EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Ms Sherry Clarke	v	1. BCA Vehicle Services Limited 2. Renault UK Limited

Heard at: Watford by CVP **On**: 1 – 5 March 2021

Before: Employment Judge Andrew Clarke QC

Members: Mr Ian Bone
Ms Nicola Duncan

Appearances

For the Claimant: Mr R Omamore, Trade Union Official
For the Respondent: R1. K Swann, Solicitor
R2. Mrs L Banerjee, Counsel

JUDGMENT

1. The first respondent must pay to the claimant, the sum of £300.32 being a sum in respect of holidays not taken as at the time of the claimant's dismissal.

2. All other claims fail and are dismissed.

REASONS

Background

1. The claimant presented a claim form on 27 May 2019 against both respondents. Following a period of early reconciliation, which culminated with the issue of a certificate on 10 May 2019, she brought claims of unfair dismissal, age discrimination and in respect of unlawful deductions from wages (or breach of contract or unpaid annual leave) against both respondents.

2. The claim was heard via CVP. No party objected to this form of proceeding and it was possible to hear the witnesses and submissions and for the tribunal to deliberate using that video platform.

3. The tribunal heard evidence from the claimant and from eight other witnesses.

   3.1 On behalf of the claimant we heard from Ms Diane Dineen who had been a senior consultant employed by the first respondent (or its predecessor) for part of the period covered by the claimant's engagement. We also heard from Ms Angela Ince who had been employed by the first respondent to work at the second respondent's premises for a few days during the claimant's engagement. Both of those witnesses gave their evidence in chief via a witness statement. We also heard from Ms Adila Mogul. She had also been a senior consultant employed by the first respondent for a significant period during the claimant's engagement. An unsigned witness statement had been produced to us in respect of her evidence, but she disavowed its contents. Hence, she gave her evidence in chief in the "old fashioned" way by being asked non-leading questions.

   3.2 On behalf of the first respondent, we heard from Mr Kevin Boulter, Mr Ross McKewan and Mr Ian Griffiths. Each was employed by the first respondent. Mr Boulter was a senior consultant towards the end of the claimant's engagement, Mr McKewan conducted a disciplinary investigation involving allegations concerning the claimant and Mr Griffiths conducted the disciplinary hearing which followed from that investigation and dismissed the claimant.

   3.3 On behalf of the second respondent, we heard from two managers who had dealt with the claimant on behalf of that respondent, Ms Briony Hill and Mr Stuart MacCalman.

4. We were impressed by all of the witnesses for the respondents. Each appeared to us to be giving careful and considered evidence, expressly making due allowance for the fact that material events took place some time ago and relying heavily on contemporaneous documents to refresh their memories. Each gave carefully considered answers to questions put to them.

5. So far as the claimant's witnesses are concerned, we were impressed by Ms Mogul. We particularly noted that when taken to the views expressed by others in contemporaneous documents, she was careful to explain her views about what they had said in detail (rather than simply adopting it) and using her own words so as to try to characterise her feelings at the time.

6. Both Ms Ince and Ms Dineen had left the employment of the first respondent's predecessor in circumstances which might prejudice them against the second respondent. Having heard her cross-examined, we

were of the view that Ms Ince actually had little, if any, evidence that she was able to give in order to assist us. We considered that the views she held about her very brief period of engagement (of some few days) was coloured by the circumstances in which that engagement terminated, with questions being raised about her competence. We explain our concerns regarding Ms Dineen's evidence when we deal with it in the context of our findings of fact.

7. We did not find the claimant to be a helpful witness. She persistently failed to engage with the question that she was being asked and she was clearly determined to paint a favourable picture of her activities and abilities, regardless of what might be stated in contemporaneous documents.

8. We were provided with an extensive bundle of documents in electronic form. We read those documents to which our attention was directed, but not otherwise. There was a separate bundle relating to remedy, which we did not read.

Findings of fact

9. The claimant worked on behalf of the second respondent (which we shall call 'Renault' where appropriate) at its Maple Cross Head Office. She was a distribution vehicle consultant. She liaised with dealers regarding ordering and selling of vehicles. She had a written contract of employment with Resource Management Solution (RME) Limited (which we shall call 'RMS' where appropriate), who contracted with CAT UK Limited ('CAT') to provide Renault with staff for the department in which the claimant worked. CAT itself had a contract with RMS by which RMS was to provide it with those employees. RMS had similar agreements with other manufacturers and importers of vehicles. CAT lost the contract with Renault such that with effect from early February 2019, the contract was awarded to the first respondent (whom we shall call 'BCA') and it is accepted that if the claimant was employed by RMS, her contract transferred to BCA by operation of TUPE.

10. The claimant alleges that she was employed by Renault. Indeed, until closing submissions, it was her case that Renault was her sole employer, so far as relevant to these proceedings are concerned. However, in closing submissions it was suggested on her behalf that she had a contract of employment both with BCA and with Renault to do work on behalf of Renault. She brought claims for unfair dismissal, age discrimination and in respect of holiday pay, wages in lieu of notice and bonuses against Renault and alternatively (or additionally) against BCA. As we shall explain, the claims in respect of wages in lieu of notice and bonuses were never proceeded with.

11. The claimant's employment began in January 2014 and ended on 12 April 2019, when she was dismissed by BCA. Renault had refused to have her return to work at its premises after a disciplinary process, for reasons which we consider below.

