



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4121115/2018

Held in Glasgow on 22 & 23 July and 3 & 4 September 2019

10

Employment Judge I McFatridge

Mr A Haq

Claimant

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Irfan Qadir t/a Natural Balance

Respondent

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The judgment of the Tribunal is

1. The claimant was unfairly dismissed by the respondent. No monetary award is made for reasons given in the judgment.
- 25 2. The claim of unlawful deduction of wages succeeds. The respondent shall pay to the claimant Two Thousand Four Hundred and Seventeen Pounds Forty Eight Pence (£2417.48) in respect thereof.
- 30 3. At the commencement of the claim the respondent had failed to comply with his duty to provide the claimant with a statement of particulars of employment in terms of section 1 and/or 4a of the Employment Rights Act 1996. The respondent shall pay to the claimant Three Hundred and Sixty Nine Pounds Twenty Three Pence (£369.23) in terms of section 38 of the Employment Act 2002.

E.T. Z4 (WR)

4. The claim relating to unpaid holiday pay is dismissed.

REASONS

- 5 1. The claimant submitted a claim to the Tribunal in which he claimed that he had
been unfairly dismissed by the respondent. He also claimed that he was due
various sums following the termination of his employment. This was
subsequently clarified as including a claim in respect of unpaid wages, unpaid
holiday pay and unpaid pension contributions. He also claimed that the
10 respondent had failed to comply with their duty to provide him with a statement
of particulars of employment or change of particulars of employment and he
sought an award in terms of Section 38 of the Employment Act 2002 in respect
of this. The respondent resisted the claim. He made the preliminary point that
the claimant did not have sufficient length of service to allow him to make a
15 claim of unfair dismissal. A preliminary hearing took place on 29 March 2019
to determine the issue. During the course of this the respondent conceded that
the claimant did have sufficient qualifying service and that the last date of his
employment was 26 July 2018. The final hearing was fixed to take place over
two days on 22 and 23 July 2019. The evidence did not conclude during those
20 two days.
2. An incident took place during the course of the first day which led the
respondent's representative to lodge a motion with the Tribunal on the morning
of the second day that the Tribunal should strike out the claim on the basis of
the claimant's conduct of the proceedings. I heard brief evidence from the
25 claimant and from Ms Saima Irfan a witness for the respondent. I found it
established that at some point the previous day there had been a brief
discussion in Urdu between the claimant and Mr Yousaf Mian who was waiting
to give evidence on behalf of the respondent. Mrs Irfan was in fact in the middle
of giving her evidence. I found it established that at some point the previous
30 day (Mrs Irfan's evidence was confused and contradictory as to exactly when)

Mr Mian had been washing his hands in the gents toilet at the Tribunal and had then come out. Mr Haq had then gone over and stood next to him. Mr Haq said, in Urdu, words to the effect that he had gone to Mr Mian's house on two occasions and that Mr Mian had not listened to him. He said that he was prepared to go to the High Court. He went on to say that he did not tell lies and that Mr Mian knew what kind of person he was. Mr Mian did not respond in any way to this nor did Mrs Irfan. Following this Mr Mian indicated that he felt stressed. I was advised by the respondent's agent that Mr Mian had indicated that he felt so stressed that he had been unable to come to the Tribunal on 23 July when he was due to give evidence. I should say that Mr Haq indicated that an encounter had occurred but he used different words. Mr Haq claimed that the words he used were "If your nephew hadn't sent blackmailing messages to me I wouldn't have had to come to the Employment Tribunal. I didn't want to take you to the Tribunal."

3. It was Ms Munir's position that the claims should be struck out under Rule 37(1)(b) and or Rule 37(1)(e). Her view was that the events clearly showed Mr Haq attempting to influence the proceedings.

4. I considered the matter in the light of the authorities in particular ***Blockbuster Entertainment Ltd v James [2006] IRLR 630 CA***. My view was that the incident had been unfortunate. Mr Haq professed to be unaware of any rule that he should not be speaking to Mr Mian during the Tribunal process. Mr Haq had worked with Mr Mian for a large number of years and had a close relationship with him. I understood the position of both parties to be that considerable attempts had been made within their local community to try and resolve the differences between them without going to Tribunal. I was mindful of the comment in paragraph 18 of ***Blockbuster*** that "the first object of any system of justice is to get triable cases tried." I considered that in this case although Mr Haq's behaviour had been unfortunate it was not sufficiently egregious as to lead to the case being struck out. I therefore indicated this decision to the parties and the case proceeded. The hearing adjourned early on 23 July so that Mr Mian could give his evidence at a later date. It was clear to me that the case would not have completed on 23 July in any event.

5. The case was set down for a further two hearing days on 2 and 3 September. On the first of these hearing dates the case could not proceed due to a problem with the electricity supply at the Tribunal building. The hearing then proceeded on 3 and 4 September. During the hearing evidence was led on behalf of the
5 respondent from Mr Qadir the respondent, Ms Saima Irfan the respondent's wife and Mr Yousaf Mian. The claimant gave evidence on his own behalf. Mr Mahmut Gardee also gave evidence on behalf of the claimant. Each party lodged a bundle of productions. On the basis of the evidence and the productions I found the following essential matters to be proved or agreed.

