EMPLOYMENT TRIBUNALS

Claimant: **Gemma Burt-Davies**

Respondent: **Primary Technologies SE Ltd**

Heard at: **London South, by video (CVP)**

On: **29 & 30 September 2022**

Before: **Employment Judge Hamour (sitting alone)**

Representation
Claimant: In person.
Respondent: Paul Tapsell, Counsel

RESERVED JUDGMENT

The Claimant's claims of unfair dismissal, and for unlawful deduction from wages, fail and are dismissed.

REASONS

The Parties

1. The Respondent is a company providing IT services and support across the South East, primarily to schools and colleges. Lewis Purver and Matthew Curtis are Directors of the Respondent.

2. The Claimant was employed by the Respondent as an IT consultant. She commenced employment in March 2018 and was dismissed on notice with effect from 11 March 2021, following a disciplinary hearing in respect of several allegations, including failure to attend work, and unauthorised use of a work mobile phone.

The Issues

3. By an ET1 claim form dated 30 March 2021, the Claimant contended that her dismissal was unfair, and also that she was owed wages or other payments. In her evidence the Claimant clarified that she was referring to

wages not paid to her whilst she was on unpaid leave, but felt she should have been offered furlough. The ET1 also included a claim of indirect discrimination, but this was struck out by an Order dated 16 May 2022.

4. The Respondent resisted the claims in full. It contended that the dismissal was fair on grounds of conduct due to the Claimant's refusal to attend work, and due to excessive use of a work mobile phone. The Respondent also contended that it had need of the Claimant's services and so could not accept her request to be furloughed.

5. Following the termination of the Claimant's employment, the Respondent issued County Court proceedings against the Claimant for the return of certain company property. Those proceedings were mentioned in evidence by the Claimant as an example of the Respondent being against her.

The Evidence

6. The Respondent provided a bundle of document which numbered 155 pages. It included a witness statement of the Claimant, together with attachments, which the Claimant had separately provided to the Employment Tribunal. I also had before me witness statements from Mr Purver and Mr Curtis.

7. After clarifying the remaining issues with the parties, I heard evidence from Mr Purver and Mr Curtis for the Respondent, who respectively heard the disciplinary hearing, and the appeal hearing. I also heard evidence from the Claimant.

The Facts

8. The Claimant was a valued employee of the Respondent who had good relationships with the schools that she supported.

9. She was originally recruited to a full-time role, but this was later reduced to part-time at the Claimant's request so as to accommodate her childcare commitments.

10. The Claimant accepted that at this time the Respondent was flexible with her and with the timetabling of her work to fit around her childcare obligations.

11. During the first coronavirus lockdown, the Respondent had furloughed its staff, including the Claimant. Later, when restrictions had changed, its staff were deemed key workers due to their support for educational establishments, and the Respondent's business continued. It therefore required its staff to continue working, either from home, or at client premises when required, with a rota'd presence in the office to support functions which could not be carried out remotely.

12. Working from home guidance was issued to the Respondent's employees on 1 April 2020. Receipt was acknowledged by the Claimant the same day. Amongst other things, it specified that, when working at home, employees

must be logged onto the system and contactable on their work phones at all times during working hours.

13. In his evidence, Mr Purver was confused as to whether or not there was a requirement for the work computer to be on at all times, but the Claimant accepted in evidence that she could not carry out her duties without being logged into either her computer or her phone.

14. The Claimant suffered a bereavement with the death of one of her two sons in August 2020, following which she was granted a period of compassionate leave from work.

15. Following the compassionate leave, the Claimant returned briefly to work, but was assigned to work at locations in the Isle of Sheppey, which she found stressful and difficult to coordinate with collection of her son from school. She was signed off sick by her GP for two weeks.

16. The Claimant attended a return-to-work meeting with Mr Purver on 1 October 2020, with Lisa Wilson as notetaker. The Claimant expressed a desire to return to work, and was offered a phased return, which she agreed. During the meeting the Claimant was also informed that her work mobile phone usage was excessive and had been cut off for reaching its limit. The Claimant apologised and said that she has been using it for personal use, including her son using it to play games whilst in the car. The Claimant offered to pay for the mobile phone use and an agreed deduction was subsequently made from her wages.

17. The Claimant was very unhappy following the return-to-work meeting, as she had been surprised by the mention of the mobile phone usage without prior notification. In evidence, the Claimant claimed that, from this point, she felt that the Respondent wanted her to get rid of her and described herself as paranoid about this. However, this was not raised by the Claimant with the Respondent at any time prior to the disciplinary proceedings which led to her dismissal.

18. There was dispute between the parties as to whether the warning to the Claimant in the meeting on 1 October, about her phone use, constituted a disciplinary warning. However, I find that the Respondent did not rely upon this warning as part of an escalation of warnings as a basis for its eventual dismissal of the Claimant, so nothing turns on this distinction. At least from 1 October 2020, it was clear to the Claimant that the work mobile phone should not be used for personal use except in emergencies, and the Respondent relied, in part, upon this knowledge, in its later decision to dismiss.

19. The Claimant felt that an occupational health assessment should have been offered by the Respondent due to her level of upset at the return-to-work meeting, but did not ask for this. The Respondent said that upset was expected, given the Claimant's bereavement, and felt that it was very supportive of the Claimant by offering compassionate leave followed by a phased and flexible return. The Respondent was not aware of any mental health issue or concern.

20. There was an incident on 18 November 2020 when the Claimant was supposed to be working at home but was not logged into the system during working time and could not be reached by Mr Purver. The Claimant said she was going to a new school, Brook, and was delayed in a traffic incident. Mr Purver disputed this and said that he was aware there were no traffic problems in the relevant area at that time. In fact, the Claimant had attended a livery yard and had difficulties leaving due to a lorry delivery, which she considered to be 'traffic'. The Claimant stated this was an example of her being disbelieved by Mr Purver.

21. The Claimant requested, in December 2020, that she be furloughed due to her childcare commitments. The Respondent refused the furlough, on grounds that it had no business need to furlough its staff, but did agree to a period of unpaid leave for the Claimant, which the Claimant accepted and took. The Claimant's claim for wages relates to that period of unpaid leave.

22. The Claimant was on unpaid leave from 9 December 2020. Taking account of the Christmas break, she was due to return to work on 4 January 2021.

23. The Respondent later identified that the Claimant had continued to use her work mobile telephone during the period of absence from 9 December. This was raised with her in a letter of 27 January 2021 and formed part of the later disciplinary hearing and decision to dismiss.

24. By email of 1 January 2021, the Claimant, together with other employees, was sent the rota from 4 January onwards. The email also notified her that she, with two others, was rota'd to be working in the office and she should check her requirements.

25. The rota required the Claimant to start work at 9:30am on 4 January in the office. By Teams messages on 4 January 2021, the Claimant questioned Mr Purver, of the Respondent, as to why she was required to work from the office and that she felt she was being treated differently from other 'onsite techs'. She was told that she was required to attend, but she did not attend the office that day. In evidence, the Claimant admitted that she also logged off the work system at 1036 because she was upset about the response from Mr Purver.

26. Following the Teams messages, the Claimant sent an email to Mr Purver on 4 January, headed "Letter of Grievance" asking for a written explanation of why she needed to attend the office to carry out virtual visits of schools. She also asked why no other onsite technicians had been asked to attend the office to carry out virtual visits with schools.

27. The rota sent with the email of 1 January had included a Teams meeting scheduled for 5 January, which the Claimant should have attended, but did not. The Claimant later apologised for this. The Claimant gave evidence that she was on a separate Teams call with her manager at that time, who the Claimant stated was also unaware of the scheduled group Teams meeting. The Claimant objected to this non-attendance being included in her subsequent disciplinary warning, as she said her manager was not similarly disciplined.

28. Mr Purver responded to the Claimant's grievance by letter of 5 January 2021, and said:

    a. Other onsite technicians had in the past been asked to attend the office for virtual visits as well as going to onsite visits from the office;
    b. That staff need to be flexible to help the business to operate;
    c. That the Claimant had been spoken to several times about her conduct and about supporting the business;
    d. That no improvement had been seen.

