EMPLOYMENT TRIBUNALS

Claimant: Mr J Flaherty

Respondent: Mrs J Darlington

HELD AT: Manchester (via CVP) **ON:** 4th May 2022 and 6th May 2022 (in chambers)

BEFORE: Employment Judge Rhodes (sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Mr A Johnston, counsel

JUDGMENT

1. The complaint of unauthorised deductions from wages is dismissed upon withdrawal.

2. The complaint of unfair dismissal is well-founded and succeeds.

3. There shall be an 80% reduction in compensation to take account of ***Polkey v AE Dayton Services Ltd*** [1987] ICR 142.

4. The complaint of breach of contract in relation to notice is well-founded and succeeds.

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REASONS

Introduction and Issues

1. The claimant complained of unfair and wrongful dismissal. At the start of the hearing, he withdrew a complaint of unauthorised deductions from wages.

2. At the start of the hearing, it was agreed that the following issues would need to be decided:

   a. Was the claimant dismissed?

b. If so, what was the reason (or, if more than one, the principal reason) for that dismissal?

c. Was that (principal) reason a potentially fair reason (for the purposes of s98 Employment Rights Act 1996 ("the Act") or an automatically unfair reason, namely an assertion by the claimant of his statutory right not to suffer unauthorised deductions from wages (for the purposes of s104 of the Act)? The respondent denied that the claimant had asserted a statutory right and there was a dismissal but, in the alternative, relied upon 'some other substantial reason', namely the breakdown of the relationship between the claimant and the respondent's son, as the reason for the alleged dismissal.

d. If the claimant was dismissed for a potentially fair reason, was that dismissal fair?

e. If the claimant was unfairly dismissed, should there be any reduction in compensation to take account of either ***Polkey v AE Dayton Services Ltd*** [1987] ICR 142 and/or any contributory fault on the part of the claimant?

f. If the claimant was dismissed (either fairly or unfairly), was he dismissed in breach of contract?

Evidence and Bundle

3. I heard evidence from claimant and the respondent. I was also referred to a 63-page bundle of documents.

Law

4. The relevant parts of section 98 of the Act provide:

"(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.

…

(4) [Where] the employer has fulfilled the requirements of subsection (1), the determination of the question of whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –

(a) depends upon whether the employer in the circumstances (including the size and administrative resources of the employer's undertaking) acted reasonably or unreasonably in treating it as sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

5. The relevant parts of section 104 of the Act provide:

"(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or if more than one, the principal reason) for the dismissal is that the employee –

…

(b) alleged that the employer had infringed a right of his which is a relevant statutory right.

(2) It is immaterial for the purposes of subsection (1) –

(a) whether or not the employee has the right, or

(b) whether or not the right has been infringed;

but, for that subsection to apply, the claim to the right and that is has been infringed must be made in good faith.

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made reasonably clear to the employer what the right claimed to have been infringed was.

(4) The following are relevant statutory rights for the purposes of this section –

(a) any right conferred by this Act for which the remedy for its infringement is by way of a complaint or reference to an [employment tribunal]"

6. The relevant parts of section 86 of the Act provide:

"(1) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more –

…

(b) is not less than one week's notice for each year of continuous service if his period of continuous employment is two years or more but less than twelve years"

7. In order to be effective, a notice of termination of employment must be expressed in clear and unambiguous terms (see, for example, ***Société Générale, London Branch v Geys*** [2013] IRLR 122).

8. Once notice has been given by either party, it cannot generally be withdrawn unilaterally (see, for example, ***Riordan v War Office*** [1961] 1 WLR 210 and ***Harris and Russell Ltd v Slingsby*** [1973] ICR 454).

9. One exception to that general proposition is where an employer, after a short period of reflection, withdraws words of dismissal spoken in the heat of the moment (***Martin v Yeoman Aggregates Ltd*** [1983] ICR 314).

