EMPLOYMENT TRIBUNALS

Claimant: Ms C Wood

Respondent: Rejoy Beauty Limited

Heard at: **Newcastle (CVP)** **On:** **4 & 5 May 2021**

Before: (1) Employment Judge A.M.S. Green
(2) Ms E Wiles
(3) Mr S Wykes

Representation
Claimant: In person
Respondent: Mr A Willis - Solicitor

REASONS

Introduction

1. The respondent has requested written reasons.

2. For ease of reference we refer to the claimant as Ms Wood and the respondent as Rejoy.

3. We conducted a final hearing on 4 & 5 May 2021. This was a remote hearing using the CVP platform. The following people adopted their witness statements and gave evidence:

    a. Ms Wood
    b. Ms Chantelle Weatherill
    c. Ms Annie Rose Thompson
    d. Ms Erin Harper
    e. Mrs Diane Harper

4. We worked from a digital bundle. Mr Willis and Ms Wood made closing oral submissions. The Tribunal deliberated on 5 May 2021.

The Claims

5. In a claim form presented to the Tribunal on 20 February 2020, Ms Wood made the following claims: unfair dismissal, detriment for taking time off for dependents and unlawful deduction from wages.

6. It is common ground between the parties that Ms Wood cannot make a claim for ordinary unfair dismissal because she did not have the requisite two years qualifying service to do so. Her claim is for automatic unfair dismissal, which she says arose because she asked to take leave for family reasons. She also claims that she suffered detriment for taking time off for her dependent children. The detriment that she identifies as her suspension and/or her dismissal.

7. Ms Wood settled her claim for unlawful deduction from wages prior to this hearing.

Issues

8. At a case management hearing on 30 November 2020, the Employment judge identified the following issues which remain to be determined by the Tribunal:

   Unfair dismissal

   a. What was the reason for Ms Wood's dismissal?

   b. Was it for misconduct as asserted by Rejoy in which case her claim will fail as she has insufficient period of service to pursue a claim for ordinary unfair dismissal?

   c. Alternatively, was her dismissal because she was taking leave for family reasons? If so, did Rejoy act reasonably in dismissing Ms Wood for that reason and was dismissal a reasonable response in the circumstances of the case? Might Ms Wood have been fairly dismissed in any event and, if so, what the chance of that occurring and/or did the claimant contribute in any way to her dismissal.

   Detriment for taking time off for dependants

   d. Was Ms Wood subjected to a detriment for taking time off for dependants? The detriment upon which she relies is suspension and/or her dismissal?

Findings of fact

9. Having considered the evidence, we make the following findings of fact.

10. Ms Wood started her employment at Rejoy as a beauty therapist on 12 June 2019. Rejoy operates a small salon and, at the time, employed approximately 10 people. Ms Erin Harper is a director and owns the business. Ms Chantelle Weatherill is the salon manager.

11. A contract of employment was issued to Ms Wood. The copy that was exhibited in the bundle is unsigned although the parties agree that the terms of that agreement governed the relationship between Ms Wood and Rejoy other than the hours of her work which were reduced from 21 to 16.

12. Ms Wood has two daughters who were 11 and 4 years old at the relevant time. There is no dispute that they are dependent on her. At that time, she was in a relationship with her former partner. His mother provided childcare support which involved taking the children to school in the morning and collecting them from school in the afternoon. Her former partner's mother would also look after the children until the Ms Wood, or her partner came home from work. This was a regular arrangement which enabled her to go to work. Her own mother occasionally provided childcare support. This was a backup arrangement.

13. Ms Wood was not originally rostered to come into work on 19 December 2019 [116]. However, she subsequently agreed to come into work on 19 December 2019 from 12 noon to 8pm. On 10 December 2019 she sent a message to Ms Weatherill to say that she had a hair appointment and asked if she could come into work from 3pm to 8pm. Ms Weatherill agreed. There was no suggestion that this was an issue for Rejoy, and the tone of the messages was friendly.

14. On 29 October 2019 Rejoy sent Ms Wood an email with their sick pay policy [114]. This requires the employee to give notice as early as possible by telephoning the salon if they are sick or unable to work.