29. The letter of 5 January went on to list the following areas of concern, with examples of each:

    a. Not being ready to start work, in the place she had been asked to be;
    b. Non-attendance at work and not following the schedule;
    c. Non-adherence to the working from home guidance.

30. The letter of 5 January concluded by giving the Claimant a 1st formal written warning for the above matters, and required improvement by 5 March 2021, otherwise the Claimant faced further warnings or possible dismissal.

31. During cross-examination, on being referred to the response to her grievance, being the letter of 5 January 2021 (p.85 of the Bundle), the Claimant at first said that she had never seen it before and that it had just been put in the bundle. On being referred to the email sending the letter (p.90 of the Bundle, 1715)), and to her own reply to that email (5th January 2021, 20:07), the Claimant then accepted that she had received and seen the letter responding to her grievance.

32. The Claimant sent two responses to the letter of 5 January. The first, an email of 5 January at 1753, apologising for missing the meeting of 5 January, and also alleging discrimination against her. The Claimant's discrimination claim was struck out prior to this hearing, so these allegations are not before me.

33. The Claimant's second response to the letter of 5 January was an email of 20:07 on 5 January, in which the Claimant said:

    a. The letter of 5 January contained false allegations;
    b. She had had no verbal warnings or disciplinary meetings in accordance with the disciplinary procedure;
    c. She intended to take advice and would not be available for work until she had done so.
    d. She would contact the Respondent again once she had advice or representation.

34. The Claimant did not attend work again after this date. She did not contact the Respondent with any update on her position or with regard to her return to work. However, the Claimant gave evidence that she sent an email to the Respondent asking 'what was going on'. This email was not in the Bundle and not put before the Tribunal by the Claimant. It is addressed in para 36 below.

35. On 19 January 2021, Mr Purver, of the Respondent, emailed the Claimant (p.150 of the Bundle) and said:

    a. There had been no contact from the Claimant for 13 days;
    b. She had been absent without leave since 5 January 2021;
    c. Her absence at a busy time was putting the Respondent under immense pressure;
    d. Furlough was not an option unless there was not enough work for everyone;
    e. That further excessive personal use of the mobile phone had been discovered over the past 3 months;
    f. That the Respondent would write to her again once it had taken legal advice.

36. In evidence, the Claimant denied that she had not been in contact with the Respondent between 5-19 January and said she had sent an email "asking what was going on", but that email "did not seem to be available". It was put to her in cross-examination that, if she had sent such an email, she would have replied to the email of 19 January by referring to it and saying that she had indeed been in touch. The Claimant responded that she didn't believe she had a job at this point and was stressed. Having considered the documents in the Bundle, the appeal outcome letter from Mr Curtis (p. 119) refers to having received an email from the Claimant on 18 January asking what the company's intentions were. It is not clear if Mr Purver was aware of this email when he sent his letter of 19 January, but in any event the Claimant's email did not take matters any further forward as, from what is said of it by Mr Curtis, it did not respond substantively, as she had said she would once legal advice had been taken, but only asked the company's intentions. Those intentions were stated by the Company in their letter of 19 January,

37. On 27 January 2021, Mr Curtis, of the Respondent, wrote to the Claimant and:

    a. Referred to the Claimant's three-week absence from work without any further explanation or communication to the Respondent;
    b. Said that it had become clear the Claimant had continued with personal use of her work mobile phone from 1 October to 31 December 2020, including the period of unpaid leave from 9 December onwards.
    c. Asked the Claimant to confirm her intentions and that she would return to work forthwith;
    d. Said that if she returned to work then a disciplinary hearing would be required into her absence from 5 January to date, and into the unauthorised use of the work mobile phone and laptop;
    e. Asked for a response by 5pm on 29 January 2021;
    f. Enclosed a rota including the Claimant with effect from 1 February 2021;
    g. Stated that if the Claimant was unwilling to return to work, and did not provide a satisfactory explanation, then she would be treated as having resigned with effect from Sunday 30 January 2021.

38. On 29 January 2021, by email of 11:17am, the Claimant responded to Mr Curtis and referred to his letter of "28 January 2021". The Bundle contained no letter of 28 January and Mr Purver gave evidence that there was no letter of this date, only the letter of 27 January. The Claimant was not able to produce any letter of 28 January either, but Mr Purver gave evidence that the letter of 27 January was also hand delivered to her and likely to have been on 28 January. The Respondent's position is that the Claimant was referring to the letter of 27 January, albeit received on 28 January. The Claimant maintained that she was referring to a different letter, not in the Bundle, and not in her possession. Given the chronology of the correspondence, and the content of the letter of 27 January, and the content of the Claimant's reply of 29 January, I find that the Claimant was responding to Mr Curtis' letter of 27 January.

39. In the Claimant's reply of 29 January, she states that there has been no reply to her grievance, although the Respondent has already responded to her grievance in writing on 5 January 2021 and which was acknowledged by the Claimant in an email of the same date. The Claimant then gives the Respondent another 14 days to "resolve the legal issues", and raised some defences to the allegations against her. The Claimant did not agree to return to work, or say that she would be willing to return to work. The Claimant did not address the rota she had been sent with effect from 1 February.

40. Mr Curtis emailed the Claimant on 29 January at 1515 (p.94 of the Bundle) to confirm that her grievance had been responded to on 5 January, and attaching a further copy of that letter. The email again asked her to confirm by 5pm that day that she would return to work with effect from 1 February, otherwise she would be treated as having resigned with effect from 30 January. On being referred to this email in cross-examination, the Claimant denied having received it. She was then referred to p.152 of the Bundle, which was her own copy of the same email, which she then accepted having received.

41. The Claimant did not reply to the Respondent to say that she would return to work. She gave evidence that she thought this email meant that she did not have a job anymore. On or around 29-30 January, the Claimant's work IT access was cut off.

42. The Claimant did not return to work on 1 February. Despite the Respondent's statements that it would treat the Claimant as having resigned with effect from 30 January, it did not do so. Instead, Mr Curtis wrote to the Claimant on 2 February and:

    a. Said that the Claimant had not returned to work or given a satisfactory explanation for her unauthorised absence;
    b. Had not confirmed or disputed that she was resigning;
    c. Said that the Respondent was being impacted by the lack of communication and that the Claimant was invited to disciplinary proceedings to be heard on 5 February 2021 in respect of:
        i. Unauthorised use of the company phone;
        ii. Being ready to start work in the place where she was asked to be;
        iii. Fulfilling working hours;

iv. Not logging into the helpdesk during working hours;
v. Not using the company VPN during working hours;
vi. Private use of the company laptop;
vii. Failure to attend work from 5-29 January 2021;
viii. Failure to confirm she would attend work from 1 February 2021;
ix. Failure to attend, or provide a satisfactory explanation for not attending, work on 1-2 February 2022.

43. The letter of 2nd February warned that dismissal was a possible outcome. The Claimant was provided with documentation setting out the mobile phone use, and asked to provide any documents she wished to refer to by 5pm on 4 February.

44. The disciplinary hearing was later rescheduled from 5 February and took place on 9 February 2021.

45. The note of the disciplinary hearing (referred to as a disciplinary investigation) is contained at p.101-109 of the Bundle. The hearing was chaired by Mr Purver, with Lisa Wilson present as notetaker. The Claimant was in virtual attendance. The Claimant contended in evidence that her 'line manager', Michelle, ought to have been present at the hearing, but this is not referred to in the notes of the hearing. In his evidence, Mr Purver referred to the Claimant's written employment contract, which states that he is the Claimant's manager.

46. The Claimant in her evidence accepted that the notes were an accurate note of the disciplinary hearing.

47. The Claimant in her evidence, questioned the involvement of Lisa Wilson, which she said extended beyond that of notetaker. Mr Purver said in evidence that Lisa Wilson's role had developed from when she was recruited, and she was present in the capacity of senior office administrator. However, I am satisfied that it was Mr Purver who made the disciplinary and dismissal decision following the hearing, so nothing turns on Ms Wilson's characterisation.

48. In the hearing, the Claimant was asked about the non-work-related numbers called from her work mobile. The Claimant said she had not used the phone for personal use except to call schools, and denied that they were her numbers, but the Respondent demonstrated that one number which had been called repeatedly was that given as the Claimant's emergency contact number. Then in cross-examination the Claimant admitted that it was her ex-partner's number.