Findings of Fact

10. In January 2018, the respondent engaged the claimant to provide one to one care to her adult son (CD) who has round-the-clock care needs. The claimant assisted CD with essential day-to-day activities such as washing, shaving and feeding; in short, his role was to help CD lead as full and active a life as possible.

11. The claimant's usual working hours were 11am to 7pm, Monday to Friday but, during his employment, he spent many other (unpaid) hours in the company of CD and the Darlington family (for example, holidays and social occasions). Although the employment relationship ultimately ended in unhappy circumstances, the respondent regarded the claimant as a very good carer, and the claimant and CD formed a close bond.

12. The respondent engaged three other paid carers to cover the periods not worked by the claimant. If the claimant was unable at short notice to attend his shift, the responsibility for CD's care would generally fall on the respondent and/or her partner (CD's father, who was also one of the other three paid carers). CD could not be without care.

13. Given the domestic nature of the relationship between the Darlington family and CD's carers, the utmost trust and reliability were two fundamental aspects of the role. The nature of the relationship also meant that there was a high degree of informality and familiarity about it.

14. In terms of size and administrative resources, the respondent was, on any analysis, a small employer. On more than one occasion, in response to the claimant's questions about polices and procedure, the respondent replied that she was just a mum seeking to provide care for her son. It is entirely understandable that the respondent would regard herself, first and foremost, as a parent but she is also an employer. The respondent's payroll services were provided by an external provider, Instream Partnership. The respondent was also able to draw upon human resources support from Peninsula Business Services but does not appear to have done so, in the claimant's case at least, until after 28th January 2021.

15. There was no contract of employment in the bundle, nor were there any policies and procedures. In fact, it is not clear whether any such documents exist, and they had certainly not been produced in response to any of the claimant's requests for them.

16. The primary means of written communication between the claimant and the respondent was by text message (and this is important in the events leading to the termination of the claimant's employment). The respondent and her partner shared the same mobile 'phone.

17. The text messages included within the bundle show that, for example, on 8th December 2020, the claimant was running late. He texted at 10.59am (one minute before the scheduled start of his shift) that he had "*just set off to yours now won't be*

long" [sic]. Similarly, on 21st January 2021, he texted at 11.23am (23 minutes after the scheduled start of his shift) to say "*sorry guys overslept im on my way now*" [sic].

18. When cross-examined about lateness, the claimant did not accept there was anything unacceptable about it or that it might cause the respondent any inconvenience. The respondent, on the other hand, put greater importance on punctuality.

19. Some time shortly after receiving his payslip dated 15th January 2021 (which related to pay for hours worked in the previous month), the claimant queried the amount of his pay with the respondent. He believed that he had worked 69 hours over the Christmas period which had not been included in his pay. The respondent assured him that details of all the hours worked had been submitted to Instream but that it was her partner and Instream who dealt with pay and she assumed his pay was correct. The respondent did not investigate this any further and the claimant did not pursue it. Although the claimant remained disgruntled, he kept this to himself, and the respondent was entitled to assume that the matter was closed.

20. When the claimant arrived at work on 27th January 2021, the respondent thought that he did not look well. The claimant disclosed to the respondent that his mental health had been suffering and that working through various periods of COVID lockdown had taken its toll. The parties agreed that the claimant would take the next two days (Thursday 28th and Friday 29th January 2021) off work so that he could see his doctor and get some rest.

21. At around the same time, the respondent became aware from CD of things concerning the claimant which troubled her: that the claimant had smoked cannabis in his presence and driven under the influence of it with CD in the car; had expressed a wish to crash the car he was driving and had discussed inappropriate things, such as rape, with CD. I should make clear that the claimant denied these matters and that I did not hear evidence from CD. I therefore do not make any finding that the claimant did or said any of things. I do, however, find that these reports were made to the respondent and that she was troubled by them.

