EMPLOYMENT TRIBUNALS

Claimant: Mrs B Hochnowska

Respondents: (1) City Tailors Trading Ltd
(2) City Tailors Ltd
(3) Mr M Aydin
(4) Mr B Aydin

Heard at: **Bristol** **On:** **15, 16, 17 & 18 November 2021**

Before: **Employment Judge Livesey**
Mr K Ghotbi-Ravandi
Ms Y Ramsaran

Representation
Claimant: Miss Inkin, consultant
Respondent: Mr Iqbal, the Fourth Respondent's friend, present for the 15 November 2021 only, thereafter, in person

JUDGMENT having been sent to the parties on 9 December 2021 and written reasons having been requested in accordance with Rule 62 (3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

1. The claim

1.1 By a claim form dated 22 October 2018, the Claimant brought complaints of unfair dismissal, discrimination on the grounds of maternity and disability, breach of contract relating to notice, unpaid holiday pay and unlawful deductions from wages.

1.2 The Claimant accepted that the Second Respondent had been her employer at the Case Management Preliminary Hearing which took place on 27 April 2020. No Judgment was entered dismissing the First Respondent from the proceedings then.

2. The evidence

2.1 In determining the claims, we heard the following witnesses give evidence in the following order.

2.2 For the Claimant;

2.2.1 Mrs Amamut, a former colleague who gave evidence through a Romanian interpreter;
2.2.2 Mrs Swinczyk, a former colleague;
2.2.3 The Claimant herself, who gave evidence through a Polish interpreter.

2.3 For the Respondents;
2.3.1 The Third Respondent;
2.3.2 The Fourth Respondent;
2.3.3 Mrs Ali, a current employee of the Second Respondent who gave evidence through a Romanian interpreter;
2.3.4 Mrs Jacob, another current employee who gave evidence through a Romanian interpreter;
2.3.5 Mrs Allen, another employee;
2.3.6 Mr Szenyou, another employee.

2.4 We also read the written statement of Mrs Graczyk whose statement was submitted on behalf of the Claimant.

2.5 The Tribunal was provided with the following documentation;
- A hearing bundle, C1;
- A cast list, C2;
- A chronology, C3;
- Ms Inkins' written submissions, C4;
- The Respondent's written submissions, R1.

3. The issues

3.1 The issues that we had to determine had been discussed and agreed before Employment Judge Ford on 13 May 2019 (pages 69 – 76 of the hearing bundle C1). They were confirmed at the start of the hearing subject to the changes referred to below.

3.2 First, there was the complaint of unfair dismissal covered in paragraph 1 of the Case Management Order. The Second Respondent contended that the reason for dismissal was conduct and the Claimant's case was that it related to her maternity. Issues of fairness also arose (paragraph 1.1 – 1.4 of the Order).

3.3 In terms of the Claimant's disability discrimination complaints, the issue of her disability (relating to gallbladder issues) was determined in her favour on 5 September 2019 by Employment Judge Cadney. She alleged that her dismissal had been an act of discrimination under s. 15 and the Respondents relied upon the defences of justification and lack of knowledge (paragraphs 6.1 – 6.3). There was also a claim of a failure to have made reasonable adjustments under s. 20 of the Act, but that was withdrawn at the start of the hearing. With that complaint, went issue of jurisdiction (time). The maternity discrimination claim under s. 18 was covered in paragraph 12 of the Order and also concerned the Claimant's dismissal.

3.4 As to the smaller money claims, the complaint of unpaid holiday pay was also withdrawn at the start of the hearing. The complaint of unlawful deductions from wages concerned alleged deductions which had

amounted to £300 from the Claimant's wages in July and August 2018. Finally, there was the notice pay claim, brought as a breach of contract claim.

4. The facts

5.1 We reached the following factual findings on a balance of probabilities and attempted to restrict them to matters which were relevant to a determination of the issues. Any page numbers cited within these Reasons are to pages within the hearing bundle C1 unless otherwise stated and references have been provided in square brackets.

Introduction

5.2 The Second Respondent is a business undertaking tailoring and alteration work. It is based on Milson Street in Bath. It came into being in 2010 and employs less than ten people.

