EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Y Liu	**v**	**China Daily UK Co Limited**

Heard at: London Central by CVP **On**: 12, 13, 14 & 15 January 2021

Before: Employment Judge A James
Ms C Buckland
Mr J Walsh

Representation

For the Claimant: In person

For the Respondent: Mr S Flynn, counsel

This has been a remote hearing. The form of remote hearing was video link (Teams). A face-to-face hearing was not held because it was not practicable during the lockdown. The claimant had applied for a postponement, on the basis that her two children were at home with her. The hearing proceeded on the basis that the claimant could take time out to care for her children, as necessary (which the claimant did). The tribunal is satisfied that holding the hearing by video link has allowed justice to be done by avoiding the postponement of the hearing until in or about December 2021, which would have been necessary had the hearing not gone ahead as planned. At the end of the hearing, the claimant confirmed that she felt she had been given an opportunity to put her case across.

JUDGMENT

(1) The claimant's detriment claims (section 47E Employment Rights Act 1996 (ERA)) do not succeed and are dismissed.

(2) The claimant's automatically unfair dismissal claim (section 104C Employment Rights Act 1996) does not succeed and is dismissed.

(3) The claimant's unfair dismissal claim (section 94 Employment Rights Act 1996) does not succeed and is dismissed.

(4) The claimant's wrongful dismissal (breach of contract) claim (Employment Tribunals (Extension of Jurisdiction) Order 1994) does not succeed and is dismissed.

REASONS

Claims and issues

1. The claimant brings claims for detriment due to her making a flexible working request, automatically unfair dismissal (for the same reason) and 'ordinary' unfair dismissal. The issues between the parties which potentially fall to be determined by the tribunal are as follows:

1.1. Flexible working detriment (sections 47E(1)(a) and 80F ERA 1996)

1.1.1. It is accepted that the claimant made a flexible working request in accordance with section 80F ERA 1996 on 19 May 2019.

1.1.2. Did the respondent treat the claimant detrimentally on the ground that she made this flexible working request as follows?

1.1.2.1. It brought disciplinary proceedings against her from July 2019.

1.1.2.2. It suspended her on 31 October 2019.

1.1.2.3. It dismissed her on 2 December 2019. (The tribunal notes that this should be dealt with as an automatically unfair dismissal claim under section 104C Employment Rights Act 1996 - see S.47E(2)).

1.2. Unfair dismissal/automatically unfair dismissal

1.2.1. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) & (2) of the Employment Rights Act 1996 ("ERA")? The respondent relies on the potentially fair reason of conduct. The claimant says that the principal reason for her dismissal was that she made a flexible working request (section 104C ERA).

1.2.2. If there was a potentially fair reason, was the dismissal fair or unfair in accordance with section 98(4) ERA and, in particular, following the 3-stage test in British Home Stores v Burchell [1978] IRLR 379

1.2.2.1. did the respondent genuinely believe the claimant was guilty of misconduct?

1.2.2.2. did the respondent hold that belief on reasonable grounds

1.2.2.3. did the respondent carry out a proper and adequate investigation?

1.2.3. did the respondent in all respects act within the band of reasonable responses?

1.3. Breach of contract

1.3.1. Did the claimant fundamentally breach her contract of employment?

1.3.2. If not, to how much notice was the claimant entitled? The claimant says that she was entitled to two months' notice. The respondent says that the claimant's contractual entitlement was to 8 weeks' notice pay.

1.4. Time limits / jurisdiction

1.4.1. Were all of the claimant's complaints presented within the time limits set out in section 48(3) & (4) of the Employment Rights Act 1996 ("ERA")?

1.5. Remedy

1.5.1. If the dismissal is unfair on procedural grounds, what is the chance that the respondents would still have dismissed the claimant had they followed fair procedures, and when would the dismissal have taken place?

1.5.2. Should there be any reduction in the compensatory award because the claimant caused or contributed to her dismissal and/or in the basic award because of the claimant's conduct prior to dismissal and if so, to what extent.

The Proceedings

2. The claim form (ET1) was submitted on 16 December 2019. The Notice of Appearance (ET3) was submitted on 29 January 2020. On 16 April 2020 there was a preliminary hearing for case management before EJ Khan.

3. The final hearing was originally listed between 12 and 17 August 2020, for 4 days. On 12 August 2020 a case management preliminary hearing took place before EJ Nicolle, during which the hearing was re-listed to 12 to 15 January 2021 due to the ongoing pandemic.

4. On 28 October 2020 a preliminary hearing took place to consider the respondent's application to strike-out the claim and the claimant's application for documents (copies of her appraisals). In a judgment dated 9 November 2020, Employment Judge Clarke refused the application to strike out the claim and rejected the claimant's application for specific discovery of her appraisals from 2012 to 2018 inclusive on the basis that those documents were not relevant to the claim, as the claimant was not dismissed due to capability issues.

