Case No: 2200556/22

EMPLOYMENT TRIBUNALS

Claimant: Ms. Amy Perry

Respondent: Vespertine Holidays Ltd

Heard at: **London Central (CVP)** **On:** **1,2 September 2022**

Before: **Employment Judge Leonard-Johnston**

Representation
Claimant: In person
Respondent: In person

RESERVED JUDGMENT

1. The claim for unfair dismissal succeeds.

2. The claim for redundancy payment succeeds. The respondent is ordered to pay the claimant the sum of £8,976, gross.

3. The claim for wrongful dismissal (unpaid notice pay) succeeds. The respondent is ordered to pay the claimant the sum of £9,249, gross.

4. The respondent made unauthorised deductions from the claimant's wages. The respondent is ordered to pay the sum of £10,481, gross.

5. The claim for failure to pay holiday pay succeeds. The respondent is ordered to pay the claimant the sum of £4,984, gross.

6. The claim for failure to pay pension contributions succeeds. The respondent is ordered to pay the sum of £592.

REASONS

INTRODUCTION

1. This is a claim for unfair dismissal, redundancy pay, breach of contract for both notice pay and pension contributions, and unlawful deduction of wages.

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

conducted in this way. The participants were told that it was an offence to record the proceedings.

3. Both parties represented themselves. At the beginning of the hearing the respondent's representative Mr Morgan (hereafter "the respondent") informed the Tribunal that he is dyslexic and diabetic. Measures were put in place to allow the respondent to take breaks and special dispensation was granted to the respondent to eat during the hearing as needed. The respondent made use of these measures and did on occasion throughout the hearing take breaks when needed. The respondent was also provided with time to take notes and throughout the hearing was given many opportunities to address the Tribunal on adjustments he required.

4. The claimant's partner was in the room with her throughout the hearing. I was satisfied that none of the witnesses was being coached or assisted while giving their evidence.

5. On numerous occasions throughout the hearing the respondent became disruptive by repetitively interrupting and talking over the Tribunal and the claimant, failing to follow the direction of the Tribunal to remain silent, and on occasion becoming argumentative. In order to continue with a fair and effective hearing I was required to place the respondent on mute on numerous occasions. When the respondent was on mute, he was still able to attract the attention of the Tribunal by raising his hand. The respondent asserted that his diabetes made him aggressive at times and that he found it difficult to be succinct because of his dyslexia. The Tribunal made ample allowances for the respondent's disabilities, however there were times when the respondent's behaviour was preventing a fair hearing, particularly during the claimant's re-examination when the respondent's constant interruption was preventing the claiming from giving evidence. I am satisfied that both parties were given fair opportunities to present their cases to the Tribunal.

6. Evidence was heard from the Claimant and the respondent. A letter from a Mr Jones of 20 July 2022 was provided but he was not presented as a witness and was not cross examined and the respondent was notified that appropriate but limited weight would be given to that witness statement accordingly. There was a bundle of documents before the tribunal running to 143 pages. References in square brackets in this decision are to page numbers in that bundle. The respondent requested written submissions due to his disabilities and an order was made for written submissions to be filed after the hearing. These were filed, along with a further letter from the respondent dated 8 August 2022.

7. As a preliminary issue respondent renewed an application made in writing for disclosure of messages including Whatsapp messages and between the claimant and her former line manager Charlotte Vincett. It was clear from the evidence that Ms Vincett was also in a contractual and employment dispute with the respondent and I was conscious of avoiding abuse of the Tribunal's procedures for that purpose. However, the respondent submitted that the text messages were relevant to the issue of the claimant's conduct, namely that they could show that there was a breakdown in the relationship between the claimant and her employer, and that the implied condition of trust and confidence had been breached. On balance I considered that the messages would potentially be relevant to issues before the Tribunal. However, I also considered that they were messages on personal mobile devices. Whilst they

may have been sometimes used for work purposes, they were paid for by the claimant and were primarily personal devices, for example they contained a lot of personal conversations between the claimant and Ms Vincett, in respect of which the claimant has an expectation of privacy. The request was very broad ranging in respect of the time period requested. Balancing the needs of justice and taking into account the claimant's right to privacy, I considered it proportionate to order disclosure of the messages between the claimant and Ms Vincett only in respect of specific time periods which were suggested by the respondent as being the most relevant. This was December 2020, September 2021 and November 2021. The claimant disclosed these to the Tribunal and the respondent unredacted on the first day of the hearing and I was satisfied that the respondent had sufficient time overnight to consider them.