5.3 The Third and Fourth Respondents are brothers. The Third Respondent is the sole director of the Second Respondent. The Fourth Respondent manages the business. The Third Respondent accepted that, although he was sole director, it was his brother who made more of the decisions at work. In fact, as the evidence unfolded, we got the distinct impression that the Third Respondent had very little knowledge of many of the day-to-day issues with the staff generally and the Claimant specifically. He clearly spent most of his time tailoring rather than managing.

5.4 The Claimant is a Polish national. She came to the UK in 2013 when she was recruited to the Second Respondent through an agent. She started work in November 2013 as Seamstress and Sewing Machinist. She was initially given a contract dated 1 May 2014 [79-82]. She left her employment in 2015 for a month "due to tax issues" (paragraph 34 of the Claim Form). When she returned, she was provided with a new contract dated 1 April 2015 [84-7].

Evidence; general findings

5.5 It was rare in our experience for parties to present evidence which was so diametrically opposed on so many issues. We considered it worthwhile to say something about the main evidence that we heard at the outset.

5.6 The Claimant described herself as a strong character. It was notable that she failed to answer some of the questions that were put to her directly on a number of occasions. We found her to have been rather prickly when she was asked about several issues. A particular example of where we considered her evidence to have been rather poor concerned the events of 17 August which we have addressed in more detail below. Similar adverse findings were made in relation to the meetings held on 1 May, 1 and 7 June.

5.7 By way of further example, her position on the Second Respondent's payment of sick pay was surprising; she had maintained that her employer did not pay it in the event of sickness absence, both in her claim form and her witness statement, yet her contract clearly said that she had been entitled to it [85].

5.8 As to the Respondents, the Third Respondent was largely unable to respond to questions in cross examination which seemed to reflect his limited dealings with the management of the business. The Fourth Respondent, however, gave evidence which we found to have been generally well balanced. He accepted that he had made mistakes in relation to industrial processes, but he stood his ground on other factual issues and gave a credible and plausible account of himself in the main.

5.9 An issue which, whilst marginal to the central issues in the case, became an important credibility issue, concerned the payment of the Claimant's wages. She made much of her assertion that she was paid partly in cash and partly by bank transfer (see paragraph 15 [80]). The Respondents' case, as set out in the Fourth Respondent's witness statement, was that *all* wages were paid by bank transfer. The Claimant had received two cash loans, separate from her wages, which she accepted, and which had been repaid.

5.10 We found that factual dispute a difficult one upon which to reach conclusions. The documents showed regular and consistent bank transfers to the Claimant between May 2015 and September 2018 [88-90]. The payments did not appear, however, to reflect one twelfth portions of the Claimant's pay. That was explained by the Fourth Respondent on the basis of there having been peaks and troughs and variations in hours over a working year. There were, however, handwritten post it notes and/or riders on the payslips which appeared to reflect further cash payments [164-6]. For example, one payslip [165] showed net pay of £1,096.31, which was exactly the sum shown as having been paid into the Claimant's bank account [88], but there was also a handwritten addition which showed that she had worked 193½ hours at £9.50 earning £1,838.25. The note therefore showed an additional sum of 'cash' of £588 which, she said, made up the balance.

5.11 The Fourth Respondent denied that the notes were his or that they reflected payments which were made to top up the Claimant's wages in cash. We understood that the payslips and notes had come from the Claimant by way of disclosure. He suggested that the additional cash sums were from her additional cleaning work which she undertook outside her work for the Second Respondent.

5.12 Miss Inkin suggested that the handwriting on the notes matched that of the Fourth Respondent. We could not reach that conclusion and no expert evidence had been provided on it, but we noted that the calculations were undertaken at the same hourly rate of £9.50 that the Claimant had received with the Second Respondent.

5.13 Ultimately, both parties' cases seemed plausible and we were not able to reach a conclusion on the issue either way, save that we did reach a finding contrary to the Claimant based on substantially the same evidence in respect of deductions which were allegedly made from her pay in July and August 2018 as a result of alleged mistakes that she had made (see below). Other than that, if small additional cash sums had been paid to avoid liabilities for tax and national insurance, which appeared to have been the Claimant's accusation, we considered that she had as much to benefit as the Second Respondent.

Disability

5.14 The Claimant's disability was described at length in Employment Judge Cadney's decision of 5 September 2019 [194-6]: She had suffered from the effects of a gallstone from 2012 and had soldiered on with painkilling medication until she saw her GP in May 2018. She was then recorded as having had a two-week history of pain [204] and was referred to a consultant. Surgery was then recommended which took place in April 2019. Apart from her gallstone, she was otherwise "*generally fit and well*" [219].