5. This hearing took place between 12 and 15 January 2021 using Microsoft Teams. There were connection issues on the first day, which led to the tribunal switching to Teams instead of CVP. The tribunal spent the remaining time on 12 January reading into the case. There was an agreed bundle of 830 pages. The claimant was allowed to submit a supplementary bundle of 62 pages. The original supplementary bundle contained without prejudice correspondence. The respondent agreed to take a pragmatic view in relation to the rest of the documents, on the basis that whilst the documents were not relevant and not referred to in the claimant's witness statement, they would not oppose their introduction. The claimant agreed not to pursue her application to submit the without prejudice documents. She later went back on that concession. Whilst not strictly necessary, in the light of the claimant's previous concession, the tribunal in any event would have excluded the without prejudice material. It was not in dispute that there were without prejudice discussions at the end of October 2019, with a view to the claimant's employment being terminated on mutually agreed terms. It was not

part of the claimant's pleaded case that the entering into of those negotiations was discriminatory or involved any impropriety.

6. Oral evidence was heard on the second and third days and on the morning of the fourth day, together with submissions. The tribunal commenced and concluded its deliberations on the remainder of the fourth day. Judgement was reserved.

7. As for witness evidence, the tribunal heard from the claimant. For the respondent, we heard from Mr Yu Yilei, Managing Director; Mrs Qiuying Tan, HR and Marketing Director; and Mr Liu Zhen, senior financial manager for the respondent, who supervised the financial aspects of the claimant's role. A written statement was submitted from Mr Xiaoxun Lei, former deputy editor in chief, confirming that he was not willing to give evidence 'in view of Liu Ying's conduct'.

Findings of Fact

8. The Respondent publishes an English-language daily newspaper and is a subsidiary of the China Daily Group ("the Group"), which is based in China. It is owned and supervised by the State Council of the Chinese Government. The company employees about 25 people in the UK and therefore is a relatively small company.

9. The claimant commenced employment with the respondent on 16 May 2011 as an accountant. The claimant was promoted to Deputy Head of the Finance Department in November 2014; and to the role of Chief Financial Officer in December 2015.

10. Clause 18 of contract of the claimant's contract of employment states:

    You must devote the whole of your time, attention and abilities during your hours of work to your duties for the Company. You may not, under any circumstances, whether directly or indirectly, undertake any other duties during or outside working hours nor are you permitted to, without the prior written consent of the Company, have any interest in any business or undertaking or engage in any other activities that might interfere with the performance of your duties or prejudicially affect your ability to discharge your duties properly and efficiently or be liable to result in a conflict with the interests of the Company.

11. Towards the end of 2014, Microsoft Office software was installed on the claimant's computer. The claimant also installed QuickBooks software, which she used for her accounting duties. That allowed her to access confidential and sensitive financial information about the company from home, and associated companies in the USA and Africa. It was the claimant's case that the software was installed with the company's permission. We reject that argument.

12. The reason we do so is that the claimant's evidence is inconsistent with the recollection of Mr Ji, and Ms Chen. We take judicial notice of the fact that it is not unusual for employers to allow employees to install Microsoft Office on their home computer, as a benefit of their employment. It is an entirely different matter to allow them to install a package such as QuickBooks. That was not documented. We also noted the genuine concern expressed by Mr

Yu, as evidenced in the notes of the meetings referred to below, and during cross examination, about this issue.

13. Further, the claimant said that she did not install QuickBooks onto her new laptop in 2016. That is inconsistent with her appeal against the refusal of her Flexible Working Request (FWR) dated 17 June 2019 in which she states.

    I also would like to address the security issues for your concerns. I use the same computer as offices' and anti-virus properly installed and updated regularly in the computer. I have done work from home in the past 8 years during the five managements of the company and can prove by the emails I have sent from my home. I installed Quickbooks (finance software) in my computer in 2014 with the consent from Mr Ji.

14. The fact that the claimant maintains that she did not install the software on her new laptop in 2016 suggests that she knew that she did not have permission, and that it was an issue. It affects our assessment of the credibility of her evidence about it. For all of these reasons, we preferred the evidence of the respondent on this matter.

15. The claimant's contracted hours were 9.00 am to 5.30 pm. The claimant had up until this point enjoyed flexibility in relation to her working hours, in that if, for example, she started late due to childcare issues, she could make up her hours by working late. On other occasions she was allowed to finish early. Again, this was on the basis that the claimant would make up her hours over the week.

16. In November 2017, Mr Yu joined the respondent as Managing Director. After Mr Yu joined the respondent, he continued to allow the claimant flexibility in relation to her working hours.

17. In April 2019, an application for advertising commission was made by Ms Tan and Mr Yu. The claimant was responsible for checking the figures provided and she queried them; the amount of commission payable was subsequently reduced. The claimant's case is that as a result, Mr Yu in particular adopted a much less flexible attitude in relation to her working hours. We reject that argument. It was not mentioned in the claimant's subsequent flexible working application, which we come onto below. Nor was it mentioned in the claimant's appeal in relation to that request; nor in her complaint to Mr Yu about his alleged behaviour towards her in June 2019. Due to this inconsistency between what the claimant said at the time and her case before the tribunal, we reject the claimant's argument that Mr Yu's behaviour towards her changed in any significant way as a result of any reduction in the advertising commission.

