EMPLOYMENT TRIBUNALS

Claimant: Mrs I Jastrzebska

Respondent: Chelsea Childrenswear Limited

HELD AT: Liverpool **ON:** 1 October 2020

BEFORE: Employment Judge Aspinall

REPRESENTATION:

Claimant: In person (with a Polish interpreter) and supported by her son
Respondent: In person (with a Punjabi interpreter on the telephone) and supported by his accountant, Mr Chothani.

JUDGMENT having been sent to the parties on 27 October 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, and with apologies for the short delay in their provision, the following reasons are provided:

REASONS

Background

1. By a claim form dated 26 September 2019 and having achieved an ACAS early conciliation certificate number R525358/19/43 the claimant brought her tribunal claims for unfair dismissal, breach of contract notice pay and outstanding holiday pay and other payments due to her. She said she was dismissed on the spot on return from annual leave on 12 June 2019 because she refused to write a letter apologising for taking annual leave that she said had been agreed.

2. The respondent defended the claims saying she had "dismissed herself" when she resigned without notice following a discussion about her leave and following his request that she write a letter of apology for having taken holiday without permission.

3. There was a case management hearing before Employment Judge Sherratt on 7 February 2020 at which it was agreed that the final hearing which had been listed for that date was postponed. EJ Sherratt ordered i) the provision of Polish and Punjabi interpreters at final hearing and ii) the claimant to provide a transcript of her audio recording of the discussion which led to the termination of her employment on 12 June 2019. The final hearing was listed for 15 June 2020. That hearing was unable to proceed because of the pandemic and it was postponed until 1 October 2020.

The hearing

4. The 1 October 2020 hearing took place by CVP. The claimant who is Polish had an interpreter, Ms Krazuska and was supported by her son who spoke a little English. Ms Krazuska joined the video platform hearing.

5. The respondent is Punjabi and arrangements had been made for his interpreter Mr Samuel to join the hearing in the same way as Ms Krazuska but Mr Samuel had difficulties joining the video platform from his mobile phone. I adjourned to allow Mr Samuel time, supported by tribunal clerks to establish his link. This led to delay until late morning when it was agreed by all parties that he would join us by audio only. The respondent was supported by his accountant Mr Chothani who spoke English. The respondent agreed through both his accountant and Mr Samuel that he would rather proceed with interpreter by audio only than have a postponement to another date to enable Mr Samuel to access by camera.

6. I referred to the guidance in the Equal Treatment Bench Book on the use of interpreters. The interpreters were sworn in and we took time to establish correct pronunciations, to allow the interpreter's each to speak to the relevant party and to ensure that they were using the correct dialects and could fully understand one another. We agreed a communication chain to avoid us talking over one another. We agreed to use short questions and answers where possible. We agreed to take regular breaks.

7. There was an agreed bundle of documents which was presented in sections rather than paginated. The respondent had prepared the bundle. It came to me electronically by email attachment in two separate attached files. There were witness statements from the claimant and the respondent.

8. There was a transcript prepared by the claimant of the 12 June 2019 conversation included in the bundle in compliance with EJ Sherratt's Order. I placed very little weight on this transcript because it was translated from the claimant's mobile phone audio recording by a fellow worker and I have no way of knowing her translation abilities or the relationship between the claimant and the fellow worker. I note that at the case management hearing the respondent did not ask for the audio file and did not seek its own translation of the audio file.

9. We were careful to describe things in a non visual way and when referring to documents I read the relevant sections aloud so that Mr Samuel could translate for the respondent. The respondent was seated beside Mr Chothani on camera. The respondent had the bundle in front of him and was supported in looking at it and reading its content (none of which was new to him) by Mr Chothani. The claimant

had the bundle and was supported in looking at and reading its content (none of which was new to her) by her son. Ms Krazuska also had opportunity to translate what I read aloud for the claimant where needed.

10. We agreed a list of issues and then a timetable for the time that remained available. We considered reasonable adjustments and agreed that we would have a lunch break, despite our late start, as Mr Chothani had medical reasons for needing a break.