5.15 Importantly, in paragraph 11 of his Judgment, Employment Judge Cadney had said this;

> "*The Claimant has a progressive condition. The evidence for which does not allow me to draw the conclusion that the symptoms had a substantial adverse effect on her normal day-to-day activities prior to May 2018. However, as she was suffering some symptoms from 2012, she is to be treated as disabled from that point."*

In other words, he found that the start of the progressive condition, although not disabling, was the start of her disability.

5.16 In her evidence before us, the Claimant said that, since her arrival in the UK, she had been back to Poland every three or five months and had been seen by her doctor there for her gallbladder problems and prescribed medication. We found it difficult to understand how, if that had been the case, it had not featured in her history to her UK GP at all and her medical notes. She did not appear to have given that evidence to Employment Judge Cadney, it was not in her witness statement, her polish medical notes had not been produced and the medication that she was allegedly taking had not been referred to in her registration form in September 2017 [212].

5.17 In May 2018, the Claimant alleged that she had a bad attack. She said that she could not function normally because of the pain, but she did not go off sick because of her belief that she would not have received sick pay (paragraph 36 of her Claim Form). During her cross-examination, she asserted that her condition affected the quantity, not the quality, of her work. The Respondents' case was that they were wholly unaware of any attack that month.

5.18 Moving specifically to the issue of knowledge of disability, the Respondents denied that they knew of the Claimant's gallbladder problems at any stage of her employment. Her case was that they knew at the start of her employment and that, in 2017 or 2018, the Third Respondent had even driven her to hospital because of an attack. Mrs Amamut and Mrs Swinczyk also believed that the Respondents knew of her problems.

5.19 Whilst the Third Respondent accepted that he had driven her to hospital, he said that he had never asked her the reason why she had been ill. He had not wanted to pry and had simply understood that she had been "*poorly*".

5.20 Having considered all of the evidence on that issue, we did not consider the Claimant's condition to have been as serious as she had made out. She had only visited her GP in the UK in May 2020 for the first time and we had great difficulty in accepting her evidence about her level of treatment in Poland over the previous five years without any supporting material. When she registered with her current GP's practice in September 2017, she did not refer to any gallbladder issues despite the ability to do so under the section relating to 'past illnesses' [212]. Employment Judge Cadney had clearly concluded that her condition had only constituted a substantial impairment from May 2018, so the suggestion that it had been the source of such extensive complaints prior to that seemed implausible.

5.21 The Third Respondent had clearly known that the Claimant had some problem on a date in 2017 or early 2018, but we accepted that he had not wanted to ask or pry into the reasons. We did not accept the Claimant's other evidence on this point. In particular, Mrs Swinczyk alleged that she had known about her condition in 2016 or 2017 when it had not been overt, even on the Claimant's own case.

The Claimant's working relationships

5.22 There was little doubt that the Claimant was initially well regarded as a good worker. The Fourth Respondent described her as a "*well behaved colleague who was good at doing her job*". Her former colleagues, however, Mrs Swinczyk and Mrs Amamut, spoke of her having been treated disrespectfully and of both her and other employees having been put under work pressure.

5.23 The Respondents' witnesses spoke about the Claimant in very different terms. Some claimed that they had been bad mouthed at work, that she stirred up conflicts, that she had a short temper, that she shouted at people, including both of the named Respondents, and that she had refused to undertake certain work. The evidence suggested a deterioration in her conduct and behaviour at the end of 2017 and into 2018. Those who attributed her behaviour, considered it to have been caused by difficulties that she was having domestically with her husband. The Claimant herself indicated that she was enjoying her work less from 2017 onwards because of the greater staff turnover and increased work targets.

5.24 We found the Respondents' witnesses, particularly Mrs Allen, Mrs Ali, and Mrs Jacob compelling. Both of the Claimant's witnesses had left the Respondents' employment and appeared to have some antipathy towards the Second Respondent and loyalty towards the Claimant. We recognised that it could have been said that the Respondents' witnesses, as continuing employees, had felt a sense of duty to give supporting evidence to their employer, but their accounts were too numerous and too consistent to have been manufactured and they reflected an employee who, in our judgment had become argumentative, divisive, disgruntled and difficult to manage, as was alleged.

