EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals

This has been a remote hearing which has been not objected to by the parties. A face-to-face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to comprised of a bundle of documents and three witness statements.

Claimant		**Respondent**
Mrs K Bruce	v	Ardega Limited

Heard at: Watford (via CVP) **On:** 16 April 2021

Before: Employment Judge Smeaton

Appearances:

For the Claimant: In person
For the Respondent: Mr P Clarke (employment consultant)

RESERVED JUDGMENT

1. The Claimant was not dismissed in breach of her contract. Her claim for wrongful dismissal fails
2. The Respondent did not make unauthorised deductions from the Claimant's wages between 5 November 2018 and 30 June 2019
3. The Tribunal does not have jurisdiction to consider the Claimant's claims for unauthorised deductions of wages in March 2019

REASONS

Introduction

1. The Claimant, Mrs. Bruce, was employed by the Respondent from 1 October 2018 until 19 June 2019, when she was dismissed summarily (although she was paid up until 30 June 2019). She had herself resigned her employment on 20 May 2019 and was due to leave the Respondent's employment on 19 August 2019.

2. By a claim form dated 16 September 2019, the Claimant brought claims

against the Respondent for (ordinary) unfair dismissal (s.94 (1) Employment Rights Act 1996 ("ERA 1996")), breach of contract (wrongful dismissal) and unauthorised deductions of wages (Part II ERA 1996). All claims were denied by the Respondent.

3. By order dated 16 March 2020, the Claimant's claim for unfair dismissal was struck out on the basis that the Tribunal had no jurisdiction to hear it. The Claimant did not have the requisite qualifying service to bring such a claim (s.108 ERA 1996). The remaining claims were listed for a final hearing.

The hearing

4. The final hearing took place via CVP over one day during which I heard evidence from the Claimant and, on behalf of the Respondent, from Mr Barclay (the Respondent's Managing Director) and Ms Louth (the Respondent's Account Manager).

5. The Claimant appeared unrepresented. The Respondent was represented by Mr. Clarke. I did my best to ensure a fair hearing and a level playing field between the parties by asking such questions of the Respondent's witnesses as I considered pertinent to determining the issues I had to decide. I took care to ask open questions and not to cross-examine any of the witnesses.

6. I was provided with a hearing bundle comprising 183 pages. The bundle was not agreed between the parties and I took some time at the outset of the hearing to ensure that all additional documents that the Claimant wished to rely on were added. There was no objection to those documents from the Respondent.

7. The Claimant raised concerns that her HR file was missing as well as documents relating to the resignations of other employees. I agreed with the parties that we would commence the evidence and address any missing documents if they became relevant.

List of issues

8. The issues had been agreed at a preliminary hearing before Employment Judge Bloom on 27 November 2020. I confirmed with both parties whether the list was accurate. There was some suggestion on the documents that the Respondent was relying on mutual termination. Mr Clarke confirmed that the Respondent accepted that the Claimant had been dismissed. The list of issues was accordingly as follows:

    8.1 Was the Claimant dismissed in breach of her contract? In answering this, I must consider whether the Respondent has established, on the balance of probabilities, that the Claimant committed gross misconduct as alleged. The Claimant claims non-payment of her wages from 1 July 2019 until 19 August 2019 (when her notice was due to expire), in the sum of £4,269.23 gross. The Respondent disputes that figure

    8.2 Did the Respondent make unauthorised deductions from the Claimant's wages between 5 November 2018 and 30 June 2019. The Claimant claims underpayment of her wages in the sum of £3,499.98 gross

8.3 Did the Respondent make an unauthorised deduction from the Claimant's wages in March 2019. The Claimant claims that deductions were made for fuel purchases in the sum of £344.92 gross

8.4 Did the Respondent make an unauthorised deduction from the Claimant's wages in March 2019. The Claimant claims that deductions were made for 'personal purchases' in the sum of £115.06 gross

8.5 Has the Claimant incurred loss in the sum of £200 attributable to any unauthorised deduction from wages above and, if so, is it appropriate in all the circumstances to compensate her for that financial loss (s.24(2) ERA 1996).