10 **Findings in fact**

6. The respondent, Natural Balance, are a retail health food shop situated at 635 Great Western Road. The business was formerly owned and operated by Yousaf Mian. The claimant came to work for Mr Mian in 2002. As well as selling health food and supplements the business also provided advice to
15 customers, mainly in relation to dietary supplements. Over the years the claimant became highly skilled at dispensing advice and had a loyal following of customers. He was highly thought of by Mr Mian and many customers left reviews which were highly complimentary of the claimant on social media and review sites. The claimant was passionate about his job. Over time he became
20 a highly trusted employee. Mr Mian and his wife both developed health difficulties in recent years and the claimant took an ever greater role in the business. He was given keys to open and close the shop during his shifts. Latterly the business employed the claimant together with one other employee called Farah Ramzan. The claimant and Ms Ramzan tended to work different
25 shifts so they were not on duty together. I was satisfied on the basis of the evidence that, as well as working for Mr Mian over the years, the claimant also carried on a "private practice" advising people regarding health supplements. On one occasion he was asked for advice by the respondent (prior to the respondent's involvement in the business). He provided advice and provided
30 a particular health supplement. Payment for the supplement was arranged to be made to his personal bank account rather than to Mr Mian. Mr Mian was aware that the claimant carried on this private practice and had no objection to

it. There was an arrangement between the claimant and Mr Mian that the claimant would be able to obtain supplements for his private practice at cost price from the respondent.

5 7. As noted above, Mr Mian was suffering from ill health over recent years and in 2017 he entered into discussions with the claimant with a view to the claimant taking over Mr Mian's business. These discussions were still ongoing in January 2018. The claimant's understanding was that matters were very close to agreement. Mr Mian then advised the claimant with the minimum of notice that he had decided not to sell the business to him but instead to sell it to his
10 nephew who is the respondent Mr Qadir. Mr Qadir took over as owner on or about 24 January 2018. As noted above the respondent accepted at the preliminary hearing that the claimant's employment transferred to Mr Qadir and that he had continuity of employment from 2002 onwards.

15 8. I found established on the balance of probabilities that Mr Mian sent the claimant a payment of £3220.00 by direct transfer to his bank on 23 February 2018. (R64). The precise makeup of this payment is unknown to me but I accept it included what was calculated to be the claimant's accrued holiday pay to date. I also accepted on the basis of the evidence that following discussions between Mr Qadir and the claimant regarding rate of pay and hours it was
20 agreed between the parties that the claimant would work 24 hours per week. The claimant was paid £814.32 per month gross, £800.84 per month net. Although Mr Mian had been under an obligation to arrange for the claimant to be auto enrolled in a pension scheme he had not done so. Mr Mian did not pay any pension contributions for the claimant nor did Mr Qadir the respondent.

25 9. Although Mr Qadir had purchased the business he also had a full time job as manager of a substantial retail business in Newcastle. He was therefore in Newcastle during business hours and was only in very occasional direct contact with the claimant. Mrs Irfan, the respondent's wife, worked in the shop alongside the claimant. When the claimant was on duty he would usually come
30 in around 12 and leave between five and six. After the claimant arrived, Mrs Irfan would usually go upstairs into a small office area where she would work

on a computer. Mrs Irfan was studying for a Masters Degree and would use this time for studying. The shop itself was very small and if there were two people serving it would be cramped.

- 5 10. Mrs Irfan is a qualified Pharmacist and held a managerial role at her previous job which was in Pakistan. Despite this, it is clear from the outset that the claimant, as well as resenting the respondent for taking over a business which he thought ought to have been his, considered that Mrs Irfan and the respondent did not have sufficient knowledge to run the business properly. The atmosphere between Mrs Irfan and the claimant was at times very difficult. The claimant is a forceful individual who has very clear ideas as to what is right and what is wrong. Over time Mrs Irfan became frightened of him. She also began to worry that the claimant was intending to set up his own business in competition with the respondent. She was concerned that he was denigrating the respondent's business to customers. She reported these concerns to her husband. At some point a discussion took place between the claimant and Mr Qadir where Mr Qadir indicated that he was no longer prepared to continue the previous arrangement whereby the claimant was permitted to purchase goods from the respondent at cost price. Mr Qadir agreed that the claimant would be entitled to a 20% discount on such purchases. The purchases which the claimant made in this way were recorded in a book which was kept in the shop.
- 15 11. During the period from January onwards the claimant asked Mr Qadir for a "contract of employment". Mr Qadir was unaware of his legal responsibilities in the matter. Whilst he provided the claimant with some information by text message he did not provide him with a contract of employment or indeed particulars of employment. Mr Mian had not previously provided the claimant with any written particulars of employment either.
- 25 12. In early April 2018 the claimant required to return to Pakistan at short notice for a period. The respondent agreed to this. The claimant was away for around two weeks. I find on the balance of probabilities that he received his normal
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pay for April and was thus effectively paid holiday pay for the period he was away.

