



EMPLOYMENT TRIBUNALS

Claimant: Mrs Lauren Flintoft

Respondent: Pamol Ltd

Heard at: Leeds Employment Tribunal
On: 15 December 2020

and

Heard at: Hull Employment Tribunal
On: 18 January 2021

Before: Employment Judge K Armstrong

Representation

Claimant: Mr Victor Edwards

Respondent: Miss Viktoria Matvejeva and Mrs Anzella Petuhhova

Interpreter

Respondent: Miss Munton

JUDGMENT

1. The Claimant's claim for unpaid annual leave is dismissed on withdrawal.
2. The Claimant was unfairly dismissed. The respondent shall pay to the claimant **£9,533.50**.
3. The Respondent failed to provide the Claimant with a statement of written particulars of employment pursuant to s.1 and s.4 ERA 1996 and s.38 EA 2002 and the award is therefore increased by **£532**.

REASONS

Claims

Reserved Judgment

Case No: 1804871/2020

1. The Claimant, Mrs Lauren Flintoft, filed an ET1 claim form on 18 August 2020. In that form she claimed:
 - a. Unfair Dismissal
 - b. Notice Pay
 - c. Holiday pay
2. The holiday pay claim was withdrawn on the first day of the hearing. Therefore I have to determine the claims for Unfair Dismissal and notice pay (also known as wrongful dismissal).

Conduct of the hearing

3. The hearing took place over two days. The first day of the hearing was 15 December 2020 and took place at Leeds ET. The second day was 18 January 2021 and took place at Hull ET.
4. On both dates, the Claimant was represented by Mr Victor Edwards, a family friend who is also the Claimant's former employer. He owned the business 'Boozeville' where the Claimant worked, which he sold to the Respondent in February 2020. He has been open with both parties and with the Tribunal that he has been involved in the dispute and that he has also assisted the Respondent with preparing their ET3, and correspondence with ACAS. He has to some degree attempted to assist both sides in resolving the dispute. I raised this at the outset of the hearing and both Claimant and Respondent, as well as Mr Edwards, acknowledged that whilst it was perhaps uncomfortable they did not object to him representing the Claimant and assisting the Tribunal. Mr Edwards also gave evidence.
5. The Respondent was represented by Miss Viktoria Matvejeva, who is an employee of the Respondent. She also gave evidence. She asked questions on behalf of the Respondent and made representations. Mrs Anzella Petuhova, one of the owners of the Respondent company, also made representations to the tribunal, including closing submissions, and gave evidence.
6. The Respondent's witnesses and the tribunal were assisted throughout both days of the hearing by a Russian interpreter, Miss Munton.

Issues for the tribunal to decide

7. It was initially agreed that the issue of liability would be dealt with first, to be followed by remedy if required. However, it was not possible to complete the evidence, judgment and remedy within the second day of the hearing therefore it was agreed that the Tribunal would hear evidence and submissions on liability and remedy, and reserve judgment.
8. The Claimant in her claim form sought reinstatement but she informed the Tribunal at the start of the first day that she no longer sought that remedy due to the time that has passed and the circumstances of her dismissal, and confirmed this in her written submissions.
9. At the start of the first day, the issues were identified as follows:

10. What date did the Claimant's continuous employment start?

- 10.1. Did the Claimant's previous employment contract transfer to the Respondent on 11 February 2020 by virtue of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE Regs 2006)?

11. Was the Claimant dismissed or did she resign?

- 11.1. Was the Claimant's employment terminated by the Respondent or the Claimant? The Tribunal will need to consider the actions taken by the Claimant and the Respondent between 13 July 2020 and 18 August 2020.

12. If the Claimant was dismissed, what was the reason for the dismissal?

- 12.1. Was it a potentially fair reason under s.98(2) Employment Rights Act 1996 (ERA 1996), namely redundancy or conduct?
- 12.2. Was she dismissed to allow Miss Victoria Matvejeva and Miss Anastasia Gorskova to work more hours within the business?
- 12.3. Was she dismissed for assertion of a statutory right (s.104 ERA 1996) – namely that she had a contract of employment in place that had transferred over and which continued to set out the working relationship between her and the Respondent?
- 12.4. This reason was not specifically pleaded in the Claimant's ET1. Mr Edwards said that the Claimant did not really know why she had been dismissed at the time her employment ended and therefore she had been 'working in the dark' to some extent when she brought her claim. It was when considering all the evidence that she thought perhaps the reason for her dismissal was that she sought to assert the transfer of her previous contract. She did not seek to adduce any further evidence and Mr Edwards submitted that this amendment was there to be seen on the face of the evidence.
- 12.5. I have a broad power under the Employment Tribunal procedure rules to allow or refuse amendments to claims and responses. I have to consider the overriding objective to deal with cases justly. I have to consider whether the amendment is necessary and appropriate and seek to do justice between the parties having regard to the circumstances of the case. In particular, I have to consider any injustice or hardship which would arise from allowing the amendment, or refusing it. I have to consider whether the application to amend is made after the time limit for bringing a claim has expired and if so whether I should extend the time limit. Having considered this guidance, I am satisfied that it is fair in the circumstances of this case to allow the amendment. The Claimant does not seek to adduce new evidence, but rather to apply a different legal interpretation to the evidence already before the Tribunal. I accept her submission that it did not become clear that this was a possible interpretation until she has received the Respondent's evidence. There is

Reserved Judgment

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a disadvantage to the Respondent in allowing the amendment in that if I were to find this to be the reason then it would be an automatically unfair dismissal. However the Respondent is able to deal with this as it arises out the evidence they have already put before the Tribunal. Therefore I allow the amendment and extend the time for bringing the claim on this basis.