18. Similarly, following a stay by the claimant in hospital in the middle of April 2019, she was asked to provide some documentary evidence in relation to that. The claimant argued before us that this was illustrative of a change in attitude towards her by Mr Yu too. We reject that contention as well. We were referred to a number of other documents in the bundle, showing that the claimant had previously provided documentary evidence in relation to previous sick leave taken. This was a requirement of the respondent. It did not have to be a formal doctor's note; it could for example be a letter regarding a hospital appointment, or a receipt for medicines from a pharmacy visited during the period of sick leave.

19. Due to the claimant's perceptions about a change in attitude towards her, she made a formal Flexible Working Request (FWR) on 19 May 2019. The claimant had been working flexibly up to then as described above. The application was to work two days from home per week. Her request stated: *'I am responsible for the upbringing of two children (ages 9 and 7) and would like to request an amendment to my working pattern to better accommodate such responsibilities'*. The claimant said she was struggling with her commute of two to three hours per day. She also told the respondent that her children were taking exams during the following few months. Extra help and tuition were required for those exams which she wanted to help deliver.

20. On 22 May 2019 there was a meeting to discuss the FWR between the claimant, Mr Yu and Mr Lei, with Ms Tan present as note-taker. The claimant stated at this meeting that she already worked from home on confidential financial documents. Concerns were expressed by Mr Yu about that during the meeting and he emphasised that such 'highly confidential and sensitive' information should not be worked on outside of the company's offices and sensitive documents should not be taken out of the office. He asked the claimant for proof of permission to do so.

21. On 3 June 2019 a letter was sent to the claimant by Mr Yu, confirming that the claimant's FWR had been refused on the basis that the Company considered it would have a detrimental effect on quality and performance; and that it would be unable to reorganise work among existing staff to accommodate her request. An alternative was put forward, namely that the claimant take Tuesdays off and work up the 8 hours on the other four days – in other words, that she work compressed hours. It was suggested this take place for a limited 3-month period. The lawfulness of this response was not formally challenged before the tribunal and we do not therefore need to come to any conclusions about that.

22. On 17 June 2019 the claimant appealed against the decision to refuse her FWR. As noted above, the claimant argued in the written appeal that she had installed QuickBooks on her home computer in 2014 with the permission of Mr Ji, the previous Managing Director. Mr Yu subsequently asked Mr Ji if he had done so. Mr Ji could not recall ever giving such permission and thought it unlikely. Mr Ji confirmed the same to Alice Chen. Ms Chen confirmed that she was asked to install Microsoft Office on the claimant's home computer, not QuickBooks. We were struck by Mr Yu's evidence before us. He told us: "I was so worried about you installing QuickBooks on your personal computer, I did not think Mr Ji would have given that permission, he confirmed that to me". We accept Mr Yu's evidence that whilst there was an expectation that the claimant would carry out some work from home, on occasions, that was work that could be carried out on her phone using Microsoft Office such as responding to urgent emails. The claimant was not required to work on sensitive financial information at home. On the contrary, that was only to be worked on in the office.

23. On 19 June 2019, the claimant sent a letter to Mr Yu complaining of discrimination at work following the submission of her FWR. She complained of the following:

    1. On 22nd May 2019, I was requested to make urgent payment for China Critic Bank project, you recalculated the payment amount with condemn tone

to speak with me. Since you have been the managing director in the company and approved thousands payments, that was the first time you have worked in that way.

2. On 24th May 2019, I was off work at 17.30 with a colleague; you scolded me in the front of the lifts with the colleague presence.

3. On 19th June 2019, as Gansu project started in the year 2018, the company did not have much advertising income at that time, you asked me to treat the Gansu project 600k RMB as revenue in last Dec. According to the contract and the Accounting Standard (UKGAAP), the income was recorded to this April and changed to the project profit based recording in May. For this kind of situation, you would only need the explanations in the past, but you made an unworkable situation to me today. (sic)

24. On 24 June 2019 the claimant was asked by Ms Tan if she wanted her letter dealt with as a formal grievance. The claimant responded to say that she did not.

25. The FWR appeal meeting took place on 27 June 2019. During that meeting, the claimant again told the respondent that the former Managing Director Mr. Ji allowed her to log in to the finance system at home. Somewhat unusually, Mr Yu was involved in that appeal, even though he had also been involved with the decision on the original application. This was a reflection of the company's practice of the management team making management decisions on a collective basis, rather than via specific individuals.

26. On 9 July 2019 the FWR appeal was rejected, on similar grounds. In the response letter, the respondent also raised concerns regarding the integrity, confidentiality and security of the Company's information and its systems. It was denied that Mr Ji had given the claimant permission to download company software onto her computer. The claimant was instructed to refrain from carrying out work on sensitive financial information from home in future.

27. On the same date, Ms Tan responded to the allegations of detrimental treatment by Mr Yu. Although the claimant had confirmed that she was not raising a formal grievance, the respondent had decided to carry out an investigation. Ms Tan did not ask the claimant for any clarification of her complaint or for further information as part of her investigation. The allegations were rejected. The claimant did not respond to that letter, by providing any feedback, by questioning the findings, or appealing against it.

