EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Miss C Logue v Beauty Secrets (Radlett) Limited

Heard at: Watford **On**: 31 March 2021
(and 29 June 2021 in Chambers)

Before: Employment Judge Shastri-Hurst

Appearances
For the Claimant: In person
For the Respondent: Mr L Jegede (solicitor)

JUDGMENT

1. The Claimant's claim of unfair dismissal succeeds;

2. The Claimant's claim for breach of contract (notice pay) succeeds;

3. The Claimant's claim for unauthorised deductions of wages succeeds;

4. The Claimant's claim for holiday pay fails;

5. The Claimant contributed to her own dismissal to the extent of 40%, this deduction to be applied to the basic and compensatory award for unfair dismissal;

6. The Respondent failed to follow the ACAS Code of Practice on disciplinary procedures. A 25% uplift is therefore attached to the compensatory award;

7. The Respondent is ordered to pay the following sums to the Claimant:

   7.1 Sums for unfair dismissal under paragraph 1 of £1380.66;

   7.2 Damages for breach of contract under paragraph 2 of £307.15;

   7.3 There is no separate award for the claim at paragraph 3 as this would lead to double recovery.

JUDGMENT having been sent to the parties on 20 May 2021 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

INTRODUCTION

1. The Respondent is a small business specialising in hairdressing and beauty treatments. At the time of the Claimant's employment as a Beauty Therapist, the Respondent only had four members of staff (plus the Claimant).

2. The Claimant was employed by the Respondent from 5 August 2017. On 12 September 2019, the Claimant and Selvie Ukperaj, the then director/owner of the Respondent, had a dispute at work, which led to the Claimant walking out. There is a dispute as to whether she resigned or was dismissed.

3. By her claim form, presented on 23 October 2019, the Claimant presented a claim for unfair dismissal and various pay claims to the tribunal. The Respondent defends the unfair dismissal claim on the basis that there was no dismissal as the Claimant resigned, and in the alternative, if there was a dismissal it was for reason of conduct and was fair in all the circumstances. In terms of the pay claims, the Respondent denies that the Claimant is due any outstanding pay.

4. The Claimant represented herself, and the Respondent was represented by Mr Jegede. I have in front of me, in order to assist my decision-making, a bundle of 60 pages. I have heard from the Claimant herself in support of her claim. For the Respondent, I have heard from Mrs Ukperaj. I have also received five other statements on behalf of the Respondent from:

    4.1 Jade Parratt;
    4.2 Emma Eggleton;
    4.3 Claudia Muskat;
    4.4 Jane Johnnson;
    4.5 Debra Landau.

5. The first four of these witnesses were employees of the Respondent at all material times. Debra Landau was a previous owner of the Respondent and did not work at the Respondent at the times pertaining to this claim. These witnesses have not attended to give evidence. I understand that, due to Covid-19 the first four are no longer employed by the Respondent, but have all become self-employed instead. It is therefore within my discretion as to how much weight I give to those statements, particularly as I note that some are not signed (those of Ms Muskat, Ms Johnnson, and Ms Landau). I will

return to the issue of how much weight I will give these statements in my findings of fact.

The issues

6. At the beginning of the hearing, I spent time with the Claimant and Mr Jegede ensuring that we were all clear on this issues that I would need to determine regarding the Claimant's claims.

7. As well as the claims set out below, the Claimant sought to bring a claim for £10 arising from a contribution to a parking fine for another employee of the Respondent. I explained to the Claimant that I did not have jurisdiction to deal with that claim. She was happy to accept that and therefore did not pursue this particular issue.

8. I set out the issues I have to deal with below:

9. <u>Unfair dismissal:</u>

    9.1 Did the Claimant resign or was she dismissed? This requires analysis of the following issues:

        9.1.1 Who really ended the contract?

        9.1.2 Were the words used by the Claimant ambiguous or unambiguous?

        9.1.3 If ambiguous, what was the objective meaning of the words used?

        9.1.4 If unambiguous, was the Respondent entitled to accept that resignation at face value, or were the Claimant's words said in special circumstances, such as in the heat of the moment, so that the Respondent was under a duty to explore whether the Claimant in fact intended to resign?

    9.2 If the Claimant was dismissed, was that dismissal fair? The Respondent relies upon the potentially fair reason of conduct, which requires consideration of the following (**British Home Stores v Burchell [1978] IRLR 379**):

        9.2.1 Did the Respondent hold a genuine belief that the Claimant was guilty of the misconduct alleged?

        9.2.2 If so, did the Respondent have reasonable grounds for that belief?

        9.2.3 Was an investigation completed that was reasonable in all the circumstances?

9.2.4 Was the sanction of dismissal within the band of reasonable responses open to a reasonable employer?

9.2.5 Was the dismissal procedurally fair?

10. Breach of contract/claim for notice pay:

10.1 Was the Claimant dismissed? (if not, this claim fails at this point);

10.2 If so, can the Respondent show that the Claimant acted in a way that was in fundamental breach of her contract so as to allow the Respondent to consider itself released from its obligation to pay the Claimant her notice pay?

