EMPLOYMENT TRIBUNALS

Claimant: Mr M Lawless

Respondent: Holden Law Limited (t/a Holden & Co LLP)

Heard at: London South (via Cloud Video Platform)
On: 9 August 2022

Before: Employment Judge Caiden

Representation
Claimant: Ms J Linford (Counsel)
Respondent: Mr J Holden (Litigant in Person)

RESERVED JUDGMENT

1. The name of the Respondent is amended to Holden Law Limited (t/a Holden & Co LLP).

2. The Respondent's application to have paragraphs 18, 24, 29-33 of the Claimant's witness statement struck through and not considered by the Tribunal on the grounds it raised material covered by without prejudice privilege is granted.

3. The Respondent's application to have the Tribunal recuse itself and not continue to hear the case, given it heard an application concerning without prejudice material, is refused.

4. The Claimant's complaint of wrongful dismissal (breach of contract claim for failure to pay notice pay) is not well-founded and is dismissed.

5. The Claimant's complaint of failure to pay holiday outstanding upon termination of employment is not well-founded and is dismissed.

6. The Claimant's complaint that there was an unauthorised deduction from his wages is well-founded. This means the Respondent unlawfully deducted the sum of £73.53 gross and is ordered to pay the Claimant this sum gross. The Claimant is responsible for any income tax or employee national insurance contributions which may become due for this gross sum.

CVP hearing

The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under rule 46.

The parties were able to hear what the Tribunal heard and see the witnesses as seen by the Tribunal. The participants were told that it was an offence to record the proceedings.

The Tribunal was satisfied that none of the witnesses from whom evidence was heard was being coached or assisted by any unseen third party while giving their evidence.

REASONS

A) Introduction and issues

1. By an ET1 presented on 7 December 2021, the Claimant made three claims against the Respondent:

   1.1. wrongful dismissal (a claim for outstanding notice pay);

   1.2. holiday pay (a claim for payment in lieu of outstanding holiday);

   1.3. unlawful deduction of wages (a claim that the sum of £73.53 that was deducted from the final wage slip for a parking permit amounted to an unlawful deduction of wages).

2. The Claimant was represented by Ms Linford of Counsel, who had been instructed by solicitors (although none attended the hearing). The Claimant provided a witness statement and gave live evidence (having taken an affirmation). The Respondent was represented by Mr J Holden, who is the Managing Partner at the Respondent and a solicitor. Although a solicitor with advocacy experience, he did not have experience in employment law and the Tribunal treated him as a litigant in person and explained the process throughout the proceedings. On behalf of the Respondent witness statements were provided by Mr J Holden and Ms B Lovett. Although Ms B Lovett was able to be called to give live evidence the Claimant's counsel confirmed no cross examination was necessary and the Tribunal did not have any questions of her. Mr J Holden did provide live evidence (having sworn an oath).

3. The Tribunal was provided with a 146 page bundle (although it was slightly longer given there were some additional inserts) and the Respondent's witness statements also contained various exhibits (some duplicates of the bundle documentation and others not). The Tribunal considered all documents that were introduced into evidence which were not subject to the successful application to have paragraphs of a witness statement removed and bundle references removed (this aspect is dealt with in more detail at paragraphs 1420 below). Page references below refer to the bundle provided to the Tribunal.

4. At the beginning of the hearing the issues and respective parties' positions were discussed in detail and agreed to be as follows:

Wrongful dismissal

5. What was the length of the notice period? The Claimant's contention was this being 3 months and the Respondent's contention was it was 1 month. There was agreement however that notice period ran from 31 August 2021 and that the gross monthly pay was £3,333.33.

6. When was the date of termination? The Claimant's contention was that the Respondent, following his resignation on 31 August 2021, on 3 September 2020 foreshortened notice by dismissing him. The Respondent's contention was that following the Claimant's resignation he was put on gardening leave until the outcome of a later arranged disciplinary hearing that dismissed the Claimant for gross negligence on 24 September 2021.

7. Subject to the date found to be the date of termination, was the Respondent either a) entitled to terminate the Claimant's contract by 24 September 2021 (if the Claimant was found to have been employed and merely put on garden leave) or b) if already terminated entitled to rely upon an unknown prior repudiatory breach to defend any wrongful dismissal claim?

8. In the event the Claimant succeeds, by what amount, if any, does the notice pay claim need to be reduced following sums earned in mitigation or failure to mitigate loss?

Holiday pay

9. How much holiday pay had been accrued as at the date of termination and did this include any holiday carried over from the previous leave year?

10. What holiday was taken during the relevant period?

11. How much holiday remains outstanding? The Respondent's position is that all holiday pay was paid in the £923.10 payment made in the final wage slip, which amounted to 6 x £153.85. The Claimant's position was that there was some 14.8 days outstanding. There was agreement however that 1 day of holiday was £153.85.

Deduction of wages

12. Was the Respondent entitled to deduct the sum of £73.53 for the parking permit from the Claimant's final wage slip? The Claimant's position is that it had been agreed that he could have a parking permit, that he paid for it and the Respondent had reimbursed it as an expense and that the later decision to try and deduct this sum in the final wage slip was unlawful. The Respondent's position is that it was just a 'grace and favour' entitlement.

B) Preliminary and procedural matters

13. Following the issues being agreed and before the evidence was heard by the Tribunal, several preliminary and procedural matters had to be dealt with by the Tribunal.

Application to exclude and strike out form statements without prejudice material

14. Mr Holden indicated that matters had been included in the bundle that were alleged to be covered by without prejudice privilege. It was indicated that this had been raised with the Claimant's solicitors and that the Respondent objected to these documents being before the Tribunal. Moreover, Mr Holden asserted that the Claimant's witness statement in the narrative referred to such matters. Ms Linford was unaware of any such correspondence of the exclusion or otherwise of without prejudice material.

15. The Tribunal raised with the parties whether, if the Respondent was correct that 'after the dismissal' material that was alleged to be covered by without prejudice, any such references and material was necessary. The Tribunal invited Mr Holden to indicate which pages of the bundle were objected to and passages of the witness statement to Ms Linford as it may be that the parties can agree a position without the need for an application. Having given the parties a break to identify the relevant parts, Mr Holden provided a list. Ms Linford agreed that in relation to all documents that were objected to in the bundle (pages 39-40, 51-52, 54-55, 119-120, 121-122) these did not need to be admitted into evidence. However, in relation to passages of the witness statement (paras 18, 24, 29-33) it was intended that these remained. Accordingly, the Tribunal invited the Respondent to make its application.

16. Mr Holden submitted that all the paragraphs identified in the Claimant's witness statement (paras 18, 24, 29-33) should be struck through on the grounds that their content dealt with without prejudice material. He directed the Tribunal's attention to *Phipson on Evidence*. In particular, what is now found (the Tribunal noted that the latest edition, 20th Ed, had slightly different paragraph numbering than given by Mr Holden but the content remained the same) in para 24-18, the quotation from *Cutts v Head* [1984] Ch. 290 at 306, per Oliver LJ, and in para 24-25, the categories for its exclusion. Mr Holden submitted that the material was very prejudicial, that it fell squarely within the scope and policy of it (being directed at settlement) and that none of the exceptions were made out. He pointed to the comments in paras 29-33 of the Claimant's witness statement which included the allege "*offered to wipe the slate clean*" and have the Claimant return on a self-employed basis were highly prejudicial to the Respondent's case in the extant dispute notwithstanding the comments themselves were denied.

