EMPLOYMENT TRIBUNALS

Claimant: Ms R Thomas

Respondent: Brandpath UK Ltd (formerly known as Expansys UK Ltd)

Heard at: Watford Employment Tribunal (the judge)
and Aylesbury Crown Court (the Claimant and assistants)
and in public by video (remainder)

On: **21, 24, 25 May 2021 and 20 and 21 September 2021**

Before: Employment Judge Quill (sitting alone)

Appearances
For the claimant: In Person
For the respondent: Mr O Isaacs, counsel

RESERVED JUDGMENT

1. The Claimant's employer, at all relevant times, was the company with the number 02870061. During her employment it was called Expansys UK Ltd and is now known as Brandpath UK Ltd. That is the entity which was the Respondent to these proceedings.

2. The Claimant was dismissed by the Respondent, but the dismissal was not unfair. The complaint of unfair dismissal is not well-founded and is dismissed.

REASONS

Background

1. On 18 January 2017, the Claimant presented a claim naming Expansys UK (a division of Brandpath Group Ltd) as respondent. She had previously commenced ACAS conciliation using the same respondent name on 27 November 2016. The early conciliation ended 19 December 2016.

2. As a result of previous decisions, by the time the case became before me, the only complaint to be decided was of unfair dismissal. There was also a lack of agreement between the parties as to the identity of the respondent to the claim and/or of the Claimant's employer, which was therefore a matter for me to resolve.

3. Previous applications to postpone the hearing had been made by the Claimant and, during the course of the hearing, further applications were made. On 25 May, I did agree to the Claimant's application to adjourn the hearing for medical reasons, part heard, recommencing on 20 September 2021. I refused the other postponement applications, including those based on the Claimant's Employment Appeal Tribunal proceedings relating to prior decisions in this case.

4. Having granted the adjournment in May, there was a discussion involving the parties during which I made some case management orders which were sent out to the parties in a document containing a heading "preliminary hearing". As I confirmed to the parties, this hearing has been a Final Hearing, held in public.

The Hearing and the Evidence

5. I was located at the hearing centre in Watford. The Claimant, her friend and her son attended remotely by video link (CVP) from Aylesbury Crown Court, and I am grateful for the assistance provided by the staff there. The Respondent's representative and its witnesses attended remotely by CVP from other locations.

6. I had a bundle of 564 electronic pages from the Respondent and a further electronic bundle of 1098 pages containing documents from the Claimant which the Respondent's representatives had scanned. I also had a witness statement bundle of 134 pages containing statements from the following:

    6.1 For the Claimant's side: herself, Darren Mason, Anatol Thomas and Quamarni Thomas (each of whom had done a main and a supplemental statement), as well as one statement each from Aileen Stottor, Sharon Rabess, and Vera Louie.

    6.2 For the Respondent: a main and 2 supplemental statements from Clive Capp; a statement from Stephen Vincent and a supplemental statement from Brooke Wingrove.

7. I heard live evidence from some of those witnesses and for the remainder, I gave their written statements such weight as I saw fit. In the order they were called, the witnesses were:

    7.1 Mr Quamarni Thomas (at Aylesbury)

    7.2 Mr Clive Capp

    7.3 Ms Brooke Wingrove (whose evidence was part heard when we adjourned on Day 3 in May, and which concluded on Day 4 in September)

    7.4 Claimant

8. The Claimant was a litigant in person. She was also accompanied by a friend, Ms Thompson. I allowed each of the Claimant and Ms Thompson to put questions to the Respondent's witnesses and to make submissions.

9. Following conclusion of the Claimant's evidence, it was agreed that the parties would each make written submissions by Friday 1 October 2021 and would each

have the opportunity to respond, in writing, to the other side's submissions by Friday 8 October 2021. The deadline was 4pm in each case, though I made clear I would not ignore items which were only slightly late, and I have therefore taken out of the attachments to the Claimant's emails of 16:15 and 16:43 on 8 October, as well as the items (from both parties) received prior to that.

Facts

10. On 23 July 2013, the Claimant signed 2 documents, with headings "summary of employment terms" and "contract of employment" respectively. These documents were written confirmation of the start of her employment (which commenced 22 July 2013) and that the identity of her employer was Expansys UK Limited, with company number 02870061. Registered office details were also included. There was no later occasion on which the parties agreed that the Claimant's employer would change. There was no later occasion, during employment, on which the employer purported to tell the employee that there had been a change of employer, or vice versa.

11. The versions of these documents in the Respondent's bundle as originally supplied were at pages R263-264 and R265-270 respectively. R269 ended part way through clause 18 of the contract and R270 started with the beginning of clause 21. The Respondent provided another version in which the equivalent of R270 purported to show the last 3 lines of clause 18 as well as clauses 19 and 20. I am satisfied that this latter document was a genuine and complete copy and that the explanation for the error in the version in the bundle was simply an innocent error made during photocopying. I am satisfied that there was no intent to deceive and that, in fact, the Respondent and its representatives had not even noticed the error until Mr Capp was being questioned.

12. The contract document had been signed on behalf of the Respondent (on 9 July 2013) prior to its being sent to the Claimant. This was done by Renata Hunter, Group HR Manager. By signing the document, the Claimant confirmed acceptance of the terms of the contract. Her acknowledgment read:

> I acknowledge receipt of this summary and the attached contract of employment. I accept the terms of my contract of employment. I have also received and read a copy of the Employee Handbook and I accept the rules, policies and procedures set in it.

13. On or around 29 June 2018, the company with number 02870061 changed its name from Expansys UK Ltd to Brandpath UK Ltd. The address of the registered office did not change, and the address remains that stated in the documents summary of employment terms" and "contract of employment".