Events leading to dismissal

5.25 The Claimant was due to have had a period of annual leave in June 2018. In May, she was asked to complete a piece of work which was complicated and allegedly "*surpassed her ability*"; two bespoke jackets and pairs of

trousers (paragraph 38 of her Claim Form). Combined with difficulties caused by her gallbladder, she said that she experienced greater stress and she tried to offload the work to her colleague, Mrs Jacob, who did not agree to accept the work.

5.26 The Respondents asserted that there was a meeting on 1 May, notes of which were taken by the Fourth Respondent [93-4]. A number of issues were addressed; the fact that her output was considered low, the fact that she was making mistakes which were costly, the fact that she refused to undertake certain tasks and that she had been spreading rumours about redundancies. She explained her position; she said that personal issues with her husband had affected her performance and that she had been feeling very tired and stressed, which had affected her behaviour. But she did say that she would correct her relationships with her colleagues. She was told that she would have been given less intricate work after she had completed the bespoke work that she was then undertaking. She was also told that her performance and conduct was to have been be monitored for the following six months.

5.27 The Claimant's case was that that meeting simply did not happen. She pointed to the properties of the Word document notes which showed that it had been created on 30 September 2019 [131] and she alleged that they had been written for the litigation only.

5.28 The Claimant's accusation was, of course, a very serious one to have made, but we concluded that her memory was not reliable. The notes did not appear to have been manufactured; they appeared too wordy to have been created *ex post facto*. They also reflected what a lot of the Respondents' witnesses had said. The Respondents' explanation about the document's properties was very simple and was one that we had heard in other cases; that the notes were originally handwritten and were subsequently typed when it became clear that they were to have been needed for the hearing. Further, the Claimant accepted that at least some of the content of the meeting had been covered in conversations that she had had in May. Yet further, the Fourth Respondent told us that there tended to be regular monthly meetings with employees who had been experiencing problems and, in this case, there were meeting minutes both from 1 May and 1 June. We therefore concluded that the notes were probably a reasonably fair reflection of the conversation which took place on that day.

5.29 There was a further meeting on 1 June which both sides agreed did take place. The Claimant's case was that she was tearful and complained that the Fourth Respondent had been "*torturing her*". She asked to return to her normal duties because of the level of difficulty of the bespoke work and her health. She said that the Fourth Respondent reluctantly agreed *if* she finished that bespoke order.

5.30 The Respondents' case was evidenced by the notes of that meeting and was rather different [95-6]. The Fourth Respondent said that the main issue that was raised was the Claimant's alleged mistreatment of a colleague Mrs Jacob; that she had criticised her and had suggested that the Respondents had been contemplating her dismissal. She was told that such conduct had to cease immediately;

> "*Her aggressive and abusive behaviour towards her colleagues to be stopped immediately such as shouting at her colleagues, creating unacceptable tension in workplace, personal insults, spreading malicious rumors and trying to influence other colleagues to terminate their employment with us to cause damage to the business.* [sic]"

Performance was also not seen to have improved and, again, the Claimant asserted that her relationship with colleagues and with her husband had not been good. The meeting ended as follows [96];

> "*I offered her to take time off to resolve issues with her husband as stress is affecting her work and damaging relationship with her colleagues.*
> *I told her that her employment could be terminated if her conduct and performance does not improve by 1 November 2018*".

5.31 From an examination of the properties of the document [132], the Claimant again believed that the notes had been created in September 2019 and, for the same reasons as those given above, we rejected that suggestion. We found that they were typed from handwritten versions taken at the time and that they probably and reasonably reflected their discussions on that day. We also concluded that the Claimant's account of this meeting was wrong in one material respect; the request to finish the job that she had been on before being allocated other work was made at the earlier meeting on 1 May, as evidenced in those notes.

5.32 Next, came the events of 7 June when the Fourth Respondent met with Mrs Jacob and her partner and fellow employee, Mr Szenyou, who made further allegations against the Claimant. They complained that she had made the working environment very bad, that they were being bullied and that they would leave if things did not improve [99]. They both confirmed the accuracy of those written accounts when they gave evidence.

5.33 The Fourth Respondent then met with the Claimant and issued her with a first written warning as a result of those continuing issues, specifically her conduct towards Mrs Jacob [97-8]. Although that was what he asserted in paragraph 12 of his witness statement, there was no reference to the warning within the notes themselves. He candidly accepted their deficiency in cross examination.