17. Ms Linford responded to the application by pointing that without prejudice only applies to a genuine attempt to resolve an existing dispute. Her first submission was that, although acknowledging the "*wipe slate clean*" comment this was not the case. She accepted that at the time of the discussions referred to there had been reference of the Claimant going to the Tribunal but asserted that there was never any genuine attempt to settle. She placed reliance upon the context that the discussion was taking place in a pub. Ms Linford's second, alternative submission, was that the matters are indeed covered by the exceptions to without prejudice in any event as one should not be allowed to cloak perjury, blackmail and so on (although she used the phrase not of the 'criminal kind'), and that the comment to "*wipe slate clean*" and enter self-employment basis was exactly that. In effect, she submitted, the Respondent was stating that it was not prepared to pay what the Claimant was owed unless he took on a self-

employed role which amounts to blackmail. But there was no conversation in terms of money owed, which she stated related back to it not being a genuine attempt to settle. Ms Linford moved on to point out the apparent inconsistency with the Respondent wanting to terminate for gross misconduct and yet in the same window of time being happy to have the Claimant return on a self-employed basis, means that this is a matter of unambiguous impropriety. She gave at the end of her argument a list of case names that she stated were relevant to the present issue, namely: *Portnykh v Nomura International Plc* [2014] IRLR 251, *Barnetson v Framlington Group Ltd [*2007] ICR 1439, *BNP Paribas v Mezzotero* [2004] IRLR 509, *Unilever plc v The Procter & Gamble Co* [2000] 1 WLR 2436; *Savings & Investment Bank Ltd (In Liquidation) v Fincken* [2003] EWCA Civ 1630.

18. Mr Holden responded in strong but brief terms that he was a solicitor (an officer of the court) and that there is no evidence to make such strong accusations including 'fraud', 'blackmail' and so on.

19. Having taken some time to deliberate, the Tribunal granted the Respondent's application to have paragraphs 18, 24, 29-33 of the Claimant's witness statement struck through and not considered by the Tribunal on the grounds it raises material covered by without prejudice privilege. This ruling and oral reasons for it were given on the 9 August 2022, but the Tribunal promised to record in its main reasons the same (although noting that the written version may be more detailed).

20. The reason the Tribunal granted the application was because:
    20.1. the relevant paragraphs that were subject to the application all fell within a 'genuine attempt to settle' an existing dispute. The events chronologically were said to have occurred on 22 September 2021 and 8 February 2022. This was well after allegations of non-payment and potential litigation were raised. Indeed, Ms Linford acknowledged already in her submissions that there had been references to going to an Employment Tribunal. Further in effect a dismissal or disputed dismissal had already occurred. The present case is thus removed from those where internal grievances only have arisen (such as *Mezzotero*). As pointed out in *Portnykh* at [28] and *Barnetson* at [34] all that is needed is an extant dispute where parties are conscious of the potential for litigation. Further, nothing suggests that if the discussions occurred as the Claimant alleged and some 'agreement' was reached it was not a genuine attempt to settle. The fact that the Claimant may not like the supposed terms or offer is not an answer to this, in the Tribunal's view there would need to be something to show, in this case, that the Respondent would not carry out its alleged 'offer'. Likewise, not responding to the Claimant's proposed offer at all (which is expressly stated in the quotation of *Cutts* found in *Phipson* para 24-18) or in effect 'counter offering' would not take the conduct and material set out in the witness statement as outside a 'genuine attempt to settle'. The Tribunal did not view the fact that the discussion allegedly took place in a pub as indicating this either given the subject matter allegedly discussed and the width of the rule (which includes of course the label on even written correspondence not being determinative);
    20.2. the scope of 'admissions' under the without prejudice rule is wide. As set out in *Unilever Plc* at 2445H-2446B it effectively includes all material

discussed. This would include oral statements which are against a party's own interest such as those at para 30-33 in the witness statement which the Claimant appears to wish to use to draw an inconsistency with the decision to dismiss without notice and the offer to later return as self-employed (the Tribunal of course notes the content of any such conversation is in dispute but for the purposes of the application assumes it occurred);

20.3. none of the exceptions to without prejudice apply, including the one relied upon by Ms Linford of unambiguous impropriety. The present case is not one of discrimination and evidence required to prove such (as in *Mezzotero*). As pointed out in *Fincken* at [57] the bar is high and mere inconsistency with one's case is not sufficient, and the same principle was repeated in *Swiss Re Corporate Solutions Ltd v Sommer* [2022] EAT 78; [2022] IRLR 650 at [9]-[10]. The high bar has not been made out in the present case. Assuming the facts are as asserted in the Claimant's witness statement, it was only the reference to re-engagement on a self-employed basis and wiping the slate clean that was put forward as being something that Ms Linford submitted fell within the unambiguous impropriety. At most this is a point of alleged inconsistency in one's case and conceptually it could be the case that a repudiatory breach is committed that following a passage of time makes one decide employment on a self-employed basis is possible.

Witness statement

21. During the exchanges in relation to identifying passages of the witness statement that the Respondent objected to by virtue of without prejudice privilege being raised, it transpired that Mr Holden had a different version of the Claimant's witness statement. The Tribunal asked Ms Linford to provide a copy of the finalised version that was provided to the Tribunal. Following a brief break to allow Mr Holden to consider its contents, it was noted that there were very few changes, and he was content to proceed. Given this confirmation by Mr Holden, along with the witness statement being only 6 pages, the Tribunal concluded that the hearing could proceed and that, although disappointing procedurally, there was no substantive prejudice caused to the Respondent.

Recusal application

22. Having granted the application of the Respondent to exclude the without prejudice material (paragraphs 1420 above) the Tribunal invited the parties to consider if they were content with it continuing to hear the case.

23. The Claimant indicated it was and the Respondent was not. The Tribunal invited the Respondent to make the necessary application.

24. Mr Holden submitted that whilst accepting that the Tribunal can professionally put things out of one's mind the present circumstances were such that there would be a cloud that would remain. The material at issue which the Tribunal had ruled on was of such a prejudicial nature that the only safe course was for the Tribunal to recuse itself. Moreover, given that the hearing had yet to formally commence and was only listed for 1 day (it nearing 13.00 at the time of the application) it would be better for it to be relisted.

25. Ms Linford in response submitted that the Tribunal could hear the case. The Claimant was not objecting to the Tribunal continuing to hear it and trusted the

Tribunal to professionally put out of its mind the material it concluded was covered by without prejudiced. Moreover, in terms of proportionality the matter could be fairly concluded today and should be, rather than it being relisted with further time, costs and so on.

26. Having taken some time to deliberate, the Tribunal refused the Respondent's application that it should recuse itself. This ruling and oral reasons for it was given on the 9 August 2022, but the Tribunal promised to record in its main reasons the same (although noting that the written version may be more detailed)

27. The reason the Tribunal refused the application was because:
    27.1. the Tribunal was not sitting with any lay members and professionally was able to put matters to one side as acknowledged by the parties. It is not unusual for settlement discussions to occur, and these do not have any materiality to the facts in dispute. The tangential relevance is a relevant factor that in the Tribunal's view would not cause a reasonable and impartial observer to conclude that the Tribunal could not fairly hear the case (be it for bias or otherwise);
    27.2. the test at issue for the main claim that potentially touched upon the without privilege material was objective in nature and based on an earlier moment in time (that is the situation in September 2021 and not some months later in February 2022). The later without prejudice material that may be relevant did not change this or overly cloud the decision making the Tribunal had to undertake;
    27.3. there was sufficient time in the day for the matter to be fully concluded in terms of evidence and submissions, although it was acknowledged that judgment may have to be reserved. Proportionality favoured the Tribunal continuing with the hearing and doing so was within the overriding objective. The Tribunal had particular regard to the limited resources it had (there did not appear to be the possibility of another Tribunal being able to take the matter over in the time that remained).

Mitigation evidence

28. During the hearing the Claimant indicated, for what appeared to be the first time, that he had earned money during the months of October and November 2021 (which were potentially dates falling within the disputed notice period). The Respondent indicated it was unaware of this and had not seen any documents. Further Mr Holden submitted on its behalf that these documents had been requested previously there was no reason for their non-disclosure, and he doubted the veracity of the figures being provided without corroborating evidence. Ms Linford, upon a break to take instructions, could not assist on whether material had been requested but was able to provide to the Tribunal and Mr Holden (via email) an excel sheet which would, she submitted, corroborate the Claimant's earnings. The Tribunal considered that the hearing could still take place as there was now the relevant documentation and Mr Holden could put in cross examination the Respondent's case in terms of mitigation.