49. Following the disciplinary hearing, Mr Purver wrote to the Claimant with an outcome letter of 10 February 2021 (p.100 of the Bundle). The letter upheld all of the allegations against the Claimant, and stated that in light of the Claimant's "repeated unauthorised use of the work phone, repeated refusals to attend work, failure to engage with the Respondent or to provide any legitimate explanation, the only suitable sanction was dismissal on notice".

50. The Claimant was given one month's notice of termination, with her last day of employment to be 11 March 2021. The Claimant was given a right of appeal, to be submitted within 7 days.

51. In his evidence, Mr Purver said that the main reason for dismissal was because the Claimant did not return to work. He said that, even on 9th January, if the Claimant had expressed a willingness to return to work, he would have reconsidered. Mr Purver described the Claimant as having very good relationships with the schools she visited, and that the Respondent would have liked to keep her, and had even wanted her to go full time the previous summer, but as she couldn't offer that, they had maintained the part-time arrangement that had been set up to accommodate her.

52. The Claimant appealed against her dismissal by letter of 16 February 2021 to Mr Curtis. Her appeal was on three grounds:

    a. She disagreed with the way the disciplinary process was conducted (gave evidence as to the reason for non-attendance at the meeting of 5 January 2021, and not having received a final written warning);
    b. The outcome was too severe;
    c. Employment wrongfully terminated on 30 January 2021.

53. The Claimant, on being asked in evidence what she thinks should have happened at the disciplinary hearing, if not dismissal, said:

    a. That she would have expected them to say that we should start afresh, but it was obvious when her access was cut off that the Respondent did not want her anymore.
    b. The problem was [the access] was kind of the final straw for [her].

54. In the Claimant's appeal, she did not ask to "start afresh", or refer to any willingness to return to work.

55. The appeal hearing was scheduled to be held virtually on 23 February 2021, and the Claimant was notified of this by letter of 19 February 2021. The Claimant was asked to submit any evidence upon which she intended to rely.

56. From 22-23 February 2021, there were several emails between the Claimant and Mr Curtis regarding email evidence for the appeal hearing. First, the Claimant asked that her IT access be restored. Mr Curtis offered to print and make available any emails she required. The Claimant said she could not provide dates or subject lines, and felt that Mr Curtis was being deliberately obstructive. Mr Curtis said he would be happy to discuss any emails or possible evidence as part of the appeal and could start a new investigation if he felt it was warranted after the appeal hearing.

57. The Claimant stated by email of 23 February (11:42) that she did not have a fair chance to support her appeal without access to her emails, and made what appeared to be some written submissions. Following further enquiry from Mr Curtis as to whether she would be attending the appeal hearing or whether her email constituted her appeal statement. She stated in a further

email of 1222 that she "could not possibly attend without the information she requires". The appeal proceeded in the Claimant's absence.

58. Mr Curtis wrote to the Claimant on 24 February 2021 with the outcome of the appeal, and addressed each allegation in detail. Mr Curtis stated that he had considered all previous evidence and emails, notes and correspondence, and anything presented to him since the first disciplinary hearing. Mr Curtis' decision was to uphold the Claimant's dismissal on notice. Mr Curtis also noted that the other employee that the Claimant had referred to as also running up a large mobile phone bill had done so in relation to work calls, during work time, and therefore the Respondent did not consider the situations comparable.

59. Mr Curtis gave evidence that he upheld the dismissal because it felt like the only conclusion once he had taken everything into account and had gone through all the evidence. The non-attendance at work as well, was at a very difficult time. Mr Curtis agreed with Mr Purver that the Claimant had very good relationships with clients and, had she returned to work, she would have gone back to work with those clients.

60. The Claimant's last day of employment with the Respondent was 11 March 2021.

Analysis and Conclusions

Unfair Dismissal

The Law

61. Section 98 of the Employment Rights Act 1996 ("ERA") provides so far as 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 it 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."

62. In **Orr v Milton Keynes Council** [2011] ICR 704 at [78] Aikens LJ summarised the correct approach to the application of section 98 in misconduct cases (a summary which incorporates the well-known test described in **British Homes Stores Ltd v Burchell** [1978] IRLR 379):

"(1) The reason for the dismissal of an employee is a set of facts known to an employer, or it may be a set of beliefs held by him, which causes him to dismiss an employee.

(2) An employer cannot rely on facts of which he did not know at the time of the dismissal of an employee to establish that the "real reason" for dismissing the employee was one of those set out in the statute or was of a kind that justified the dismissal of the employee holding the position he did.

(3) Once the employer has established before an employment tribunal that the "real reason" for dismissing the employee is one within what is now section 98(1)(b), ie that it was a "valid reason", the tribunal has to decide whether the dismissal was fair or unfair. That requires, first and foremost, the application of the statutory test set out in section 98(4)(a).

(4) In applying that subsection, the employment tribunal must decide on the reasonableness of the employer's decision to dismiss for the 'real reason'. That involves a consideration, at least in misconduct cases, of three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of; and, thirdly, did the employer have reasonable grounds for that belief.

If the answer to each of those questions is 'yes', the employment tribunal must then decide on the reasonableness of the response of the employer.

(5) In doing the exercise set out at (4), the employment tribunal must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views, whether the employer has acted within a 'band or range of reasonable responses' to the particular misconduct found of the particular employee. If it has, then the employer's decision to dismiss will be reasonable. But that is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse.

(6) The employment tribunal must not simply consider whether *they* think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The tribunal must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which 'a reasonable employer might have adopted'.

(7) A particular application of (5) and (6) is that an employment tribunal may not substitute their own evaluation of a witness for that of the employer at the time of its investigation and dismissal, save in exceptional circumstances.

(8) An employment tribunal must focus their attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any appeal process) and not on whether in fact the employee has suffered an injustice."

63. In **Turner v East Midlands Trains Ltd** [2013] ICR 525, Elias LJ at [16]-[17] added:

"The band of reasonable responses test does not simply apply to the question whether the sanction of dismissal was permissible; it bears upon all aspects of the dismissal process. This includes whether the procedures adopted by the employer were adequate: see *Whitbread plc (trading as Whitbread Medway Inns) v Hall* [2001] ICR 699; and whether the pre-dismissal investigation was fair and appropriate: see *J Sainsbury plc v Hitt* [2003] ICR 111."

Conclusions on unfair dismissal

64. The Respondent tried as far as it could to support the Claimant, and, contrary to the Claimant's assertions, was not looking for a way to terminate her employment.

65. The Claimant gave evidence that she felt that the Respondent was targeting her for termination, but this was not supported by the evidence. The Respondent made considerable effort to accommodate the Claimant and would, even at a late stage, have accepted if the Claimant had agreed to return to work.

66. The Claimant did not want to work in the office, but the Respondent's request that she do so on a rota basis was reasonable, and in accordance with her contract, which contained no right to work from home.

67. I am satisfied that the Respondent, in the person of Mr Purver, in deciding to dismiss, did so because he genuinely believed that the Claimant had committed misconduct. This was the reason, and the only reason, for dismissal.

68. I am also satisfied that Mr Purver's belief was held on reasonable grounds, following a reasonable investigation and process.

69. There were 9 grounds considered in the disciplinary hearing which led to the Claimant's dismissal. Although all were upheld, I accept the evidence from Mr Purver that the main reason for the dismissal was the Claimant's unauthorised absence from work, and her failure to return or to make clear her intentions.

70. Given the Claimant's absence from work, over an extended period from 5 January to 9 February when the disciplinary hearing took place, it was put to me in submissions for the Respondent that even a summary dismissal would have been within the band of reasonable responses. This did not occur, but I am satisfied that a sanction of dismissal on notice, as occurred with the Claimant, was within the band of reasonable responses of a reasonable employer.