5.34 The Claimant, on the other hand, said that no meeting took place on 7 June at all. She accepted that there had been one on the 6th when she was asked not to speak to Mrs Jacob and when she complained that another colleague was not showing *her* enough respect, a lady called Sonja Kovac. We considered that, particularly in light of the written note, the Claimant had simply got the dates wrong. There clearly was a conversation at which these issues were discussed.

5.35 The Claimant then took a period of annual leave and returned on 2 July when she then said that she was told by the Fourth Respondent that her pay was being docked by £300 because of losses suffered in relation to her work on the bespoke order. Part of that deduction was to have come from her July pay and part from her August pay.

5.36 The Respondents' case was that mistakes were a frequent occurrence in tailoring. No deductions had ever been made from anybody's pay. Mrs Amamut and Mrs Swinczyk confirmed that, despite their own mistakes, they had suffered no deductions.

5.37 More specifically, the Claimant's case was that 18 hours were deducted from her July pay, as allegedly shown by the post it note ("*191hrs-18*") [166]. 18 hours at £9.50/hour was £171, close enough, she said, to the £170 that was deducted from her pay in July.

5.38 Her case was therefore premised on another handwritten note on one of the payslips, documents which we had been otherwise unable to find to have been reliable. Further, there was no evidence of any August deduction. Yet further and most importantly, the July and August payments from the Respondents' bank account remained consistent [88].

5.39 Taking all of that evidence together, we were unable to find that the Claimant probably suffered the deduction alleged.

5.40 The Fourth Respondent took annual leave in July and August 2018. Whilst away, it was alleged that the Claimant had lost her temper with the Third Respondent and had shouted at him in front of customers and Mrs Allen on 4 August. Although the Third Respondent's evidence had lacked detail in many respects, on this issue we found him to have been much more reliable. He remembered the day well and the shame that he had felt because customers had been present.

Dismissal

5.41 On 17 August, the Claimant discovered that she was pregnant. She alleged that, before lunch, the Third Respondent had brought some further work for her to do. In her witness statement, she stated that she then thought that she had raised the issue of her pregnancy (paragraph 39). That was the first time that she had said that she had raised it then. It had not been suggested in her Claim Form (paragraph 56) and it was denied by the Respondents. In cross examination, she said that she could not remember when she had first raised it on 17 August but that it had definitely been before the end of the day. The Third Respondent agreed that it was raised at the end of the day and that was our finding.

5.42 At the end of the afternoon shift, the Claimant's case was then, very simply, that the Third Respondent told her that she was being dismissed with notice (paragraph 57 of the Claim Form). She then told him that she was pregnant. In cross examination, however, her evidence changed again; she accepted that she was only suspended until the Fourth Respondent had returned from leave. There was then to have been a meeting at which she *was* to have been dismissed. That broadly accorded with the Third Respondent's evidence who said that he had informed her that she was being suspended pending an investigation. She then informed him that she thought that she might have been pregnant (we noted that her pregnancy was not actually confirmed until 22 August by her GP [205]).

5.43 Despite the findings made in paragraph 5.44 above, we were satisfied that the Claimant had initially believed that she had been dismissed on 17 August, hence the wording of her Claim Form. There may have been

language difficulties between her and the Third Respondent as his English was not as good as that of the Fourth Respondent. The Claimant's initial position was also consistent with her letter of 20 August [100] in which she stated that she believed that she had been dismissed with notice. We accepted, however, that that had never been the Third Respondent's intention, that it was not what he had actually communicated and, as we have said, the Claimant accepted in cross examination that she was not dismissed at that point but was only suspended.

5.44 On 20 August, the Claimant asked for an explanation of the situation. She wanted a meeting to discuss her 'grievance' [100]. She did not raise her gallbladder issue or any allegation of discrimination on the grounds of disability.

5.45 She emailed again on 24 August, seeking further clarification [104-5]. On 27 August, she was invited to a meeting which was to have taken place on 29 August but, on 28 August, she was informed that the meeting had been cancelled and that she would be getting a letter [103].

