



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

Ms. E. Montrieux

AND

Respondents

**(1) Mr. Aiken (deceased by his
personal representatives)
(2) Mrs. Aiken**

HELD AT: London South (Ashford)

ON: 31 January 2020

EMPLOYMENT JUDGE Mason

Representation

For the Claimant: In person

For the Respondent: Mr Canning, counsel

RESERVED JUDGMENT

The judgment of the Tribunal is that:

1. The Claimant's claim of unfair dismissal succeeds and the Claimant is awarded £765.23 (representing two week's net pay).
2. The Respondent breached the Claimant's contract of employment by failing to give her notice or pay monies in lieu (7 weeks) and is also ordered to pay the Claimant £3,230.77 (gross).

REASONS

Background

1. In this case Ms. Montrieux (“the Claimant”) claims that she was unfairly and wrongfully dismissed.
2. The Claimant was employed as a housekeeper in the home of Mr & Mrs Aiken. Her employment commenced on 2 January 2012.
3. Mr. Aiken died on 24 March 2019 and his personal representatives are the First Respondent. Mrs. Aiken is the Second Respondent. The Claimant claims both Respondents were her employers. The Respondents’ say that her contract of employment was solely with Mr. Aiken and was frustrated on his death.
4. The Claimant first contacted Acas on 29 April 2019 and an Acas Early Conciliation certificate was issued on 12 June 2019.
5. The Claimant presented this claim on 14 June 2019 and brings the following claims:
 - 5.1 Unfair dismissal:
 - (i) Her contract was not terminated by frustration as her employer was also Mrs. Aiken.
 - (ii) Her role was not genuinely redundant.
 - (iii) Her dismissal was unfair procedurally.
 - 5.2 Wrongful dismissal
She was not given or paid notice (7 weeks).
 - 5.3 The Claimant also mentioned in her claim form “discrimination” and “personal injury” but was not specific and these claims were not accepted by the Tribunal (as explained to the parties in a letter from the Tribunal dated 10 December 2019).
6. On 14 October 2019 the Respondents lodged a response. The Respondents defend the claims on the following basis:
 - 6.1 They say the Claimant worked solely for Mr. Aiken and her contract of employment was frustrated by his death on 24 March 2019.
 - 6.2 As the contract was frustrated there was no dismissal but it is accepted that this was a deemed redundancy and accordingly on 3 May 2019 the Claimant was paid:
 - (i) a Statutory Redundancy Payment (SRP) of £4,846.17;
 - (ii) £676.94 accrued holiday pay; and
 - (iii) an ex gratia payment of 3 days pay, £461.55
 - 6.3 Alternatively, if (which is denied) Mrs Aiken was also the Claimant’s employer, the dismissal was fair:
 - (i) The dismissal was for a fair reason, specifically:
 - a. redundancy; or

- b. “some other substantial reason” (SOSR) due to the breakdown in the relationship between the Claimant and Mrs. Aiken.
- (ii) The dismissal was fair in all the circumstances and even if the dismissal was procedurally unfair, no compensation should be awarded on the basis the Claimant would have been dismissed in any event.

Procedure at the hearing

- 7. The Respondents provided a joint bundle of documents (pages 1 to 172). We added an additional 20 pages provided by the Claimant at the start of the hearing (pages 173 to 193) consisting of copies of salary cheques she received from the Respondents and also payslips from her new employment.
- 8. Having agreed with the parties the issues (para. 12 below), I retired to read the witness statements and the joint bundle.
- 9. On behalf of the Respondents I heard from Mr. Alex Aiken (son of Mr. and Mrs. Aiken) and from Mrs Susan Hart (Mr. Aiken’s Personal Assistant). I then heard from the Claimant. All the witnesses adopted their respective witness statements as their evidence-in-chief and were cross-examined.
- 10. Mrs. Aiken provided a witness statement but did not attend the hearing. Mr Canning informed me that this was due to her age (76 years) and illness; however, there was no medical evidence before me to support this. I explained at the outset that Mrs. Aiken’s absence reduced the weight to be placed on her witness statement as she was not present to be cross-examined.
- 11. I heard oral submissions from both Mr. Canning and the Claimant. I reserved my decision which I now give with reasons.

Claims and Issues

- 12. The claims and issues as agreed with the parties at the outset are as follows:
- 13. Unfair Dismissal
 - 13.1 Who was the Claimant’s employer?
 - 13.2 If Mr. Aiken was the Claimant’s sole employer, was her contract of employment frustrated by his death on 24 March 2019?
 - 13.3 If Mrs. Aiken also employed the Claimant:
 - (i) Did Mrs. Aiken have a potentially fair reason for the dismissal? The Respondents rely on (1) redundancy and/or (2) SOSR which are both potentially fair reasons.