12. As a result of her conduct, BCA gave her a written warning and offered her the chance to apply for various internal vacancies. She declined to do so and was then dismissed. There is a fundamental dispute between the claimant and Renault/BCA concerning her performance in her role working at Renault. The respondents say she exhibited periodic poor performance about which she was warned and that this culminated in unacceptable behaviour on 30 January 2019. She alleges that the issues now relied upon were never drawn to her attention and that the allegations are part of a policy to remove her due to her age.

The organisation of Renault's business

13. Renault engaged BCA (and before it CAT) to provide a variety of services to it. To that end, various BCA staff worked at Renault's Head Office. So far as the claimant's part of the enterprise was concerned, BCA provided staff who operated at two levels. Those at the claimant's level and their immediate superiors, known as 'seniors'. Higher levels of management above that were Renault employees.

14. Given that the BCA staff were integrated into Renault's operation, it is unsurprising that Renault had a considerable measure of day-to-day control over them. Holiday requests were made to a senior (being, in effect, the claimant's immediate manager) and approval came from that person, but that person would be guided by Renault's requirements. We note that the claimant referred the issue of whether her holiday entitlement had increased due to her length of service to RMS (not Renault). Asked why she had done this, she responded "because they were my employers".

15. Discipline was dealt with by RMS/BCA such that the claimant's disciplinary investigation and hearing in 2019 was dealt with initially by RMS employees and after the transfer to BCA, by BCA employees. The investigation involved Renault employees because Renault was the client at whose premises the claimant worked and the senior managers involved in the matters which were under investigation and consideration were its employees. When the claimant raised a grievance, in mid-2018, the matter was investigated by Ms Murdoch of RMS, but also considered by a Renault manager at the same time. That rather hybrid approach is explained by the fact that the conduct of a Renault manager was one focus of the grievance and the auditing of the claimant's work in accordance with Renault's systems another.

16. The claimant also relied upon a series of further matters which she said demonstrated that she was a Renault employee. We deal below with the relevant facts in relation to each:

    16.1 **Setting Objectives.** This was done annually at a meeting attended by both Renault and an RMS representative (as well as the claimant) and recorded in a document which both representatives signed and which was adapted from a standard Renault document.

16.2 **Holding one-to-one meetings**. These were held with the seniors who were RMS employees, but also with more senior staff (such as Ms Hill) who were employed by Renault.

16.3 **Employee Handbook.** The RMS handbook was alleged to be identical to Renault's handbook, save for the name of the company. The claimant accepted in cross-examination that the documents were not identical. They were similar in key respects, for example each had similar disciplinary and grievance policies in the sense that the disciplinary policy contained similarly described levels of disciplinary sanction, but that would be true when comparing the disciplinary policies of many, if not most, large companies.

16.4 **The sick notification and pay regime**. Sickness absence had to be notified to both RMS and Renault, but fit notes had to be sent to RMS, which paid sick pay where appropriate.

16.5 **Staff meetings**. RMS staff attended some, but not all, staff meetings attended by Renault staff.

16.6 **Bonuses**. These were awarded by reference to performance. Performance was measured against the objectives referred to above. Renault was closely involved in setting bonuses, which were paid by RMS but recoverable from Renault under the contract between CAT and Renault.

17. At times, the claimant clearly recognised that she was not an employee of Renault, but a contractor employed by RMS when asking (for example in emails in February 2018) whether she could be considered for a Renault internal vacancy. She queried whether, as a contractor, she could apply for an internally advertised vacancy.

Problems with the claimant's performance

18. In November 2014, Ms Dineen, an RMS employee, joined the team at Renault as a senior consultant. In her witness statement she claimed that "shortly after" she started work, she was instructed to review the claimant's work, focussing on examples of poor performance in order to manage the claimant out of the business.

19. On being questioned she said that this could have happened at any time during her three years of employment, that she did not question the instruction (although she considered the claimant a good worker), that she might have been given details of why the instruction was given, but could not recall them and that she could not recall what gave her the impression that the claimant was to be managed out of the business. She told us that she did not do as requested, but could recall no follow-up from anyone.

20. We found her evidence unsatisfactory. In particular, she was unable to explain why she would have described the giving of the instruction just

referred to as taking place "shortly after" she started work when, in fact, it had taken place at some time (which she could no longer recall) between the beginning and the end of her employment. She left Renault after a dispute as to sick pay and an altercation with Mr MacCalman. We consider that she was aware of concerns about the claimant's mode of working and that her cases (like those of others) were to be randomly monitored under the new CRM system, but was never given the instruction she now claims.

21. In 2016 Renault introduced a customer relationship manager software system (CRM). This was supplemented by the introduction of standardised KPI's and the auditing of individual's cases within the system, in April 2018.

22. Since at least February 2017, concerns had been raised with the claimant about the quality of her work at CRM reviews. Her work had been graded as "poor" in a number of respects in February 2017, and progress was described as "disappointing" at a review in April 2017. Steps were taken to help the claimant to improve. This was recorded in an email to the claimant of 12 April 2017. From time-to-time thereafter the claimant was spoken to about performance issues.

23. For example, on 20 February 2018, Mr MacCalman complained about how she had handled a particular issue and noted "we are passed the point of accepting this as being ok, we must strive for better". We note that as regards this and later matters of criticism, Mr MacCalman, (despite obvious frustration at lack of improvement) set out clearly what had gone wrong and how he expected matters to have been dealt with, in communications with the claimant.

24. The claimant complained to us of lack of training, but it is clear to us that the claimant was offered appropriate guidance amounting to on-the-job training as well as more formal training.

