5

EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4102206/2020

Hearing Held by Cloud Video Platform (CVP) on 24 and 25 February 2021

10

Employment Judge: Russell Bradley

Lynn Corrigan — **Claimant**
Mr G Bathgate
Solicitor

Apple Oils Ltd — **Respondent**
Ms S Mackie
Solicitor

15

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Tribunal is:-

1. The claim of an unlawful deduction of wages under section 13 of the
20 Employment Rights Act 1996 is withdrawn in terms of Rule 51; it is not dismissed; the Claimant having expressed her wish to reserve the right to bring a further claim against the Respondent and there being a legitimate reason for her doing so;

2. The Claimant was unfairly dismissed by the respondent; and the Respondent shall pay to the Claimant the sum of **THIRTY ONE THOUSAND SEVEN HUNDRED AND THIRTY FOUR POUNDS AND TWENTY ONE PENCE** (£31,734.21); The Employment Protection (Recoupment of Job Seeker's Allowance and Income Support) Regulations 1996 apply. The monetary award is £22,671.71. The prescribed element is £22,671.71, and the dates to which that prescribed element applies are 20 December 2019 until 25 February 2021. The monetary award does not exceed the prescribed element.

REASONS

Introduction

1. At the outset of the Hearing I drew to parties' attention the fact of my prior instruction from Mr Bathgate in previous, unrelated, employment claims. After a short adjournment for instructions, Ms Mackie advised that the Respondent agreed that there was no issue arising as to my impartiality in deciding the issues in the case.

2. The Claimant maintained the single claim of unfair dismissal. A claim of unlawful deductions from wages was withdrawn in the course of the hearing but on Mr Bathgate's application (which was not opposed) it was not dismissed. His position is that it may be litigated elsewhere. I was satisfied that the Claimant had a legitimate basis to do so.

3. Prior to hearing evidence, the Respondent sought (and was permitted) leave to make a number of changes to the paper apart to the ET3 form. Those changes were:-

   a. Paragraph 5 was amended so as to read "*Admitted the Claimant and AM are named as joint owners of taxi business as averred at paragraph 7 of the paper apart to the ET1 claim form. The Respondent contends that the taxi business was not run separately from the Respondent and its running was integrated into the daily management of the respondent's business*."

   b. Paragraph 14 was amended so as to read "*On further investigation, the Respondent established that this instruction was given to TB in February 2016 and continued for 41 weeks. The sums paid to the Claimant's personal bank account was a substantial sum.*"

   c. On the first line of paragraph 23 so as to read "*The Claimant accepted that she had removed £115,000 from the respondent's business account …..*"

4. On 27 November 2020 the Tribunal issued a case management order. Amongst other things it ordered a timetable for disclosure of bundle material, the exchange of witness statements, and preparation and lodging of financial loss details. Ms Mackie made an (opposed) application to have the case struck out under Rule 37(1) (b) and (c) of the Employment Tribunal Rules of Procedure 2013 in relation to various failures to comply with that order. After hearing both parties and a short discussion, she withdrew it. Ms Mackie also intimated a claim for wasted costs which was held over to the time of submissions. By then, she did not insist on it.

5. For the hearing, the Tribunal had (i) a final indexed bundle of 244 pages (ii) written witness statements from three witnesses and (iii) the Claimant's schedule of loss (which was added to the bundle at **page 245**). The Claimant's witness statement was amended in an adjournment early on the first day and reproduced so as to coincide its references with the pagination of the final bundle.

The issues

6. The issues for determination were:-

   a) Has the Respondent shown that the reason for the Claimant's dismissal related to her conduct, a reason falling within section 98(2) of the Employment Rights Act 1996?

   b) If so did the Respondent believe in the guilt of the Claimant on the alleged misconduct, which was specified in a letter dated 3rd December 2019 **(page 150 to 151)**?

   c) Did the Respondent have a reasonable basis on which to hold that belief?

   d) At the stage that it held that belief or at least at the final stage that it did so, had it carried out as much investigation into the matter as was reasonable in all the circumstances of the case?

   e) Was the Claimant's dismissal fair or unfair (having regard to the reason shown by the respondent) in the circumstances (including its size and administrative resources) and did it act reasonably or unreasonably in treating it as a sufficient reason for dismissing the Claimant in accordance with equity and the substantial merits of the case?

   f) If the Claimant was unfairly dismissed to what compensation is she entitled as a remedy?