The law

9. The sole issue which I have to decide in relation to the wrongful dismissal complaint is whether the Claimant was guilty of a repudiatory breach of her contract ('gross misconduct'). A fundamental or repudiatory breach is one that is so serious that it goes to the root of the contract.

10. The burden is on the Respondent to establish that the Claimant did in fact do something that fundamentally breached her contract. Unlike in claims of unfair dismissal, it is not enough that the Respondent genuinely and reasonably believed that the Claimant had done so.

11. Since the question of whether an employee is in repudiatory breach is a matter of fact, the employer's motivation for wanting to summarily dismiss is effectively irrelevant. Where there has been a repudiatory breach by the employee that has not been waived or affirmed by the employer, the employer is not prevented from relying on that breach as justifying summary dismissal even if it was looking for a reason to justify dismissal (Williams v Leeds United Football Club [2015] IRLR 383, QBD).

12. An employer who discovers after the employee has been dismissed that the employee was guilty of a fundamental breach of contract which would have justified summary dismissal, can rely on that breach to rebut a claim of wrongful dismissal (Boston Deep Sea Fishing and Ice Co v Ansell [1888] 39 ChD 339, CA).

13. If I accept that the Claimant was wrongfully dismissed, she will be entitled to the notice pay due to her between the date of termination and the date her contract was due to expire, subject to the duty to mitigate loss.

14. In respect of the claims for unauthorised deductions of wages, s.13 ERA 1996 provides, so far as is relevant:

    (1) An employer shall not make a deduction from wages of a worker employed by him unless –
        (a) The deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
        (b) The worker has previously signified in writing his agreement or consent to the making of the deduction.

15. By virtue of s.13(6) ERA 1996, the agreement or consent of the employee referred to in s.13(1)(b) ERA 1996 must be obtained not only before the

deduction is made but also before the incident which is said to justify the deduction has occurred:

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

Findings of fact

16. Having heard the evidence and closing submissions from both parties, I made the following findings of fact.

17. The Claimant commenced employment with the Respondent as Business Centre Manager on 1 October 2018. She earned £23,000 gross per annum.

18. The Respondent is a small company engaged in the business of renting serviced offices and providing accountancy and business support services to professionals and small businesses. The serviced offices are known as Saracens House Business Centre and the Manor House. The Manor House is fully managed by the Respondent.

19. On 5 November 2018, after one month of employment, the Claimant was promoted to General Manager with an increased annual salary of £30,000 gross. As General Manager, the Claimant was ordinarily the most senior person on site.

20. The Claimant's contract of employment, dated 5 February 2019, provided that her notice period was one week or statutory notice, whichever was greater, save as in instances of gross misconduct which permitted summary dismissal.

21. The Claimant, as she readily admits, was inexperienced in the role of General Manager. Mr Barclay accepted in evidence that she informed him in November that she had never worked at that level. She was assured by Mr Barclay that he would help her with the elements of the role that she had not previously carried out. Mr Barclay accepted in evidence that the Claimant's new role required additional training.

22. Mr Barclay maintained that the Claimant had been given all necessary training to carry out the role. This, according to Mr Barclay's evidence, amounted to one 'international' conference call between the Claimant, Mr Barclay and the CEO of one of the Respondent's suppliers, JLC.

23. This was plainly inadequate. Given the Claimant's lack of experience, of which Mr Barclay was aware, she needed more training and support to carry out her new role. She was left to run operations with very little input from Mr Barclay. He did not attend the premises regularly.

24. The Claimant's inexperience and lack of training was compounded by the fact that turnover of staff at the time of the Claimant's appointment was relatively

high. Nick Hampton, the accountant who had been with the company for ten years, had left shortly before the Claimant joined. The accountant that took over from him, Mr Richmond, was in the role for only one month. Although the Claimant was not expected to carry out the role of accountant for the Respondent, the high turnover of staff in that important position made the Claimant's role more difficult.