15. On 19 December 2019, whilst the Ms Wood was at the hairdresser, her partner's mother telephoned her to say that because of ill health, she would no longer be able to collect the children after school and look after them. The call was at about 11:30 am according to the Ms Wood's evidence.

16. At 12:56 on 19 December 2019, Ms Wood sent a Facebook message to Ms Weatherill [121] saying:

> *Hi Chantelle, I'm due in work for 3pm, Bens mam was suppose [sic] to picking the girls up from school for me and having them till Ben finishes work, she's just rang me as she's unable to collect them & have them due to personal reasons. I'm not going to be able to get in till 6pm when Ben finishes work? I don't know what els [sic] I can do? Not sure if I can come in 9am in the morning for my appointments really stressed at the minute as I hate letting people down x*

15 Ms Weatherill replied, asking Ms Wood to call her [122]. She telephoned Ms Weatherill although it was there was conflicting evidence when that call

took place. We believe that it was sometime between 12:56 and 14:16 (when the Ms Wood sent another message). Ms Wood initially spoke to Ms Weatherill, who passed her over to Ms Erin Harper to continue the call. It was unclear precisely how long the call lasted but we believe, having heard all three women's' evidence, that the telephone call lasted less than 5 minutes. In her oral evidence, Ms Weatherill told the Tribunal what she understood the purpose of the call was. She was asked the question twice and eventually said that it was to inform the salon that Ms Wood was not coming in. I asked her what the reason for that was, and she replied it was because she was having childcare difficulties. In her evidence Ms Erin Harper said: "I came into the salon, Chantelle asked me to take over, the claimant told me that she was not coming in because her mother-in-law had let her down over childcare. She was trying to tell us that she was coming in later." In paragraph 13 of her witness statement, Ms Erin Harper states that Ms Wood offered to bring her children into the salon so that she could work her shift. In paragraph 16 of her witness statement, Ms Erin Harper stated that she suggested that Ms Wood could bring her children into the reception area until she could organise for them to be collected. She goes on to say that five hours is a long shift for them to sit through. This was confirmed by her when she was asked about this by Mr Wykes. From this we conclude that Ms Wood was told she could not bring her children in to the salon for the whole duration of her shift. It was not disputed Ms Wood terminated the call. She admitted that because she was highly stressed out.

16 At some time immediately before 14:16, Ms Wood received automated notifications on the Booksy system that her appointments were being cancelled. Rejoy uses Booksy to book and manage customer appointments.

17 This prompted Ms Wood to send another message at 14:16 [122] via a Facebook message to Ms Weatherill to say that she would be coming in "tomorrow for my appointments, I would like to book a meeting with Erin also when I can please x".

18 At 14:44, Ms Weatherill replied via Facebook messaging to say "we wont require you tomorrow now x"[122]

19 Ms Wood replied asking why that was, and also referred to Saturday and Tuesday. Ms Weatherill replied at 15:02 to say that Erin would be in touch in the New Year [123].

20 At 15:24 Ms Word replied to Ms Weatherill saying :

> *Sorry I know your busy Chantelle I'm contracted to 16 hours each week, they've been taken off me because I couldn't get into work as my childcare let me down lastminute which is out of my control. Can you rnake a appointment with Erin before the new year as I'd like to discuss this. Thanks x*

21. The tone of this email is friendly and suggests that the Ms Word did not understand the situation that she was in.

22. In paragraph 19 of her witness statement, Ms Erin Harper says that they did not know if Ms Word was going to "show for her shift the next day". She goes on to say the salon would have clients with appointments and no service to provide, which would "ruin our reputation and profits". She claims that they did not cancel the appointments and after Ms Wood put her phone down, they began to move clients to other therapists because they did not know whether she was coming in or not. The booking application, Booksy, would automatically notify staff when clients are moved. We do not accept Ms Harper's evidence in this regard for the reason that at 14:16 the claimant had told Ms Weatherill that she would be coming in for her appointments the following day.

23. In paragraph 23 of her WS, Ms Harper states that later on 19 December 2019 she telephoned Ms Wood to tell her that she had decided to suspend her on full pay because "my Team and I felt uncomfortable at the possibility of her coming back". Ms Harper told Ms Wiles that she had no intention of getting rid of Ms Wood and she did not think it would be the outcome. She then told me that she thought everything would be sorted out at the disciplinary meeting on 10 January 2021. In paragraph 25 of her witness statement she says that she did not explain why Ms Wood was being suspended and that she would receive a letter in due course.