Evidence

7. Evidence was heard from Ellen Lloyd, HR Manager, Tracey Burke, Lead HR Business Partner and the Claimant. All spoke to their written witness statements and were cross-examined. Of the material in the bundle, the majority of documents under the heading of "*Absence*" **(pages 97 to 119)** were not spoken to by any witness.

Findings in Fact

8. From the evidence and the Tribunal forms, I found the following facts admitted or proved.

9. The Claimant is Ms Lynn Corrigan. The Respondent is Apple Oils Limited. It is a limited company. Its registered office is at 2236 London Road, Glasgow G32 8YF. Its principal business function is waste management.

10. The Claimant's employment with the Respondent began on 1 May 2008. She was appointed the respondent's company secretary on 25 April 2013. She was summarily dismissed on 20 December 2019. The respondent's managing director is Alexander McDonald. He is its majority shareholder. At the time of the Claimant's employment the Respondent employed about 17 staff.

11. The Claimant and Mr McDonald were in a personal relationship for about 19 years. It ended on 15 October 2018.

12. The Claimant and Mr McDonald also ran a taxi business. On or about 12th June 2013 they became partners in the business called "*Cosmos Taxi Service*" **(page 196)**. Its business involved renting taxis to about four drivers. One of them was Tam Boyle. Mr Boyle paid rent, or "*weigh in*" money, for his taxi. For some time, Mr Boyle paid his weigh in money in cash. From about February 2016, Mr Boyle paid it into a bank account held by the Claimant. Mr McDonald submitted tax returns in respect of the taxi business. Those returns were not for income due or paid to the respondent.

13. On Monday 11 June 2018, the Claimant discovered that Mr McDonald had been texting another female. The Claimant confronted him about it at the time. There was an argument between them. He said to the Claimant that their relationship was breaking down. He told her that she would need to move out of the house they shared. He told her to "*take 50% of the share*." **(page 154)** He told her to "*take 50% and get out*" (cross-examination). On 12 June, the Claimant took £115,000 by online banking in three tranches. One was for £15,000. The others were for £50,000 each **(page 129)**. Later that day she sent a text message to Yvonne Carruthers, the respondent's Finance and Administration Manager. In it she said, "*Not in work at mo and may not get in before you leave today. FYI big transfers done from apple a/c, not fraud I know about them so don't panic*." **(page 136)** Thereafter, the Claimant continued to attend work. The Claimant and Mr McDonald worked to repair their relationship. It was as part of that effort that Mr McDonald agreed with the Claimant that if she repaid the money he would not "*take matters further i.e., termination of employment, criminal proceedings*." **(page 127)** The Claimant repaid the money to the Respondent by making five payments of £20,000; on June 15, July 16, 17, 18 and 19 and one payment of £15,000 on 20 July all 2018.

14. The relationship between the Claimant and Mr McDonald ended on 15th October 2018. On 24 October, Mr McDonald instructed Ms Carruthers to start paying each of the Claimant and himself £40,000 per annum backdated to the beginning of the respondent's financial year **(page 177).** Her gross monthly pay was therefore £3333.00. Her net monthly pay was £2536.00. The Claimant began a period of absence from work by reason of illness from about 4 December 2018. At or about that time, Mr McDonald started to inspect the taxi business accounts. He noticed that income from Mr Boyle had not been paid into the taxi bank account. Mr McDonald spoke with him. Mr Boyle told him that he paid the money in every week to the bank account as advised by the Claimant.

15. The Claimant remained absent from work by reason of illness during the first eight months of 2019. On or about 13 June 2019, Mr McDonald contacted Susan Earle, HR Consultant of Connect Three Solutions. On or about 5 August, Ms Earle conducted an investigation meeting with Mr Boyle. **(page 125)**

16. On 31 August 2019, the Claimant started employment with Scotmid. By that time, she had exhausted statutory sick pay from the respondent. She earned £8.21 per hour in her employment with Scotmid.

