EMPLOYMENT TRIBUNALS

Claimant: **Mr Canneaux**

Respondent: **Land Science Limited**

Heard at: **London South Employment Tribunal**

On: **02/03/2022**

Before: Employment Judge Dyal

Representation:

Claimant: Mr D Taylor, Solicitor

Respondent: Mr E Toms, Managing Director

RESERVED JUDGMENT

1. The Claimant was unfairly dismissed.
    a. A *Polkey* deduction of 70% will be made to the compensatory award;
    b. No reduction for contributory conduct shall be made to either the basic award or the compensatory award.

2. The Respondent made unauthorised deductions from wages in respect of the period of 23 March 2020 – 9 April 2020.

3. The claim for £221.54 is dismissed upon withdrawal.

4. Remedy for the successful complaints is to be assessed if not agreed:
    a. The parties should liaise to seek to agree remedy.
    b. If the parties agree remedy they should notify the tribunal forthwith.
    c. If the parties are not able to agree remedy by 9 April 2022 they must inform the tribunal of that fact and a remedy hearing will be listed.

REASONS

Introduction

1. The matter came before the tribunal today for its final hearing.

2. The issues were identified at a PH before Employment Judge Harrington on 14 December 2021. At the outset of the hearing, both parties agreed that these remained the issues. In short there are claims of:

   2.1. Unfair dismissal contrary to s.94 & 98 Employment Rights Act 1996;
   2.2. Unauthorised deduction from wages in respect of the period 23 March – 9 April 2020;
   2.3. Unauthorised deduction from wages in the sum of £221.54

3. In the course of the hearing, Mr Taylor withdrew the claim for £221.54.

4. An unfortunate feature of the history of this case is that for a protracted period the tribunal administration wrote to the Respondent using the wrong email address. It therefore missed months of correspondence as well as the Preliminary Hearing. This did not come to Mr Toms' attention until some point in January 2022. The Preliminary hearing however was uncontentious and the issues identified there were agreed today to be correct. Further, Mr Toms has been able to prepare for this hearing and was very keen that the matter proceed today. In light of that, and given (1) the detailed witness evidence Mr Toms produced; (2) the voluminous disclosure Mr Toms made on behalf of the Respondent, and (3) the brevity and simplicity of each of the Claimant's witness evidence, the Claimant's disclosure and the issues in the case, it was fair to proceed today.

5. *Documents before the tribunal*:

   5.1. Agreed bundle of documents running to nearly 600 pages;
   5.2. Two short videos of the Claimant performing stunts in an old car;
   5.3. Witness statements of:
      5.3.1. The Claimant;
      5.3.2. Mr Elliot Toms, Managing Director of the Respondent;
   5.4. A one page written document described by Mr Toms as a witness statement of Ms Wood, former Accounts Manager of Respondent.

6. *Witnesses the tribunal heard from and who were cross-examined*:

   6.1. The Claimant;
   6.2. Mr Elliot Toms, Managing Director of the Respondent

7. *Submissions:*

   7.1. Both sides made very short closing submissions that were consistent with their pleaded cases.
   7.2. Mr Taylor also submitted that I should not attach any weight to the statement of Ms Wood. It is not signed, there is no statement of truth and she did not attend to give evidence in circumstances in which there has been no good explanation as to why not. It is true that Ms Wood no longer works for the Respondent but that is not itself a barrier to her giving evidence. I accept these submissions. I do not think it would be either fair or safe to attach any weight to the document described as her witness statement.

Findings of fact

8. The tribunal made the following finds of fact on the balance of probabilities.

9. The Respondent is a business that provides testing and advice on ground engineering and contaminated land projects. At the time of the Claimant's dismissal it had about 18 employees. It had very limited administrative resources and did not even have an in-house HR advisor.

10. The Claimant's employment commenced in February 2016. He was employed as a Project Manager. He had a written contract of employment which is before the tribunal. He was paid an annual salary at monthly intervals.