List of issues

8. The following are the issues to be determined.
   a. Was the claimant dismissed and if so, what was the effective date of termination?
   b. What was the principal reason for the dismissal and was it a reason within 98(2) Employment Rights Act 1996 ("ERA 1996")?
   c. The Respondent relies on conduct. If the reason was misconduct, did the respondent act reasonably in treating that as sufficient reason to dismiss the claimant;
      i) Were there reasonable grounds for that belief;
      ii) At the time the belief was formed has the respondent carried out a reasonable investigation
      iii) The respondent acted otherwise in a procedurally fair manner
      iv) Dismissal was within the range of reasonable responses.
   d. Was there a redundancy within the meaning of S98(2)(c) and S139(1) ERA?
   e. If the Claimant was entitled to statutory redundancy payment, how much was she entitled to?
   f. If the claimant was unfairly dismissed what is her entitlement?
   g. Was the claimant wrongfully dismissed?
   h. Was there a breach of contract in failure to pay pension contributions?
   i. Did the respondent fail to pay the claimant for annual leave accrued but not taken at date of dismissal?

THE LAW

9. The effective date of termination under section 97 ERA is determined by when the employee has actually read the letter terminating employment or had had a reasonable opportunity to read it *Gisda Cyf v Barratt [2010] UKSC 41.*

10. The test for unfair dismissal is set out in section 98 ERA The burden is on the employer to show the reason for dismissal and that it is a potentially fair reason (section 98(1) ERA 1996). However, it is for the tribunal to determine what the true reason for the dismissal is.

11. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in *British Home Stores v*

Burchell [1978] IRLR 379 and *Post Office v Foley* 2000 IRLR 827. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances.

12. Redundancy is also one of the fair reasons for dismissal in section 98(2) ERA 1996. Section 135 provides that an employer shall pay a redundancy payment to any employee of his if the employee is dismissed by the employer by reason of redundancy, although this is subject to various provisions including section 140 ERA.

13. Section 139 deals with the definition of redundancy and provides that:

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

14. If the reason is a fair reason, the employer must act reasonably in treating it as a sufficient reason for dismissing the employee (section 98(2) ERA 1996). It is not for the Tribunal to substitute its own decision but to consider whether the dismissal was within the range of reasonable responses. The correct test is that set out in *Iceland Frozen Foods Ltd v Jones* 1983 ICR 17 as follows*:*

> "We consider that the authorities establish that in law the correct approach for the… tribunal to adopt in answering the question posed by section 98(4) is as follows:
>
> (1) the starting point should always be the words of themselves;

(2) in applying the section [a] tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the … tribunal) consider the dismissal to be fair;

(3) in judging the reasonableness of the employer's conduct [a] tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;

(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably takes another;

(5) the function of the … tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band, it is unfair.'

15. There is a further consideration that is known as the *Polkey* consideration, in that had a fair procedure been followed by an employer, would the dismissal have occurred in any event, i.e., what were the percentage chances.

FINDINGS OF FACT

Background

16. The respondent is a small travel business specialising in online ski holidays, formerly trading as Interactive Resorts Ltd. The claimant was employed at the respondent's business for over 16 years, from 2005 until her dismissal. At the time of dismissal, she was Head of Operations. There was an out-of-date contract of employment in the bundle [57] dated from 7 May 2011 from when the claimant was recorded as Admin Manager. There is no contract of employment reflecting the claimant's current job title or salary but there is an email from the claimant's line manager [99] containing a pay review from 2014. At the time of dismissal, the claimant's salary was £37,000 per annum (subject to temporary furlough arrangements, further below). The claimant was entitled to 29 days paid holiday per year inclusive of bank holidays and her holiday year ran from 1 May to 30 April each year.

17. The respondent did not provide a number of documents that it would be expected for a business to hold. The respondent asserts that this is partly because they were not provided to him by Charlotte Vincett the former Director, following her dismissal, and partly because he was required to migrate digital systems and accordingly lost the data, including emails.

Maternity leave and furlough

18. In early 2020 the respondent's business was significantly impacted by the Covid-19 pandemic. The claimant was working full time until July 2020 when she went on maternity leave, which lasted until April 2021. Until she went on

maternity leave the claimant's line manager was Ms Charlotte Vincett who was the FCO and Director in charge of the day to day running of the business.

19. The claimant emailed the respondent on 9 February 2021 [3] from her personal email account concerning the end of her maternity leave on 15 April 2021. She asked the respondent if she could take her 15 days accrued annual leave and return to work on 10 May 2021. The respondent replied on 10 February 2021 [4]. At this point the company was under significant financial pressure because of the pandemic and most of the staff were on furlough. The respondent told the claimant that she could "tag on' her 15 days leave to the end of her maternity leave. She was told that she would likely be on furlough after her maternity leave if the government scheme were to be extended.