25. Upon appointment as General Manager, the Claimant informed Mr Barclay that she had personal debt issues. A Debt Relief Order ("DRO") was in force against her and she was required to pay over the difference between her current salary and the General Manager salary (£7,000 gross per annum) whilst the DRO was in force.

26. The Claimant maintains that, as a result of this disclosure, Mr Barclay agreed that the company would 'keep back' the difference in her salary every month and pay it to her on the expiry of the DRO. She seeks payment of that sum in this claim. Mr Barclay denies making such an agreement. The Respondent maintains that the Claimant instructed the company accountant to pay the difference to her son, Brendon Heath, who was an employee of the company and who lived with the Claimant, thereby avoiding the DRO but ensuring that the Claimant continued to receive the increase in her salary. Mr Barclay's evidence was that he was made aware of, and agreed to, this arrangement because the correct payments were still being made to HMRC.

27. It is clear that, from the date the Claimant was appointed General Manager until the date Mr Heath left the Respondent's employment, he received £600 per month over and above the salary due to him. Mr Heath left the company in April 2019. From May 2019, the Claimant salary's increased. The Claimant's evidence was that she did not know why Mr Heath received the additional pay until April 2019. She suggested it might be a 'discretionary incentive'.

28. I prefer the evidence of Mr Barclay on this point. The Claimant's evidence is not credible. The difference between the Claimant's old and new salary was, with the Claimant's knowledge (and at her instruction), paid directly to her son so as to avoid the effect of the DRO.

29. Accordingly, there was no deduction from the Claimant's wages in the sum of £3,499.98 gross as alleged. She was paid that money, via her son, at her request.

30. The Claimant's failure to give credible evidence on this issue casts doubt on her credibility more generally. I have not automatically disregarded her evidence on other matters but I have approached her evidence with caution given my findings on this point.

31. The Claimant's problems with debt meant that she was struggling to meet her personal expenses. She maintains that, upon appointment as General Manager, Mr Barclay agreed that she could use a company credit card for personal purchases including to pay for fuel for her car. She further maintains that she had specific agreement from Mrs Louth, the Accounts Manager, to use the card to purchase a stairlift and to pay for repairs to her car. Both of which were purely personal expenses.

32. Mr Barclay disagrees entirely. He maintains that there was no agreement for the Claimant, or any member of staff, to use a company credit card for personal purchases, including fuel. He accepts that the Claimant was given a company credit card but maintains that it was for petty cash expenses, i.e. company expenses. Mrs Louth also disagrees with the Claimant's evidence. She notes that the Claimant was more senior to her so that it was not within her power to give the Claimant authorisation to use the credit card in this way.

33. In March 2019, Mr Barclay spoke to the Claimant about her use of the credit card. He maintains that it only came to his attention that she was using it for personal expenses when he checked the credit card statement that month and noticed that the amount owed had jumped from £50-100 per month to £1,300 plus per month. He also emailed the Claimant, recording their conversation, and stating that the card was to be used for commercial purposes only. He asked the Claimant to repay any personal expenses and then to stop using the credit card in that way.

34. In response, the Claimant asked Ms Louth to invoice her for the personal expenses and to deduct the outstanding amounts for her pay accordingly. She repeated this request in an email on 25 March 2019. This, the Respondent maintains, signifies her agreement to the consequent deduction from wages (thus satisfying s.13 ERA 1996). The Claimant did not, at the time the matter was raised with her, suggest that she had Mr Barclay's authority to use the credit card for all personal expenses, as she now claims. She did suggest that Mr Barclay had told her she could use the card to purchase fuel but subsequently sent an email suggesting she had misconstrued the information given to her.