28. During early July 2019 there was a conversation between the claimant and Mr Yu about obtaining National Insurance (NI) numbers for two Chinese nationals working for the respondent. It appears that the claimant had advised the respondent it was not necessary to obtain NI numbers for the first two years during which such workers were present in the UK, carrying out work for the respondent. Given that they had been present for over two years, she took the view that it was now necessary to obtain NI numbers. The claimant arranged meetings with Jobcentre Plus, and the confirmation of those appointments, prepared by the claimant, contained the incorrect start date/most recent arrival dates for the two people concerned. During that meeting, we find that the claimant suggested to Mr Yu that incorrect dates be given as to when the two members of staff arrived in the UK. Mr Yu was concerned about that suggestion and did not agree to it.

29. The meeting with Mr Yu was not prearranged. Mr Yu operated an open-door policy. It later transpired that the meeting was recorded. The claimant argues it was deliberately recorded, with a view to the conversation being manipulated, with Mr Yu encouraging the claimant to suggest that false dates be provided. We accept Mr Yu's evidence that the recording of the conversation was inadvertent. The tribunal finds the claimant's arguments that Mr Yu was secretly recording the meeting in order to entrap her is not credible; it simply makes no sense, in the context of what was said, about which there is largely no dispute. (The tribunal notes that there were some minor differences in the translation of the transcript, but those are not material to the findings above).

30. Had the claimant's argument that it was Mr Yu who was telling her to use incorrect arrival dates been accepted, that would have potentially involved tax evasion (in respect of the NI contributions). Despite her position as a senior member of staff, with responsibility for the financial affairs of the company, at no point did the claimant raise any concerns about that, during her employment with the company.

31. At some time between the FWR appeal meeting and 23 July, the company discovered that the claimant had set up her own private company, Superwell Services Co Limited. The respondent was concerned that this meant that the claimant was in breach of paragraph 18 of her contract of employment.

32. As a result, a disciplinary investigation was commenced against the claimant. Ms Alice Chen was tasked with conducting the investigation. The claimant was informed of that decision in a letter dated 23 July 2019, inviting her to a disciplinary investigation meeting on 25 July to consider allegations that she had:

    (a) Set up and operated a personal business whilst she was employed by the Company, in contravention of clause 18 of her contract of employment;

    (b) Installed QuickBooks on to her personal computer and used her personal computer to carry out sensitive work tasks relating to the Company and its operations, without the permission of her line manager, in breach of the Company's Confidentiality and Handling Confidential Information, Data Protection and Computer policies.

33. That meeting duly took place on 25 July 2019. Present were Ms Chen, Administration Manager and Ms Tan, HR Director. Ms Chen asked the Claimant questions about Superwell Services Co Limited. The Claimant told Ms Chen that this was a shell company which she had opened in 2015 but it was dormant. The claimant also told Ms Chen that she had set up the private limited company as part of her retirement planning in order to improve its standing and because she wanted a 'better serial number' and a better ranking. The claimant is 45 years' old. It is the claimant's case that the shorter and earlier the number, the longer this demonstrated that the company had been established, which was a reliable measure of the company's financial strength and stability. She also maintained that she had been given permission to download office software on to her personal computer by Mr Ji, in about October/November 2014. She said however that she did not transfer QuickBooks to her new laptop which she purchased in 2016.

34. Ms Chen did not find the claimant's answers satisfactory and produced an Investigation Report on 14 August 2019 which concluded that there was a case to answer.

35. On 21 August 2019 a letter was sent to the Claimant inviting her to a Disciplinary Hearing on 3 September 2019. That meeting duly went ahead and was conducted by Mr Xiaoxun Lei and attended by Ms Tan. Again, in brief, the Claimant maintained that her private company, Superwell Services Co Limited, was a dormant company and was not producing any income. The Claimant further maintained that she had been given permission by Mr Ji Tao to download QuickBooks on to her personal computer.

36. In September 2019 there was a discussion between the claimant and Mr Yu about sending minutes of a meeting to the auditors, BDO. The claimant told Mr Yu that all communications with the auditors had to go through her. She wanted the reference in the minutes to the disciplinary investigation to be removed. She maintained that including that information could have a big impact on the audit. Mr Yu disagreed. He subsequently confirmed with BDO that he was able to send the document himself, and that there was nothing in the arrangements with BDO that meant all communications between the respondent and the auditors had to go through the claimant.

37. On 5 September 2019 the claimant pressed 'reply all' during an email exchange which resulted in a financial report about China Daily's UK company and African company, including payroll information, being sent to the USA company. The email also contained a paragraph about the operation of the UK company which was confidential. This was of concern to Mr Yu since he understood that this put the UK company in breach of UK data protection law.

38. Between 3 September 2019 and 21 October 2019, there was a delay in the disciplinary process. We accept the respondent's explanation that this was down to a combination of factors, including the fact that Mr Yu was exceptionally busy, with management meetings; a visit by the Chinese state to Europe; and it also coincided with Chinese national holidays.