14. I am satisfied that in both her early conciliation and in the claim form, the Claimant was seeking to identify her employer as the proposed respondent. Furthermore, I am satisfied that she did identify her actual employer with sufficient clarity. As will be mentioned below, the termination of the Claimant's employment came before the name change. Furthermore, these proceedings commenced before the name change.

15. For the entire period of her employment, the name of the employer was Expansys UK Ltd. At the time the proceedings commenced, the correct identity of the

Respondent (that is, of the Claimant's former employer) was Expansys UK Ltd. The correct name of that company (and therefore of the Respondent) is now Brandpath UK Ltd.

16. The Respondent is one of a number of companies in a group. The Claimant knew this. Her job was in the finance department (and her job title was "purchase ledger clerk") and she did work on the accounts for various companies within the group. This required her to be aware of which particular company's income, expenditure, invoices, etc, she was dealing with at any given time. Although the duties of her job for the Respondent required her to do work on the accounts of the other companies in the group, she was not employed by any of the other companies.

17. There is a document called "Employee Handbook 2013" in the Respondent's bundle at pages R271-313. I am satisfied that this was not the exact same Employee Handbook referred to in the acknowledgment that the Claimant signed in July 2013 (given that, on the last page, it states that it was produced in October 2013). In the opening paragraph it states:

> The purpose of this booklet is to explain all of your entitlements and responsibilities as an employee of EXPANSYS Group ("the Company") or one of the subsidiary companies (EXPANSYS Inc. UK, SARL, HK, PJM & DSNS). The handbook forms part of your terms and conditions of employment and it is therefore important that you familiarise yourself with them. The policies and procedures contained in this handbook are non-contractual and where there is a difference between the terms specified in your Statement of Terms and Conditions of employment and the handbook, the terms contained in your statement of Terms and Conditions of employment apply.

18. I reject the Claimant's argument that it was an Employee Handbook only produced for other companies in the group, and not hers. My finding is that "Inc. UK" means "including Expansys UK Ltd". In any event, regardless of that interpretation, the words before the brackets are wide enough to include Expansys UK Ltd and my finding is that they did so.

19. At clause 20 of the contract, the Respondent reserves the right to "make reasonable changes to any of your terms and conditions of employment" and states that such changes will be notified to you not less than one month in advance of the change taking effect.

20. The summary of employment terms states:

> 16. Disciplinary and grievance rules and procedures: The Company's disciplinary and grievance rules and procedures are set out in the Company Handbook.

21. The contract states:

> 9. DISCIPLINARY AND GRIEVANCE PROCEDURES
>
> The Company's non-contractual disciplinary and grievance procedures are set out in the Company Handbook.

22. My finding is that there is no significance to the difference in terminology between "company handbook" and "employee handbook" and both were intended to refer to the same thing. Furthermore, from the Respondent's point of view, the October 2013 version (the only version included in the hearing bundle) was intended to replace any earlier versions. From the Respondent's point of view, the 2013 document included the Code of Conduct, Disciplinary Procedure and Grievance Procedure which applied to all of its employees.

23. My finding is that whether the Claimant was specifically aware of the 2013 document or not at the time it was produced, she was aware from her contract of employment that the contents of the Handbook that she received in July 2013 did not contain a contractually binding disciplinary procedure or grievance procedure, and that, in any case, the Respondent had the right to make changes. In other words, she was on notice that, should the time arise when she or her employer sought to instigate a disciplinary procedure or grievance procedure then the procedure which applied would be whatever was in the then current version of the Handbook, which would not necessarily match the version which she received in July 2013. Furthermore and in any event, the Claimant has not produced a version of the one she received, or highlighted any relevant alleged differences.

24. As of 2016, the Claimant's line manager was Chris Hughes. He has not produced a witness statement for these proceedings. Around 31 May 2016, he was away from the office. After his return, according to documents which he produced at the time, he drew up an "investigation plan" (R211) in which he described himself as "investigator" and the "terms of reference" as being:

> To investigate a grievance raised by Tom H that Renata T has spoken to him improperly on more than one occasion, in particular the morning of 31" May 2016

25. By "Tom H", he meant an employee named Tom Halpin (who has not produced a witness statement for these proceedings) and by "Renata T", he meant the Claimant. I have been shown no written document produced prior to the "investigation plan" which would amount to a formal written grievance by Mr Halpin and my finding is that there was none. The Respondent had plenty of opportunity to produce it if it existed, and the contemporaneous documents do not refer to such an item as being in existence.

26. The investigation plan referred to the need to follow the Respondent's grievance procedure and its disciplinary procedure. It referred to a timeline of commencing interviews on 8 June (2016) and concluding the investigation by 9 June (2016). It noted the intention to interview Mr Halpin, the Claimant and Charlotte Burnett, and expressed the willingness to interview others as and when necessary "following initial interviews". My finding is that Appendices 1, 2 and 3 (the first two of which are expressly referred to in the investigation plan on R211) were produced on or before 8 June 2016, and were the typed questions that Mr Hughes intended to ask, respectively, to Halpin, the Claimant and Burnett.

    26.1 Further, the handwriting on R212-214, is the notes (either made by Mr Hughes or by HR) of answers given by Mr Halpin to the questions asked by Mr Hughes on 8 June 2016.

26.2 Similarly, the handwriting on R216-217 is the notes of answers by Ms Burnett the same day.

26.3 In each case, I do not assume that the notes are a fully accurate summary of the answers or that the answers are true.

26.4 R215 has no handwriting because the Claimant was not interviewed. However, I am satisfied that it does reflect the questions Mr Hughes intended to ask.