- 12.6. This therefore adds the following issues, by virtue of s.104 ERA 1998:
- 12.7. Did the Claimant allege that the Respondent had infringed a right of hers, namely a right conferred by the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE 2006), specifically the right under regulation 4 i.e. that the transfer to Pamol Ltd would not terminate her contract of employment and that her contract shall have effect after the transfer as if originally made between the Claimant and Respondent?
- 12.8. Was the allegation made in good faith (it is immaterial whether or not the right had in fact been infringed)?
- 12.9. Was the Claimant's allegation that the Respondent had infringed a right of hers the reason for the dismissal (or, if more than one, the principal reason)?
13. **If she was dismissed for a potentially fair reason, was the dismissal fair in all the circumstances?**
- 13.1. Did the Respondent act reasonably or unreasonably in all the circumstances (including the size and administrative resources of the undertaking) in dismissing the Claimant?
- 13.2. If the reason for the dismissal was the Claimant's conduct:
- (i) did the Respondent believe that the Claimant was guilty of misconduct;
 - (ii) did the Respondent have in mind reasonable grounds on which to sustain that belief; and
 - (iii) had the Respondent carried out as much investigation as was reasonable in the circumstances?
- 13.3. Did the Respondent's action fall within the band (or range) of reasonable responses open to an employer?

Notice Pay

14. Was the Claimant wrongfully dismissed?
15. Is the Claimant owed notice pay?

Evidence

16. I have considered a bundle of documents prepared by the Respondent, containing documents from the Claimant and Respondent. It consists of 98 pages, including the parties' witness statements: Mrs Anzella Petuhhova, Miss Viktoria Matvejeva and Mr Ilja Petuhhov on behalf of the Respondent, and the Claimant and Mr Edwards on behalf of the Claimant.

17. I have also considered some further documents which were presented to the Tribunal on the first day of the hearing. The Claimant adduced documents labelled A12 And A13 which are copies of text messages between the Claimant and Mr Petuhhov (**A12**) and the Claimant and Miss Matvejeva (**A13**). The Respondent adduced a message from the Claimant to the Respondent which refers to her being married. There was no objection from either party to these documents being adduced.
18. On 18 January 2021 the Respondent presented some further documents. Firstly, copies of the translation qualifications of a Ms Yulia Pavlovna Pavlova who the Respondents say translated their witness statements. There was no objection to this being produced. They also produced a handwritten and typed copy of some notes provided by Mr Edwards to assist the Respondent with their submission to ACAS. I reminded the Respondent that their correspondence with ACAS is confidential and did not read these documents.
19. The Claimant produced two small bundles of documents relating to remedy on 18 January 2021 containing a record of job applications which she has made since the termination of her employment. The Respondent had received these documents on Friday 15 January. The Respondent objected that the documents were served late, however Mrs Petuhhova confirmed that she had been able to read the documents and understood them. She did not dispute that the Claimant had made the applications set out therein, the issue being whether the search she had undertaken was reasonable. I therefore allowed the documents relating to remedy to be admitted in evidence.
20. At the start of the first day I watched five CCTV clips from the Respondent's shop showing the Claimant on the 8 July 2020 and the 13 July 2020. I also listened to an audio recording of a conversation between the Claimant and Miss Matvejeva which was made on 13 May 2020. This recording was made without Miss Matvejeva's knowledge at the time. However, the Respondent's witnesses had heard the recording and were happy for me to listen to it as part of the evidence in this case.
21. I heard evidence on 15 December 2020 from the Claimant, Mr Edwards and Mrs Anzella Petuhhova.
22. I heard evidence on 18 January 2021 from Miss Viktoria Matvejeva, and Mr Ilya Petuhhova, Mrs Petuhhova's son and co-owner of the Respondent company. I also heard evidence from the Claimant regarding remedy. I heard submissions from both parties and Mr Edwards provided submissions in writing. The Respondent had time with the interpreter to read through some of Mr Edward's written submissions, but rather than seeking more time to read through the submissions in full, asked for Mr Edwards to make the submissions orally during the hearing, which he did.
23. An updated schedule of loss was sent to the Tribunal and the respondent on 15 January 2021. This is four days later than directed. However, I decided to accept the schedule of loss as it did not put the Respondent at a disadvantage and it was evidence which the Tribunal required in order to make a decision as to remedy. The Respondent had time to consider the document with the translator at the hearing.