71. The Claimant did not attend the appeal hearing, but it was reasonable for

Mr Curtis to hold the appeal hearing in her absence as:

a. The Claimant was aware of the hearing and date and had put forward written submissions to be considered;
b. Although the Claimant had said she could not defend herself without access to her emails, the Respondent's offer to print what she specified, or otherwise to discuss the position with her during the appeal hearing, and potentially to reinvestigate, was reasonable;
c. The main allegation (as stated in evidence by Mr Purver and Mr Curtis) was the Claimant's absence from work, and failure to return, and on which further emails were unlikely to have advanced the Claimant's position;
d. Similarly, in respect of the mobile phone usage, the call logs had been provided to the Claimant and were available to Mr Curtis;
e. Mr Curtis had access to all the documentation from the initial disciplinary hearing, and reviewed all of this as part of the appeal.

72. I am satisfied that Mr Curtis upheld the decision to dismiss because he genuinely believed that the Claimant had committed misconduct. This was the reason, and the only reason, for upholding the dismissal.

73. I am also satisfied that Mr Curtis' belief was held on reasonable grounds, following a reasonable appeal process, which included a reconsideration of all the evidence from the previous hearing, together with the Claimant's further submissions in respect of the appeal.

74. There are matters which represented flaws in the disciplinary process, but which are insufficient to render the dismissal unfair. I have set these out in turn, and addressed why each does not render the dismissal unfair.

a. The issue of a verbal warning following the meeting of 1 October 2020 without any prior disciplinary process.

The Respondent may have felt that having discussed the work mobile phone usage with the Claimant in a return-to-work meeting, and given that she apologised and offered to pay the bill, that it was reasonable to have issued a warning. However, there was ongoing dispute between the parties as to whether the warning constituted a disciplinary warning, and the Claimant reasonably questioned how and why she was issued a warning without first being invited to a disciplinary hearing. However, as I have stated in para 18 of this Judgment, the Respondent did not rely on escalation of warnings in its dismissal of the Claimant, but said that the allegations addressed in the hearing of 9 February were in themselves sufficient to justify dismissal. Therefore, nothing turns on the warning in October 2020.

b. The issue of a 1st written warning in the letter of 5 January 2021, without any prior disciplinary process.

The Respondent again issued a warning to the Claimant without calling her to a disciplinary hearing at which she could address the allegations against her. There was no process followed, and therefore no fair process in respect of this warning. However, the later disciplinary

hearing of 9 February did not rely upon escalations of this warning in order to reach the sanction of dismissal. The allegations addressed in the hearing of 9 February to some extent overlapped with the previous allegations, but did not build on or rely on, the warning issued on 5 January. I am satisfied that even in the absence of the issue of the 1st written warning, the same disciplinary outcome would have been reached in the hearing of 9 February.

c. The Respondent's letter of 27 January 2021 stating that the Claimant would be deemed to have resigned if she failed to return or respond.

This correspondence was unhelpful and would likely be ineffective in its attempts to deem a resignation. The Claimant was understandably confused by this, including when submitting her appeal and referring to employment termination as of 30 January 2021. The Respondent appears to have recognised these issues by not seeking to rely upon any resignation by the Claimant (either at the time, or before this Tribunal), but by instead writing to the Claimant on 2 February and inviting her to a disciplinary hearing. The Respondent at this stage clearly accepted that her employment was ongoing, and the Claimant, despite her queries, participated in the hearing of 9 February, and submitted an appeal, all of which are consistent with her acceptance that her employment continued until terminated on notice by the Respondent. The Respondent was somewhat disingenuous with the Claimant in saying, during the hearing of 9 February, that the Respondent had not referred to a termination on 30 January. I find that the Respondent instead had thought better of its approach and sought to remedy this by means of the letter of 2 February, and by not pursuing its assertion of deemed resignation. The assertion of a deemed resignation did not form part of the disciplinary hearing of 9 February, but any failure was in any event cured by the letter of 2 February and the full disciplinary and appeal process which took place before the termination of the Claimant's employment.

75. The Claimant also made other criticisms of the Respondent's approach which I do not accept, or do not accept had any bearing on the decision to dismiss. The Claimant has alleged an unfair disparity of treatment between:

a. Herself and her manager, who she says also missed the Teams meeting of 5 January 2021, but was not disciplined.

The Respondent accepted in evidence that the manager, Michelle, was not disciplined, but that the matter was brought up with her. In the Claimant's case, this non-attendance was included in the 1st written warning of 5 January. There was a difference in treatment, However, this allegation was excluded from the disciplinary proceedings of 9 February, and expressly stated by Mr Curtis to be excluded from the allegations when the appeal was considered on 23 February 2021. It did not form part of the decision to dismiss or render the dismissal unfair.

b. Herself and another employee, Sameer, who had also used a lot of data on his work phone.

The Respondent confirmed to the Claimant, during the disciplinary process, that this other employee's usage related to work calls during working time.

c. Herself and other employees who she says were not asked to work from the office.

I have accepted the Respondent's evidence that employees were asked to attend the office on a rota basis, and I was taken to a rota in the Bundle (p.79) which shows that the Claimant was not alone in being rota'd to work in the office.

76. In summary therefore, I conclude that the disciplinary process as whole was fair, and the disciplinary and appeal outcomes were fair. The complaint of unfair dismissal accordingly fails.

Remedy

77. The question of remedy in respect of unfair dismissal does not therefore arise. However, I make the following findings for completeness and in case I am wrong on the question of unfair dismissal.

Contributory fault

78. Section 123(6) ERA provides that where the tribunal finds that the claimant's dismissal was to any extent caused or contributed to by any action of his, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

79. The Claimant was absent from work, without authorisation, for almost one month. For that reason, I conclude that the Claimant was guilty of blameworthy conduct. That conduct directly led to her dismissal. Had she been unfairly dismissed, I would have reduced any compensatory award by 100%.

Polkey (**Polkey v AE Dayton Services Ltd** [1987] UKHL 8)

80. If the procedural flaws that I identified were, contrary to my findings, sufficient to make the dismissal unfair, then the issue of **Polkey** would have arisen. I would have concluded that had the Respondent acted fairly, it would have dismissed the Claimant in any event, due primarily to the Claimant's unauthorised absence and failure to return to work.

81. For these reasons, if the Claimant would otherwise have been entitled to any compensatory award, I would have reduced it to zero by applying the principles set out in **Polkey**.

Wages

The Law

82. S.13 of the Employment Rights Act 1996 provides, as far as is relevant:

(1) An employer shall not make a deduction from wages of a worker employed by him unless—
(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

83. S.27 of the Employment Rights Act 1996 provides, as far as is relevant:

(1) In this Part *"wages"* , in relation to a worker, means any sums payable to the worker in connection with his employment, including—
(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,

Conclusions in respect of Wages

84. The Claimant made a request for furlough on 8 December 2020, but this was refused by the Respondent. The Claimant was not in fact furloughed in December 2020 or at any time thereafter.

85. The Claimant sought to be furloughed due to her childcare commitments and asserted that this was an eligible ground for furlough. However, regardless of eligibility, the Claimant had no right under the Coronavirus Support Scheme then in place to insist upon being furloughed against the wishes of the Respondent.

86. The Respondent did not agree to furlough the Claimant as it had work for her to do, but it did agree to a period of unpaid leave in order to accommodate her.

87. The Claimant was unhappy that furlough was refused, but she accepted the offer of unpaid leave. As such, she was not entitled to any pay.

88. For there to be a valid claim for an unlawful deduction under S.13 ERA, there first has to be an entitlement to pay, from which a deduction has been made. The Claimant had no entitlement to pay during her period of agreed unpaid leave.

89. The Claimant's claim, from her evidence, is founded on her assertion that the Respondent should have agreed to furlough instead of offering unpaid leave. The Claimant therefore seeks to recover the wages she would have received had she been on furlough instead of on unpaid leave. This claim is not well-founded and fails.

Conclusion

90. The Claimant's claims of unfair dismissal, and unlawful deduction from wages, fail and are dismissed.

Employment Judge Hamour

Date 13 November 2022

EMPLOYMENT TRIBUNALS

Claimant: **Gemma Burt-Davies**

Respondent: **Primary Technologies SE Ltd**

Heard at: **London South, by video (CVP)**

On: **29 & 30 September 2022**

Before: **Employment Judge Hamour (sitting alone)**

Representation
Claimant: In person.
Respondent: Paul Tapsell, Counsel

RESERVED JUDGMENT

The Claimant's claims of unfair dismissal, and for unlawful deduction from wages, fail and are dismissed.