25. By July 2018, the claimant's senior was Edwin Hunt. He found her difficult to manage. When confronted with criticism about the handling of cases, she would become confrontational and defensive. He recorded in an email of 5 July 2018, his view that when criticised she was "quite obstructive", that she responded to criticism in "a very defensive manner" and "mumble[d] defensive comments". He concluded that she had a "very negative myopic view of the network". We note that the criticisms which he there recorded seemed to us to be mirrored in the evidence the claimant gave to us, both as regards its content and the way in which she delivered it. The claimant then complained about Mr Hunt to his immediate superior, Mr MacCalman, a Renault employee. She alleged bullying and intimidation on his part.

26. On the third occasion when she did this, Mr MacCalman wrote a strongly worded email to her on 16 July 2018. He accused of her not working as part of the team and having an unacceptable attitude to senior staff. He said that the matter would be referred to RMS when appropriate staff returned from holiday.

27. We next turn to the claimant's grievance. She made five complaints in a written grievance of 26 July 2016 about both Mr Hunt and Mr MacCalman. Her points were that:

    27.1 They were discrediting her work and seeking to get rid of her.

    27.2 Mr MacCalman did not objectively investigate the complaint she had made against Mr Hunt (to which he had responded in the way set out above).

    27.3 Not conducting regular one-to-one meetings.

    27.4 Not following the company policy on grievances.

    27.5 A lack of care towards her and failing to protect her dignity at work.

28. Lucy Jones, Renault's Director of HR (North Territory) suggested that Renault could investigate this as Mr MacCalman was their employee and they would be vicariously liable for his actions. Laura Murdoch (RMS HR Operations Manager) agreed, but on the basis that RMS, as the claimant's employer, should also be kept involved. Eventually, it was decided that Ms Hill (for Renault) and Ms Murdoch (for RMS) should hear the grievance. Although the claimant objected to Ms Hill's involvement, due to the fact that she had previously held a management role in the area concerned and had (indirectly) managed the claimant, we are satisfied that this actually made Ms Hill an appropriate person to consider the matter due to her knowledge of the operation of that department.

29. The claimant then went on holiday. On her return on 31 August there was a further incident where her lack of careful consideration of an issue led to her closing a case when further investigation had been required. Mr MacCalman complained to Ms Hill that, once again, the claimant had made errors which led to problems and, once again, when confronted with this she had reacted badly. He suggested that he now wanted to move roles. We note that despite his obvious annoyance and frustration with the claimant, he nevertheless, set out in writing to the claimant what had gone wrong and why.

30. After the grievance had been heard, the claimant received two grievance outcome letters. The first was sent from Ms Hill, although it recorded that it set out the views of Ms Murdoch. It was dated 4 September 2018. It dealt with each issue. It rejected the first point, finding that the Renault employees had simply dealt with the claimant's errors. She felt that the complaint against Mr Hunt should have been better handled by Mr MacCalman. As to one-to-one meetings, she found that more structured meetings would have been preferable, but that the claimant had been given regular feedback. She found that the grievance procedure had been followed and that more should have been done to avoid situations of confrontation. Recommendations were made as to how matters might be dealt with better in the future.

31. The claimant felt the outcome of the grievance was unclear. We disagree. We consider that the findings are clear and reasoned. However, in the light of that criticism, a meeting was held to explain the outcome to the claimant and Ms Murdoch then produced an outcome letter on 10 September 2018 which spelt out, in terms, exactly what had been upheld from within the grievance and what not upheld. Her approach followed that set out in the letter sent by Ms Hill, save that:

    31.1 She found that whilst the formal grievance procedure had been followed, the informal process prior to it could have been dealt with more robustly.

    31.2 Whilst her work quality was the catalyst to the way in which the claimant was treated, the management team needed to adopt a more structured approach regarding the issues which arose.

32. Thereafter, the Renault managers (and the RMS employed seniors) sought to operate in accordance with the guidance given following the grievance. Regular one-to-ones were held to review cases and concerns were dealt with in a formal manner by being more fully documented. The one-to-ones and the monitoring of cases was carried out by Ms Hill herself in respect of cases dealt with by the claimant in August to October 2018. The claimant complained that cases were not being selected at random, but when this complaint was rejected but with Ms Hill offering that further cases be jointly selected, the claimant rejected the proposition of future joint selection.

33. The review of the claimant's cases continued to show examples of poor performance where she scored well below the KPI's set for work within the CMA system. She was given constructive feedback, but consistently refused to accept any criticism. We note that her responses in cross-examination when taken through examples of poor performance, appeared to us to mirror the allegations made against her. She would not accept that she had acted wrongly, save very occasionally when driven to it in circumstances where the contemporaneous documents left no room for argument. She would then blame the lack of training, despite the fact that the problem arose from (for example) a failure to communicate accurately to a dealer the simple information that she had been given as to a vehicle's location and transportation.

34. Throughout this period from her grievance to the year end, the claimant continued to display the behaviour towards dealers and fellow staff members for which she had been repeatedly criticised. Various contemporaneous documents note these issues, as did several witnesses. These witnesses included Ms Mogul, who had sought to address the claimant's tendency to raise her voice on the telephone, to be aggressive (and periodically demeaning) towards dealers, and to be consistently negative towards change, which attitude involved encouraging others to adopt a similarly negative view.