24. After the call with Ms Harper, the Ms Wood sent her a WhatsApp message. We think it is important to quote it in full:

> *Hi Erin, I thought I would give you a message as I'm feeling very stressed and awkward regarding everything with work at the moment and I know it's not the time of year for this as you also will be in the salon. I just feel very hurt with our conversation over the phone when I called to discuss the reaaons [sic] I couldnt get into work as I was let down with childcare last minute and was totally stuck. I even ask if I could bring the girls into work with me as I hate letting people down That's not what I'm like you know this, situation was out of my control, I've come into work before Poorly myself as that's life you have to get on with it but when something is out of control what I meant to do. I feel very hurt to be honest with you comments you made where you said give give give and don't receive anything back from me? How? Why? That's what I'm struggling to understand what I don't give? Also you said you are letting me go early on Saturday (I did email and ask before as no one was booked in the last half an hour before my finish time) I do everything I should be doing regarding my work and I feel I go above and beyond and help others in the salon when I can because that's part of my job, I explained over the phone the last 4 times I've been into work I've gone 8/9 hours without a break/drink/toilet because I haven't had time but I've not once complained about this because I feel that's part of my job again to as salons are always so busy. You then mentioned "how*

do you think the other girls feel" I never once mentioned the other girls in our conversation and never ever would, of course I understand they feel the same as I do, that's part of the job. I have a lot of things going on at home which I don't want to discuss, then this work has made everything so stressful at the minute I absolutely love my job at rejoy, I love the salon I love everyone I work with there, it's hurt me that I'm suspended which I don't understand what reasons I messaged forward/phone to inform you my reasons for not been able to get into work and the conversation got to me at the end of the phone call as it hurt me the comments you said so resulted me putting it down which I'm very sorry for and apologise I know I shouldn't have done that I know it's not very professional. Will speak with you in January and I hope you have a lovely Christmas xx

21. We believe that this text shows that Ms Wood felt remorseful for her behaviour during the telephone call on 19 December 2019. It does not show that she was acting in an argumentative manner or could make a person feel uncomfortable. It does not demonstrate that the relationship had irretrievably broken down. It offered a way forward. It does show her frustration she had with the problems she had with her childcare arrangements falling through on the day in question.

22. On 19 December 2019, Ms Harper wrote to Ms Wood formally suspending her [119]. She told the Tribunal that it was a standard letter produced by their HR advisor. The letter was sent in Ms Harper's name. The letter says, amongst other things:

Further to our telephone conversation on 19.12.2019, I am writing to confirm that you are suspended with immediate effect on full pay to allow the Company to carry out investigations into allegations that have been made against you.

Serious misconduct

....

Should the investigation indicate that there is some substance to the allegation(s) you will be required to attend a disciplinary hearing. You will be provided with all relevant documentation prior to the hearing and you will be notified in writing of the time, date and venue.

23. Although the words "serious misconduct" are used, the letter does not specify the allegations against Ms Wood. The letter indicates that allegations had been made against Ms Wood but says no more about who made those allegations. On hearing Ms Erin Harper's and Ms Wood's evidence, we are satisfied that no further investigations were carried out or that Ms Wood knew what allegations were being made against her. This is supported by the lengthy WhatsApp message quoted above. We find that operative reason for the suspension was a cooling off period and for

things to be sorted out in January and at a time before any formal disciplinary proceedings had been instigated against Ms Wood. This was clear from Ms Harper's evidence. Ms Harper said that she decided to suspend the claimant because she was worried about the atmosphere, she wanted things to cool down and she wanted to focus on sorting out the clients before Christmas. The letter was based on what was given to Rejoy by an HR consultant and she accepted that wording could be misleading, and she said on the phone to the Ms Wood that the suspension would last until after Christmas. Despite was written in the letter, we find that the suspension had nothing to do with allegations or carrying out investigations.

