# EMPLOYMENT TRIBUNALS

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| **Claimant:** | **Miss L London** |
| **Respondent:** | **Mohammed Saleem Arif (trading as The Suntrap)** |
| **Heard at:** | **Newcastle Employment Tribunal** |
| **On:** | **12 September 2022** |
| **Before:** | **Employment Judge Robertson** |
| **Representation** | |
| **Claimant:** | **in person** |
| **Respondent:** | **in person** |

# RESERVED JUDGMENT

1. The claimant's claim of unfair dismissal brought under Part X of the Employment Rights Act 1996 is well-founded and succeeds.

2. The claimant's claim for failure to provide a written statement of reasons for dismissal is well-founded and succeeds.

# REASONS

CLAIMS

1. The Claimant brought a claim for unfair dismissal, which is a claim for ordinary unfair dismissal under Part X of the Employment Rights Act 1996 ("the ERA"). The claimant also brought a claim for failure to provide a written statement of reasons for dismissal, which is a claim under section 93 of the ERA.

2. The issues to be decided in relation to the Claimant's claim of unfair dismissal were discussed at the start of the hearing and agreed as follows:

   *Unfair dismissal*

3. Was the claimant dismissed (whether by an express or constructive dismissal)? The claimant relied on text messages between herself and the respondent sent and received on 17 February 2022;

4. If so, was the claimant's dismissal with or without notice?

5. Was the claimant reinstated? The respondent accepted that he had dismissed the claimant, but said that he had acted in haste and reinstated her by text message the same day. The claimant denied that she had been reinstated.

6. If she was reinstated, did the claimant resign by her refusal to return to work or was she constructively dismissed? The claimant accepts that she refused to return to work for the respondent.

7. In deciding whether the claimant was constructively dismissed, the claimant relied on the text messages from the respondent on 17 February 2022 as breaching the implied term of trust and confidence. The issues for the Tribunal to determine are as follows:

    7.1. Did the respondent's text messages breach the implied term of trust and confidence? The Tribunal will need to decide:

        7.1.1. whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

        7.1.2. whether it had reasonable and proper cause for doing so.

    7.2. Was the breach a fundamental one?

    7.3. Did the claimant resign in response to the breach? The respondent contends that the claimant had been looking for alternative employment.

    7.4. Did the claimant affirm the contract before resigning?

8. If the claimant was dismissed (constructively or otherwise):

    8.1. What was the reason or principal reason for dismissal? The respondent relies on some other substantial reason justifying dismissal or conduct as potentially fair reasons for dismissal. The respondent contended that the claimant had been aware that her partner was the person that had been causing the damage to the respondent's property which was described in the ET3 and had not passed that information to the respondent, which had delayed the identification of the person responsible for that damage. Although the claimant was paid "redundancy pay", the respondent confirmed that the claimant was not redundant and he had replaced her.

    8.2. If there was a potentially fair reason for the dismissal, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The respondent accepted that, if the claimant had been dismissed, no procedure had been followed.

9. If there is a **compensatory award**, how much should it be? The Tribunal will decide:

    9.1. What financial losses has the dismissal caused the claimant?

    9.2. Has the claimant taken reasonable steps to replace her lost earnings, for example by looking for another job? Was the claimant's refusal to accept any offer of reinstatement unreasonable?

    9.3. If not, for what period of loss should the claimant be compensated?

    9.4. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? If so, should the claimant's compensation be reduced? By how much?

    9.5. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did the respondent unreasonably fail to comply with it? If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

    9.6. If the claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct? If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

    9.7. Does the statutory cap of fifty-two weeks' pay or £89,483 apply?

10. What basic award is payable to the claimant, if any? Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?

    *Failure to provide a written reasons for dismissal*

11. Did the claimant ask for a statement of written reasons for dismissal? Were adequate and true particulars provided? Was there an unreasonable failure to provide a written statement? If relevant, what remedy should be awarded?

PROCEDURE

12. This hearing was held remotely, by CVP. Both parties had indicated that they were able to take part in the hearing by video.

13. The parties had not complied with directions to send documents and witness statements to each other, and the claimant had not produced a schedule of loss. They explained that the reason for this was that they had not understood what was required of them. There was therefore a detailed discussion as to whether the parties were ready for the hearing to take place.

14. As to the documents, the parties had sent documents to the Tribunal. Each of those documents was shared with the other party and the case was stood down to allow time to review those documents during the course of the hearing.

15. As to a schedule of loss, the claimant's position was that her employment by the respondent had ended on 17 February 2022 and her new employment had started on 20 June 2022, but her earnings were lower than previously as she was working fewer hours per week. She was seeking to recover compensation for her loss of earnings until she obtained alternative employment.

16. I explained to the parties that the Tribunal operates a "cards on the table" approach so as to ensure that parties were properly prepared for the hearing, knew the case they were facing and did not face surprises on the day from the other side. I also explained that, by proceeding today, the parties' cases risked being prejudiced as they would not benefit from the same amount of preparation as if the matter were to be postponed until a later date for detailed witness statements and a schedule of loss to be prepared. I stood the matter down to allow the parties to consider how they wished to proceed. Following the break, both parties confirmed that they understood the legal and factual issues to be decided in this case and that they were the same issues as they had anticipated. As to witness statements, both parties confirmed that they wished to rely on their pleadings as their statements and to cover any remaining issues by way of oral evidence. Both parties confirmed that they would prefer the hearing to proceed today and accepted that their cases might thereby be prejudiced. I decided to proceed and gave reasons for this decision at the time. I gave the parties the opportunity to ask for an adjournment during the course of the hearing if they believed that further time was needed, but neither did so.