11. Mr Toms had a longstanding dissatisfaction with the Claimant. The Claimant had a habit of engaging in inappropriate behaviour:

    11.1. In 2017, though Mr Toms did not become aware until 2019, the Claimant and a colleague performed stunts in an old car on a client's premises. It was a scrap car, but nonetheless one that belonged to the client and which the Clamant did not have permission to use. The stunts involved driving the car over a makeshift ramp at speed to make it jump and driving the car through a makeshift wall of tyres that were stacked higher and wider than the car.
    11.2. The Claimant was surly at work. He was not happy there and he made this obvious through his demeanour and presentation.
    11.3. The Claimant sometimes said inappropriate things to colleagues, like calling them 'retards' or fat.
    11.4. The Claimant engaged in 'laddish' behaviour. This included leaving a model penis on Ms Wood's desk and drawing a penis on her car. I do not accept that this upset Ms Wood herself. I accept the Claimant's evidence that he and her had a very good relationship within which this kind of behaviour was mutually regarded as funny. However, it is the type of behaviour that might have offended others, including but not limited to female staff. There is no specific evidence whether it did not but plainly it is something that management could legitimately be concerned about.
    11.5. On one occasion Mr Canneaux brought a bullet that he had found to work;
    11.6. On one historical occasion the Claimant was responsible for the Respondent incurring substantial standing charges by a sub—contractor.

12. In February 2020, the Claimant was invited to a formal disciplinary hearing. The primary issue was that the Claimant had completed a number of poor pieces of work in which he had not been very responsive to others and had missed deadlines. I accept that the Claimant had performed poorly in the way explained at paragraphs 41 – 44 of Mr Tom's statement. The Claimant was given a verbal warning and told that if there were further issues they would be dealt with formally.

13. The Claimant had invoicing targets. He sometimes did not meet them and his results in 2019-20 were the lowest of the four project managers.

Respondent's financial position and the pandemic

14. In 2019, the Respondent began to suffer substantial financial losses. Its operating and financial position was imperilled further by the pandemic, particularly once March 2020 came and the country moved to lockdown.

15. I accept that in around March 2020, Mr Toms was advised by the Respondent's accountant that he urgently needed to cut the business' staff costs.

16. In late March 2020, the Respondent began preparing for the pandemic and began preparing to furlough most of its staff. The staff were asked to work from home from 23 March 2020 and to complete certain work prior to being furloughed on 10 April 2020.

17. The Respondent gave staff some homeworking guidelines which emphasised that working from home was not a holiday. It also asked staff to complete timesheets during that period.

18. The Claimant did not, contemporaneously, produce a timesheets (he only did so much later in June 2020 by which time his recollection of the hours he had worked in late March/April was not great.)

19. On 12 June 2020, Mr Toms wrote to the Claimant telling him that he was suspended as a result of abuse of homeworking protocols during the pandemic and misuse of company property. The letter stated he would be contacted again once the Respondent had completed its investigation.

20. On 23 June 2020, Mr Toms emailed a document that is perhaps best described as a disciplinary investigation report of a sort. The report essentially alleged that the Claimant had:

    20.1. not completed the work he was supposed prior to going on furlough;
    20.2. not complete timesheets during the period of home working;
    20.3. taken the Respondent's pressure washer in April without permission to do so.

21. The report went on to characterise these allegations in various very serious ways and invited the Claimant to a disciplinary hearing on 29 June 2020.

22. Also on 23 June 2020, Mr Toms wrote to the Claimant notifying him that he was dismissed by reason of redundancy. The letter stated that his overall performance, commitment to the business and disciplinary record had been taken into account. No right of appeal was offered.

23. I accept Mr Toms' evidence that although there was some recruitment after the Claimant's dismissal, those who were recruited were not replacements for the Claimant nor did they undertake work of a similar kind to him. They replaced other outgoing staff.

Did the Clamant work between 23 March 2020 and 9 April 2020?