24. On 7 January 2020, Ms Diane Harper (Ms Erin Harper's mother) wrote to Ms Wood inviting her to attend a disciplinary hearing to discuss the following matter(s) of concern "serious misconduct" [127]. The hearing was scheduled for 10 January 2020 and was to be chaired by Ms Weatherill. Mrs Harper attached a description of the telephone conversation of 19 December and a copy of the email sent on 29 October 2019 detailing the procedure for notifying sickness or absence. Ms Wood was warned that if the matters of concern were substantiated, procedures according to clause 8 of her contract may be followed (i.e. dismissal). She was advised of her right to be accompanied.

25. Ms Wood prepared a statement in support of her position for the disciplinary hearing [129]. In it she says, amongst other things:

> *In the hearing letter I received, Erin HASN'T stated that during our phone call she said 'she's feels she gives gives gives and doesn't get anything back from me' which is then I replied 'how do I not give anything back'? When I come into work when poorly my self if I say I will be in work I will be, this is out of my control, the only time I haven't is when my girls have been poorly or if I've been let down by childcare' This is the first time I have been let down regarding childcare. I also stated 'I have worked the last 3 working days (which I haven't been late for) I've not had a break and work over as it's been so busy but I have never complained about this' (this was me trying to explain how I give the salon)Erin then replied 'how do you think the other girls feel' I then replied 'I haven't mentioned the other girls' I did end my phone call as I felt I couldn't and wasn't able to get my point across and asking for a meeting with Erin as I didn't want to argue over the phone. I feel I wasn't speaking in a loud tone, nor aggressive, I feel I did speak in a frustrated manner as I was feeling very stressed I couldn't get into work and Erin wasn't letting me explain this.*
>
> ...
>
> *I feel very frustrated I had been suspended right before Christmas with no explanation/reasons. This situation was out of my control that I couldn't get into work as I got let down last minute with no childcare. It's made me feel very stressed, upset and on edge over the festive period that i didn't have a job to return too. I'm heartbroken it has came to this, this is not what I wanted to happen. I'm not the type of person*

that want conflict/awkwardness/arguments/disagreements. This job is my passion my forever career for my self, my girls and my family's future. I would do anything for anyone and help anyone out that's in need, that's the kind of person I feel I am. I absolutely love my job, my work colleagues ,and also my clients.

26. We find that this was an honest statement that shows Ms Wood's frustration about what happened. It does not indicate that she shows "A worrying aggressiveness in contact when challenged and unreliability is the main concern for our business staff & clients safety & needs" as claimed by Rejoy in their Statement for Disciplinary Hearing" [128].

27. The disciplinary hearing was held on 10 January 2020. Ms Weatherill chaired the hearing; Ms Wood attended with a colleague, Ms Annie Rose Thompson. Mrs Harper took notes [131a]. Rejoy and Ms Wood's statements were read out. It is suggested that Ms Wood was dismissive and appeared not to feel that she had done anything untoward. It is noted that Ms Wood said that she felt the suspension was out of proportion .

28. We also note the disciplinary hearing consideration [131] which was signed by Ms Weatherill. The theme in this note is the lack of apology and Ms Wood not showing remorse. It was assumed that because she failed to apologise to her colleagues, she would behave in a similar manner towards the Rejoy's clients. We have not seen evidence to reach such a conclusion. In her oral evidence, Ms Erin Harper suggested that if Ms Wood had apologised and shown remorse, she would not have been dismissed. It is noteworthy that the notes of the meeting do not refer to or acknowledge the fact that Ms Wood had already shown remorse and apologised in her earlier WhatsApp message.

29. On 15 January 2020, Ms Weatherill wrote to Ms Wood to notify of the outcome of the disciplinary hearing. The decision was to dismiss her with effect from 10 January 2020 for gross misconduct. This was a summary dismissal. She was notified of her right to appeal.

30. Ms Wood did not exercise her right of appeal because she did not think anyone at Rejoy was trustworthy and that the salon's management had "ganged up against her".

Applicable Law

31. Clause 9.3 of Ms Wood's contract of employment permits Rejoy to suspend Ms Wood in two circumstances. It says:

> *We reserve the right to suspend you with pay for no longer than is necessary to investigate any allegation of misconduct against you or so long as is otherwise reasonable while any disciplinary procedure against you is outstanding.*

32. The relevant statutory provisions are the Employment Rights Act 1996 ("ERA") and Maternity and Parental Leave etc Regulations 1999 ("MPL").