20. On the 9 and 18 March 2021 the claimant emailed the respondent from her personal email account asking about her return to work. The claimant's evidence is that the respondent confirmed by text message that she would be furloughed but she did not supply a copy of the text message because it was on an old phone.

21. On 15 April 2021 the claimant was placed on furlough (rather than on annual leave for 15 days). The claimant never returned to work from her maternity leave.

22. There is a letter dated 27 March 2020 addressed to the claimant at her current home address placing the claimant on furlough, utilising the Coronavirus Job Retention Scheme and paying the claimant 80% of wages [101]. There is conflicting evidence regarding this letter. It was addressed from Theo Morgan but was not signed. And there is a photograph of the letter saved under a file name addressed to another employee. It may have been sent by Ms Vincett on behalf of Mr Morgan, but there is little evidence that it was actually sent. Nonetheless I accept that the reality of the status of the claimant's employment from 15 April 2020 is that set out in the letter of 27 March 2020, being a temporary amendment to her terms and conditions whilst on furlough, with payment at 80% of her salary.

23. There is an email dated 4 August 2021 from the claimant's person email account asking the respondent about her returned to work in October when the furlough scheme was expected to end [6]. The claimant's evidence is that the respondent called her after this email. Her recollection of this conversation is at paragraph 19 of her witness statement. The respondent's evidence was not clear on this point. The claimant's version is that she was told that the business was considering making some redundancies at the end of furlough. She was told that she was not needed back at work until January 2022 at the earliest and that the respondent would continue to pay the furlough amount of 80% of her salary for October, November and December 2021. I accept her version of this conversation. It is consistent with her email dated 18 October following up on this conversation, it is consistent with the evidence in Mr Morgan's witness statement at paragraph 10 that in August 2020 the business contacted all furloughed employees asking whether they wish to remain on furlough of take or new work or take redundancy rather than furlough. It is also consistent with Mr Morgan's evidence and in the ET3 that the claimant and respondent had agreed an extended period of furlough from October through to the end of December 2021. I do note that the respondent changed his position on this

during the hearing from that in his statement and disagreed that the arrangement was a furlough arrangement. Nonetheless, I find that from October through to December 2021 the claimant was on an extended furlough, being another temporary amendment to her employment contract.

24. The claimant's case is that there was no further communication between her and the respondent until 18 October 2021, when she emailed the respondent from her personal email account regarding her possible redundancy [7], to which she did not receive a reply.

Disciplinary proceedings

25. There are significant factual disputes between the parties as to the events occurring in November and December 2021. The respondent's case is that during this time he was carrying out disciplinary action against the claimant for misconduct. The claimant disagrees. The claimant has set out her communications with the respondent in November and December 2021 at paragraphs 21-41 of her witness statement, with evidence of texts and outgoing call logs provided [124]. I note that the respondent did not provide evidence of his call logs, texts or emails. Given the nature of the dispute I have found it helpful to set out a chronological summary of the communications between the parties and where necessary, the conflicting evidence.

a. 1 November text to Mr Morgan requesting October pay, with no reply;
b. 2 November text to Mr Morgan about pay, with no reply;
c. 3 November unanswered call to Mr Morgan;
d. 4 November 13-minute phone call with Mr Morgan. The Claimant states that during this phone call they discussed the respondent's new accountants and the need for her to send the employment contract details, before the October pay would go through;
e. 4 November text to Mr Morgan with employment contract details, including her current address, with no reply;
f. 10 November text to Mr Morgan seeking an update on pay, with no reply;
g. 11 November call to Mr Morgan lasting 30 minutes. The Claimant says that during this phone call they discussed the respondent's financial difficulties including debts, that he was considering liquidating the company, and that he would update the claimant on 12 November after a conversation with his credit card company. The claimant says that she explained that she was unable to pay her mortgage or secure a nursery place for her child, and the respondent mentioned a possible part payment "advance" potentially from his own personal funds. The claimant told him that it would be overdue salary not an advance. The respondent's version of this phone call is consistent in that the subject matter of the phone call was payment of the claimant's salary and that any disciplinary action was not mentioned. The respondent says the claimant refused to help him resolve issues around Ms Vincett's departure which would help to resolve overdraft issues with his bank. His evidence was that he was trying to resolve the financial issues and that he was not able to make payments.
h. 15 November text to Mr Morgan seeking overdue payment, with no reply;
i. 17 November unanswered call to Mr Morgan;
j. 17 November email to Mr Morgan from personal email address seeking pay and referring to ACAS early conciliation [8];