24. On balance I find that the Clamant was working during the period of home working between 23 March – 9 April 2020 and was not, as Mr Toms asserts, treating it as holiday:

    24.1. There is a certain amount of documentary evidence about this and it presents a mixed picture. It is undoubtedly clear from the documents that the Claimant was at the least doing some work. For example, there are contemporaneous messages that he sent on Teams that make this plain. However, there is only so far that the documents go. They do not tell the full story. For instance, the Claimant explained in his oral evidence (and I accept) that he was having difficulty using SharePoint and thus he completed work and emailed it to colleagues who then uploaded it to the SharePoint. Once uploaded it to SharePoint it would bear their initials not his and thus his work on the document would not be obvious. Thus looking at the SharePoint records does not give a complete picture.
    24.2. I found the Claimant's oral evidence to be the clearest and best evidence on the matter. His evidence, tested under cross-examination, was that he was working

from around 9am – 1pm. His partner looked after his daughter during this period. He then looked after his daughter in the afternoon while his partner worked. The nursery was closed because of lockdown and no alternative childcare was available, again because of lockdown. The Claimant then finished his day's work in the evening.

24.3. In my view, part (not all) of Mr Toms' frustration relates to the fact that the Claimant did not do any further work once he had been furloughed. Mr Toms appears to consider that the Claimant should have because he had not finished that which he was asked to do prior to going on furlough. However, there can be no doubt that the Claimant was right not to engage in work once he had been furloughed and it would have been unlawful for the Respondent to make a claim to the Coronavirus Job Retention Scheme in relation to the Claimant if he had been working (and I note that the events here preceded the introduction of 'flexible-furlough').

25. The Claimant was initially paid his wages for 23 March – 9 April 2020. However, once the parties entered a dispute in June 2020 a sum equal to those wages was deducted from his pay.

Law

Unfair dismissal

26. The Respondent has the burden of proving the reason for the dismissal and in particular that the reason was a potentially fair one within the meaning of s. 98(2) ERA. One such reason is redundancy.

27. Redundancy for present purposes is defined as:

> ***139****—(1) For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—*
> *…*
> *(b) the fact that the requirements of that business—*
> *(i) for employees to carry out work of a particular kind, or*
> *(ii) for employees to carry out work of a particular kind in the place where the employee was so employed by the employer,*
> *have ceased or diminished or are expected to cease or diminish.*

28. The test for redundancy focuses, essentially, upon the number of employees that the employer requires to do work of a particular kind. It is not focussed upon issues such as whether or not there has been a reduction in the amount of work that the employee is contracted to undertake. See ***Safeway Stores v Burrell*** [1997] IRLR 2001 (approved by HL in ***Murray v Foyle Meats*** [1999] IRLR 562).

29. Where there is a potentially fair reason for dismissal, the test for fairness is that at s.98(4) ERA. Fairness *"(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 substantial merits of the case".*

30. It is vital to remember, in applying s.98(4) ERA, that the range of reasonable responses test applied. In a redundancy case the principles were neatly summarised by the EAT in ***Hachette Flipacchi UK Limited v. Johnson*** EAT/0452/05 (HHJ Richardson):

We then turn to consider the questions raised by s.98(4). Again, the law is well-established. The question at all stages is whether the employer acted reasonably having regard to equity and the substantial merits of the case. Therefore, a Tribunal must not find a dismissal to be unfair if the course taken was within the range of courses open to a reasonable employer. This applies to procedural questions as much as to substantive questions: see ***Sainsbury's Supermarkets v Hitt*** *[2003] IRLR 23 at paragraph 29 where Mummery LJ emphasised that the objective standard of the reasonable employer applies to all aspects of the question whether the employee has been fairly and reasonably dismissed.*

As regards redundancy it has long been established that the objective standards of a good employer will generally require the employer to give as much warning as possible to consult about selection criteria, and to ensure that selection is made fairly in accordance with those criteria and to seek to see whether instead of dismissing the employee he can offer alternative employment. Not all those factors will be present in every case.