Name of Respondent

29. During the hearing it also became apparent that the Respondent was not in fact "Holden & Co LLP". The payslips and the (unsigned) contract all referred to Holden Law Limited. The standard letters also referred to it being a registered

company. The Respondent confirmed the correct employer and legal entity was Holden Law Limited and confirmed to the Tribunal that there was no objection with the records being corrected to indicate this. The Claimant also agreed that the name should be corrected. Accordingly, the Tribunal has affected this change as evidenced by the title page of the judgment and reasons.

C) Findings of fact

30. The Tribunal heard and considered much evidence. It makes the following findings of fact on the balance of probabilities of those areas that were material to the decision it had to make.

31. The Claimant commenced employment with the Respondent on 28 May 2020 as a solicitor. Although already qualified as a solicitor he had to arrange to be restored to the roll as he had spent a period doing another career (teaching).

32. The Tribunal saw correspondence that related to negotiations before employment commenced (pages 27-33 and pages 64-70). The only material facts to record are that:
    32.1. there was no discussion of notice provisions that would apply to the Claimant during his employment with the Respondent;
    32.2. the amount of holiday was 20 days plus 8 bank holidays, which is consistent with the statutory minimum and the later produced employment contract (see paragraph 34 below);

33. The Claimant initially worked part-time, doing 3 days per week from 28 May 2020 until 1 October 2020. Thereafter until the termination of his employment he was required to work full-time, that is 5 days a week.

34. The first and only contract that was provided to the Claimant by the Respondent came almost a year after employment had commenced. It was provided on 23 April 2021 to the Claimant by Mr A Gregory (pages 19-26). The material terms for present purposes:
    34.1. the preamble states that the contract "*sets out the terms and conditions of employment which are required to be given to the employee under section 1 of the Employment Rights Act 1996 as amended principally by the Employment Relations Act1999 and which apply at the date hereof*" (page 20);
    34.2. by clause 3, the Claimant's £40,000 gross salary is to be paid in monthly intervals;
    34.3. by clause 4, notwithstanding the date having passed, the Claimant's working hours would increase from three days per week to full time from 1 October 2020;
    34.4. by clause 5 that the holiday leave year ran from 1 January – 31 December, provided an entitlement to 20 days plus statutory public holidays (subject to pro rata principles if not working full time), and further stating that holiday cannot be rolled over from one year to the next;
    34.5. by clause 9 that "*The Employer/Employee may terminate this Agreement by giving written notice as follows: (a) With not less than three months' notice during continuous employment,*

The Employer may terminate this Agreement without notice or payment in lieu of notice in the case of serious or persistent misconduct such as to cause a major breach of the Employer's disciplinary rules.
After notice of termination has been given by either party, the Employer may in its absolute discretion give the Employee payments in the lieu of all or any part of any notice; or, provided the Employee continues to be paid and to enjoy his/her full contractual benefits under the terms of this agreement. The Employer may in its absolute discretion for all or part of the notice period exclude the Employee from the premises of the Employer and require that he carries out duties other than those specified in his/her job description or require that he carries out no duties at all until the termination of his/her employment";

34.6. by clause 13 that the Respondent can deduct the cost of the practising certificate from the final salary payment;

34.7. by clause 22 that car usage was a requirement of the role.

35. The contract was signed on behalf of the Respondent on 23 April 2021 (pages 25-26) however the Claimant never signed a copy.

36. The Tribunal pauses to note that before the Tribunal a precedent employment contract was appended to the witness statement of Mr Holden. It provided in relation to termination at clause 9

The Employer/Employee may terminate this Agreement by giving written notice as follows:
(a) With not less than four weeks' notice during continuous employment, then
(b) With not less than 12 weeks' notice after 2 years of continuous employment.

37. The Tribunal accepts that this is one precedent but rejects the Respondent's case that this is the only contract used at the Respondent. The basis of this is that the Claimant's contract plainly, in so far as the termination clause, did not match. The explanation of the Respondent was that Mr A Gregory mistakenly altered the precedent and that the Claimant should have received effectively a document mirroring the precedent. This explanation is rejected in so far as the Respondent is suggesting that Mr A Gregory was required to make any changes to the contract as the clause does not need any alteration at all (save perhaps to correct the poor drafting of clause (a) to add 'during [the first 2 years of] continuous employment). Further in so far as the mistake was an accidental deletion of a clause from the precedent in isolation this is also rejected on the basis that a "3 month" wording has been used in the Claimant's supplied contract rather than "12 weeks'". Accidentally deleting a clause would not effect a change to this period.

38. In relation to the contract, the Respondent alleged that the Claimant deliberately did not sign the contract as he knew the notice clause was a mistake. This too is rejected, the Tribunal finds as a fact that the Claimant did not know that the provision of three months' notice was a mistake. The contract had already been signed by the Respondent so there was no reason for the Claimant not to sign it on the basis that it was a mistake that he wished to rely upon. That may be an explanation for not returning a contract but not one for not signing a contract in the first place. Moreover, the Claimant's case that

others in the Respondent told him they had three month notice provisions is accepted. This is consistent with the actual precedent contract (in so far as 12 weeks is orally referred to as three months) and the Respondent's case that the examples he gave were senior. Additionally, the Claimant's previous position even after qualification required 3 months' notice and the Tribunal accepts the suggestion he made that it is common in some areas of law for three month notice provisions for even junior solicitors to apply.

39. Returning to the chronology, the Claimant since working full time on 1 October 2020 maintained a predominantly family law practice. At the time this was an area that was profitable for the firm and involved legal aid work. Towards the end of 2020, the head of the department left, and the Claimant became the main fee earner in the department. The precise circumstance of their departure is not relevant save that owing to the departure the Claimant picked up some of the workload of the departing fee earner.

40. Around the end of December 2020 and beginning of January 2021, Mr Holden on behalf of the Respondent agreed that the Claimant and others could carry over leave. Whilst this is inconsistent with the contract and it was suggested that the reason was Covid that such a carry-over was allowed, the Tribunal finds this as a fact based on Mr Holden's answer in cross examination that he was "*Not being technical about it but wanted to let them*" carry over leave (in response to the suggestion in cross-examination that it was Covid that was the reason). Additionally, it is consistent with the letter of 30 September 2021 that stated the Respondent was prepared to pay this 57 below.

41. In 2021 the Claimant had a busy case load. Whilst the precise amount of work was in dispute between the parties, it suffices for the Tribunal's purposes to record that the Claimant was busy as a finding of fact. The Respondent after all accepted that the family law work was one area of the firm that was doing particularly well during the disruption to legal work caused by Covid.

42. The Claimant was away from work from 23-27 August 2021. Upon his return to work on 31 August 2021 he had resolved to resign. At this stage he had no job offer and came to work with a pre-drafted resignation letter that was dated 28 August 2021 but was only provided to the Respondent on the 31 August 2021 (page 84). This letter gave "*notice of my resignation*" but did not expressly provide any period for the notice.

43. Prior to handing Mr Holden the letter of resignation, the Claimant had an initial conversation with him in the morning of 31 August 2021 where he announced his resignation. During this conversation the subject of notice was discussed. The Tribunal finds that the Mr Holden asked the Claimant what the notice period was in his contract, and he stated it was 3 months. The basis for this finding of fact is that it was consistent with the wording of the contract, with an attendance note recorded by the Claimant (page 35, which Mr Holden did not challenge in cross-examination), and with Mr Holden's statement that he would "*need 3 months*". The Tribunal does not accept the Respondent's contention that Mr Holden was simply pressed for the notice period and, as set out in his witness statement at para 19, that he said that should be 3 months even if only contractually bound to give 1 months' notice. This does not accord with the corroborating written evidence, as already mentioned, but also is illogical for the Respondent's position to be that one month is more than enough to be stated in a contract with the Claimant not allegedly doing enough work in any

event and yet wanting him to stay for 3 months. Additionally, it is not consistent with Mr Holden's answer in cross-examination which made no mention of the contract stating one month expressly but rather stating "*I said whatever is in your contract I think I need 3 months notice*".