35. Ms Jones provided a short statement (on 27 February 2019) in the claimant's disciplinary process summarising her concerns and the efforts to help the claimant to improve which she and others had made. Ms Mogul told us that Ms Jones' views and actions mirrored her own, although she was very careful to take us through her concerns using her own language. We accept that all other team members had complained about the claimant's behaviour, as had several dealers. We also accept that the claimant's behaviour was very disruptive of the team, especially as regards her shouting, which disrupted their calls and meetings and the calls and meetings of the HR department which sat in the vicinity to the claimant's desk. She regularly followed up on calls by giving the team an account, blow-by-blow, of what had happened. She consistently promised to reflect on the matters being raised with her and to try to improve, but no long-term improvement was visible. This was true, both as to her failures to perform in a technical sense and her failures concerning shouting, being negative and so-forth.

36. During the autumn of 2018, the claimant appealed the grievance outcome and the outcome of that appeal was announced by Ms Jones in a letter of 23 November. She overturned the decision below on two points, but these relate to process rather than substance, and the reasoning (if not the final conclusion on all matters) mirrors that of Ms Hill and Ms Murdoch. In short, Ms Jones considered that the way claimant's complaints which gave rise to the grievance and the grievance itself had been dealt with was not sufficiently thorough, objective and formal. Ms Jones rejected the claimant's fundamental grievance (and challenge to the original outcome) that her managers had been making a concerted effort to discredit her. Her view (eventually set out in detail in the statement of 27 February referred to above) was that there were serious and legitimate concerns as to the claimant's behaviour in a number of respects.

37. The claimant sought to take the grievance further by letter of 29 November 2018. She refused to accept the finding that the managers had not been "out to get her". She was told that the grievance process had been exhausted and if she wished to go further, she would have to approach ACAS and possibly take her claim to an Employment Tribunal. At that stage she did neither.

38. Unsurprisingly, relations between the claimant and her immediate managers were not good at this time. She had accused them of being out to remove her by making false allegations about her poor performance. Despite the grievance outcome, she would not accept that she was wrong. They had been told to deal with her objectively and conduct regular one-to-ones, which they were doing.

39. She complains that Mr MacCalman was not speaking to her but communicating by email. We consider this to be an exaggeration, but he was certainly taking care to document his concerns in some detail. We consider that understandable and appropriate given what we have set out above as to the then state of affairs and the fact that the claimant had told

him that she was keeping a diary of relevant matters which she would use to support any claim that she might make. We note that no diary has been produced in evidence.

40. The year 2018 closed with Mr MacCalman "at the end of [his] patience" as he said in an email of 19 December 2018 to Ms Hill. The claimant had been the subject of performance management by regular examinations of her cases at monthly audits and issues within individual case handling were fed back to her. It is clear that Mr MacCalman was getting to a point where he felt that he could not cope and was again contemplating changing jobs. Having heard from him and looked at the contemporaneous documents, we are clear that this was not because he struggled to manage an older, more experienced, employee (as the claimant would have it) but because his very best efforts had failed to lead to consistent improvement on the part of the claimant.

41. On 31 December 2018, Mr MacCalman sent an email to the claimant criticising how she had dealt with a particular dealer problem and asking that she follow up on a series of five points. The claimant's response was that she found the email offensive and that "I never have been trained". The email was not offensive and the claimant had been trained, both by on-the-job training and by a bespoke series of training modules over the early months of 2018, which external training was given to the whole team. However, although the whole team had been trained, the decision to commission the training was motivated largely by the claimant's failings. As more than one witness noted, in the main the claimant's failings did not reveal a lack of training, but the need to display basic common sense and courtesy.

42. At this point, at the end of 2018, a new senior consultant was appointed. Mr Boulter was an experienced manager. He was aware of the problems with the claimant, but was determined to make up his own mind about her and was initially confident in his ability to help her to improve where appropriate.

43. Mr Boulter's initial observation of the claimant led him to raise her performance in a one-to-one interview on 16 January 2019. He raised the way she vocalised concerns about dealers in a very negative way to all in her vicinity. He commented upon her case audits for December 2018 and the areas for concern, correcting her statement that she alone had been audited. As he told her, all those employed at her level had been audited using random selection of cases. He sought to give her constructive feedback.

44. The following day, Mr Mark Waller, a Human Resources employee of Renault (who worked in the vicinity of the claimant) complained to Mr Boulter about her shouting on calls and of "the constant negativity, drama and running commentary on every call". He wished Mr Boulter well in his efforts to manage the claimant's performance. However, reading between the lines, it seems clear to us that he had little confidence that Mr Boulter would succeed.

45. On 30 January, Mr Waller again complained about the claimant's rudeness to dealers and her disturbing of his HR team by her constant misbehaviour. After a series of calls, during one of which the dealer had asked to be put through to the claimant's manager (Mr Boulter) to sort matters out, Mr Boulter took the claimant to another room. He intended to deal with Mr Waller's complaints, together with her swearing after ending a call to a dealer and with the matters which he had already dealt with on 16 January.

46. Shortly after the meeting began the claimant accused Mr Boulter of failing to support her, became agitated and started shouting and waving her arms. She then left the meeting. After taking a moment to compose himself and make a brief note of what had happened, Mr Boulter went to the claimant's work area. He found her in the process of leaving. She then went to her GP's surgery and was described as presenting with symptoms of acute stress. She did not tell Mr Boulter that she felt ill, but clearly the combination of confrontational phone calls with dealers and Mr Boulter beginning to raise issues with her about her performance had led to a state of anxiety.