10.3 If not, the Claimant's contract entitles her to one month's notice pay – p38.

11. Arrears of pay:

11.1 If the Claimant was dismissed, when did that dismissal take place?

11.2 Was the Claimant paid up to her dismissal?

11.3 If not, how much pay is the Claimant owed up to the date of her dismissal?

12. Holiday pay:

12.1 How much holiday was the Claimant allowed to take in one year? – p37 tells me that the answer to this is 28 days;

12.2 How much holiday had the Claimant taken between 1 January 2019 and the effective date of termination?

12.3 How much holiday had the Claimant accrued between those dates?

12.4 How much holiday had the Claimant accrued but not taken between those dates?

12.5 How much holiday pay does that amount of holiday entitlement equate to?

13. Remedy:

13.1 ACAS uplift pursuant to s207A of the Trade Union and Labour Relations (Consolidation) Act 1992 ("TULR(C)A")

13.1.1 If the Claimant is successful in her unfair dismissal claim, then did the Respondent follow the ACAS process regarding dismissals?

13.1.2 If not, should an uplift under s207A TULR(C)A apply?

13.1.3 If so, what percentage uplift is appropriate?

13.2 If the Claimant was unfairly dismissed, what, if any, is the percentage chance that she would have been dismissed even if a fair procedure had been followed? – Polkey v A E Dayton [1987] IRLR 503;

13.3 Did the Claimant cause or contribute to her dismissal? If so, what reduction to the compensatory award is appropriate? – s123(6) Employment Rights Act 1996 ("ERA").

13.4 Would it be just and equitable to reduce any basic award in light of conduct of the Claimant prior to the dismissal – s122(2) ERA.

LEGAL FRAMEWORK

14. Was there a dismissal?

14.1 The question here is "who really ended the contract of employment?". The case of Martin v Glynwed Distribution Ltd [1983] IRLR 198 sets out that:

> "whatever the respective actions of the employer and employee at the time when the contract of employment is terminated, at the end of the day the question always remains the same "who really ended the contract of employment?""

14.2 The question of whether or not there has been a dismissal must be considered in light of all the surrounding circumstances – BG Gale Ltd v Gilbert [1978] IRLR 453 (dictum of Arnold J).

14.3 The issue of who ended the contract requires me to consider whether the words used by the Claimant were ambiguous or unambiguous.

14.4 If the Claimant's words were ambiguous, then the requisite test is how the words would have been understood by a reasonable listener. The test is objective, not subjective. Likewise, the intention of the speaker is not the relevant test – BG Gale Ltd v Gilbert [1978] IRLR 453:

> "It is of course well-known that the undisclosed intention of a person using language whether orally or in writing as to its intended meaning is not properly to be taken into account in concluding what its true meaning is. That has to be decided from the language used and from the circumstances in which it was used."

14.5 If the Claimant's words were unambiguous, the starting point is subjective, combined with a "special circumstances" exception – Kwik-Fit (GB) Ltd v Lineham [1992] IRLR 156. This means that there is no general duty on an employer to ensure that an employee using apparently unambiguous words of resignation intended to resign,

unless there are special circumstances, in which case it may be unreasonable for words to be construed at face value. One such example is when words are said in the heat of the moment.

14.6 If the words were spoken in the heat of the moment, the employer should allow a reasonable time to elapse (usually a day or two) to see if the employee actually intended what he said. Further, a prudent employer should investigate the matter and, if he fails to do so, he may find that the tribunal has drawn the inference that there was a dismissal. – Kwik-Fit.

14.7 Kwik-Fit was approved by the Court of Appeal in Willoughby v CF Capital Ltd [2011] IRLR 985 at paragraph 249:

> "The "rule" is that a notice of resignation or dismissal (whether oral or in writing) has effect according to the ordinary interpretation of its terms. Moreover, once such a notice is given it cannot be withdrawn except by consent. The "special circumstances" exception as explained and illustrated in the authorities is, I consider, not strictly a true exception to the rule. It is rather in the nature of a cautionary reminder to the recipient of the notice that, before accepting or otherwise acting upon it, the circumstances in which it is given may require him first to satisfy himself that the giver of the notice did in fact really intend what he had apparently said by it. In other words, he must be satisfied that the giver really did intend to give a notice of resignation or dismissal, as the case may be. The need for such a so-called exception to the rule is well summarised by Wood J in paragraph 31 of Kwik-Fit's case …."