44. On the morning of 1 September 2021, the Claimant and Mr Holden had a further conversation. The Claimant alleged that during this conversation, Mr Holden stated that he did not need his, the Claimant's, services, that he would be placed on garden leave until Friday (3 September 2021), and that he should collect all his personal belongings. The Respondent denied this and asserted he only proposed that the Claimant should go on Friday that week, and when the Claimant objected, stated that he would place him on garden leave whilst considering the situation. The Tribunal finds as a fact that the Claimant's account, that his services were not needed anymore and that he would be placed on garden leave until Friday 3 September 2021 is what Mr Holden stated. The basis for this is that it is consistent with not only an attendance note produced by the Claimant of the same day (page 36) but is also:
    44.1. consistent with the letter dated 31 August 2021 in so far as the 3 September 2021 date is selected and reference is made to "*last day at the firm*" (see paragraph 45 below);
    44.2. consistent with an email of 1 September 2021 (see paragraph 46 below);
    44.3. makes little sense for an employer to tell an employee that someone would be placed on garden leave whilst a situation is considered. If the Respondent was prepared, even on its case suggesting a Friday departure date, there was nothing that seemingly would need to be considered. The Respondent simply needed to state that the Claimant would be placed on garden leave until the end of the notice period. The Tribunal's conclusion is reinforced in this regard by it being normal practice for employers to set this out and provide an express end to the notice period. This contrasts with the course the Respondent is saying it adopted which was to choose a date, and then state that Claimant is being put on garden leave whilst things are 'considered'.

45. By letter dated 31 August 2021, but received by the Claimant on 1 September 2021, Mr Holden in writing "*accepted*" the resignation, noted his surprise that the contract had not been signed, and stated "*however, as you have clearly made plans to move on, there is no point in you remaining here and I propose that your last day with the firm shall be 3 September 2021. I will not require you to attend the office before your employment contract expires. Please arrange to place your key and any other items belonging to the firm through the letterbox over the course of the following weekend…*" (page 34 and 85).

46. On 1 September 2021 at 14:47, the Claimant sent an email to Mr Holden following "*our conversation this morning and yesterday morning*" (page 36 and 86). In this email the Claimant stated amongst other things that Mr Holden had "*agreed a 3-month notice period, in accordance with my employment contract…*[however you] *unilaterally proposed my last day of employment to be 3 September 2021…I had not received your letter until after I arrived at the office on 1st September 2021, when you dismissed me from your employment, verbally informing me that you no longer needed my services after Friday and were placing me on garden leave for the remainder of the week*". This email

made clear the Claimant's understanding that he had been dismissed and requiring payment in lieu of notice.

47. On 3 September 2021 at 08:37, Mr Holden emailed the Claimant (page 89). This stated amongst other things that "*I do not agree your version of events. At no time have I been contractually bound to pay you 3 months salary in lieu of notice…Your resignation letter asked me to tell you when I wanted you to leave. I told you*" (page 90).

48. On 3 September 2021 at 11:16, the Claimant sent an email to Mr Holden (pages 42-43 and 91-92). This included the following "*We discussed my notice period on the morning of 31st August 2021 and you stated 'I expect 3 months' notice from you, I think I deserve this'…*[t]*he termination of employment date would have been 31 November 2021…Shortly after this conversation, you then sent me home for the day…Upon my arrival at work on 1st September, you stated that you had sent me a letter, and then informed me that you no longer needed my services after 3'' September 2021, and then required me to leave my key and collect all my possessions before other staff arrived for work and leave the office*".

49. At 16:53 on 3 September 2021, Mr Holden emailed the Claimant pointing out that he had not signed the contract of employment that contained 3 months and that this was a mistake (page 41 and 93). This email stated that the Claimant would therefore only be entitled to 1 months' notice which would be paid in the ordinary way at the end of the month of September 2021 and stated, "*In the meantime, you are on gardening leave until then*".

50. Later on the 3 September 2021, at 17:55, the Claimant replied to Mr Holden by email stating amongst other things "*On 1 September 2021 you placed me on garden leave indicating that you did not need my services after 3rd September. You have unilaterally….change*[d] *the terms upon which I have been employed by you. My employment end date was 3 September 2021*" (page 94).

51. By letter of 15 September 2021, the Claimant was told by Mr Holden that he was "*put on gardening leave for a month…*[however Mr Holden upon review of files had] "*concerns about the quality of your work*" (page 44 and 96). The letter accordingly stated the Claimant was invited to attend a disciplinary hearing and had a paragraph stating, "*You must be advised that these matters are serious enough to warrant immediate dismissal for serious misconduct*" (page 47 and 99). The letter referred to a printout of the disciplinary policy being provided, which in its para 4 had non-exhaustive examples of "*gross misconduct*" which included "*Serious negligence which causes loss, damage or injury*" (page 111). With respect to the allegations found in the letter these were (client names were provided in the letter but are not set out below):
    51.1. in relation to file number 301020-741: delay in dealing with a matter followed by a complaint being made by the client, which was formally made on 3 August 2021;
    51.2. in relation to file number 241018-431: telling a client that the firm was at fault when in fact it was the court that had made a typographical error, leading to the client writing on 10 August 2021 that she had been promised work would be done at no cost to her;

51.3. in relation to 221220-722: incurring fees that would not be recoverable under the public funding certificate, namely counsel fees which were £728.09 but reduced to £455.34;

51.4. three clients where legal aid was not applied for non-molestation orders which resulted in a cost of £120 to cover a process server fee and doing work for nil remuneration;

51.5. a further client where no legal aid was applied for which resulted in nil income for the firm;

51.6. a client whereby a fee had been agreed of £600, but a higher invoice of £930 had been provided with the client refusing to pay the extra amount and the Claimant not informing the Respondent;

51.7. a client where several hearings were attended for which no legal aid would ever be available and so no money would be earned;

51.8. a client who had legal aid subject to a contribution but refused to make the contribution and yet the firm continued to represent without regard to how money would be earned on the matter;

51.9. a client whereby there was a failure to arrange for costs to be taken from the proceeds of a sale and so there was cost and loss of goodwill by having to separately chase the client for it.

52. The Claimant wrote to Mr Holden on 16 September 2021, declining to attend the disciplinary hearing on the grounds he was no longer employed by the Respondent (pages 48-49, 113-114 and 115-116).

53. Mr Holden confirmed receipt of the Claimant's 16 September 2021 letter in writing on 17 September 2021, which additionally stated the disciplinary hearing would still be taken place on 24 September 2021 (page 53 and 117).

54. On 27 September 2021, Mr Holden wrote to the Claimant to inform him that his employment terminated from 24 September 2021 for "*gross negligence*" (pages 124-126). It concluded that the Claimant had "*fail*[ed] *to ensure that the firm was remunerated for the work* undertaking", "*occasioned significant financial loss to the firm*", failed to carry out work in a timely manner on two occasions, failed to bring complaints to the attention of the firm, and "*displayed a disregard for instructions and procedures that make it problematic for a high street legal aid practice to safely employ you*". This was based on Mr Holden finding that:

54.1. in respect of the three clients where no legal aid was applied for in relation to the non-molestation order up to £1350 in costs was lost and £120 irrecoverable processer fees were incurred (this relates to the allegation at paragraph 51.4 above). With the addition the addition of a further client for whom there was no legal aid (this relates to the allegation at paragraph 51.5 above) this amounted to a loss of at least £4,000 in fees and instead an irrecoverable cost of £360 being spent on the matters;

54.2. in respect of the client for whom several hearings were attended without legal aid (this relates to the allegation at paragraph 51.7 above) and the client who refused to pay the legal aid contribution (this relates to the allegation at paragraph 51.8 above) unquantifiable loss had been incurred;

54.3. in respect of the client whereby there was a failure to arrange for fees to be taken from the proceeds of a sale (this relates to the allegation at paragraph 51.9 above), it appeared unlikely that the fees of £2,118.64

would be recovered and there is further costs and loss of goodwill in its chasing;

54.4. in relation to file number 301020-741 (this relates to allegation at paragraph 51.1 above) there was 5 months delay in carrying out the client's instruction and failure to notify of problems/complaint;

54.5. in relation to file number 241018-431 (this relates to allegation at paragraph 51.2 above) he had failed to read the file, failed to notify of complaints and not sought the firm's permission before giving client assurances that the firm would cover the cost;

54.6. in relation to file number 221220-722 (this relates to the allegation at paragraph 51.3 above) a loss of £450.34 to the firm given Counsel's fees would not be covered.