22. CD also told the respondent that the claimant spent too much time on his 'phone when they were together, which was something the respondent had also observed and was concerned by. CD told the respondent that he was relieved that the claimant would not be working for the next two days and that this was a weight off his mind. The respondent formed a clear impression that CD no longer wanted the claimant to care for him.

23. These concerns were added to the respondent's own concerns about the claimant's timekeeping and, as a result, the respondent decided to terminate the claimant's employment. The respondent then sent the following text message to the claimant at 9.11am on Thursday 28th January 2021:

"*Hi jo really sorry about this but wer gonna have to let u go its not workin out u take too much time off u wont do any weekends ur constantly on the phone we really need help at the moment*" [sic]

24. The claimant was shocked and upset to receive this message and, a short time after doing so, called the respondent to discuss it. Neither party gave a clear account of what was discussed during this call but they both agree that it was a

heated conversation, that CD was with the respondent and that he was shouting in the background. The claimant heard CD make insulting remarks about the claimant's mental health which further upset the claimant and which, in his words, "*were terrible things you wouldn't want to hear*". The claimant said that his "*life had flipped upside down*".

25. On 2nd February 2021, the claimant emailed a copy of a fit note dated 29th January 2021 to Instream which he asked to be passed to the respondent. In that email, he referred having had "*a very rough few days since being fired*".

26. On the same day, the respondent wrote to the claimant by post to query why he had not turned up for work on Monday 1st February 2021 and to inform him that, if she did not receive an explanation for his absence by 5th February 2021, she would treat that absence as unauthorised. The language and formality of that letter marked a significant shift from the informal text message communications which had passed between the parties up to the point. It was a letter which the respondent had clearly been advised to write as a result of the events of the previous week.

27. However, the 2nd February 2021 letter conspicuously failed to refer to the text message of 28th January 2021 or the contents and outcome of the subsequent telephone conversation. A reasonable employer ought to have concluded that the events of 28th January 2021 *might* have explained the claimant's absence and addressed those events in that letter.

28. The claimant responded to that letter by email and post on 4th February 2021. He gave a detailed account of his perception of the events of 28th January 2021 and asserted more than once that the respondent had terminated his employment by text on that day. He also asserted that the respondent was not entitled to make use of his fit note for any purpose.

29. Upon receipt of that letter, the respondent could not have been in any doubt that the claimant believed that he had been dismissed on 28th January 2021. If that belief was mistaken, the respondent had the opportunity to set the record straight and make clear to him either that he had not been dismissed or that his dismissal had been retracted during their telephone conversation on 28th January 2021. The respondent did not take that opportunity.

30. In the meantime, the claimant continued to submit fit notes to Instream and began to receive statutory sick pay from the respondent. On the face of it, this is inconsistent with the claimant's assertion that he had been dismissed and consistent with the respondent's that he had not. However, the claimant's explanation, which I accept as genuine, is that he believed that he was to have an ongoing relationship with Instream who may have been able to find him alternative work. This is somewhat borne out by the evidence of the respondent that, although Instream only provided payroll services to her, they also place carers in work. The respondent also accepted that she did not fully understand how Instream's payroll services work and it is therefore reasonable for the claimant not to understand either. Moreover, the claimant consistently told Instream that he had been fired and, from 4th February 2021, refused permission for Instream to share copies of his fit notes with the respondent. I therefore accept that, although mistaken, the claimant genuinely believed that he had an ongoing relationship with Instream which was distinct from his employment with the respondent.

31. On 16th March 2021, the respondent wrote to the claimant to invite him to an informal welfare meeting to discuss his absence from work. Again, that letter unfortunately failed to address the claimant's assertion that he had been dismissed.

32. In response, the claimant sent a lengthy email on 29th March 2021 in which he again referred to having been dismissed by text message and told the respondent that there would be further contact from him, other than via an employment tribunal claim. Once again, the respondent did not seek to correct the claimant's assertion that he had been dismissed. Instead, the respondent now relies on that letter as being a resignation but I do not accept that it can be construed in that way given that it is consistent with all the claimant's post-28th January 2021 correspondence in referring to having been dismissed on that date.