47. She came into work the next day. Renault discussed with RMS what to do about the claimant and it was agreed that she should be suspended whilst her conduct was investigated. Ms Hill and Mr Boulter met with her, enquired if she was feeling ok and set out what the meeting that she walked out of had been intended to address. The claimant then explained that she had gone to her doctor on 30 January and had been signed off work, but had chosen to come in that day as it was month-end. She was told to share that information about her being signed off work with RMS straight away and to send them her fit note. She was also told that she should not come into work the next day but should await hearing from RMS.

48. Ms Murdoch of RMS then began to investigate the events of 30 January. She spoke to Mr Boulter and to the claimant and prepared statements for each based upon what she had discussed with them. The claimant declined to sign her statement because it followed on from a telephone (rather than a face-to-face) meeting which she claimed that she had seen as an informal chat. We accept that Ms Murdoch had made clear to the claimant that this was an investigatory interview and that it might lead to a formal disciplinary meeting. The claimant commented on the issue of concern raised with her. She admitted to being a "loud person" and speculated that Mr MacCalman sometimes did not talk to her perhaps because of her or because her face did not fit. When this statement was sent to her (and when she refused to sign it) she was given the opportunity to add to or correct the statement. She did neither.

49. The claimant and other relevant employees transferred to RMS to BCA on 5 February 2019 and it was BCA which then took over the investigation. Mr McKewan looked at the statements already taken and undertook further investigations, which resulted in further statements, including one from Ms Jones as to the complaints previously made about the claimant's attitude at work and discussions which she had had with her. This is the statement to which we have already referred. Renault made clear to Mr McKewan, as

the statement showed, that they were not prepared to have the claimant back on site as they felt that the relationship with her had now broken down irretrievably.

50. Mr McKewan concluded that the matter should be taken further and on 4 March 2019, he sent all of his assembled papers to Mr Ian Griffiths to decide how to proceed.

51. Mr Griffiths decided that the claimant should face a disciplinary hearing to address five disciplinary charges as set out in a letter to the claimant of 7 March 2019. These related to her unacceptable conduct in the work place generally and on 30 January 2019 in particular, the use of unacceptable language on 30 January, insubordination in walking out of the meeting with Mr Boulter, reputational damage to BCA given that Renault considered the working relationship with her now untenable and breach of trust and confidence. The material relied upon (being that assembled by Mr McKewan) was all attached to that letter.

52. The disciplinary hearing was postponed to 21 March 2019 to enable the claimant's Trade Union representative to attend. In the event, she was unrepresented at that hearing but asked that it go ahead anyway. She produced a five page statement in which she sought to answer each of the five allegations. She asserted that the relationship between her and Renault had been rendered untenable because of her having raised a grievance, parts of which were upheld and, in short, she denied the allegations of poor performance. Notes taken of that hearing were sent to the claimant.

53. Mr Griffiths decided that he needed to conduct further investigations. He then interviewed Ms Hill and Mr Boulter and sought information about the audits conducted on the claimant's cases and those conducted on the cases of others (given that the claimant was still alleging that it was she alone who had been the subject of auditing). This resulted in yet further statements being taken (and signed by the makers) and a significant volume of contemporaneous documents being assembled, which Renault had provided to Mr Griffiths at his request. Copies of all these statements and documents were sent to the claimant in advance of the resumed hearing on 3 April 2019 and at the start of that hearing, Mr Griffiths told the claimant that the allegation regarding the use of unacceptable language on 30 January would be taken no further. He had reached the conclusion that some swearing did take place from time-to-time in the work place.

54. On 9 April 2019, Mr Griffiths sent a seven page letter to the claimant setting out his detailed conclusions on each of the five allegations against her. He dealt with all of the points made by the claimant, including her "feeling" that she had been discriminated against due to her age. He noted the lack of any evidence to support this assertion and rejected it on the basis that he considered the way in which she had been treated to have been justified. He largely rejected the various points that the claimant had made. He considered that she had behaved in unacceptable ways prior to and on 30 January 2019 and that her performance in the job was not good, that she

had been given advice and training, but that her conduct had not improved. He considered that a written warning of 12 months duration was the appropriate penalty.

55. Mr Griffiths noted that he had sought to persuade Renault to allow her to return with appropriate performance management and monitoring in place, but that Renault had refused on the basis that they considered the relationship between her and her managers had broken down irretrievably against a background of repeated efforts to secure improved performance and conduct. We accept that he made significant efforts to persuade Renault to change its mind, but to no avail. Hence, he suggested that the claimant consider a list of current BCA vacancies. He pointed out that if she could not find a job acceptable to her, she would be dismissed for some other substantial reason. The claimant rejected all the available roles by letter of 11 April. Hence, she was dismissed by letter of 12 April 2019 with wages in lieu of notice.

Mr Sajjad Janjuha

56. This gentleman (who we shall refer to as Mr Sajjad) is relied upon by the claimant as a comparator for her age discrimination claim. Mr Sajjad was an RMS employee assigned to work at Renault. He had a poor attendance record, both as regards the level of his absences and persistent lateness. He failed to follow the absence procedure on many occasions. He was spoken to by RMS. This was possibly at the prompting of Renault, but as RMS received details of attendance for payroll purposes, they may have acted on their own initiative. Eventually, he received a formal written warning (the penalty that Mr Griffiths had opposed on the claimant for her poor performance) then a final warning and then, after a disciplinary process, he was dismissed.

The law

57. There was little dispute as to the relevant principals of law applicable in this case. However, the claimant placed reliance upon section 83 of the Equality Act 2010 which reliance was disputed as inappropriate by the respondents.