Background

24. The claimant worked in the off-licence 'Boozeville' on Hessle Road, Hull. She commenced employment on 1 March 2017 when the shop was owned by Maple News Ltd, the company owned by Mr Edwards. On 11 February 2020 the business was sold to Pamol Ltd, the Respondent. The deed of transfer of undertaking contains the following clause: *"the Employees" means the list of employees listed in the second schedule subject to the sale of the business by virtue of the Regulations.* (5). The Second Schedule includes the Claimant as follows: *'Mrs Lauren Jessica Flintoft, age 23 yrs old, Employed 1 March 2017. Worked 16 hours.'* It then specifies her shifts, and her rate of pay at £8.75 per hour. (15)
25. The Claimant had been given a written statement of employment particulars by Mr Edwards but a copy of this was never provided to the Respondent. The Claimant had mislaid her copy during a house move and was unable to produce it to the Tribunal or the Respondent. The Respondent placed significant reliance on this in their representations to the Tribunal in respect of whether the Claimant's terms of employment had transferred to them upon transfer of the business.
26. Following transfer of the business, no written particulars of employment were provided to the Claimant or any other employees. Mrs Petuhhova described it in her oral evidence that *'they [the employees] came as part of the business.'* The Respondent's evidence was that they intended to issue written particulars of employment once the COVID-19 restrictions had passed. It was not clear to me why that necessitated a delay in issuing written statements of terms and conditions.
27. On 10 May 2020, there was a meeting between Mrs Petuhhova, Miss Viktoria Matvejeva, a translator, the Claimant and two other members of staff. At that meeting the interpreter translated whilst Mrs Petuhhova went through a list of 'rules' which she wanted the employees to follow. She wanted to put these in place as after a few months of ownership of the business, she felt that there were areas that required improvement. The list of the rules appears at page 15 in the bundle, and contains 14 items, such as *'Do not use phone when at work'*, *'Come to work on time'* and *'All places at work must be clean.'*
28. Mrs Petuhhova also said in her oral evidence that during that meeting she told the employees that *'after COVID'* they would be introducing written contracts. It is not disputed that the Claimant said she already had a contract. Mrs Petuhhova said she was surprised by this. The Claimant says Mrs Petuhhova was more than surprised, she was angered by the comment.
29. Following this general staff meeting the other two staff members left. The Claimant remained on the premises as her shift was due to start and she was invited to a further meeting with Mrs Petuhhova, Miss Matvejeva and the translator.
30. There is an issue between the parties as to what was said during both of these meetings. The Claimant says that during the first meeting she indicated that she was content to accept the rules, she just sought clarification of some, for example could she keep her mobile phone to hand in case of an emergency involving her young son. She says she also simply wanted to make clear that this was not a new contract and that she was still employed under the same

terms as prior to the transfer. She clarified in her evidence to the Tribunal that by this she meant with the same rate of pay, holiday pay, years of service and hours. In her oral evidence she said that she was told that her previous contract was *'void, finished, done.'* The Claimant says that during the second meeting Mrs Petuhhova and Miss Matvejeva raised their voices and were talking very fast. She said the translator was also talking very loud and very fast, and she felt *'like I was under attack by Miss Victoria and Ms Anzella.'* She says that at the end of the meeting Mrs Petuhhova told her that she would be issued a new contract in due course, and that if she didn't sign the new contract when it was issued she would lose her job.

31. Mrs Petuhhova says that the Claimant stated in the larger meeting that she *'had no intentions to abide by a new contract should one be put in place'* and that the claimant showed a *'rude attitude'*. In her oral evidence she expanded on this, saying that *'we tried to explain to her and calm her down that nothing is going to change.'*
32. The Claimant signed the rules the following day, 11 May 2020, as follows: *'I'm signing to acknowledge the rules only'* (15).
33. Also on 11 May 2020, the Claimant handed to Mrs Petuhhova a letter (16-18). In it, the Claimant states *'I have agreed to sign the rules as acknowledgement of understanding'*. She goes on to state: *'the law states that my contract must be transferred over to the new owners of the business, hence my long standing contract governs my employment relationship with you as the new owner. A new contract can only be issued if both parties (employer and employee) are in agreement with a new contract being issued, no such agreement has been reached, therefore it is to my understanding that the pre-existing contract I had with Mr Edwards still stands and legally both parties must comply with the existing contract.'*
34. On 12 May 2020 there was a text message exchange between the Claimant and Miss Matvejeva. Miss Matvejeva accepts that the full conversation is as set out in A13. To the extent that it is relevant, the conversation is as follows:
- Miss Matvejeva: *'Hi. Lauren why you writing this letter Andzella?'*
Claimant: *'I was informed my contracts between myself and Victor is still valid and has been transferred to Anzella therefore I do not wish to have a new contract as my long standing one is still in place.'*
Miss Matvejeva: *'Andzella no contract with you. Edwards Edward did not give her anything. If Edward would hand over the contract they would have to assure it through a lawyer Andzella had to get acquainted with your contacts, see all the points and then sign and Ilya should also sign, but this was not done so your contract is invalid.'*
Claimant: *'Talk to Victor about my contract. I don't no want to get an argument about this I have taken legal advice and I know my legal rights.'*
Miss Matvejeva: *'Andzella is not understood. Why did you need to? What legal advice, if your experience also continues, as you continued to work, and generally your actions are not clear.'*
Claimant: *'I will explain better tomorrow.'*
35. On 13 May 2020 there was a conversation between the Claimant and Miss Matvejeva regarding the Claimant's contractual rights. This is the conversation which was covertly recorded by the Claimant. I have listened to

that conversation and it is apparent that the Claimant is seeking confirmation that her contract with Mr Edwards continued. Miss Matvejeva appears to understand this but is asking for a copy of the contract. I bear in mind that when this recording was made, the Claimant knew that it was being recorded whereas Miss Matvejeva did not. It is clear that the Claimant was seeking confirmation that her previous contractual terms would continue. I find that in the course of that conversation Miss Matvejeva did not say that the contract was terminated, but was seeking to see a copy of it.