55. The Tribunal pauses to note that the allegation in relation to a client whereby a fee had been agreed of £600, but a higher invoice of £930 had been provided with the client refusing to pay the extra amount and the Claimant not informing the Respondent (that is allegation 51.6 above), is not canvassed in the 27 September 2021 letter. Separately, it is noted that an appeal was offered by the Respondent in this letter.

56. Returning to the chronology, by email of 28 September 2021, the Claimant complained to Mr Holden about various matters which included the alleged invalid dismissal received the day before along with the Claimant's assertion that holiday pay, he was owed was 14.8 days and he provided his calculation for this (pages 129-130).

57. In a letter date 30 September 2021, whilst disputing the Claimant was entitled to carry over 2020 holiday by virtue of the holiday year rules, Mr Holden indicated he was prepared to pay for holiday carried over from 2020.

58. The Claimant received his final payslip at the end of September 2021 along with the final payments received from the Respondent. This provided that (page 135):

58.1. his salary was £2666.66 for the month of September 2021 which amounts to the Claimant being paid up to the 24 September 2021;

58.2. his holiday pay was £923.10, which amounts to 6 days holiday at the rate which the parties agreed was £153.85;

58.3. a deduction of £73.53 for the parking permit.

59. The Claimant found a self-employed solicitor consultant role in mid-September 2021 but made no profit in his first month. A modest profit was made of £32.98 in October 2021 and a further £1075.16 in November 2021. Accordingly, a total amount of £1,108.14 in mitigation was earned between 1 September 2021-30 November 2021.

D) Relevant legal principles for the heads of claim

Wrongful dismissal

60. The Tribunal has jurisdiction to hear wrongful dismissal claims, that is claims for non-payment of notice pay by virtue of art.3 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. The claim is in

effect a common law claim for breach of contract that would ordinarily be heard in civil courts for which the 1994 Order allows Tribunals to determine. Likewise, the same principles apply, so there is a duty to mitigate and provide credit for sums earned in mitigation.

61. There is no rule that an employment contract requires a signature to be binding. Indeed, contracts of employment can be implied as well as expressed, so there is no formation requirement that terms need to be signed. Even where a written contract is produced an employee's conduct, continuing to work without protest, can lead to its terms being accepted. By way of example this occurred in *Wess v Science Museum Group* UKEAT/0120/14/DM where the reduction of notice period was found to have been accepted by an employee who had not signed the contract but worked for a further 9 years post the whole new contract being provided.

62. In respect of statements of particulars provided under s.1 Employment Rights Act 1996, an employer faces a heavy burden to show that the terms of the contract are different to those in the statement, whereas against the worker such a statement of particulars is no more than persuasive *System Floors Limited v Daniel* [1981] IRLR 475 at [10]-[11].

63. If no notice is expressly provided for there is an implied term that it must be reasonable notice, and this is not simply equated with statutory (ie it can be more but not less), see for example *Clark v Fahrenheit 451 (Communications) Ltd* UKEAT/591/99 where an employee with only 9 months service successfully appealed against a conclusion that 1 month notice was reasonable.

64. Once notice is given it cannot be unilaterally withdrawn and where notice is given by an employee compensation for later dismissal by the employer is limited to the notice period of notice that commenced with the employee's resignation: *Harris & Russell Ltd v Slingsby* [1973] ICR 454 at 455G and 457F-H (and in relation to notice either of resignation or dismissal not being able to be unilaterally withdrawn see also *Willoughby v CF Capital Plc* [2011] EWCA Civ 1115; [2012] ICR 1038, at [37]).

65. In relation to termination of employment contracts (whether by resignation or dismissal) the approach to words or conduct is to reflect what an ordinary and reasonable employee would understand by them having regard to the facts known by the employee as at that time in cases of ambiguity, and in so far as there is any ambiguity in words the usual rule of construction that it is interpreted most strongly against the person who used them applies: *Chapman v Letheby & Christopher Ltd* [1981] IRLR 440 at [13]-[16] and *Graham Group plc v Garratt EAT* 161/97.

66. As wrongful dismissal is a common law claim the position has long been that if the employee has committed a prior repudiatory breach that has not been affirmed, that can be relied upon to justify the summary dismissal and any wrongful dismissal claim fails (*Boston Deep Sea Fishing & Ice Co Ltd v Ansell* (1888) 39 ChD 339 at 352 and 358 (CA). Even issues that were not known at the time can be relied upon to defeat the claim (*A v B* [2010] IRLR 844 (EAT) at [43] making clear that this principle following *Ansell* applied just as much to claims before Employment Tribunals). Moreover, it does not matter that the acts occurred quite some time ago or that the employer went looking to find

such repudiatory conduct as evident in *Williams v Leeds United Football Club* [2015] EWHC 376 (QB), [2015] IRLR 383 (see [82]-[84] in particular), where the lewd email that was sent which defeated the claim was some 5 years before the dismissal. Furthermore, in relation to a repudiatory breach there is no limit to the categories and errors of judgment that can amount to repudiatory breaches as evident from *Davidson v AAH Ltd* [2010] EWCA Civ 183; [2010] IRLR 709, no wrongful dismissal where the employee, finance director, failed to promptly report possible fraudulent activity of others and him reporting matter to line manager was not sufficient. In modern case law the touchstone for a repudiatory breach is whether there has been undermining of the trust and confidence at the heart of the employment contract, see *Davidson* at [6]-[7], [33], [37], [40] the relevant threads of law are drawn together and applied to the case. Although the label 'gross misconduct', which is a repudiatory breach, often involves a single act it is possible for multiple acts which individually are insufficient to amount to a breach to in totality render a repudiatory breach: *Mbubaegbu v Homerton University Hospital NHS Foundation Trust* UKEAT/0218/17/JOJ at [32].

Holiday pay

67. Regulation 14 Working Time Regulations 1998 provides for payment in lieu of untaken leave following termination. At reg.14(3) it provides a formula for working out this in the event there is no relevant agreement.

68. Claims for outstanding holiday payments in lieu of untaken leave at termination may be brought before a Tribunal by virtue of an unlawful deduction of wages claim (*Revenue and Customs Commissioners v Stringer* [2009] UKHL 31; [2009] ICR 985 at [29]-[33]) or directly as a breach of Working Time Regulations 1998 under reg.30.

69. In an unlawful deduction of wages context it is the worker who bears the burden of establishing on the balance of probabilities that there has been a 'deduction' (see *Timbulas v Construction Workers Guild Ltd* EAT/0325/13 [17], a case where the Claimant was unsuccessful in claiming lack of holiday pay as a deduction of wages as he failed to provide evidence to indicate which days holiday was taken and merely pointing to payslips showing some days were not paid was not enough).

Deduction of wages

70. The right not to suffer unauthorised deductions is set out in s.13 Employment Rights Act 1996. A deduction can be made if it is authorised by statutory provisions, or relevant provision of the worker's contract, or if the worker has previously signified in writing agreement/consent to the deduction (s.13(1)). By virtue of s.14(1) overpayments of wages or expenses are excluded from the scope of s.13. Section 27 sets out the definition of wages. Normal pay received falls within s.27(1)(a), but it is also clear that any payment in respect of expenses incurred by a worker carrying out his employment is outside the scope of wages by virtue of s.27(2)(b).

E) Analysis and conclusions

71. The Tribunal sets out its analysis and conclusion on the claims, having regard to the agreed issues which are set out at paragraphs 5-12 above.

Wrongful dismissal

What was the length of the notice period?

72. The first issue to determine to resolve the wrongful dismissal claim is the length of the notice period (see paragraph 5 above).

73. In the present case there was a contract of employment that was provided. The material clause 9 has been extracted at paragraph 34.5 above. Its provision of "*With not less than three months' notice during continuous employment*" (page 22) would by any reasonable objective party be understood to amount to three months' notice clause. Even if not the best drafted clause it objectively speaking is clear and unambiguous. In the alternative, the same result is reached even if it is read as being ambiguous as that ambiguity would under ordinary principles be resolved in favour of the recipient (the Claimant) and not the party responsible for its production (the Respondent).