k. 18 November call to Mr Morgan lasting 18 minutes. The claimant's evidence is that the respondent was angry, that he told her not to pursue ACAS early conciliation and that there was nothing he could do about not paying the claimant and that she would have to wait. The respondent's version of this phone call is that the claimant was abrasive and abrupt and was not interested in discussing the issues left behind by the FCO's departure, only when she would be paid. The evidence is consistent in that that Mr Morgan told the claimant he did not know when he would be able to pay her. Both parties gave evidence that any disciplinary proceedings were not mentioned. However, I note that in Mr Morgan's oral evidence he said he did mention the disciplinary proceedings. This was not included in his witness statement and the discrepancy not explained, so I find his account inconsistent on this point. I prefer the claimant's evidence that there was no mention of the disciplinary proceedings in all of the communications or calls between the parties in November and December. I found the Claimant to be a balanced and credible witness.
l. 26 November text to Mr Morgan seeking update, with no reply;
m. 1 December unanswered call to Mr Morgan, voicemail left;
n. 2 December email to Mr Morgan from person email address seeking update;
o. 7 December, unanswered call to Mr Morgan;
p. 13 December, unanswered call to Mr Morgan, voicemail left;
q. 17 December text to Mr Morgan noting that the Xerox HR system showed payslips for October, November and December 2001 [14] but no pay had been received; with no reply;
r. 21 December, unanswered call to Mr Morgan.

26. The respondent's version of the events of November and December 2021 are different. He says that he was investigating the claimant for misconduct. There are a series of letters in the bundle from Mr Morgan to the claimant that the respondent asserts were sent to the claimant to her work email address. Those are:
    a. Letter dated 9 November inviting the claimant to attend an investigation on 16 November to "*discuss your availability to work, communication uncovered about myself with the then director Charlotte Vincett, handling of the company's incentive and benefits, in particular ones you have received yourself."*
    b. Letter dated 10 November stating that the claimant is required to co-operate in the company's investigations and at any subsequent disciplinary hearing. The letter informs the claimant not to carry out any duties, attend the premises or communicate with any other employees or customers.
    c. Letter dated 11 November regarding the investigation interview on 16 November stating that the company "*is investing your relationship with the disgraced FCO, with whom (as you know) you have a very close relationship with. The Company is concerned about a number of factors in relation to: trust, unauthorised increases pay, payment of bonuses, petty cash, independent judgment and promoting the best interest of the company at all times."* The letter makes a series of requests for documentation from the claimant.
    d. Letter dated 16 November titled '*Notice of disciplinary hearing'* set for 30 November 2021. This sets out a series of allegations of gross misconduct. These can be summarised as; first, sending unsavoury emails to Ms Vincett on 5 September 2019 about Mr Morgan; second, being in receipt of financial

benefits from the business over and above salary without approval from the Board of Directors and failing to properly repay petty cash; third, failing to be available for work from 1 October 2021 onwards; fourth, failing to exercise independent judgment and to fulfil her duty to the business because of her friendship with Ms Vincett.

e. Letter dated 6 December dismissing the claimant for gross misconduct following a meeting on 30 November, and notifying her that the last date of employment would be 30 November 2021. The reasons for dismissal were as follows.

> "*Gross misconduct: the disciplinary hearing considered the allegations and evidence laid out in the correspondence to you of 16 November 2021. It was the view of the hearing that the nature of the unsavoury emails between Ms Vincett and yourself about a director of the company made your position untenable and were so serious that the Company move to dismiss you as an employee. In addition, it has been discovered that you received illicit payments from the company which have been paid without the agreement of the board of the company, this has resulted in you having been over paid, any outstanding salary there is been used to offset this debt."*

27. It is not in dispute between the parties that the claimant did not read the letters dated 9,10,11,16 November and 6 December 2021. As to whether they were sent, he respondent asserts that he emailed these letters to the claimant's work email account and his position is that she should have been checking her emails. The claimant had not been actively working at the respondent since July 2020 so was not checking her work emails. In addition, she had repeatedly emailed the respondent from her personal email account between July 2020 until her dismissal. There are no emails or data logs as evidence that these letters were sent by email, and they are not signed. The respondent is unable to access any emails from this time because he says that he changed hosts and for costs reasons elected not to retain old emails.