35. Taking all of the evidence together, and noting in particular the email chain from March 2019, I am satisfied that the Claimant did not have authority to use the company credit card for personal expenses (including fuel) in the way she did. I do not find her evidence credible. Mr Barclay's strong negative reaction to the discovery is, I find, reflective of the fact that he only discovered the payments when he saw the credit card bill. The Claimant chose to use the company credit card as a personal expenses account without authorisation. Ms Louth could not give authorisation because she was junior to the Claimant. I find that the Claimant knew she did not have authorisation to use the card in this way.

36. This, by itself, is sufficiently serious conduct to constitute a fundamental breach of the Claimant's contract of employment. On discovery, however, the Respondent did not dismiss the Claimant. It took action to recover the money as set out above but did not take any disciplinary action. Viewed as an isolated breach, the Respondent had affirmed the contract by June 2019 (at the latest) when the Claimant was dismissed.

37. In my judgment the sums of £344.92 and £115.06 (£459.98 in total) are owed by the Claimant to the Respondent. I also find that the Claimant gave written consent for those sums to be deducted from her pay. She did not do so, however, until after the incident said to justify the deduction had occurred. Accordingly, the deduction falls outside the scope of authorisation contained in s.13(1)(b) ERA 1996.

38. The complaint of unauthorised deductions of wages in respect of these two deductions is, however, out of time. Claims for unauthorised deductions from wages must be made within a period of three months beginning with the date of the payment of the wages from which the deduction was made (or, where there has been a series of deductions, from which the last deduction in the series was made) (s.23 ERA 1996). The deductions were made from the Claimant's March 2019 pay. ACAS Early Conciliation did not start until 15 August 2019. No arguments have been put forward to suggest that it was not reasonably practicable to bring these claims in time (s.23(4) ERA 1996) and I can identify no reasons to extend time.

39. In March 2019, the Claimant requested a loan to Mr Barclay of £6,000 in order to carry out decoration work to her house. This was the second loan request made to Mr Barclay. Mr Barclay agreed to the first but refused the second. It is the Respondent's case that upon that refusal by Mr Barclay, the Claimant took steps to deliberately harm the Respondent's business and that her work deteriorated significantly. In particular, the Respondent maintains that the Claimant failed to follow through with promises she had made to one of the Respondent's clients, Breathable Baby, resulting in the loss of its business and that she placed a large Purchase Order to a supplier, JLC, which the company could not afford.

40. It is clear that, during the Claimant's time as General Manager, the Respondent experienced serious financial difficulties including the loss of business from Breathable Baby and the placing of an order that it could not afford. Considering all of the evidence in the round, and in particular the Claimant's lack of experience and training as set out above, I am not satisfied that the Claimant deliberately sabotaged the business as alleged by the Respondent. I am also not satisfied that the Claimant's actions, in respect of her work specifically, were such as to amount to gross misconduct. They were, in my judgment, matters of capability and performance which ought to have been addressed as such.

41. In May 2019, the Claimant informed Mr Barclay (by telephone) that three computer monitors had stopped working. Mr Barclay authorised payment for three new monitors. When he visited the office the following week, the monitors remained unopened. The Claimant informed Mr Barclay that they were not needed and he instructed her to return them. She does not dispute that she did not do so within the permitted returns window. The Respondent maintains that the Claimant subsequently arranged for one of the monitors to be sold at a large discount to Cash Converters and that the money from the sale was never paid back to the Respondent. The Claimant did not deny failing to return the monitors within the permitted returns window but maintained that it was not her but one of her staff members who sold one of them. She denied having gained anything from that sale.

42. I find that the Claimant failed to comply with Mr Barclay's instruction to return the monitors. I also find that, even if it was not her but another colleague who sold the monitors, she must have authorised or permitted the sale to take place. If not, I would have expected to see evidence produced by the Claimant addressing the issue with the employee in question. I find that the Claimant was involved in the unauthorised sale of the monitors. This is, I find,

a further act of dishonesty which, by itself or taken in conjunction with the dishonest use of the company credit card, constitutes a fundamental breach of the Claimant's contract.