REASONS

The Parties

1. The Respondent is a company providing IT services and support across the South East, primarily to schools and colleges. Lewis Purver and Matthew Curtis are Directors of the Respondent.

2. The Claimant was employed by the Respondent as an IT consultant. She commenced employment in March 2018 and was dismissed on notice with effect from 11 March 2021, following a disciplinary hearing in respect of several allegations, including failure to attend work, and unauthorised use of a work mobile phone.

The Issues

3. By an ET1 claim form dated 30 March 2021, the Claimant contended that her dismissal was unfair, and also that she was owed wages or other payments. In her evidence the Claimant clarified that she was referring to

wages not paid to her whilst she was on unpaid leave, but felt she should have been offered furlough. The ET1 also included a claim of indirect discrimination, but this was struck out by an Order dated 16 May 2022.

4. The Respondent resisted the claims in full. It contended that the dismissal was fair on grounds of conduct due to the Claimant's refusal to attend work, and due to excessive use of a work mobile phone. The Respondent also contended that it had need of the Claimant's services and so could not accept her request to be furloughed.

5. Following the termination of the Claimant's employment, the Respondent issued County Court proceedings against the Claimant for the return of certain company property. Those proceedings were mentioned in evidence by the Claimant as an example of the Respondent being against her.

The Evidence

6. The Respondent provided a bundle of document which numbered 155 pages. It included a witness statement of the Claimant, together with attachments, which the Claimant had separately provided to the Employment Tribunal. I also had before me witness statements from Mr Purver and Mr Curtis.

7. After clarifying the remaining issues with the parties, I heard evidence from Mr Purver and Mr Curtis for the Respondent, who respectively heard the disciplinary hearing, and the appeal hearing. I also heard evidence from the Claimant.

The Facts

8. The Claimant was a valued employee of the Respondent who had good relationships with the schools that she supported.

9. She was originally recruited to a full-time role, but this was later reduced to part-time at the Claimant's request so as to accommodate her childcare commitments.

10. The Claimant accepted that at this time the Respondent was flexible with her and with the timetabling of her work to fit around her childcare obligations.

11. During the first coronavirus lockdown, the Respondent had furloughed its staff, including the Claimant. Later, when restrictions had changed, its staff were deemed key workers due to their support for educational establishments, and the Respondent's business continued. It therefore required its staff to continue working, either from home, or at client premises when required, with a rota'd presence in the office to support functions which could not be carried out remotely.

12. Working from home guidance was issued to the Respondent's employees on 1 April 2020. Receipt was acknowledged by the Claimant the same day. Amongst other things, it specified that, when working at home, employees

must be logged onto the system and contactable on their work phones at all times during working hours.

13. In his evidence, Mr Purver was confused as to whether or not there was a requirement for the work computer to be on at all times, but the Claimant accepted in evidence that she could not carry out her duties without being logged into either her computer or her phone.

14. The Claimant suffered a bereavement with the death of one of her two sons in August 2020, following which she was granted a period of compassionate leave from work.

15. Following the compassionate leave, the Claimant returned briefly to work, but was assigned to work at locations in the Isle of Sheppey, which she found stressful and difficult to coordinate with collection of her son from school. She was signed off sick by her GP for two weeks.

16. The Claimant attended a return-to-work meeting with Mr Purver on 1 October 2020, with Lisa Wilson as notetaker. The Claimant expressed a desire to return to work, and was offered a phased return, which she agreed. During the meeting the Claimant was also informed that her work mobile phone usage was excessive and had been cut off for reaching its limit. The Claimant apologised and said that she has been using it for personal use, including her son using it to play games whilst in the car. The Claimant offered to pay for the mobile phone use and an agreed deduction was subsequently made from her wages.

17. The Claimant was very unhappy following the return-to-work meeting, as she had been surprised by the mention of the mobile phone usage without prior notification. In evidence, the Claimant claimed that, from this point, she felt that the Respondent wanted her to get rid of her and described herself as paranoid about this. However, this was not raised by the Claimant with the Respondent at any time prior to the disciplinary proceedings which led to her dismissal.

18. There was dispute between the parties as to whether the warning to the Claimant in the meeting on 1 October, about her phone use, constituted a disciplinary warning. However, I find that the Respondent did not rely upon this warning as part of an escalation of warnings as a basis for its eventual dismissal of the Claimant, so nothing turns on this distinction. At least from 1 October 2020, it was clear to the Claimant that the work mobile phone should not be used for personal use except in emergencies, and the Respondent relied, in part, upon this knowledge, in its later decision to dismiss.

19. The Claimant felt that an occupational health assessment should have been offered by the Respondent due to her level of upset at the return-to-work meeting, but did not ask for this. The Respondent said that upset was expected, given the Claimant’s bereavement, and felt that it was very supportive of the Claimant by offering compassionate leave followed by a phased and flexible return. The Respondent was not aware of any mental health issue or concern.

20. There was an incident on 18 November 2020 when the Claimant was supposed to be working at home but was not logged into the system during working time and could not be reached by Mr Purver. The Claimant said she was going to a new school, Brook, and was delayed in a traffic incident. Mr Purver disputed this and said that he was aware there were no traffic problems in the relevant area at that time. In fact, the Claimant had attended a livery yard and had difficulties leaving due to a lorry delivery, which she considered to be 'traffic'. The Claimant stated this was an example of her being disbelieved by Mr Purver.

21. The Claimant requested, in December 2020, that she be furloughed due to her childcare commitments. The Respondent refused the furlough, on grounds that it had no business need to furlough its staff, but did agree to a period of unpaid leave for the Claimant, which the Claimant accepted and took. The Claimant's claim for wages relates to that period of unpaid leave.

22. The Claimant was on unpaid leave from 9 December 2020. Taking account of the Christmas break, she was due to return to work on 4 January 2021.

23. The Respondent later identified that the Claimant had continued to use her work mobile telephone during the period of absence from 9 December. This was raised with her in a letter of 27 January 2021 and formed part of the later disciplinary hearing and decision to dismiss.

24. By email of 1 January 2021, the Claimant, together with other employees, was sent the rota from 4 January onwards. The email also notified her that she, with two others, was rota'd to be working in the office and she should check her requirements.

25. The rota required the Claimant to start work at 9:30am on 4 January in the office. By Teams messages on 4 January 2021, the Claimant questioned Mr Purver, of the Respondent, as to why she was required to work from the office and that she felt she was being treated differently from other 'onsite techs'. She was told that she was required to attend, but she did not attend the office that day. In evidence, the Claimant admitted that she also logged off the work system at 1036 because she was upset about the response from Mr Purver.

26. Following the Teams messages, the Claimant sent an email to Mr Purver on 4 January, headed "Letter of Grievance" asking for a written explanation of why she needed to attend the office to carry out virtual visits of schools. She also asked why no other onsite technicians had been asked to attend the office to carry out virtual visits with schools.

27. The rota sent with the email of 1 January had included a Teams meeting scheduled for 5 January, which the Claimant should have attended, but did not. The Claimant later apologised for this. The Claimant gave evidence that she was on a separate Teams call with her manager at that time, who the Claimant stated was also unaware of the scheduled group Teams meeting. The Claimant objected to this non-attendance being included in her subsequent disciplinary warning, as she said her manager was not similarly disciplined.

28. Mr Purver responded to the Claimant's grievance by letter of 5 January 2021, and said:

    a. Other onsite technicians had in the past been asked to attend the office for virtual visits as well as going to onsite visits from the office;
    b. That staff need to be flexible to help the business to operate;
    c. That the Claimant had been spoken to several times about her conduct and about supporting the business;
    d. That no improvement had been seen.

29. The letter of 5 January went on to list the following areas of concern, with examples of each:

    a. Not being ready to start work, in the place she had been asked to be;
    b. Non-attendance at work and not following the schedule;
    c. Non-adherence to the working from home guidance.

30. The letter of 5 January concluded by giving the Claimant a 1st formal written warning for the above matters, and required improvement by 5 March 2021, otherwise the Claimant faced further warnings or possible dismissal.