11. The list of issues was agreed as follows:

Unfair dismissal

11.1 Was the claimant dismissed on 12 June 2019?

11.1.1 If so what was the reason for dismissal and was it a potentially fair reason for dismissal?

11.1.2 Did the respondent follow a fair procedure in bringing about the dismissal?

11.2 If not, did the claimant resign on 12 June 2019?

11.3 Did the respondent commit a fundamental breach of the claimant's contract which entitled her to resign and treat herself as dismissed?

11.4 Did the respondent issue an ultimatum that the claimant apologise for having taken leave or be dismissed, and if so did that ultimatum amount to a fundamental breach of the implied term of mutual trust and confidence in a contract of employment?

11.5 If so, did the claimant resign in response to that fundamental breach, or did she resign for another reason?

11.6 Did the claimant delay before resigning and affirm the contract and lose the right to claim constructive dismissal?

11.7 If the claimant was constructively unfairly dismissed:

a. Did the respondent nevertheless have a potentially fair reason to dismiss the claimant, namely her conduct, such that any compensation shall be reduced accordingly?

b. Did the claimant's conduct contribute to her dismissal?

c. Has the claimant taken reasonable steps to mitigate her losses?

Wrongful dismissal

11.8 Was the claimant dismissed in breach of contract and if so was the claimant entitled to receive notice pay?

Other pay: arrears of pay

11.9 Did the claimant receive all wages due to her on termination of her employment?

Holiday pay

11.10 Did the claimant have any accrued but untaken holiday on the termination of her employment?

11.11 If so, was she paid in respect of it?

ACAS uplift

11.12 Was the claimant entitled to an uplift because the respondent failed to follow a fair procedure in bringing about her dismissal?

Failure to provide written statement of terms of employment

11.13 Was the claimant entitled to an award because the respondent had failed to provide a written statement of terms of employment?

12. The claimant gave evidence. She gave a consistent account of what had been her agreed annual leave as at 29 March 2019. She was credible about the dates of annual leave because they related to a christening she was to attend in Poland.

13. The respondent called Mr Naseem. He avoided answering some questions directly. He often tried to avoid answering by saying that the claimant ought to know the answer to the question. I took care to explain that the process is that he is given an opportunity to respond to any points they disagree about. Mr Naseem had a poor knowledge of the chronology he relied upon; he was not clear about the date on which he said the claimant ought to have returned from leave, confusing the 11th,12th and 13th June. Initially he said the claimant returned on 13th but should have returned on 12th, then changed his position to accept she returned on 12th but then said she should have returned on 11th.

14. I also found him to be inconsistent in his responses about the content of the meeting on 12 June 2019. His oral evidence was that he did not ask her to apologise in writing at all. His witness statement says he asked her to put her resignation in writing. His ET3 says he asked her to apologise for not notifying him of her absence.

15. I found his version of the meeting of 12 June 2019 less credible than the claimant's because he was unclear about the dates and because he has shifted his position.

16. Mr Naseem initially said that he did not have any questions to put to the claimant by way of cross examination. It was agreed by the parties that I would assist the respondent in putting the key factual dispute points to the claimant. I suggested the following points might be put 1) you took leave without permission from 31 May – 11 June 2) you did not return when you should have on 11 June but returned one day late on 12 June and 3) you resigned on 12 June.

17. The parties each made a short closing submission.

18. I adjourned to reach my decision and gave oral judgment. Sadly, the communication of the amounts awarded was not clear. There were difficulties with internet connectivity and with Mr Samuel being present only by telephone. The parties agreed that I should present the schedule of loss document on screen through CVP and talk through the award, slowly, allowing time for translation. I did this but was then told that the presentation was only partly visible to the claimant and of course not visible to Mr Samuel, though Mr Naseem and Mr Chothani could see the figures. Communication became very difficult at this point and I was aware that presenting the schedule of loss may have raised a false expectation that the total amounts claimed were being awarded. We agreed that amounts awarded would be confirmed in writing in the judgment and that the parties would have an additional e having received those figures in which to apply for reconsideration. My Judgment dated 1 October 2020 records the issue at paragraph 4.

Relevant Findings of Fact

19. The respondent operates a children's clothing manufacturing business. Its director is Mr Rashid Naseem. The claimant started working for the respondent on 2 March 2015 as a seamstress. She worked 37.5 hours per week and was paid before tax £303 per week. There was no written contract of employment.