15. Unfair dismissal – reason for dismissal

15.1 The relevant legislation is found at s98(1), (2) and (4) **ERA**.

15.2 It is for the employer to show the reason for dismissal and that it is a potentially fair one, such as conduct: this is not a high threshold for a respondent. In Gilham and ors v Kent County Council (No2) 1985 ICR 233, the Court of Appeal held as follows:

> "The hurdle over which the employer has to jump at this stage of an inquiry into an unfair dismissal complaint is designed to deter employers from dismissing employees for some trivial or unworthy reason. If he does so, the dismissal is deemed unfair without the need to look further into its merits. But if on the face of it the reason could justify the dismissal, then it passes as a substantial reason, and the inquiry moves on to [s98(4)] and the question of reasonableness".

16. Unfair dismissal – fairness

Substantive fairness

16.1 Regarding conduct cases, the oft-cited case of British Home Stores Ltd V Burchell [1978] IRLR 379 encompasses the relevant test for fairness:

16.1.1 Did the Respondent have a genuine belief that the Claimant was guilty of the misconduct alleged by the Respondent?

16.1.2 If so, were there reasonable grounds for the Respondent in reaching that genuine belief? And,

16.1.3 Was this following an investigation that was reasonable in all the circumstances?

16.2 In all aspects of such a case, including consideration of sanction, in deciding whether an employer has acted reasonably or unreasonably within s98(4) ERA, the tribunal must decide whether the employer acted within the band of reasonable responses open to an employer in the circumstances. This includes the need to consider whether the sanction of dismissal fell within that range of reasonable responses. Whether the tribunal would have dealt with the matter in the same way or otherwise is irrelevant, and the tribunal must not substitute its view for that of a reasonable employer – Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, London Ambulance Service NHS Trust v Small [2009] IRLR 563.

17. Procedural fairness

17.1 Following the case of Polkey v AE Dayton Services Ltd [1987] IRLR 503, it is well established that fairness in procedure is a vital part of the test for reasonableness under s98(4) ERA. It is not relevant at this (the liability) stage to consider whether any procedural unfairness would have made a difference to the outcome: that is a matter for remedy (the issue in Polkey is set out below).

17.2 If there is a failure to adopt a fair procedure, whether by the ACAS Code's standards, or the employer's own internal standards, this will render a dismissal procedurally unfair.

17.3 Regarding dismissal for conduct issues, the reasonableness of the procedure rests fairly heavily on the reasonableness of the investigation, and the provision of opportunity for the employee to make his position, explanation and mitigation heard and understood.

17.4 Procedural and substantive fairness do not stand as separate tests to be dealt with in isolation – Taylor v OCS Group Ltd [2006] ICR 1602. It is, ultimately, a view to be taken by the tribunal as to whether, in all the circumstances, the employer was reasonable in treating the reason for dismissal as a sufficient reason to dismiss. It may therefore be that in a serious case of misconduct, it may be fair to dismiss, even if there are slight procedural imperfections. On the other hand, where the conduct charge is less serious, it may be that a procedural issue is sufficient to tip the balance to make the dismissal unfair.

18. Wrongful dismissal/breach of contract

18.1 This claim requires the tribunal to perform a different exercise, compared to the test under s98 ERA. Here, the question is, as a matter of fact, "was there a breach of contract in that the employer failed to pay the employee their contractual notice pay?".

18.2 This requires a tribunal to consider first whether the employee acted in a way so as to fundamentally breach their contract to enable the employer to summarily terminate the employment contract.

18.3 Unlike under a claim for unfair dismissal, regarding a wrongful dismissal claim, it is for the tribunal to make findings of fact as to the nature and extent of the employee's conduct. The reasonableness of actions by the employer is irrelevant.

18.4 Therefore, a wrongful dismissal is not necessarily unfair, and an unfair dismissal is not necessarily wrongful **–** Enable Care and Home Support Ltd v Pearson EAT 0366/09.

19. Limited remedy issues

Polkey reduction

19.1 The decision in Polkey v AE Dayton Services Ltd [1987] IRLR 503 permits the reduction of compensation when, even if a fair procedure had been followed, the Claimant would have been dismissed in any event.

19.2 Compensation can be reduced as a percentage, if a tribunal considers that there was a percentage chance of the employee being dismissed in any event. Alternatively, where it is found that a fair procedure would have delayed dismissal, compensation should reflect this by compensating the employee only for the length of time for which dismissal is found to have been delayed.

19.3 The tribunal has to consider what difference a fair procedure would have made, if any. It is for the Respondent to adduce evidence on this point. It is always the case that a degree of uncertainty is inevitable, unless the process was so unreliable it would be unsafe to reconstruct events. However, the tribunal should not be reluctant to undertake the exercise just because it requires speculation – Software 2000 Ltd v Andrews [2007] ICR 825**.**

20. Contribution

20.1 Under s122(2) ERA, the relevant test is whether it is just and equitable to reduce compensation in light of conduct of the Claimant prior to the dismissal. The conduct need not contribute to the dismissal. The EAT has confirmed that the same test of "culpable or blameworthy" applies to the s122(2) reduction

question as to s123(6) ERA – Langston v Department for Business, Enterprise and Regulatory Reform UKEAT/0534/09.