17. I heard the issues of both liability and remedy. During the hearing, the parties produced additional documents and the case was stood down to allow time to review those documents during the course of the hearing. I considered the pleadings, the documents and oral evidence from the claimant and the respondent. The documents were 12 pages in total (in addition to the pleadings) and were largely text messages or correspondence between the parties, which the parties had previously seen. The documents were as follows:

    17.1. Text messages between the claimant and the respondent (17 February 2022);

    17.2. Letter from claimant to respondent (2 March 2022);

    17.3. The claimant's P45 from the respondent (11 March 2022);

    17.4. Extracts from the claimant's Facebook page (14 April and 8 and 19 October 2021);

    17.5. Email to the claimant in relation to the respondent's failure to provide a reference (26 April 2022).

18. At the end of the one day hearing, judgment was reserved. Based on the evidence heard, and insofar as relevant to the issues that must be determined, I make the findings set out below.

RELEVANT LAW

*Dismissal*

19. The right not to be unfairly dismissed is set out in s94 of the ERA. In order to bring a claim for unfair dismissal under s111 of the ERA, the Claimant must first show that her employment with the respondent ended as a result of her 'dismissal', as defined under s95(1) ERA:

> "s95 - Circumstances in which an employee is dismissed
>
> (1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) ….., only if)—…
>
> (a) the contract under which he is employed is terminated by the employer (whether with or without notice),
> …..
> (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

20. Where notice has been given, that notice cannot be withdrawn unilaterally (*Riordan v The War Office [1959] 3 All ER 552*).

21. Even if the employee's actions constitute a resignation, that might amount to a constructive dismissal if the employer's behaviour constituted a repudiatory breach of contract (*Palmanor v Cedron [1978] IRLR 303*).

*Express dismissal*

22. In *Martin v Glynwed Distribution Limited [1983] IRLR 198*, the EAT set out the following test for deciding whether there was actually a dismissal:

23. *"Whatever the respective actions of the employer and employee at the time when the contract of employment is terminated, at the end of the day the question always remains the same, "Who really ended the contract of employment?""*

24. The first question for the Tribunal is to identify whether on the true construction of the language used by the employer, which are relied upon by the employee as being a dismissal, are ambiguous or unambiguous (*Sothern v Franks Charlesly & Co [1981] IRLR 278*, approving the EAT's decision in *B G Gale Limited v Gilbert [1978] IRLR 453*.

*Ambiguous language*

25. In *Gale* (having reviewed earlier EAT decisions including *Tanner v DT Kean [1978] IRLR 110* in which reference had been made to the relevance of the intention with which the words were spoken), the EAT supported the application of an objective test where ambiguous language had been used:

26. *"It is of course well known that the undisclosed intention of a person using language, whether orally or in writing, as to its intended meaning is not properly to be taken into account in concluding what its true meaning is. That has to be decided from the language used and from the circumstances in which it was used."*

27. In *Sothern*, it was held that:

*"The non-disclosed intention of a person using language as to his intended meaning is not properly to be taken into account in determining what the true meaning is. That was the actual decision of the Tribunal in Gale v Gilbert [1978] IRLR 453 and, in my view, it was correct."*

28. In *Chapman v Letheby & Christopher Ltd, EAT 556/80* held that the test is:

29. *"First, the construction to be put on the letter should not be a technical one but should reflect what an ordinary, reasonable employee in Mr. Chapman's position would understand by the words used. Secondly, the letter must be construed in the light of the facts known to the employee at the date he receives the letter."*

*Unambiguous language*

30. In the context of unambiguous language, the EAT in *Barclay v City of Glasgow District Council [1983] IRLR 313* described the approach as follows:

31. *"It is true that if unequivocal words of resignation are used by an employee in the normal case the employer is entitled immediately to accept the resignation and act accordingly. This has been authoritatively decided by the Court of Appeal in Sothern v. Franks Charlesly & Co [1981] IRLR 278 to which we were referred. It is clear however from observations made in that case that there may be exceptions. These include cases of an immature employee, or of a decision taken in the heat of the moment, or of an employee being jostled into a decision by employers (Fox LJ at paragraph 21); they also apply to cases where idle words are used under emotional stress which employers knew or ought to have known were not meant to be taken seriously (Dame Elizabeth Lane, paragraph 25). There is therefore a duty on employers, in our view, in an appropriate case to take into account the special circumstances of the case…. The real question however is whether or not in the special circumstances the respondents were entitled to assume that this was a conscious rational decision."*

*Constructive dismissal*

32. The decision of the Court of Appeal in *Western Excavating (ECC) Limited v Sharp [1978] IRLR 27* has stood the test of time for over 40 years. It is well-established that to satisfy the Tribunal that she was indeed dismissed rather than simply resigned, the Claimant has to show four particular points as follows:

    32.1. The Respondent acted (or failed to act) in a way that amounted to a breach of the contract of employment between the Respondent and the Claimant;

    32.2. If so, that breach went to the heart of the employment relationship so as to amount to a fundamental or repudiatory breach of that contract;

    32.3. If so, the Claimant resigned in response to that breach; and

32.4. If so, the Claimant resigned timeously and before doing so he had not by his actions or inaction affirmed the contract.