20. There was an informal arrangement in place evidenced by established practice that the claimant could take time off as needed, unpaid. In January and February 2019 she took days off, approximately 30 over the two months though I make no formal finding as to how many days. It was agreed that she was not paid for them.

21. In March 2019 Mr Naseem wanted to make the arrangement for taking time off more formal. It was agreed that before taking time off the claimant would in future get his prior written approval.

22. It was agreed that the claimant was entitled to 28 days, inclusive of bank holidays, paid annual leave per year.

23. The claimant is of Polish origin and has limited English. When talking to Mr Naseem it was often necessary for her to have one of the other Polish workers, who had better English than the claimant, present to translate for her. Sometimes, the claimant recorded conversations, secretly, on her mobile phone, especially if the translator colleagues had not been present, so that she could try to understand the content later with support from her family.

24. The claimant submitted a written request for annual leave on 29 March 2019. She listed the dates she wanted. The request slip was in the bundle at Section 4. She gave it to Mr Naseem. It was verbally agreed that the claimant would take the following dates as leave; 10 – 17 May 2019 and 31 May – 11 June 2019. The second period of absence was to travel to Poland for the christening of her two grandchildren. The claimant is a catholic and the christenings were significant religious events for her and her family. Her leave was approved verbally by Mr Naseem on 29 March 2019. He kept the request slip. She booked flights to travel.

25. The claimant took leave from 10 – 17 May 2019.

26. Mr Naseem told the claimant on 27 May that she could not now take her second holiday from 31 May - 11 June 2019. She told him that he had approved the holiday in March and that she had booked flights and that the holiday was important to her because it was the christening. Mr Naseem was insistent that she should not go. He withdrew his prior authorisation for her to take leave from 31 May 2019 – 11 June 2019 on 27 May 2019. That was a Monday and she was booked to travel on the Friday.

27. The claimant was in a difficult position but she had booked the flights, it was for a significant reason, the christening, and she had had unpaid leave in the past and come back to work with no problems. She took the leave from 31 May to 11 June 2019. She returned to work on 12 June 2019 and sat at her machine to sew but was called into Mr Naseem's office. She recorded the meeting.

28. Mr Naseem was angry and was shouting. He insisted that she apologise in writing for coming back to work a day late. He put a pen and paper in front of her. Mr Naseem was frustrated that the claimant could not speak English and could not fully understand what he was saying. A translator colleague was brought in to the meeting part way through. Through her translator colleague the claimant understood that Mr Naseem wanted her to write a letter of apology for being absent from work on 11 June 2019. She said that she didn't think she had anything to apologise for because she had provided him with a written request for holiday and he had accepted it in March.

29. Mr Naseem issued an ultimatum that if she did not apologise in writing she could not continue to work for him. His words came through the words of the translator colleague. The claimant checked back with the translator and it was confirmed to her that if she would not write a letter of apology to Mr Naseem for having come back to work one day late then she would be dismissed.

30. The claimant said she was not one day late, the leave had been approved and she would not write a letter of apology. Mr Naseem said words to the effect that *that is it then you are finished.* The translator translated the words and then commented to the claimant "you have just been dismissed". The claimant checked with Mr Naseem herself and he repeated the word "finished" and used the word "go" in English which she understood directly in English without the need for translation. She understood that he had dismissed her. The claimant then asked about outstanding pay due to her and Mr Naseem told her to come the next week to collect her P45 and outstanding pay.

31. The claimant found another job on no less pay within two weeks. She also took advice from Eccles Citizens Advice Bureau who wrote a letter in her name dated 20 June 2019 to the respondent seeking a reason for her dismissal.

32. The respondent replied by a letter dated 21 June 2019 saying that it had not dismissed her. The letter said that she had had 15 days holiday in January 2019 and 15 days in February 2019. The letter attached a P45 and a cheque for £222.26 being outstanding pay and holiday pay.

33. The claimant brought her employment tribunal claim.

The Law and its application in this case

34. I am setting out the relevant law in a way that will, I hope, be easier for the parties to understand. I refer to the relevant law and then apply it to this case step by step, rather than setting out a whole section of law and then a separate section explaining how I have applied the law and the reasons for my decision. I am using the questions from the list of issues we agreed as sub- headings so the parties can see how each part of the claim has been decided.