39. The claimant was invited by email to a without prejudice meeting on 21 October 2019. That meeting took place on 23 October 2019. At the conclusion of that meeting, the parties thought that they had an agreement in principle. Unfortunately however, for reasons which we are not concerned with and which have not been put in evidence before us, the settlement negotiations broke down.

40. As a result, on 30 October 2019 the claimant asked to return to work. That request was refused. Instead, on 31 October 2019 the claimant was suspended, and six further disciplinary allegations were made. The reason for the suspension was that the respondent had concerns that the Claimant would try to tamper with evidence or speak to witnesses, and thereby interfere with the investigation. This was particularly the case due to the further misconduct allegations by the Claimant.

41. On 14 November 2019 the claimant was invited to a further Disciplinary Hearing on 21 November 2019 to consider the following further allegations:

> *(c) That she deliberately provided false information at the disciplinary hearing on 3 September 2019 when stating that her company, Superwell Services Co. Limited, was dormant.*
>
> *(d) That, in April to May 2019, she delayed applying for a monthly pre-payment from the Company's headquarters which led to a shortage of money in the Company's bank account. This led, in turn, to a failure to pay important clients of the Company on time. The Claimant failed to report this mistake afterwards which would have allowed the Company to take steps to rectify the situation.*
>
> *(e) That, in early July 2019, she provided the Respondent with documents to sign which contained incorrect arrival dates for two employees (Xiaoxun Lei and Xiaoying Du) and, in doing so, attempted to deliberately provide incorrect information to HMRC on behalf of the Company.*
>
> *(f) That, in September 2019, the Company's auditors, BDO, had requested copies of meeting minutes. The Claimant falsely informed the Respondent that those documents must be presented by herself rather than by other means. The Claimant asked the Respondent to remove reference to herself from the meeting minutes prior to them being sent to BDO, thereby attempting to provide fraudulent information to the Company's auditors.*
>
> *(g) That, during the period 20 September 2018 to 10 January 2019, the Claimant conducted her own private company business in work time; namely, completing tax documents relating to a client, Shenzhen Xiaoling Technology. In doing so, the Claimant used Company facilities (i.e. computer and scanner) to conduct this business.*
>
> *(h) That, on 5 September 2019, the Claimant sent confidential information in an email to an incorrect recipient in the Company's US branch, and failed to report her error afterwards.*

42. In an email to Ms Tan in response on 14 November 2019, the claimant stated:

> *… I will book a trade union representative as soon as possible and inform you the date we are convenient soon (We probably need to speak English in the meeting, hope I can book a Chinese speaker).*
>
> *Wish you all have good time in the process of manipulating and lying.*

43. The claimant commenced the ACAS early conciliation process on 17 November 2019.

44. The claimant's attempt to arrange representation by a trade union failed. This was probably because she had only recently joined. On 22 November 2019 the respondent informed the claimant that the meeting would be delayed to 26 Nov 2019 and chaired by Mr Lei. In light of the fact that the claimant could not obtain representation, the claimant said she was not prepared to attend but wanted to make written submissions.

45. On 25 November 2019 the claimant provided written submissions in response to the allegations. In summary, she maintained that (a) her company was dormant, and was not a business; (b) she had obtained permission from Mr Ji to install QuickBooks on her home laptop; (c) the business invoice was fictitious, and she had produced it to help her niece in relation to the completion of her school assignment in China; (d) that the difficulties in making payments were due to the budget for 2019 not being approved until

May 2019, not because she delayed requesting the monthly pre-payment; (e) that the arrival dates of the two employees were provided by them, not her; (f) since she started, she was the person responsible for passing the minutes of meetings to the auditors; (g) in respect of the Shenzeng Xiaoling Technology matter, she had helped her cousin obtain a UK VAT number on a voluntary basis; and (h) denied that 'replying all' in the email was an error.

46. The claimant did not provide any supporting documents with her appeal letter, so those documents which she later put before the tribunal were not considered by the respondent at the time that they took the decision to dismiss.

47. The disciplinary hearing went ahead in the claimant's absence on 26 November 2019. Present at the meeting were the management team members, Mr Fan, Mr Lei, Mr Yu and Ms Tan. The management team made a decision in principle, that on the basis of their findings on the allegations (which are set out below), the claimant should be dismissed. As noted above, that was a collective decision, which required the approval of China Daily HQ. That approval was subsequently granted although we find that it was in effect a rubberstamping of the decision that had already been made in principle by the respondent's management team. The claimant was dismissed without notice. We accept Mr Yu's evidence that there was no discussion at the dismissal meeting about the claimant's FWR request and that issue had been concluded in July 2019.