36. On 8 July 2020 Mrs Petuhhova noticed that a large sum of money, £227.88, had been put through the till and then refunded during the Claimant's shift. This was a significant discrepancy and therefore she asked Miss Matvejeva to check the CCTV for that date. Miss Matvejeva discovered four other incidents of note during that day and therefore recorded some excerpts from the CCTV onto her phone, which were shown to me during the hearing. They are as follows:
37. **APIP 25:** Claimant using her mobile phone whilst a customer is present. On the clip it is clear that the Claimant is speaking on her mobile phone. A customer approaches the desk, after a moment or two the Claimant notices the customer and ends the call.
38. **APIP 26:** Claimant passing goods through the door to a customer. The till is behind a clear screen, there are two ways through either through a door or through an open hatch next to the till. This clip shows the Claimant passing a bag full of goods through the door to a client. The Respondent says this is unacceptable for two reasons - firstly all goods have to be passed through the hatch and secondly it doesn't show the Claimant scanning the goods first. The Claimant says she had scanned the goods first – it was 12 cans of lager. She says that the moments before on the CCTV would show that. She says she passed the goods through the door because they were too heavy to pass through the hatch. The Respondent says they are not too heavy. They have provided photographs at page **38-39** in the bundle which show 12 cans of lager being passed through the small hatch.
39. **APIP 27:** Shows the Claimant at the till. The Claimant says this shows her correcting the error in question. Her version of events is that she scanned one can and multiplied this by 12. However the bar code was wrong so for each can the till it came up with price for a crate of 12 cans, so when multiplied by 12 this was obviously far too much. She had to void it off and then re-enter one at a time. This can be seen on the receipts in the bundle. The cans in question are the same ones in clip APIP 26. Mrs Petuhhova did not accept this explanation in her evidence. She believes that the items were passed to the customer and then entered manually.
40. **APIP 28:** This shows the Claimant closing up the shop and walking away. She can be seen returning a couple of minutes later. A woman with a child can be seen outside the shop and then walking away. The Respondent says they are waiting to enter the shop. The Claimant says they are using the cashpoint. It is accepted that the Claimant tried to call Mr Petuhhov and when he didn't respond she left the premises to get some change from another nearby shop. The Respondent says that the claimant should not have left without also telephoning Mrs Petuhhova or Miss Matvejeva. The Claimant says she didn't do this because of the language barrier with Mrs Petuhhova

and because she didn't believe that Miss Matvejeva was around the shop that day.

41. **APIP 29:** This shows the Claimant leaving the shop on 13 July 2020. It is a short clip which simply showed the Claimant leaving the building.
42. Miss Matvejeva says on another occasion she found a key in the wrong place when the Claimant was on shift (47). The Claimant denies this. In any event this was not put to the Claimant in the meeting on 13 July 2020 (see below) and I do not put any weight on this alleged incident.
43. Miss Matvejeva took this evidence to Mrs Petuhhova. They waited until Mr Petuhhov was available to speak to the Claimant as he acted as translator, being more fluent in English. He was not available until 13 July 2020.
44. The events of 13 July 2020 are disputed and form the central issue of fact in the case that I need to determine.
45. It is not disputed that Mr Petuhhov, Mrs Petuhhova and Miss Matvejeva entered the shop around 4.25pm whilst the Claimant was working a shift, and said they wanted to discuss some things with the Claimant.
46. In her witness statement the Claimant says that she *'could tell by everyone's body language that something was not right.'* She was then handed two till printouts, showing the error on 8 July 2020 described above. The Claimant was shown the CCTV and she gave her explanation, as set out above. At the end of this discussion, the Claimant says Mrs Petuhhova said something to Mr Petuhhov, which he then translated as *'We WILL be making a redundancy, so you'd better start begging for your job.'* The Claimant says she was shocked and asked Mr Petuhhov *'What do you mean that we have to beg for our job?'* The Claimant says Mr Petuhhov translated this to Mrs Petuhhova who *'began shouting and waving her phone in the air and then shouted and pointed at me "You will go then", and then "slammed the door and stormed off and left the shop through the back way.'* The Claimant says she was shocked and confused. She says there was a moment of silence and then Mr Petuhhov said *'You need to come in for your next shift on Wednesday.'* The claimant replied that this was *'no problem'* and then left the premises by agreement. She says she did not cash up because it was 17.12, and her shift was due to end at 17.00, and she was *'very upset and confused by the way the meeting had concluded.'*
47. In her oral evidence, the Claimant accepted that other issues were also discussed in the course of the meeting. She accepts that she was challenged about being late to work on 1 July 2020, which she accepted and apologised for. She was also asked about the CCTV referred to above showing her leaving the shop on 8 July 2020. She was shown the CCTV clip and gave the explanation set out above. She was also asked about using her mobile phone at work, although she was not shown the CCTV clip APIP25 in the meeting, and explained that the only phone calls she had taken at work were either for medical reasons or related to an emergency situation regarding her young son.
48. Mrs Petuhhova in her witness statement sets out the discussions regarding the issues above. She states that the Claimant failed to provide a proper