- (ii) Did Mrs. Aiken follow a fair and reasonable procedure in dismissing the Claimant?
- (iii) If the Claimant was unfairly dismissed, how much is she entitled to by way of a compensatory award taking into account the likelihood that the Claimant would have been dismissed in any event (**Polkey v AE Dayton Services Ltd [1987] ICR 142**)?

14. Wrongful dismissal

- 14.1 Was the Claimant dismissed without due notice or a payment in lieu?
- 14.2 If so, how much is she entitled to? It is agreed that her statutory entitlement to notice was 7 weeks which is greater than and therefore supersedes her contractual notice period of one month.

Findings of fact

15. Following an interview with Mrs. Aiken, the Claimant was offered employment as housekeeper in the home of Mr. & Mrs. Aiken. Prior to this, the Claimant worked in a pub owned by Mr. and Mrs. Aiken.

16. In December 2011, Mr. Aiken wrote to the Claimant to formally offer her the position of housekeeper [page 36]. That letter is typed on Mr. Aiken's own headed notepaper and signed by him. The Claimant says [w/s para 1] that Mr. Aiken "used his letter heading for everything"; I accept this.

Relevant extracts from that letter are as follows:

"This letter is to formalise the offer of the post of Housekeeper ... with the broad range of duties discussed and that such a position envisages. All aspects of house management are included and probably will vary from time to time because of agreed priorities and events.

In respect of your duties you will report to my wife, Mrs. Sigi Aiken, but for terms of employment, payroll matters and other administration to me. Your salary payment, PAYE and NHI will be handled by Colin Taylor of Taylors Ltd, Chartered Accountants."

The letter concludes:

"Eveline, both Sigi and I are very pleased that you will be taking up this role. If you accept this offer please sign the copy and return it to me. Please also let me know when you are ready to start."

17. On 20 December 2011, Mr. Aiken wrote to the Claimant again [page 37]. That letter was also on Mr. Aiken's own headed notepaper and signed by him. Relevant extracts are as follows:

"Thank you very much for accepting the terms and conditions of employment ... my wife and I are delighted you will be working for us in the role of Housekeeper.

As discussed, your start date will be Monday 2 January 2012...."

18. On 2 January 2012, the Claimant commenced employment as a housekeeper in Mr. & Mrs. Aiken's home. It is a large house consisting of lounge, library, dining room, kitchen, utility, gun room, pool house, barn, office, five bedrooms and four bathrooms.

19. It is accepted that the Claimant's duties included cleaning, washing-up, laundry, ironing (apart from the sheets which were sent out to be pressed) and putting shopping away. I accept her evidence [w/s para. 3] that she was also required to clean the outside dustbins the dog kennels, the dog bedding and bring in the logs. I also accept her verbal evidence that she was also required to empty the compost bin, empty the rubbish bins, clean the silver, polish the brass taps, clean the fireplace, bring in the coal and change the beds,
20. The Claimant liaised with Mrs. Aiken with regard to her day to day duties and with Mr. Aiken with regard to the terms of her employment. If she wished to take holiday she contacted Mr. Aiken; if she was sick she rang Mrs. Aiken or left a message on her answer phone and also text Mr. Aiken. The payroll was dealt with by external accountants, Taylors Limited. I accept the evidence of Mrs. Susan Hart (Mr. Aiken's PA since 2009) [w/s para. 2] that she [Mrs. Hart] liaised with the accountants regarding the Claimant's payslips and made a note of any days the Claimant took off as holiday or on sick leave.
21. The Claimant worked initially on a full-time basis but in February 2014, at her request, her hours were reduced to 21 per week. On 10 February 2014, Mr. Aiken wrote to the Claimant [page 38] (again on Mr. Aiken's own headed notepaper and signed by him):

"... I am writing to formalise the amended changes to your original contract letter of December 2011.

Your normal working hours will be 21, and you will be entitled to 17 days annual leave plus Bank Holiday. Your morning start will remain unchanged at no earlier than 9.30am. Your salary will be £24,000 annually and paid monthly by cheque on or around 28th of the month.

I confirm that the notice period is a calendar month on either side".
22. The Claimant was paid £2,000 per month gross (£1,658 net). The Claimant's pay slips for February and April 2019 [pages 47 and 48] show in the top right hand corner "M P Aiken". She was paid by cheque on a joint account in the name of Mr. & Mrs. Aiken; cheques were signed by Mr. Aiken [copy cheques pages 173-179]. This directly conflicts with Mrs Aiken's evidence [w/s para. 3] that the Claimant's pay "*came from his [Mr. Aiken's] sole bank account*". An HMRC Employer Payment Booklet for the Income Tax Year 2019/20 is in Mr Aiken's name [page 139].
23. Mr. & Mrs. Aiken engaged a gardener/handyman and a groom to assist them at their home. I accept Mrs. Hart's evidence [w/s para. 3] that they (and Mrs. Hart) are self-employed and submit monthly invoices [pages 117-122]. I also accept Mrs Hart's evidence [w/s para 4] that Mr & Mrs Aiken (not just Mr Aiken) engaged the gardener and the groom.