20.2 Under s123(6) ERA, the test is whether any of the Claimant's conduct prior to dismissal was "culpable or blameworthy" – Nelson v BBC (No.2) 1980 ICR 110, CA. This requires the tribunal to look at what the Claimant in fact did, as opposed to being constrained to what the Respondent's assessment of C's culpability was – Steen v ASP Packaging Ltd [2014] ICR 56.

20.3 The EAT in Steen summarised the approach to be taken under s122(2) and s123(6) ERA – paragraphs 8-14:

a. Identify the conduct which is said to give rise to possible contributory fault;

b. Ask whether that conduct was blameworthy, irrespective of the Respondent's view on the matter;

c. Ask, for the purposes of s123(6), whether the conduct which is considered blameworthy caused or contributed to the dismissal; and, if so,

d. Ask to what extent the award should be reduced and to what extent it was just and equitable to reduce it.

20.4 Steen also indicated that a reduction of the basic award to nil would be a rare finding.

FINDINGS OF FACT

21. The Respondent is a small business specialising in hairdressing and other beauty treatments, and at the relevant time had only four members of staff (plus the Claimant). The Respondent had been owned by Michael and Debra Landau, who were also directors, from 2011 until it was sold to Selvie Ukperaj in April 2019. At all times relevant to this claim, Ms Ukperaj was the owner and director of the Respondent.

22. The Claimant was employed by the Respondent from 5 August 2017 as a beauty therapist.

23. In March 2019, there were two occasions on which the Claimant had a dispute at work and left the building. On the first occasion, the Claimant had a disagreement with a colleague called Nicole. The Claimant left the building to cool off, and Ms Ukperaj went out to talk to her. Following that conversation, the Claimant returned to the building and to work.

24. On the second occasion, the Claimant had appointments booked that required her to use certain products to which she was allergic. She did not

want to undertake that work and so left work, meaning that she left clients behind. The Respondent therefore had to cover those appointments.

25. The Claimant was not disciplined for leaving work on either of these occasions. At the time of both these incidents, Debra Landau was the owner of the Respondent.

26. On 11 September 2019, Ms Ukperaj noticed that the Claimant had blocked out her diary for the following afternoon from 3pm. I have heard different reasons given for the Claimant having to block this time out: the Claimant told me that she had a doctor's appointment, whereas she told Ms Ukperaj at the time that she had to take her partner to an eye appointment. Regardless of the purpose of the early finish for on 12 September 2019, Ms Ukperaj accepted that she left that time blocked out of the Claimant's diary and did not book her any clients for after 3pm on that day.

27. Also on 11 September 2019, Ms Ukperaj sent a WhatsApp message around the employee WhatsApp group – p44. A colleague of the Claimant's was given a parking ticket, and Ms Ukperaj suggested in her message that all members of staff contribute £10 each to cover the fee. Ms Ukperaj's message was perfectly polite and conveyed that this was voluntary, not mandatory. Evidently however, when one's boss asks one to do something, however politely, I accept that there is an innate amount of pressure to comply, simply because the request comes from the boss. I do not criticise Ms Ukperaj in any way for her message, but this is just inevitable due to the imbalance of power between manager and staff.

28. The Claimant took against this idea of contributing to the parking ticket, and confronted Ms Ukperaj the following day, on 12 September 2019 at around 3pm. This was at the end of the Claimant's day, given that she had blocked out the rest of the afternoon. There was a discussion between Ms Ukperaj and the Claimant in a room off the main hallway/reception area where two other employees (Jane Johnnson and Emma Eggleton) were working. This conversation escalated, but did not reach the level of shouting, and led to the Claimant leaving the room, moving into the hallway/reception area, and indicating that she was leaving.

29. There is a dispute in fact as to what the Claimant said on her departure. The Claimant claims she said "I will not be coming in for the rest of the week" – ET1 p15. The Respondent claims the Claimant said "I have had enough of this and I'm leaving. I'm not coming back. This is my last day".

30. On the balance of probabilities, I find that the Claimant said that she was leaving and not coming back. I find this for the following reasons:

    31.1 In terms of live evidence, this dispute comes down to one word against another. However, I do have witness statements from Ms Eggleton and Ms Johnnson who were present on 12 September 2019. Given that they have not attended to give evidence, I would normally give their statements extremely limited, or no, weight. However, in this case, I also have emails from those two much nearer

the time of the incident which set out their recollection of the conversation they overheard – Ms Johnnson at p55 and Ms Eggleton at p58. Each employee's email is consistent with their statement. I therefore have given *some* weight to these statements (particularly Ms Eggleton's, as hers is signed).

