EMPLOYMENT TRIBUNALS

Claimant: Ms J Talbot

Respondent: Kession Capital Limited

Heard at: Watford Employment TribunalOn: 28 and 29 March 2022

Before: Employment Judge Dobbie (by video)

Representation
Claimant: In person
Respondent: Ms A Fadipe (Counsel)

JUDGMENT having been sent to the parties on 21 April 2022 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

Introduction

1. The Claimant commenced working for the Respondent, a company providing regulatory hosting services to the financial services sector, on 12 February 2018. The Claimant's employment terminated on 9 December 2021 following a dismissal for alleged misconduct.

2. By a claim form presented to the Tribunal on 28 February 2021, she brought claims against the Respondent for unfair dismissal, wrongful dismissal (notice pay) and holiday pay.

Findings of fact

3. The Claimant commenced working for the Respondent on 12 February 2018 as a Compliance and Project Manager and was promoted to the role of Global Operations Manager from 12 October 2020. Her contract required her to work from the Respondent's premises at Hyde House, Colindale [54]. Her earlier contract had the same requirement [45].

4. Of course, during the national lockdowns caused by the covid-19 pandemic, the Claimant worked from home from time to time. From the first national lockdown in March 2020 until approximately July 2020, the Claimant worked from home exclusively. Then, from July 2020, she attended the office one

day a week. From September 2020, she attended the office approximately one to two days a week.

5. On 26 October 2020, the Claimant resigned on notice and she and Mr Kessler (Director, CEO and Founder) had a discussion about her notice. The Claimant stated she needed to move home to Wales due to her mental health and life pressures and wanted to do so by mid December 2020 at the latest. There was a dispute between the parties about what was agreed on this date. Mr Kessler's account was unclear, but he was consistent in stating that he never agreed for the Claimant to work her notice from Wales from 7 December 2020 unconditionally (but the conditions, and the dates of what was raised when, were not consistent). The Claimant stated that on 26 October 2020, they did agree she could work the remainder of her notice from Wales from 7 December 2020 onwards, without reduction in salary or any other conditions.

6. I find that, during the meeting on 26 October 2020, Mr Kessler indicated to the Claimant that she could work from London until 4 December 2020, then work the remainder of her notice (to 29 January 2021) from Wales, without expressing any conditions on that date. I make the finding that this is what he expressed to her on that date because:
   a) This is what the Claimant testified to and she was a straight-forward and credible witness;
   b) In the Claimant's private message to her friend on 26 October 2020 she stated they had agreed "Doing 6 weeks here and the rest from Wales!... And he said he like me to stay on from there.... which I said I would consider.... but we'll see x" [64]. I considered why would she send that in a private message if it were not true? [64]
   c) In the Claimant's resignation letter, dated 26 October 2020, she stated "As discussed, my last week to attend the London office will be the week ending 4th December 2020, the remainder of my notice will be working from home from my new location in Wales. My employment will cease on 1 February 2021" [61]. Mr Kessler did not respond to this to say it was not an accurate account of what had been agreed;
   d) In the Claimant's amended resignation letter, sent 3 November 2020, she reiterated the same points but altered the end date to 29 January 2021 [65-66]. There was no reply from the Respondent to that letter to say it was inaccurate in any way either;
   e) Mr Kessler's own comments in the meeting on 25 November 2020 timed at c.04:16 of the recording, part of which was transcribed at [185-186] but was much clearer on recording, indicated such an agreement had been reached;
   f) Mr Kessler's own comments in the recorded meeting on 2 December 2020 (for which there was no transcript) also indicated such an agreement had been reached;
   g) Mr Kessler's own comments in the audio recording of the appeal meeting on 7 January 20, transcribed at [236] indicated he had agreed to her working from Wales. He is recorded as having stated:

      "on the 25th October [sic], Jess came in to meet with me and we discussed her resignation. [] I wanted to try and retain Jesse's service beyond the notice period. [] so I think what could go to the fourth of December, sorry, that she could stay in London until the fourth of December and then from the fourth of December she would be based

in Wales. I did say that. I think we can make this work by her working remotely. And I did. I did." [236].

h) He went on to say

"I don't know if I discussed it on that day. But or I don't think I did. But obviously, that was with the view that if you are working from Wales, then it's a significant departure from working in London and some of the capabilities and the the the job itself would be significantly reduced. So I did have to think about it. I did. I did want Jess to extend her time with us." [236]. This latter comment indicated that on 26 October itself, there was no discussion of any conditions (reduction in pay etc) attached to the agreement to vary the Claimant's workplace. Mr Kessler accepts he did not raise them on this date (26th October) but thought about them subsequently.