33. The circumstances in which an employee may take time off for dependants are set out in ERA section 57A. ERA, section 57A(1) states that an employee is entitled to be permitted to take a reasonable amount of time off during the employee's working hours in order to take action which is necessary:

    a. to provide assistance on an occasion when a dependant falls ill, gives birth or is injured or assaulted;

    b. to make arrangements for the provision of care for a dependant who is ill or injured;

    c. in consequence of the death of a dependant;

    d. because of the unexpected disruption or termination of arrangements for the care of a dependant; or

    e. to deal with an incident involving a child of the employee which occurs unexpectedly in a period during which an educational establishment is responsible for the child.

34. Certain reasons for dismissal can be described as "automatically unfair" in the sense that, if one of these reasons is established, the Tribunal must find the dismissal unfair. Unlike ordinary unfair dismissal, considerations of the reasonableness of the decision to dismiss is entirely irrelevant when it comes to claims based on any of the statutory provisions that render a dismissal automatically unfair. In such cases, the focus of the Tribunal's enquiry will be on establishing, on the evidence, whether the prohibited reason was the reason or the principal reason for dismissal. If it was, then there is no option but for the Tribunal to find the dismissal unfair.

35. There are numerous categories of automatically unfair reasons for dismissal emanating from several different statutory sources. An employee will be regarded as automatically unfairly dismissed if the reason or principal reason for the dismissal (or selection for redundancy) is connected with the fact that the employee took or sought to take time off under ERA, sections 57A and S.99(3)(d) Reg 20(3)(e)(iii) MPL.

36. In **Qua v John Ford Morrison 2003 ICR 482, EAT**, the EAT held that an employment tribunal should ask itself four questions in order to determine whether an employee has been automatically unfairly dismissed for taking time off for dependants. These are:

    a. Did the employee take time off or seek to take time off from work during his or her working hours? If so, on how many occasions and when?

b. If so, on each of those occasions did the employee:

   i. as soon as reasonably practicable inform the employer of the reason for the absence; and

   ii. tell the employer how long he or she expected to be absent?

   iii. If not, were the circumstances such that the employee could not inform the employer of the reason until after he or she had returned to work?

   If on the facts the tribunal finds that the employee did not comply with the requirements of ERA, section 57A(2), then the right to take time off work under subsection (1) does not apply. The absences would then be unauthorised, and the dismissal would not be automatically unfair.

c. If the employee did comply with the above requirements, then the following questions arise:

   i. did the employee take or seek to take time off work in order to take action which was necessary to deal with one or more of the five situations listed at paras (a) to (e) of ERA section 57A(1); and

   ii. if so, was the amount of time off taken or sought to be taken reasonable in the circumstances?

d. If the employee satisfies questions c(i) and (ii), was the reason or principal reason for his or her dismissal that he or she had taken or sought to take that time off work?

e. If the answer to the final question is in the affirmative, then the employee is entitled to a finding of automatic unfair dismissal and the tribunal should consider whether to order that the employer reinstate or re-engage the employee, or whether to make an award of compensation to the employee.

37. This interpretation was approved in **Cortest Ltd v O'Toole EAT 0470/07**. The online guidance on the right to time off for dependants makes it clear that the right is intended to cover *unforeseen* matters and would not cover, for example, a parent taking a child to a hospital appointment. It suggests that if employees know in advance that they are going to need time off, they may be able to arrange with their employer to take annual leave. Alternatively, if the circumstances behind the need to take time off relate to the employee's child, the employee may qualify to take unpaid parental leave.

38. If there are multiple reasons for dismissal, the Tribunal must be satisfied that the prohibited reason is the principal reason for the dismissal. A claim for automatically unfair dismissal will not succeed if the prohibited reason is merely a subsidiary or indirect reason for dismissal.

39. Because Ms Wood lacks the requisite continuous service to claim ordinary unfair dismissal (i.e. two years) she has the legal burden of proving, on a balance of probabilities, that the reason for her dismissal was an automatically unfair one. In **Smith v Hayle Town Council 1978 ICR 996, CA**, Lord Denning MR said that tribunal should weigh the evidence according to the "proof which it [is] in the power of one side to have produced and in the power of the other side to have contradicted". In other words, once an employee has presented some prima facie evidence that he or she was dismissed for the prohibited reason, it is up to the employer to produce evidence to the contrary. A similar opinion was advanced by the EAT in **H Goodwin Ltd v Fitzmaurice and ors 1977 IRLR 393** where it was held that tribunal should deal with an employee's alleged reason first but should not dismiss the claim without hearing evidence of the employer's stated reason because if the latter reason was unproved, it could bolster an employee's otherwise weak allegation.