28. The respondent asserts that he gave all his staff a direction to check their work emails whilst on furlough but I find this to be implausible. The evidence shows that Mr Morgan was communicating with the claimant via her personal email address throughout her maternity leave and furlough.

29. There is conflicting evidence as to whether the letters were also sent in hard copy to the claimant. They were addressed to an address that the claimant had not lived at since 2011. This is despite the letter of 27 March 2020 being addressed to the correct adress, and the claimant texting the correct address to the respondent on 4 November. There is also no evidence that the letters were sent by hard copy and Mr Morgan's evidence was that the company was not in the habit of sending post. Given that it was only him working for the business at that point and that he did not give evidence that he posted them, I find that the letters were not sent by post. In any event, the claimant did not receive them. She was not aware of the letters until these proceedings.

30. I note that there is also a document dated 16 November which is titled "*Investigation summary into the conduct of Ms Amy Perry*". Even on the respondent's own case that was not sent to the claimant at the time of the events. The claimant saw this for the first-time during tribunal proceedings.

31. I find it more likely than not that the disciplinary or dismissal letters were never sent. I find it implausible that any genuine disciplinary procedures took place as asserted in November 2021. This is because:

    I found the respondent to be an unreliable witness whose oral evidence was inconsistent with his witness statement. For example, his written evidence as to the 11 November and 18 November phone conversations made no mention of the disciplinary proceedings. In his oral evidence however, he said he did mention the disciplinary proceedings, but gave no detail and no explanation as why this was not in his witness statement. His evidence was inconsistent on basic points such as whether the claimant was on furlough in October 2021 or had been requested to return to work.

    a. The phone calls on 11 November and 18 November were 30 minutes and 18 minutes long respectively. If disciplinary proceedings were genuinely being pursued against the claimant at that point, I would have expected it to be raised with her.

    b. The letters were addressed to the claimant at the incorrect address, and were not sent to the email address that the parties had been using to communicate since . I find that the respondent either did have or was easily able to access the correct contact details for the claimant, including her phone, email and address, but did not do so. The respondent provided no evidence that he attempted to contact the claimant to ensure that she was aware or could participate in the proceedings.

    c. The dismissal letter is dated 6 November 2021 but purports to take effect from 30 November 2021. Further, other documentary evidence produced by or on behalf of the respondent such as the payslips from October-December 2021 and the furlough letter dated 27 March 2020 were incorrect, which allows for doubt over these documents.

    d. There is a lack of evidence of the type you would expect to see from a disciplinary process, such as emails and minutes from disciplinary hearings. Save for the assertions of the respondent the only evidence that the disciplinary proceedings took place as submitted is a letter from the respondent's accountant Mark Jones dated 20 July 2022. I give limited weight to this letter because the witness was not called in order for his evidence able to be challenged. The extent of the evidence is that "*I attended the disciplinary hearings of Miss Flora Jenkins and Miss A Perry and I can confirm that neither Miss Flora Jenkins or Miss A Perry made themselves available at the time*." At its highest this is evidence that a disciplinary meeting took place, but does not confirm the date or the content of the meeting, or any evidence as to the nature of the disciplinary proceedings. It is not evidence that the letters were ever sent.

32. On the basis of the evidence before me I find that it is more likely than not that the respondent never sent the letters in November and December 2021, either by email or post. It is more likely than not that genuine disciplinary proceedings did not take place.

Dismissal

33. I now turn to the circumstances of the dismissal. On 28 January 2022 the claimant emailed the respondent's accountant Mr Jones to request copies of her payslips because she could no longer access the online system [22]. A response on 30 January 2022 said "*Please find attached your payslips from November 2020 onwards as requested, together with your P45."* The claimant asked for an explanation as to why she had been sent a P45 [21]. The response from Mr Jones on 2 February 2022 [20] said *"We were instructed by the Director that your employment with Interactive Resorts Limited ceased with effect from 30 November 2021 and that a P45 should be issued."* This came as a shock to the claimant. The claimant tried contacting the respondent on 4 February and on multiple occasions on 7 February, with no response from the respondent. Accordingly, the claimant issued proceedings. I note that the claimant did not receive any reasons for the dismissal until after she commenced proceedings in the Tribunal. The claimant was first notified of her dismissal on 30 January 2022.

