's actions in selling the Company car and keeping the proceeds would have led to her dismissal for gross misconduct in any event.

Mobile phone

32. Mr Sanderson said that the claimant kept an iPhone 6 which had been Company property. The claimant disputed the model of phone, but accepted that she had a phone, which she says was her personal phone. It was not clear to me from the evidence how the handset was paid for and by whom. Mr Sanderson gave evidence that his mother "probably" paid for it out of the business account, but did not appear to have any recollection of what actually occurred. The claimant accepted that the Company paid the monthly bills for the contract, although she would account for any excess over her monthly usage allowance. The O2 bills in the bundle show that the Company was invoiced for her usage and Mr Sanderson was able to cancel the contract on 10 July 2018. The claimant seemed to take the view that, because she had signed the contract for the phone, it was her property. She did not return it to the Company on termination of her employment, because she said it contained personal photographs and information. Although it was clear that the contract for usage was with the Company, there was insufficient evidence for me to make any finding as to who had paid for or owned the mobile phone handset. The respondent has not shown that it owned the mobile phone. In the absence of any written or oral contractual terms regarding the phone, and taking into account the evidence regarding the phone I find that the respondent has not shown that there was any contractual term requiring the claimant to return the

handset on termination of her employment.

Wages

33. Mr Sanderson says he withheld the claimant's wages during her notice period, on advice, against the value of the mobile phone and car. However, I have not been shown any written statement of terms and conditions for the claimant nor any other contractual documentation. It does not appear that there was any contractual agreement that the respondent was entitled to make deductions from the claimant's wages in respect of company property which was not accounted for on termination of employment. Nor, I find, was there any evidence that the claimant had previously signified in writing her agreement or consent to such deductions.

Holiday

34. The claimant's holiday year was from 1 January to 31 December. She was entitled to 28 days' holiday per annum. She had accrued 20.3 days' leave by 21 September 2018. She took 3 weeks' holiday, or 15 days' holiday, prior to 9 July 2018. A further 5.3 days' leave were therefore accrued but untaken by 21 September 2018.

Presentation of claim

35. The claimant contacted ACAS and obtained an EC certificate (page 1 of the bundle) which named the prospective respondent as James Mark Sanderson. The claim form (page 2 of the bundle) named the respondent as "James Mark Sanderson Mundy's Services Limited". I accepted the claimant's evidence that she named Mr Sanderson to ACAS because he was the managing director and she saw him as the person responsible for her redundancy. The claimant said she did not name the company to ACAS because she believed it was Mr Sanderson's personal grudge against her which resulted in her dismissal. She also explained that, because her mother who was the sole shareholder, had died and probate was not settled, she was confused about naming the Company as the respondent to ACAS.

36. The Tribunal's file shows that the administrative staff of the Tribunal referred the claim form to a judge in accordance with Rule 12(1) because they considered that the claim may be one which instituted relevant proceedings (proceedings which required early conciliation) but the name of the respondent on the claim form was not the same as the name of the prospective respondent on the EC certificate (Rule 12(1)(f)).

37. The Tribunal's file shows that an employment judge made the decision not to reject the claim. Under Rule 12(2A) a claim form must be rejected where relevant proceedings are instituted but the respondent's name on the EC certificate does not match that on the claim form, unless the judge considers that the claimant made a 'minor error'. The employment judge, in not rejecting the claim, considered the difference in names to be a minor error. The claim was duly served on the respondent.

38. At this hearing, having heard from the parties, I find that the claimant's employer was the Company and that her claims were presented against the Company

and Mr Sanderson.

The law

Jurisdiction

39. Section 7(2) of the Employment Tribunals Act 1996 ("ETA") requires that proceedings before employment tribunals "shall be instituted in accordance with" the ET Rules.

40. Rule 12 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the ET Rules"), requires that:

(1) The staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be –

…

(f) one which institutes relevant proceedings and the name of the respondent on the claim form is not the same as the name of the prospective respondent on the early conciliation certificate to which the early conciliation number relates.

…

(2A) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraph (e) or (f) of paragraph (1) unless the Judge considers that the claimant made a minor error in relation to a name or address and it would not be in the interests of justice to reject the claim.