explanation for any of the issues. She says that during this discussion the Claimant repeatedly said *'Is that all?'* after each question, as though to rush her through. The Claimant denies this. Mrs Petuhhova states that *'When the conversation was over and we were going to leave, Lauren said that "she didn't hold to her employment."* This comment was translated from English to Russian by Mr Petuhhov. In her oral evidence, the Claimant denied saying this, and said it was not a turn of phrase that she would use.

49. Mrs Petuhhova says that after this comment she asked the Claimant to finish her working week off with her last day being Wednesday 15 July. She then states in her witness statement that *'After this Lauren walked away from the premises leaving the job place without finishing her duties off.'* In her oral evidence, Mrs Petuhhova accepted that she left the premises through the back door before the Claimant had left, therefore she could not have seen the Claimant leave.
50. Mr Petuhhov and Miss Matvejeva gave a very similar accounts of the exchange to Mrs Petuhhova.
51. Later that evening at 18.50 the Claimant sent the following text message to Mr Petuhhov: *'What day will I have my redundancy letter issued please? Also what are the reasons for my redundancy? And lastly I will need my P45 too.'* (31).
52. Mr Petuhhov did not reply and the following day, 14 July 2020 at 08.44 the Claimant sent another message: *'I will need to know my redundancy date and tge reason why today so I can notify the correct people'* (31)
53. At 9.28, Mr Petuhhov replied: *'I email my accountant, he should reply today. As soon I will let you know.'* (31) He then sent a further message at 13.14: *'Lauren, the reason will be gived in hand or emailed to you on Friday as well as your holidays and salary. The p45 will be only issued at the end of the month same with the statement. Thank you.'* (32)
54. The following day, 15 July 2020 the Claimant came into work. She worked her full shift. At 14.14 she messaged Mr Petuhhov again: *'Can I ask which day is my last please? Is it today or Sunday?'* He responded *'It's today last day Lauren.'* (32). In his submissions, Mr Edwards identified this as the final unequivocal dismissal, although he states that it forms part of a course of action which amounted to dismissal.
55. Later the same day (15 July 2020), the Claimant sent the following message to Mr Petuhhov: *'Following the information of my dismiss verbally given to me on monday, which was confirmed by Victoria at 4.30 today, Please send me my letter of dismissal as soon as possible so I can forward to my solicitor.'* The Claimant says that on 15 July 2020 she had a telephone conversation with Miss Matvejeva in which she was told *'not to return to the premises as my wages would be transferred to me via bank transfer and my dismissal letter and P45 would be emailed to me on Friday also.'* (35). Miss Matvejeva denies making any such telephone call.
56. On 17 July 2020 the Claimant received by email a dismissal letter dated 16 July 2020 (35). It reads as follows:

'Date of issue: 16th July 2020

Sub: Termination of employment

Dear Lauren,

We are writing to inform you that your employment ended as of 15th July 2020 when you left the premises. Due to repeated violations of the rules and regulations of the company committed by you, we have decided to end your employment with us.

Yours faithfully,

Pamol Ltd.'

57. On 22 July 2020 the Claimant sent a letter to the Respondent appealing the termination of her employment (36-37). She states *'Firstly, I did not leave the premises. I was verbally dismissed on 13th July 2020 and was told to return on the 15th July 2020 to do my usual shift. It was then on the 15th July during my shift that I was told not to return to the premises as my dismissal was enforced that day. Following that discussion I was informed a letter would be sent to me to confirm my dismissal and the reason for my dismissal.'* She also denies that she *'repeatedly violated the company's rules and regulations.'* and gives the explanation set out above regarding handing the cans of lager through the door rather than the hatch. She sets out a request for holiday pay and then concludes *'This being said, I will respectfully ask you to reconsider your legal position and reinstate me and also compensate me for my loss of earnings.'*

58. The Respondent did not acknowledge this letter and took no action. Mrs Petuhhova accepted that she received the letter. In oral evidence she initially said she took no action because it wasn't addressed to Pamol Ltd, it was addressed to her personally on the envelope and Mr Petuhhov in the letter. She then said it was because she couldn't understand the letter because Mr Petuhhov was out of the country at the time, and google translate *'didn't make it any clearer.'* In his oral evidence, Mr Petuhhov confirmed that he was in telephone contact with his mother whilst he was out of the country. He also stated that he didn't think it would have been a problem because she could have used google translate.