Diminution of the claimant's work

34. The claimant and the respondent's evidence were consistent as to the financial state of the business throughout the relevant time periods. Mr Morgan gave evidence that there was no work for the claimant upon her return from maternity leave in April 2021, until at least January 2022. I find that because of the impact of the pandemic the business requirement for the claimant's position as Head of Operations had ceased at some point during her maternity leave and the business did not recover sufficiently afterwards to justify her role. The business was not in a position to pay the claimant's salary without the assistance of the government job retention scheme. When the claimant returned from maternity leave in April 2021 she was paid through to the end of September 2021, and thereafter the business did not pay her salary or any outstanding leave requirements. The communications between the claimant and the respondent in November and December 2021 were consistently about the respondent's failure to pay the claimant's salary and the financial position of the copmany. I find that the need for the claimant's role had reduced significantly or ceased between July 2020 and April 2021.

DISCUSSION AND CONCLUSIONS

Date of dismissal

35. The respondent states that the dismissal letter of 6 December 2021 (backdated to 30 November 2021) was emailed to the claimant at her work email address. I have found that it was not sent either by email or in hard copy and in any event was addressed to the wrong address. Even if it were sent by email, it was not reasonable in those circumstances for the respondent to email the dismissal notice only to the claimant's work email, because that did not give her any reasonable opportunity to read it and would not constitute an effective notification of dismissal (see *Gisda Cyf v Barratt [2010] UKSC 41*.)

36. The claimant found out about her dismissal on 30 January 2022 when she received a P45 from the accountant. Accordingly, the effective date of termination is 30 January 2022.

Reason for dismissal

37. It is for the respondent to establish a potentially fair reason for dismissal. The respondent relies on the claimant's conduct as the reason however the evidence also points to redundancy being a potential reason for dismissal. I remind myself that my role is to determine whether the respondent has proved its reason for dismissal and to determine the primary reason for dismissal if there is more than one. I also remind myself that in deciding whether the employer has discharged the burden of proof they do not need to show that the reason actually did justify the dismissal (as that is a question of reasonableness), rather the question is whether the set of facts or beliefs as known to the employer were the cause of the dismissal. In cases of conduct, the employer does not have to prove the offence, merely an honest belief held on reasonable grounds (*Alidair Ltd v Taylor* 1978 ICR 445, CA).

38. The reason for the dismissal given by the respondent is the claimant's conduct as set out in the letter dated 6 December [81], although in evidence the respondent relied also on the allegations in the letter dated 16 November 2021 [53]. In order to assess whether the reason for the dismissal was the claimant's conduct, it is necessary to assess each of the allegations of misconduct and determine whether the respondent honestly held a belief in that misconduct on reasonable grounds.

39. The first allegation is in relation to emails sent by the claimant to Ms Vincett on 5 and 6 September 2019, only discovered by the respondent during his investigation into Ms Vincett in 2021, in which unsavoury comments were made about the respondent, for example the claimant emailed "*has Theo got shingles or scabies*?" He says that he was shocked by the content of the emails and that it confirmed his suspicions that the claimant and Ms Vincett disliked him and discussed him negatively. The respondent alleges that the claimant's friendship with Ms Vincett clouded her judgment, that she assisted Ms Vincett to control the business, and that this meant the claimant was not putting the needs of the business first. The respondent also alleges that there was a breakdown in the implied term of trust and confidence. He gave evidence that his experience of working with the claimant and Ms Vincett over many years was affected by their negative view of him and that once he had read those emails, he could no longer trust the claimant.

40. The claimant accepted the email of 5 September 2019 was a joke at the respondent's expense. Her explanation was that there was a relaxed culture in the organisation and that this was one of the jokes that the respondent would have been "in on". The respondent disagreed as to the nature of the work environment. I preferred the evidence of the claimant that this was a small business with a relaxed working culture where jokes were commonplace.

41. The disclosure of the Whatsapp messages between the claimant and Ms Vincett did show that in December 2020, September 2021 and November 2021 they were privately discussing their frustrations with the respondent in negative

terms. I note the context of those conversations however. In December 2020 there was an ongoing dispute between Ms Vincett and the respondent. The later messages were at a time when the business was in financial trouble and the claimant was not being paid by the respondent. Whilst it appears that personal mobile phones were sometimes used for business purposes, I find that these were private discussions not related to the day-to-day work of the claimant. The messages are a snap shot of a period in time when the relationships had deteriorated and do not reflect the working relationships over the 16 years of employment. In any event these messages were not before the respondent at the time of dismissal so cannot have contributed to the decision.

42. The claimant's evidence was that her relationship with the respondent was bumpy over the course of 16 years but was also a good working relationship for the most part. She said their relationship would be impacted by whether the respondent and Ms Vincett were getting on. She accepted that she discussed him with Ms Vincett in the office prior to the pandemic, but only at their desks where no one would overhear them. I find that there were times throughout the 16 years of her employment in which the clamant did discuss the respondent negatively with Ms Vincett. However, I do not find that this was anything other than the type of private conversations which are usual in the margins of workplaces. I saw no evidence that the claimant did not carry out her employment professionally.