27. I do not propose to itemise everything that Mr Halpin is recorded as saying. He suggested that there was a discussion on 31 May 2016 in which, in his opinion, the Claimant was unhelpful and then rude. He says that after the incident he spoke to "JD" (probably a reference to Jonathan Davies) then "Julie" (probably a reference to Julie Smith, from HR) and that "JW" (meaning Jessica Wheeler from HR) spoke to the Claimant. In terms of his own behaviour, he is recorded as saying that he "lost [his] cool" and that he swore during the exchange (replying to the Claimant saying that he was being rude by saying "[you're] f'ing rude"). He does not allege that the Claimant swore.

28. Ms Burnett's account was that her attention had been drawn by Mr Halpin saying to the Claimant, "fuck's sake – don't speak to me like that". She gave her opinion that she did not think that what Mr Halpin has asked the Claimant to do was unreasonable. She said she had intervened and told them both to stop. She named other people whom she thought might have some information. From the context, it is unclear if she was suggesting that they had seen/heard the particular incident, or whether she meant that they might have general opinions on the working relationships that Mr Halpin and/or the Claimant had with colleagues.

29. The Claimant's account to the tribunal of the incident described by Halpin and Burnett (and she does not necessarily accept it was 31 May 2016) is that Mr Halpin was asking her to record an invoice in the accounts of a particular company in circumstances in which she believed that she did not have the necessary information/evidence to do so. She said her refusal was based on the accounting practices (and month end closure dates) for that particular company. Her opinion was that Mr Halpin was in error in making the request, and that he also misunderstood her reasons for objecting; she believes that he had in mind the (different) accounting rules (and month end closure dates) of another company in the group, one which he was used to working on himself. There is no evidence to contradict the Claimant's account on this point and I accept it.

30. Furthermore, the Claimant's account is that after the incident, she was spoken to by Jessica Wheeler. (On the Claimant's account, both the incident with Mr Halpin and the discussion with Ms Wheeler were on 2 June 2016, rather than 31 May 2016. Nothing particularly turns on the difference between Tuesday 31 May 2016 and Thursday 2 June 2016; the sequence of events is more relevant than the exact calendar date). It was Ms Wheeler who instigated the conversation. The Claimant says that during the conversation, she complained about Mr Halpin's treatment of her. Not only is there no evidence to contradict the Claimant's account on this point, her account is fully consistent with all the evidence that I do have and I accept it. Ms Wheeler made no written record of what the

Claimant said to her. Nor did Ms Wheeler decide that the Respondent should treat the conversation as the Claimant raising a grievance against Mr Halpin. In terms of the chronology of the events, I am satisfied that Ms Wheeler spoke to the Claimant after Mr Halpin had first raised the matter with senior staff and HR.

31. At 12:45 on 8 June 2016, Mr Hughes sent an email to the Claimant, copies to Ms Wheeler, which said:

> We will be having a meeting today to ask you a few questions about the incident on Tuesday 31st May.
>
> The meeting will be with myself and Jess so please take your lunch before 2pm.
>
> Jess or I will confirm the meeting room for our meeting at 2pm.

32. This was the first that the Claimant knew of the proposed meeting, and she replied at 12:49 to ask, "Is this an official or un-official meeting". At 13:06, he answered:

> It is an informal investigation now I've returned from annual leave, we've met with Tom and would like to understand your position.
>
> It is informal but if you would like someone to join you in this meeting you can.

33. The Claimant replied at 13:17:

> At this stage I have said what I needed to say to Jess; which had me in tears.
>
> I am sorry, but I do not wish to re-live this ordeal.
>
> My position is as I discussed with Jess last week.

34. In this email, the Claimant was referring to the conversation she had had with Ms Wheeler on the day of the incident. If Mr Hughes had not been previously aware that such a conversation had taken place, he was now.

35. Ms Wheeler who had been copied in through the exchange then replied at 13:29 as follows (spelling as per the original):

> This is an investigation ahead of a formal meeting potentially being arranged.
>
> I did say last week that we would need to speak further, as the indecent was not resolved.
>
> Your cooperation is required.
>
> Chris as your line manager, will conduct this investigation, which will be used as consideration in any formal meeting.
>
> This is a request from your line manager, I encourage you to conduct yourself in a collaborative manor.

36. The Claimant replied at 13:41, stating:

> As expressed last week, not too sure why you are approaching me in an extremely forceful/full on manner?
>
> There is no mention & or indication from me to the contrary of what you are referring to below (ie. line manager & co-operation).
>
> I am merely reiterating what I mentioned to you last week — 'Duty of Care' , as you are well aware of how upsetting the whole event was/ has been to me.
>
> I appreciate that Chris requires my presence so I am/will discuss anything further in a meeting with him.

37. From reading this email, Mr Hughes was aware, if he had not been already, that the Claimant's version of her conversation the previous week with Ms Wheeler was that she had referenced duties which the Respondent owed to her as well as saying that she had been upset by the incident.

38. At 13:46, Ms Wheeler replied:

> Thanks for your email.
>
> Naturally I am happy to provide further explanation as to why you are required to provide answers in an investigation, when you object to a legitimate request from Chris.
>
> It is a shame, you interoperate me to be forceful, when my intention it to be clear and reasonable.
>
> I understand the situation is not comfortable, my duty of care as Head of HR is to consider all parties that are involved and bring to resolution in the shortest window possible-
>
> In order to do this, your cooperation is required.
>
> As Chris suggested, although this is not a formal meeting, if you would feel more supported bringing along a colleague, please feel welcome.
>
> I'll see you at 2pm in [room name].

39. The Claimant replied at 13:56, stating she would like to arrange to have an "independent representative" with her and that she would like to time to arrange that and to liaise with that person before the meeting. At 14:29, Ms Wheeler replied to state that the meeting had been re-arranged for 4pm (the Claimant not having attended at 2pm) and that "*If you fail to attend the meeting at 4pm today, the company could perceive this as a disciplinary matter in relation to insubordination and failure to carry out legitimate management instruction*." The offer that the Claimant could be accompanied was not withdrawn, but the email asserted that it was the Respondent's position that the Claimant had no right to be accompanied. Although not expressly stated, I am satisfied that Ms Wheeler's meaning was that the Claimant could bring a companion at 4pm, but that she was required to attend unaccompanied if she could not find somebody.