59. On 18 August 2020 the Claimant filed her ET1.

Findings of fact

60. Where the Claimant's evidence conflicts with that of the Respondent, I generally preferred the Claimant's version of events. I found her to be a clear and measured witness who gave consistent accounts of events which were consistent with the documentary evidence in the bundle. The Respondent's witnesses were less credible. I found it difficult to accept that they were each giving their own true recollection of events. On a number of occasions throughout the hearing, Mrs Petuhhova and Miss Matvejeva attempted to tell each other and Mr Petuhhov what to say in response to questions whilst giving oral evidence. I had to remind Mrs Petuhhova and Miss Matvejeva several times of the importance of a witness giving their own evidence, and that it would impact on my ability to accept what was said if they were prompted to give certain answers. On 18 January 2021 I had to ask Miss Matvejeva to move and sit at the back of the hearing room after she wrote a note on a piece of paper and attempted to show it to Mr Petuhhov whilst he

was giving evidence. All of this, combined with the fact that Mrs Petuhhova in her witness statement describes the Claimant leaving the premises after the meeting on 13 July 2020, which she accepted in oral evidence she did not see, leads me to the conclusion that the Respondent's witnesses have collectively presented a version of events which they believe to be favourable to the Respondent, rather than each giving their own honest recollection of events.

61. In relation to the alleged conduct incidents which were discussed on 13 July 2020, I find that none of them are misconduct and none of them amount to a breach of contract. Mrs Petuhhova and Miss Matvejeva in submissions told me that the Claimant could have returned to work at any point, therefore I do not find that they themselves viewed the incidents as misconduct justifying dismissal, or a breach of contract. The Claimant has given cogent explanations for each incident, which accord with the CCTV footage which I have seen.
62. I prefer and accept the Claimant's account of the events of 13 July 2020. Mrs Petuhhova's account is inconsistent in that in her witness statement she describes the Claimant leaving the premises first, but in oral evidence she accepted that she left through the rear door to the premises before the Claimant had left. I find that Mrs Petuhhova's admission that she left first is consistent with the Claimant's account of her leaving in bad temper. I also accept having heard Claimant give evidence that '*I don't hold to my employment*' is not a turn of phrase that she would use. I conclude that this is a phrase that Respondent witnesses have either fabricated after the meeting, or alternatively it was a mis-translation by Mr Petuhhov.
63. The text correspondence and letters after the 13 July 2020 do not make sense if the Claimant had resigned on that date. The messages which the Claimant sent to Mr Petuhhov make no sense if she resigned, unless she was setting up an elaborate ruse in order to claim unfair dismissal. I do not find this to be the case on the balance of probabilities, particularly given that until 15 December 2020 the Claimant was seeking reinstatement.
64. On the balance of probabilities, if the Claimant had resigned on 13 July 2020 I do not believe that she would have returned to work on 15 July 2020. She would have treated her employment as at an end on 13 July 2020, and therefore there would be no good reason for her to return on 15 July 2020.
65. The Respondent had ample opportunity to question the Claimant if they were of the view that she had resigned. Mr Petuhhov could have responded to her text messages showing some confusion and asking why she was speaking as if she had been dismissed. Any of the Respondent's witnesses could have spoken to her during her shift on 15 July 2020. The dismissal letter dated 16 July 2020 makes no sense if the Claimant had resigned on 13 July 2020. Finally, it is extremely unlikely that the Claimant would have appealed her dismissal if she had in fact resigned on 13 July 2020.
66. I find that Mrs Petuhhova deliberately ignored the appeal letter. She gave two different reasons for not responding. I do not accept that the fact that it was addressed to her rather than Pamol Ltd justifies failing to respond. I also do not accept that it was impossible for her to translate it because Mr Petuhhov was abroad. Mr Petuhhov himself in evidence said it wasn't a problem

because she could have used a translation app. I note that she also has other contacts who are able to translate documents for her, and she has sufficient assistance with this to be able to run a successful business. I therefore find that she deliberately chose to ignore the appeal letter.

Relevant law and conclusions**What date did the Claimant's continuous employment start?**

67. Reg 3 TUPE 2006 provides: *'(1) These Regulations apply to – (a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity.'*
68. Reg 4 TUPE 2006 provides: *'(1) ... a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.'*
69. There is no provision which makes the transfer conditional upon the transferee having sight of a written copy of the contract of employment.
70. The business 'Boozeville' transferred from Maple News Ltd to Pamol Ltd on 11 February 2020. The Claimant's contract continued to have effect after the transfer as if originally made between her and the Respondent.
71. Therefore I find that the Claimant's continuous employment commenced on 1 March 2017. She therefore has sufficient continuous service to bring a claim for unfair dismissal.

Was the Claimant dismissed or did she resign?