58. We turn first to the law as to the identity of the employer. We were referred to the decision of the Court of Appeal in Tilson v Alstom Transport [2011] IRLR 169 and to the decision of the EAT in Heather Wood & Wrexham Park Hospitals NHS Trust v Kulubowila & Others [UK/EAT/0633/06] which is referred to in Tilson. We draw the following three points from those authorities:

    58.1 The onus is on a claimant to establish that a contract between that individual and an end-user of her services should be implied.

    58.2 A contract can only be implied in those circumstances where it is necessary to do so.

58.3 In order to imply such a contract, it is not enough simply to show that the nature of the relationship between the claimant and the end-user is consistent with their being an employment relationship in place, if it is also consistent with there not being an employment relationship in place with the end-user.

59. After setting out the first two of those propositions (in paragraphs 7 and 8 of his judgment), Elias LJ said the following:

> "It is important to emphasise that if these principals are not satisfied, no contract can be implied. It is not against public policy for a worker to provide services to an employer without being in a direct contractual relationship with him. Statute has imposed certain obligations on an end-user with regard to such workers, for example under Health and Safety and Discrimination legislation, even where no contract is in place between them. But it has not done so with respect to claims for unfair dismissal. It is impermissible for a tribunal to conclude that because a worker does the kind of work that an employee typically does, or even of a kind that others employees engaged by the same employer actually do, that worker must be an employee".

60. Elias LJ then proceeded to cite with approval, observations from HHJ Peter Clark from the Heather Wood & Wrexham case.

61. As the essence of the claimant's case was that there was day-to-day control of her activities by Renault, we note what Elias LJ went onto say in paragraph 44:

> "The mere fact that there is a significant degree of integration of the work into the organisation is not at all inconsistent with the existence of an agency relationship in which there is no contract between worker and end-user. Indeed, in most cases, it is quite unrealistic for the worker to provide any satisfactory service to the employer without being integrated into the main stream business, at least to some degree, and this will inevitably involve control over what is done and, to some extent, the manner in which it is done. The degree of integration may arguably be material to the issue were there, if there is a contract, it is a contract of service. But it is a factor of little, if any, weight, when considering whether there is a contract in place at all. This argument repeats the error of asserting that because someone looks and acts like an employee, it follows in law that he must be an employee."

62. The claimant also relies on the need to apply to a line manager employed by Renault in respect of holidays. In fact, we have found the involvement of Renault's employees to be far less significant, however, we are assisted by what Elias LJ said in that regard:

> "The need to apply to the line manager before taking annual leave is not sufficient to justify the implication of a contract."

63. The claimant's written closing submissions also cited, in this regard, Halawi v WDFG Limited, trading as World Duty Free [2014] EWCA Civ 1387 and Jivraj v Sadruddin Hashwani [2011] UK SC46. We were not referred to specific paragraphs of those decisions when they were cited to us and we found them of no assistance.

64. We next turn to the law on direct age discrimination. Direct discrimination is defined in Section 13 of the Equality Act 2010. It is where a person (A) treats another (B) less favourably than (A) treats or would treat others because of a protected characteristic. Here that characteristic is age. It is a comparative exercise. The claimant may rely upon either an actual comparator (where there must be no material difference between the circumstances relating to each case) or a hypothetical comparator. We note what is said in cases such as London Borough of Islington v Ladle [2009] ICR387, with regard to the construction of the hypothetical comparator and the possibility that it may be more helpful to look at the reason for any potentially less favourable treatment than to spend time constructing the characteristics of that hypothetical person.

65. Section 39 of the 2010 Act prohibits an employer from discriminating against their employees and Section 41 prohibits the principal from discriminating against a contract worker. Renault accepts that the claimant was a contract worker and that Section 41 is applicable.

66. The claimant bears the burden of proof, but may be assisted by the provisions of Section 136 of the 2010 Act. If the claimant can establish facts from which a court could conclude, in the absence of any other explanation, that discrimination has taken place, then we must hold that discrimination has taken place unless a non-discriminatory explanation can be provided. As will become clear, we did not find Section 136 of particular assistance in this case as we were able to establish the facts of the case without resort to it. Although we were addressed on various authorities relating to the appropriate approach to take to Section 136, it is unnecessary for us to set them out here.

67. The claimant relies upon Section 83 of the 2010 Act in order to establish that Renault was her employer. It was suggested that this provision provided a very wide definition of employment which would encompass the relationship between the claimant and Renault. We reject that submission. Clearly, Section 83 could only assist the claimant with regard to a claim under the 2010 Act. The definition of "employer" for the purposes of unfair dismissal is different. However, it is unnecessary to extend the definition of employer for the purposes of the discrimination statute, because Section 41 already provides a route by which someone in the claimant's position can bring a claim for unlawful discrimination. If the definition of employment also encompassed that which is encompassed by Section 41, there would be no need for that section at all.

68. We next turn to the law on unfair dismissal. it is for the employer to satisfy us that the reason for dismissal was one of the statutorily permissible reasons under the Employment Rights Act 1996 and, if we find that to be the case, we must then consider whether dismissal was fair in all the circumstances (see Section 98(4) of the 1996).

69. It was accepted before us that where an employee is dismissed because of third party pressure, such as from an end-user of that employee's services

(as here), that may give rise to a statutorily permissible reason for dismissal (being some other substantial reason).

70. In relation to the reasonableness test, it was agreed that the dismissal would not, be reasonable in all the circumstances if the employer had failed to do everything that it reasonably could in order to avoid or mitigate the decision, most obviously by trying to get the client to change its' mind. We accept that this would require an employer to demonstrate to us that it had carried out some kind of enquiry to establish what were the reasons for the end-user's refusal to have the employee back and to have evaluated those reasons and what it might reasonably be expected to do in the circumstances of the particular case to seek to change minds.