*Implied term of mutual trust and confidence*

33. To establish such a breach of contract, the Claimant relies upon a breach or breaches of the term implied into all contracts of employment that the parties will show trust and confidence, the one to the other. As was said in *Woods v WM Car Services (Peterborough) Limited [1981] IRLR 347*,

*"… it is clearly established that there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee …. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract: the Tribunals' function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it …. The conduct of the parties has to be looked at as a whole and its cumulative impact assessed."*

*"… the conduct of the employer had to amount to repudiation of the contract at common law. Accordingly, in cases of constructive dismissal, an employee has no remedy even if his employer has behaved unfairly, unless it can be shown that the employer's conduct amounts to a fundamental breach of the contract."*

*"Any breach of that implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of contract."*

34. Unreasonable conduct alone will not suffice: see *Claridge v Daler Rowney Ltd [2008] ICR 1267, EAT*.

35. Once there is a breach of contract that breach cannot be cured by subsequent conduct by the employer but an employee who delays after a breach of contract may, depending on the facts, affirm the contract and lose the right to treat him/herself as dismissed - *Bournemouth University Higher Education Corpn v Buckland [2010] IRLR 445*.

36. The test to be applied is not what is the principal or effective cause of a resignation, but it is whether the Claimant resigned at least in part by reason of some or all of the conduct which is said to amount to a repudiatory breach. The breach of contract need not be the only reason for the resignation providing that it is a reason for the resignation: *Wright v Ayrshire Council [2014] IRLR 4*. The employee need not spell out or otherwise communicate his reason for resigning to the employer and it is a matter of evidence and fact for the tribunal to find what those reasons were: *Weathersfield Limited (trading as Van & Truck Rentals) v Sargent [1999] IRLR 94*.

*Unfair dismissal provisions*

37. Section 94(1) of the ERA provides that an employee has the right not to be unfairly dismissed by his employer.

38. Section 98 of ERA provides, so far as is relevant:

> *(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-*
>
> *(a) the reason (or, if more than one, the principal reason) for the dismissal and*
>
> *(b) that is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.*
>
> *(2) A reason falls within this subsection if it…*
>
> *(b) relates to the conduct of the employee…*
>
> *(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-*
>
> *(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*
>
> *(b) shall be determined in accordance with equity and the substantial merits of the case.*

39. Section 98(1) ERA requires the employer to demonstrate that the reason or, if more than one the principal reason, for the dismissal was for one of the potentially fair reasons listed in section 98(2) ERA or for 'some other substantial reason justifying dismissal'.

40. The reason for dismissal is the set of facts known to the employer, or the set of beliefs held by him, that causes him to dismiss the employee: *Abernethy v, Mott, Hay and Anderson [1974] ICR 323, CA*.

41. To amount to some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held, the reason must be of a kind which could be a substantial reason other than a S.98(2) reason, must not be whimsical, capricious or dishonest; and must not be based on an inadmissible reason such as race or sex. The reason for dismissal needs to be genuine: *Harper v National Coal Board 1980 IRLR 260, EAT*. To amount to a substantial reason to dismiss, there must be a finding that the reason could justify dismissal: *Mercia Rubber Mouldings Ltd v Lingwood 1974 ICR 256, NIRC*.

42. Once the employer has shown that there was a potentially fair reason for dismissal, the Tribunal must decide whether the employer acted reasonably under S.98(4) in dismissing for that reason. The burden here is neutral. Section 98(4) poses a single question namely whether the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the claimant. It requires the Tribunal to apply an

objective standard to the reasonableness of the investigation, the procedure adopted and the decision itself. However, they are not separate questions – they all feed into the single question under section 98(4). Whilst an unfair dismissal case will often require a Tribunal to consider what are referred to as 'substantive' and 'procedural' fairness it is important to recognise that the Tribunal is not answering whether there has been 'substantive' or 'procedural' fairness as separate questions. The Tribunal must not decide the case on the basis of what it would have done had it been the employer, but rather on the basis of whether the employer acted in a reasonable way given the reason for dismissal.

43. If an employer has shown that there was a substantial reason for dismissal which was a potentially fair one, the Tribunal must decide whether the employer acted reasonably under S.98(4) in dismissing for that reason by asking whether the decision to dismiss fell within the range of reasonable responses that a reasonable employer might adopt, taking into account the guidance in *Iceland Frozen Foods Limited v Jones [1983] ICR 17*.

44. In misconduct cases, the approach which a Tribunal takes is guided by the well-known decision of *British Home Stores v Burchell [1978] IRLR 379, EAT*. Once the employer has shown a valid reason for dismissal the Tribunal there are three questions:

    *(i) Did the employer carry out a reasonable investigation?*

    *(ii) Did the employer believe that the employee was guilty of the conduct complained of?*

    *(iii) Did the employer have reasonable grounds for that belief?*

45. In assessing the reasonableness of the employer's response, it must do so by reference to the objective standard of the hypothetical reasonable employer (*Tayeh v Barchester Healthcare Ltd [2013] IRLR 387, CA, para 49*). Dismissal can be a reasonable step even if not dismissing would also be a reasonable step.

46. A dismissal may be unfair because the employer has failed to follow a fair procedure. In considering whether an employer adopted a fair procedure, the range of reasonable responses test applies: *Sainsbury plc v Hitt [2003] I.C.R. 111, CA*. The fairness of a process which results in dismissal must be assessed overall.

47. All the above requirements need to be met for the dismissal to fall within the band of reasonable responses. If the dismissal falls within the band, it is fair. If it falls outside the band, it is unfair.