Discussion and Conclusions

Was the claimant dismissed?

33. Yes.

34. Despite its informality, the respondent's text message of 28th January 2021 is clear and unambiguous in its intention and effect.

35. The message begins with an expression of regret ("*really sorry*") which sets the claimant up to receive some bad news.

36. The claimant immediately understood the words "*wer gonna have to let u go*" as words of dismissal. The respondent's pleaded case, on the other hand, is that the text was intended to be an admonishment. The draft update to the online Oxford English Dictionary dated July 2009 defines "*to let (a person) go*" as "*to release or (*euphemistic*) dismiss (a person) from employment*". The claimant's interpretation is clearly the correct one.

37. It might be said that the words "*wer gonna*" connote a future possibility or intention but, in the context of the remainder of the message, I do not accept that they add anything of significance, given the expression of regret at the start of the message and the way in which the text ends ("*we need help at the moment*") which suggests an immediate issue to be addressed.

38. It is also important to bear in mind what the respondent had been told by CD which caused her to send that message. Whether or not the respondent had a later change of heart, at the time she sent that message, she did not want the claimant to continue to care for her son. In response to my questioning, the respondent accepted that, at the point of sending that message, she considered that the claimant's employment could not continue but that she intended to discuss how it would end. However, I find that the text message went further than that.

39. I am therefore satisfied that upon the claimant's receipt of that message, his employment had been terminated but that it is not the end of the matter. The respondent's alternative position is that, if the wording of the text message amounted to a dismissal, the text was sent in the heat of the moment and the dismissal was retracted during the subsequent telephone conversation between the parties. On this point, the respondent relies upon ***Martin v Yeoman Aggregates Ltd*** (cited above) but ***Martin*** can be distinguished from this case in several key respects.

40. First, the dismissal in ***Martin*** took the form of an oral outburst. It was not put into writing. In this case, whilst it is still possible that a text message could be sent in the heat of the moment, it inevitably requires more thought and composure to put something in writing than to blurt it out in speech. The text message distils several concerns which the respondent genuinely held at time and which the respondent was reasonably entitled to conclude would make the employment relationship untenable.

41. In ***Martin***, the director concerned had a change of heart within a few minutes of telling the claimant he had been dismissed. He then sought out the claimant and substituted the dismissal with a warning before instructing an HR manager to write to the claimant to this effect. In this case, however, it was the claimant who called the respondent. It is a moot point as to whether the respondent would have called the claimant if he had not called her.

42. Further, there is no clear account of the ensuing conversation other than both parties' recollection of a heated exchange and the claimant's recollection of hurtful comments made about him by CD. Whatever was said during that conversation, it did not change the claimant's impression that he had been dismissed on 28th January 2021 and, despite several opportunities to set the record straight (if it needed setting straight), the respondent did not seek to deny that the claimant had been dismissed or to confirm her purported retraction of the dismissal in writing.

43. For these reasons, therefore, I find that there was no, or no effective, attempt to retract the notice of dismissal.

What was the reason (or, if more than one, the principal reason) for that dismissal?

44. Whilst I find that the claimant, by raising his complaint about his pay for December 2020, had asserted the statutory right not to suffer unauthorised deductions from wages, I do not find that that was the reason for his dismissal. The reason was the respondent's conclusion that the employment relationship had broken down because of the concerns about the claimant expressed to the respondent by CD, allied to the respondent's own concerns about the claimant's reliability.

Was that reason a potentially fair reason (for the purposes of s98 Employment Rights Act 1996 ("the Act") or an automatically unfair reason, namely an assertion by the claimant of his statutory right not to suffer unauthorised deductions from wages (for the purposes of s104 of the Act)?

45. That reason was a potentially fair reason. Although it is not a reason listed in section 98(2) of the Act, it amounts to some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held (section 98(1)(b)). The respondent did not seek to rely on conduct as the reason.