43. I accept the respondent's evidence that by the Autumn of 2021 his relationship with Ms Vincett had deteriorated to such an extent that the sight of the email of 5 September 2019, taken with the relationship between the claimant and Ms Vincett, meant that there was distrust on his part toward the claimant. I find that it was the relationship between the respondent and Ms Vincett that lead to the respondent's lack of trust in the claimant, not her conduct, and that her friendship with Ms Vincett was not a reasonable ground of complaint against her.

44. The next allegation was that the claimant obtained additional benefits over and above her salary without approval of the board of the company, such as commission, bonuses and concessions, and that the claimant's relationship with Ms Vincett contributed to this. There was insufficient to support a reasonable belief in this allegation. The claimant received notification of bonuses and salary from her line manager was not responsible for ensuring that those were approved by the Board. That was a matter for the Directors. I find that the claimant did not receive any inappropriate payments from the business.

45. The respondent alleged that the claimant failed to repay petty cash amounts to Mr Morgan over the years on instruction from Ms Vincett. I heard evidence from the claimant on the petty cash system. The claimant did prioritise repayment of petty cash debts to staff (including herself) over Directors. But I find that this was authorised by Ms Vincett and accepted practice in the business.

46. The respondent also alleged that the claimant failed to follow direct instructions from the respondent to post some ads online. Having seen the email and heard evidence from both parties, I find that the claimant was not disobeying direct orders to post ads online. She was attempting to avoid duplication of work so was checking the position with her line manager.

47. Finally, there was an allegation that the claimant was unwilling or unavailable to return to work. I find this to be wholly inconsistent with the evidence from both the respondent and the claimant that there was an agreement that the claimant would remain on furlough at 80% of her salary between October and December 2021. The respondent accepted this in oral evidence and in the ET3, so I find this allegation to be without foundation.

48. I note that there was no genuine attempt to conduct disciplinary proceedings, and that at no stage in her 16 years of employment had the respondent ever raised conduct issues with the claimant, nor was she given any warning. I note that the claimant was not informed of any disciplinary proceedings nor notified that she was being dismissed. My finding that it is more likely than not the case that the disciplinary procedure did not take place leads me to doubt that conduct was the reason for the dismissal. I have taken into account evidence of what was in the mind of the respondent at the time, including the breakdown in relationships. I have taken into account that the conversations between the claimant and respondent did not mention any disciplinary proceedings and were focussed on the financial position of the business. I find that financial considerations were in the forefront of the respondent's mind when the respondent stopped paying the claimant's salary and failed to notify her of her dismissal or to pay a redundancy payment. Having considered all the evidence in the round I find that the dismissal was mainly attributable to the respondent's financial circumstances and not caused by the claimant's conduct.

49. The evidence before me does not support an honest and reasonable belief in the claimant's misconduct of such a nature as to justify dismissal. Accordingly, the respondent has not discharged the burden of establishing a reason for dismissal under section 98 ERA.

50. The unfair dismissal claim therefore succeeds.

Reasonableness

51. I do not need to go on to consider whether the dismissal would have been reasonable. For completeness, however, even if conduct was the real reason for dismissal, the dismissal would not have been within the band of reasonable responses. Even taking the respondent's claim at its highest, the disciplinary process was procedurally unfair in that the claimant was not given a reasonable opportunity to contribute, and the dismissal did not comply with the principles set out in *Burchell*. The ACAS code of conduct for disciplinary and grievance procedures was not followed, and no appeal was provided. In those circumstances a conduct dismissal would be procedurally unfair.

Redundancy payment

52. The test under section 139(1)(b) ERA 1996 for whether a dismissal will be a redundancy in circumstances such as these is if the dismissal is wholly or mainly attributable to the fact that the requirements of the business for employees to carry out work of a particular kind have diminished. The evidence shows that the claimant's role was not needed after her return from maternity leave. This is a redundancy dismissal within the meaning of 139(1)(b) ERA.

53. Section 135 ERA sets out an employee's entitlement to redundancy payment if the employee is dismissed by reason of redundnacy. This entitlement is qualified by section 140 ERA which states that the employee is not entitled to a redundancy payment if the employer is entitled to terminate the contract by reason of the claimants conduct and does so. I have taken into account my findings above as to the allegations of the claimant's misconduct and find that in all the circumstances they do not entitle the respondent to terminate her contract without notice. She is therefore entitled to a redundancy payment.