48. If the Tribunal concludes that the dismissal is unfair procedurally, it must go on to consider what chances there would have been of the employer dismissing the employee in any event, and it may make a consequential reduction in the compensatory award accordingly. This is the Polkey principle, from the House of Lords' decision in *Polkey v AE Dayton Services Ltd [1998] ICR 142, HL*. It is essentially an assessment of what would have happened had the respondent followed correct procedures.

49. The Tribunal must then go on to consider whether there was an unreasonable failure by one or other of the parties to follow the ACAS Code of Practice on Disciplinary and Grievance Procedures (2015) and, if so, to make an adjustment of up to 25% up or down to the compensatory award under s.207A of the Trade Union and Labour Relations Act 1992.

50. Furthermore, the Tribunal must take account of whether there was any contributory fault on the part of the claimant. In terms of contributory conduct, if the dismissal is found to be unfair, s123(6) of the ERA requires the Tribunal to reduce compensation on a just and equitable basis – even if the parties do not raise it as an issue. There is also an equivalent provision for reduction to the basic award, in relation to which the Tribunal has a broader discretion, not limited to conduct causing or contributing to dismissal.

*Written reasons for dismissal*

51. Section 92 of the ERA provides that, within 14 days of making a request for one, an employee is entitled to be provided by his employer with written reasons giving particulars of the reasons for the employee's dismissal. Section 92 applies if the employee is given by the employer notice of termination of his contract of employment.

52. Under section 93(1), a complaint may be presented by the employee on the ground that:

    (a) The employee unreasonably failed to provide a written statement under section 92; or

    (b) The particulars of reasons given in purported compliance with that section are inadequate or untrue.

SUBMISSIONS

53. After the evidence had been concluded, both parties made submissions which addressed the issues in this case. I have set out the key points in the parties' submissions below. It is not necessary for me to set out those submissions in detail here. Suffice it to say that I fully considered all the submissions made, and the parties can be assured that they were all taken into account in coming to my decision.

54. The respondent submitted that he had had a kneejerk reaction to the situation which he had tried to rectify but the claimant's refusal to return to work had tied his hands. He said that he had employed the claimant for five years with no problems at all. He submitted that the claimant, in only applying for two jobs (one of which was during her employment with the respondent), had not sought to mitigate her loss sufficiently but he had no evidence of other potentially suitable jobs which she had not applied for. He did not contend that the claimant could have been fairly dismissed in any event at a later date. He submitted that any uplift in respect of any failure to comply with the ACAS Code of Practice should be minimal to protect others' jobs in his small family business.

55. The claimant submitted that her dismissal was unfair, being by text message and she had lost her job through no fault of her own. She submitted that the

respondent could have discussed the matter with her but he did not. The claimant submitted that her new job had only started on 20 June because it took time to receive her DBS check. She submitted that the respondent had refused to provide a refence in respect of her other job application (and relied upon an email stating that was the case); she submitted that had been unfair as she had done what was expected of her in her role. She informed me that her ex-partner was currently in prison and there was a restraining order preventing him from coming near to her or her home, but that this was unrelated to the damage to the respondent's car in issue in this case. The claimant submitted that any uplift in respect of any failure to comply with the ACAS Code of Practice should be 25%. She submitted that, if she had returned to work, the respondent would have dismissed her again.

FINDINGS OF FACT

56. Having taken into consideration all the relevant evidence before the Tribunal (documentary and oral), the submissions made by or on behalf of the parties at the hearing and the relevant statutory and case law, I record the following facts either as agreed between the parties or found by me on the balance of probabilities.

57. The claimant was employed by the respondent from 17 January 2017. She worked in the respondent's shop. It is a family business owned by the respondent and his wife. The claimant's ex-partner is the nephew of the respondent's wife (and, therefore, the respondent by marriage). The claimant's ex-partner's mother and sister also worked at the shop. It was common ground that the claimant had not been provided with a written contract of employment.

58. The claimant's relationship with her ex-partner had been on-going for several years. I accept the respondent's uncontested evidence that this had been, at times, an "on-off" relationship. However, the relationship finally broke down in January 2022.

59. In or around March, April and May 2021, the respondent's car windows were broken. In December 2021, his car had been set on fire. The respondent had involved the Police. The respondent was distressed by the situation and, as the perpetrator had not been identified, he was concerned that similar incidents could take place in the future. The claimant had been aware of these difficulties that the respondent and his family were facing.

60. On 17 February 2022, the respondent was told by the claimant's ex-partner's cousin (referred to in the text messages as 'Kieran') that the claimant's ex-partner was responsible for paying another individual to carry out the last four or five acts of damage to the respondent's car. During that discussion, that individual had told the respondent that the claimant (and her ex-partner's mother and sister) knew about these matters. The respondent was also told during this discussion that someone had gone to the house in which the claimant and her ex-partner lived at the time and asked for money, and the respondent understood that the claimant's ex-partner must then have told the claimant what the money was for. I accept the respondent's evidence that Kieran had "got drunk and told [him]" this information.

61. Based solely on this discussion and his own belief that the claimant and her ex-partner were living together at the time of the incidents (which he subsequently sought to corroborate by Facebook extracts dated 14 April and 8 and 19 October 2021), the respondent believed that the claimant must have been aware that her ex-partner was involved in the damage to his car. He was not certain, however, as he subsequently acknowledged by text message that he did not know if it was true. The respondent believed that the claimant, as his employee, should have told him about her ex-partner's involvement and that her failure to do so had delayed the identification of the person responsible and an end being brought to the matter.