43. On 20 May 2019, the Claimant resigned from her employment giving three months' notice in accordance with her contract. Her employment was due to terminate on 19 August 2019.

44. In May/June 2019, Mrs Louth raised concerns with Mr Barclay that she had been instructed by the Claimant to authorise the payment of large sums of money to a maintenance contractor for work allegedly undertaken at the Manor House. Mrs Louth alleged that the work was unnecessary and unjustified. Mrs Louth queried the payments with the Claimant and the Claimant insisted on payment. Mrs Louth's evidence, putting the figures into context, was that Manor House had a turnover of £31,000 between January and June 2021 and that the invoices for the maintenance work amounted to £10,401; 24% of that turnover. She believed that the Claimant was abusing her position to organise unjustified payment of funds from the company to someone she was in a personal relationship with.

45. The Claimant denies inflating invoices as alleged or at all. In support of her position, she relies on a statement from the contractor dated 18 December 2019 in which he maintains that it was the owners of the Manor House who requested him to carry out maintenance work. The contractor did not attend the hearing to give evidence and accordingly I place very little weight on his statement. In any event, he does not address the allegations that his invoices were inflated.

46. Mrs Louth also maintained that she raised concerns at this point with Mr Barclay that the Claimant had been engaging in sexual activity during working hours with the same contractor. She maintained that a tenant of commercial premises in the Manor House (who she named in evidence) had raised a verbal complaint with her about the consequent noise. The Claimant and Ms Louth gave contradictory evidence as to whether or not the conduct occurred. The Claimant relied, again, on the statement from the contractor. As set out above, I am unable to place any real weight on this statement because his evidence has not been tested. In any event, he does not expressly deny engaging in sexual activity with the Claimant during working hours or on working premises. On balance, I prefer the evidence of Ms Louth. I find that she received a complaint about the Claimant's actions. I also find that the Claimant openly spoke to Ms Louth and others in the office about her activities. Ms Louth's evidence on the issue was clear and consistent. The Claimant identified no reason why Ms Louth would be fabricating her evidence. This conduct, whether in isolation or with the acts of misconduct identified above, constitutes a fundamental breach of the Claimant's contract.

47. I do not accept, however, that this issue was raised with Mr Barclay in May/June 2019 as Ms Louth claims. Text messages in the bundle suggest that the issue was not raised until 29 June 2019.

48. On 19 June 2019, Mr Barclay visited the office and held a meeting with the Claimant. By this point Mr Barclay was very concerned about the Claimant's performance and ability to carry out the role of General Manager. No minutes

were taken of the meeting. The Claimant was not given any warning of the meeting. She was not told in advance what was to be discussed and was not given the opportunity to attend accompanied. This is not, however, a claim for unfair dismissal and issues of unfairness are irrelevant to the issues I have to decide.

49. The parties were broadly in agreement about the nature and topic of conversation. Mr Barclay raised various concerns about the Claimant's actions, including the loss of business and the purchase order. Mr Barclay confirmed that if the Claimant left the premises immediately she would be paid until the end of the month and would get a good reference. The parties were in agreement that the Claimant was dismissed at this meeting. I find that the Claimant was dismissed but that Mr Barclay was giving the Claimant the opportunity to leave without a formal letter to that effect.

50. I do not accept that the alleged sexual activity during working hours and on work premises was discussed at this meeting or was in Mr Barclay's mind when the Claimant was dismissed. As above, text messages between the Claimant and Mr Barclay in the bundle dated 29 June 2019 suggest that this issue was not raised with the Claimant until after her dismissal. This does not prevent the Respondent from relying on it as a breach sufficient to rebut the claim of wrongful dismissal (applying Boston Deep Sea Fishing).