7. Further, in the email from Mr Kessler sent to Laura Wright about the Claimant's resignation, dated 26 October 2020, referring to the Claimant's first resignation letter, Mr Kessler stated

"I think before accepting this we need to chat about the working from Wales for 6 weeks, as that's what she wants to do it is not a foregone conclusion that is what we accept xx" [183].

8. This tends to suggest that on 26 October 2020, Mr Kessler had not indicated to the Claimant that working from Wales would entail a reduction in pay or any other specific conditions. Had he mentioned any to the Claimant he would have explained these to Laura Wright in the email. Further, given that the resignation letter itself states that the matters *had been agreed*, it is peculiar for Mr Kessler not to have stated to Laura Wright (or the Claimant) that that was not correct (if indeed it was incorrect).

9. Of course, this email could indicate that Mr Kessler had not yet indicated to the Claimant that her proposed arrangement was in fact agreed. However, just because he says to another employee that there is no obligation to accept something does not mean he had not in fact already indicated to the Claimant that he was amenable to the arrangement. His email to Laura Wright is inconsistent with the evidence above which indicates (sometimes by his own admission) that he had agreed the variation on 26 October 2020.

10. On balance, I find that Mr Kessler did agree to the Claimant's request and did not say to the Claimant that he was merely considering her suggestion (but had not yet agreed it) at that time. I find that he subsequently thought better of it and decided he wanted to try and impose conditions after the fact (I.e. reduced pay, or a minimum number of days in the London office).
11. On 30 October 2020, Mr Kessler sent an email to the Claimant stating "let's discuss this when you are in the office" [69] but he made no comment that the dates or record of what had been discussed on 26 October 2020 (as set out in the resignation letter) were in any way inaccurate.

12. On 31 October 2020, the Government announced a second national lockdown effective from 5 November 2020. The Respondent stated that employees would be required to attend work one day a week until the restrictions eased.

13. On 3 November 2020, the Respondent received a reference request for the Claimant's Welsh rental property and he completed it. On the same day, the Claimant amended the dates for her resignation and sent this in writing to the Respondent [65-66].

14. There was a meeting between the Claimant and Mr Kessler on 4 November 2020, but there was no recording of it, nor any notes. Neither party specifically addressed it in their evidence. At paragraph 20 of Mr Kessler's statement, he merely stated there were discussions during 4 and 25 November 2020, without specifically stating what was said on 4 November 2020. In the recording of the meeting dated 2 December 2020, the Claimant stated that it was at this meeting (on 4 November 2020) that Mr Kessler raised for the first time that he had not agreed to her working from Wales from 04 December 2020 at the same rate of pay.

15. On Mr Kessler's own evidence, he had not suggested reduced pay for remote working (from Wales) until 4 November 2020, following the announcement of the second lockdown (paragraph 19 Kessler WS).

16. On 5 or 6 November 2020, the Claimant served 1 month's notice on her London property. She was due to hand the keys back 6 December 2020.

17. There was a further discussion between the Claimant and Mr Kessler on 25 November 2020, which was recorded. The audio recording is clearer than the transcript. At this meeting, Mr Kessler was asking the Claimant to accept furlough from the date she left London, and they discussed the prior discussion (on 26 October 2020 [184-185]). It is partly on the basis of what is said in this recording that I find the Respondent had agreed to the Claimant working from Wales from 4 December 2020 unconditionally (as found above).