62. Although the text messages referred to items being stolen from someone called Brenda, and to "skunk", there was no other reference to this in evidence and I conclude that this did not play any, or any material, part in the respondent's decision to dismiss the claimant.

63. Shortly after the above discussion, also on 17 February, there was an exchange of text messages between the respondent and the claimant. The respondent did not speak to the claimant before sending the text messages. These text messages were sent and received within a period of around two hours.

64. The first of these was that the respondent sent a text message to the claimant which said that 'Kieran' had mentioned to him that the claimant's ex-partner had paid someone £50 to have his car burned out. The respondent went on to say, "I don't know if it's true but until you can prove it wasn't, I don't think it's appropriate for you to work in the shop, il sort ya wages up until you need in the mornin." I accept the claimant's evidence that she understood this to mean that she had lost her job with immediate effect as soon as she received that message. The respondent's statement stated that he had dismissed the claimant by text message. In oral evidence, the respondent said that he had not intended to dismiss the claimant by this first text message, but rather to place her on garden leave until she proved that her ex-partner was not responsible.

65. There followed an exchange of text messages between the claimant and the respondent. In these messages, the claimant pointed out that she was no longer in a relationship with her ex-partner, and asked why it should be for her to prove anything. She also said, "how can you try and give me the sack over something [the claimant's ex-partner] has meant to have done that's nothing to do with me."

66. In response, the respondent said that he was going to pay her the two weeks' notice she was owed and any outstanding holiday pay. The respondent accepted that by the time he had sent that message, he had dismissed the claimant. The claimant reiterated her position.

67. Following the receipt of one or all of these text messages, the claimant contacted her ex-partner by telephone and asked him to sort out the problem with the respondent as she believed that she had been dismissed because of the problem between them, which was nothing to do with her. The respondent believed that the claimant should have spoken to him, rather than sending her ex-partner to speak to him in this situation. However, the claimant's ex-partner had previously spoken to the respondent about matters

concerning the claimant's employment, such as her holidays, rather than the claimant.

68. Although the respondent's evidence was that the claimant's ex-partner had been sent to his house and try to "terrorise" him into giving the claimant her job back, I accept the claimant's evidence that that had not been her intention. She had not been present during their discussion. I accept the respondent's evidence that the claimant's ex-partner had told the respondent that he (that is, the respondent) needed to prove what had happened and that the claimant would bring a claim against him.

69. The respondent then sent the penultimate text message in which he said, "[the claimant's ex-partner]'s just been said it weren't him, you can work in the mornin if you want." I shall refer to this as the "penultimate text message."

70. The respondent gave evidence that this retracted the dismissal, pointing out that if the claimant could accept that she had been dismissed by text, then she must be able to accept that her job had reopened by text. The respondent said that he had had a kneejerk reaction to an unexpected situation which he believed was reasonable, albeit that he had not acted in the proper manner. He said that there had been a misunderstanding between the claimant and himself, but he had offered the next shift to the claimant and she had refused to "come back to him." He said later that he had offered the claimant her job back and then said that she had been reinstated. The respondent asked the claimant why she had not, "accepted the offer", to which the claimant responded that the message only said that she could work in the morning if she wanted to, and there was no apology.

71. The claimant refused that offer. At the time, she said that this was because she had been humiliated by text message. The respondent simply replied, "ok." Although the claimant worked in the shop alone, she came into contact with other employees (members of the respondent's family) on shift changeovers who, she said, knew that she had been dismissed. She was no longer in a relationship with her ex-partner and so they were no longer part of her 'family'.

72. There was a dispute as to who (the claimant or the respondent) was responsible for other employees coming to believe that the claimant had been dismissed, with the respondent saying that he had not told others and he should not be responsible for humiliation caused by the claimant having told others. On balance, I accept that the respondent did not tell other staff members what had happened. I find that the claimant's actions in telling her ex-partner what had happened was the way in which her colleagues came to know about this.

73. She was clear, and I accept, that she did feel humiliated by having had her, "job taken from [her]," and the manner in which that had been done by text message. I preferred the claimant's evidence that she did not return to work because of the manner in which her employment had been dealt with, by text message, and she had not wanted to go back for the same to happen again.

74. I preferred the claimant's evidence that, had she accepted the respondent's offer and returned to work, she would have been dismissed again. I do not accept the respondent's evidence in this regard: after the claimant's

dismissal, other family members had informed him that the claimant knew that her ex-partner was responsible for the damage. It was not credible, in view of his strength of feeling about the claimant's knowledge, that he would have continued to employ the claimant.

75. There was a dispute as to whether the claimant was aware that her ex-partner was responsible for the damage. The Police investigation into her ex-partner in relation to this matter has been closed and no charges had been brought. As to the claimant's knowledge, I prefer the claimant's cogent and persuasive evidence that she did not, and still does not, know whether her ex-partner was involved in the incidents.

76. The claimant did not receive a letter confirming her dismissal. She sent a letter to the respondent on 2 March 2022, stating she wanted to raise a formal grievance regarding her dismissal on 17 February 2022. That letter stated that she had been given no warnings prior to her dismissal, she had always done what was expected of her, she believed that she had been treated unfairly and that the reason for her dismissal were unclear. She asked for written reasons for her dismissal, five weeks' notice pay, outstanding holiday pay and her P45. The respondent received this letter but no meeting or discussion took place between the claimant and the respondent, and the respondent did not respond other than to arrange for the claimant's P45 and the final payments to be sent to her.