40. At 15:38, the Claimant sent a reply which concluded as follows:

> I believe I have already advised on this matter, and am again advising that; upon advice, I cannot enter into any meeting with You both; whether formal or informal.
>
> Again, I advise that I would need proper notice, where I would be able to attend with my independent representative, to this meeting with the both of you (whether it be formal or informal - as you have stated below/previously).
>
> Apologies, but I have taken advice and would need to decline this meeting, until a more convenient time/date can be diarised for all parties {including my representative).

41. The Claimant did not attend the meeting. She carried on working as normal and sending and receiving work emails for the remainder of the day. A letter was delivered to her (R218-219). The letter was headed "invite to a disciplinary hearing". The meeting was to be at 4.45pm on 10 June 2016, and the letter asserted that the Claimant had been given 48 hours' notice. She was told of right to be accompanied. The allegations to be considered did not relate to Mr Halpin, but rather to the Claimant's non-attendance at the 2pm and 4pm meetings. The evidence included was the email trail on 8 June, as described above.

42. The Claimant wrote a letter to the Respondent on 10 June 2016 (R221-222). Amongst other things, it referred to the Claimant having spoken to Ms Wheeler (on 2 June, on the Claimant's account, though the date is not specified in the letter) about the incident with Mr Halpin which, on the Claimant's account, was part of a long chain of previous issues with Mr Halpin which she had been trying to move on from and which, she said, had left her "distraught, anxious, distressed and harassed". She stated she had been in tears when speaking to Ms Wheeler. She expressed willingness to attend a meeting provided her representative (whom she named) could attend, and said that she could not do it that week. 10 June 2016 was a Friday. The letter was given to Ms Wheeler around 16:28 (R220).

43. The Claimant repeated during the tribunal hearing that she had been very upset and in tears when she met Ms Wheeler. Her evidence is uncontradicted on this point, and I accept it.

44. According to the documents in the bundle, at 4.45pm on 10 June 2016, Ms Wheeler ("note taker") and Mr Hughes ("hearing chair") held a meeting in the Claimant's absence. The notes acknowledge that the attendees had seen the Claimant's letter and had decided to proceed in her absence. According to the notes, there was a list of questions (which were included in the notes) which, in the Claimant's absence, were unanswered. The notes conclude:

> In the absence of RT, CH took the decision that insubordination was found and sanctioned a final written warning

45. A letter dated 13 June was sent to the Claimant (R226-228). The heading said "First and Final Written Warning". The letter asserted that Mr Hughes had decided that the Claimant had not provided an acceptable reason for not attending on 10 June and so he had decided, in her absence, that the allegations mentioned in the 8 June invite letter were proven. The letter concluded:

> My decision is therefore to issue you with a first and final written warning. This warning will remain on your personnel file but will be disregarded after 12 months if no further disciplinary warnings are issued.
>
> It must be stressed. in no uncertain terms. continued behaviour of this nature will not be tolerated and you are required to comply with all reasonable management instructions made of you. This includes the requirement to comply with requests to attend a meeting to investigate further Tom Halpin's grievance. Further refusal to do so could result in further disciplinary action which could result in the termination of your employment. in my view. it would be entirely foolish to put yourself in a position whereby by your actions are jeopardising your continued employment for the sake of refusing to attend an Informal investigation meeting which I must stress again, is not a formal hearing and is not therefore one which you are entitled to be provided with any set notice to attend or entitled to attend with an independent representative. No conclusions have been reached in relation to the subject matter of Tom Halpin's grievance and all we are seeking to do is give you an opportunity to provide your account of events prior to considering whether any further action is necessary in relation to this matter.
>
> I would ask you to think very carefully about your continued refusal to cooperate In this matter and to the potential consequences of you continuing to maintain this position. I note that you have previously referred to taking advice in relation to this matter and I would strongly urge that if you are taking advice that you update your adviser as to the current situation and would very much hope that they would encourage you to cooperate with the Company's investigations.
>
> Should there be any repeat of these issues, or any other misconduct by you. further disciplinary action will be commenced. As any further disciplinary action may result in your dismissal. I urge you to address these issues immediately and to follow the Company's rules and procedures.
>
> You have the right to appeal against this decision. if you wish to appeal. you must state your grounds of appeal in writing to Jonathan Davies - Head of Finance within 5 days of the date on this letter.

46. The Claimant received this letter. She did not appeal.

47. From Tuesday 14 June 2016, the Claimant commenced a period of sickness absence which continued for the remainder of her employment. A GP Fit Note dated 14 June 2016 was sent to the Respondent; it stated that she would be unfit until 28 June 2016, giving the reasons "work-related stress and anxiety". On 17 June, Ms Wheeler wrote, acknowledging contents of the Fit Note and proposing 9am on 29 June 2016, the anticipated return date, for the "purely investigatory and informal" meeting concerning the Halpin matter.

48. The Claimant did not return on 29 June 2016, and a letter was sent that day by Ms Wheeler asserting that the Claimant had not contacted the Respondent and that the Claimant was in breach of the absence policy and (therefore) on unauthorised absence. In fact, the Claimant had obtained a fit note on 28 June 2016 for the period 28 June to 12 July, stating that the Claimant was unfit for the same reason as before. According to Ms Wheeler's letter of 5 July 2016, this note was received by the Respondent on 1 July 2016. The letter alleged that the Claimant had not contacted the Respondent prior to 1 July and criticised her for that, stating it was a breach of the absence notification procedure. The letter

stated that the meeting re Halpin would be arranged after 13 July (the potential return date).