18. There was a further meeting on 2 December 2020, which was audio recorded, but there was no transcript. Mr Kessler said to the Claimant that the offer to furlough the Claimant at 80% was still open to her and they discussed what had been said at the earlier meeting on 26 October 2020. In the meeting on 2 December 2020, the Claimant asserted that Mr Kessler had agreed on 26 October 2020 that she could work out her notice from Wales after 4 December 2020. Mr Kessler did not dispute this on various of the occasions the Claimant asserted it during the audio recording of the meeting. He simply added that he *also* agreed that if he wanted to terminate her employment at that point (when the Claimant moved to Wales) he could have done so and that the Claimant had sprung it on him, so he had agreed she could work from Wales but had not agreed on what terms. From this, and the sources of evidence listed above, it is clear that on 26 October 2020, Mr Kessler did agree that the Claimant could work from Wales without any change to her terms and conditions (because he had been caught off guard by the request) and whilst Mr Kessler subsequently intended to amend her terms and conditions to reflect the change in location, he did not express this to the Claimant nor think of it at that time (26 October 2020).

19. Also, at the meeting on 2 December 2020, the Claimant offered to work one day a week in London after 4 December 2020 until the date of termination, but Mr Kessler insisted she work three days a week in London. This was

just after the second national lockdown had ended (it ended on that day – 2 December 2020) but the UK went into a tier system at that time, when employees and employers were advised to allow working from home if employees could work effectively from home.

20. Mr Kessler and the Claimant did not reach a fresh agreement about the working arrangements post 4 December 2020. However, on 5 December 2020, the Claimant stated she would accept furlough [94] and on 6 January 2020, Mr Kessler sent her an email circa midnight inviting her to sign a furlough letter sent the week prior [95].

21. Then, on 7 December 2020, on a day the Claimant was supposed to be available for work, she sent Mr Kessler an email saying both that she was available for work from home or in the alternative that she be granted a day's leave to take advice on the furlough letter [95], which would leave 1.5 days' annual leave remaining. That day, she collected a car from a separate rental company run by Mr Kessler. The car loan had been agreed by the General Manager of the company, though not by Mr Kessler. I accepted the Claimant's evidence that on at least one other occasion she had loaned a car in this way, without Mr Kessler's permission and that she had understood that the General Manager had authority to loan vehicles to staff on these terms.

22. The Claimant drove to Wales that afternoon, 7 December 2020, during working hours. The Respondent had not agreed at any time that this could be taken as holiday.

23. On 8 December 2020, the Claimant informed Mr Kessler she was available to work from home (in Wales) that day [97]. Mr Kessler replied that she should either accept the furlough offer or that 7 and 8 December 2020 would be treated as unauthorised absence, since she was not attending the London office to work [98].

24. The Claimant replied, also on 8 December 2020, stating that furlough is not an option for her (she had been informed it was not available for those working notice) and stating that on 26 October 2020 they had agreed she could work from Wales so she disputed that the leave was unauthorised [99].

25. Also on 8 December 2020 at 11:49, Mr Kessler replied stating that on 26 October 2020, he did not know that the furlough scheme would be extended - but he did not dispute that there had been an agreement that she could work from Wales from 7 December 2020 on that date. He went on to say that unless the matter is resolved the two days (7 and 8 December 2020) will be counted as unauthorised absence. [100].

26. In a further email from Mr Kessler to the Claimant on 8 December 2020 at page [102], he again did not dispute that there had been an agreement on 26.10.20 (that the Claimant could work from Wales from 7 December 2020) he merely added that it was also agreed he could terminate on that date is wished to do so [102].

27. On 9 December 2020, the Claimant again informed Mr Kessler that she was available to work from home (from Wales) that day. [103] Mr Kessler replied informing her she was dismissed retrospectively as of 7 December 2020. [104]. No process whatsoever was followed.

28. Accordingly, the effective date of termination is 9 December 2020. It is not possible for her employment to have been terminated prior to her being informed of it (or indeed for it to be retrospectively terminated on a date prior to the employer deciding to terminate it).

29. On 10 December 2020, the Claimant requested an appeal against the decision to dismiss her. None had been offered to her [106].

30. On 10 December 2020, Mr Kessler sent a formal termination letter purporting to terminate the Claimant's employment with effect from 7 December 2020 [108].

31. On 15 December 2020, the Claimant sent to the Respondent her formal grounds of appeal [113]. On 18 December 2020, the Respondent invited the Claimant to an appeal meeting.

32. On 19 December 2020, it was announced that London was being placed in Tier 4 restrictions under which employees were not allowed to attend work unless it was reasonably necessary to do so because it is not reasonably possible to work from home.