13. The claimant returned to the UK around 22 April. There is an annual trade show for health supplements which the claimant was in the habit of attending on behalf of the respondent. He had been a regular attender at this whilst he was working for Mr Mian. On 22 April he texted Mrs Irfan stating "Back from Pakistan and recovering and will be back in the shop on Tuesday. Do you want me to go to the show that is if you can cover my expenses." Mrs Irfan responded on 23 April early in the morning stating "Thanks for your reply. I am attending the trade show today. Can you please come at 11 tomorrow?"

14. The claimant decided that he would attend the trade show himself. In order to obtain a credential to allow him to enter the trade show he stated that he was a representative of Guava Limited. This was a company which the claimant had set up himself in 22 January 2018. The registered office of the company had been the address of the respondent's shop at 635 Great Western Road, Glasgow up until 24 April 2018 when it had been changed to an accommodation address. Guava Limited is the name of the company which the claimant now uses to operate his new health food shop. Whilst at the trade show the claimant met Mr Mian. He told Mr Mian that he was attending the trade show on behalf of Guava Limited and hoped to be in a position to make contact with various suppliers and set up accounts with them.

15. Mr Mian reported this conversation to Mr Qadir.

16. During the period between January when the respondent took over and May when the claimant ceased attending work there were many instances where the claimant behaved aggressively towards Mrs Irfan. Mr and Mrs Irfan discussed matters with each other and believed that the problem was that the claimant was angry and resentful that they had taken over the shop. They felt that if they simply gave him his head and did not challenge him then matters would eventually settle down.

17. On 16 May 2018 the claimant was due to attend work at 12 noon. Mrs Irfan started work in the shop at 10am. She expected the claimant in at 12. Her usual practice would be to go upstairs and work on her course work after the claimant arrived. The claimant turned up late. He arrived around 2pm. He then went upstairs leaving Mrs Irfan downstairs to look after any customers who came in. He remained upstairs for some time. While he was upstairs a delivery arrived at the shop. Mrs Irfan called upstairs for the claimant to come down and help her put away the delivery. The claimant told Mrs Irfan that he was not in the mood to do any work. He said to Mrs Irfan that she should deduct two hours' pay. Mrs Irfan thought the claimant was behaving strangely. He seemed to be going round the shop collecting things.
18. Mrs Irfan was aware that there had been conversations between the claimant and her husband about the claimant taking things from the shop. Whilst he was allowed to take stock he paid for and receive a discount of 20% Mr Qadir had previously said that a note must be taken of what was being removed. Mrs Irfan panicked because it seemed to her that the claimant was preparing to remove a lot of items. The claimant said that the items which he was putting together were his own belongings. Mrs Irfan panicked about this. She tried to contact her husband by telephoning him at his work in Newcastle. Mr Qadir told Mrs Irfan to tell the claimant not to take anything without his consent. Mrs Irfan relayed her husband's words to the claimant. At this Mr Haq took out various items. He had been putting them in a bag but then took them out and placed them on the counter. Mr Haq took a photograph of the items. He repeated that the items were his own property. The photograph was lodged (C44). Mrs Irfan asked the claimant why he was doing this. She said that he wasn't allowed to remove anything which belonged to the shop. The claimant became extremely angry and aggressive at this. He started shouting at Mrs Irfan. She said that if he was not in the mood to work he could simply take the day off.
19. At some point a customer came into the shop. The customer appeared to be confused about what was going on and the claimant said "they are accusing me of stealing". Mrs Irfan decided that she was feeling so stressed she would

absent herself from the situation and then went upstairs. Another customer came in and she went downstairs again. The claimant began shouting at Mrs Irfan and the customer left the shop. Mrs Irfan contacted Mr Mian by telephone. Mr Mian said he thought that the claimant was probably leaving and taking his stuff out of the shop. Mrs Irfan was extremely upset when she spoke to Mr Mian.

20. Mr Mian indicated that he knew that the claimant became angry sometimes because he had lost the opportunity of taking the shop.
21. An individual who Mrs Irfan now knows to be Mr Gardee entered the shop. Mrs Irfan thought that he was an acquaintance of the claimant who had come to help him move things out. She went upstairs. The claimant then left.
22. When Mrs Irfan came down she saw that the book which the claimant had used to note the items which he was purchasing from the respondent had been removed. She assumed it had been taken by the claimant. Mrs Irfan tried to play the CCTV back so that she would be in a position to show her husband what had happened. She found that the cassettes on which the CCTV was recorded had been removed. She assumed that the claimant had taken them also.
23. Mrs Irfan spoke to her husband again.
24. Mr Qadir suggested to his wife that she call the police. She contacted the police and complained that she had been a victim of bullying by the claimant. She accused the claimant of taking the cassettes together with some other items. Mrs Irfan was extremely stressed. She had to go to her GP. She required to use anti-depressants which she was prescribed.
25. Following this Mrs Irfan contacted Mr Mian again. She told him that the claimant had been shouting at her and she was very upset. She said that the claimant had taken cassettes. Mr Mian tried to calm her down. He once again explained that he thought the claimant had a grudge against Mrs Irfan because they had taken over the business. Mr Mian agreed that the claimant should not have taken the cassettes. Mr Mian then phoned the claimant. The claimant

phoned him back. The claimant admitted to Mr Mian that he had taken the cassettes but said that the ones he had taken were old and useless. He said that he had bought new ones to replace them. Mr Mian told him he needed to bring back the old ones.