31.2 I note the Claimant's suggestion that all the witnesses for the Respondent were either asked by Ms Ukperaj to write their emails and statements, or colluded by sitting together when writing their statements. I have no evidence for this, this is the Claimant's conjecture, although I understand why she may believe this. I consider that, had all the witnesses colluded in some way, their statements would be nigh-on identical, however this is not the case. In terms of the two who were present at work at the time of the altercation between the Claimant and Ms Ukperaj, their evidence is as follows:

31.2.1 At paragraph 3 of Ms Eggleton's statement, she states that she was present on 12 September 2019 and recalls the Claimant saying that "she was leaving; that she was not coming back; and that we should cancel all her clients' bookings". A similar account is given in Ms Eggleton's email of 16 October 2019 at p58. Ms Eggleton goes on at paragraph 5 of her statement to say that she went to collect the Claimant's set of salon keys from her, and that the Claimant seemed surprised by this.

31.2.2 At paragraph 4 of Ms Johnnson's statement, she recalls that she too was present on 12 September 2019 and heard the Claimant say "she would not be back". Ms Johnnson does not mention that the Claimant told them to cancel her clients. I note also Ms Johnnson's email at p55 on 7 October 2019 in which she states she "knew it was the last time [the Claimant would walk out] and we cancelled all her clients". This suggests that the Claimant did not tell them to cancel clients, but that it was the Respondent's decision to do so.

31.5 I also note the corroborating evidence of Claudia Muskat, at paragraph 3 of her statement. Although she was not present on 12 September 2019, the Claimant called her that day to say "she had left work, that it was her last day and she was not coming back to work". This is repeated in Ms Muskat's email of 16 October 2019 at p57.

31.6 Further, I note that Jade Parratt's account in both her statement at paragraph 7 and her email at p60 recalls that the Claimant told her in a telephone conversation on 12 September 2019, after the incident, that she would not be returning that week. However, Ms Parratt did not hear the original conversation between the Claimant and Ms Ukperaj; she is recounting what the Claimant told her later that same day.

31.7 I also note the Claimant's initial text to Ms Ukperaj at p45, which was sparked by Ms Eggleton collecting her salon keys on the evening of 12 September 2019. In that message, although the Claimant denies that she walked out (saying it was instead the end of her shift), she simply states she will be back at work tomorrow. She did not say "all I said was I won't be back this week". Throughout the ensuing text conversation between Ms Ukperaj and the Claimant at pp45-48, the Claimant does not deny that she said she was leaving, but simply says "I have not handed my notice in".

32. For all those reasons, taking all the evidence I have heard and considering the issue on the balance of probabilities, I find that the Claimant did say, in anger, that she was not coming back and was leaving. On the Claimant's departure from the salon she was clearly agitated and slammed the door on the way out. I should state, this does not mean that I believe the Claimant has lied to me or to anyone else. Honest witnesses can be very adamant in their recollection, but still be mistaken.

33. Again, in light of the above evidence I have highlighted, I find that the Claimant did not tell the Respondent to clear her diary of clients. I note particularly Ms Johnnson's statement and also the Claimant's text to Ms Ukperaj in which she states in surprise that the Respondent had taken her out of the diary and told her clients that she had walked out.

34. On 12 September 2019, Ms Ukperaj told the remaining staff members to redistribute the Claimant's client bookings and to cancel bookings for clients that could not be rearranged. As I have already stated, Ms Ukperaj also asked Ms Eggleton to go to the Claimant's property that evening to retrieve the Claimant's work keys.

35. Following Ms Eggleton's visit to the Claimant, the Claimant sent Ms Ukperaj the text message at p45. There was then an exchange of messages at pp46-47.

36. I note particularly Ms Ukperaj's text on p47:

> "...This is not the first time you walked out, and I have had enough with this. I spoke to you last week and that was your final warning, so this is best for everyone and leave things as they are".

37. These words seem to me to suggest that Ms Ukperaj, recognising that the Claimant wanted to return to her employment, was not going to allow it. This is echoed in Ms Ukperaj's statement at paragraph 16:

> "I maintained the Claimant's resignation of the day before and was not willing to allow her back to work".

38. Ms Ukperaj understood that the Claimant had (very swiftly) withdrawn her resignation by text on the evening of 12 September 2019, and yet refused to allow her to return. Further, she acted extremely quickly to remove all trace of the Claimant from her workplace.

39. On 13 September 2019, the Claimant attended work as normal. She found her diary had been cleared and Ms Ukperaj told the Claimant that she (the Claimant) had broken her contract and was not coming back to work. The Claimant therefore left.

40. Later, on 13 September 2019, the Claimant sent Ms Ukperaj the email at p49, stating again that she had not resigned, and so assumed she was being dismissed, but sought confirmation in writing. The Claimant told me that she understood that she had been dismissed as of 13 September 2019, having been into work on that date and been told her appointments had all been redistributed.