41. Two authorities were discussed at the hearing:

41.1. **Giny v SNA Transport Ltd** EAT 0317/16, in which the claimant gave ACAS the name of the sole director, rather than the company name, at the company's address. On the claim form, the claimant named the company and the EAT upheld an employment judge's decision to reject the claim because of this difference, finding that the discrepancy was not a 'minor error'. The EAT rejected the claimant's argument that Rule 12 should be construed purposively such that it is satisfied provided ACAS is given sufficient information to enable it to make contact with the correct respondent. The EAT held it was a finding of fact for the employment judge to make as to whether the difference in names was a minor error. The EAT did not accept the respondent's submission that the difference between the name of a natural person and a legal person can never, as a matter of law, be a 'minor error'.

41.2. **Chard v Trowbridge Office Cleaning Services Ltd** [2017] ICR D21, in which the EAT approved the principles in **Giny** but reached the opposite conclusion on essentially the same facts. It agreed with the EAT in **Giny** that the issue of 'minor error' is one of fact and judgment for the tribunal and that the EAT can interfere only if the decision is flawed by error of law or perversity. The EAT in **Chard** considered that **"***considerable emphasis"* should be placed on the overriding objective, in particular in avoiding elevating form over substance in procedural matters, especially where parties are unrepresented**.** The EAT also held that instead of considering separately whether an error is minor and then whether the interests of justice require the claim to be accepted, the 'interests of justice' aspect should be seen as a useful pointer to what sort of errors ought to be

considered minor. In that case, the EAT held that the judge had failed to take into account the closeness of the relationship between the director and the company and did not adequately address the argument that an error can be minor even though it is more than just typographical. In **Chard** the EAT decided the difference was a 'minor error'.

42. In **Secretary of State for BEIS v Parry and 1 Other** [2018] EWCA Civ 672, at paragraphs 38 – 41, the Court of Appeal characterized the rejection of a claim as a recognition of the fact that no valid proceedings have been commenced under Rule 8(1). Rule 12 is the means by which the tribunal identifies this and notifies the claimant that their claim has not "got off the ground". The rejection of a claim under Rule 12 is therefore not a 'determination' within the meaning of section 7 of the ETA. It is a "judicial act of a different quality".

Effective Date of Termination

43. Section 97(1) ERA provides that the effective date of termination ("EDT") is the date on which notice of termination expires, unless the contract is terminated without notice, in which case the EDT is the date on which the termination takes effect. Once the employment has come to an end the parties cannot agree a different EDT. A notice to terminate employment is construed strictly against the person who gives it and, if there is any ambiguity, it should be resolved in favour of the person who receives it (the 'contra proferentem' rule).

44. Section 98(2)(c) ERA provides that redundancy is a fair reason for dismissal. Section 139(1) ERA defines redundancy:

For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –

…
(b) the fact that the requirements of that business –
(i) for employees to carry out work of a particular kind, or
(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer
have ceased or diminished or are expected to cease or diminish.

45. There is a three-stage process for determining whether redundancy is the reason for dismissal in relation to section 139(1)(b)(i): (1) Was the employee dismissed? (2) If so, had the requirements of the employer's business for employees to carry out work of a particular kind ceased or diminished, or were they expected to cease or diminish? (3) If so, was the dismissal of the employee caused wholly or mainly by the state of affairs identified at stage (2)? (**Safeway Stores plc v Burrell** [1997] IRLR 200, endorsed by Lord Irvine LC in **Murray v Foyle Meats Ltd** [1999] IRLR 562).

46. "Work of a particular kind" in section 13(1)(b) ERA means work which is distinguished from other work of the same general kind by requiring special aptitudes, skills or knowledge (**Amos v Max Arc Ltd** [1973] IRLR 285, [1973] ICR 46). The statutory focus is thus on the nature of the work involved.

47. The case of **Polkey v AE Dayton Services Ltd** **[1988] ICR 142**, concerns

whether, if a dismissal was unfair, the claimant would have been dismissed in any event had a fair process been followed. A reduction can be made to any compensation awarded to reflect the likelihood of dismissal in any event.