5 26. At some point over the next few days the police contacted the claimant. The claimant denied to them that he had taken the cassettes. He said he had only been removing his own goods. He indicated that there was an employment dispute. The police indicated they would be taking no action.

10 27. On the following day, 17 May, the claimant sent a text message to Mr Mian (R78). He said "Thanks for phoning querying about the USB stick and some old VHS cassettes, there was some misunderstanding, I don't have any of them. Please let Mr Irfan know thanks."

15 28. In the meantime on 16 May at 20:42 the respondent sent a WhatsApp text message to the claimant. It was lodged (C56). It stated "I have informed police about you, don't dare to enter the shop again." The claimant immediately responded at 21:46 stating "What happened Mr Irfan Qadir?" (C56). He sent further WhatsApp messages to Mr Qadir asking to let him know about the police and stating that he was confused. Mr Qadir did not respond to any of these messages. Mr Qadir's position at the hearing was that he had decided to block the claimant from sending him any more WhatsApp messages after he had sent to him the message of 16 May.

20 29. Over the next few weeks the claimant sent various messages to Mr and Mrs Irfan asking them what was happening. He also raised again the fact that he had not received a contract. The emails were lodged (C56, C58 (29 May)). He wrote further WhatsApp messages on 17 June stating

"Hi Mr Irfan,

Two more weeks have gone by & I am still awaiting your response."

He said

“I am also waiting for my my May payslip, can you please give me it to me as soon as possible.” (C59).

He sent a further WhatsApp message on 5 July. This stated

“Hi Mr Irfan,

5 Another three weeks have gone by. I have not come to work because you asked me not to do so.

Please let me know as soon as when to come back. Please also provide me with the following. My payslips for the months of May & June. My contract. My wages for the above stated two months. I have sent you repeated messages. Copy is also being sent to your wife as well.
10 Thanks.”

30. By this time the claimant was sending copies of the WhatsApp messages to Mrs Irfan as well as Mr Qadir. WhatsApp messages have a feature whereby the message is ticked once it has been delivered and then ticked again once it has been read. Each of the messages to Mr and Mrs Irfan from the claimant
15 have two ticks next to them which indicates that they were read.

31. The claimant also sent a further WhatsApp message on 13 July. This stated

“Hi Mr Irfan,

I have sent you and your wife Saima, repeated messages to expand on my employment status. Last message was sent to you on 5/7/18. You
20 have chosen to ignore my messages. I sent you the following message on 5/7/18 (above message repeated).” (C62/63)

He wrote again on 17 July (C64). This stated

“Hi Mr Irfan,

25 I received the following message from you on 16 May 2018.
‘I have informed police about you, don’t dare to enter the shop again.’
I have not come to work because of your above statement.
I have sent you repeated messages to clarify your statement.

A reminder of the last message sent to you & your wife on 13/07/2018
....”

32. The claimant also wrote in a similar vein on 19 July (C67).

33. In the meantime the respondent would appear to have taken some advice and
5 decided to invite the claimant to a disciplinary hearing. On 30 May 2018 he
wrote to the claimant. The letter was sent recorded delivery to the claimant
giving his address as 40 Clifford Road, Glasgow. The claimant’s actual
address is 40 Clifford Street, Glasgow. A copy of the letter was lodged (R47).
The letter was dated 30 May 2018 and states:

10 “I am writing to advise that you are required to attend a disciplinary meeting
on 6th June 2018 or 9th June 2018 at 2.00pm which is to be held at
[address].

At this meeting the question of disciplinary action against you, will be
considered with regard to your conduct on 16th May 2018.

15 The possible consequences arising from this meeting might be summary
dismissal for gross misconduct.

You are entitled if you wish to be accompanied by a representative.”

The recorded delivery slip for this letter was lodged (R48) as was the tracking
information. The claimant never received this letter and the Royal Mail tracking
20 information suggests it was returned to the respondent. (C12)

34. On 20 June 2018 Mr Irfan sent a letter to Mr Haq addressed to 40 Clifford
Road. It was lodged (R49). It stated

“On 30th May 2018 you were informed that Natural Balance (635 Great
Western Road) was considering dismissing you.

25 This was discussed in a meeting on 9th June 2018. At this meeting, it was
decided that:

Your conduct was still unsatisfactory and that you will be dismissed.

The reasons for your dismissal are:

Abusive and bullying behaviour on 16th of May; also the theft on the same
30 day.

I am therefore writing to you to confirm the decision that you be dismissed and that your last day of service with the Company will be 14th June 2018. You have the right of appeal against this decision. Please write to the address at the top of the letter within 21 days of receiving this disciplinary decision.

You are liable to deposit £2752.36 in our account.”

It is believed this last figure was in respect of the amount which the respondent considered the claimant owed them in respect of stock he had removed.