24. Around May/June 2018, Mr. Aiken sought legal advice with a view to making the Claimant redundant [pages 49-50d]. However, this was not pursued and the Claimant was unaware of this until these proceedings. Mr. Alex Aiken was unaware of this [w/s para. 10]. Mrs. Hart was aware of this but does not know why Mr. Aiken decided not to go through with it [w/s para. 5]. Mr. Aiken's reasons for considering making the Claimant redundant at that time are not apparent from the evidence before me; the only clue is in Mrs. Aiken's witness statement [para. 8] in which she says:
"The amount of work the Claimant undertook had already been reduced prior to [Mr. Aiken's] death as we had started to send the ironing to an outside company from June 2018."
25. On 22 March 2019, Mr. Aiken prepared a letter to the Claimant [page 39] to provide her with information about automatic enrolment in a workplace pension with effect from April 2019.
26. On 24 March 2019, Mr. Aiken died suddenly. The Claimant was at her own home at the time. At Mrs. Aiken's request, Mrs. Hart telephoned the Claimant that afternoon and told her that Mr. Aiken had died and advised her to stay at home until further notice and that someone would be in touch shortly.
27. On 25 March 2019, Mr. Alex Aiken (son of Mr. & Mrs. Aiken) telephoned the Claimant. He explained that the family were grieving and needed time alone in the house and that they would be in touch soon.
28. On 3 April 2019, the Claimant sent a text message to Mrs. Hart [page 63-64] asking about her March salary which was overdue. Mrs. Hart spoke to Mr. Alex Aiken and he offered to drop a cheque round to the Claimant at her home for the March salary. Mrs Hart sent a text to the Claimant [page 65] to say that she would hopefully get a cheque to the Claimant the following day.
29. Also on 3 April 2019, the Claimant saw her GP and she was "signed off" with depression, anxiety and stress [page 32].
30. On 4 April 2019, Mr. Alex Aiken visited the Claimant at her home to deliver her March salary cheque. He says the visit lasted about 20 minutes; the Claimant says it was about 5 minutes. There is also some disagreement between the Claimant and Mrs. Aiken as to what was said at that meeting.
- 30.1 Mr. Aiken says [w/s para. 5]:
"We had a very friendly and sincere chat. I said that I understood that the relationship between her and [Mrs Aiken] wasn't perfect, and asked her whether she would agree that there was no reason for her to continue She said that it made sense not to continue. The Claimant tried to go into more detail about the difficulties between her and [Mrs. Aiken] as I was leaving but I told her it was inappropriate and cut her off without discussing this any further".
- 30.2 The Claimant on the other hand says [w/s para. 4]:

“He arrived; we spoke very little as we were both deeply upset of his father’s death. After he had gone, I realised I had not asked about the funeral and when I could expect to go back to work ...”.

She agrees that they discussed briefly her poor relationship with Mrs. Aiken but denies that continuation of her job was discussed.

31. Following the visit, later that same day, the Claimant sent Mr. Alex Aiken a text [pages 59 -60]

“Dear Alex,

Thank you for dropping off payslip and workplace pension letter.

I didn’t ask you when is the funeral and whether employees would be able to attend.

You did mention that you knew of the situation between your mother and myself, obviously [Mr. Aiken] was always there to advise. How does that leave things in respect of my job...?

Please pass on my deepest sympathy to [Mrs. Aiken].”

32. I accept Mr. Alex Aiken’s evidence [w/s para. 6] that he was “flummoxed” as to why the Claimant asked for an update on her employment and that it was his understanding that the whole of their conversation earlier that day was around the fact that his father had died and it was clear she did not get on with Mrs. Aiken.

I also accept his evidence [w/s para. 6] that it was his understanding that the Claimant:

“... clearly said to me that she did not want to carry on and that it was in the best interests of both parties if her employment were to end”

33. Mr. Alex Aiken sent a text to the Claimant later that day [page 61] as follows:

“Hi Eveline, It was very good to see you today. Yes, please do come to the funeral. As far as the job goes, I thought you understood. I’m sorry, but the sad truth is that the job does not exist anymore without my Dad in the house. I look forward to seeing you next week.”

34. Having considered the exchange of texts above and having heard evidence from both the Claimant and Mr. Aiken, I prefer the evidence of Mr. Aiken as to what was said at the meeting with the Claimant on 4 April. My reason is the wording of Mr. Alex Aiken’s text - *“As far as the job goes, I thought you understood...”*; this supports Mr. Aiken’s account that the job was discussed. This is not to say that I believe the Claimant was lying; I believe she was genuinely mistaken in circumstances where she was grieving and was suffering with anxiety, stress and depression.