72. Because I prefer the Claimant's version of events on 13 July 2020, it follows that she was dismissed by the Respondent. I do not accept that she resigned during the meeting on 13 July 2020.
73. I accept that the dismissal took effect on 15 July 2020. This is the date given in the dismissal letter dated 16 July 2020. It was also on this date that Mr Petuhhov confirmed *'Its today last day Lauren.'*
74. The documentary evidence is entirely consistent with the Claimant having been dismissed, and entirely inconsistent with her having resigned. The messages from Mr Petuhhov do not challenge or query the Claimant's request for written confirmation of her dismissal. The Respondent's letter of 16 July 2020 is unequivocal that *'we have decided to end your employment with us'*. The Claimant's appeal letter is nonsensical if she had in fact resigned.
75. As I have found, the Respondent had ample opportunity to discuss with the Claimant if they were confused as to why she was asking for a 'redundancy' letter. This could have been done by text message, or at any point during her shift on 15 July 2020. They did not take that opportunity. There was no

compulsion for them to write a letter saying she had been dismissed. They could have acted upon her appeal letter to resolve any misunderstanding and re-instate her employment. I find that they did not seek to clarify or challenge the Claimant on this because she had not, in fact, resigned at all. She had been dismissed.

If the Claimant was dismissed, what was the reason for the dismissal and was it a potentially fair reason under s.98(2) ERA 1996?

76. It is for the employer to show the reason for the dismissal and that it is either a potentially fair reason or some other substantial reason of a kind such as to justify the dismissal (s.98(1) ERA 1996). The difficulty the Respondent faces is that it asserts that the Claimant resigned, and they did not put forward a potentially fair reason for the dismissal to the Tribunal.
77. The Respondent does not seek to rely on conduct or redundancy as a reason for the dismissal. In her closing submissions, I asked Mrs Petuhhova what the Respondent would say was the reason for the dismissal, if I accepted that the Claimant had not resigned. She was very clear that the Respondent did not put forward any reason for the dismissal, because the Claimant had in fact resigned.
78. I have however considered all the evidence before me and I am not satisfied that there was a potentially fair reason for the dismissal.
79. Although I find that Mr Petuhhov used the word ‘redundancy’ on the 13 July 2020, it clearly was not meant in the legal sense and no evidence has been put forward that this was the real reason for the dismissal.
80. In submissions, Mrs Petuhhova explicitly said that she did *not* rely on the Claimant’s conduct as a reason for dismissal. In fact it was part of the Respondent’s case that the Claimant could have had her job back at any point and she was a good worker, therefore I cannot find that conduct was the reason for the dismissal.
81. The Claimant has speculated that she may have been dismissed to allow Miss Victoria Matvejeva and Miss Anastasia Gorskova to work more hours within the business. However, no evidence was put forward to this effect and none of the Respondent’s witnesses were asked about this, therefore I do not find that this was the reason for the dismissal.
82. I have considered whether the Claimant was dismissed for assertion of a statutory right. Section 104 ERA 1996 provides:
- ‘(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee –*
- (a) Brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or*
 - (b) Alleged that the employer had infringed a right of his which is a relevant statutory right.*
- (2) It is immaterial for the purposes of subsection (1) –*
- (a) whether or not the employee has the right, or*
 - (b) whether or not the right has been infringed;*

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But, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

(4) The following are relevant statutory rights for the purposes of this section-

...

(e) the rights conferred by the Transfer of Undertakings (Protection of Employment) Regulations 2006.

83. The Claimant says that perhaps the reason she was dismissed was because of her assertion that her contract of employment with Maple News Ltd remained valid and had transferred to her employment with the Respondent.
84. The statute requires that the Claimant alleges that the employer *had infringed* a right of hers. This means that an allegation that there may be a breach in future is not sufficient (*McPartland v Pybus EAT 170/99; Spaceman v ISS Mediclean Ltd (t/a ISS Facility Service Healthcare) 2019 ICR 687, EAT*).
85. The difficulty the Claimant faces is that although the Respondent had stated an intention to issue new contracts, this had not yet been done. None of her terms of employment had actually been altered (save for the identity of her employer) – her rate and hours of pay remained the same, as did her place of work. The new ‘rules’ discussed in the meeting on 10 May were not contractual terms, as the Claimant and Respondent both accept.
86. Therefore, the Claimant cannot rely on s.104 ERA 1996.
87. It is for the Respondent to show on the balance of probabilities what the reason for the dismissal was. This means that the Respondent must bring evidence to satisfy the Tribunal that it is more likely than not that the Claimant was dismissed for a particular reason. The Respondent has not proven what the reason for dismissal was, and has not proven that it was for a potentially fair reason. Therefore, the dismissal is unfair.

If she was dismissed for a potentially fair reason, was the dismissal fair in all the circumstances?

88. I do not need to consider this issue, as no potentially fair reason has been established.

Wrongful dismissal

89. The Claimant was dismissed without good reason. As set out above, the Claimant had not fundamentally breached her contract of employment such as to justify termination of the contract by the Respondent. Therefore she was wrongfully dismissed.