46. Whilst I have found that the claimant asserted a statutory right, that was not the reason for his dismissal. The respondent reasonably regarded the issue of the claimant's pay to be closed. The claimant's own evidence supported the fact that CD was angry and upset with him and I am satisfied that the respondent, in dismissing the claimant, acted solely on the basis of concerns about the claimant and did not have any regard to his previous pay query.

If the claimant was dismissed for a potentially fair reason, was that dismissal fair?

47. No, it was unfair. Even taking account of the size and administrative resources of the respondent's undertaking, the claimant was entitled to the benefit of a process which satisfied the basic elements of fairness and, at the very least, to have been given the opportunity to respond to the respondent's concerns about him. The respondent could also draw upon advice from Peninsula. Such a process need not have taken long, and it may have been possible to conduct a fair dismissal process within one week.

Should there be any reduction in compensation to take account of ***Polkey****?*

48. Yes. Even though the claimant should have been given the opportunity to respond to the respondent's concerns, the evidence suggests that it is highly likely that the relationship between the claimant and the respondent and, crucially, CD had broken down irretrievably. The claimant accepted that CD had said "*terrible things you wouldn't want to hear"* which the claimant said had broken the bond of trust between them. The nature of the relationship was such that there had to be complete trust between CD, the respondent and the claimant. It would be understandable for the respondent not to want to take any chances once she concluded that that relationship had broken down.

49. Although it is highly likely that the breakdown was irretrievable, it was not inevitable and, if a proper process had been followed, it is possible that the relationship could have been repaired and dismissal avoided. I would not put the chances of that at any higher than 20% though. I therefore find that there should be an 80% ***Polkey*** reduction.

Should there be any reduction in compensation to take account of any contributory fault of the part of the claimant?

50. No. The respondent did not pursue conduct as the reason for the dismissal and did not (understandably) call CD to give evidence. I have not made any findings in respect of CD's allegations and, if I was called upon to do so, I would have to find in the claimant's favour, as he denied them all. Although I was invited to make a contributory fault finding on the basis of the timekeeping and reliability concerns, about which I heard evidence from the respondent, I do not accept that these were uppermost in the respondent's mind when she dismissed the claimant. She was more troubled by the concerns raised by CD.

Was the claimant dismissed in breach of contract?

51. Yes. The respondent accepted that, if the claimant was dismissed, it was a wrongful dismissal. As previously noted, there was no written contract in evidence. In the absence of an express notice provision, the claimant was entitled to reasonable notice, which I find to be the same as his statutory minimum notice of three weeks.

CASE MANAGEMENT ORDER

52. The matter will be listed for a one-day remedy hearing. Within seven days of the date on which this judgment is sent to them, the parties shall notify the Tribunal of their unavailable dates for the remainder of 2022.

53. Within 21 days of the date on which this judgment is sent to the parties, each party shall send the other a list of documents relevant to the issue of remedy, together with copies of the same. In the claimant's case, these documents should include those which evidence his efforts to obtain alternative employment since his dismissal and those which evidence money earned during that time.

54. At the same time, the claimant shall prepare and send to the respondent a schedule of loss setting out the sums claimed and how they have been calculated.

55. The respondent shall prepare a bundle of documents relevant to the issue of remedy and send a copy to the claimant within 14 days of completion of the disclosure exercise referred to above. The respondent shall prepare, and include within the bundle, a counter-schedule of loss.

56. Within 42 days of the date on which this judgment is sent to them, the parties must simultaneously exchange copies of witness statements relevant to the issue of remedy.

57. The respondent shall ensure that electronic copies of the remedy bundle and witness statements are sent to the Tribunal no later than one week before the remedy hearing.

Employment Judge Rhodes
Date: 15th May 2022

JUDGMENT AND REASONS SENT TO THE PARTIES ON
17 May 2022

FOR THE TRIBUNAL OFFICE