33. On 28 December 2020, the Claimant stated she was not available for an appeal until 5 January 2021 [118]. The third national lockdown commenced on 6 January 2021 and ran until March 2021. The appeal was held on 7 January 2021 chaired by Andrew Price, a known business associate / acquaintance of Mr Kessler. Mr Kessler attended. Mr Price delivered the appeal outcome (confirming dismissal) on 11 January 2021 [125]. No reasons whatsoever were given in writing or orally.

Law

34. Under s.98 ERA it states:

"(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) ….

(2) A reason falls within this subsection if it— …

(b) relates to the conduct of the employee ... ...

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

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

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

35. In cases of ordinary unfair dismissal, where the employee has at least two years' service, the Respondent carries burden of proof as to the reason for dismissal. There is then a neutral burden on the issue of whether the dismissal for that reason was fair or unfair in all the circumstances (Boys and Girls Welfare Society v McDonald [1996] IRLR 129).

36. I reminded myself that, following Sainsbury's Supermarket Ltd v Hitt [2003] IRLR 23 and Iceland Frozen Foods Ltd v Jones [1982] IRLR 439, I am not asked to consider what I might regard as fair, but what a reasonable employer might consider in same circumstances. This is known as the "range of reasonable responses" test.

37. In British Leyland UK Ltd v Swift [1981] IRLR 91, Lord Denning MR stated: "The correct test is: Was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in all these cases there is a band of reasonableness, within which one employer might reasonably take one view: another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him."

38. Given that the Respondent relied on conduct as the reason for dismissal, I reminded myself of the guidance in the case of British Home Stores Ltd v Burchell [1978] IRLR 379, which essentially requires a Tribunal to consider each of the three following questions when determining whether the decision to dismiss was within the range of reasonable responses:
    (a) Did the Respondent genuinely believe the Claimant had committed the misconduct?
    (b) Was such a belief reasonable?
    (c) Was the belief formed and maintained after a reasonable investigation?

39. I also reminded myself however that the overarching test to apply is that set out in the statute.

40. The test of reasonableness is an objective one, therefore a Tribunal must determine the way in which a reasonable employer in the same circumstances in the same line of business would have behaved. The objective standards and responses of such a hypothetical reasonable employer are key; the Tribunal judge must not simply consider whether they think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer.

41. An employer is not required to carry out a quasi-criminal investigation; the purpose of the investigation is not to conclude whether the Claimant is or is not guilty of the alleged misconduct, but rather to establish whether there are reasonable grounds for the belief formed.

42. As stated by Lewison LJ in Davies v Sandwell MBC [2013] IRLR 374 (at para 33); "The function of the ET is a limited one. It is to decide whether the employer acted reasonably in dismissing the employee. It is not for the ET to conduct a primary fact-finding exercise. It is there to review the employer's decision".

43. More generally, in terms of reasonable process, "a flaw at one stage of a dismissal process for any of the potentially fair reasons…..does not of itself mean that the dismissal is unfair. Accordingly, tribunals should guard against minute scrutiny of individual parts of the process lest it diverts them from the task set by the statute" (Camelot Group plc v Hogg [2011] UK/EATS/19/10) and therefore the tribunal should consider the fairness of the whole of the process followed, the 'overall picture'; see para 47 & 48 in Taylor v OCS [2006] IRLR 613) including the post-dismissal appeal stage. Of course, given that the whole process must be judged in the round, there are cases where a defect can be rectified by the appeal stage of a process.

44. In Polkey v AE Dayton Services Limited 1988 ICR 142, it was stated that if an employer could reasonably have concluded that a proper procedure would be "utterly useless" or "futile", it might well be acting reasonably in not putting one in place before dismissing the employee. The test is an objective one: the tribunal must ask whether an employer, acting reasonably, could have made the decision that it would have been futile to follow proper procedures (Duffy v Yeomans and Partners Ltd 1995 ICR 1).

45. In Polkey, Lord Bridge stated that cases in which a proper procedure could reasonably be abandoned on the basis of being futile would be "exceptional". Accordingly, in the majority of cases, a fair process is a necessary precondition of a finding of fair dismissal.