31. During cross-examination, on being referred to the response to her grievance, being the letter of 5 January 2021 (p.85 of the Bundle), the Claimant at first said that she had never seen it before and that it had just been put in the bundle. On being referred to the email sending the letter (p.90 of the Bundle, 1715)), and to her own reply to that email (5th January 2021, 20:07), the Claimant then accepted that she had received and seen the letter responding to her grievance.

32. The Claimant sent two responses to the letter of 5 January. The first, an email of 5 January at 1753, apologising for missing the meeting of 5 January, and also alleging discrimination against her. The Claimant's discrimination claim was struck out prior to this hearing, so these allegations are not before me.

33. The Claimant's second response to the letter of 5 January was an email of 20:07 on 5 January, in which the Claimant said:

    a. The letter of 5 January contained false allegations;
    b. She had had no verbal warnings or disciplinary meetings in accordance with the disciplinary procedure;
    c. She intended to take advice and would not be available for work until she had done so.
    d. She would contact the Respondent again once she had advice or representation.

34. The Claimant did not attend work again after this date. She did not contact the Respondent with any update on her position or with regard to her return to work. However, the Claimant gave evidence that she sent an email to the Respondent asking 'what was going on'. This email was not in the Bundle and not put before the Tribunal by the Claimant. It is addressed in para 36 below.

35. On 19 January 2021, Mr Purver, of the Respondent, emailed the Claimant (p.150 of the Bundle) and said:

    a. There had been no contact from the Claimant for 13 days;
    b. She had been absent without leave since 5 January 2021;
    c. Her absence at a busy time was putting the Respondent under immense pressure;
    d. Furlough was not an option unless there was not enough work for everyone;
    e. That further excessive personal use of the mobile phone had been discovered over the past 3 months;
    f. That the Respondent would write to her again once it had taken legal advice.

36. In evidence, the Claimant denied that she had not been in contact with the Respondent between 5-19 January and said she had sent an email "asking what was going on", but that email "did not seem to be available". It was put to her in cross-examination that, if she had sent such an email, she would have replied to the email of 19 January by referring to it and saying that she had indeed been in touch. The Claimant responded that she didn't believe she had a job at this point and was stressed. Having considered the documents in the Bundle, the appeal outcome letter from Mr Curtis (p. 119) refers to having received an email from the Claimant on 18 January asking what the company's intentions were. It is not clear if Mr Purver was aware of this email when he sent his letter of 19 January, but in any event the Claimant's email did not take matters any further forward as, from what is said of it by Mr Curtis, it did not respond substantively, as she had said she would once legal advice had been taken, but only asked the company's intentions. Those intentions were stated by the Company in their letter of 19 January,

37. On 27 January 2021, Mr Curtis, of the Respondent, wrote to the Claimant and:

    a. Referred to the Claimant's three-week absence from work without any further explanation or communication to the Respondent;
    b. Said that it had become clear the Claimant had continued with personal use of her work mobile phone from 1 October to 31 December 2020, including the period of unpaid leave from 9 December onwards.
    c. Asked the Claimant to confirm her intentions and that she would return to work forthwith;
    d. Said that if she returned to work then a disciplinary hearing would be required into her absence from 5 January to date, and into the unauthorised use of the work mobile phone and laptop;
    e. Asked for a response by 5pm on 29 January 2021;
    f. Enclosed a rota including the Claimant with effect from 1 February 2021;
    g. Stated that if the Claimant was unwilling to return to work, and did not provide a satisfactory explanation, then she would be treated as having resigned with effect from Sunday 30 January 2021.

38. On 29 January 2021, by email of 11:17am, the Claimant responded to Mr Curtis and referred to his letter of "28 January 2021". The Bundle contained no letter of 28 January and Mr Purver gave evidence that there was no letter of this date, only the letter of 27 January. The Claimant was not able to produce any letter of 28 January either, but Mr Purver gave evidence that the letter of 27 January was also hand delivered to her and likely to have been on 28 January. The Respondent's position is that the Claimant was referring to the letter of 27 January, albeit received on 28 January. The Claimant maintained that she was referring to a different letter, not in the Bundle, and not in her possession. Given the chronology of the correspondence, and the content of the letter of 27 January, and the content of the Claimant's reply of 29 January, I find that the Claimant was responding to Mr Curtis' letter of 27 January.

39. In the Claimant's reply of 29 January, she states that there has been no reply to her grievance, although the Respondent has already responded to her grievance in writing on 5 January 2021 and which was acknowledged by the Claimant in an email of the same date. The Claimant then gives the Respondent another 14 days to "resolve the legal issues", and raised some defences to the allegations against her. The Claimant did not agree to return to work, or say that she would be willing to return to work. The Claimant did not address the rota she had been sent with effect from 1 February.

40. Mr Curtis emailed the Claimant on 29 January at 1515 (p.94 of the Bundle) to confirm that her grievance had been responded to on 5 January, and attaching a further copy of that letter. The email again asked her to confirm by 5pm that day that she would return to work with effect from 1 February, otherwise she would be treated as having resigned with effect from 30 January. On being referred to this email in cross-examination, the Claimant denied having received it. She was then referred to p.152 of the Bundle, which was her own copy of the same email, which she then accepted having received.

41. The Claimant did not reply to the Respondent to say that she would return to work. She gave evidence that she thought this email meant that she did not have a job anymore. On or around 29-30 January, the Claimant's work IT access was cut off.

42. The Claimant did not return to work on 1 February. Despite the Respondent's statements that it would treat the Claimant as having resigned with effect from 30 January, it did not do so. Instead, Mr Curtis wrote to the Claimant on 2 February and:

    a. Said that the Claimant had not returned to work or given a satisfactory explanation for her unauthorised absence;
    b. Had not confirmed or disputed that she was resigning;
    c. Said that the Respondent was being impacted by the lack of communication and that the Claimant was invited to disciplinary proceedings to be heard on 5 February 2021 in respect of:
        i. Unauthorised use of the company phone;
        ii. Being ready to start work in the place where she was asked to be;
        iii. Fulfilling working hours;

iv. Not logging into the helpdesk during working hours;
v. Not using the company VPN during working hours;
vi. Private use of the company laptop;
vii. Failure to attend work from 5-29 January 2021;
viii. Failure to confirm she would attend work from 1 February 2021;
ix. Failure to attend, or provide a satisfactory explanation for not attending, work on 1-2 February 2022.

43. The letter of 2nd February warned that dismissal was a possible outcome. The Claimant was provided with documentation setting out the mobile phone use, and asked to provide any documents she wished to refer to by 5pm on 4 February.

44. The disciplinary hearing was later rescheduled from 5 February and took place on 9 February 2021.

45. The note of the disciplinary hearing (referred to as a disciplinary investigation) is contained at p.101-109 of the Bundle. The hearing was chaired by Mr Purver, with Lisa Wilson present as notetaker. The Claimant was in virtual attendance. The Claimant contended in evidence that her ‘line manager’, Michelle, ought to have been present at the hearing, but this is not referred to in the notes of the hearing. In his evidence, Mr Purver referred to the Claimant’s written employment contract, which states that he is the Claimant’s manager.

46. The Claimant in her evidence accepted that the notes were an accurate note of the disciplinary hearing.

47. The Claimant in her evidence, questioned the involvement of Lisa Wilson, which she said extended beyond that of notetaker. Mr Purver said in evidence that Lisa Wilson’s role had developed from when she was recruited, and she was present in the capacity of senior office administrator. However, I am satisfied that it was Mr Purver who made the disciplinary and dismissal decision following the hearing, so nothing turns on Ms Wilson’s characterisation.

48. In the hearing, the Claimant was asked about the non-work-related numbers called from her work mobile. The Claimant said she had not used the phone for personal use except to call schools, and denied that they were her numbers, but the Respondent demonstrated that one number which had been called repeatedly was that given as the Claimant’s emergency contact number. Then in cross-examination the Claimant admitted that it was her ex-partner’s number.