48. A reduction can also be made where the tribunal considers that any conduct of the claimant before dismissal was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent (section 122(2) ERA. In addition, the Tribunal shall reduce any compensation to the extent it is just and equitable to do so with reference to any culpable or blameworthy conduct of the claimant and its contribution to her dismissal (section 123(6) ERA).

Determination of the issues

Jurisdiction

49. The respondent submitted that the Tribunal did not have jurisdiction to hear part of the claim because the intended respondent was Mr Sanderson and the claimant's claims could not be pursued against an individual who is not personally the employer. The EC certificate was in Mr Sanderson's name, which also appeared on the ET1, along with the name of the Company. There was no EC certificate naming the Company. The Respondent submitted that the claimant clearly intended to bring proceedings against Mr Sanderson personally. While I accepted that the claimant stated that she would 'see him in court' and agreed at the hearing that he was the target, she also agreed that the Company was her employer. From the claimant's evidence, I find that she sought relief for the termination of her employment by her employer, whether that was the Company or Mr Sanderson. I took the following into account:

    49.1. The claimant saw Mr Sanderson and the Company as being one and the same thing, naming "Mr Sanderson Mundy's Services Ltd" on the claim form;
    49.2. Mr Sanderson and the Company are intimately connected, he being the sole director and guiding hand once his mother had died;
    49.3. The claimant is a litigant in person and cannot necessarily be expected to know the technicalities of employment tribunal procedure nor appreciate the distinction between a legal person and a natural person.

50. I find that the Company was the claimant's employer and that she presented her complaints against the Company. The complaints presented against Mr Sanderson are dismissed.

51. The Company is not named on the EC Certificate. The respondent submitted that, if I find that the claimant presented her claims against the Company, I should find that the claims cannot proceed because they should be rejected under Rule 12(1)(f) of the ET Rules. The respondent submitted that the claims should be rejected because the difference in names between the claim form and EC Certificate could not be classed as a 'minor error'. The respondent submitted that I had power under Rule 29 to vary, suspend or set aside an earlier case management order and that the decision not to reject a claim under Rule 12 was a case management order as defined in Rule 1(3). Miss Frantzis submitted that the decision not to reject the claim ought to be set aside or varied because it was necessary in the interests of justice because the respondent

had not had an opportunity to make representations.

52. This is an interesting, if technical, point about the ET Rules. While I was not directed at the hearing to the case of **Parry** in the Court of Appeal, that case suggests that the respondent's submissions are not correct. The issue in **Parry** concerned the rejection of a claim under Rule 12(1)(b) but the same principles must apply in the present case. The Court of Appeal held that rejection of a claim under Rule 12 is not a disposal of existing proceedings, but rather a recognition of the fact, or has the effect that, no valid proceedings have ever been commenced. The non-rejection of a claim form under Rule 12 must therefore be recognition of the fact that a valid claim has been issued and the Tribunal has jurisdiction to hear the claim. The Judge is not therefore making a case management decision, but merely recognizing a state of affairs. This conclusion is supported by the fact that there is no provision in the ET Rules for reconsideration of a decision not to reject a claim form under Rule 12. Rule 13 only allows for reconsideration of a rejection. There also can be no reconsideration of non-rejection under Rule 70 because there is no determination or disposal of the proceedings (but 'a judicial act of a different quality', **Parry**). As a result, it seems to me that there is no power in the ET Rules (either under Rule 13, 70 or Rule 29) for me (or the judge who originally made that decision) to reconsider, vary, suspend or set aside the non-rejection of a claim.

53. Even if Miss Frantzis is correct, and I can vary, suspend or set aside the non-rejection of the claim, I would not do so on these facts. While it is true that the respondent did not have an opportunity to make representations before the claim was served, that is a feature of the Rules. It does not, of itself, affect the interests of justice. The question at Rule 12 was whether the difference in names between the EC Certificate and the claim form was a 'minor error'. Miss Frantzis submitted that the difference could not be characterized as a 'minor error' under Rule 12(2A): The claimant deliberately named Mr Sanderson to ACAS and it was not therefore an error at all. For the reasons set out above, I find that the claimant exhibited some confusion about the natural person and legal person. She named both on the claim form and I was satisfied that, had she known she could not pursue her claims against Mr Sanderson as an individual, she would have anyway pursued her claims against the Company in the alternative, despite the fact that she may become a 10% shareholder once probate is granted.