46. Even if gross misconduct is found, summary dismissal does not automatically follow. The employer must consider the question of what is a reasonable sanction in the circumstances - see Brito-Babapulle v Ealing Hospital NHS Trust [2013] IRLR 854.

47. The ACAS Guide suggests that the employee's disciplinary record (including current warnings), general work record, work experience, position and length of service – should be taken into account when deciding whether a disciplinary penalty is appropriate. However, this is just a non-statutory guide.

Adjustments to awards

48. A deduction to compensation can be made under section 123(1) ERA and following the case of Polkey v AE Dayton Services Ltd [1988] AC 344, where the Claimant would have been dismissed in any event had a fair procedure been followed.

49. In Software 2000 Ltd v Andrews [2007] IRLR 568, Elias J (then President of the EAT) reviewed the authorities in this area and stated:
"The question is not whether the tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with

sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice.".

50. If the Claimant is found to have been guilty of blameworthy conduct which contributed to the dismissal, compensation can be reduced by up to 100%. The employee's conduct need only be a factor (Robert Whiting Designs Ltd v Lamb [1978] ICR 89, EAT 24.

51. Although the contributory fault provisions in relation to the basic and compensatory awards are separate under ss.122(2) and 123(6) ERA and differently worded, a tribunal finding contribution should normally reduce both awards by the same amount: G McFall & Co Ltd v Curran [1981] IRLR 455, NI CA. However, the test under s.122(2) ERA is slightly different as a basic award could be reduced on a just and equitable basis even if the conduct did not necessarily cause or contribute to the dismissal.

52. There is no reason why a compensatory award may not be reduced for both *Polkey* possibilities and for contributory conduct (Robert Whiting Designs Limited v Lamb [1978] ICR 89).

Application of law to the facts

Unfair dismissal claim

53. The reason given for dismissing the Claimant in the letter of termination is that on 7, 8 and 9 December 2020 she failed to attend the Respondent's offices for work, which was said to be a breach of her written contract of employment and the Respondent's mandate that she attend the London office every Monday, Tuesday and Wednesday. The Respondent described the absences from the office as "unauthorised absence".

54. As I have found above, whilst Mr Kessler may have changed his mind (by 4 December) in respect of what he wanted to pay the Claimant for working remotely, he had previously agreed (in the conversation with her on 26 October 2020) that she could work from Wales from 4 December 2020 onwards with no conditions and the Claimant had made plans in reliance on that agreement. There was thus an express variation to her contract on 26 October 2020 as to the place of work, with Mr Kessler seeking to impose conditions after the fact. Accordingly, the Respondent cannot have genuinely believed that that the failure to attend the London office on 7-9 December 2020 was culpable "unauthorised absence". Moreover, it cannot reasonably have believed the same, in the circumstances.

55. Addressing the other matters set out in Burchell, and considering the requirements for a fair dismissal in law, it is notable that there was no process or investigation whatsoever prior to the decision to dismiss. The Claimant was not invited to an investigatory or disciplinary hearing, she was not presented with allegations and was not given any opportunity whatsoever to participate in any process until after the decision to dismiss her had been taken.

56. I have considered the very narrow circumstances from Polkey under which there can sometimes be a fair dismissal in absence of any process whatsoever prior to dismissal and I do not find that this is a case falling within that exception because it cannot be said that the Respondent

reasonably believed that such a process would have been futile. The Respondent may have genuinely believed this (demonstrating that the decision to dismiss was predetermined) but such a belief cannot be a reasonable one in the circumstances, given in particular there was a dispute of fact between the Claimant and Mr Kessler as to what had been agreed on 26 October 2020.

57. Indeed, in the Respondent's closing submissions, there was very little reference to the complete lack of any process prior to the decision to dismiss, nor any real argument or evidence from which a tribunal could conclude that the Respondent could reasonably have concluded that a process would have been futile. The Respondent's closing submission merely stated at paragraph 50: "Given the context, an investigation is likely to have been of limited utility." Even on the Respondent's own case, the benefit of a process was "limited" - not "futile". This is no criticism of Ms Fadipe, her submissions were sensible in not overstating the position. There was no evidence as to why this was reasonably believed to be the case.