Unfair dismissal Questions 11.1-11.7

35. Where an employee has more than two years' service she can bring a claim for unfair dismissal. It was agreed that the claimant had more than two years' service.

36. The claimant has to show that she has been dismissed. The law sets out what amounts to a dismissal in Section 95 of the Employment Rights Act 1996. The employment can come to an end by dismissal because (in section 95(1)(a)) the employer dismisses the employee (with or without notice) or because (in section 95(1)(c)) the employee is entitled to treat herself as dismissed because of the employer's actions.

37. The claimant was dismissed by Mr Naseem within section 95(1)(a) when he told her she was finished. She had refused to write a letter of apology and he said *that is it then you are finished.* I was satisfied having listened carefully to the claimant and to Mr Naseem that he gave her that ultimatum, that she said she would not sign to apologise and he then dismissed her. He used the words *finished* and *go.* She checked what he had said with her translator colleague and with him directly. I am satisfied by what the claimant and Mr Naseem told me on camera that they both understood that he had ended her employment at the time. I am satisfied of that because they agreed that she had asked about her final pay and he told her to come back for the pay and P45.

38. The transcript of the conversation on 12 June 2019 supports this interpretation of events but I don't take too much notice of it because I don't know who prepared the translation or how qualified that person was. I pay a little bit of attention to it in so far as it shows me the running order of what happened. It shows me that after Mr Naseem had said "finished" and "go" the claimant asked about how she would get her pay and Mr Naseem referred to a P45. That supports my conclusion that they both understood that the employment had come to an end.

39. The Court of Appeal said in Martin v Glynwed Distribution Ltd 1983 ICR 511, CA. 'Whatever the respective actions of the employer and employee at the time when the contract of employment is terminated, at the end of the day the question always remains the same, "Who really terminated the contract of employment?" If the answer is the employer, there was a dismissal.' The issue is a question of fact for a tribunal to decide in the circumstances of the particular case. Here, there was an express dismissal by Mr Naseem. The law focuses on not what was intended by Mr

Naseem but on the effect of his words. The effect of him saying "finished" and "go" was that the claimant was dismissed.

40. The tribunal then looks to the employer to say what was the reason for the dismissal. The law sets out in section 98(2) and (1)(b)(ii) of the Employment Rights Act 1996, five *potentially* fair reasons for dismissal. In its Response Form the respondent said that it did not dismiss the claimant. It said she "walked out and said I do not want to work for you" and "the employee was not dismissed, she left of her own accord". I reject that interpretation of what happened on 12 June 2019 for the reasons set out above.

41. If the employer can show a potentially fair reason for dismissal then the tribunal determines whether the dismissal is fair or unfair. When thinking about whether it is fair or unfair the law tells the tribunal in section 98(4) Employment Rights Act 1996 to take into account; the reason given by the employer, and whether in the circumstances (including the size and administrative resources of the business) the employer acted reasonably or unreasonably in treating that reason as sufficient for dismissing the employee. The tribunal has to think about what is fair in the circumstances of each case.

42. Mr Naseem did not give me a reason for dismissal. He was insistent that he had not dismissed. Sometimes, a respondent will have an argument "in the alternative" so that if their first position of not having dismissed at all, is not accepted then they can argue that there was a fair reason for a dismissal. Mr Naseem did not have an argument in the alternative.

43. I sought to support him as a party without legal representation, though supported by his accountant, in drawing from his oral evidence and statement what might have been his *in the alternative* arguments. In his witness statement and in the evidence, he gave on camera and in the transcript from 12 June it was clear that there was a dispute about whether or not the claimant should have been in work on 11 June 2019. There was also an issue about Mr Naseem wanting a letter of apology and the claimant refusing to write one. These might be *in the alternative* arguments so that Mr Naseem's case was well, if I did dismiss her it was fair that I did so because she had unauthorised absence or because she had unreasonably refused to write a letter of apology for it.