74. Mr Holden in submissions and during his cross-examination of the Claimant spent considerable time on the fact that the contract was not signed. Mr Holden also advanced the proposition that the Respondent's standard contract contains only 1 months' notice (until two years employment has been reached).

75. With respect to the fact that the contract was not signed this is not determinative. There is no formal requirement for a contract of employment to be signed. As set out at paragraph 61 the case of *Wess* is an example of this principle in practice (although on that occasion it was to the employee's detriment). What matters is whether from the Claimant's conduct it can be taken that he accepted the contract. In this case the answer is that he has. He has turned up to work repeatedly and worked 'under' the contract. At no stage has he ever protested the contractual terms, and he has sought to rely upon them (for example taking holiday, pension, and his wage).

76. The Tribunal is reinforced by the above conclusion that the document itself stipulated that it was s.1 Employment Rights Act 1996 particulars. One of the particulars this necessitates providing is notice. As set out in *Daniel* (see paragraph 62 above) it is ordinarily a heavy burden for an employer, in this case the Respondent, to demonstrate that the terms of the contract (which on the Respondent's case is not this written document but something else) are different to in the statement of particulars provided.

77. The Tribunal moves on to consider Mr Holden's submission that this drafting and contract provided to the Claimant was a mistake. The Tribunal has already made a factual finding in relation to the precedent contract being the only contract and that the Claimant knew it was a 'mistake' at paragraph 36-38; namely, it rejects the Respondent's contention, these were not the only contracts and the Claimant did not know about the notice clause containing what the Respondent has labelled a 'mistake'. In brief even if there had been a genuine mistake by the Respondent (done by an employee acting on its behalf and having signed the contract containing the mistake) this does not alter the conclusion that the 3 months' notice clause would bind in the circumstances. Although not precisely expressed as such by Mr Holden, it appeared the argument was being relied upon was some form of 'rectification'.

This however would only be available if either both parties had a common intention that the notice provision was 1 month, rather than the mistaken 3 months, or the Claimant knew the mistake in the 3-month drafting and took unconscionable advantage of it. Based on the earlier factual findings this cannot be made out – to repeat the key point there was no basis for the Claimant knowing of any 1 month notice clause as:

77.1. no other document was sent to him;
77.2. notice was never discussed in any of the correspondence;
77.3. he did not deal with contracts of employment for other employees;
77.4. the only people he knew at the firm whom he discussed contracts with had 3 month notice clauses, and he was informed of this orally.

78. Accordingly, the Tribunal concludes that the Claimant had an express contractual term that entitled him to 3 months' notice. Briefly and in the alternative, even if the contract was not relied upon the Claimant would be entitled to an implied term of reasonable notice (see by way of example *Clark* at paragraph 63 above). On these particular facts the Tribunal concludes that this would be 3 months based on the following:

78.1. whilst not particularly senior or experienced, the Claimant was the main fee earner left in the department;
78.2. it is standard for 3 month notice provisions to apply to solicitors;
78.3. the Claimant had already passed any probationary period (this was found in the disciplinary policy as being 6 months, page 105) and as at the date of providing the contract was employed for nearly a year;
78.4. the Respondent itself thought 3 months initially was a suitable period for the Claimant to remain.

When was the date of termination?

79. The Tribunal now turns to the issue of when was the date of termination. Before doing so it is repeated that both parties agreed that the time when notice started to run was 31 August 2021 and with the found 3-month notice this would expire on 31 November 2021. This appears to be consistent with the principle set out in *Slingsby* (see paragraph 9 above).

80. The relevant factual findings in relation to this issue are set out at paragraphs 45-55 above. The Tribunal reminds itself that words and/or conduct that are said to amount to a dismissal are viewed as a reasonable employee would understand them, having regard to facts known by the employee, that ambiguity in such words and/or conduct would be in the circumstances construed in favour of the employee when spoken or done by the employer, and that once notice has been given it cannot be unilaterally withdrawn (*Slingsby, Willoughby*, *Chapman*, and *Garratt*, see paragraphs 64-65 above). Having regard to this and the factual findings already made, the Tribunal concludes that the Claimant's employment was terminated by the Respondent on 3 September 2021. This is because of the following:

80.1. the letter dated 31 August 2021 but received on 1 September 2021 stated, "*I propose that your last day with the firm shall be 3 September 2021*". It continues to state "*I will not require you to attend the office before your employment contract expires. Please arrange to place* [items] *over the course of the following weekend*" (page 34 and 85). So, the 3 September 2021 date was picked soon after the resignation and

was not necessary as the Respondent could have asked, in writing or otherwise, if the Claimant had another job to go to (which was its only reason for picking a 3 September 2021 on its case). Mr Holden placed great emphasis on the use of "*propose*" highlighting the date was only a suggestion during his line of cross-examination of the Claimant. However, the Tribunal concludes that in context and with the rest of letter that puts the bar too high. After all the Respondent had stated in the same letter that the Claimant would not be required to attend the office before the contract expires in any event and furthermore it has not availed itself of the opportunity to put any other date for when that expiry would be. It also asked the Claimant to return all property. Whilst the "*following weekend*" is ambiguous as it could be the 4-5 September 2021 or the 11-12 September 2021, in context of the other the Tribunal concludes it must be the 4-5 September 2021. It makes little sense for the statement last day at the firm and for the Claimant to keep the keys for a week longer, especially as there would be no work done. The ambiguity of propose and the following weekend should be read in all the circumstances against the Respondent's suggested interpretation;

80.2. prior to this letter the Respondent had initially suggested three months' notice being needed. Whilst Mr Holden stated it was a decision made in the heat of the moment and on reflection, he realised that was not workable, none of this is included in the letter and it could have done so. A reasonable employee would regard that coupled with the later letter as a clear statement that he was to leave on the 3 September 2021;

80.3. the Tribunal has found that it was orally stated on 1 September that the Claimant's services were not needed anymore and he would be placed on garden leave until 3 September (see paragraph 44);

80.4. the reading of the 31 August 2021 is supported by the 3 September 2021 email which, the Tribunal finds, is rather in stern tone, in so far as the 3 September 2021 date it responds "*Your resignation letter asked me to tell you when I wanted you to leave. I told you*" (page 90);

80.5. the phrase garden leave was not mentioned in any of the correspondence until very late on 3 September 2021 (at 16:53) and there were hearings/work that was needed to be done in the remainder of September 2021;

80.6. the Claimant repeatedly made clear his understanding that he had been dismissed, which in all the circumstances appeared reasonable;

80.7. the entire garden leave purpose for this employee seems questionable. The Respondent's own case was that it only needed to give the Claimant one month notice, and it stated it did not need the Claimant's services. So, there would be little difference between paying the Claimant on 3 September as opposed to towards the end of the month, and in any event, it could always be stated that the actual payment would be made in that pay run. If the Respondent believed that it owed more, for cashflow reasons it would make sense to use garden leave rather than a payment in lieu of notice but that was not its case before the Tribunal. Equally, the Respondent did not seem to be concerned by the Claimant going to a competitor as such and so it was not an issue of trying to keep the Claimant outside of the marketplace. Further still, the disciplinary, which the Respondent had control of, was scheduled for the end of the month so that would not make any material difference to the one month's notice/termination for cashflow purposes, and it does not seem the Claimant was placed on garden leave to enable the

Respondent to investigate or answer allegations by the Respondent (as this all was able to take place in the end without his involvement);

80.8. Mr Holden's submission before the Tribunal were that any misunderstands were in part because of the Claimant's "*obsession*" to find out when his employment would end. However, this is not a case where all the matters happened in discussion and in effect the many indicators and matters that caused the Claimant, and the reasonable employee in all the circumstances, to consider dismissal had been in written correspondence by the Respondent. That is something which the Respondent had control over, not the Claimant, and there was no reason that any such repeated requests would cause difficulties for Mr Holden to carefully construct a letter back on his own terms and making clear his position. In effect all that needed to be done on his case is, something along the lines of "you contractually owe one month's notice which expires on 31 September 2022; however, we do not require you to work your notice and in line with the contract ask that you remain at home. You will be entitled to payment and your benefits in the usual way until your contract expires on the 31 September. Parties can agree to waive notice provisions, so if you wish to leave before 31 September 2021, please let me know and an earlier leaving date can be arranged (although you will only be entitled to pay and benefits up to that earlier agreed date)".