40. A "reason for dismissal" has been described as "a set of facts known to the employer, or it may be of beliefs held by him, which caused him to dismiss the employee" (**Abernethy v Mott, Hay and Anderson 1974 ICR 323 CA**). Ordinarily, when identifying the employer's reason for dismissal, courts need generally to look no further than the reasons given by the appointed decision-maker. In **Orr v Milton Keynes Council 2011 ICR 704 CA** a case concerned with the question of reasonableness of dismissal rather than the reason for it, the Court of Appeal held that it is the person deputed to carry out the employer's functions whose knowledge or state of mind counts as the employer's knowledge or state of mind.

41. In certain (albeit rare) circumstances, however, the person who takes the decision to dismiss may be misled or manipulated into adopting an invented reason for dismissal by a manager or other person in a position of authority who has a hidden (prohibited) reason for procuring the dismissal. This situation was examined by the Supreme Court in **Royal Mail Group Ltd v Jhuti 2020 ICR 731, SC**. In that case J's line manager decided that she should be dismissed because of a protected disclosure but hid this reason behind allegations of poor performance that were adopted in good faith by the decision-maker. Upholding J's claim for automatically unfair dismissal, the Supreme Court concluded that where the real reason for the dismissal is hidden from the decision-maker behind an invented reason, it is a court's duty to look behind the invention. In that case, therefore, the hidden reason could be attributed to the employer.

42. Going behind the reason is an exceptional circumstance. Most employees will contribute to the decision-makers enquiry. The employer will advance the reason for the potential dismissal and the employee may well dispute it and/or suggest another reason for the employer's stance. The decision-

maker will generally address all rival versions of what has prompted the employer to seek to dismiss the employee in the first place and, in reaching a decision to dismiss, will identify the reason for this. In most cases, therefore, it will still only be the reasons of the decision-maker that will be relevant to an unfair dismissal claim.

43. We now turn to detriment. An employee is entitled not to be subjected to any detriment by any act, or any deliberate failure to act, by his or her employer because he or she took or sought to take time off under ERA sections 57A — S.47C and regulation 19 MPL Regulations. 'Detriment' potentially covers a wide range of unfavourable treatment, including failure to promote, denial of training or other opportunities, unjustified disciplinary action and reduction in pay. In **Royal Bank of Scotland plc v Harrison 2009 ICR 116, EAT**, a mother who had to take a day off work when she was unable to make alternative childcare arrangements was subjected to an unlawful detriment when her employer issued her with a warning. The EAT held that, for an employee to enjoy the right to time off because of a change in arrangements for the care of a dependant under ERA, section 57A, the change need not be sudden and unexpected, merely unexpected. The word 'unexpected' did not imply any temporal element. The verbal warning was held to amount to a detriment, and the three-month time limit was found to run from the date of the warning, not the date the employee was refused time off.

44. In **Ministry of Defence v Jeremiah 1980 ICR 13, CA** (a sex discrimination case), Lord Justice Brandon said that detriment meant simply 'putting under a disadvantage', while Lord Justice Brightman stated that a detriment 'exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment'. This view was approved by the **House of Lords in Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL** (also a sex discrimination case), where their Lordships emphasised that a sense of grievance which is not justified will not be sufficient to constitute a detriment.

45. It would seem, therefore, that the term 'detriment' is meant to be all-embracing in the sense that it would be unlawful for an employer to subject an employee to any adverse treatment for a prohibited reason.

46. The wording of the MPL Regulations makes it clear that employees have the right not to be subjected to any detriment for having exercised or sought to exercise one of the rights to family leave. Thus, the mere fact that a detriment arises is insufficient — there must be a link between the employer's act (or deliberate failure to act) and the exercise of the right. However, an employee does not have to show that the detriment was deliberately inflicted or that the employer acted with any malice.