44. Mr Naseem said he told the claimant in March that the dates were not agreed and that she should go on alternate dates instead. I was referred the request slip in the bundle which the claimant had written. She had asked for 31 May until 11 June and I accept her evidence that those dates had been agreed verbally in response to her written request. The document showed the dates struck through and alternate dates 17 June – 28 June written on the slip in different handwriting. I accept the claimant's evidence that she thought her dates were agreed, she booked her flights to go to the christening and only on 27 May did Mr Naseem tell her she could not go. It was too late then, she had made her plans. I accept her evidence that she did not see the dates struck through on the request slip until she saw it in the bundle for this hearing.

45. I prefer her version of events about the dates of her trip to Poland for the christening as the more accurate version of the agreed dates. She did not need to

be in work on 11 June as she had annual leave that day. So, if Mr Naseem had made his *in the alternative* arguments explicitly, rather than them being implicit in his evidence. I find that his dismissal, in response to her absence and or her refusal to write an apology was not for a potentially fair reason within the law.

46. There was no fair reason for dismissal within Section 98.

47. The claimant is entitled to a basic award of four weeks' pay (one for every complete year of service) calculated at a multiplier of 1.5 because of her age at the time of her dismissal. That is 1.5 x 4 x her week's pay of £304.

48. The claimant is also entitled to a compensatory award. She was out of work for two weeks but I make no award for those two weeks because she is awarded four weeks' notice pay below. Those two weeks are the first two of the weeks for which she gets notice pay. She is entitled to a payment to compensate her for the fact that she has lost her job security. She had been with the respondent for four years and had accrued the right to bring employment claims. It will take her two years with a new employer to accrue those rights again and so I award £250 to compensate her for the loss of that statutory protection.

49. Section 123 Employment Rights Act 1996 allows for deductions to be made from compensation when an employee has caused or contributed to their own dismissal. I have put this very simply. Mr Naseem did not make any arguments about deductions from any compensatory award. He did say in oral evidence that she dismissed herself. If he had made clear submissions on deduction, based on the claimant defying his instruction on 27 May 2019 that she should not take previously approved holiday on 31 May 2019, I would have been likely to conclude that it was not just and equitable to make deductions because he was unreasonable in his late withdrawal of permission (knowing that she had booked flights and was going to a christening) and because it was not her conduct that lead to or contributed to her dismissal but his. I make the same finding in relation to any argument, none was put explicitly, but I want to deal with the arguments that might be implicit in Mr Naseem's position from his evidence, for adjustment to the basic award under Section 1222(2) Employment Rights Act 1996; that is that it should be reduced because her conduct contributed to her dismissal. I find it did not. Neither her basic nor compensatory award are reduced on grounds on contributory conduct.

<u>Wrongful dismissal – notice pay Question 11.8</u>

50. The claimant was employed under a verbal contract of employment and had a statutory right to receive notice on termination of her employment. Mr Naseem did not give her notice. He said that she was finished and told her to go at the meeting on 12 June 2019. She is therefore entitled to an award of pay for the period of notice she should have had if he had terminated the contract lawfully. The claimant had four complete years of service with the respondent at the time of dismissal so applying Section 86 Employment Rights Act; she should have one week's pay for every complete year of service. That is four weeks' pay for the four weeks' notice she was entitled to.

<u>Other payments outstanding wages – Question 11.9</u>

51. At the hearing the claimant agreed that the respondent had paid her wages and some of her holiday pay to her in October 2019 so that all that was outstanding in terms of pay was the holiday pay and notice pay.

Holiday pay – Question 11.10

52. The law makes provision for 28 days annual leave for an employee. The claimant was entitled to 28 days. It was not necessary for me to make findings of fact about the calculation for annual leave as the parties agreed that there were 4 days annual leave outstanding. That amounted to £228 of which £160 had been paid. That left £68 due to the claimant.

ACAS increase on award – Question 11.11

53. The claimant claimed an increase on any award due to her because no procedure was followed in her case. The section that allows a tribunal to increase an award by up to 25% is Section 207A of the Trade Union and Labour Relations Consolidation Act 1992. It provides that if an employer has failed to comply with a Code of Practice, in this case in relation to procedures to be followed for dismissal, and if that failure is unreasonable then the tribunal may if it considers it just and equitable in all the circumstances, increase any compensatory award by up to 25%.