31. In some cases, where consultation and/or other procedural safeguards would be "utterly useless" or "futile" it may be fair to dismiss an employee without the same (***Polkey v AE Dayton Services Ltd*** [1988] ICR 142*).*

Contribution and Polkey

32. The applicable provisions in respect of the basic award and compensatory award are respectively at ss.122 and 123 ERA.

33. In *Polkey v A E Dayton Services Ltd* [1987] IRLR 503, Lord Bridge said this:

'If it is held that taking the appropriate steps which the employer failed to take before dismissing the employer would not have affected the outcome, this will often lead to the result that the employee, though unfairly dismissed, will recover no compensation or, in the case of redundancy, no compensation in excess of his redundancy payment. Thus, in Earl v Slater & Wheeler (Airlyne) Ltd *[1973] 1 WLR 51 the employee was held to have been unfairly dismissed, but nevertheless lost his appeal to the Industrial Relations Court because his misconduct disentitled him to any award of compensation, which was at that time the only effective remedy. But in spite of this the application of the so-called* British Labour Pump *principle [*British Labour Pump Co Ltd v Byrne *[1979] IRLR 94, [1979] ICR 347] tends to distort the operation of the employment protection legislation in two important ways. First, as was pointed out by Browne-Wilkinson J in* Sillifant's *case, if the [employment] tribunal, in considering whether the employer who has omitted to take the appropriate procedural steps acted reasonably or unreasonably in treating his reason as a sufficient reason for dismissal, poses for itself the hypothetical question whether the result would have been any different if the appropriate procedural steps had been taken, it can only answer that question on a balance of probabilities. Accordingly, applying the* British Labour Pump *principle, if the answer is that it probably would have made no difference, the employee's unfair dismissal claim fails. But if the likely effect of taking the appropriate procedural steps is only considered, as it should be, at the stage of assessing compensation, the position is quite different. In that situation, as Browne-Wilkinson J puts it in* Sillifant's *case, at 96:*

"There is no need for an 'all or nothing' decision. If the [employment] tribunal thinks there is a doubt whether or not the employee would have been dismissed, this element can be reflected by reducing the normal amount of compensation by a

> *percentage representing the chance that the employee would still have lost his employment."*
>
> *An example is provided by the case of* Hough and APEX v Leyland DAF Ltd *[1991] IRLR 194 where the EAT upheld an [employment] tribunal decision that the compensatory award should be reduced by 50% in circumstances where there was a failure to consult over redundancies but the tribunal concluded that such consultation might have made no difference'.*

34. The *Polkey* principle is not confined to cases of procedural unfairness but has a broader application. The tribunal's task is to apply ERA 1996 s 123(1) and award 'such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer'). See e.g. *Lancaster & Duke Ltd v Wileman* [2019] IRLR 112*.*

35. In *Hill v Governing Body of Great Tey Primary School* [2013] IRLR 274*,*

> *A '*Polkey *deduction' has these particular features. First, the assessment of it is predictive: could the employer fairly have dismissed and, if so, what were the chances that the employer* would *have done so? The chances may be at the extreme (certainty that it would have dismissed, or certainty it would not) though more usually will fall somewhere on a spectrum between these two extremes. This is to recognise the uncertainties. A tribunal is not called upon to decide the question on balance. It is not answering the question what it would have done if it were the employer: it is assessing the chances of what another person (the actual employer) would have done. Although Ms Darwin at one point in her submissions submitted the question was what a hypothetical fair employer would have done, she accepted on reflection this was not the test: the tribunal has to consider not a hypothetical fair employer, but has to assess the actions of the employer who is before the tribunal, on the assumption that the employer would this time have acted fairly though it did not do so beforehand…*

36. Guidance as to the *Polkey* exercise was given in *Software 2000 -v- Andrews* [2007] IRLR 568 which must be read subject to the repeal of Section 98A, but which otherwise speaks for itself. Similarly, in *Scope -v- Thornett [2007] IRLR 155,* Pill LJ said as follows at paragraph 34:

> "*... The employment tribunal's task, when deciding what compensation is just and equitable for future loss of earnings will almost inevitably involve consideration of uncertainties. There may be cases in which evidence to the contrary is so sparse that a tribunal should approach the question on the basis that loss of earnings in the employment would have continued indefinitely but, where there is evidence that it may not have been so, that evidence must be taken into account ..."*

37. The basic and compensatory award can each be reduced on account of a claimant's conduct according to the different statutory tests at Section 122(2), Section 123(6) of the Employment Rights Act.