41. The next contact the Claimant received from Ms Ukperaj was on 1 October 2019 at p53, which simply read:

> "Apologies for not getting your payment, it looks like I lost connection when I tried to make a payment to you last night.
>
> Also, you might want to know that I don't tolerate anger and damaging my property at work place".

42. On 2 October 2019, the Claimant again emailed Ms Ukperaj asking that the Respondent put in writing the reason for the Claimant's dismissal and what notice period the Respondent was intending to pay the Claimant for – p52.

43. Ms Ukperaj replied the same day at p52, stating:

> "You are not getting payed [sic] in full as only worked 61 hours last month. You broke the contract when you left and said you not coming back to work! ...".

44. Later in October/early November, several of the Respondent's employees provided emails with their versions of events of 12 September 2019 or other matters relating to the Claimant: I have referred to these earlier in my judgment.

45. The Claimant presented her claim to the tribunal on 23 October 2019.

CONCLUSIONS

Unfair dismissal claim

46. <u>Was there a dismissal or resignation?</u>

    46.1 I have found that the Claimant said on 12 September 2019 that she was leaving, it was her last day, and she was not coming back. Those words are unambiguous, and, considering the subjective test, were taken by the Respondent to mean that the Claimant had resigned.

46.2 Was the Respondent entitled to leave it at that? Given the context in which the Claimant said those words, I find that they were said in the heat of the moment. This case therefore falls within the exception set out in Kwik-Fit, obliging an employer to not simply take an employee's words at face value, but requiring an employer to allow a reasonable time to see whether an employee actually intended to resign, and also to do some investigation into the matter.

46.3 The Respondent failed to do either of these things, ignoring the Claimant's clear, unambiguous, and almost immediate overtures to clarify that she had not in fact resigned, in text on 12 September 2019, then in person and in email on 13 September 2019. The Claimant therefore communicated her desire to retract her resignation within a reasonable time, however Ms Ukperaj chose to ignore this.

46.4 In those circumstances, the Respondent was wrong to maintain its acceptance of the Claimant's resignation. I therefore find that the Claimant did not resign, but was dismissed by the Respondent.

47. When was the Claimant dismissed?

47.1 Dismissal must be communicated to an employee, whether by words or actions. The Claimant told me she understood she had been dismissed on 13 September 2019 due to the clearing of her diary by the Respondent and the way Ms Ukperaj acted towards her. I therefore find that dismissal was communicated to the Claimant on 13 September 2019.

47.2 The effective date of termination is therefore 13 September 2019.

48. Was the dismissal fair?

48.1 The Respondent argues that, if there were a dismissal, it was a fair one, the reason being conduct which is a potentially fair reason under s98(2) ERA.

48.2 I accept that Ms Ukperaj was fed up with the Claimant's conduct of walking out of work, and that this was considered by Ms Ukperaj to be misconduct. There is no alternative reason that has been put forward as to why the Respondent dismissed the Claimant. I therefore accept that the reason for this dismissal was conduct.

48.3 I then have to consider the three-stage test as set out in **Burchell**:

48.3.1 Did Ms Ukperaj have a genuine belief in the misconduct of the Claimant walking out of work? From Ms Ukperaj's evidence, both to me and in her texts at the time – I note particularly p46 "it wasn't the first time you walked out" – I accept that Ms Ukperaj did have a genuine belief that the Claimant was guilty of walking out of work.

48.3.2 Did Ms Ukperaj have reasonable grounds for that genuine belief? This comes down to whether the Claimant had, to Ms Ukperaj's reasonable knowledge, walked out in the middle of her work day on 12 September 2019. Ms Ukperaj accepts that the Claimant had booked out from 3pm on 12 September 2019, and that she (Ms Ukperaj) was aware of this and accepted this booking out. I therefore find that the Claimant did not walk out in the middle of her shift. She may have walked out abruptly, but this was at the end of her shift. She had concluded all her client appointments for that day, and was leaving to attend an appointment. She had waited until the end of her working day to have the discussion with Ms Ukperaj about the parking fine. I therefore find that Ms Ukperaj did not have reasonable grounds for believing that the Claimant was walking out of work again on 12 September 2019.

48.3.3 Had there been an investigation that was reasonable in all of the circumstances? Although Ms Ukperaj had witnessed the Claimant walking out, this was done at the end of her shift and not mid-way through the day. Further, the Claimant did not admit (either at the time in September/October 2019, or now) that she had resigned. This means that there were disputes of fact that should have been investigated at the time: no such investigation was undertaken. Therefore, the investigation was not reasonable.