49. Following the disciplinary hearing, Mr Purver wrote to the Claimant with an outcome letter of 10 February 2021 (p.100 of the Bundle). The letter upheld all of the allegations against the Claimant, and stated that in light of the Claimant’s “repeated unauthorised use of the work phone, repeated refusals to attend work, failure to engage with the Respondent or to provide any legitimate explanation, the only suitable sanction was dismissal on notice”.

50. The Claimant was given one month's notice of termination, with her last day of employment to be 11 March 2021. The Claimant was given a right of appeal, to be submitted within 7 days.

51. In his evidence, Mr Purver said that the main reason for dismissal was because the Claimant did not return to work. He said that, even on 9th January, if the Claimant had expressed a willingness to return to work, he would have reconsidered. Mr Purver described the Claimant as having very good relationships with the schools she visited, and that the Respondent would have liked to keep her, and had even wanted her to go full time the previous summer, but as she couldn't offer that, they had maintained the part-time arrangement that had been set up to accommodate her.

52. The Claimant appealed against her dismissal by letter of 16 February 2021 to Mr Curtis. Her appeal was on three grounds:

    a. She disagreed with the way the disciplinary process was conducted (gave evidence as to the reason for non-attendance at the meeting of 5 January 2021, and not having received a final written warning);
    b. The outcome was too severe;
    c. Employment wrongfully terminated on 30 January 2021.

53. The Claimant, on being asked in evidence what she thinks should have happened at the disciplinary hearing, if not dismissal, said:

    a. That she would have expected them to say that we should start afresh, but it was obvious when her access was cut off that the Respondent did not want her anymore.
    b. The problem was [the access] was kind of the final straw for [her].

54. In the Claimant's appeal, she did not ask to "start afresh", or refer to any willingness to return to work.

55. The appeal hearing was scheduled to be held virtually on 23 February 2021, and the Claimant was notified of this by letter of 19 February 2021. The Claimant was asked to submit any evidence upon which she intended to rely.

56. From 22-23 February 2021, there were several emails between the Claimant and Mr Curtis regarding email evidence for the appeal hearing. First, the Claimant asked that her IT access be restored. Mr Curtis offered to print and make available any emails she required. The Claimant said she could not provide dates or subject lines, and felt that Mr Curtis was being deliberately obstructive. Mr Curtis said he would be happy to discuss any emails or possible evidence as part of the appeal and could start a new investigation if he felt it was warranted after the appeal hearing.

57. The Claimant stated by email of 23 February (11:42) that she did not have a fair chance to support her appeal without access to her emails, and made what appeared to be some written submissions. Following further enquiry from Mr Curtis as to whether she would be attending the appeal hearing or whether her email constituted her appeal statement. She stated in a further

email of 1222 that she “could not possibly attend without the information she requires”. The appeal proceeded in the Claimant’s absence.

58. Mr Curtis wrote to the Claimant on 24 February 2021 with the outcome of the appeal, and addressed each allegation in detail. Mr Curtis stated that he had considered all previous evidence and emails, notes and correspondence, and anything presented to him since the first disciplinary hearing. Mr Curtis’ decision was to uphold the Claimant’s dismissal on notice. Mr Curtis also noted that the other employee that the Claimant had referred to as also running up a large mobile phone bill had done so in relation to work calls, during work time, and therefore the Respondent did not consider the situations comparable.

59. Mr Curtis gave evidence that he upheld the dismissal because it felt like the only conclusion once he had taken everything into account and had gone through all the evidence. The non-attendance at work as well, was at a very difficult time. Mr Curtis agreed with Mr Purver that the Claimant had very good relationships with clients and, had she returned to work, she would have gone back to work with those clients.

60. The Claimant’s last day of employment with the Respondent was 11 March 2021.

<u>Analysis and Conclusions</u>

<u>Unfair Dismissal</u>

<u>The Law</u>

61. Section 98 of the Employment Rights Act 1996 (“ERA”) provides so far as 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 it 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."

62. In **Orr v Milton Keynes Council** [2011] ICR 704 at [78] Aikens LJ summarised the correct approach to the application of section 98 in misconduct cases (a summary which incorporates the well-known test described in **British Homes Stores Ltd v Burchell** [1978] IRLR 379):

"(1) The reason for the dismissal of an employee is a set of facts known to an employer, or it may be a set of beliefs held by him, which causes him to dismiss an employee.

(2) An employer cannot rely on facts of which he did not know at the time of the dismissal of an employee to establish that the "real reason" for dismissing the employee was one of those set out in the statute or was of a kind that justified the dismissal of the employee holding the position he did.

(3) Once the employer has established before an employment tribunal that the "real reason" for dismissing the employee is one within what is now section 98(1)(b), ie that it was a "valid reason", the tribunal has to decide whether the dismissal was fair or unfair. That requires, first and foremost, the application of the statutory test set out in section 98(4)(a).

(4) In applying that subsection, the employment tribunal must decide on the reasonableness of the employer's decision to dismiss for the 'real reason'. That involves a consideration, at least in misconduct cases, of three aspects of the employer's conduct. First, did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case; secondly, did the employer believe that the employee was guilty of the misconduct complained of; and, thirdly, did the employer have reasonable grounds for that belief.

If the answer to each of those questions is 'yes', the employment tribunal must then decide on the reasonableness of the response of the employer.

(5) In doing the exercise set out at (4), the employment tribunal must consider, by the objective standards of the hypothetical reasonable employer, rather than by reference to its own subjective views, whether the employer has acted within a 'band or range of reasonable responses' to the particular misconduct found of the particular employee. If it has, then the employer's decision to dismiss will be reasonable. But that is not the same thing as saying that a decision of an employer to dismiss will only be regarded as unreasonable if it is shown to be perverse.

(6) The employment tribunal must not simply consider whether *they* think that the dismissal was fair and thereby substitute their decision as to what was the right course to adopt for that of the employer. The tribunal must determine whether the decision of the employer to dismiss the employee fell within the band of reasonable responses which 'a reasonable employer might have adopted'.

(7) A particular application of (5) and (6) is that an employment tribunal may not substitute their own evaluation of a witness for that of the employer at the time of its investigation and dismissal, save in exceptional circumstances.

(8) An employment tribunal must focus their attention on the fairness of the conduct of the employer at the time of the investigation and dismissal (or any appeal process) and not on whether in fact the employee has suffered an injustice."

63. In **Turner v East Midlands Trains Ltd** [2013] ICR 525, Elias LJ at [16]-[17] added:

"The band of reasonable responses test does not simply apply to the question whether the sanction of dismissal was permissible; it bears upon all aspects of the dismissal process. This includes whether the procedures adopted by the employer were adequate: see *Whitbread plc (trading as Whitbread Medway Inns) v Hall* [2001] ICR 699; and whether the pre-dismissal investigation was fair and appropriate: see *J Sainsbury plc v Hitt* [2003] ICR 111."

Conclusions on unfair dismissal

64. The Respondent tried as far as it could to support the Claimant, and, contrary to the Claimant's assertions, was not looking for a way to terminate her employment.

65. The Claimant gave evidence that she felt that the Respondent was targeting her for termination, but this was not supported by the evidence. The Respondent made considerable effort to accommodate the Claimant and would, even at a late stage, have accepted if the Claimant had agreed to return to work.

66. The Claimant did not want to work in the office, but the Respondent's request that she do so on a rota basis was reasonable, and in accordance with her contract, which contained no right to work from home.

67. I am satisfied that the Respondent, in the person of Mr Purver, in deciding to dismiss, did so because he genuinely believed that the Claimant had committed misconduct. This was the reason, and the only reason, for dismissal.

68. I am also satisfied that Mr Purver's belief was held on reasonable grounds, following a reasonable investigation and process.

69. There were 9 grounds considered in the disciplinary hearing which led to the Claimant's dismissal. Although all were upheld, I accept the evidence from Mr Purver that the main reason for the dismissal was the Claimant's unauthorised absence from work, and her failure to return or to make clear her intentions.

70. Given the Claimant's absence from work, over an extended period from 5 January to 9 February when the disciplinary hearing took place, it was put to me in submissions for the Respondent that even a summary dismissal would have been within the band of reasonable responses. This did not occur, but I am satisfied that a sanction of dismissal on notice, as occurred with the Claimant, was within the band of reasonable responses of a reasonable employer.