48. The reasons for the dismissal are set out in the dismissal letter dated 2 December 2019 and can be summarised as follows:

(a) That the Claimant had set up a private limited company, Superwell Services Co. Limited, whilst she was employed by the respondent, in contravention of clause 18 of her contract of employment. Whilst the Claimant had previously contended that this business was not active, the respondent had considered evidence that this was not the case. This allegation was upheld;

(b) That the Claimant had installed QuickBooks on to her personal computer and used her personal computer to carry out sensitive work tasks relating to the respondent and its operations, without the permission of her line manager, in breach of the respondent's Confidentiality and Handling Confidential Information, Data Protection and Computer policies. Whilst the Claimant had said she had been given permission to download the software by the former Managing Director, Mr Ji Tao, there was no evidence to support this. This allegation was upheld;

(c) That the Claimant had deliberately provided false information at the disciplinary hearing on 3 September 2019 when stating that her company, Superwell Services Co. Limited, was dormant. In particular, the respondent considered an invoice from the Claimant's company, dated 29 May 2019, which had been found on the respondent's public disk which was connected to the scanner. This allegation was upheld;

(d) That, in April and May 2019, the Claimant had delayed applying for a monthly pre-payment from the respondent's headquarters which led to a shortage of money in the respondent's bank account. This led, in turn, to a failure to pay important clients of the respondent on time, including The New

York Times. The Claimant failed to report this mistake afterwards which would have allowed the respondent to take steps to rectify the situation. The respondent upheld this allegation;

(e) That, in early July 2019, the Claimant provided the Respondent with documents to sign which contained incorrect arrival dates for two employees and, in doing so, attempted to deliberately provide incorrect information to HMRC on behalf of the respondent. The Respondent gave evidence that the respondent had asked the Claimant to assist in the arrangements for paying tax and national insurance contributions for the two employees. The Claimant had told the Respondent that she had made appointments for the two colleagues with Job Centre Plus to apply for their national insurance numbers and their application required letters confirming employment for each of them. The Claimant had provided the Respondent (Mr Yu) with letters containing false arrival dates for the employees, and had said this was a practical way to obtain national insurance numbers for the employees. The Respondent had refused to sign these letters. The respondent upheld this allegation;

(f) That, in September 2019, the respondent's auditors, BDO, had requested copies of meeting minutes. The Claimant had falsely informed the Respondent that those documents must be presented by herself rather than by others. The Claimant asked the Respondent to take reference to herself out of the meeting minutes prior to them being sent to BDO, thereby attempting to provide fraudulent information to the respondent's auditors. The Respondent had refused to do this. The respondent upheld this allegation;

(g) That, during the period 20 September 2018 to 10 January 2019, the Claimant conducted her own private company business in work time; namely, completing tax documents relating to a client, Shenzhen Xiaoling Technology. In doing so, the Claimant used Company facilities (i.e. computer and scanner) to conduct this business. In this regard, the respondent considered documents it had found on the public disk connected to the scanner, including a letter and application form completed by the Claimant for another company. The respondent's Use of Company Property Policy states that use of office equipment for personal and private purposes is prohibited. The respondent found this allegation proven;

(h) That, on 5 September 2019, the Claimant sent confidential information in an email to an incorrect recipient in the respondent's US branch, and failed to report her error afterwards. The respondent considered an email which the Claimant had sent containing the confidential finance monthly report for the UK and African branches of the Group. The Claimant had been supposed to send this to the Group's headquarters only, but in fact had sent it to a colleague in the Group's US branch and failed to report her error and potential data breach. The respondent found this allegation proven.

49. In the dismissal letter, the claimant was advised of her right to appeal the decision. The claimant did not appeal.

The Law

50. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a

reason falling within subsection (2), e.g. conduct, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

51. As for the automatically unfair dismissal claim, section 104C Employment Rights Act 1996 provides that an employee who is dismissed shall be regarded for the purposes of the Employment Rights Act 1996 as unfairly dismissed if the reason, or if more than one the principal reason for the dismissal is that the employee *'(a) made or proposed to make an application under section 80F'*.

52. Under section 98(4) *'… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case.*'

53. Tribunals must consider the reasonableness of the dismissal in accordance with s.98(4). Tribunals have been given guidance by the EAT in *British Home Stores v Burchell [1978] IRLR 379; [1980] ICR 303, EAT*. There are three stages in a conduct dismissal:

(1) did the respondent genuinely believe the claimant was guilty of the alleged misconduct?
(2) did they hold that belief on reasonable grounds?
(3) did they carry out a proper and adequate investigation?

54. Tribunals must bear in mind that whereas the burden of proving the reason for dismissal lies on the respondent, the second and third stages of *Burchell* are neutral as to burden of proof and the onus is not on the respondent (*Boys and Girls Welfare Society v McDonald [1996] IRLR 129, [1997] ICR 693*).

55. Finally, tribunals must decide whether it was reasonable for the respondent to dismiss the claimant for that reason. The question is whether the dismissal was within the band of reasonable responses open to a reasonable employer. It is worth noting here that a claimant in unfair dismissal claims often comes to a tribunal expecting that the tribunal will hear the disciplinary allegations afresh and come to an independent decision as to whether or not the misconduct occurred. As should be clear from the above, that is not the tribunal's function under UK employment law. To the extent that the claimant was hoping that she could 'clear her name' by coming to the tribunal, she was wrong.