58. From the evidence, it is difficult to see how the Respondent could have believed that a process would be futile. Such a process would have required a decision maker to engage with the competing version of events advanced by the Claimant and Mr Kessler. Had that evidence been properly considered, there is every chance that a reasonable employer acting reasonably would have held that the Claimant's absences on 7,8 and 9 December 2020 were either in accordance with an agreed variation to the Claimant's workplace arising from the discussion on 26 October 2021, or that she reasonably believed that to be the case such that the Claimant's non-attendance in the London office on those dates could not properly be classed as culpable unauthorised absence. This is especially so given that the Claimant had relinquished her London flat and entered into a lease on an apartment in Wales in reliance on the agreement.

59. Further and alternatively, even if the Respondent did see fit to class the failure to attend the London office as unauthorised absence, a reasonable process would have obliged the Respondent to consider the Claimant's mitigating circumstances and other relevant factors, rather than deciding dismissal was the automatic consequence. Such factors would include:
    a) The fact that the move to Wales was driven by her mental health;
    b) That she believed she had Mr Kessler's agreement to the move and had thus taken actions which had serious consequences in reliance upon that, such as terminating the lease on her London property and obtaining a rental property in Wales (at least part of which the Respondent was aware of an assisted her in by providing a reference);
    c) The lockdown in London announced on 19 December 2020 which would have meant the Claimant ought not to be attending the London office in any event (and this would have been in the Respondent's knowledge at the time of the hypothetical disciplinary process should have been conducted because even if such process had commenced on 10 December 2020 with an investigation, it is highly likely that any reasonable or fair process would not have been concluded by 18 December 2020); and
    d) Her length of service and clean disciplinary record.

60. Had the Respondent done this, it might have concluded that a warning (or no sanction) was the appropriate outcome. Indeed, it might have agreed to continue her services remotely for the notice period or even beyond it (given the lockdown restrictions and the indications in earlier discussions that she might continue to work past the original date agreed for notice).

61. Therefore, I find that in the circumstances of this case, no reasonable employer would have behaved this way and the failure to provide or follow any form of process at all prior to the appeal was outside the range of reasonable responses.

62. I have considered whether the complete lack of process prior to the decision to dismiss was rectified on appeal, but I find that the appeal was itself deficient. Not because of Mr Price necessarily being an unsuitable chair due to his connection to Mr Kessler (they had worked together) - I accept that the Respondent is a small company and it was not unreasonable to ask him to conduct it. However, Mr Price did not then conduct the process in a way that fell within the range of reasonable responses. For example, he provided no reasoning whatsoever for his decision and this suggests he did not consider the matter properly or at all and that he did not attempt to engage in deciding between the Claimant's and Mr Kessler's competing versions of events.

63. As such, I find that whilst Mr Price might have been perfectly capable of being an independent chair (his relationship to Mr Kessler did not mean he was automatically unsuitable) he did not in fact embark on the task in a reasonable way. He did just "rubber stamp" the decision to dismiss which had been taken unilaterally by Mr Kessler. Had Mr Price applied his mind to the matter, he would have to have decided who to believe: Mr Kessler or Claimant to explain why, and to consider whether the Claimant's actions in that context amounted to misconduct for unauthorised absences. There was no evidence before me that he did any of this.

Remedy

Polkey deductions

64. The Respondent argued that if it had not dismissed the Claimant for misconduct for the failure to attend the office, it would nonetheless have fairly dismissed her for loaning a car from Mr Kessler's other company without his agreement or for text messages she sent privately to a colleague who worked in that company in which they disparaged Mr Kessler.

65. I do not find that loan of the car is culpable behaviour which the Respondent would nonetheless have fairly dismissed the Claimant for had it known of it at the time (and which it discovered in the days after her termination). I accepted the Claimant's evidence that she loaned the car in same way as had done so before and that the text messages on 7 December 2020 regarding meeting the General Manager of the car rental company around the corner were to avoid seeing Mr Kessler (which would have been awkward given their disagreements) not because the Claimant knew she was doing something wrong. In any event, in his live evidence, Mr Kessler stated he "might" but could not say that he *would* have dismissed the Claimant in any event for this.

66. As to the text messages the Respondent discovered, which had passed between the Claimant and a colleague, I find that these are nothing more than private venting to a friend. There was no reputational damage or risk of it and whilst they are unpleasant, no reasonable employer would regard such messages as serious or genuine threats so as to amount to misconduct less still gross misconduct.