35. Once again a certificate of posting for this letter was lodged (R50). The claimant lodged the tracking information for this letter (C13). This showed that the letter was returned to sender on 26 June. Like the earlier letter it was sent to Clifford Road instead of Clifford Street which was the claimant’s actual address.

36. On 23 July 2018 the claimant sent an email to Mr Qadir. He had not previously sent him emails despite knowing his email address. The email was lodged (R51). It states

“Dear Mr Irfan Qadir Mian,

On 16th of May, 2018 I received the following message from your phone no. 07539626436 & since then I have not come to work as you explicitly asked me not to do so. Message from yourself ‘I have informed police about you, don’t dare to enter the shop again.’

Since then I have also sent you countless WhatsApp messages on your mobile phone (07539626436) & your wife Saima’s mobile phone (07881381273) and also in a normal message format, seeking a clarification of your message & my job status but you have chosen to ignore my messages.

URGENT RESPONSE NEEDED!

Please, kindly let me know in 24 hours, when to come back to work. Also, please provide me with the following.

My PAYSLEIPS for the months of MAY & JUNE, MY WAGES FOR THE MONTHS OF MAY AND JUNE. My employment contract.

A copy is also being forwarded to your shop email address 'naturalbalance12@gmail.com'. I await your response."

37. Mr Qadir responded from the Natural Balance email account on 24 July 2018 at 12:51. The email stated

5 "For your kind information that the letters attached have been sent as recorded delivery." (R52)

The letters attached were those which had been sent to the claimant on 30 May and 20 June 2018.

10 38. Since the date of his dismissal the claimant has not attempted to seek other employment. He has instead set up his own health food store in competition with the respondent. It is situated not far away from the respondent. It is being operated through Guava Limited. The respondent considers the claimant to be a competitor of theirs.

Matters arising from the evidence

15 39. I found this a difficult case since all of the evidence from the witnesses tended to be lacking in some respects. In addition I found the claimant's style of cross examination to be extremely unhelpful and his questions appeared to be designed more to verbally attack the respondent's witnesses than to fairly put his position to them. I shall expand on that below. Mr Qadir's evidence was
20 that from the time he had purchased the business the claimant had been extremely resentful. It was his position that the claimant had told him that he was setting up his own business and this accorded with what Mr Qadir was told by Mr Mian. His position was that the claimant had been a difficult
25 employee but that he had decided not to take any disciplinary or other action against him. The reason for this was that having discussed matters with his uncle he could see that the claimant was extremely angry that he had not been allowed to take over the business himself and he hoped that over time the claimant would become resigned to this and would revert to being as good an employee for them as he had been for Mr Mian. He confirmed that he
30 bought stock for his own customers and confirmed there had been a

discussion about giving him a 20% discount for this rather than allowing him to purchase it at cost price. His version of the events on 16 May accorded with the evidence of his wife although he was himself not present. Where I found his evidence difficult to follow was in relation to events after this. His position was that he had not received any of the messages from the claimant because he had blocked the claimant. He said he had blocked the claimant's number and had had no contact with him. He said that it was not until he received the email of 23 July that he realised the claimant had not received his letters. At the end of the day I accepted his evidence where it accorded with that of his wife and Mr Mian. I was not certain that he was being fully frank in respect of either not receiving the claimant's messages or his reason for blocking the claimant. There seemed to be little logic to it. It was unclear to me whether he had in fact seen the claimant's messages or not. Mr Qadir's evidence as to what happened on 9 June was extremely vague. In evidence in chief he suggested that a meeting had taken place however during cross examination he appeared to depart from that. It seemed quite clear to me that there had been no actual meeting.

40. I found Mrs Irfan to be a much better witness. It was clear from her evidence that she was clearly nervous and even at the hearing appeared to be frightened of the claimant. She indicated in her evidence that she had problems with anxiety. I have generally accepted her evidence regarding the course of events on 16 May. There were a number of matters of detail where her evidence was incomplete however I felt this was probably due to her state of anxiety and that she was genuinely trying to assist the Tribunal by giving truthful evidence as she saw it. Once again I found her explanation as to why there had been so little contact with the claimant after 16 May to be somewhat strange.

41. With regard to the events of 16 May I did not find that her evidence conflicted unduly with that of Mr Gardee. I considered that she was genuine in when she gave her evidence that she understood Mr Gardee had turned up by arrangement with the claimant and was helping him remove his goods. It appeared to me that she may have been mistaken about this but that this was something which she genuinely believed.