54. Miss Frantzis referred me to **Giny v SNA Transport Ltd** UKEAT/0317/16, in which the EAT upheld a Tribunal's decision that a difference in names was not a minor error and the claim should be rejected. But this case is to be distinguished from **Giny** because the natural person (Mr Sanderson) was named on the claim form in addition to the legal person (the Company). In **Giny** the EC Certificate named the natural person while the claim form only named the legal person. While, in **Giny** the EAT warned against taking too purposive an approach to the Rules, it is clear to me that both the claimant and Mr Sanderson will have understood from the EC Certificate and the claim form precisely what her issues were with her treatment. There was no confusion caused as a result of her naming Mr Sanderson, rather than the Company, on the EC Certificate. The EAT gave guidance in **Chard** that considerable emphasis should be put on the overriding objective and that the reference to avoiding formality and seeking flexibility includes the need to avoid elevating

form over substance in procedural matters, especially where the parties are unrepresented. I consider that, to reject the claimant's claim at this stage of proceedings would be to deny her access to justice on a technicality which resulted in no prejudice to the respondent or Mr Sanderson. It would not be in the interests of justice. I conclude that this was a minor error.

wUnfair dismissal

55. I find that, although the claimant had agreed in principle to leave her employment, the details were not agreed. For example, there had been no agreement as to the termination date, notice, the amount or timing of the termination payment nor what would happen to the Company assets in her possession. There was therefore insufficient 'meeting of minds' for the arrangement to amount to an agreement to end the contract. The respondent did not dispute that the claimant was dismissed.

Effective date of termination

56. The letter handed to the claimant on 8 July 2018 did not expressly state that she was dismissed with or without notice. From Mr Sanderson's evidence I find that he intended to give her notice of termination. However, the letter was ambiguous. Although it enclosed a P45, that was subsequently substituted with a replacement P45 and the claimant was issued with payslips for wages covering the duration of her notice period. I take account of Mr Sanderson's evidence about his intention to dismiss with notice and also the principle that notice to terminate employment must be construed strictly against the person who gives it (the employer) and, if there is any ambiguity, it must be resolved in favour of the person who receives it (the employee). In notifying the claimant of termination of her employment I find that the respondent, in effect, gave her notice that her employment would terminate at the end of her notice period on 21 September 2018. However, she was not required to work during the notice period.

Reason for dismissal

57. I find that there was a redundancy situation at the respondent as defined in section 139 ERA. While the claimant carried out a variety of duties for the respondent, her primary duties from 2015 were to assist her mother, whose ailing health meant she could no longer carry out the work she had previously undertaken. When her mother died, there was no longer a requirement for an employee to assist her and her mother's role transferred to Mr Sanderson, who did not require assistance of that kind. Although the Company was expanding, there was therefore a reduction or cessation in the requirement for employees to carry out work of that particular kind. I find that there was, therefore, a redundancy situation as defined in section 139 ERA.

58. More difficult, however, is the question of whether that redundancy situation was the sole or principal reason for the claimant's dismissal. Clearly, there was less of a role for her assisting her mother but, given the Company's expansion and the fact that the claimant was family, it seems highly unlikely that her employment would have terminated had it not been for the burgeoning family dispute.

59. Given the close family relationship and size of the Company, the increasing personal antipathy, the probate dispute and Mr Sanderson's genuine belief in the breakdown of trust and confidence, I find there were multiple reasons for the termination of the claimant's employment. On balance, I conclude that the respondent has not shown that the redundancy situation was the principal reason for the claimant's dismissal, rather than a secondary consideration for Mr Sanderson. The respondent has not shown that there was a potentially fair reason for dismissal. I find that the claimant's dismissal was unfair.