17. By letter dated 17 September 2019 Mr McDonald invited the Claimant to attend a disciplinary hearing to take place on 23 September. The hearing was to be conducted by Ms Earle. The letter alleged that she "*did misappropriate funds by arranging for payments to be made from Tam Boyle directly into your own bank account. You were not given permission to do so.*" The letter recorded that it enclosed a copy of the respondent's disciplinary policy. It also recorded that it enclosed a copy of documents to be relied on at the hearing. The letter did not specify what those documents were. It set out that if the allegation was upheld, the Claimant may be dismissed. The hearing did not proceed on 17 September.

18. There then followed several attempts to convene the disciplinary hearing. By letter dated 27 September Mr McDonald wrote to the Claimant in terms substantially the same as his letter of 17 but with the hearing date fixed for 30 September. That hearing did not proceed.

19. In late October or early November 2019, the Respondent contacted Stephanie Robinson of Solve HR requesting support. At that time, Ms Lloyd was an employee of Solve HR. She is now employed by EDF Renewables as an HR Manager. She and Ms Robinson met Mr McDonald and Ms Carruthers. Ms Lloyd was asked to support the Respondent with its investigation, for example how to put together a report. The investigation report **(pages 120 to 124)** was completed on 29 November 2019. It records that the investigation began in June 2019.

20. By letter dated 2 December Ms Lloyd invited the Claimant to a disciplinary hearing to take place on 5 December **(pages 146 and 147)**. The Claimant was unable to attend that day as her trade union representative was unavailable. On 3 December Ms Lloyd invited the Claimant to a disciplinary hearing to take place on 17 December **(pages 150 and 151)**. The letter set out five allegations. It replicated the allegations from 2 December. They were:-

    a. On 12 June 2018, you removed a total of £115,000 from the Apple Oils business account without permission resulting in theft of Company money

    b. in February 2016, without permission, you instructed Taxi driver, Tam Boyle, to start paying his taxi weigh in directly into your personal bank account rather than the business account. This has resulted in further theft of Company money

    c. Fraud, dishonesty and deception caused by your actions in relation to each of the allegations listed above

    d. Serious failure to follow Company procedures

    e. You have breached the faith and integrity Apple Oils has place upon you as its employee, which has resulted in a loss of trust and confidence in your ability to carry out your role.

21. The letter of 3 December recorded that it enclosed documentation for reference in the Hearing. That documentation was:-

    a. The investigation report **(pages 120 to 124)**

    b. Investigation minutes from Mr Boyle, 5 August 2019 **(pages 125 and 126)**

    c. Witness statement from Mr McDonald, 28 November **(pages 127 and 128)**

    d. Screenshots of the respondent's bank account **(pages 129 to 133)**

    e. Taxi invoice from Tam Boyle to Mr McDonald **(page 134)**

    f. Claimant's bank statements **(page 135)**

    g. Text messages between Claimant and respondent **(page 136)**

22. The letter of 3 December **(pages 150 and 151)** was prepared by Ms Lloyd. It was her decision to include the five allegations noted above. She framed them. She had seen earlier letters to the Claimant (like the one dated 17 September) which contained the one allegation noted at paragraph 17 above. It was Ms Lloyd's decision to include the first allegation in the letter of 3 December. She did so because she considered that it was relevant to the second allegation.

23. By the time of the disciplinary hearing, proceedings were underway in the sheriff court between the Claimant and Mr McDonald in relation to the termination of their personal relationship.

24. The Claimant attended the disciplinary hearing on 17 December. She was accompanied by Stephen Shiach, her trade union representative. Prior to the start of the meeting, Mr Shiach raised with Ms Lloyd the propriety of the hearing proceeding (i) at the same time as ongoing litigation between the Claimant and Mr McDonald to do with the break-up of their personal relationship and (ii) where the Claimant was a director of the Respondent and not an employee. Ms Lloyd telephoned Ms Carruthers to discuss those two issues. Ms Carruthers advised her that the Claimant paid tax under the PAYE system as an employee and was not a director. Ms Lloyd's decision was that the meeting should proceed on the basis that (i) the Claimant was an employee and (ii) the purpose of the hearing was not linked to the ongoing civil court litigation.