71. At the preliminary hearing which took place in this case, there was some suggestion that the claimant might seek to advance a claim for a redundancy payment. That possibility was provided for in the list of issues, albeit in a rather tentative way. However, no such argument was raised before us and we need not consider the matter.

72. That list of issues identified potential claims for unlawful deductions from wages, unpaid holiday pay, unpaid wages and non-payment of a bonus. In the event, the only claim advanced was for unpaid holiday pay. Agreement had been reached that the claimant was underpaid by an amount equivalent to three days' wages (agreed to be £300.32) in respect of holidays not taken. In the event of that agreement between the parties it is unnecessary for us to set out here the law in respect of such payments contained in the Working Time Regulations.

Submissions

73. The first and second respondents provided helpful opening submissions which, in particular, summarised the relevant legal principals. All parties provided detailed written closing submissions dealing, in the main, with issues of fact as applied to the relevant law.

74. Those submissions can be summarised quite briefly:

    74.1 **Regarding the correct employer**. The claimant relied upon the factors in her witness statement (which are dealt with above) and, in particular, day-to-day control by the second respondent, to indicate the existence of a contract of employment between the claimant and that company. Asked to explain how the existence of a written contract with the first respondent fitted into this factual matrix, the claimant asserted that she was employed by both the first and second respondents to do the work which she undertook for the benefit of the second respondent.

    The respondents both asserted that the application of the principals found in Taplin clearly led to the conclusion that the claimant was employed by the first respondent, because there was no necessity to imply a contract between the claimant and the second

respondent. They accepted an element of day-to-day control by the second respondent, but noted that in meaningful respects (for example remuneration, holiday and sick pay, holiday administration, discipline and grievance considerations) the claimant was treated as an employee of the first respondent with whom she had a written contract of employment.

74.2 **Unfair dismissal**. The claimant considered that the disciplinary process was not fairly carried out, in particular it represented (she said) the culmination of an exercise designed to manage her out of the business due to her age and was reliant upon an untruthful account of her performance.

The respondents drew a distinction between the procedure leading to the giving of a written warning and that leading to dismissal. The former was consequent upon the events of 30 January, viewed against the background of complaint, informal warnings and continued failure to improve. The latter was consequent upon the refusal of the respondent to have the claimant back and her refusal to contemplate any other roles that the first respondent might be able to offer her.

74.3 **Discrimination**. The claimant asserted that each of the three acts of discrimination relied upon represented less favourable treatment, when compared to that of Mr Sajjad or a hypothetical comparator, on the ground of her age. The claimant's factual submissions repeated those made in respect of unfair dismissal, in the sense that she asserted that the claims of poor performance were a contrivance (in the main) or explicable by a complete absence of training and had been unjustifiably relied upon to explain an otherwise discriminatory dismissal.

The respondents also relied upon the matters relied upon in respect of the unfair dismissal claim. They pointed to the volume of contemporaneous material which exemplified the claimant's failings and Renault's efforts to help her to improve. They also pointed to the fact that the suggestion that the actions of either respondent were at all motivated by her age was only raised very late in the day, that this was said to be the claimant's "feeling" and that the claimant had attributed the respondent's actions to a range of other (inconsistent) motivations. These included that "her face" did not fit, that she would "argue 'til the cows come home", that they acted because she had raised a grievance and/or because of the outcome of that grievance which they could not accept and because she challenged and questioned instructions given to her. In this context, the respondents also relied upon claim in time points. Given the findings that we set out below, it is unnecessary for us to consider whether the claims were presented within the primary limitation period and, if not, whether it would be just and equitable to extend time.

74.4 With regard to the non-payment of the appropriate amount of holiday pay, no submissions were made to us, the matter having been agreed.

Decision

75. We turn first to the issue of the identity of the claimant's employer. There is a written contract of employment between the claimant and the first respondent. The first respondent (and its predecessor as the provider of services to Renault) are in the business of providing certain specialised administration functions to vehicle manufacturers, importers and distributors, like Renault. Whilst employees of the first respondent are assigned to the second respondent and would necessarily be subject to some degree of day to day control, we are satisfied that they remained the first respondent's employees.

76. We note that when investigating the possibility of applying for a role where she would be employed by the second respondent, the claimant recognised that she was employed by the first respondent. That company paid her and dealt with disciplining and considering her grievance. In both disciplinary and grievance processes, there was some involvement by the second respondent and its employees precisely because it was in Renault's business that she worked day-to-day.

77. There is no necessity to imply a contract of employment between the claimant and Renault. On these facts, the nature of the relationship as it operated in practice was not consistent with there being an employment relationship between Renault and the claimant. On the contrary, an examination of all of the circumstances shows that, save for day-to-day control, the evidence would point towards the first respondent as the employer of the claimant, even if there had been no written set of terms and conditions of employment supplied to her.

78. Next, we turn to the claim for unfair dismissal. We are satisfied that the dismissal resulted from the second respondent refusing to allow the claimant to return to work at its premises. The first respondent, by Mr Griffiths, sought to persuade the second respondent to allow her to return with appropriate performance management and monitoring in place. The refusal was unsurprising in the circumstances. The second respondent had identified the claimant's problems long before and had sought to address them, but her performance had not improved. She had promised to address the issues as to her conduct raised by others working at Renault, but had repeatedly failed to do so. Furthermore, the grievance and disciplinary processes had shown that the claimant generally refused to accept that there was anything wrong and when she did so, would not accept the blame, but alleged a lack of training together with an unfair, discriminating and inadequate approach by her managers. Mr Griffiths' investigations and hearings informed him in detail of all these matters and he reached conclusions on them in his disciplinary outcome letter. Against that

background, we are satisfied that Mr Griffiths did all that he reasonably could to persuade Renault to change its mind.