49. In fact, the Claimant's son had successfully contacted the Respondent by phone around 14 June 2016. On later occasions, family members including the Claimant's brother attempted to speak to the Respondent to update them, not always successfully.

50. A further fit note for the period 12 July to 26 July was submitted to the Respondent, giving the same reason for the absence. On 13 July 2016, Ms Wheeler wrote to acknowledge receipt of the note and an absence notification from the Claimant's son. The letter invited the Claimant to a meeting on 19 July to discuss her absence and measures the Respondent might take to alleviate her stress. The Claimant did not attend the meeting. By letter dated 22 July 23016, Ms Wheeler rescheduled the welfare meeting for 26 July 2016 and stated that she regarded the request to attend as reasonable and asked for the Claimant to contact her to give reasons if she was not going to attend.

51. A fit note covering absence from 25 July 2016 to 7 August 2016 was submitted to the Respondent, citing work related stress. On 28 July 2016, a union representative contacted Ms Wheeler to state that the Claimant had received medical advice that she should not attend work meetings for the time being as it would be detrimental to her recovery.

52. On 29 July 2016, Ms Wheeler wrote to the Claimant and asked the Claimant to ask her GP to confirm when the Claimant was likely to be fit enough to attend work meetings and whether there were any adjustments that might help, including off site meetings, or allowing the Claimant to have a non-work companion. The letter also stated that the Respondent proposed that the Claimant should attend an Occupational Health ("OH") appointment, asserting the contractual right to insist on this.

53. The Claimant's reply to that is at R240. It is not dated, but Mr Capp states, and I accept, it was received by the Respondent on 3 August 2016. The letter agreed that the Claimant would ask her GP the questions, and acknowledged the need for her (via family members, potentially) to keep the Respondent updated. It made no direct response to the request for confirmation that she would attend an OH appointment, other than stating she needed more time to fully respond to the Respondent's letter.

54. A fit note for absence of 3 weeks from 2 August 2016 was supplied to the Respondent, citing work-related stress and anxiety. There was also a "to whom it may concern" letter from the GP dated 2 August 2016. The letter confirmed the contents of the fit notes and that they had been issued after the Claimant had been seen at surgery. It stated the fit notes were intended to allow the Claimant to refrain from the workplace while she was being treated (having therapy sessions). It gave no estimated end date, and suggested no adjustments, and stated the fit notes would continue to be issued until the Claimant was fit to return to work.

55. The Respondent did receive this communication from the GP but, prior to doing so, on 4 August 2016, Ms Wheeler wrote to the Claimant giving her 7 days to supply the information requested in the 29 July letter.

56. On 9 July, Ms Wheeler wrote directly to the GP to acknowledge receipt of the GP letter and asking for specific information about timescales and what the Respondent could do to assist. On 22 August 2016, Ms Wheeler wrote to the Claimant to state that the GP required written consent to answer these questions and supplied her with a consent form.

57. A fit note to cover absence for the period 22 August to 26 September was submitted to the Respondent.

58. On 30 August, Ms Wheeler wrote a reminder letter to her 22 August letter stating that no response had been received (by the requested deadline of 26 August, or at all). The letter concluded:

> As I hope I have made clear In these letters, the reason I am asking for an occupational health referral and the reason I have asked for your consent to contact your GP to ask some further questions following their letter dated 2 August, is to attempt to manage your current sickness absence and to manage the other on-going matters, such as the grievance Investigation As I have previously stated, if you do not cooperate with us we may be left with no option but to consider making decisions in relation to these matters without the benefit of full medical information. As previously advised, I cannot see that is in your interests and would therefore urge you to consider your position and to respond to my letters dated 4 August and 22 August.
>
> I would also reiterate that in relation to OH, you have agreed under your contract of employment that the Company can refer you for an independent medical assessment and would note that in relation to both matters (OH referral and consent for your GP), the Company does consider it a reasonable management request for you to respond to these requests within the time-frames provided (and extended on occasion at your request), which we consider reasonable.
>
> If I have not received the consent to contact your GP and DH referral back by close of play on 2 September I will unfortunately, have to consider next steps.

59. In response, the Respondent received a letter dated 6 September from the Claimant. It said the Claimant needed more time to respond and that either she or a union representative would reply by Friday 16 September.

60. No such contact was received. On 21 September 2016, the Respondent wrote to the Claimant with a letter headed “disciplinary hearing”.

    60.1 The disciplinary hearing was for 27 September 2016.

    60.2 The letter was from Clive Capp, Senior Vice President - Group HR & Recruitment. Mr Capp is not an employee of the Respondent but provides Human Resources (HR) advice to the companies in the group. His letter stated that he would be chairing the disciplinary hearing.

    60.3 The letter enclosed disciplinary procedure from the Employee Handbook (being the same Handbook that is in the hearing bundle).

60.4 The allegations were said to include "the subject matter of Tom Halpin's grievance" but did not say what specific misconduct the Claimant was accused of. The allegations were also said to include failure to attend investigation meetings for this matter and alleged that the Claimant had failed to follow the absence notification procedure, without specifying particular dates/periods.

60.5 The letter referred to the fact that the Claimant had been given "a final written warning on 10th June" and stated a possible outcome was dismissal.

60.6 The letter finished:

> If you are unable to attend please inform me by Monday 26th September 2016 explaining your reasons for not attending. if you cannot attend you may wish to provide written submissions for my consideration prior to a decision being made.
>
> If you fail to attend without good reason or prior notification, the hearing may take place in your absence and a decision made based on the evidence in our possession. As this meeting may result in your dismissal, I urge you to attend

61. The Claimant replied by letter dated 23 September. She acknowledged that she had not sent a communication by 16 September, and stated that she was still awaiting "a response and communication from my professional adviser". She said that she or her adviser would be in touch "in due course". A fit note to cover 22 September to 20 October 2016 was also supplied to the Respondent. Mr Capp received both items on 26 September.