35. On Saturday 6 April 2019, the Claimant sent the following text message to Mr. Alex Aiken [page 62]:

“I’ve rung ACAS, I’ve got a case.”

36. On 11 April 2019, the Claimant wrote to Mrs. Aiken [page 74]. She said in that letter that she was *“shocked and angry”* to have been made redundant by text from Mr. Alex Aiken on 4 April. She said she had been advised by Acas that she had a case for unfair dismissal as she believed her job still existed. She asked Mrs. Aiken to *“consider the damage of the continuous*

mental abuse” that she (the Claimant) had suffered whilst working for Mrs. Aiken.

37. On 26 April 2019, the Respondents’ solicitors (Cripps) wrote to the Claimant [pages 75-76]. Cripps informed the Claimant that her employment contract had been frustrated on the death of Mr. Aiken on 24 March 2019; there had been no dismissal (and therefore no unfair dismissal) and she was not entitled to receive notice of termination or payment in lieu. However, Cripps advised her that this was a “deemed” redundancy and, accordingly, she was entitled to a statutory redundancy payment of £4,846.17 together with 4.4. days’ accrued holiday (£676.94) and an ex gratia payment of 3 days pay (£461.55). The total sum (gross) came to £5,984.66.
38. On 3 May 2019, Colin Taylor, accountant, wrote to the Claimant [page 72] enclosing her final payslip and a cheque for £5,919.46 (representing the gross sum of £5,984.66 less deductions for tax and NI).
39. On 20 May 2019, the Claimant sent a text to Mrs. Hart asking when she would receive her P45 [page 70]; Mrs. Hart replied [page 71] to advise her it was being sent by the accountants. The P45 was then sent to the Claimant by Colin Taylor on 31 May 2019 [page 73].
40. I have no hesitation in finding that the relationship between the Claimant and Mrs. Aiken was extremely strained and difficult. This is not in dispute and in any event there is ample evidence of this including the following:
 - 40.1 The Claimant says in her claim form [page 8]:

“I have endured years of abuse and false accusations from Mrs. Aiken to which I have diary entries and witnesses to this. This has affected my health both mentally and physically, I have been to the GP several times over the years. I have Rheumatoid Arthritis which the GP suggested could be stress related. I suffer with anxiety which was exacerbated by Mrs Aiken’s behaviour towards me”.
 - 40.2 There was an exchange of text messages between the Claimant and Mr. Aiken on 9 January 2019 [page 51-52] in which the Claimant advised Mr. Aiken that she has had to go home because Mrs. Aiken’s conduct had been “awful”. She said:

“It has given me worse anxiety and now my whole body is trembling, it’s constant verbal abuse which is not acceptable”.

Mr. Aiken apologised and, having spoken to Mrs. Aiken, sent a text message to the Claimant as follows:

“I have spoken with [Mrs. Aiken] and made my view very clear about appropriate conduct for both Employer and Employee in the work place. If you would like to have a further chat about the situation I am available.”
 - 40.3 Extracts from the Claimant’s diary in the bundle show her intense unhappiness as a result of Mrs. Aiken’s alleged behaviour. She refers to Mrs. Aiken’s “vicious” treatment of her and describes her as “evil” [page 158] and says “I don’t even want to drive towards her house or associate with anyone that knows her” [page 159]. In other entries she makes comments about Mrs. Aiken such as “unfair treatment”, “picking on me”,

“undermines me”, finds fault, “humiliating me”, “ obstructs me in any way”, “nasty” “vicious”, “emotional distress” “damage to my mental health” [pages 165 -167].

40.4 The Claimant mentioned to Mr. Alex Aiken at their meeting on 4 April 2019 that Mrs. Aiken was *“abusive”*.

40.5 In verbal evidence, the Claimant said she was *“attacked on a daily basis”*.

41. I also find that Mr. Aiken effectively mediated and conciliated between the Claimant and Mrs. Aiken:

41.1 An example of this is on 9 January 2019 [page 51-52] (see paragraph 402 below).

41.2 I accept the Claimant’s verbal evidence that Mr. Aiken sent Mrs. Aiken to her house on a couple of occasions to apologise and that there were occasions when the Claimant *“appealed”* to Mr Aiken in respect of Mrs. Aiken’s behaviour.

41.3 In her text to Mr. Alex Aiken on 4 April 2019 [page 60] the Claimant said *“You did mention that you knew of the situation between your mother and myself, obviously [Mr. Aiken] was always there to advise.”*
A common sense reading of this sentence is that the Claimant regarded Mr Aiken as someone to advise on the situation between Mrs. Aiken and herself.