77. The P45 was subsequently issued and stated that the claimant's employment ended on 4 March 2022. This was the date the P45 had been raised by the respondent's accountant and there is no significance in this date.

78. No action was taken by the respondent to discipline or dismiss the claimant's ex-partner's other family members; his evidence was that he had realized that he had made an error of judgment in dismissing the claimant.

79. Around two weeks after the claimant's employment terminated, the respondent was told by several other family members that the claimant's ex-partner was responsible for the incidents.

80. Around two weeks prior to the hearing, the respondent had attended another family gathering at which he had been told that the claimant had instigated the damage to the respondent's car by telling her ex-partner about any issues she was having at work. Although he contended that there was no direct conflict between himself and the claimant's ex-partner to give him a reason to damage the respondent's property except that the claimant worked for him, I do not accept the respondent's evidence in this regard: I prefer the claimant's contemporaneous text messages which refer to a problem between them which he did not dispute at the time.

81. It was common ground that the claimant had applied for alternative employment in late 2021, and the respondent had provided a reference in respect of that job application. The claimant was not in receipt of an offer of alternative employment on 17 February.

82. Following the termination of her employment, the respondent paid to the claimant her outstanding wages, accrued but untaken holiday pay, 5 weeks' notice pay and 5 weeks' redundancy pay.

83. The claimant obtained alternative employment which started on 20 June 2022. Her net earnings in her new job are £345.77 per month. She worked 12 hours per week for the respondent, but works 10 hours per week in her new job because of childcare responsibilities. She had applied for two jobs as these were the only jobs that were suitable; she is a single mother with two young children. She had received Universal Credit since her employment with the respondent terminated.

84. As to the claimant's employment history: in or around 2020, the respondent had given the claimant a warning for locking the shop so that she could vomit after consuming alcohol the previous night; and around six months prior to the termination of her employment, he had sent her a text message raising with her that she had knowingly breached the rules by allowing someone under 18 years of age into the sunbed area (which had not been called a warning). I accept the respondent's evidence that neither issue played a part in his decision-making on 17 February.

85. There was a dispute about whether the respondent had refused to provide a reference for the claimant in respect of a different potential alternative role after her employment terminated. The respondent gave inconsistent evidence in relation to this: he initially said that he had refused to provide a reference "after this came to light", and clarified that it was because of the "terrorism" that she and her partner had put him through for 1.5 years. He then went on to say that he thought he had simply not replied. The email which I viewed from the prospective employer stated that the respondent had refused to provide a reference. On balance, I find that the respondent refused to provide a reference.

DISCUSSION AND CONCLUSIONS

86. Applying the law to my findings of fact, I reach the conclusions set out below.

87. The claimant was employed by the respondent between 17 January 2017 and 17 February 2022. As such, she had five years' continuous employment at the time of her dismissal.

88. The claimant notified ACAS under the Early Conciliation Procedure on 21 March 2022 and the ACAS Early Conciliation Certificate was issued on 1 May 2022. The claim was presented on 4 May 2022. The claims were presented in time.

89. The first issue which I must decide is whether the claimant was dismissed by the respondent.

90. To decide that issue, I must first consider whether the respondent's text messages (up to the penultimate text message) were ambiguous or unambiguous in their wording. The text messages do not make it clear whether or not the claimant's employment had been terminated and, if so, what the effective date of termination was. I therefore conclude that the text messages were ambiguous. In the context of ambiguous language, the authorities support the proposition that the test is objective rather than subjective and the question of whether or not there has been a dismissal or

resignation must be considered in the light of all the surrounding circumstances.

91. Taking an objective view, I conclude that the respondent's first text message amounted to a dismissal of the claimant with immediate effect. Although the words, "work in the shop" could be taken to mean that the claimant was being placed on garden leave until she could prove that her ex-partner was not responsible for the damage, the fact that the text ended by saying that the respondent would pay the claimant her wages up until she needed indicated an immediate end to the employment relationship. The surrounding circumstances (the respondent's distress and concern that similar incidents could take place in the future, as the perpetrator had not been identified) supported this conclusion. Further, the claimant understood her employment to have been terminated with immediate effect and challenged the respondent about his decision: his response confirmed that her understanding was correct. I shall deal with this further below. An ordinary, reasonable employee in the claimant's position in the light of the facts known to the employee at the date she received the text message would understand that she was being dismissed with immediate effect.

92. Even if that is not the correct view, I conclude that, viewed together, the exchange of text messages up to the penultimate text message amounted to a dismissal of the claimant with immediate effect. In those messages, the claimant challenges the respondent, asking how he could "try and give [her] the sack," and the respondent's responses include "what did you expect me to do," and "gonna pay you the 2 wks notice in wages u owed and any holiday pay owed." An ordinary, reasonable employee in the claimant's position in the light of the facts known to the employee at the date she received the text messages would understand that she was being dismissed with immediate effect. Indeed, her message made it clear that she understood the respondent was 'trying to give her the sack', and this was confirmed by the respondent's responses. She could expect to receive her notice pay and accrued holiday pay but those payments are paid when an employee's employment terminates and not otherwise. It might have been theoretically possible for her to be reinstated if she could provide the proof the respondent had requested. Although the claimant referred to the respondent 'trying' to sack her, and that could be taken to mean that he had not done so, I conclude that in light of the respondent's response (to confirm that she would be paid her notice pay), the claimant had in fact been dismissed with immediate effect on 17 February 2022.