71. The Claimant did not attend the appeal hearing, but it was reasonable for

Mr Curtis to hold the appeal hearing in her absence as:

a. The Claimant was aware of the hearing and date and had put forward written submissions to be considered;
b. Although the Claimant had said she could not defend herself without access to her emails, the Respondent's offer to print what she specified, or otherwise to discuss the position with her during the appeal hearing, and potentially to reinvestigate, was reasonable;
c. The main allegation (as stated in evidence by Mr Purver and Mr Curtis) was the Claimant's absence from work, and failure to return, and on which further emails were unlikely to have advanced the Claimant's position;
d. Similarly, in respect of the mobile phone usage, the call logs had been provided to the Claimant and were available to Mr Curtis;
e. Mr Curtis had access to all the documentation from the initial disciplinary hearing, and reviewed all of this as part of the appeal.

72. I am satisfied that Mr Curtis upheld the decision to dismiss because he genuinely believed that the Claimant had committed misconduct. This was the reason, and the only reason, for upholding the dismissal.

73. I am also satisfied that Mr Curtis' belief was held on reasonable grounds, following a reasonable appeal process, which included a reconsideration of all the evidence from the previous hearing, together with the Claimant's further submissions in respect of the appeal.

74. There are matters which represented flaws in the disciplinary process, but which are insufficient to render the dismissal unfair. I have set these out in turn, and addressed why each does not render the dismissal unfair.

a. The issue of a verbal warning following the meeting of 1 October 2020 without any prior disciplinary process.

The Respondent may have felt that having discussed the work mobile phone usage with the Claimant in a return-to-work meeting, and given that she apologised and offered to pay the bill, that it was reasonable to have issued a warning. However, there was ongoing dispute between the parties as to whether the warning constituted a disciplinary warning, and the Claimant reasonably questioned how and why she was issued a warning without first being invited to a disciplinary hearing. However, as I have stated in para 18 of this Judgment, the Respondent did not rely on escalation of warnings in its dismissal of the Claimant, but said that the allegations addressed in the hearing of 9 February were in themselves sufficient to justify dismissal. Therefore, nothing turns on the warning in October 2020.

b. The issue of a 1st written warning in the letter of 5 January 2021, without any prior disciplinary process.

The Respondent again issued a warning to the Claimant without calling her to a disciplinary hearing at which she could address the allegations against her. There was no process followed, and therefore no fair process in respect of this warning. However, the later disciplinary

hearing of 9 February did not rely upon escalations of this warning in order to reach the sanction of dismissal. The allegations addressed in the hearing of 9 February to some extent overlapped with the previous allegations, but did not build on or rely on, the warning issued on 5 January. I am satisfied that even in the absence of the issue of the 1st written warning, the same disciplinary outcome would have been reached in the hearing of 9 February.

c. The Respondent's letter of 27 January 2021 stating that the Claimant would be deemed to have resigned if she failed to return or respond.

This correspondence was unhelpful and would likely be ineffective in its attempts to deem a resignation. The Claimant was understandably confused by this, including when submitting her appeal and referring to employment termination as of 30 January 2021. The Respondent appears to have recognised these issues by not seeking to rely upon any resignation by the Claimant (either at the time, or before this Tribunal), but by instead writing to the Claimant on 2 February and inviting her to a disciplinary hearing. The Respondent at this stage clearly accepted that her employment was ongoing, and the Claimant, despite her queries, participated in the hearing of 9 February, and submitted an appeal, all of which are consistent with her acceptance that her employment continued until terminated on notice by the Respondent. The Respondent was somewhat disingenuous with the Claimant in saying, during the hearing of 9 February, that the Respondent had not referred to a termination on 30 January. I find that the Respondent instead had thought better of its approach and sought to remedy this by means of the letter of 2 February, and by not pursuing its assertion of deemed resignation. The assertion of a deemed resignation did not form part of the disciplinary hearing of 9 February, but any failure was in any event cured by the letter of 2 February and the full disciplinary and appeal process which took place before the termination of the Claimant's employment.

75. The Claimant also made other criticisms of the Respondent's approach which I do not accept, or do not accept had any bearing on the decision to dismiss. The Claimant has alleged an unfair disparity of treatment between:

a. Herself and her manager, who she says also missed the Teams meeting of 5 January 2021, but was not disciplined.

The Respondent accepted in evidence that the manager, Michelle, was not disciplined, but that the matter was brought up with her. In the Claimant's case, this non-attendance was included in the 1st written warning of 5 January. There was a difference in treatment, However, this allegation was excluded from the disciplinary proceedings of 9 February, and expressly stated by Mr Curtis to be excluded from the allegations when the appeal was considered on 23 February 2021. It did not form part of the decision to dismiss or render the dismissal unfair.

b. Herself and another employee, Sameer, who had also used a lot of data on his work phone.

The Respondent confirmed to the Claimant, during the disciplinary process, that this other employee's usage related to work calls during working time.

c. Herself and other employees who she says were not asked to work from the office.

I have accepted the Respondent's evidence that employees were asked to attend the office on a rota basis, and I was taken to a rota in the Bundle (p.79) which shows that the Claimant was not alone in being rota'd to work in the office.

76. In summary therefore, I conclude that the disciplinary process as whole was fair, and the disciplinary and appeal outcomes were fair. The complaint of unfair dismissal accordingly fails.

Remedy

77. The question of remedy in respect of unfair dismissal does not therefore arise. However, I make the following findings for completeness and in case I am wrong on the question of unfair dismissal.

Contributory fault

78. Section 123(6) ERA provides that where the tribunal finds that the claimant's dismissal was to any extent caused or contributed to by any action of his, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

79. The Claimant was absent from work, without authorisation, for almost one month. For that reason, I conclude that the Claimant was guilty of blameworthy conduct. That conduct directly led to her dismissal. Had she been unfairly dismissed, I would have reduced any compensatory award by 100%.

Polkey (**Polkey v AE Dayton Services Ltd** [1987] UKHL 8)

80. If the procedural flaws that I identified were, contrary to my findings, sufficient to make the dismissal unfair, then the issue of **Polkey** would have arisen. I would have concluded that had the Respondent acted fairly, it would have dismissed the Claimant in any event, due primarily to the Claimant's unauthorised absence and failure to return to work.

81. For these reasons, if the Claimant would otherwise have been entitled to any compensatory award, I would have reduced it to zero by applying the principles set out in **Polkey**.

Wages

The Law

82. S.13 of the Employment Rights Act 1996 provides, as far as is relevant:

(1) An employer shall not make a deduction from wages of a worker employed by him unless—
(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

83. S.27 of the Employment Rights Act 1996 provides, as far as is relevant:

(1) In this Part *"wages"* , in relation to a worker, means any sums payable to the worker in connection with his employment, including—
(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,

Conclusions in respect of Wages

84. The Claimant made a request for furlough on 8 December 2020, but this was refused by the Respondent. The Claimant was not in fact furloughed in December 2020 or at any time thereafter.

85. The Claimant sought to be furloughed due to her childcare commitments and asserted that this was an eligible ground for furlough. However, regardless of eligibility, the Claimant had no right under the Coronavirus Support Scheme then in place to insist upon being furloughed against the wishes of the Respondent.

86. The Respondent did not agree to furlough the Claimant as it had work for her to do, but it did agree to a period of unpaid leave in order to accommodate her.

87. The Claimant was unhappy that furlough was refused, but she accepted the offer of unpaid leave. As such, she was not entitled to any pay.

88. For there to be a valid claim for an unlawful deduction under S.13 ERA, there first has to be an entitlement to pay, from which a deduction has been made. The Claimant had no entitlement to pay during her period of agreed unpaid leave.

89. The Claimant's claim, from her evidence, is founded on her assertion that the Respondent should have agreed to furlough instead of offering unpaid leave. The Claimant therefore seeks to recover the wages she would have received had she been on furlough instead of on unpaid leave. This claim is not well-founded and fails.

Conclusion

90. The Claimant's claims of unfair dismissal, and unlawful deduction from wages, fail and are dismissed.

Employment Judge Hamour

Date 13 November 2022