54. The claimant worked at the respondent's business for 16 years and was aged 42 at the time of dismissal. Her week's pay was £711 (however this is capped at £544). She is therefore entitled to 16.5 x £544, which is £8976 (gross).

Wrongful dismissal

55. An employee is entitled to notice of termination of employment unless the employer is entitled to terminate the contract without notice because of the employee's conduct. I have already found that evidence does not support summary dismissal of the claimant for conduct, in these circumstances. I have also found that the respondent did not give the claimant notice of termination. The claimant wsa notified of her dismissal on 30 January 2022 through a third party. Under her employment contract she was entitled to 3 months' notice. She was therefore entitled to paid notice of £3,083(gross) x 3 which equals £9,250 (gross).

Unlawful deduction of wages

56. Section 13 ERA gives an employee the right not to have wages deducted unlawfully. It is not in dispute that the claimant was not paid her wages in October, November and December 2021. At that point the claimant was entitled to reduced furlough pay of £2,466 (gross) per month. For the months of October, November and December 2021 the claimant was entitled to 3 x £2,466 which is £7,398 (gross).

57. The claimant is also entitled to the wages for the month of January because she was not notified of her dismissal until 30 January 2022. That figure is £3,083 per month. In total the respondent unlawfully deducted wages from the claimant in the amount of £10, 481 (gross).

Holiday pay

58. The claimant had accrued 15 days of annual leave whilst she was on maternity leave, which she attempted to take in April 2021 but which was not paid to her. That entitlement is £142 per day gross (being the daily rate for annual salary of £37,000) x 15, which equals £2130 (gross).

59. In addition, the claimant took no leave between 1 April 2021 and her termination date. Her holiday entitlement for that part of the annual leave year is 23.4 days. At the date of termination, she had accrued but untaken leave amounting to 23.4 x £142 which is £3,322.

60. Her total holiday pay entitlement is therefore £4,984 (gross).

Loss of pension contributions

61. The respondent did not dispute that pension contributions were unpaid for October, November and December 2021. The monthly contribution for those months was 3% of furlough pay at £2466 gross, being £74 per month. This amounts to unpaid contributions of £222.

62. The respondent should also have paid pension contributions for January 2022 and the three months of her notice period up until 30 April 2022, at her full rate of pay. 3% pension contribution of her full salary is £92.50. For January to April 2022 this equals £370.

63. In total the respondent failed to pay pension contributions equalling £592.

Remedy for unfair dismissal

64. I have found that the dismissal was unfair and that the claimant is entitled to a redundancy payment. Accordingly, section 122(4)(a) applies such that the amount of the basic award for unfair dismissal shall be reduced by the amount of the redundancy payment. I therefore make no basic award.

65. In relation to the compensatory award, the Tribunal must make an award that it considers just and equitable in all the circumstances having regard to the loss sustained in consequence of the dismissal (section 123(1) ERA. The claimant set out her claims in a schedule of loss and included the following:

    a. loss of wages between October 2021 and January 2022. The claimant has been awarded this already as an unlawful deduction of wages.

    b. Pension contributions. These have been assessed already and awarded.

    c. Holiday pay. This has been assessed and awarded already.

66. In addition, the claimant has been awarded 3 months statutory notice pay until April 2022.

67. There are two additional heads of loss set out in the claimant's witness statement. Firstly, that the job that she found starting on 16 May 2022 was at a lower salary of £34,000 pa. However, this job started after the notice period she was entitled to would have expired. Even if the respondent had followed a fair and proper procedure for notice of redundancy, the claimant would still have been made redundant given the respondent's circumstances. It is therefore not just and equitable to make an award for loss of salary after the notice period.

68. Secondly, the claimant explains that her family lost out on a local nursery place for their child because of the respondent's actions and that she therefore spends more money on nursery fees and petrol than she would have had she been paid properly by the respondent and been given notice. These claims are not evidenced or itemised and I therefore make no award for compensation in respect of these.

69. Finally, as I have found that the dismissal did not involve a disciplinary offence there is no award for failing to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures.

70. I make no further award in respect of unfair dismissal because the loss sustained by the claimant has been compensated by other awards.

71. Save for the sum relating to pension contributions the above awards are all gross figures. Provided that the respondent accounts to HMRC for any tax and national insurance due, payment to the claimant of the net sum will suffice to discharge this judgment.

Employment Judge Leonard-Johnston

Date 10 October 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

10/10/2022

FOR EMPLOYMENT TRIBUNALS