5.46 On 30 August, she received a termination letter dated 28 August [106-8] in which the Fourth Respondent recounted his meeting with her in June and the discussions that they had had about her treatment of Mrs Jacob. He cited eight further allegations of misconduct which concerned alleged refusals to undertake work, bullying of staff, divisiveness and sowing feelings of general discontent and unhappiness throughout the workplace. Her dismissal was said to take effect immediately. The Respondents alleged that the issues raised in that letter had been largely covered informally with the Claimant by the Third and/or Fourth Respondent as and when they had occurred, although no notes had been kept of those discussions. The letter of dismissal contained no offer or stated right of appeal.

6. Conclusions

Unfair dismissal (ss. 98 and 99)

6.1 What was the reason for dismissal? The Second Respondent relied upon the Claimant's conduct, whereas she asserted that it had been because of her pregnancy under s. 99.

6.2 We concluded that conduct was indeed the fair reason for the Claimant's dismissal on the basis of the factual findings that we made. We considered that the behavioural problems had reached something of a crescendo in August, as the notes and the accounts of other members of staff indicated. We have dealt with the Claimant's case in more detail in respect of the discrimination claim below.

6.3 Was the dismissal fair? In cases involving dismissals for reasons relating to an employee's conduct, the tribunal had to consider the three stage test in *BHS-v-Burchell* [1980] ICR 303;

(i) Had the employer genuinely believed that the Claimant was guilty of the misconduct alleged;
(ii) Was that belief based upon reasonable grounds;
(iii) Was there a reasonable investigation prior to the employer reaching that view?

Crucially, it was not for the tribunal to decide whether the employee had actually committed the acts complained of.

6.4 We considered that the Second Respondent's belief was genuinely held. It was the fair reason for the dismissal in our view. It was also based upon reasonable grounds, namely the evidence and experiences of the Claimant's misconduct from the Third and Fourth Respondents themselves and from other employees. We were not, however, satisfied that there had been a reasonable investigation prior to the Second Respondent reaching that view. Apart from a brief noted interview with Mrs Jacob and Mr Szenyou, there were not witness statements taken from other employees and there was no interview with the Claimant in which some or any of the allegations were covered.

6.5 Further, in procedural terms, the dismissal was a mess. There were no allegations set out in writing for her to answer at a disciplinary meeting. She did not receive any written evidence, not even the interviews of the two employees in writing. She was not given a right of representation at any disciplinary hearing which actually took place. She was invited to a hearing on 29 August, but it was cancelled. The dismissal letter contained new allegations which had never been put to her and which she never had a chance to respond to and it contained no opportunity to appeal. There was a failure to follow a fair procedure, a failure to follow the ACAS Code of Practice and the Claimant's dismissal was unfair.

6.6 Both the principle in *Polkey* and contributory conduct under ss. 122 and 123 were raised by the Second Respondent in paragraphs 85 and 86 of the Response.

6.7 The decision in *Polkey-v-AE Dayton Services* [1988] ICR 142 required a tribunal to reduce compensation if it found that there was a possibility that the employee would still have been dismissed even if a fair procedure had been adopted. Compensation could have been reduced to reflect the percentage chance of that possibility. Alternatively, a tribunal might have concluded that a fair of procedure would have delayed the dismissal, in which case compensation could have been tailored to reflect the likely delay. A tribunal had to consider whether a fair procedure would have made a difference, but also what that difference might have been, if any (*Singh-v-Glass Express Midlands Ltd* UKEAT/0071/18/DM).

6.8 It was for the employer to adduce relevant evidence on the issue, although a tribunal should have had regard to any relevant evidence when making the assessment. A degree of uncertainty was inevitable, but there may well have been circumstances when the nature of the evidence was such as to make a prediction so unreliable that it was unsafe to attempt to reconstruct what might have happened had a fair procedure been used. However, a tribunal should not have been reluctant to have undertaken an examination of a *Polkey* issue simply because it involved some degree of speculation (*Software 2000 Ltd.-v-Andrews* [2007] ICR 825 and *Contract Bottling Ltd-v-Cave* [2014] UKEAT/0100/14).

6.9 Had a fair procedure been followed in this case, we still considered that there had been a good chance that a dismissal would have occurred, but not an overwhelming chance. The Respondents had clearly reached the

stage where they considered that the Claimant's conduct could no longer have been tolerated. They had an employee who had shouted at the Director in front of customers and another employee and other colleagues who had threatened to resign if her conduct had not stopped.