47. In any detriment claim under section ERA, section 47C, it is for the employer to show the ground on which any act, or deliberate failure to act, was done (ERA, section 48(2)). ERA, section 48(2) is easily

misunderstood. It does not mean that, once a claimant asserts that he or she has been subjected to a detriment, the respondent (whether employer, worker or agent) must disprove the claim. Rather, it means that once all the other necessary elements of a claim have been proved on the balance of probabilities by the claimant — i.e. that there was a request for time off for dependants, there was a detriment, and the respondent subjected the claimant to that detriment — the burden will shift to the respondent to prove that the worker was not subjected to the detriment on the ground that he or she had made a request for time off. If an employment tribunal can find no evidence to indicate the ground on which a respondent subjected a claimant to a detriment, it does not follow that the claim succeeds by default.

48. If an employment tribunal upholds a complaint of detriment relating to time off under ERA section 57A, it will generally make an award for injury to feelings. An example is **Naisbett v Npower Ltd ET Case No.2502795/12**. In that case, in the period between March 2011 and February 2012, N had to take a total of seven days' absence to care for her infant son when he was too ill to attend nursery. On each occasion, she followed the employer's procedure on time off for dependants, and the leave was authorised by a manager. After the final absence, the employer invited N to a capability meeting where she was issued with a 'first written notification of concern' and warned that she could face dismissal if she had further unsatisfactory attendance due to time off for dependants. N complained to an employment tribunal that she had been subjected to a detriment for exercising her rights under ERA section 57A. The tribunal upheld the claim, finding that the time off that N sought was both reasonable and necessary — there was nobody else available to look after her son in these circumstances. It recognised that N had not suffered any financial loss, but nonetheless considered that the written warning was a detriment because it could be taken into account in future disciplinary proceedings or when N applied for promotion. She was awarded £1,000 compensation for injury to feelings.

49. In this case, Ms Wood has cited her suspension and her dismissals as instances of detriment. She cannot claim that her dismissal was a detriment because, in the case of employees, if the detriment amounts to a dismissal, it is specifically excluded from the provisions relating to detriment by regulation 19(4) MPL Regulations, as such dismissals are dealt with separately under ERA, section 99.

50. Where an employment tribunal finds a detriment complaint under ERA, section48 well founded, it must make a declaration to that effect (ERA section49(1)(a)). In addition, the tribunal may make an award of compensation ERA, section 49(1)(b). Any such award will be the amount the tribunal considers 'just and equitable in all the circumstances' of the case, having regard to:

a. the infringement to which the complaint relates ERA, section 49(2)(a); and

b. any loss which is attributable to the act or failure to act which infringed the complainant's right not to be subjected to a detriment ERA section, 49(2)(b).

51. The Tribunal may make an award for injury to feelings where detriment has been established. In doing so should adopt the general guidelines that apply to discrimination claims, which were set out by the **Court of Appeal in Vento v Chief Constable of West Yorkshire Police 2003 ICR 318, CA**. These guidelines provide for three broad bands: a top band applicable to the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment; a middle band applicable to serious cases that do not merit an award in the higher band; and a lower band applicable to less serious cases, such as where the act of discrimination is an isolated or one-off occurrence. The applicable bands for 2019-2020 were:

Lower band: £900 - £8800
Middle band: £8,800 - £26,300
Upper band: £26,300 - £44,000

Discussion and conclusions

52. Applying the law to the facts we make the following findings relating to Ms Wood's claim for automatic unfair dismissal. Applying the test in **Qua,** Ms Wood sought to take time off during her working hours on 19 December 2019.

53. We believe that Ms Wood informed Rejoy as soon as reasonably practicable what the reason was for her absence. Mr Willis suggested that she had not done so. We disagree. On the evidence, she first knew of the difficulties with her childcare arrangements at about 11.30 am. She notified Rejoy at 12:56 by Facebook messaging, (i.e. 1 hour 16 minutes later). This was more than hour before her shift was scheduled to begin. She followed this up with a telephone call to Ms Weatherill. We accept that the Ms Wood told Rejoy that she could bring in her children into the salon after collecting them from school. It is reasonable to infer that she would be late coming into work as a consequence. She intended to come into work the following day as normal. Consequently, we find that Ms Wood complied with the requirements of section ERA section 57A(2). The right to take time off work under subsection (1) applied.