93. As to the impact of the penultimate text message, notice cannot be withdrawn unilaterally and, in any event, her employment had already been terminated with immediate effect. I conclude that the claimant was not reinstated by the penultimate text message on 17 February. The claimant had, as I deal with further below, essentially appealed against her dismissal by her text messages and asking her ex-partner to speak to the respondent. The language used by the respondent in response (in the penultimate message) is ambiguous, as it does not make clear what the effect of the message on the claimant's employment was. It does not say that her employment was continuing, nor does it say that she had been reinstated. It merely says that she could work in the morning if she wanted to. Taking an objective view of the ambiguous wording, the text message does not amount to a reinstatement. An ordinary, reasonable employee in the claimant's position in

the light of the facts known to the employee at the date she received the text messages would understand that she was merely being offered her job back. Had she been reinstated, she would have been required to attend work the following morning (which was her next scheduled shift), not simply given the opportunity to turn up if she wanted to. No subsequent attempt was made by the respondent to require the claimant to return to work, to clarify his position or to reassure her about her employment situation.

94. In the context of ambiguous language, the authorities do not appear to provide that there is a duty on employees in an appropriate case to take into account the special circumstances of the case (such as a decision taken in haste) in order to be able to establish whether she was entitled to assume that this was a conscious rational decision to dismiss her. However, even if there were such a duty, the respondent did not seek to withdraw his earlier dismissal and did not reinstate the claimant. He merely offered the claimant her job back. She refused his offer, the respondent replied, "ok," and then did nothing further other than to arrange her P45 and her final payments to be made. That being the case, even if special circumstances were relevant in this case, the claimant was entitled to assume that the respondent's decision to terminate her employment was a conscious, rational one.

95. She refused the respondent's offer to have her job back. The claimant had asked how the respondent could "try and give [her] the sack" and she had asked her ex-partner to speak to the respondent about her job, both of which essentially amounted to an appeal against her dismissal, and are matters which indicate that her view at that point in time was that the matter was not closed. However, by the time she had time to reflect and was in receipt of an offer to work the following day, she felt humiliated by the manner of her dismissal. I preferred her persuasive evidence that, had she accepted the offer, the respondent would have dismissed her again. In light of his actions on 17 February, I find that there was a significant risk that any subsequent dismissal would have been implemented without following a proper procedure and without speaking to her first.

96. Having concluded that the claimant was not reinstated, I do not need to decide whether she resigned or was constructively dismissed.

97. Having concluded that the claimant was dismissed, I must go on to consider the reason for her dismissal.

98. The damage was not being attributed to the claimant herself, and it took place outside of the workplace. However, I have found that the reason for the claimant's dismissal was the respondent's belief that the claimant knew that her ex-partner was responsible for the damage and had failed to report this to the respondent (therefore delaying the identification of the person responsible and an end being brought to the matter). I conclude that the principal reason for the claimant's dismissal was for a reason relating to her conduct.

99. Having concluded that there was a potentially fair reason for the dismissal, I must go on to consider whether, under section 98(4) of the ERA, the dismissal was fair or unfair. It is not for me to substitute my view. What I have considered is whether the dismissal was within the band of reasonable responses. I conclude that it was not. Applying the principles in *Burchall*, I conclude that the respondent did not carry out a reasonable investigation. He

relied solely upon his own belief that the claimant had been living with her ex-partner when his car had been damaged and the conversation with 'Kieran' who had been drunk at the time. He had not spoken again to Kieran when he was not drunk to clarify the position, nor had he spoken to the claimant or her ex-partner to investigate the matter any further. He knew that the claimant's relationship with her ex-partner had been "on-off" but he did not investigate whether they had been in a relationship at the relevant times prior to her dismissal. In particular, he did no further investigation as to who was responsible for the damage nor, if it had been the claimant's ex-partner, whether the claimant was in fact aware of this. Notably, he had not asked the claimant.

100. I conclude that the respondent did genuinely believe that the claimant knew that her ex-partner was responsible for the damage and had failed to inform the respondent about this. Although he was not certain, I conclude that he did believe it to be true in light of his decision to dismiss the claimant.

101. However, the respondent did not have reasonable grounds for that belief as it was based on an investigation which was lacking in the above respects.

102. The respondent conceded that he did not follow any procedure in dismissing the claimant. In addition to the failure to carry out a reasonable investigation, the respondent did not inform the claimant of the disciplinary allegations and invite her to a disciplinary meeting, accompanied by a colleague or trade union representative, to discuss the matter before reaching his decision. Although the claimant essentially sought to appeal by asking her ex-partner to speak to the respondent, no appeal meeting took place and, for the above reasons, she was not reinstated. The claimant sought to raise a grievance in relation to her dismissal but the respondent did not respond. The failure to discuss matters with the claimant was not, as the respondent contended, because the claimant did not return to work.

103. This being a misconduct case, the ACAS statutory Code of Practice on disciplinary procedures applies in this case and was not followed as described above.

104. The respondent was considering dismissal as a sanction. The respondent contended that these were exceptional circumstances but I am not satisfied that following a procedure would have been futile. This is evidenced by the respondent offering her job back shortly after her dismissal, after speaking to one of the potential witnesses he could have interviewed as part of his investigation. Although the respondent runs a small family business and has no HR department, I conclude that the respondent's investigation fell outside of the band of reasonable responses.