25. A typed note of the meeting was prepared **(pages 152 to 159)**. Mr Bathgate agreed that it was a fair and accurate representation of the discussion. For present purposes it is sufficient to summarise the issues in the note as including; the Claimant's explanation in answer to the first allegation (the money was not stolen, she did not need permission to transfer the funds, she was a partner in the business and had access to the respondent's bank accounts, it was transferred because Mr McDonald had told her to take 50% of the share, she did not deny taking the money and it was repaid); the Claimant's explanation in answer to the second allegation (the taxi business was nothing to do with the respondent's business which business had both the Claimant and Mr McDonald named, and he made a separate tax return for it); on the third allegation, she denied fraud and acting dishonestly; on the fourth allegation, the Claimant did not know what procedures were being referred to; on the final allegation she was not an employee but a partner in the respondent's business. It also recorded the Claimant's reference to two interdicts against Mr McDonald, one to protect the respondent's funds, the other due to abusive language, and the fact that Ms Lloyd was aware of the legal proceedings between them; Mr McDonald had told the Claimant that during her illness she should take as long as she needed and would be fully paid; SSP was paid to her; and that in April 2019 Mr McDonald had removed her from office as company secretary without her knowledge.

26. Ms Lloyd advised that she review all of the evidence, consider if further investigation was required and keep the Claimant advised.

27. After the meeting Ms Lloyd spoke with both Mr McDonald and Mr Boyle by telephone. She decided that both "*stood by*" their original statements. By letter dated 20 December 2019 (**pages 160 to 164**) Ms Lloyd wrote to the Claimant to advise of the outcome from their meeting. She upheld the first allegation. She did so on the basis that she preferred Mr McDonald's version of events that he did not permit or instruct the taking of £115,000 from the respondent's funds. She upheld the second allegation. She did so on the basis of her belief that she "*intentionally stole the taxi weigh in money from Alex, administered by Apple Oils …*" She upheld the third allegation. She did so on the basis that both of allegations one and two were dishonest and that the second was also fraudulent. Ms Lloyd upheld the fourth allegation. She did so on the basis that the Claimant was aware of the Handbook, had access to it and her statement at the disciplinary hearing about her knowledge of it was untruthful. She upheld the fifth allegation. She did so on the basis of her conclusion that the Claimant was an employee (not a partner) and as such her actions were in breach of the faith and integrity owed by her as an employee.

28. By email on 22 December the Claimant wrote to appeal her dismissal. It was considered at a meeting on 17 January 2020. The appeal was heard by Tracey Burke, HR Lead Business Partner of Solve HR. In advance of the meeting Ms Burke had reviewed papers and had spoken to Ms Lloyd. The appeal meeting was minuted (**pages 167 to 175**). Mr Bathgate took no issue with the accuracy of the minutes. Following the meeting, the Claimant emailed some material to Ms Burke who spoke with Mr McDonald to clarify some points.

29. By letter dated 28 January 2020 Ms Burke advised of the outcome of the appeal. She set out reasons under eight "*Issues*" or elements of appeal. None of them were upheld.

30. The Claimant has worked continuously for Scotmid in the period 31 August 2019 until January 2021 **(pages 203 to 218)**. In the period between her dismissal and December 2020 she earned £7,760.29 from that employment. In the period since her dismissal she has received Employment Support Allowance of £3038.00 **(page 245)**.

Comment on evidence

31. Both Ms Lloyd and Ms Burke gave honest evidence. They both genuinely believed that they were making decisions which were correct based on the material that they had. By the nature of their involvement, as third party agents brought in to decide on the Claimant's dismissal at a relatively late stage, they did not have immediate knowledge of the workings of the respondent. That is not a criticism. They depended (to some extent) on information from other sources, including Mr McDonald.

32. The Claimant's evidence in cross-examination was direct. She did not seek to avoid questions. She answered squarely the questions put to her without hesitation. Her position on contentious issues was consistent with how she had responded to them within the disciplinary process.