38. The impugned conduct need not be unlawful so as to justify a reduction but it must be blameworthy. Blameworthy conduct includes conduct that could be described as 'bloody-minded', or foolish, or perverse. See further *Nelson -v- British Broadcasting Corporation (No. 2)* [1980] ICR 110*.* In the case of Section 123(6), the blameworthy conduct must also cause, or partly cause, the dismissal.

39. Where the self-same factors might give rise to both a *Polkey* reduction and a reduction for contributory conduct, the tribunal must ensure that the Claimant is not penalised twice for the same conduct (*Lenlyn UK Ltd v Kular,* unreported EAT, 2016). For instance, it might not be just and equitable to make a reduction for contributory fault if the blameworthy conduct had already been fully accounted for in the *Polkey* reduction.

Unauthorised deductions from wages

40. By s.13 Employment Right Act 1996, the employer may not make deductions from the wages properly payable to the employee save in accordance with a statutory provision, in accordance with the terms of the employee's contract or in accordance with a written agreement/consent made in advance of the deduction.

41. Certain deductions are excepted from the foregoing, including the overpayments of wages (see s.14).

42. In assessing what is properly payable it may be necessary to construe the contract of employment. The principles of construction were summarised by Lord Neuberger in ***Arnold v Britton*** [2015] UKSC 36 at paragraph 15:

> *the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the [agreement], (iii) the overall purpose of the clause and the [agreement], (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions.*

Discussion and conclusions

Unfair dismissal

43. In my view the reason for the dismissal was redundancy:

    43.1. I accept that the business was losing money and was in a very difficult financial and operational position. It is therefore rational that it would seek to save money on employee costs. I appreciate that the CJRS was available at the relevant times. However, the CJRS did not cover all costs of employment by any means and was at the relevant times of uncertain duration. Further, the financial problems were not solely related to the pandemic. I accept that Mr Toms believed that the business could make do with one less Project Manager and that losing a project manager was the right area to make savings in staff costs. There was a redundancy situation.

    43.2. I found it difficult to decide whether the reason or principal reason for dismissal was the redundancy situation or whether it was the view that Mr Toms had taken of the Claimant's conduct. There is certainly a suggestion in the evidence that the reason for the dismissal might have actually been conduct but labelled as redundancy. However, on balance, I accept that the principal reason was indeed redundancy. On the evidence, the correct analysis is that Mr Toms wanted to make a redundancy from the project managers, and the reason Mr Toms selected the Claimant was because he thought his conduct and performance was the worst out of the project managers.

44. It is obvious that the dismissal was unfair:

44.1. There was no warning of redundancy;
44.2. There was no consultation of any kind;
44.3. The Claimant was given no opportunity to make representations about the selection pool or criteria prior to his dismissal;
44.4. The Claimant was given no opportunity to make representations about his selection for redundancy prior to dismissal;
44.5. No effort was made to seek volunteers for redundancy or to consider alternative employment;
44.6. The Claimant was not given any right of appeal.

45. Mr Toms maintained that because the law does not fix any minimum period of consultation in cases where there are less than 20 redundancies, he adequately consulted with the Claimant by sending him the letter of dismissal which stated the reasons for his dismissal. With respect that argument is totally without merit. In this case there is no need to consider fine questions of whether the consultation period was long enough to be in the band of reasonable responses. The issue is more fundamental: there was no consultation. The purported consultation was nothing more than telling the Claimant what the decision was and broadly the reasons for it. Communicating the outcome once it has been decided is obviously not consultation.