6.10 We were not entirely convinced that the Respondents had done quite enough to try to correct her conduct. If she had been given a clear, final written warning or a better insight into the effect of her conduct through a more transparent, formal process, a dismissal might have been averted. There was always going to have been an element of crystal ball gazing in any assessment that we made, but on balance, we considered that there was a 60% chance of the Claimant having been dismissed in any event.

6.11 We also considered the Second Respondent's arguments under ss. 122 (2) and 123 (6). In order for a deduction to have been made under these sections, the conduct needed to have been culpable or blameworthy in the sense that it was foolish, perverse or unreasonable. It did not have to have been in breach of contract, equivalent to gross misconduct or tortious (*Nelson-v-BBC* [1980] ICR 110). We applied the test recommended in *Steen-v-ASP Packaging Ltd* [2014] ICR 56; we had to;

(i) Identify the conduct;
(ii) Consider whether it was blameworthy;
(iii) Consider whether it caused or contributed to the dismissal;
(iv) Determine whether it was just and equitable to reduce compensation;
(v) Determine by what level such a reduction was just and equitable.

We also considered the slightly different test under s. 122 (2); whether any of the Claimant's conduct prior to her dismissal made it just and equitable to reduce the basic award, even if that conduct did not necessarily cause or contribute to the dismissal.

6.12 We took a slightly different view here than in relation to *Polkey* but, since we had concluded that the Claimant's conduct had been poor in the period prior to her dismissal, she could have expected a finding under both sections. The relevant conduct was the Claimant's bullying, demeaning of others, refusal of work, stirring up trouble, shouting at colleagues and the other issues to which we have referred, specifically, the matters referred to by Mr Szenyou and Mrs Jacob [99] and the matters covered in the following paragraphs of the dismissal letter [107-8]; paragraph 1, which was verified by Mrs Ali, paragraph 2, which was supported by the evidence of Mrs Allen and the Third Respondent, paragraph 4, as above, save with the exception of Sonja Kovacs who did not give evidence, and paragraph 5, the refusal of work on 17 August. That conduct was blameworthy and contributed to or caused the dismissal. We did consider that it was just and equitable to reduce compensation and, on balance, we considered that the appropriate reduction under the sections was one of 65%.

<u>Discrimination arising from disability; legal test</u>

6.13 When considering a complaint under s. 15 of the Act, we had to consider whether the employee was "*treated unfavourably because of something arising in consequence of her disability*". There needed to have been, first, '*something'* which arose in consequence of the disability, which was an objective question and, secondly, unfavourable treatment which was suffered because of that '*something*' (*Basildon and Thurrock NHS-v-*

Weerasinghe UKEAT/0397/14). That second question was subjective, in the sense that it required us to examine the employer's mind in order to establish whether the treatment had been by reason of its attitude or reaction to the '*something*' (*Dunn-v-Secretary of State for Justice* [2019] IRLR 298, CA). Although an employer must have had knowledge (actual or imputed) of the disability, there was no requirement for it to have been aware that the relevant '*something*' had arisen from the disability (*City of York-v-Grosset* 2018] IRLR 746, CA).

6.14 Although there needed to have been some causal connection between the '*something*' and the disability, it only needed to have been loose and there might have been several links in the causative chain (*Hall-v-Chief Constable of West Yorkshire Police* UKEAT/0057/15 and *iForce Ltd-v-Wood* UKEAT/0167/18/DA). It need not have been the only reason for the treatment; it must have been a significant cause (*Pnaiser-v-NHS England* [2016] IRLR 170), but the statutory wording ('in consequence') imported a looser test than 'caused by' (*Sheikholeslami-v-University of Edinburgh* UKEATS/0014/17 and *Scott-v-Kenton Schools Academy Trust* UKEAT/0031/19/DA).

6.15 In *IPC Media-v-Millar* [2013] IRLR 707, the EAT stressed the need to focus upon the mind of the putative discriminator. Whether conscious or unconscious, the motive for the unfavourable treatment claim needed to have been "*something arising in consequence of*" the employee's disability. No comparator was needed.

Discrimination arising from disability; conclusions

6.16 The alleged act of discrimination here was the Claimant's dismissal. The 'something arising' in consequence of her claimant's disability was her alleged inability to produce as much work due to her gallbladder problem. It was not an issue regarding the quality of her work, she said.