Submissions

33. Both solicitors made oral submissions. I summarise them here.

34. Ms Mackie referred to the following cases:-

    a. ***British Home Stores v Burchell*** [1980] ICR 303

    b. ***Iceland Frozen Foods Ltd v Jones*** [1983] ICR 17

    c. ***NHS 24 v Pillar*** UKEATS/0005/16/JW

    d. ***Chubb Fire and Security Ltd v Harper*** [1983] IRLR 311

    e. ***Post Office v Foley*** [2000] IRLR 827 CA

    f. ***Sainsbury's Supermarkets plc v Hitt*** [2003] IRLR 23

g. ***Hollier v. Plysu Ltd*** [1983] IRLR 260

h. ***Lemonious v Church Commissioners*** UKEAT/0253/12/KN

35. Under reference to section 98(2) of the Employment Rights Act 1996, and the five allegations, Ms Mackie emphasised the basis of belief in guilt as being the admissions by the Claimant on the first two. On the first allegation, there was no business reason to have transferred the funds. On the second, in the disciplinary hearing **(page 155),** the Claimant admitted to knowingly providing her own personal bank account details to Tam Boyle. Ms Mackie invited me to consider the Claimant's dismissal in the context of three questions. First, had the Respondent shown a reason for dismissal? Second, was it potentially fair? Third, were the circumstances sufficient a reason to dismiss? On the first two, and in light of the evidence and admissions by the Claimant she submitted that the dismissal was for a conduct-related reason, a potentially fair reason. On the third question, the context is the three step test set out in ***BHS v Burchell***, and the "***range or reasonable responses***" test from ***Iceland Frozen Foods***. On the first leg of the ***Burchell*** test, both Ms Lloyd and Ms Burke had a genuine belief in the allegations of gross misconduct. In the disciplinary process the Claimant had been given the opportunity to provide further material. The "*taxi money*" had not been repaid. On the second leg, she referred to the evidence from the bank statements and from both Mr McDonald and Mr Boyle. The Claimant did not deny the alleged conduct but had said that it was not dishonest. She had shown no remorse and had failed to consider the impact of her actions on the business and other employees. The Claimant's explanations were almost entirely to do with her personal relationship with Mr McDonald. She was fixated on points which were not relevant and did not satisfy either Ms Lloyd or Ms Burke that she had acted honestly. Both had take reasonable steps to ensure impartiality in the process which included separate personnel and neutral venues. On the third leg, the investigation was thorough and sufficient. Reference was again made to the witness statements and to the bank statements. Reference was also made to

the text to Yvonne Carruthers, the receipt from Mr Boyle and the Claimant's bank account details. While the Respondent recognised the turbulence of the relationship between the Claimant and Mr McDonald and the passage of time before the disciplinary process, the issue of trust in the Claimant (as company
5 secretary) was important. I was referred to Mr McDonald's answer to question 3 in the supplementary appeal investigation questions **(page 176)**. The Claimant's evidence (statement at **paragraph 5**) was that she removed the respondent's funds in the heat of the moment. There was thus, Ms Mackie said, the potential for a repetition of such an event particularly if there were further
10 arguments between the Claimant and Mr McDonald. The time gap between the discovery in December 2018 of funds paid to the Claimant by Mr Boyle and the start of the investigation was not insurmountable on the question of fairness. Reference was made to the decision of the EAT in ***NHS 24 v Pillar***. I was reminded that much of the Claimant's answer to the allegations focussed
15 on her status within the Respondent as a *de facto* director, distinct from that of employee. Ms Mackie reminded me (by reference to ***Iceland, Foley*** and ***Hitt***) of the relevance of the *"band of reasonable responses*" test and of its application to both the decision to dismiss and to the investigation. Reference was made to ***Chubb Fire and Security Ltd v Harper***. The relevant question
20 was; would a reasonable employer have dismissed the Claimant on those allegations? The respondent's case was that the decision to dismiss was squarely inside the band of reasonable responses. The Claimant had admitted to the allegations, and her conduct had jeopardised the business. On the issue of sanction and any factor mitigating against summary dismissal, Ms Lloyd and
25 Ms Burke had applied their minds to all relevant material. The breakdown of the Claimant's relationship with Mr McDonald was one such factor. But (Ms Mackie said), with a small site and small staff numbers, allegations of dishonesty and the potential of future risk, the decision to summarily dismiss was well within the band. Ms Mackie referred to two procedural points. First,
30 she said that the fact that the Claimant had not been suspended had no impact on the question of fairness. Second, the delay between the discovery of the issue with the taxi "*weigh in*" and dismissal was not a factor which should indicate unfairness. The Claimant had been absent by reason of illness for

some time; the Respondent had no HR resource and used two external agencies to assist. The dismissal was fair and reasonable. On the issue of remedy, and under reference to ***Hollier*** and ***Ladrick Lemonious*** both the basic and the compensatory award should be reduced. She suggested that the awards should be reduced by 100%. On the question of pay in the period of her absence, the Claimant did not raise a grievance about the reduction of her pay to SSP which the Respondent was entitled to pay until it was exhausted. Finally, the Claimant had found alternative employment.