56. The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of a reasonable employer) applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason. The objective standards of a reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed, including the investigation (*Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA*).

57. In reaching their decision, tribunals must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. A failure by any person to follow a provision of the Code does not however in itself render him liable to any proceedings.

58. Section 47E of the Employment Rights Act 1996 makes it unlawful for an employer to subject a worker to detrimental treatment on the grounds that they, amongst others, made an application for flexible working under the flexible working regulations. In such cases, the key question before the tribunal, in relation to any detrimental treatment which a tribunal finds occurred is: 'what are the grounds for the alleged treatment'? Put another way, what was the reason why the respondent took the action it did?

59. Finally, an employee should be provided with the correct contractual notice, on the termination of their employment, unless the employer is entitled to dismiss without notice because of the employee's gross misconduct.

Conclusions

60. We now apply the law to the facts to determine the issues. If we do not repeat every single fact, it is in the interests of keeping these reasons to a manageable length.

<u>Flexible working detriment (sections 47E(1)(a) and 80F ERA 1996)</u>

61. It is accepted that the claimant made a flexible working request in accordance with section 80F Employment Rights Act 1996 on 19 May 2019.

62. *Did the respondent treat the claimant detrimentally on the ground that she made this flexible working request as follows*?

    62.1. *The disciplinary proceedings* - it is accepted that the respondent brought disciplinary proceedings against the claimant from July 2019 onwards. We conclude that the reason why the respondent commenced disciplinary proceedings against the claimant in July 2019 was because she disclosed in the flexible working request meeting that she had downloaded QuickBooks onto her laptop. That may not have been further investigated, were it not for the fact that the respondent subsequently discovered that the claimant had set up her own private company, which was a potential breach of clause 18 of her contract. Since both of those matters were potential misconduct issues, the respondent was entitled to instigate a disciplinary investigation and we conclude that was the reason it did so; not her flexible working request.

    62.2. During the disciplinary investigation, the respondent did not find the claimant's explanation for QuickBooks being on her laptop and the setting up of the private company credible. We conclude that it was for that reason that the decision was made that there was a case to

answer and a disciplinary hearing was arranged for 3 September. Following that disciplinary hearing, the respondent was still not satisfied with the answers given, and decided to enter into discussions with the claimant with a view to her employment being terminated on mutually agreed terms. Unfortunately for the claimant, those negotiations broke down. None of this was because of the claimant's flexible working request.

62.3. By that stage, further matters had come to light. We conclude that the management team of the respondent had by this stage genuine concerns as to whether or not they could continue to trust the claimant to carry out her duties, as a senior employee of the company, with a crucial role to play. A further investigation took place, and pending that investigation, the respondent made the decision to suspend the claimant for the reasons set out below. At the conclusion of the investigation, the respondent invited the claimant to a disciplinary hearing. We are quite satisfied, on the basis of the facts found above, that the claimant's flexible working request in May 2019 and subsequent appeal, had nothing whatsoever to do with the instigation and continuation of the disciplinary process against her.

62.4. *The suspension of the claimant* - it is not disputed that the respondent suspended the claimant on 31 October 2019. We conclude that the reason for the suspension was that provided by the respondent i.e. concerns that the Claimant would try to tamper with evidence or speak to witnesses and thereby interfere with the investigation. That evidence was not challenged by the claimant. We accept that those were the reasons why the claimant was suspended. Again, we are entirely satisfied that the claimant's flexible working request had nothing whatsoever to do with the suspension decision.

62.5. *The dismissal of the claimant on 2 December 2019*. Whilst this is listed as a detriment, it needs to be considered as an automatically unfair dismissal claim, which we turn to next.

<u>Unfair dismissal/automatically unfair dismissal</u>

63. *What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) & (2) of the Employment Rights Act 1996 ("ERA")?* The respondent relies on the potentially fair reason of conduct. As noted above, the claimant says that the principal reason for her dismissal was that she made a flexible working request (contrary to S.104C ERA).

64. We conclude that the reason for the claimant's dismissal had nothing whatsoever to do with her flexible working request. It is true that the disciplinary process which resulted in her dismissal commenced partly because of what the claimant said during the FWR process. However, we conclude that it was those comments which led to the claimant's subsequent dismissal, together with the findings on the other allegations that came to light; not her FWR itself. The respondent considered all of the disciplinary allegations in the round and, taking them together, came to the conclusion

that it could no longer trust the claimant to carry out her duties. The claimant was carrying out a senior role within the company, and we conclude that the respondent reasonably concluded that it could not trust the respondent to carry out her duties with honesty and integrity, on the basis of the information before it. The respondent considered, on the basis of the disciplinary process, that the claimant had given misleading and dishonest answers to the allegations, and it was for that reason that it came to the conclusion that it could no longer trust her. Those were the reasons why the respondent decided to dismiss her. Those were matters of conduct which is a potentially fair reason. The reason/principal reason for the decision to dismiss was that conduct, not the claimant's flexible working request application/appeal.