Remedy

Basic award

90. The Claimant was employed from 1 March 2017 until 15 July 2020. Her date of birth is 13 March 1997 and therefore she was aged 23 at the date of dismissal. Her 22nd birthday was on 13 March 2019. She had 3 full years' service. Her weekly pay was £133. The basic award is therefore £133 x 2 (1 week for the last year of service, and 0.5 weeks' for each of the preceding years). Therefore the basic award is: **£266**

Compensatory award

91. Loss of earnings to date of hearing (15 July 2020 to 18 January 2021):
£133 x 27 weeks: **£3,591.**

92. Future loss of earnings:

The Claimant claims a further six months loss of earnings. In the current economic climate I consider it is entirely reasonable to expect it to take six months for the Claimant to secure another job. £133 x 26 weeks : **£3,458.**

93. Expenses:

The Claimant claims £65 expenses, consisting of £10 per month further mobile telephone credit to cover additional data used in searching for jobs (£10 x 6.5 months). I am satisfied that this is reasonable. Total: **£65.**

94. Loss of statutory rights:

The Claimant claims £500 for loss of statutory rights as it will take her two years to regain protection from unfair dismissal. She will also require continuous service to regain other statutory rights. I accept this. Total: **£300.**

95. Mitigation:

I have considered whether the Claimant has failed to mitigate her losses. The Respondent submits that the Claimant could have widened her search for employment to include factory work, a wider geographical area, other online employment agencies, and visiting employment agency offices. The Claimant has produced evidence that she has applied for over 100 jobs via indeed.com, across Hull. Her evidence was that she had looked at other job sites but most of the jobs were replicated on indeed.com and indeed.com had the widest selection of posts. She has recently expanded her job search to include factory work, although she did this reluctantly as she had wanted to secure employment with some prospect of promotion within the business, and which built on her skills and experience in retail. She did not want to visit employment agencies' physical offices due to the COVID-19 risks and restrictions.

96. She has also driven around her local area and identified which shops were still open. She made telephone calls to those business (a total of 15 businesses), which she has since followed up with further telephone calls, however in the current climate none are recruiting. She has also provided written applications which she has sent to a further six businesses in her local area since December 2020.

97. The Respondent also submitted that the Claimant had failed to mitigate her losses as she could have returned to her previous post. I am not persuaded by this argument given that the Claimant was dismissed by the Respondent,

and that they did not offer her her job back when she appealed the dismissal, or at any point after she filed her ET1 claiming re-instatement.

98. I am wholly satisfied that the Claimant is making every possible effort to secure employment, in a very challenging economic climate.

99. Total compensatory award: **£7,414.**

100. ACAS uplift:

I have considered whether to increase (or decrease) the compensatory award by up to 25% for failure to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures, under s.207A Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A 1992).

101. Section 207A TULR(C)A 1992 provides:

'(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2 [which includes unfair dismissal]

(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that –

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

The employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%

102. I have found that the Respondent has failed to show that the reason for dismissal was conduct. However, the dismissal letter does state that the Claimant has been dismissed *'Due to repeated violations of the rules and regulations of the company committed by you.'* This is a reference to misconduct. The dismissal took place during or shortly following a meeting at which conduct issues were discussed. I am therefore satisfied that the claim concerns 'a matter to which a relevant Code of Practice applies', namely the Code of Practice on disciplinary and grievance procedures. I am also satisfied that the Respondent unreasonably failed to comply with that code of practice – there was no proper investigation, disciplinary meeting, notice of dismissal, or right of appeal. There was a total failure to follow the Code of Practice and therefore I award a 25% increase to the compensatory award: **£1,853.50.**

103. Failure to provide written particulars of employment:

I am required to consider whether I should increase the award by a further two or four weeks' pay as a result of the Respondent's failure to provide the Claimant with a statement of initial particulars of employment and/or a statement of changes containing particulars of changes of employment following the transfer of undertaking in February 2020 (ss.1 and 4 ERA 1996 and s.38 Employment Act 2002). The Claimant in submissions wished to emphasise that she does not seek to 'punish' the Respondent and would

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leave this matter to the Tribunal's discretion. The Respondent accepts that the Claimant was not provided with a written statement of particulars of employment following the transfer, and they intended to do this 'after COVID-19'. Because no statement was provided I am required to increase the award by the minimum amount of two weeks' pay. The only issue for the Tribunal is therefore whether it would be just and equitable to increase the award by the higher amount of four weeks' pay. I am not satisfied that the pandemic justified a delay in providing a written statement. I also find that the absence of confirmation of the Claimant's written particulars, confirming the only change was the identity of her employer, caused the Claimant unease and worry. I am therefore satisfied that the compensatory award should be increased by a further four weeks' pay: **£532**.

104. The total compensation for unfair dismissal is therefore as follows:

Basic award: **£266**.

Compensatory award: **£7,414**.

ACAS uplift: **£1,853.50**.

Failure to provide written particulars: **£532**.

TOTAL: £10,065.50.

Wrongful dismissal

105. The Claimant is entitled to her statutory minimum notice pay for wrongful dismissal. This period is covered in the compensatory award above and therefore I do not award any further remedy in respect of wrongful dismissal.

Recoupment

106. The Employment Protection (Recoupment of jobseekers' allowance and income support) Regulations 1996 apply as the Claimant is been in receipt of universal credit. The effect of this is explained in the attached Annex. The monetary award is: £10,065.50. The Prescribed element is: £3,591. The prescribed element relates to the period 15 March 2020 to 18 January 2021. The monetary award exceeds the prescribed element by £6,474.60.

Employment Judge **Kate Armstrong**

28 January 2021