51. The Claimant was paid up until 30 June 2019.

52. On 12 July 2019, the Claimant lodged a grievance challenging her dismissal. She had not, at this stage, received formal notification of her dismissal or the grounds for it. In the grievance, she alleged bullying and harassment by Mr Barclay, unauthorised deductions from wages (as set out above) and a breach of her contract of employment.

53. By letter dated 20 July 2019, the Respondent responded to the grievance. The Claimant was invited to, and did attend, a grievance meeting on 7 August 2019. The meeting was chaired by Mr Barclay and adjourned part-way through so that the Claimant could contact ACAS and attend with a legal representative.

54. In the wake of that grievance, and it having become clear that the Claimant was not going to leave without challenge as had been expected following the meeting on 19 June 2019, the Respondent sent the Claimant a letter (dated 20 July 2019 but not received until August 2019) confirming her dismissal for gross misconduct. The letter set out eight allegations of misconduct:

    (a) Using company time and managed property for the purpose of sexual activity in breach of the requirement to maintain professional standards
    (b) Allowing a contractor to charge the company inflated prices and insisting on payment when challenged
    (c) Failing to carry out specific instructions to maintain good commercial relationships with suppliers resulting in a significant loss of business
    (d) Failing to take necessary action to develop sales
    (e) Making casual and unauthorised parking arrangements
    (f) Using the company credit card for personal gain
    (g) Placing an unauthorised order for $80,000 knowing that the company did

not have the necessary funds to pay for it
(h) Colluding in the unauthorised sale of company property.

55. The allegation in respect of unauthorised parking arrangement was not explained until I heard evidence from Mrs Louth. This appeared to concern an individual from a different company who was using a car parking space belonging to the Respondent for free, apparently with the Claimant's agreement. I was given very little detail of this allegation and I am not satisfied, on balance, that the Claimant was guilty of any wrongdoing in this regard.

56. I find, on the balance of probabilities and taking all of the evidence into account, that the Claimant committed a repudiatory breach of contact justifying summary dismissal. I do not agree with the Respondent that all of the allegations set out above occurred as alleged or amounted to gross misconduct. It is enough, however, that one such incidence of gross misconduct occurred (and was not affirmed). In my judgment, the Claimant's use of the company credit card for personal expenses was a fundamental breach of her contract justifying summary dismissal. That breach, viewed by itself, was affirmed by the Respondent but must be viewed together with her misconduct in using her position within the company to raise inflated invoices for a contractor, colluding in the unauthorised sale of company property and engaging in sexual activity during working hours.

57. I find that the formalisation of those allegations in a dismissal letter dated 20 July 2019 was a reaction to the Claimant raising a grievance. Having found that the conduct did occur, however, the Respondent's motivation is irrelevant (Williams v Leeds United Football Club).

Conclusions

58. In light of the above, my conclusions are as follows:

(a) The Claimant was not dismissed in breach of her contract. The Claimant committed a fundamental breach of her contract which was accepted by the Respondent.
(b) The Respondent did not make an unauthorised deduction from the Claimant's wages between 5 November 2018 and 30 June 2019 in the sum of £3,499.98 gross. That money was paid to the Claimant via her son.
(c) The Respondent did make two unauthorised deductions from the Claimant's wages in March 2019 in the sum of £459.98 gross. Although the sums were due to the Respondent, proper authorisation had not been given to deduct them from the Claimant's wages. The Tribunal does not, however, have jurisdiction to deal with these claims as they were brought outside of the statutory three month time limit.
(d) As the Tribunal does not have jurisdiction to deal with the claims for unauthorised deductions from wages, it does not have jurisdiction to make an award for consequent loss. Even if it did have jurisdiction to make such an award, it would not be appropriate in all the circumstances to compensate the Claimant for any loss. The deduction, although not made in accordance with s.13 ERA 1996, was authorised by the Claimant and

was made in respect of money owed by her to the Respondent.

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Employment Judge Smeaton

Date: 24 May 2021

Judgment sent to the parties on

27 May 21

For the Tribunal office