46. For the avoidance of doubt, this was certainly not a case in which consultation would have been futile or utterly useless. There was a prospect of consultation leading to any number of possible material changes. For example, these may have been in relation to the need to make a redundancy (there might have been a volunteer), the selection pool, the selection criteria, the application of the criteria and the timing of any redundancy to name but a few things.

47. In short, it was way outside the band of reasonable responses to dismiss the Claimant in the way he was dismissed. I have no hesitation in finding that the dismissal was unfair.

Polkey

48. The Respondent's primary case is that if the Claimant had not been dismissed by reason of redundancy he could and would have been fairly dismissed by reason of conduct at or around the same time.

49. I do not accept that. Although it is true that the Respondent had opened a disciplinary investigation into the Claimant and was using the language of gross misconduct among other things to describe it, in my view this was in essentially about leverage. It wanted to put the Claimant in a position where taking redundancy seemed like a good option. That would make it more likely for him to go quietly (i.e., not challenge his dismissal internally or externally).

50. In my view that is a highly plausible explanation for the proximity of the disciplinary allegations to the redundancy dismissal and of the tone of the allegations. That is not to say that the disciplinary issues were entirely trumped up. They were exaggerated rather than trumped up:

    50.1. Taking the pressure washer without asking and keeping it at home for over a month or two was misconduct. However, it was not that serious because there was a culture of using work equipment for personal use (albeit normally with permission) and because there was obviously no intention to steal the item (i.e., to permanently deprive the respondent of it).

50.2. In terms of homeworking, this issue was also exaggerated. Up and down the country people's working patterns were disrupted in the early weeks (and beyond) of the pandemic. That was especially true of people (like that Claimant) with young children whose childcare arrangements had been disrupted. The Claimant could have been more communicative with the Respondent in this period and clearer about what he was doing, including by completing a timesheet. However, the extent of his misconduct is exaggerated in the correspondence proximate to his dismissal.

51. I therefore do not think it at all likely that the Claimant would have been dismissed for misconduct had he not been made redundant.

52. However, I do think there is a significant chance that the Claimant could *and would* have been fairly dismissed for redundancy had he not been unfairly dismissed:

    52.1. The redundancy exercise was genuine;
    52.2. It was open to the Respondent to make a redundancy from its project managers and a sensible and rational pool would have been the project managers;
    52.3. The Respondent had some legitimate concerns about the Claimant's past conduct as identified above, with the quality of his work and with the level of his invoicing. These are certainly matters that could and would have been taken into account in a fair redundancy process. If the Respondent had not acted unfairly it could and would have designed selection criteria that measured matters such as past conduct in the workplace, quality of work and invoicing levels. There is a high chance that these would have been measured by fair selection criteria following fair consultation;
    52.4. There is a good chance that the selection pool would have comprised the project managers had the Respondent acted fairly. There is also a good chance the Claimant would have been fairly selected for redundancy when measured against others in that pool. He was, I accept, the only employee about whom there were significant concerns about behaviour and work quality.

53. There are, however, further uncertainties. For example, as to whether any other employee would have taken voluntary redundancy. There is clearly a possibility of this, though I think, given the economic climate at the time, it is a fairly low possibility. There is also the possibility of alternative employment. There were no vacancies as such but experience tells me that sometimes businesses, even small ones, are able to find ways of partially or fully accommodating redundant employees nonetheless. That was improbable here though not impossible.

54. Stepping back and looking at matters in the round, in my view if the Respondent had acted fairly, there is an approximately 70% chance that it could and would have fairly dismissed the Claimant fairly by reason of redundancy.

Contribution

55. In my view it would not be just and equitable to make a further reduction to the basic or compensatory awards on account of the Claimant's conduct.

    55.1. So far as the compensatory award is concerned: the matters which could arguably amount to blameworthy conduct have already been fully and adequately taken into account in the making of the *Polkey* deduction. Of course I accept that in principle there can be cases in which both *Polkey* deductions and contributory conduct deductions can be made, but in this case I would be penalising the Claimant twice for the same matters if I were to make a further reduction.