81. Finally, the Tribunal briefly notes that even if it were wrong in this analysis, the Respondent's proposed termination date of 24 September 2021 cannot in law be right. If the Claimant was on garden leave, as the Respondent suggests but as above the Tribunal rejects, his employment could only terminate when he had notice of the dismissal. That was by letter of 27 September 2021 and not the earlier 24 September 2021 date. This would result in the Claimant being owed 3 more days pay.

Could the employer terminate the contract without notice?

82. In terms of liability, the last remaining issue is whether the Respondent was entitled to summarily terminate the contract or if already terminated, were there any repudiatory breaches that it discovered after the earlier termination that would allow it to defend any wrongful dismissal claim (see issue at paragraph 7). In this case the Tribunal has concluded the termination occurred on 3 September 2021 as set out above. Therefore, in law it is the *Boston Deep Sea* fishing approach that is relevant, although even if the Tribunal were incorrect and the contract subsisted, Ms Linford agreed that it was in effect the same legal test (eg an act justifying summary dismissal would be the same as repudiatory breaches relied upon to defeat the wrongful dismissal claim).

83. The critical question is therefore whether the Respondent has established that there had been a repudiatory breach that entitled or would have entitled summary dismissal of the Claimant (eg dismissal without notice).

84. At the outset it is noted that Mr Holden during the hearing and in the documentation in the bundle indicated that the areas he found "*gross negligence*" justifying summary dismissal were just a 'sample'. The Tribunal makes clear that it can only deal with the matters that the Respondent, who in this regard has the burden, has put before it. This means that the Tribunal has limited its analysis to the matters set out in the disciplinary invitation and

outcome letter (the need to refer to the disciplinary invitation is because the entire factual allegation is not immediately clear in the disciplinary outcome letter and so some cross-referencing is required).

85. Ms Linford in submissions put that at best the matters complained of by the Respondent were 'capability' and could only lead to dismissal with notice. She placed reliance on the definition of "*gross misconduct*" in the unreported EAT case of *Sandwell & West Birmingham Hospitals NHS Trust v Westwood* UKEAT/0032/09. In particular, *Westwood* at [110]-[113] set out the relevant ratio and lead to the conclusion *"gross misconduct" involves either deliberate wrongdoing or gross negligence"*.

86. The Tribunal has carefully re-read in deliberation *Westwood* and concluded that nothing it says is inconsistent with the law summarised at paragraph 66 above. However, it equally concludes that in light of the present case concerning "omissions" rather than deliberate acts the better analysis is to return to the modern touchstone of 'trust and confidence' rather than dealing with the difficult to determine 'epithet' of something being gross or not.

87. Before returning to the critical issue, the Tribunal shortly notes Ms Linford's submission that the actions of the Respondent were simply "*retaliation to Mr Lawless having handed in his notice*" and in effect manner to "*avoid having to pay*". This can be shortly dealt with: it does not matter and so the Tribunal does not have to make any such findings. In law, if there was a repudiatory breach which was unknown at the time and later discovered it can be relied upon and the motivation for looking for it is immaterial (see *Williams* at paragraph 66 above).

88. Returning to the critical issue, the first aspect is whether as a matter of fact the things said to have been a breach (the failure to get legal aid, doing work which one would not be paid for, not passing along complaints, and in effect costing the Respondent money by 'negligent' actions) occurred and for which the Claimant could be responsible. The Claimant in witness evidence was not able to provide much of an account, saying he had not seen the papers, but he did rely upon some of the files being initially with another handler. That was in relation to the first two allegations which contained file numbers (at pages 96-97, which are summarised at paragraphs 51.1-51.2 above). He relied on the file numbers not being his. Mr Holden in live evidence denied any such partitioning and said they were the Claimant's matters. The Tribunal finds that in terms of the relevant issue leading to what is alleged to be repudiatory breaches it was the Claimant's matter. The events that were critical occurred *after* the other fee earner had left and the complaints were in the period shortly before his resignation in August 2021. Equally, the Tribunal accepts the factual basis and assertions set out in the letters at pages 96-99 (the invitation that contained the allegation) and pages 124-126 (the outcome letter), which are summarised at paragraphs 51 and 54 above. This is because not only was nothing before it to gainsay, but Mr Holden was cross-examined on its aspects and gave live evidence. Whilst other aspects of his evidence have been rejected by the Tribunal, on this aspect it found his evidence both truthful and candid. For instance, Mr Holden did not maintain, as is often the case when

witnesses are dealing with potential gross misconduct, that each allegation was standalone type gross-misconduct and he also accepted that in fact such a draconian sanction may not have been issued if there was an explanation for some the issues. However, there really was, he explained, no excuse for not passing on complaints. He explained in evidence that SRA will issue £400 fines if complaints have been made and no actions has been taken by complaints officers (in this case that role being Mr Holden's and it being apparent that would be the case if the Claimant or others did not pass the complaints to him) irrespective of if there was any substance to the underlying complaint. Further, if there were two many issues that the SRA found during an investigation, which included simply not dealing with complaints, that could lead to serious problems for the Respondent. Additionally, he explained that the Respondent is one of the last legal aid practices in the South West and work must be done in a certain way to get the necessary funding. The Tribunal accepts all these aspects of his evidence.

89. Therefore, the Tribunal must turn next in the analysis to whether the things that were found by the Respondent as a fact, which as explained above the Tribunal equally so finds, amounted to a repudiatory breach. In this regard there is some force in Ms Linford's submission that these were capability issues, that it was not wilful disobedience as such, and that the Claimant had a busy workload and, on his case, needed help. However, the Tribunal's role is not one of procedure as such, but to determine whether in fact there had been any repudiatory breach. The Tribunal accepts Mr Holden's submission that it was the totality that has to be regarded, and one cannot just take matters in isolation, indeed *Mbubaegbu* (see paragraph 66 supports this analysis).

90. Stepping back and regarding to the totality of the 'negligence' found, the Tribunal concludes that objectively speaking there has been a breach of the trust and confidence at the heart of the employment contract. This is because:
    90.1. it is at the root of the solicitor employment relationship with a firm that complaints are addressed. The Respondent needs to have confidence that this is occurring. Of course, complaints may be unjustified or be proven later to be unwarranted, but the procedure and mechanisms are important. It is often the case that in cases involving negligence with solicitors and other legal professionals a main issue has been the attempt to ignore or bury a difficult issue or complaint;
    90.2. whilst the Claimant may have been busy and stressed, or even felt a lack of support, that does not undermine the procedural step required to pass complaints along the chain as it were at the very least;
    90.3. the above issue, which concerned two of the allegations, was something that the Respondent had been clear on even as at the stage the Claimant joined, as evident from page 73, "*I have a statutory duty that I am bound to fulfil and the firm's reputation rests on fair and effective investigation of complaints. I regret to inform you that I have not been getting full and effective cooperation. I have even had members of the firm seeking to argue with me as to whether or not I should be investigating the complaint in the first place. I wish to make it clear that such conduct in future will be treated as totally unacceptable and failure to assist me fully in dealing with complaints will be treated as a*

disciplinary matter that may warrant immediate suspension followed by immediate dismissal";

90.4. the disciplinary policy set out that an example of gross misconduct was "*serious negligence which causes loss, damage or injury*" (page 111);

90.5. in terms of the financial losses from not dealing in effect with legal aid correctly, that not only falls within the above example of gross misconduct, it is something which also strikes at the root of the trust and confidence in this particular employment context. The Respondent relied upon this work, and it needed someone in the role of an employed solicitor in the department who could consistently do this. The corollary also applies that the client needs this to be done too or they may not have their case adequately dealt with. So, whilst the Tribunal does not accept all the criticism about the Claimant not actually doing the tough work in terms of dealing with legal issues, this is something that does not necessitate much legal analysis as such but is a procedural step. This means that the Claimant's point that some of these matters were complex (such as those that generated complaints) does not provide an adequate excuse having regard to the core trust and confidence;

90.6. for the Respondent losses of some £4,000 or so were significant and appeared to all be avoidable. It does not seem to the Tribunal to be an answer that the Claimant may have generated work, the Respondent needs to be able to have trust and confidence that repeated losses are not occurring.