48.4 I therefore find that the dismissal was substantively unfair. Even if I am wrong on my conclusions regarding the Burchell test, and the investigation was reasonable, I consider that the sanction of dismissal was outside the band of reasonable responses. I consider that no reasonable employer would have dismissed the Claimant in these circumstances. I remind myself of what those circumstances were:

48.4.1 Ms Ukperaj knew that the Claimant had walked out before in March 2019, and returned to work, and had not intended that this action be taken as a resignation;

48.4.2 The Claimant had not been disciplined for these March incidents, which suggests the Respondent did not see the Claimant's actions in March 2019 as worthy of formal disciplinary action;

48.4.3 I have found that the Claimant did not leave work early on 12 September 2019 but that she left at her allotted time;

48.4.4 The Claimant had not left clients unattended on 12 September 2019;

48.5 I note Ms Ukperaj was concerned that "it looked as if [the Claimant] was getting away with things" – paragraph 20 of her statement. The reasonable way to remedy that would have been for the Claimant to have been disciplined back in March 2019, and/or disciplined in September 2019.

48.6 I therefore find that the dismissal was also substantively unfair due to the sanction falling outside the band of reasonable responses.

49. Procedural fairness

49.1 The Respondent does not deny that no procedure was in place. No steps at all were taken to follow the ACAS Code, therefore I find that the dismissal was procedurally unfair.

49.2 The Claimant's claim for unfair dismissal is therefore successful.

Limited unfair dismissal remedy issues

50. Polkey reduction

50.1 Is there a percentage chance that the Claimant would have remained employed had a fair process been followed, or would the Claimant's dismissal have been delayed if a fair process had been followed?

50.2 I consider that Ms Ukperaj had already made up her mind that the Claimant should not stay employed. This is clear from her own words at p48:

> "Chloe I'm not playing this game with you anymore ok! I haven't got time for this. This is not the first time you walked out and I have had enough with this. I spoke to you last week and that was your final warning, so this is best for everyone and leave things as they are."

50.3 It appears clear to me that Ms Ukperaj was very clear in her mind that the working relationship could not go on. Given Ms Ukperaj's pre-determination of this issue, and the wholesale lack of process, I cannot be satisfied that a fair process would have led to the same outcome, as I consider any process in which Ms Ukperaj would have been the decision-maker would have been unfair.

51. Contribution

51.1 Objectively, was the Claimant's conduct blameworthy? I have found that the Claimant conducted herself as follows:

51.1.1 She had a row with her boss;

51.1.2 She threatened to leave;

51.1.3 She walked out aggressively at the end of her shift.

51.2 This does appear to me to be blameworthy, and I note that the Claimant accepts she lost her temper. It is evidently also the case that this conduct contributed towards the Claimant's dismissal. However, it was not the sole cause of that dismissal, as the Claimant did then swiftly try to revoke her notice, but Ms Ukperaj refused to accept that revocation on the basis that she was fed up with the Claimant acting in this manner.

51.3 So, to what extent should the compensatory award be reduced to reflect this fault? I consider both parties share some blame for this matter. Ms Ukperaj's initial communication regarding the parking fee was perfectly polite, and the Claimant accepted that she lost her temper in the conversation that followed. I remind myself that I have found the Claimant did not leave her shift early, and so was not guilty of the extent of misconduct that the Respondent alleges. Also, Ms Ukperaj should not have refused to take the Claimant back when she so clearly indicated swiftly that she had not intended to resign.

51.4 I therefore make a deduction of 40% on the compensatory award.

51.5 Regarding the basic award, the test under s122 ERA is somewhat different. The issue is whether it is just and equitable to reduce compensation in light of the Claimant's conduct on 12 September 2019. I remind myself that under this test (s122 ERA) it is not necessary for the Claimant's conduct to have contributed to her dismissal. I have already found that the Claimant's conduct was blameworthy.

51.6 I have no reason to depart from the figure I have deducted from the compensatory award, and so will deduct 40% from the Claimant's basic award on the same logic.

52. ACAS

52.1 Under s207A TULR(C)A, there is a discretion to award up to 25% uplift on any award for unfair dismissal where the Respondent has failed to follow the ACAS Code. Here, there was a wholesale failure to follow the ACAS Code. I consider that, where no procedure was followed, the appropriate uplift is 25%.

Notice pay claim

53. Although I have accepted that the reason for dismissal was misconduct, I am not satisfied that the Claimant's actions on 12 September 2019 (as I have found them to have been) were so severe as to fundamentally breach her contract of employment so as to allow the Respondent to treat itself as released from its contractual obligation to pay C her notice pay.

54. I therefore find that the Claimant is owed her notice pay of one month's pay.

Arrears of pay claim

55. I have found that the Claimant's effective date of termination ("EDT") was 13 September 2019. The Claimant was paid up to and including 12 September 2019. C is therefore owed 1 day's pay under this claim, to take her to her EDT.

Holiday pay claim

56. I have been provided with no evidence (documentary or oral) as to how much holiday the Claimant had taken in 2019, despite asking the Claimant if she could tell me this. There is no information regarding the holiday pay claim in the claimant's witness statement or within her ET1, or indeed in the bundle.