60. Even if I am wrong in that, I would find that the claimant' dismissal was unfair because of the absence of any proper process. It would not make sense, in a case where there was an agreement in principle to terminate employment, to apply the guidance in **Williams v Compair Maxam** or the kind of steps one might ordinarily expect a reasonable employer to follow to seek to avoid dismissal. However, in this case no mutual agreement was reached, there was no proper discussion of the terms of termination and there was no process of any kind. The claimant was not warned of her dismissal, nor informed of the real reason for her dismissal. She was not given an opportunity to put forward her views or alternatives to dismissal. There was no discussion regarding the payments to be made, the timing of termination, the handling of the loan or the return of Company property. It is perhaps often a feature of family disputes that no one acts entirely reasonably. However, while the behaviour displayed may not be unusual for siblings who have fallen out, it is not, in my view, within the range of reasonable responses for an employer and employee, even in circumstances where they are siblings.

61. I therefore find that the complete absence of any process by the respondent was not within the range of reasonable response of a reasonable employer in all the circumstances, for the purposes of section 98(4) ERA.

Remedy

62. Although I find that the claimant's dismissal was unfair, given the particular circumstances of this case, I find that it was inevitable that the claimant's employment would have terminated by 21 September 2018 in any event, whether by resignation, mutually agreed termination or by a fair dismissal. The antipathy described in the witness evidence, including the allegations of theft and the involvement of the police, suggest that it would be highly unlikely that the claimant's involvement with the Company would have continued. In the circumstances I consider that any losses cannot continue beyond 21 September 2018. I do not therefore make any award of compensation in respect of the compensatory award.

63. I also consider that the claimant's conduct, prior to termination of her employment, in particular in selling the Company car and failing to account for the proceeds to the Company, was such that it would be just and equitable to reduce the amount of the basic award to zero under section 122(2) ERA. She has, in any event, had the benefit of a 'redundancy' payment.

Notice

64. The claimant was given notice of her termination and served that notice, albeit that she was not required to attend work. Her claim for breach of contract in

respect of notice therefore fails.

Unauthorised deductions from wages

65. The respondent was not entitled to make payment in lieu of notice and did not, in fact, purport to do so. The claimant, in serving her notice, was entitled to payment of wages (as defined in section 27 ERA) during her notice period. She is therefore entitled to pursue a claim for unauthorised deductions from wages under section 13 ERA. She was issued with payslips for the notice period but did not receive any wages. There was no contractual term or prior written agreement that the respondent was entitled to deduct money from her wages and I therefore find that, in doing so, it made unauthorised deductions from her wages. The respondent is therefore ordered to pay to the claimant compensation in the sum of £3,792.84, representing 12 weeks' wages due for her notice period, as evidenced by the wage slips in the bundle.

Holiday pay

66. The claimant's leave year was 1 January to 31 December. She was entitled to 5.6 weeks' (or 28 days') leave per annum. Her employment terminated on 21 September 2018 and she had therefore accrued 20.3 days' leave. However, she took 3 weeks' holiday in June and July 2018, thereby using up 15 days' holiday. There were therefore 5 ½ days' (or 1.1 week's) accrued holiday untaken on termination, for which the respondent must pay compensation of £377.30 (gross weekly pay of £343.00 (as per her payslips) x 1.1 weeks).

Employer's contract claim

Car

67. I find that the claimant sold a Company asset and did not account for the value of it to the Company. I find that there was a term implied into her contract of employment by way of business efficacy, that she would account for the value or return any Company property on termination of employment. Her failure to do so was therefore a breach of her contract of employment. I find, from the trade-in value of the previous company car, that the amount for which the claimant should have accounted to the Company was £3,600.00. The respondent's claim for damages for breach of contract therefore succeeds and the claimant shall pay to the respondent damages of £3,600.

Phone

68. There was insufficient evidence for me to make any finding as to who had paid for or owned the mobile phone handset. The respondent has therefore failed, on the balance of probabilities, to show that the claimant breached her contract by keeping the phone or that any damages should be paid by the claimant to the respondent.

69. In light of these findings, there is no requirement for a remedy hearing.

Employment Judge

Date 1 August 2019