91. Accordingly, the claim of wrongful dismissal must fail. The Claimant was responsible for a repudiatory breach that the Respondent was unaware of at the time but can rely upon to defeat his claim for any outstanding notice monies.

Is any reduction required for mitigation?

92. Given the above conclusion, that the wrongful dismissal claim fails, it is not strictly necessary for the Tribunal to determine the issue of mitigation. However, in case any of the analysis above is proven to be incorrect it will briefly address this. The claim is a common law claim of wrongful dismissal and so the Claimant must provide allowances for the sums earned in mitigation which amount to £1,108.14. The Respondent ordinarily has the burden for establishing a failure to mitigate. It has not set out what steps should have been taken that were not and when this would have led to a different result. Seeking self-employed work appears reasonable to the Tribunal and there should be no reduction for failure to mitigate loss in the circumstances.

Holiday pay

How much holiday pay had been accrued as at the date of termination and did this include any holiday carried over from the previous leave year?

93. As set out at paragraph 9 above, the first issue to determine in relation to holiday pay is how much holiday pay had been accrued as at the date of termination and did this include any holiday carried over from the previous leave year?

94. Turning to the 2020 leave year first, the Claimant's position is best summarised by the 28 September 2021 email and page 130 which asserts that he accrued 5.9 days between 28 May 2020-1 October 2020 when employed part time, and

7 days in the remainder of the year when on full time. This amounts to a total of 12.9 days. Ms Linford at the beginning of the hearing clarified that this was the number of days the Claimant relied upon as being accrued in the 2020 leave year.

95. The Respondent on the other hand's position is set out in page 134, which is also exhibited to Ms Lovett's witness statement and confirmed by the same. This calculates that it is 9 days (based on 20 days for full time) and notes there are 3 bank holidays in addition. The total is therefore 12.

96. The Tribunal has also adopted the approach of applying the statutory minimum, 28 days, and this yields a total of 12.78. This is made up of:
    96.1. 126/365 (the fraction of the year based on period between 28 May to 30 September when part time) x 3/5 (the days worked proportion to full time) x 28 (the statutory minimum) = 5.80 (2dp);
    96.2. 91/365 (the fraction of the year based on a period between 1 October to 31 December when full time) x 28 (the statutory minimum) = 6.98

97. The Tribunal concludes that although the difference between the parties (and the Tribunal's own arithmetic is negligible) it is 12.78 days holiday that accrued in the 2020 leave year.

98. Dealing with the 2021 leave year, the Claimant's position at page 130 is 18.9 days have been accrued. The Respondent's position at page 134 is 15 days plus 6 bank holidays (so would total 21). The Tribunal's calculation, adopting the statutory minimum of 28 days and having regard to its earlier finding that the termination date was 3 September 2021, yields 17.35. This is made up of 226/365 (the fraction of the year based on the periods between 1 January to termination on 3 September) x 28 = 17.35 (2dp). However, as the contract appears to provide for 20 days plus statutory bank holidays with a termination date of 3 September, the calculation would be slightly more generous. That is: 226/365 (the fraction of the year based on the periods between 1 January to termination on 3 September) x 20 (the figure provided in the contract) + 6 (the number of bank holidays in the period) = 18.38 (2dp).

99. The Tribunal adopts the most favourable 18.38 holiday accrued for the 2021 leave year.

100. Accordingly at the date of termination and across both holiday leave years the total holiday accrued would be 31.16 (that is 18.38 + 12.78). This it is noted is less generous than the Respondent's calculation (when bank holidays are added) which is 33 days and the Claimant's which is 31.8.

101. In terms of whether the earlier 2020 leave year accrued leave should be included, the Tribunal concludes that it should be. The basis for this the Tribunal's factual finding set out at paragraph 40 above which is that the Respondent agreed to the carrying over of all this leave. Whilst the agreement is that unused leave is carried over that is adequately dealt with by the next issue of what holiday was taken during the relevant period.

What holiday was taken during the relevant period?

102. As set out at paragraph 10 above, the next issue to how much holiday was taken during the relevant period.

103. Exhibited to Ms Lovett's witness statement a full list of holiday dates taken is provided (it is a handwritten list). It includes the bank holidays in 2020 and 2021, which is consistent with the contract that provides for separate allocation to bank holidays in addition to the '20 days' leave in the contract. Ms Lovett's witness statement at para 4 states that this document comes from "*the records that I keep on a daily basis of each employee*". Ms Lovett signed a witness statement with a statement of truth and was not challenged or cross examined on her statement. Further, the bank holidays listed do corroborate with those that occurred in the years (and once again no challenge was made in that regard to this document even to Mr Holden who was cross examined, nor was it part of the Claimant's live evidence).

104. The total number of days taken shown by this exhibited document (including bank holidays) is 27.

105. In contrast to the above, the Claimant's witness statement does not deal with the issue of what holidays have been taken. During evidence he indicated that he disputed two-three of the dates (28 December 2020) and (3 June-4 June 2021). He also asserted he may have taken half days but was not able to indicate which these were. He stated that he did not have access to the records.

106. The Tribunal concludes from all the evidence before it that it was 27 days holiday that was taken. It accepts the evidence of Ms Lovett which was unchallenged. It also notes that consistent with *Timbulas*, see paragraph 69 above, the burden is on the Claimant to establish these points to show a shortfall and he has failed to do so in the circumstances.

How much holiday pay remains outstanding?

107. In light of the conclusions above there appears to be no holiday outstanding upon termination.

108. The amount of holiday accrued was 31.16 over both leave years and the Clamant took 27 days leave over these leave years. This would have left 4.16 days. However, as can be seen in the Claimant's final payslip he was paid £923.10 (page 135), which is the equivalent of 6 days holiday at the agreed £153.85 per day rate (page 133 has the working for this). As an aside, even if the Claimant or Respondent's figures were used for the amount of holiday accrued is used there would be no holiday outstanding given the conclusion of the Tribunal that 27 days of holiday was taken in both leave years.

109. Accordingly, the Claimant's claim for holiday pay, pay in lieu of unused holiday upon termination of employment, fails, and is dismissed.

Deduction of wages

Was the Respondent entitled to deduct the sum of £73.53 for the parking permit from the Claimant's final wage slip?

110. As set out at paragraph 9 above, the only issue to determine in relation to deduction of wags from the parking ticket is whether such a deduction is lawful.

111. The contract of employment did not provide in writing any consent or agreement to deduction for wages. The only aspect which it allowed a deduction for was the practising certificate – clause 13 (see paragraph 34.6 above). As an aside this is shown as a deduction on the wage slip but is not subject to any dispute (page 134, shows this as "*Practising Cert 33.25*" in the deductions column). There is therefore no authority to make the deduction by virtue of s.13(1).

112. Moreover, the actual deduction was plainly occurring to wages properly payable. It was the ordinary pay that the Claimant was receiving that was subject to a deduction. The present case is not one where the Claimant is arguing for expenses being paid to him, which would fall outside of wages under s.27 Employment Rights Act 1996, but rather at most he had already received the payment of expenses and it was the Respondent that was seeking to deduct from the usual wages to recoup it. Equally the present case is not one where there has been overpayment of expenses under s.14 Employment Rights Act 1996. The Respondent paid the correct amount of the expenses but was seeking at the end of employment to pro-rate the period that remained.

113. To lawfully make the deduction, the Respondent would have needed, as was the case with the practising certificate, to include a term in the contract or otherwise have the Claimant's agreement or consent in writing before the deduction. It cannot rely upon it allegedly being labelled a 'grace and favour' entitlement. Once a payment had been made it was not lawful to recoup an equivalent sum from the Claimant's final wages owed.

114. Accordingly, the Claimant's claim that the deduction of £73.53 was unlawful is well-founded and such a sum should be repaid to the Claimant.

Employment Judge Caiden
11 August 2022

Notes

Public access to employment tribunal decisions: Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.