79. Having failed to persuade Renault to allow her to return, he sought to find her another role in the first respondent. She would not consider which he suggested on the basis that, unlike the Renault job, they were not close to home when otherwise potentially suitable. Hence, having refused all suitable available jobs, she was dismissed.

80. We are satisfied that her dismissal was for a statutorily permissible reason, namely "some other substantial reason". It was fair in all the circumstances. She could not return to Renault and she declined all available roles. The procedure which led to that position was an entirely fair (not to say exemplary) procedure. Hence, Mr Griffiths could not have approached Renault on the basis that it's local management had behaved unfairly, or were being unreasonable in refusing to allow her to return. On the contrary, his findings supported the factual basis for their views of the claimant.

81. Finally, we turn to the age discrimination claim. We consider each of the three allegations of less favourable treatment separately.

82. First, subjecting the claimant to the disciplinary process and giving her a written warning. This is certainly unfavourable treatment, but was the claimant treated less favourably than an actual or hypothetical comparator would have been treated?

83. The claimant relied upon Mr Sajjad as her comparator, alternatively upon a hypothetical comparator. Mr Sajjad was not an appropriate comparator, because his case concerned unauthorised absence, persistent sickness absence (without following appropriate policies) and persistent lateness. We consider this to be materially different from the claimant's behaviours. However, the cases are comparable in the sense that each involved the application of the first respondent's disciplinary procedure. In that regard, the claimant and Mr Sajjad were treated in very similar ways. Each was spoken to and efforts were made to persuade them to improve, failing which a more formal process was adopted and, after due investigation, they were each given a formal written warning. Hence, if Mr Sajjad was an appropriate comparator, the comparison would show that he was not treated more favourably that she was treated.

84. As regards the hypothetical comparator, we have no doubt that a person behaving as the claimant behaved would have been treated the same by the first respondent regardless of their age. Such a person would have been treated in exactly the same way by the second respondent. Having looked at the contemporaneous documents and heard from the witnesses, we consider that the claimant's age played no part whatsoever in the decisions to commence the disciplinary process and then to discipline the claimant. We say that looking at the commencing the disciplinary process in its widest sense so as to include the role of the second respondent. All relevant decisions were made because of the claimant's behaviour on 30 January 2019 when viewed in the light of her behaviour prior to that day. In

short, her behaviour was unacceptable and despite informal warnings and provision of advice and training, she failed to improve.

85. Next, we turn to Renault's request that the claimant be removed from its site. Although the claim was put in that way in the list of issues, arrived at - at the preliminary hearing, in fact Renault did not request her removal. It certainly encouraged the first respondent to investigate the serious disciplinary incident on 30 January. The claimant was then suspended and the investigation undertaken. After that had been done, and the claimant issued with a formal warning, Renault refused to have her resume work at any of its sites, an act which it had foreshadowed during its involvement in the investigation and disciplinary process by telling Mr McKewan and then Mr Griffiths that this would be its attitude.

86. Mr Sajjad is not an appropriate comparator. There was no evidence that Renault asked for him to be the subject of a disciplinary process. The evidence suggests that the first respondent picked up the problems itself and addressed them. Furthermore, the situation is materially different, for the reasons given above. It is, of course, the case that Renault did not refuse to have him back after he was given his written warning, but that had nothing to do with his age. Renault hoped that, following the warning, his time-keeping and absence record would improve. They didn't, so he was eventually dismissed. Renault believed that he would improve, but held the opposite view with regard to the claimant, it had nothing whatsoever to do with their respective ages.

87. Again, we have no hesitation in finding that the reason for Renault's action was unrelated to age. The claimant was criticised and asked to modify her behaviour by various managers, because of her unacceptable levels of performance and her disruptive behaviour. Renault refused to have her return to the site (or any other Renault site) because, despite their best efforts, she had failed to modify her behaviour and relations with senior managers had, they felt, broken down irretrievably.

88. Finally, we turn to the dismissal of the claimant. Mr Sajjad was also dismissed but the circumstances were very different. He was dismissed because despite informal then formal warnings, he continued to be both absent and late on a regular basis. The claimant was dismissed because Renault would not allow her return to any of its sites and the first respondent had no other job which she was prepared to consider.

89. Once again, age had nothing to do with the first respondent's decision, this time to dismiss her. An employee of whatever age would have been treated the same in materially similar circumstances.

90. Had we found the claimant's discrimination case relating to conduct prior to her dismissal to have had any merit, we would have had to consider whether the claim had been brought within the primary limitation period and, if not, whether it would have been just and equitable to extend time. Given our findings as to the merits, no purpose would be served by considering this issue, which cannot, in any event, be divorced from the merits.

91. Our conclusions on the unauthorised deductions claims and that for a redundancy payment have already been set out. In short, they were not advanced.

Conclusion

92. Save as regards the claim for holiday pay, where the fact of indebtedness and the sum are agreed, all of the claimant's other claims fail and are dismissed.

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Employment Judge Clarke QC

Date: 30 April 21

Sent to the parties on: 20 May 21

For the Tribunal Office