54. Ms Wood sought to take time off in order because of the unexpected disruption or termination of arrangements for the care of her two dependent children caused by her partner's mother being unable to collect them from school and to look after them until Ms Wood or her partner returned home from work. This is a reason listed in ERA, section

57A(1)(d). She was only addressing the implications on one 5-hour shift. Given the age of her children, it would not be reasonable to suggest that they could be left at home un-attended. The amount of time she was seeking off was reasonable under all the circumstances. If she could not bring her children in, the least she was asking for was 3 hours off until 6pm or, at most, not to work the 5-hour shift at all.

55. According to the dismissal letter, the stated reason for dismissing Ms Wood was gross misconduct. It was also clear that Rejoy hoped that it would not be necessary to dismiss Ms Wood if she apologised and showed remorse. Rejoy hoped that the suspension period between 19 December 2019 and 10 January 2020 would allow for a cooling off and facilitate that outcome. The fact that Rejoy believed that she did not apologise or show remorse at the disciplinary hearing was the trigger for the decision to dismiss her. We remind ourselves that this is not an ordinary unfair dismissal case where we would be looking at, amongst other things, procedural fairness and reasonableness. Under those circumstances, the fact that Ms Wood's earlier apology and expression of remorse in her WhatsApp message appeared not to have been considered by Ms Weatherill would have been unreasonable. We also note that if a person is asked to apologise and to show remorse, it presupposes that they have done something wrong and accept that (i.e. they committed an act of misconduct). We are not minded or believe that we are entitled to go behind the express reason for dismissal. Rejoy's reason for the dismissal stands. They thought she had done something wrong and had failed to show remorse or apologise.

56. Applying the law to the facts we make the following findings in relation to Mrs Wood's detriment claim. The chain of events is as follows. Ms Wood's childcare arrangements fell through on 19 December 2019. This necessitated exercising her statutory right under ERA, section 57A(1)(d) to ask Rejoy for time off work because of the unexpected disruption of arrangements for the care of her two dependent children. As a result of the telephone conversation, she was suspended. We have to determine whether the chain of causation was broken. Rejoy's position was that Ms Wood's behaviour was unacceptable which breaks the chain of causation and they suspended her because of that unrelated reason. We disagree. We believe that the conversation broke down because Ms Wood's suggestions about solving the problem were not accepted which led to her frustration. In particular, her suggestion that she brought her children to work was rejected. The conversation ended because of this. Consequently, we believe that her suspension was still connected to Ms Wood's request to have time off for her dependents.

57. Rejoy relied on clause 9.3 of the contract of employment to suspend Ms Wood. This was purportedly to investigate allegations of misconduct. However, in their suspension letter, although they purported to suspend her to investigate allegations of misconduct, they did not in fact carry out any investigation nor did they specify what the allegations were. Ms Harper admitted this in her evidence. To this day, Ms Wood did not know

what the allegations were, and we have no reason to disbelieve her. Furthermore, in her oral evidence, Ms Harper said that she decided to suspend the claimant because she was worried about the atmosphere, she wanted things to cool down and she wanted to focus on sorting out the clients before Christmas. The letter was based on what was given to Rejoy by an HR consultant and she accepted that wording could be misleading, and she said on the phone to the Ms Wood that the suspension would last until after Christmas . It is reasonable to conclude that the decision to suspend had nothing to do with investigating any allegations of misconduct. Furthermore, as at the date of suspension, the disciplinary procedure had not yet commenced and did not commence until Rejoy wrote Ms Wood on 7 January 2020 inviting her to attend a disciplinary hearing on 10 January 2020. Therefore clause 9.3 of the contract cannot be engaged and Ms Wood's suspension was done in breach of her contract.

58. In her evidence, it was clear that Ms Wood was very upset about being suspended. We do not doubt that she had very little information about the allegations against her or why she had been suspended. She had tried to apologise, and she was left waiting to find out what would happen until the New Year despite asking for earlier meetings with Erin Harper. Her statement in support of her position which she used at the disciplinary hearing very clearly sets out how she felt about being suspended and the impact that this had on her feelings. Under the circumstances, we believe that an award at the lower end of the applicable Vento band would be appropriate. We consider it would be just an equitable to award £1250.

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Employment Judge Green

Date 18 May 2021