42. Mr. Alex Aiken says [w/s para 11] says:
“The natural process of time meant that there are now fewer people around the house than there were when the Claimant started working there back in 2012”.
Four years ago, he and his own family have moved to Tunbridge Wells and sleep over less often; two years ago his younger brother and his family moved to live in Italy; his older brother sadly passed away three years ago.. However, it is not in dispute that only Mr. & Mrs. Aiken lived in the house during the entire time the Claimant was employed and the Claimant did not work at weekends and I accept her evidence that her workload was not particularly affected by visitors.

43. Since Mr. Aiken’s death, the gardener and the groom have continued in their respective roles. I accept Mrs. Hart’s evidence [w/s para 4] that the gardener’s hours have slightly reduced but the groom’s have increased by two or three hours per week to cover the hours Mr. Aiken spent caring for and riding the horses. I accept the Claimant’s evidence [page 163] that the gardener is doing some of the jobs that she used to do such as bringing in logs, dealing with the rubbish and emptying the compost from the kitchen.

44. Mrs Aiken says [w/s para 9] that since Mr Aiken’s death, she has had no help with the housework until just before Christmas 2019 when a self-employed cleaner started to come to the house for 3 hours a week. Although Mrs. Aiken was not present to verify this, I accept this to be the case as:

- 44.1 It is supported by Mr. Alex Aiken who says [w/s para. 11] Mrs. Aiken now *“carries out the majority of the tasks that the Claimant used to undertake. She has taken on a cleaner within the last month, however, this is only for 3 hours a week, significantly less time than the Claimant was employed for.”*
- 44.2 The Claimant was unable to comment on this when I asked her and therefore there is no challenge or evidence to the contrary
45. The Claimant accepted in verbal evidence that there were no vacancies she can identify that Mrs. Aiken could have offered to her.
46. The Claimant is now 67 years old. From 3 April 2019 to 7 October 2019, she was signed off sick with depression, anxiety and stress. I accept her evidence that she has searched and applied for many roles. Evidence of this is in the bundle [pages 79-104] and the Respondents take no issue with her attempts to mitigate her loss. Since 4 October 2019, she has been working in a pub earning £8.50 per hour [payslips pages 180- 193]. Her hours and therefore her pay vary but the payslips show an average of £227.53 (net) per week. I accept her verbal evidence that she is effectively on a zero hours contract and her hours vary between 15 and 21 per week.

Submissions

Respondent’s submissions:

47. Frustration
- 47.1 Mr. Canning submits the Claimant’s contract of employment was frustrated on Mr. Aiken’s death as he was the Claimant’s sole employer.
- 47.2 He says the following demonstrate this:
- (i) Mrs. Aiken clearly had no intention to enter into legal relations with the Claimant (w/s paragraphs 2 and 7).
 - (ii) The offer letter [page 36] is on Mr. Aiken’s own headed notepaper and signed only by him. He does not say that he is writing on behalf of himself and Mrs. Aiken.
 - (iii) The Claimant reported to Mrs. Aiken but it was Mr. Aiken who was responsible for the terms of the Claimant’s employment and it was to Mr. Aiken that she raised any complaints.
 - (iv) The payslips show only his name.
 - (v) The salary cheques payable to the Claimant are all signed by Mr. Aiken. It *“tells us very little”* that they were paid out of a joint account.
 - (vi) It was Mr. Aiken who took advice in 2018 with regard to potentially making the Claimant redundant.
 - (vii) Mr. Aiken’s text on 9 January 2019 [page 51] (in which he says he has “ ... spoken with [Mrs. Aiken] and made my view very clear about appropriate conduct for both Employer and Employee in the work place”) does not assist the Tribunal as it clear Mr. Aiken as a lay person was not using these terms in the sense a lawyer would.

48. Redundancy

48.1 If (which is not accepted) the contract of employment was not frustrated, Mr. Canning submits that the Claimant was dismissed by reason of redundancy which is a potentially fair reason.

48.2 He says the following show that there was a genuine redundancy situation:

- (i) Mrs. Aiken says [w/s para. 8] that there is a reduced demand for housekeeping as she now lives alone.
- (ii) Mr. Alex Aiken describes [w/s para. 11] the ways in which the house has emptied over the years.
- (iii) Mrs. Hart says [w/s para. 4] that since Mr. Aiken's death, the groom has increased her hours but the gardener is working reduced hours.
- (iv) Whilst it remains a big house, Mrs. Aiken is now on her own and says [w/s para. 8 and 9] that she now does some of the housework and only since December 2019 has she had help of 3 hours per week, which is sufficient for her needs.
- (v) Mr. Aiken was considering making the Claimant redundant in June 2018 which shows there was a reducing need for housekeeping.
- (vi) The text from Mr. Alex Aiken on 4 April 2019 [page 61] shows that there was either no work for the Claimant to do or a diminution in the need for housekeeping.