6.17 As set out above, there was no evidence of an impairment before May 2018 (paragraph 11 of Employment Judge Cadney's Judgment). The main criticism levelled at the Claimant regarding her work was in relation to quality not the level or amount of her output (see [93-4] and [95-6]). Further and more importantly, the main reason for the Claimant's dismissal had nothing to do with her work at all, but her conduct. We did not accept that either the quality or quantity of her work had a material part to play in the Second Respondent's decision. It did not feature within the eight factors cited in the dismissal letter.

6.18 Even if we had been wrong about that, we would have found that the Respondents did not have knowledge, or ought not reasonably to have known, of her disability under s. 15 (2). More detailed findings were not necessary in the circumstances.

Discrimination on the grounds of pregnancy and maternity

6.19 A woman suffered discrimination under s. 18 if, because of her pregnancy, she was treated unfavourably. No comparator was needed. The test was merely whether the Claimant had been treated unfavourably for that reason.

6.20 Here, we considered that the dismissal had neither been because of the Claimant's pregnancy under s. 18 nor was the reason or principal reason rooted in her pregnancy under s. 99. Our conclusion was reached for three primary reasons; first, the train of events which led to the dismissal was already hurtling down the tracks by 17 August. Indeed, on her initial case, she had been dismissed *before* she had announced her pregnancy (see paragraph 57 of the Claim Form [22]). Secondly, we noted that the vast majority of the Second Respondent's workforce was female. It seemed inherently implausible to us that it would have treated pregnancies in this way given the profile of its staff. Thirdly, the Claimant herself seemed to lose heart in her case; Miss Inkin did not cross examine the decision maker, the Fourth Respondent, at all on the issue and paragraph 55 of her closing submissions (C4) seemed to advance what was only then a somewhat tentative case.

Unlawful deductions from wages

6.21 That claim was also dismissed on the basis of the factual findings that were made made in relation to the alleged £300 deduction.

Wrongful dismissal

6.22 We had to decide whether, in fact, the Claimant had been guilty of the conduct alleged and, consequently, whether she had been in fundamental breach of contract such that a summary dismissal was justified. That was a very different test from that which had to apply when considering a claim under the Employment Rights Act and the application of the *Burchell* test. Repudiatory conduct must ordinarily have demonstrated a deliberate intention not to have been bound by the essential requirements of the contract and the burden was on the employer to demonstrate that the Claimant's conduct had been of such a nature so as to have justified her dismissal without notice.

6.23 We found this issue more difficult. On the one hand, we had reached factual findings against the Claimant for the purposes of our findings under ss. 122 and 123 and we considered that her shouting at the Third Respondent on 4 August in front of a customer and a colleague to have been particular egregious. On the other hand, the rest of her conduct had been allowed to continue without suspension and she was also allowed to continue to work for two weeks *after* 4 August. On that basis, was it really repudiatory?

6.24 Ultimately, we concluded that the conduct had constituted gross misconduct and a fundamental breach of contract, given the status of the Third Respondent and the circumstances in which the events of the 4 August had taken place, in addition to the other allegations. The delay between 4 and 17 August was explicable on the basis that the Third Respondent had been waiting for his brother to return from leave. That delay did not affect the character of the conduct which was what we were assessing. Accordingly, the claim for breach of contract in relation to notice was also dismissed.

7. Remedy

7.1 At the conclusion of the hearing, the Tribunal addressed the issue of remedy by working through the Schedule of Loss with the parties and

exploring which figures were capable of having been agreed [167-188]. The figures within paragraph 4 of the Judgment were agreed as a result of those discussions and the findings which had been made above in relation to *Polkey* and under ss. 122 and 123.

8. Delay in preparation of the Reasons

8.1 The delay in the provision of these Reasons warranted an explanation.

8.2 The Judgment was sent to the parties on 9 December 2021. The Claimant's representative asked for written reasons to be provided on 16 December 2021. That request was not replied to, nor referred to the Judge. A chasing email was sent on 9 February 2022, again without response from the Tribunal administration or referral to the Judge. A further request was made on 27 April 2022 which was ultimately referred to the Judge the following day and a somewhat exasperated and apologetic response was then provided. These Reasons have followed.

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Employment Judge Livesey
Date 20 May 2022

REASONS SENT TO THE PARTIES ON
26 May 2022 By Mr J McCormick

FOR THE TRIBUNAL OFFICE