62. The Claimant did not attend on 27 September. Mr Capp did not treat her letter as either a request for a postponement or an explanation for absence. The Claimant did not submit any written submissions. Mr Capp decided to proceed in the Claimant's absence. R253 to 255 is the meeting notes which contain his deliberations. By letter dated 4 October 2016, he wrote to the Claimant to say that she was dismissed with effect from 7 October 2016 and would be paid in lieu of one month's notice. He informed her of a right to (and the mechanism for) appeal. His letter enclosed the meeting notes and stated that the note set out "the issues which [he] considered and [his] findings in relation to the same." I am satisfied that the notes do indeed set out the issues which Mr Capp considered and his findings.

63. Mr Capp's decisions were:

63.1 The Claimant did not attend the Disciplinary Hearing, despite having been told that this was her opportunity to comment upon TH's grievance in the. The Claimant did not provide written despite writing "fairly voluminous correspondence to" the Respondent during her absence.

63.2 The Claimant had spoken to Mr Halpin improperly on more than one occasion and Ms Burnett's evidence supported Mr Halpin's assertion and belief about that issue.

63.3 It had been necessary for Ms Burnett to intervene to prevent it escalating.

63.4 Mr Halpin could have handled the situation "more appropriately" but it was the Claimant's manner which exacerbated the situation.

63.5 That, according to Ms Burnett, it was not only Mr Halpin who had a difficult working relationship with the Claimant. Rather Ms Burnett regarded Mr Halpin as non-confrontational but believed other individuals believed that the Claimant might "turn on them".

63.6 He concluded that there had been "inappropriate behaviour" by the Claimant in relation to the incident (which, according to his findings, had occurred on 31 May 2016).

63.7 For the allegation about failing to follow the absence reporting procedure, his decisions were:

> Furthermore, and in relation to the allegation that RT has failed to follow the Company's absence reporting procedure correctly in respect of her absence from work since 14'" June 2016, I have concluded that this allegation is upheld. Although Sick Notes have been received from her Doctor, RT has failed to give consent to welfare meetings, provide consent to contact her GP or to be assessed by occupational health specialists, despite numerous requests for the same. Furthermore, RT has committed to providing substantive responses in relation to such requests within time-frames which the Company has agreed to extend, due to RT's absence from work for stress and has subsequently failed to meet her own requested deadlines in relation to the same.
>
> Throughout this time away from the office, RT has failed to correctly follow the Company's absence reporting procedure. All communications have been initiated by the Company and RT has repeatedly failed to adequately respond to repeated requests for meetings, medical assessments and consultative health advice.

63.8 He took into account the warning and decided that it was appropriate to dismiss the Claimant for the "further misconduct" which he had decided had occurred.

64. The Respondent received a letter (R257) slightly outside the 5 day deadline. The letter said the dismissal letter had been received on 6 October. It said she would like to appeal, but before doing so (or at least before providing detailed grounds) she intended to seek advice. It also stated that she was not well enough to submit a full appeal straight away and that she would be in touch as soon as she was well enough. By letter dated 14 October 2016, the Respondent replied stating that the Claimant's letter had been received that day and concluding:

> Whilst I am not able to deal with your appeal without grounds, the decision to terminate' your employment stands. If, when you are well enough to do so, you do wish us to consider the situation further please contact Clive or me. I cannot, however. guarantee that this matter would be dealt with as a formal appeal against dismissal. given, that I cannot leave' open indefinitely your right to appeal. However, I will consider further if, or when, I receive your further correspondence.

65. There was no further follow up from the Claimant to the Respondent in relation to potential appeal.

Law

66. Section 98 of the Employment Rights Act 1996 ("ERA") says (in part)

> (1) 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.
>
> (2) A reason falls within this subsection if it—
>
> …
>
> (b) relates to the conduct of the employee,
>
> …
>
> (4) 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.

67. The respondent bears the burden of proving, on a balance of probabilities, that the claimant was dismissed for the fair reason relied on. (Conduct).

68. Provided the respondent does persuade me that the claimant was dismissed for that reason, then the dismissal is potentially fair. That means that it is then necessary to consider the general reasonableness of that dismissal under section 98(4) ERA 1996. In considering this general reasonableness, I must take into account the respondent's size and administrative resources and I must decide whether the respondent acted reasonably or unreasonably in treating the conduct as a sufficient reason.

69. In considering the question of reasonableness, I must analyse whether the respondent had a reasonable basis to believe that the committed the conduct in question. I must also consider whether or not the respondent carried out a reasonable process prior to making its decisions. In terms of the sanction of dismissal itself, I must consider whether or not this particular respondent's decision to dismiss this particular claimant fell within the band of reasonable responses in all the circumstances. The band of reasonable responses test applies not only to the decision to dismiss, but also to the procedure by which

that decision was reached. (Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23 CA).

70. It is not the role of this tribunal to assess the evidence and to decide whether the claimant should or should not have been dismissed. In other words, it is not my role to substitute my own decisions for the decisions made by the respondent.

71. The ACAS Code of Practice on Disciplinary and Grievance Procedures must be taken into account by the Employment Tribunal if it is relevant to a question arising during the proceedings (see section 207(2) of the Trade Union and Labour Relations (Consolidation) Act 1992). The ACAS Code sets out one procedure, for both 'conduct' and 'poor performance', but acknowledges that an employer might choose to have separate procedures. Having (and following) a separate procedure for performance is permissible, provided that the procedure for poor performance meets the basic principles of fairness set out in the Code. The ACAS Code confirms the importance of warnings as part of the process.

72. In Wincanton Group plc v Stone [2013] IRLR 178, at para 37 Langstaff P gave a summary of the law on warnings in misconduct cases.