49. "Some other substantial reason" ("SOSR")

49.2 If (which is not accepted) the contract of employment was not frustrated and the Claimant was not dismissed by reason of redundancy, then Mr. Canning submits that the Claimant was dismissed for SOSR which is a potentially fair reason. The SOSR is the breakdown in the relationship between the Claimant and Mrs. Aiken combined with the death of Mr. Aiken.

49.2 Mr. Canning relies on the case of **Harper v National Coal Board [1980] IRLR 260** and says the following show that there was SOSR:

- (i) Mrs. Aiken says [w/s para. 11] that the relationship had broken down to such an extent that it would have been impossible for her to continue employing the Claimant.
- (ii) At the meeting between the Claimant and Mr. Alex Aiken, the subject of the conflict was raised.
- (iii) It is hard to see how the relationship could continue without the Claimant having Mr. Aiken to complain to.

50. Procedural Fairness (s 98(4) Employment Rights Act 1996)

50.1 Mr. Canning submits that Mrs. Aiken acted reasonably in treating either redundancy or SOSR as a sufficient reason for dismissing the Claimant, given Mrs. Aiken's administrative resources and in all the circumstances. In accordance with equity and the substantial merits of the case the Claimant's dismissal was fair.

50.2 Mr. Alex Aiken went to see the Claimant on 4 April 2019 and says it was agreed with the Claimant that she would not continue to work at the house.

On the evening of 4 April, the text from Mr. Alex Aiken makes it clear there was no longer a job.

50.3 If this was not a domestic employer, Mr. Canning accepts that this would be a procedurally unfair dismissal. But Mrs. Aiken was a domestic employer who was grieving and dealing with a scenario where she and the Claimant could not continue working together. In such circumstances, any procedure would have been unhelpful.

50.4 Mr. Canning submits that even if the dismissal was procedurally unfair (which is denied), it is very unlikely that the Claimant and Mrs. Aiken could have continued to work together and therefore any compensation should be reduced by 100% (*Polkey*).

50.5 Mr Canning said he had “nothing to say” on mitigation.

Claimant’s submissions:

51. Frustration

51.1 The Claimant says her contract of employment was not frustrated by Mr Aiken’s death as she was also employed by Mrs. Aiken.

51.2 The following show that Mr. Aiken was not her sole employer:

- (i) Mr. Aiken used his personal headed notepaper all the time and also signed everything. This is therefore irrelevant.
- (ii) Cheques for her salary were always from Mr. & Mrs. Aiken’s joint bank account.

52. Redundancy

52.1 The Claimant does not accept that there was a genuine redundancy situation.

52.2 The following show that there was not a genuine redundancy situation:

- (i) It is not the case that the household has “emptied”. Since her employment started in 2012, the only people living in the house were Mr. and Mrs Aiken. There were occasional visitors
- (ii) Her workload remained the same.
- (iii) Mrs. Aiken now has someone to help her with the housekeeping.

52.3 The Claimant believes Mr. Aiken’s death was an opportunity for Mrs. Aiken to get rid of her.

53. Some other substantial reason

53.1 The Claimant says her relationship with Mrs. Aiken has been the same since 2012. Mrs. Aiken made her life hard but she [the Claimant] did her job and remained professional throughout.

53.2 The Claimant would have continued working for Mrs. Aiken regardless; the Claimant says she lives on her own and needs to work financially.

54. Procedure

54.1 No formal procedures were followed.

54.2 She denies that there was a conversation with Mr. Alex Aiken about her job when he called round to her house on 4 April 2019 and the first time she knew that she no longer had a job was when she received his text later that day.

The Law

Frustration of the employment contract

55. A contract of employment will terminate automatically by operation of law where the contract is frustrated by an unforeseen event which makes performance of the contract impossible or radically different from what the parties intended.

55.1 There is no resignation or dismissal and the employee cannot therefore claim unfair dismissal and is not entitled to notice or a payment in lieu.

55.2 However, where the employment contract is with an individual employer, whilst the death of that employer will automatically dissolve the contract; there is a deemed dismissal for the purposes of the statutory redundancy scheme in accordance with s136(5) ERA.

55.4 The burden of proof is on the party asserting that the contract has been frustrated.

Unfair dismissal

56. Reason for dismissal

56.1 Section 98 (1) ERA:

“(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and*
- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.”*

56.2 Section 98(2) ERA:

“A reason falls within this subsection if it—

- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,*
- (b) relates to the conduct of the employee,*
- (c) is that the employee was redundant, or*
- (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.”*

56.3 Redundancy

(i) Section 139 ERA:

“(1) 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—

- (a) the fact that his employer has ceased or intends to cease—*
 - (i) to carry on the business for the purposes of which the employee was employed by him, or*
 - (ii) to carry on that business in the place where the employee was so employed,*
- or*

*(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.”*

(ii) Section 139(6) ERA

The word “cease” means either a permanent cessation of the business and “diminish” means either a temporary or a permanent diminution.