42. I found Mr Mian's evidence so far as it went to be credible. His evidence in chief was in fairly short compass. He referred to meeting the claimant at the trade show which the claimant was attending on behalf of Guava Limited. He referred to his conversation with the claimant when the claimant advised that he was there to further his business of Guava Limited to speak to suppliers. The claimant was critical of this evidence in cross examination indicating that he would be able to set up accounts online. My view was that these criticisms were misplaced. It is certainly possible to set up accounts online but equally one of the purposes in going to trade shows is to meet other individuals in the same line of business face to face. I considered it is to be more likely than not that this is the explanation he gave to Mr Mian. Mr Mian in his evidence was honest in saying that the claimant had been a very good employee for him over the years and had been highly trusted. He accepted that the claimant had felt extremely angry when Mr Mian had sold the business to his nephew rather than to the claimant. I accepted Mr Mian's evidence regarding the phone calls about the cassettes and in particular that the claimant had accepted he had taken cassettes albeit the claimant had given an explanation for this. I also accepted his evidence regarding his conversations with Mrs Irfan which were in line with my findings in fact. Once again there was some confusion about messages which had been sent. In evidence Mr Mian claimed that the claimant had sent her a blackmailing message trying to persuade him not to give evidence to the Tribunal. There was in fact reference to on the one hand an allegation that the claimant was seeking to blackmail the respondent and that the respondent was seeking to blackmail the claimant at various times during the hearing. I have not made any detailed findings since I do not consider them to be relevant to the case before me. In any event, once again there was reference to a message which appears to have been deleted. Mr Mian's evidence was that he had deleted this message as he had not wanted his family to see this and I found this to be slightly odd given that other messages appear to have been kept. He accepted the claimant's suggestion that at some point the claimant had shown him pictures from the CCTV cassettes which were extremely fuzzy and that the claimant had told Mr Mian that they should be getting new ones. Mr Mian's position was that this did not entitle the

claimant to throw out the old ones. At the end of the day much of Mr Mian's cross examination by the claimant was not relevant to the matters before the hearing. I also found it strange that the claimant appeared to be trying to set up a legitimate reason for the claimant having removed the cassettes when his position was that he had not removed them.

43. I found it difficult to know what to make of the claimant's evidence. Much of his evidence was uncontroversial. His position as to the events of 16 May did not differ vastly from those of Mrs Irfan except that he did not accept that she had any right to be frightened of him or distressed. He denied taking any items that were not his own. He said that he was not moving his stuff out of the shop because he was leaving but because he wished to take his toothbrush and other personal items that he used every day back to his house because Ramadan was starting and he would not be using them in the shop during the hours of daylight. I considered that this was an untrue explanation which he had put together after the event. His position was that he had set up Guava Limited at the time he thought he was purchasing the respondent business from Mr Mian. He said that he had simply kept it on the books and had then decided to use it to go to the trade show. I thought it fairly likely that he had set up Guava Limited initially because he was planning to purchase the shop from Mr Mian. I considered on the balance of probabilities that he had decided to use Guava Limited to obtain credentials for the trade show because by that stage he was planning to set up a business on his own. I did not accept his protestations that this was not something he was doing. I also preferred the respondent's evidence that he was purchasing stock for onward sale to his own customers rather than the claimant's explanation was that he was purchasing stock in large quantities because he had a large family. On the balance of probabilities I thought the claimant probably had removed the CCTV tapes and the memory stick from the shop. I thought he probably had intended to leave on that date. I found the claimant's position that he had not intended to do so difficult to square with certain aspects of his cross examination of Mr Mian where he specifically put to Mr Mian that there had been a discussion about the CCTV tapes being old and this had resulted in a fuzzy picture. I also preferred the respondent's evidence rather than that of the claimant over the

issue of the book. It appeared to me to be more likely than not that the claimant had removed the book because he wished to make it as difficult as possible for the respondent to calculate the amount of money he owed them. I considered that he removed the CCTV tapes for the same reason.

5 44. I did accept the claimant's evidence that he had not received either of the two letters sent to him. I accepted that the claimant had sent the various text and WhatsApp messages which he referred to. As noted above I did not entirely accept the respondent's evidence that they had not received these. It appeared to me that in the period after 16 May both parties were to some extent fencing with each other. In my view it would have been entirely reasonable for the claimant to have contacted the respondent either direct or through Mr Mian to find out what was happening. I feel that his decision not to do so was a deliberate tactical one. I also consider that the respondent was being somewhat disingenuous in believing that if they simply sent letters to the claimant the issue would go away.

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30 45. Mr Gardee was called by the claimant and gave very limited evidence. His position was that he was not a regular customer of the respondent but had simply come in to buy apple cider vinegar. His evidence was that he had witnessed the claimant discussing matters with Mrs Irfan and that they were "nice and softly talking about something I didn't hear what they were talking about." He said that the claimant had a bag in his hand and there were no other customers present. He said the claimant had then taken various items out of the bag including his cup, plate, toothbrush and that he had taken pictures of these. I understood Mr Gardee was called by the claimant to refute the suggestion that he was there by arrangement to help the claimant remove his property. In cross examination Mr Gardee strenuously denied this however he accepted that he did not in fact buy any apple vinegar although he said that he only came into the shop once every two or three months for this purpose. He denied being a relation or friend of the claimant.

46. At the end of the day I did not find his evidence particularly convincing or indeed much help. I considered that the circumstances in which he came to be there

at all were somewhat unclear and did not assist his evidence. If he was a customer who came in to buy something specific I would expect him to buy it. On his own evidence there was nothing going on between the claimant and Mrs Irfan which would cause him to leave. It is of course entirely possible that he was telling the truth and that during the few minutes he was in the shop there was no actual raised voices or conflict going on although there could have been both before and after. I was entirely satisfied on the basis of the evidence of Mrs Irfan that she had been upset and that there had been a considerable degree of conflict between her and the claimant. This was backed up by the evidence of her husband and Mr Mian to whom she had spoken to that day and both described her as being upset.