65. *Was this dismissal fair or unfair in accordance with section 98(4) ERA* and, in particular, following the 3-stage test in *British Home Stores v Burchell [1978] IRLR 379:*

65.1. *First, did the respondent genuinely believe the claimant was guilty of misconduct?* We conclude that they did, for the reasons set out in the dismissal letter of 2 December 2019.

65.2. *Second, did the respondent hold that belief on reasonable grounds.* We conclude that they did, again for the above reasons. We would also add the following. In relation to the allegations that the claimant was carrying out her own business in work time and using her own private company for that work, in breach of her contract of employment, it is highly material that the claimant did not put any of the evidence which she put before us, to her employer. It may well have been the case for example that had she put the text messages between her and her cousin, that allegation may not have been upheld. As noted above in the law section, the claimant may have assumed that she could come to tribunal, and we would completely rehear the allegations against her. That is not how unfair dismissal claims are dealt with in employment tribunals, on the basis of the legal test that we must apply. It is our duty to objectively review the decision of the employer to decide whether the employer's belief in the misconduct was reasonable, and held on reasonable grounds. Having caried out that review, we conclude that it was.

65.3. It is also material, in relation to the allegation concerning the May 2019 invoice which was found on the respondent's public disc, that even at this stage, the claimant has not put forward any evidence such as email exchanges between her and her niece, to prove her defence to that allegation. The respondent concluded that the claimant's defence - that the invoice, which was signed by her, in the name of her company, was a mock invoice to assist her niece in a school assignment - was not credible. We consider that was a reasonable conclusion for the employer to reach, given the information before it at the stage that it decided to dismiss her.

65.4. *Third, did the respondent carry out a proper and adequate investigation?* We conclude that the investigation carried out by the respondent was proper and adequate. As for the failure to interview Ms Zhu about the QuickBooks issue, we conclude that it was open to the claimant to obtain a statement from her. The claimant failed to

do so. We consider it was within the range of reasonable responses for the employer to rely on the evidence from Mr Ji together with the corroborative evidence from Ms Chen. The way the disciplinary investigation and hearings proceeded in this case is certainly unusual, in that the initial disciplinary investigation was conducted in relation to just two allegations; the proceedings were then put on hold pending without prejudice discussions; and the respondent then put a substantial number of further allegations to the claimant, in the subsequent disciplinary process. We conclude however that this was still reasonable in all the circumstances of <u>this case</u>. The claimant was made fully aware of the later allegations against her, and had an opportunity to respond. Some of the matters were known to the respondent during the first disciplinary process (namely (d) and (e)); but others (namely (c), (f) (g) and (h)) were not, including the specific allegations in relation to the claimant carrying on her own business. We are satisfied that at the time the respondent decided to dismiss the claimant, it had carried out as much investigation as was reasonable and the claimant had been given a reasonable opportunity to respond. We also note that by this stage the claimant appears to have disengaged from the process. As a result, she did not put all of the evidence before her employer in her defence that she could and should have done, had she wanted to avoid dismissal.

65.5. We refer to our findings of fact above, in which we note that decisions on the claimant's disciplinary process and on her FWR request and appeal, were made by the management team, on a collective basis. We further note that there may be circumstances in which this practice conflicts with UK employment law, especially where it results in the same people being involved in an initial decision and then in a subsequent appeal decision. In this case however, nothing turns on this practice.

65.6. The claimant did not put any alleged breaches of the ACAS code before us. On the face of it, there are no obvious breaches, materially affecting the fairness of the claimant's dismissal.

66. *Did the respondent in all respects act within the band of reasonable responses?* We conclude that it did, for all of the reasons set out above. In particular, the senior nature of the role carried out by the claimant; and at the end of the disciplinary process, the respondent had reasonably lost trust and confidence in her, on the basis of the misconduct allegations against her that it found proven.

<u>Breach of contract</u>

67. *Did the claimant fundamentally breach her contract of employment?* We conclude that the allegations against the claimant, taken as a whole, amounted to gross misconduct, which is a fundamental breach of contract, for which the respondent was entitled to dismiss her without notice.

68. *If not, to how much notice was the claimant entitled?* This question does not arise in the circumstances.

Time limits / jurisdiction

69. *Were all of the claimant's complaints presented within the time limits set out in section 48(3) & (4) of the Employment Rights Act 1996 ("ERA")?* In the light of our conclusions above, this question does not need to be considered.

Remedy

70. *If the dismissal is unfair on procedural grounds, what is the chance that the respondent would still have dismissed the claimant had they followed fair procedures, and when would the dismissal have taken place?* In the light of our conclusion that the respondent did follow a fair and reasonable procedure, this question does not fall to be considered.

71. *Should there be any reduction in the compensatory award because the claimant caused or contributed to her dismissal and/or in the basic award because of the claimant's conduct prior to dismissal and if so, to what extent?* Again, in the light of our conclusions above, we do not consider it appropriate or necessary to come to any conclusions on this issue.

Employment Judge A James
London Central Region

Dated: 19 January 2021

Sent to the parties on:

.25th Jan 2021

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For the Tribunals Office