36. I summarise here Mr Bathgate's submission. The internal dispute on status is irrelevant in this forum, albeit the Claimant's position in the disciplinary process is explicable given the nature of the relationship between her and Mr McDonald. The relevant tests are as set out in ***British Home Stores v Burchell***. The key allegations are the first two. The following three are dependent on them. On the first allegation, the Claimant took the funds after a fallout with Mr McDonald. When it appeared to have been resolved they were repaid. At the time, Mr McDonald agreed that the matter would be at an end. This included a commitment that he would not "*take matters further i.e., termination of employment*" **(page 127)**. On the second allegation the respondent's position presented a more fundamental problem; as the Claimant was a partner in the taxi business (a distinct legal entity) and with an interest in it, the allegation cannot be established because there was no theft of money from the respondent. That being so, there cannot be a basis for this allegation. In the context of the three stage ***Burchell*** test, there was no real challenge to the first stage. However, on the question of sufficiency of investigation, the Respondent did not meet the band of reasonable responses test. In particular, there was a complete acceptance of Mr McDonald's statements (without supporting evidence) which was preferred over the Claimant's with no cogent basis for doing so. The minutes of the meeting with Mr Boyle undermined Mr McDonald's statements as to how and to which account the taxi weigh in payments were to be made. Further, given the atmosphere of mutual distrust between the Claimant and Mr McDonald it was not reasonable to prefer his evidence without testing it. Separately, there was no account taken of the ongoing civil court proceedings. A reasonable investigation would have taken

account of the background personal situation between the Claimant and Mr McDonald. The high tension between them can be seen from the text exchanges (**pages 178 to 182** and **240 to 244**). A reasonable investigation would not have compartmentalised the employment relationship with the Respondent from the personal relationship with Mr McDonald. Both Ms Lloyd and Ms Burke made that compartmentalisation. The evidence clearly supported the contention that Mr McDonald's actions in progressing the disciplinary process to a dismissal was borne out of his frustration at what was occurring in the sheriff court proceedings. On the first allegation, a proper investigation would have taken account of Mr McDonald's unequivocal commitment and the fact of a 300% pay rise shortly after the money was repaid. A proper investigation would have concluded that the matter which was "*water under the bridge*" resurfaced in June 2019 only because of Mr McDonald's sense of frustration. Applying ***Burchell***, there was insufficient evidence for there to be a reasonable basis to set out the allegations in the invitation letter. Even if the Claimant is wrong on that submission, no reasonable employer faced with the particular circumstances would have chosen to dismiss. The second allegation had no basis. The first allegation was "*yesterday's news*." While the passage of time may not in itself render the dismissal unfair, the relevant issue is what Mr McDonald did in that time following the repayment of the funds. Both procedurally and substantively the dismissal was unfair. On *Polkey*, if an appropriate investigation had been carried out into the second allegation, the Respondent would have concluded that it could not go ahead with disciplinary action. On any reduction for contributory conduct, the circumstances behind the first allegation were not blameworthy and even if they were any reduction to compensation should be modest at least to reflect the fact that the conduct had been condoned by Mr McDonald. In summary, parts two and three of the Burchell test are not met, and accordingly the dismissal was unfair. There should be no reduction for *Polkey* and no "*contribution*", or if any it is modest. On losses, the Claimant was fit to return to work in June 2019 and was working elsewhere by August 2019. It was for the Tribunal to determine any award on a just and equitable basis.

The law

37. Section 98(1) of the Employment Rights Act 1996 provides that *"In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—(a) the reason (or, if more than one, the principal reason) for the dismissal, and (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*" One reason with subsection (2) if it relates to the conduct of the employee.