> (1) The Tribunal should take into account the fact of that warning.
>
> (2) A Tribunal should take into account the fact of any proceedings that may affect the validity of that warning. That will usually be an internal appeal. This case is one in which the internal appeal procedures were exhausted, but an Employment Tribunal was to consider the underlying principles appropriate to the warning. An employer aware of the fact that the validity of a warning is being challenged in other proceedings may be expected to take account of that fact too, and a Tribunal is entitled to give that such weight as it sees appropriate.
>
> (3) It will be going behind a warning to hold that it should not have been issued or issued, for instance, as a final written warning where some lesser category of warning would have been appropriate, unless the Tribunal is satisfied as to the invalidity of the warning.
>
> (4) It is not to go behind a warning to take into account the factual circumstances giving rise to the warning. There may be a considerable difference between the circumstances giving rise to the first warning and those now being considered. Just as a degree of similarity will tend in favour of a more severe penalty, so a degree of dissimilarity may, in appropriate circumstances, tend the other way. There may be some particular feature related to the conduct or to the individual that may contextualise the earlier warning. An employer, and therefore Tribunal should be alert to give proper value to all those matters.
>
> (5) Nor is it wrong for a Tribunal to take account of the employers' treatment of similar matters relating to others in the employer's employment, since the treatment of the employees concerned may show that a more serious or a less serious view has been taken by the employer since the warning was given of circumstances of the sort giving rise to the warning, providing, of course, that was taken prior to the dismissal that falls for consideration.

> (6) A Tribunal must always remember that it is the employer's act that is to be considered in the light of section 98(4) and that a final written warning always implies, subject only to the individual terms of a contract, that any misconduct of whatever nature will often and usually be met with dismissal, and it is likely to be by way of exception that that will not occur.

73. In Bandara v BBC 2016 WL 06639476, the EAT confirmed (having considered both Wincanton and also the Court of Appeal's review in Davies v Sandwell Metropolitan Borough Council [2013] IRLR 374) that a tribunal assessing an unfair dismissal claim can, in an appropriate case, decide that the sanction of final written warning for a prior incident was a manifestly inappropriate sanction. A tribunal should only take that step if it there is something that is drawn to the tribunal's attention which enables it to conclude that the sanction plainly ought not to have been imposed, and this requires more than simply deciding that the sanction of final written warning had been outside the band of reasonable responses.

74. Subject to the comments above, where a final written warning is live, then the issue of whether the decision to dismiss was fair or unfair requires consideration (as per Section 98(4)) of whether, in the particular case, it was reasonable for the employer to treat the conduct reason, taken together with the circumstance of the final written warning, as sufficient to dismiss the claimant.

Conclusions

75. I have already stated in my findings of fact that the Claimant brought her claim against the correct respondent, namely her former employer. To the extent that the Claimant argues that the correct respondent (and/or her former employer) failed to submit a valid response, I reject that argument. The ET3 (R15) and other documents correctly identified "Expansys UK Ltd" as the company was then called. As an aside, an argument from the Claimant that she has not brought a claim against "Expansys UK Ltd" (as it was then called) does not assist her case in any event; that entity was her employer, and so if my decision had been that her claim had not been validly brought – in the first place – against Expansys UK Ltd, then she would be left needing to make an application to amend the claim to add the correct respondent, if she sought to a finding of unfair dismissal.

76. Mr Capp decided that there had been misconduct by the Claimant in two respects. I will deal with each separately first.

Halpin Incident

77. I am satisfied that Mr Capp did genuinely conclude that the Claimant had acted "inappropriately". He was not able to give specific information, but rather relied on Ms Burnett's comments that there had been an ongoing pattern of behaviour.

78. Taken in isolation, to the extent that he found that the situation would have escalated but for Ms Burnett's intervention, I do not think there are reasonable grounds for that specific conclusion. I think it is contrary to what Halpin said and Burnett said she did not know.

79. To the extent that he found that the Claimant was responsible for the situation, the question is not what I would have decided had I been the decision-maker; the question is whether there were reasonable grounds for him to reach the conclusion that the Claimant was responsible. He did note that Mr Halpin was the person who swore (as confirmed both by him and Ms Burnett). He did not have the same information that I have from the Claimant – namely that she believes that Mr Halpin reacted to her refusing to do something which, in her opinion, was a refusal she was obliged to make. Rather he had the notes taken by Mr Hughes in which Halpin alleged that the Claimant was often obstructive and that 31 May 2016 was a further example, and in which Burnett alleged that Halpin's request had not been unreasonable and that the Claimant's response had been inappropriate. Burnett did not claim to have heard the exact response uttered by the Claimant, but the implication from her account is that she, the Finance Manager, knew what the Claimant had been asked to do and did not believe that the Claimant was being sufficiently co-operative. She also stated her opinion that other people (whom she named in the notes) found the Claimant difficult. There was, therefore, reasonable evidence for Mr Capp's conclusion that the Claimant had behaved inappropriately.

80. In terms of what response there should be, he had before him evidence that there had previously been mediation between the Claimant and Mr Halpin, and that had failed. Ms Wheeler had left the organisation by this stage, and he did not have her account of what the Claimant had said to her. He did not have it from Ms Wheeler and he did not have it from the Claimant.

Sickness Reporting

81. In terms of any alleged unauthorised absence, the only period for which there was evidence was for 29 and 30 June 2016. That is the expiry of the first fit note, immediately before the Respondent received the second one. Upon reading it, Mr Capp would have been aware that the Claimant had in fact obtained that note on 28 June 2016, so the fault, if any, lay in the delay in contacting the Respondent with an update; there were no days which were uncertificated. He did not have reasonable grounds for believing that the Claimant was frequently late in supplying fit notes.