47. At the end of the day my factual findings are as set out in the findings of fact set out above. There were a large number of irrelevant matters raised by the claimant which I have not made findings on and indeed a number of irrelevant matters also raised by the respondent.

Issues

48. The claims being made by the claimant were as set out in paragraph 6 of Employment Judge Hoey's note of 29 March 2019. The claimant claimed unfair dismissal. He claimed an uplift for a failure to follow the ACAS Code. He sought compensation for a failure to provide written particulars of employment. He claimed in respect of unlawful deduction of wages. He also sought holiday pay and payment in respect of lost pension contributions.

49. I will deal with the claims in turn.

25

Unfair dismissal

50. With regard to the claim of unfair dismissal the relevant legal provisions are set out in the Employment Rights Act 1996. Section 98 states

“(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
- 5 (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.”

It was the respondent’s position that the reason for dismissal was conduct which is a potentially fair reason falling within section 98(2)(b) of the said Act.

10 51. I accepted that this was indeed the reason for the claimant’s dismissal. It was the reason given by the respondent in the dismissal letter and is foreshadowed in the letter of invitation to the disciplinary hearing albeit that the claimant did not receive these at the time they were sent. Having heard the evidence it is also clear to me that Mr Qadir essentially dismissed the claimant because the
15 claimant had behaved aggressively towards his wife causing his wife to be extremely upset.

52. Having established a potentially fair reason for dismissal I then have to consider the terms of section 98(4). This states

20 “(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

- (a) 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 it as a
25 sufficient reason for dismissing the employee, and
- (b) shall be determined in accordance with equity and the substantial merits of the case.”

In submissions I was referred by the respondent’s agent to the well-known case of **British Home Stores Ltd v Burchell [1978] IRLR 379 EAT**. This confirms
30 that it is not for the Tribunal to make up its own mind as to the guilt or innocence

of the employee in relation to the conduct he is accused of. Instead the focus is on the employer. The Tribunal has to decide whether the employer who discharged the employee on the ground of the misconduct in question entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. This involves three elements. First there must be established by the employer the fact of that belief; that the employer did believe it. Second it must be shown that the employer had in his mind reasonable grounds upon which to sustain that belief and third the employer at the stage at which he formed that belief on those grounds must have carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

53. In this case I had absolutely no doubt that Mr Qadir had a genuine belief that the claimant was guilty of the misconduct in question. I also considered that he did have reasonable grounds for that belief on the basis of what his wife had told him about what happened in the shop on 16 May and indeed what he was told by Mr Mian at around the same time in relation to the phone calls from the claimant. What the respondent did not do was carry out a reasonable investigation. The case of **Sainsbury's Limited v Hitt [2003] IRLR 23 CA** confirms that the test of reasonableness in determining the reasonableness of an investigation is that of the range of reasonable responses. This test is well known in Employment Law and recognises that there is no "one size fits all" approach to such matters but that there is a band of reasonableness of approach. If an employer's conduct falls within that band then it is acceptable in terms of Employment Law. It is my view however that the respondent's investigation fell outwith that band. In my view no reasonable employer would have dismissed the claimant who, after all, was an employee who had worked in the business for many years, without investigating his version of events. Whilst I accept that the respondent may have made a genuine mistake in sending the letter of invitation to the disciplinary hearing to the wrong address it appeared to me that when the claimant did not turn up for either of the two times suggested in the letter then any reasonable employer would have investigated the matter further. All that was required was for Mr Qadir to check the address on the letter which had been sent out and he would no doubt have

noticed that it was wrong. He would then have been in a position to contact the claimant. In addition as noted in my findings of fact I can find no good explanation as to why Mr Qadir either blocked messages from the claimant or refused to engage with the claimant over WhatsApp and Messenger which were clearly ways in which they had communicated in the past. It is my view that the dismissal was unfair.

54. Procedural fairness is also an important part of overall fairness and in any event it is clear to me that the procedure in this case also rendered the dismissal unfair. In my view to dismiss the claimant without a meeting in those circumstances was clearly procedurally unfair. The claim of unfair dismissal succeeds.

Unlawful deduction of wages

55. It was the claimant's position that he was due to be paid his wages for the months of May and June and for the period from 1 to 26 July 2018 which was the last date of his employment. I note from the note issued following the preliminary hearing in front of Judge Hoey that at that hearing the respondent's representative accepted that the last day of employment was 26 July.

56. The evidence before me was that the claimant was paid a salary. This was the same each month. There was no evidence to suggest that the claimant's hours varied or that his pay would vary depending on the hours he actually worked. On that basis I considered that the claimant's claim for unlawful deduction of wages is well founded and that the claimant is due to be paid his monthly salary for the period of May, June and pro rata up to 26 July 2018.