38. Section 98(4) of the Act provides "*Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and (b) shall be determined in accordance with equity and the substantial merits of the case*."

39. The three-part test which Tribunals and courts apply in cases of alleged misconduct is well known, derived as it is from ***Burchell***. "*First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case*." Equally well known and often cited is what was said in ***Iceland***. The Tribunal "*must not substitute its decision as to what was the right course to adopt for that of the employer*." And "*The function of the employment Tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have*

adopted." The band of reasonable responses applies to the consideration of the investigation by the Tribunal as well as the decision to dismiss (***Hitt***).

40. "*A "* ***Polkey*** *deduction" has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer would have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A Tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done*." And "*the Tribunal has to consider not a hypothetical fair employer but has to assess the actions of the employer who is before the Tribunal, on the assumption that the employer would this time have acted fairly, though it did not do so beforehand.*" ***Hill v Governing Body of Great Tey Primary School*** [2013] I.C.R. 691 at paragraph 24).

41. Section 123(6) provides that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding. A Tribunal must identify the conduct which is said to give rise to possible contributory fault. Having identified that conduct, it must ask whether that conduct is blameworthy. The Tribunal must ask if that conduct which it has identified and which it considers blameworthy caused or contributed to the dismissal to any extent. If it did then the Tribunal moves to the next question; by what proportion is it just and equitable, having regard to that finding, to reduce the amount of the compensatory award?

42. Section 122(2) provides that where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly.

Discussion and decision

43. The Claimant does not argue that the first part of the ***Burchell*** test was not met. The reason for the Claimant's dismissal related to her conduct. Ms Lloyd and Ms Burke believed that their decisions related to the alleged misconduct of the Claimant. However, in my view neither part two nor part three of the ***Burchell*** test is met. Given the amendments made to the ET3's paper apart on the question of ownership of the taxi business, no reasonable employer having recognised that state of affairs could have concluded that the second allegation was well-founded. No reasonable employer could have concluded on that allegation that the Claimant had committed "*theft of Company money.*" The Respondent knew that taxi "*weigh in*" money was not, and never had been, "*Company money*". Looking at Ms Lloyd's rationale in her dismissal letter of 20 December 2019 on this allegation demonstrates the point (see **page 162**). There she says, "*The taxi business is not a separate business to Apple Oils but is run as part of the day-to-day operations of Apple Oils and Apple Oils administers the taxi weigh in on Alex's behalf.*" If Apple Oils administered the weigh in for Mr McDonald then that revenue from the taxi business was self-evidently not revenue which belonged to the respondent. It was, as was ultimately accepted, a separate business from that of the respondent. Indeed, as conceded by the Respondent in its amended ET3 paper apart, it was a business in which the Claimant was a partner. Separately, any reasonable employer reviewing the investigation minutes of the discussion with Mr Boyle would have concluded that the allegation related to one where Mr McDonald was the alleged victim, not the respondent.

44. In cross-examination, Ms Lloyd's evidence was that she had seen letters to the Claimant like the one dated 17 September containing the single allegation which referred to payments made by Mr Boyle. Her evidence was that it was her decision to include the first allegation in the letter of 3 December. She said that she did so because she considered that it was relevant to the second allegation. If there was no basis to believe that the allegation involving theft of taxi money was theft of money from the respondent, then there was no reasonable basis on which she could connect it with the circumstances of the transferring of the £115,000. Separately, even looked at in isolation, any reasonable employer would have recalled that by the end of July 2018 on the repayment of the last instalment of the £115,000 it had given an undertaking that it would not be taken any further, that undertaking including not to terminate the contract.

45. On that analysis there was on reasonable basis for the Respondent to believe that the Claimant was guilty of misconduct on either of those two allegations. That being so, her dismissal was unfair. The case of ***Pillar*** is distinguishable on its facts. In my view it did not provide any assistance in determining the issues.

46. On the question of sufficiency of the investigation, neither Ms Lloyd nor Ms Burke saw, or asked to see, documentary evidence to support the assertion that the taxi business was administered by the Respondent or was run as part of its day to day operations. Any sufficient investigation would have readily concluded that the Claimant had not committed theft from the Respondent of monies paid by Mr Boyle.