105. In light of the above conclusions, I must conclude that the decision to dismiss the claimant was outside of the band of reasonable responses and was therefore unfair.

*Written statement of reasons for dismissal*

106. The respondent did not respond to the claimant's request for a written statement of reasons for dismissal. This was because he believed that he

had already provided those details in writing in his text messages on 17 February 2022. The text messages do not adequately particularise the reasons for her dismissal: they refer to the belief in the claimant's ex-partner's responsibility for the damage and in the claimant's knowledge of that, but do not make clear what led to her dismissal. The claimant's request for written reasons stated that the reasons were unclear. As set out above, the respondent did not respond to refer to the text messages. The respondent's complete failure to respond to the request amounted to an unreasonable failure to provide a written statement under section 92 of the ERA.

REMEDY

*Unfair dismissal*

*Contributory conduct*

107. In light of my finding that the claimant did not know that her ex-partner was responsible for the damage to the respondent's car (if indeed he was, as the Police investigation had been closed and no charges brought), the claimant did not contribute to her dismissal. As such, it would not be just and equitable to reduce her compensatory award. For the same reason it would not be just and equitable to reduce the basic award for the claimant's conduct.

*Polkey*

108. The respondent did not argue that the claimant could have been dismissed anyway if a fair procedure had been followed, or for some other reason. For the reasons above, I accept that view.

*Basic Award*

109. The claimant had five years' continuous employment at the time of her dismissal and was 28 years of age at the time of her dismissal. Her weekly pay was £106. Her basic award is calculated as 5 weeks' pay, being £530. For the reasons below, the claimant did not unreasonably refuse an offer of reinstatement and so there is to be no reduction to the basis award. I therefore order the respondent to pay to the claimant a basic award of £530.

*Prescribed element*

*Compensatory Award*

*Immediate loss*

110. The claimant sought compensation for loss of earnings until she started her new job on 20 June 2022. She accepted that she could not work more than the 10 hours per week which she is currently working due to her childcare responsibilities and was not seeking to increase her earnings beyond the current level. She was paid by the respondent in respect of her 5 week notice period and so she did not begin to suffer loss of earnings until 25 March 2022. There was then a period of 12 weeks and 3 days in which she was not in receipt of any employment earnings. Her loss of earnings for this period is £1,317.43.

111. As to whether the claimant unreasonably failed to mitigate her loss, the respondent's position was that the claimant ought to have returned to work for him and ought to have looked for more than two jobs.

112. The claimant's refusal to accept the respondent's offer of her job back was not unreasonable. Although she had initially challenged her dismissal (indicating that, initially, her mind was not closed to returning to work), I found that, by the time she was in receipt of an offer to work the following day, she had been able to reflect and felt humiliated by the manner of her dismissal. I also conclude that her refusal was not unreasonable in light of my finding that it was likely that, had she returned to work the respondent would have dismissed her again after he spoke to other family members, and she would have reasonably anticipated that he would have done so unfairly, or without speaking to her.

113. The steps the claimant should have taken to mitigate her losses were to seek alternative employment. She had applied for one role prior to her employment with the respondent ending, and she applied for another after it had terminated but the respondent refused to provide a reference for her. The respondent was unable to point to any roles which she had not applied for. The claimant was delayed in starting her new role due to the need to obtain a DBS check after an offer was received and it was not unreasonable for her to stop looking for another job during that period.

114. As such, I conclude that the respondent has not shown that the claimant unreasonably failed to mitigate her loss.

115. The claimant must give credit for the redundancy payment of £530 which she received. Deducting this from £1,317.43 gives a figure of £817.43. The compensatory award is £817.43.

*Non-prescribed element*

*Written statement of reasons for dismissal*

116. Where a Tribunal finds this complaint well-founded, the Tribunal may make a declaration as to what it finds the employer's reasons were for dismissing the claimant were. As I have stated above, the reason for the claimant's dismissal was the respondent's belief that the claimant knew that her ex-partner was responsible to the damage and had failed to inform the respondent about this (therefore delaying the identification of the person responsible and an end being brought to the matter).

117. In these circumstances the Tribunal is required to award two weeks' pay. I therefore award £212, being two weeks' pay.

*ACAS uplift*

118. I have concluded that the ACAS Code of Practice on disciplinary procedures applied to this dismissal, and the respondent failed to comply with its requirements. I also conclude that he did so unreasonably. Taking into account the parties' submissions on this matter, but stepping back and having regard to the overall size of the award, in my view the respondent's

unreasonable and total failure to comply with the Code makes an uplift of 25% appropriate.

119. Applying this uplift, the total award due to the claimant is £1,949.29.

*Recoupment Regulations*

120. The recoupment regulations apply in this case as the claimant claimed Universal Credit following her dismissal. For the purposes of regulation 4 of the Employment Protection (Recoupment of Benefits) Regulations 1996:

120.1. The Prescribed Element is £817.43;

120.2. The Prescribed Period is 25 March 2022 to 19 June 2022 (inclusive);

120.3. The total monetary award is £1,949.29; and

120.4. The excess of the total monetary award over the Prescribed Element is £1,131.86.

CONCLUSIONS

121. The claimant's claim of unfair dismissal brought under Part X of the Employment Rights Act 1996 is well-founded and succeeds.

122. The claimant's claim for failure to provide a written statement of reasons for dismissal is well-founded and succeeds.

Employment Judge Robertson

14 October 2022