56.4 Some other substantial reason (SOSR)

A breakdown in working relations leading to a loss of trust and confidence can amount to SOSR so long as the employer can show a genuinely held belief that it had a fair reason for dismissal and that reason was not whimsical or capricious.

57. Reasonableness of Dismissal:

57.1 Section 98(4) ERA:

Where the employer has fulfilled the requirements of s98(1), the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer):

- (i) depends on whether in the circumstances (including the size and administrative resources of the employer’s undertaking) the employer acted reasonably or unreasonably in treating the s98(2) reason relied on as a sufficient reason for dismissing the employee; and
- (ii) shall be determined in accordance with equity and the substantial merits of the case.

57.2 Range of reasonable responses

- (i) In judging the reasonableness of the dismissal the Tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer; it is not for the Tribunal to impose its own standards.
- (ii) The Tribunal must ask whether dismissal fell within the range of reasonable responses of a reasonable employer. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion in all the circumstances. The band of reasonable responses test applies as much to the question of whether procedure was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.
- (iii) In many (though not all) cases there is a band of reasonable responses within which one employer might take one view, and another might quite reasonably take another. The function of the Tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

58. Unfair dismissal Compensation:

- 58.1 In addition to a Basic Award (s.119 ERA), **Section 123(1) ERA** provides for a Compensatory Award: “... *the amount of the compensatory award shall be such*

amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer”.

58.2 Mitigation:

S.123(4) ERA requires a Claimant to mitigate their loss and a Claimant is expected to explain to the Tribunal what actions they have taken by way of mitigation.

58.3 ***Polkey v AE Dayton Services Ltd [1987] ICR 142 (“Polkey”):***

Where evidence is adduced as to what would have happened had proper procedures been complied with, there are a number of potential findings a Tribunal could make:

- (i) In some cases it may be clear that the employee would have been retained if proper procedures had been adopted. In such cases the full Compensatory Award should be made.
- (ii) In others, the Tribunal may conclude that the dismissal would have occurred in any event. This may result in a small additional Compensatory Award only to take account of any additional period for which the employee would have been employed had proper procedures been carried out.
- (iii) In other circumstances it may be impossible to make a determination one way or the other. It is in those cases that the Tribunal must make a percentage assessment of the likelihood that the employee would have been retained.

Claim for monies in lieu of notice

59. Breach of Contract

59.1 Article 4 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 gives the Employment Tribunal jurisdiction to hear claims for damages for breach of contract provided the claims arose or are outstanding on termination of the contract of employment and have been brought in time.

59.2 In accordance with s.86 ERA, employees are entitled to one week’s notice for each complete year of service unless dismissed fairly for gross misconduct. If an employee proves that they have been dismissed (constructively or otherwise) without due notice, this will give rise to a claim for damages for wrongful dismissal.

Conclusions

Frustration of the contract of employment

60. I have concluded that the Claimant’s contract of employment was not frustrated on the death of Mr. Aiken for the following reasons:

60.1 The Claimant was employed by Mr. & Mrs. Aiken on a joint basis and I draw support for this conclusion from the following factors:

- (i) It is clear that the Claimant was taken on to work for both Mr. Aiken and his wife. Mr. Aiken referred to the Claimant as “*working for us*” [page 37]. The letter of offer and other correspondence is on Mr. Aiken’s headed notepaper

and signed only by Mr. Aiken but I have accepted that the Claimant's evidence that Mr. Aiken generally used his letter heading for correspondence and I therefore place little weight on this.

- (ii) Mr. Canning argues that it was not Mrs. Aiken's intention to enter into legal relations with the Claimant but Mrs. Aiken did not attend the hearing.
- (iii) Both Mr. & Mrs. Aiken engaged the gardener and the groom (Mrs. Hart's evidence [w/s para 4]). Whilst they may be engaged on a self-employed basis, it is indicative that it was not the norm for only Mr. Aiken to engage staff.
- (iv) Mrs. Aiken was closely involved in the working relationship with the Claimant; it was Mrs. Aiken who interviewed her; it was Mrs. Aiken who the Claimant reported to; and it was Mrs Aiken who exercised close control over how the Claimant carried out her work.
- (v) Whilst cheques were signed only by Mr. Aiken, they were drawn on a joint account.

60.2 Mr. Aiken's death was an unforeseen event but it did not make performance of the contract of employment impossible or radically different.

Unfair dismissal

61. Redundancy

61.1 I have concluded that there was not a genuine redundancy situation. The Respondent has failed to persuade me that there was either a permanent or temporary diminution in the requirements for the Claimant to carry out housekeeping work at Mrs. Aiken's house as a result of Mr. Aiken's death or otherwise.