57. The initial burden of proof must be on the Claimant to show that she is owed some holiday pay. C has failed to acquit herself of that burden, and therefore I dismiss this claim.

Remedy

58. At the hearing, I went through my calculations with the parties and ensured that they were both content at each stage of my calculations. Mr Jegede quite properly picked me up on two areas where I had failed to account for double recovery, for which I was grateful. These points were remedied at the hearing. The figures set out below were therefore agreed to be accurate.

59. Following giving my ex tempore decision at the hearing, I realised that I had failed to include an award to compensate the Claimant for her loss of statutory rights. I therefore wrote to both of the parties, explaining this omission and my intention to alter the overall award to reflect the need to compensate the Claimant accordingly. Neither dissented from my proposal.

<u>Unfair dismissal</u>

57. <u>Basic award</u>

    57.1 The Claimant worked for a full two years and, given her age, is therefore entitled to receive an amount in the sum of her gross weekly pay x 1 (multiplier for the Claimant's age) x 2 (complete years' service).

    57.2 The Claimant's rate of pay was £9 per hour. She worked five days a week, 7.75 hours each day. Her gross weekly pay is therefore 9 x (5 x 7.75) = £348.75.

    57.3 This equates to £18,135 per annum, which net is £15,971.80 per annum, or £307.15 per week.

    57.4 The Claimant's basic award is therefore 2 x £348.75 = £697.50

57.5 Given my findings regarding reduction under s122(2) ERA above, this figure must be reduced by 40%, giving a basic award element of £418.50.

58. Compensatory award

Loss of earnings

58.1 The Claimant found a new job that started on 7 October 2019. She is content that, on starting that job, she had fully mitigated her losses, and therefore she does not seek to claim beyond 6 October 2019.

58.2 I found that the Claimant's EDT was 13 September 2019. The Claimant started her new employment on 7 October 2019, a Monday, so her last working day for which the Claimant seeks compensation would be Friday 4 October 2019.

58.3 The period between 13 September and 4 October 2019 is 16 working days, which is 3.2 weeks. As above, the Claimant's net weekly pay is £307.15.

58.4 The Claimant's claim for loss of earnings therefore amounts to 3.2 x 307.15 = £982.88.

58.5 I have awarded a 25% uplift under s207A **TULR(C)A**, which provides a subtotal of (982.88 + 25%) = £1,228.60.

58.6 I have awarded a reduction in the compensatory award of 40% under s123(6) ERA, which provides a revised subtotal of (£1,228.60 – 40%) = £737.16.

Loss of statutory rights

58.7 Regarding loss of statutory rights, I consider that the appropriate figure is £300. This again attracts the uplift of 25% and reduction of 40% set out above. This leads to a revised figure of [(300 + 25%) – 40%] = £225.

Total for unfair dismissal

58.8 The total award for the successful claim of unfair dismissal is (£418.50 + £737.16 + £225) = £1,380.66.

Notice pay (awarded net)

59. Notice pay is awarded net of tax. I have found that the Claimant is owed one month's net pay, however it is necessary to consider when the notice period fell. The Claimant's EDT was 13 September 2019. She is entitled to one month's notice, which means her notice period ended on 12 October 2019.

60. Some of that period has already been taken into account within the compensatory award above, the Claimant having been compensated up to and including 4 October 2019. Therefore, to award the Claimant a full month's salary here would be to give her double recovery.

61. The Claimant's compensatory award takes her up to and including 4 October 2019. Her notice period expires on 12 October 2019. The period for which she therefore needs to be compensated is the five working days from 7 October 2019 to 11 October 2019. Five working days equates to one week, so the Claimant is entitled to one week's net salary of £307.15 for her notice pay claim.

Arrears of pay

62. I repeat that I have decided that the Claimant's EDT was 13 September 2019. The Claimant was paid up to and including 12 September 2019: the Claimant is therefore theoretically entitled to one day's pay. However, she has already been compensated for that day within the compensatory award above. To award the Claimant anything further under this head of loss would be to allow double recovery. The Claimant is therefore awarded no additional sum under this head of loss.

Grand total

63. Taking the Claimant's award for her unfair dismissal claim of £1,380.66, together with her award for her notice pay claim of £307.15, the grand total payable to the Claimant is £1687.81. This figure was to be paid 28 days from the date of judgment. I extended the default period for payment of 14 days, given that Ms Ukperaj is unable to work due to the ongoing Covid-19 pandemic, and the Claimant has income from her new employment via the furlough scheme. Mr Jegede asked for 42 days to pay, as that is the period for appealing a judgment. I was not prepared to keep the Claimant from her money for that long, but was content to give the Respondent some additional time as set out above.

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Employment Judge Shastri-Hurst

Date: 12 July 2021

Sent to the parties on:

13 September 2021

For the Tribunal Office