67. I have also considered a Polkey deduction based on the principle / argument that even if the Respondent had followed a fair procedure, the decision to dismiss the Claimant for the failure to attend the London offices would have been the same in any event. This is a different principle from the case of Polkey that is discussed above (I.e. when determining whether a process would have been futile). However, the same evidence is relevant both to that determination and to the consideration of what chance there was of a fair dismissal (for the same misconduct, namely failing to attend the London office) if a fair process had been followed. In reliance on the same evidence above, I find that there was no prospect that a fair reasonable disciplinary process would have resulted in a fair dismissal. The Respondent's actions were more than just procedurally defective.

68. Accordingly, in all the circumstances of the case, I find that the dismissal was unfair and that there was no event or circumstances giving rise to a Polkey deduction on the basis that the Claimant would or might have been dismissed fairly in any event on the same date or at some later date.

Contribution

69. As for any deduction or adjustment to the award for contribution, I find that the Claimant not being available for work at all for part of on 7 December 2020 (because she was driving to Wales and should have been available for work) is culpable. This is not on the basis that she failed to attend the London office on that date, but because she was not available for work *at all* when she should have been. I did not find (above) that the Respondent agreed that this could be a holiday day, as had been requested by the Claimant. Therefore, I find that this did contribute towards her dismissal by a small amount, in that it formed part of the reason for the Claimant not being available for work, which is the reason she was dismissed, and I make a 10% deduction for contribution for that.

70. As to the period of loss awarded under the Compensatory Award, I award the Claimant the loss of pay until 26 January 2021 (not to 26 February 2021) because if the Claimant had not been dismissed on 9 December 2020, she would have worked to the end of notice 26 January 2021, on which date her employment would have ceased, per her most recent resignation letter sent to the Respondent on 30 October 2020 at pages [69-71].

ACAS adjustment

71. The Respondent had received some advice about dismissals by 2 December 2020 and Mr Kessler had followed some sort of dismissal process in other businesses prior to and after the date on which the Claimant was dismissed. There was no adequate explanation before me as to why the Respondent had failed to follow any process whatsoever in respect of the Claimant. Therefore, the failure to do so was an unreasonable failure to follow ACAS Code. Accordingly, I award a 20% uplift under the

ACAS Code and s.207A Trade Union and Labour Relations (Consolidation) Act 1992 for Respondent's unreasonable failure to follow a fair process. The only reason I have not awarded the full 25% is that the Respondent did provide an appeal stage with an appeal hearing and a separate chairperson who had no prior involvement in the matters (albeit that I have also found above that the appeal stage was deficient).

Holiday Pay claim

72. The Claimant's contract stated that her holiday year resets on 1 January (clause 8.4). Accordingly, had she not been dismissed, her holiday pay would have accrued from 1 to 26 January 2021 (just under 4 weeks). The Respondent did not seek to argue nor lead any evidence to indicate that she would have been required to use up any outstanding leave during her notice period. The Claimant's contract required employees to take bank holidays as paid holiday. Hence 1 January 2021 would have been taken as such, leaving the Claimant with 1.15 days' holiday.

Notice pay claim

73. The Respondent was contractually obliged to pay the Claimant for her notice period under clause 19.2.2. It was open to the Respondent to argue that the Claimant had committed a repudiatory breach of contract, which it accepted, entitling it to dismiss her forthwith and thus releasing it from the duty to pay her notice pay. The Respondent did not advance any such arguments and in any event, there was no evidence to support a finding of repudiatory breach of contract by the Claimant. The same evidence which led to the conclusion that the Respondent cannot reasonably have believed that the Claimant had committed an act of serious misconduct (as set out above) leads me to a finding that she did not in fact commit a repudiatory breach of contract entitling the Respondent to dismiss her before the end of her notice.

74. Accordingly, the Respondent is liable for the remainder of the unpaid notice pay. However, given that such sum overlaps with the period of recovery for the unfair dismissal claim, there shall be no separate award under this head of claim since otherwise she would be compensated twice for the same period of loss.

Employment Judge Dobbie

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Date: 29 June 2022

REASONS SENT TO THE PARTIES ON

26 July 2022

FOR THE TRIBUNAL OFFICE