54. The relevant Code of Practice in this case was the ACAS Code of Practice 1: Disciplinary and Grievance Procedures 2015. The Code sets out the keys to handling disciplinary issues in the workplace including; establish the facts of each case, inform the employee of the problem, hold a meeting with the employee to discuss the problem, allow the employee to be accompanied at the meeting, decide on appropriate action, provide employees with an opportunity to appeal.

55. In this case Mr Naseem did not carry out an investigatory meeting with the claimant to establish the facts. He did not give the claimant notice in writing of a disciplinary meeting and notice in writing of the alleged misconduct, whether that was being absent on 11 June or refusing to write a letter of apology.

56. There was a meeting on 12 June 2019 to discuss the absence on 11 June 2019 but the claimant could not understand much of the content of that meeting. No formal interpretation was provided. The claimant was not given the opportunity to be accompanied at the meeting.

57. At the meeting Mr Naseem was both investigating and deciding the outcome. He was angry with the claimant about the historic informal arrangement and he was shouting. The claimant was entitled to a fair hearing with an unbiased decision maker. The hearing was not fair and unbiased for the reasons above. The outcome of the meeting was not confirmed in writing to the claimant until after her advisors at Eccles Citizens Advice Bureau wrote to the respondent on her behalf. She was not given an opportunity to appeal.

58. Mr Naseem runs a small business and does not speak the same language as the claimant. His business does not have administrative support, there is no formal interpreter service and there is no HR function. Small businesses must comply with employment law and there are many sources of information available free of charge to business about how to deal with potential disciplinary issues. ACAS has a Guide

which accompanies the Code of Practice and can be found online easily through a simple internet search. Even though the respondent is a small business, its size and administrative resources would not have prevented it from complying with the Code. The respondent failed to comply with the Code and its failure to comply was unreasonable.

59. However, the tribunal may increase the award *if it considers it just and equitable in all the circumstances.* In considering what is just and equitable in this case I am taking into account the fact that the claimant had benefited from the informal arrangement of being able to take unpaid leave as suited her throughout her employment. I am also taking into account the poor communication between the respondent and claimant generally. I am taking into account Mr Naseem's late withdrawal of permission for annual leave, just three days before the claimant was due to travel, and the claimant's decision to defy that late change because of her historic experience of there being no consequence for her taking unnotified unpaid leave and because I accept her oral evidence that she had booked her flights and that the christening was a significant religious event for her and her family. I do not think it would be just and equitable in all those circumstances of informality and lack of communication, which until March 2019 had suited both parties, to increase any award for failure to comply with the Code. That is not to say it should not be complied with and I encourage Mr Naseem to use the resources provided by ACAS and others to assist him in managing people in a way that is compliant with their statutory and contractual rights going forward.

Failure to provide written particulars of employment – Question 11.12

60. Section 1 Employment Rights Act 1996 provides that an employee is entitled to a written statement of particulars of employment. Nowadays that is a day one right but at the time when the claimant started work for the respondent it had two months from the start date in which to provide those particulars. The respondent did not provide any written particulars at all throughout the claimant's employment. Section 38 Employment Act 2002 says that where a tribunal makes an award to the employee in respect of the claims she brings and when those claims were brought the employer had not provided written particulars then the tribunal must make an award of the minimum two weeks' pay and may if it considers it just and equitable in all the circumstances award the higher four weeks' pay.

61. I award four weeks' pay. It is just and equitable to do so because Mr Naseem did not put anything in writing to the claimant at all in relation to her employment terms and conditions. His failure to set out written terms led to the confusion about her leave entitlements and whether or not her leave was approved for 11 June 2019 and what might happen to her if she took that leave. His failure to provide written particulars played a part in the loss of her employment. For those reasons I find it just and equitable to award the higher amount of four weeks' pay.

62. The total amount the respondent must pay to the claimant is £4,506.00. The figures awarded are those set out in my judgment dated 1 October 2020 and sent to the parties on 27 October 2020.

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Employment Judge Aspinall

Date: 2 February 2021

REASONS SENT TO THE PARTIES ON

5 February 2021

FOR THE TRIBUNAL OFFICE

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