55.2. So far as the basic award is concerned, I do not think it would be just and equitable to make a reduction from the basic award on account of the Claimant's conduct. There were elements of blameworthy conduct in his past behaviour in the workplace. They were either historical or at a relatively low level or both. The Claimant was an employee of relatively long service. The procedure adopted to secure his dismissal was devoid of any semblance of procedural fairness. Leveraging the Claimant by exaggerating allegations misconduct was also unimpressive. In my view, even taking into account the size and administrative resources of the Respondent, and the circumstances prevailing at the time, it treated the Claimant very poorly in the dismissal process. In all the circumstance I do not think it would be just and equitable to reduce the basic award on account of the Claimant's conduct.

56. In calculating the basic award, however, credit must be given for certain things such as a statutory redundancy payment. If the Claimant did receive a statutory redundancy payment (I have not yet considered the evidence in respect of this aspect of the case), it must be set off against the basic award.

Unauthorised deductions.

57. The Claimant was entitled to pay in the disputed period provided that he fulfilled the primary obligations under his contract to work or be ready, willing and able to work. In my judgment, he did work.

58. I do not accept the Respondent's primary case that the Claimant "checked out" and treated the period of home-working as a "holiday". As set out in the findings of fact the Claimant did work and did not check-out or treat the period as a holiday.

59. I also do not accept the proposition that the Claimant was in breach of contract by not working to the hours specified in clause 7.1 of his contract:

> "*Your normal hours of work will be 7.5 hours per day. There is a degree of flexibility of working hours so long as the total number of hours worked over the course of a single week is correct. You may start work no earlier than 8:00 am and finish no later than 6.30pm. With the agreement of your Team Leader or Regional Director you may work additional hours on one day in order to finish earlier or start later on another day within the same week."*

60. This clause must be properly construed applying ***Arnold***.

61. The clause describes what is intended to be the *normal* working pattern. It would be absurd to construe it in either a pedantic or a literal way. For example, to suggest as Mr Toms did at one stage, that the Claimant was in breach of contract by sending a message in the evening after 6.30pm during lockdown. The clause is not designed to cover every eventuality and oblige the employee to work the stated hours in all circumstances, including times of crisis. It is intended to cover the normal run of events but not all exceptional circumstances.

62. The pandemic, particularly in its early stages was an utterly exceptional circumstance particularly in the Claimant's case as someone who had a small child who was no longer allowed to attend his/her child-care setting or any alternative childcare setting because of lockdown restrictions.

63. I thus do not accept that he was in breach of clause 7.1 by working in the way that he did as described in the findings of fact.

64. For similar reasons, I do not accept that the Claimant was in breach of clause 7.4 of his contract. It provided:

> *During your employment unless prevent by sickness, injury or other incapacity or as otherwise agreed by the Company you will devote the whole of your time attention and abilities during your hours of work to the business and affairs of the Company.*

65. I again do not think this clause should be construed in a pedantic or literal way so as to apply to each minute of each working day. It applies to the normal run events. It does not apply where there are truly exceptional circumstances as there were in this case.

66. Provided the Claimant was devoting as much of his attention to the Respondent's business as the exceptional circumstances reasonably allowed, I do not think he was he was in breach of that clause. He was indeed doing that.

67. I also do not accept that the Respondent was entitled to make any deduction to the Claimant's wages pursuant to clause 6.1:

> *"The Company reserves the right at any time during or upon termination of your employment, in its absolute discretion, to deduct from you pay any sums which you may owe the Company including, but without limitation, any overpayment, outstanding loans (and interest where appropriate) made to you by the Company, losses suffered by the Company as a result of your negligence, breach of duty, damage or loss to Company property caused by your or breach of Company rules".*

68. The Claimant's conduct during the relevant period of March and April 2020 did not engage this clause in any way.

69. The deductions from the Claimant's wages were unauthorised and unlawful.

_____

Employment Judge Dyal

Date 09 March 2022