82. However, he was also entitled to (and did) have regard to clause 7.2 of the contract which reads:

> 7.2. The Company reserves the right to require you to have a medical examination or counselling from a doctor of its own choice at its expense. You hereby authorise the Company to have unconditional access to any report produced as a result of such examination.

83. Ms Wheeler had put the Claimant on notice that the Respondent was seeking to exercise its rights under this clause. The Claimant failed to either agree that she would attend OH or to submit detailed reasons for refusing; she did, as mentioned above, say she needed more time to consider her position and respond, and did state there were health grounds for needing more time.

84. The Claimant had also failed to supply consent authorising her GP to respond. While that was not, in itself, a contractual requirement, the Claimant was not even

supplying information from her own GP as a potential alternative solution to an OH appointment. Further, she and her union representative had previously said that the Claimant was willing to have her GP supply information to the Respondent.

85. For these reasons, Mr Capp did have reasonable grounds to decide that, overall, the Claimant was not providing sufficient information and co-operation about her absence, despite having been given clear information about what was required, and several reminders and extensions of time.

Procedure

86. The 27 September hearing went ahead in the Claimant's absence. Many employers might have postponed and have given the Claimant a further (and probably final) opportunity to attend or at least make written submissions. I think some employers would have done that in any event, but, in particular, I think many would have treated the 23 September 2016 letter as an implied request for postponement.

87. However, I do not consider that it was outside the band of reasonable responses to go ahead in the Claimant's absence.

87.1 Her 23 September letter simply said that she (or her "professional adviser", whose details were not supplied) would be in touch in due course. It gave no estimate of when that might be.

87.2 Ms Wheeler had written on 4 August and requested a reply by 11 August, and there was no response. She wrote again on 22 August seeking a reply by 26 August, and there was still no response. Her 30 August letter sought a reply by 2 September, and did not elicit a response from the Claimant until 6 September. That letter promised a substantive response by 16 September, which did not materialise.

87.3 The Respondent had also written to ask the Claimant's GP for comments as to when the Claimant would be fit to attend any meeting (including welfare meetings, not just disciplinaries) and about what could be done to help. No replies to these questions had been received.

87.4 In these circumstances, it was not unreasonable for Mr Capp to conclude that offering the Claimant a further opportunity to attend or make written submissions was unlikely to result in meaningful co-operation by the Claimant (or a representative).

88. I acknowledge that the Claimant believes that her conversation with Ms Wheeler on 31 May 2016 (or 2 June 2016) should have resulted in:

88.1 (Preferably): the Respondent treating her remarks as a grievance by her abut Mr Halpin's conduct, and potentially a formal investigation into that conduct.

88.2 (At the least): the Respondent treating her as having given her version of events, which could/should have been put in writing by Ms Wheeler and taken into account for relevant purposes. [On the Claimant's case, taken

into account to the extent that there would be no investigation of her conduct at all, but, at least put before Mr Capp.]

89. However, Ms Wheeler was involved in writing to the Claimant from 8 August 2016 onwards. In one email, Ms Wheeler asserts that she told the Claimant during the prior conversation that there would be an investigation. Regardless of whether (as the Claimant maintains) that should have been an investigation into Mr Halpin's conduct (instead of or as well as the Claimant's), it was clear to the Claimant that Ms Wheeler was not intending to put forward Ms Wheeler's account of what the Claimant had said and that, if the Claimant wanted to give her own account, she would need to do so, either face to face or in writing. In the first instance she was asked to do this to Mr Hughes (and this was before her sickness absence began) or later to Mr Capp (which could have been in writing).

90. I acknowledge the Claimant's argument that by swearing at her, Mr Halpin committed a breach of the Code of Conduct and that he was not formally punished. However, I also accept Mr Capp's account that he had been told that Mr Halpin acknowledged that he ought to have behaved better. More importantly, the Claimant had the opportunity to put her case across and that could have included any arguments that she should not be given any stronger sanction than Mr Halpin and/or that he, rather than she, should be disciplined.

91. I acknowledge that the Claimant was ill at the time. However, the Respondent sought to follow a procedure which took account of that. While I do not agree that the Claimant's letters were "voluminous" I am satisfied that the procedure would have allowed her to put in a brief summary of the reasons that her conduct on 31 May 2016 (or thereabouts) was appropriate. She also had the means and opportunity to give consent for her GP to answer the Respondent's questions, which might have led to adjustments to the procedure or timescales. It was not unreasonable for the Respondent to adhere to the procedure it followed when it had made clear to the Claimant that, with evidence, there might be adjustments, and the Claimant had failed to address that.

Dismissal Decision

92. I do not agree with the Claimant that Mr Capp was obliged to disregard the written warning because it was issued earlier in the same related series of events. The warning was specifically for failing to attend the meeting(s) on 8 June 2016, which was treated as failing to comply with an instruction. The warning was not for either the Halpin incident or the failure to follow appropriate procedures during absence. Furthermore, the fact that the warning post-dated the Halpin incident did not oblige the Respondent to ignore it.

93. Standing back, I regard the decision as being at the harsher end of the spectrum, both in terms of the dismissal outcome, and in terms of going ahead on 27 September without offering one last and final opportunity to respond to the allegations. However, as already stated, I have information (the Claimant's assertion that there were sound reasons for declining to do what Mr Halpin wanted, and that he misunderstood her reasons for refusing) which Mr Capp did not have. The Claimant had the opportunity to put that argument to him, but did not do so. On the evidence before him, a reasonable request was made to the

Claimant on 31 May 2016 and she unreasonably refused to co-operate with her colleague, not (on the evidence before Mr Capp) for the first time. The decision to dismiss, taking account of the written warning, was not outside the band of reasonable responses.

94. For these reasons, the claim fails.

_____

Employment Judge Quill

_____

Date: 20 December 2021

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON

14 January 2022

FOR EMPLOYMENT TRIBUNALS