61.2 I draw support for this from the following:

- (i) Mrs. Aiken says [w/s para. 8] that there is a reduced demand for housekeeping as she now lives alone but she does not explain why living alone should result in less housekeeping requirements. The house remains the same and it is reasonable to assume still requires cleaning to the same extent. In any event I place limited weight on Mrs. Aiken's witness statement as she was not present at the Tribunal hearing.
- (ii) Mrs. Aiken says [w/s para. 8 and 9] that she now does some of the housework and only since December 2019 has she had help of 3 hours per week, which is sufficient for her needs. This does not show a diminution in housekeeping requirements, only that Mrs. Aiken has chosen to meet those requirements in a different way.
- (iii) I do not accept that the house has "emptied" over the years the Claimant has been employed. Since the start of her employment, only Mr. & Mrs. Aiken have lived in the house and whilst family visits may have reduced, this did not significantly impact on the Claimant's duties as she did not work at weekends.

- (iv) The fact that since Mr. Aiken's death, the groom has increased her hours and the gardener is working reduced hours is of no relevance to the Claimant's situation as she carried out entirely different work.
- (v) I place no weight on the fact that Mr. Aiken was considering making the Claimant redundant in May/June 2018; there is no satisfactory evidence before me to demonstrate why a redundancy situation existed at that time and in any event I must consider the position at the time of the Claimant's dismissal, almost a year later.

62. Some other substantial reason

- 62.1 I have concluded that there was SOSR for termination of the Claimant's employment.
- 62.2 I have found that the relationship between Mrs. Aiken and the Claimant was toxic for the reasons set out above (para. 40 above). It is very clear from the Claimant's own evidence that all trust and confidence had been lost and there was a total breakdown in their working relationship.
- 62.3 I have found that Mr. Aiken effectively mediated and conciliated between the Claimant and Mrs. Aiken and it is very difficult to envisage how the relationship between the Claimant and Mrs. Aiken could continue after Mr. Aiken's death given his essential role.
- 62.4 I agree with Mr. Canning that these two factors combined amount to SOSR.

63. Reasonableness of Dismissal

- 63.1 The Respondent has fulfilled the requirements of s98(1), and I must then determine whether the dismissal was fair or unfair having regard to the reason shown (SOSR).
- 63.2 In the particular circumstances, given the very personal nature of the contract which required the Claimant to work in Mrs. Aiken's home and under her sole supervision and control, dismissal fell within the range of reasonable responses of a reasonable employer. Another employer may have taken a different view, but the decision to dismiss certainly fell within the band of reasonable responses which a reasonable employer might have adopted.
- 63.3 I must also consider whether the lack of procedure was reasonable in all the circumstances. Whilst I have accepted Mr. Alex Aiken's version of events on 4 April, nevertheless the Claimant should have been properly consulted prior to her dismissal. It was not within the band of reasonable responses for Mrs. Aiken to dismiss the Claimant with no prior warning or consultation after 7 years service. Whilst Mrs. Aiken was a domestic employer and grieving, she had the support of her son, Mrs. Hart and access to solicitors and accountants; her administrative resources were therefore not insignificant.
- 63.4 The Claimant was therefore unfairly dismissed due to the lack of proper procedures.

64. Compensation for unfair dismissal

64.1 The Claimant has received a Statutory Redundancy Payment of £4,846.17 which extinguishes her right to be awarded a Basic Award

64.2 With regard to a Compensatory Award, in view of the relationship breakdown with Mrs. Aiken and Mr. Aiken's death, it is clear to me that the Claimant would not have been retained by Mrs. Aiken even if proper procedures had been adopted. Her dismissal would therefore have occurred in any event. Furthermore, I have accepted Mr. Alex Aiken's evidence that at the meeting on 4 April the Claimant had said she did not want to carry on.

64.3 Accordingly I award the Claimant two weeks' pay net pay (£382.61 x 2 = £765.23) as I believe this is how long consultation would have taken. This amounts to £765.23.

65. Monies in lieu of notice

65.1 As the contract was not frustrated, the Claimant was entitled to be given due notice (7 weeks) or paid in lieu.

65.2 By failing to do so, the Respondent was in breach of contract and I award the Claimant 7 weeks' gross pay, £3,230.77.

66. For the purposes of rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which I have identified as being relevant to the claim are at paragraphs 13 and 14; both these issues which it was necessary for me to determine have been determined; the findings of fact relevant to these issues are at paragraphs 15 to 46; a statement of the applicable law is at paragraphs 55 to 59; how the relevant findings of fact and applicable law have been applied in order to determine the issues is at paragraphs 60 to 65.

Employment Judge Mason

Dated: 3 February 2020