47. The Claimant was unfairly dismissed.

Remedy

48. The Claimant sought compensation. The Schedule of Loss (**page 245**) sets out her claims for basic and compensatory awards. Taking account of the Claimant's age (56) and length of service (11 years) at the effective date of termination, and her average gross weekly wage (£769.15 per week) the basic award is £8662.50.

49. For her loss of earnings as part of the compensatory award the Claimant sought past losses in the period from her effective date of termination for 12 months. The Respondent took no issue with the Claimant's assertion that her net pay was £2536.00 per month. The Claimant sought compensation for her losses at that net rate for 12 months (£30,432), under deduction of (i) her earnings from Scotmid in that 12 month period (£7,760.29) and (ii) £3,038.00 of Employment Support Allowance. She sought £400.00 as compensation for loss of statutory rights. The Respondent took no issue with that amount.

50. On ***Polkey***, the question is; could the Respondent have fairly dismissed and, if so, what were the chances that the Respondent would have done so? On the material available to it, the Respondent in this case could not have fairly dismissed the Claimant. Had a sufficient investigation taken place neither of the two principal allegations (on which the other three depended) would have been upheld. The compensatory award is therefore not liable to any deduction under ***Polkey***.

51. On the application of section 123(6) of the Employment Rights Act 1996 the first question is; what conduct of the Claimant could give rise to contributory fault? The Respondent relies on the Claimant's admissions that (i) she transferred the £115,000 from the respondent's bank and (ii) she received Mr Boyle's weigh in money to her own bank account. The next question is; is that conduct blameworthy? In my view neither is. On the transfer of the £115,000 the Claimant's evidence was that Mr McDonald (in the context of a heated confrontation in which he told her that she would require to remove from their home) told her to take money from the respondent's bank. In the disciplinary hearing, she said that he told her to take 50% of the share. In her evidence to

the Tribunal she said that he had told her to "take 50% and get out". She understood this to include 50% of the business. I had no direct evidence from Mr McDonald that this was not the case. I took account of the information which he had provided as part of the disciplinary process. But I preferred the Claimant's evidence to the Tribunal. It seemed to me to be quite credible that in the context of the exchange between them at the time that Mr McDonald told her to "*take half*" and that this included the £115,000 in the respondent's bank account. It is reinforced by the Claimant's explanation as to why the sum was returned which was as part of her attempt to repair their relationship. On the question of "*weigh in*" money it is in my view self-evidently not blameworthy conduct. Those funds were (as is now accepted by the respondent) not the property of the respondent. They belonged to the Claimant and Mr McDonald as partners in a separate business. On that basis my view is that there is no conduct on the part of the Claimant which could be regarded as blameworthy, and which caused or contributed to her dismissal. The compensatory award is therefore not liable to a reduction under section 123(6) of the 1996 Act. ***Hollier*** contains useful guidance on the Tribunal's function in deciding what if any part an employee's conduct played in causing or contributing to the dismissal and, in the light of any such finding, to decide what, if any, reduction should be made in the assessment of the employee's loss. But given my findings, it was of no application in this case. In ***Ladrick Lemonious*** the employment Tribunal had found that the Claimant had made a finding of 100% contributory fault. The EAT recorded (at paragraph 61) that the one ground to succeed in respect of both appeal and cross-appeal was that the Tribunal had failed adequately to set out its reasons for making such a finding. While it may be authority for the proposition that in order to make such a finding a Tribunal should set out adequate reasons, that proposition was not relevant here.

52. I considered that there was no conduct of the Claimant before her dismissal which was such that it would be just and equitable to reduce the amount of the basic award. Ms Mackie did not argue that the basic award should be reduced taking account of any conduct in addition to that relied on to reduce the compensatory award.

53. The Schedule of Loss refers to receipt by the Claimant of Employment Support Allowance. The Employment Protection (Recoupment of Job Seeker's Allowance and Income Support) Regulations 1996 apply. The monetary award in this case is £22,671.71. The prescribed element is £22,671.71, and the dates to which that prescribed element applies are 20 December 2019 until 25 February 2021. The monetary award does not exceed the prescribed element.

Employment Judge: M Whitcombe
Date of Judgement: 30 March 2021
Entered in register: 07 May 2021
and copied to parties