57. With regard to holiday pay the claimant's position was that his employment started on 10 October 2002. The holiday year would therefore run from 10 October in one year to 9 October in the following year. I accepted the evidence of Mr Mian that when the respondent took over the business on or about 28 January 2018 the claimant was paid in respect of holiday pay accrued to that date. The claimant would therefore be due to be paid by the respondent for in respect of holidays accrued but untaken for the period between

28 January and 26 July 2018. The claimant worked four days per week and is entitled to 11.2 days' annual leave for that period. It is clear to me however that the claimant was absent on leave for at least twelve working days in April 2018. He appears to have returned to work on or about 24 April. The respondent's position was that he was paid as usual during this period and accordingly it appears to me that the claimant had received all of his holiday entitlement. This claim therefore fails.

58. The claimant claimed that he had not received a written statement of particulars of employment. On the basis of the evidence this was correct. The respondent did lodge an email in which they had proposed various terms to the claimant but their own evidence was that the claimant had not accepted this. In any event there was no statement of particulars which contained all of the information required by statute. Given that the claimant's other claims have succeeded I considered that in all the circumstances it was appropriate to award the claimant two weeks' pay under this head (£369.23). I do not consider that it would be just and equitable to award four weeks' pay given that the respondent was a small employer who had just taken over the business and that there had been at least some attempt to agree written terms with the claimant.

59. With regard to pension Mr Mian's evidence was that he had not paid any pension contributions in respect of the claimant during the whole period of employment. It appeared to me that whilst at the start of the claimant's employment Mr Mian was under no obligation to do this Mr Mian had been under an obligation to make pension payments in respect of the claimant since the current pension auto-enrolment scheme commenced. I did not have sufficient information to put a date to this but given that all employers were required to have auto-enrolled their staff by April 2017 it is likely that the obligation started then. Similarly, the current respondent was under an obligation to auto-enrol the claimant and pay 3% contribution towards his pension from the date his employment with them started. He did not do so. Given that the claimant's gross pay was £814 per month this means that the respondent was due to pay £24.42 per month by way of pension contributions

unless the claimant had opted out. There was no evidence that the claimant had opted out of this. The claimant of course would have been under an obligation to match these sums. On balance I consider that the respondent is due to pay this sum for the period from 26 January until 26 July (six months).

5 The total amount payable is therefore £146.52. I believe this sum can be recovered as an unlawful deduction from wages.

60. I considered whether the respondent was liable for any contributions which ought to have been paid by Mr Mian on the basis that his obligation transferred to them under the Transfer of Undertaking Regulations. I note however that
10 regulation 10 states that the provisions of regulations 4 and 5 of the TUPE Regulations 2006 shall not apply to so much of a contract as relates to an occupational pension scheme or to any rights, powers, duties or liabilities relating to such a scheme. It is therefore my view that the respondent is not liable for any payments which may have been due by Mr Mian. This does not
15 of course affect the claimant's right to claim such payments direct from Mr Mian.

Remedy – unfair dismissal

61. The claimant had 17 full years' qualifying service as at the date of dismissal. I calculate his gross weekly pay as £187.84. His net pay was £184.62.

20 62. The claimant was aged over the age of 41 for six of those years and below the age of 41 for the other 11. The claimant is therefore entitled to a basic award of 20 weeks' pay amounting to £3756.80. With regard to the compensatory award it was clear to me that the claimant had started work in his new business from before the date of dismissal. It was clear to me that the claimant had
25 intended to leave at some point in any event and indeed that he had most likely planned to leave on 16 May. In the circumstances I consider that any wage loss suffered by the claimant was as a result of his decision to stop working and start working in his new venture rather than his belated dismissal by the respondent. Alternatively, even if I am wrong in this, it does appear to me that
30 any wage loss suffered by the claimant after 26 July would be covered by his replacement income from his new business.

63. The respondent's position was that the basic award and indeed any compensatory award I made should be reduced on the basis of the claimant's contribution to his own dismissal. Given that I have not made any compensatory award the issue of contribution does not arise in respect of this.
5 With regard to the basic award section 122(2) of the Employment Rights Act provides

"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or
10 further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

64. In the present circumstances I consider that the claimant's conduct was such that it would be just and equitable to reduce the amount of the basic award. It was clear to me that the claimant had been extremely angry with the
15 respondent and resented him for taking over the business which he considered to be his. It was clear to me on the evidence that the claimant had expressed this resentment in various ways over the whole period of his employment with the respondent. I accepted Mrs Irfan's version of what happened on 16 May. The claimant behaved in a completely unacceptable fashion. He behaved
20 aggressively to Mrs Irfan. She was so upset she required to contact her husband. I also accept that the claimant then removed the book which had in it the information which would allow the respondent to calculate the amounts which he was due to them for stock and also the CCTV tapes. In my view given this conduct it is just and equitable to reduce the basic award to nil.

25 65. The figure for wage loss is £2270.96 $(2 \times 800 + (800 \times \frac{26}{31}))$.

66. The total award is therefore –

Unfair dismissal	nil
Arrears of wages	£2270.96
Failure to provide particulars of employment	£369.23
30 Pension payments due but unpaid	£146.52

Holiday pay nil

The total is therefore £2786.71. The recoupment regulations do not apply and there is no prescribed element.

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Date sent to parties

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**I McFatridge
Employment Judge**

**10 October 2019
Date of Judgment**

11 October 2019