Case No: 2305140/2020
& 2305141/2020

EMPLOYMENT TRIBUNALS

Claimants: (1) Mr Mariusz Swica ('first claimant')
(2) Mrs Angelika Swica ('second claimant')

Respondent: Acrelane Timber Limited

Heard at: South London **On:** 12, 13 December 2022
12 December 2022 (in person)
13 December 2022 (hybrid)

Before: Employment Judge B Smith (sitting alone)

Representation
Claimant: Michael Wiencek (Legal Consultant)
Respondent: Robert Hickford (Solicitor)

RESERVED JUDGMENT

1. The first claimant's claim for unfair dismissal is not well-founded and is dismissed.

2. The first claimant's claim for breach of contract is well-founded. The respondent was in breach of contract by dismissing the first claimant without notice.

3. The first claimant's claim for unlawful deduction of wages is not well-founded and is dismissed.

4. The first claimant's claim for holiday pay is not well-founded and is dismissed.

5. The second claimant's claim for unfair dismissal is not well-founded and is dismissed.

6. The second claimant's claim for breach of contract is well-founded. The respondent was in breach of contract by dismissing the second claimant without notice.

7. The second claimant's claim for unlawful deduction of wages is not well-founded and is dismissed.

8. The second claimant's claim for holiday pay is not well-founded and is dismissed.

REASONS

Introduction

1. Mr Mariusz Swica ('the first claimant') was employed by Acrelane Timber Limited ('the respondent'), a timber merchant in south London, from 5 May 2016 until his dismissal without notice on 25 May 2020. Mrs Angelika Swica ('the second claimant') was employed by the respondent from 27 March 2017 until her dismissal without notice on 25 May 2020.

2. The claimants claim that their dismissals were unfair within section 98 of the Employment Rights Act 1996 ('ERA 1996'). They also claim that the respondent breached their contracts of employment by failing to give them the required notice of termination of their employment.

3. The respondent contests the claims. It says that the claimants were fairly dismissed for misconduct because they were unavailable for work when required and had sought to mislead the respondent by lying about their movements and whereabouts when requested to return to work. It was therefore entitled to terminate the claimants' employment without notice because of their gross misconduct.

4. It was confirmed with the claimants' representative at the start of the hearing that the breach of contract claims effectively included the additional claims for unpaid wages and holiday pay.

Procedure, documents and evidence heard

5. The claimants were represented by Mr Wiencek, Legal Consultant. They gave sworn evidence and were assisted by a Polish interpreter throughout the hearing. The respondent was represented by Mr Hickford, Solicitor. The respondent called sworn evidence from Mr James Crampsie, a manager at the respondent. Mr Wiencek appeared remotely on day 2 of the hearing on 13 December 2022 with the consent of the parties and Tribunal.

6. I considered the documents from an agreed bundle of 365 pages which the parties introduced in evidence. The digital copy of the bundle omitted the last three pages but they were included in the hard copy of the bundle. The parties were informed that if any particular documents were relied upon then the relevant page references should be provided to me.

7. Neither party nor any witness required any adjustments to the hearing.

8. At the start of the hearing the claimants were given an opportunity by the respondent to inspect the original copy of the book containing pp.202a – 202b of the bundle.

9. After the evidence was called the parties made oral submissions. My decision on liability was reserved due to a lack of hearing time. At the end of the hearing neither representative raised any issues of unfairness when given the opportunity to do so.

Issues for the Tribunal to decide

10. The list of issues was agreed by the parties at the start of the hearing as follows:

    (i) What was the reason or principal reason for the claimants' dismissals, namely the claimants' conduct?

    (ii) Was the reason a substantial reason of a kind which can justify dismissal?

    (iii) Was the dismissal fair or unfair applying the band of reasonable responses?

        a. Did the respondent have a genuine belief in the claimants' misconduct?

        b. Were there reasonable grounds for such a belief?

        c. Had a reasonable investigation been carried out by the time of forming that belief?

        d. Did the respondent act reasonably in treating the reason for dismissal as sufficient to dismiss the claimants in the circumstances, including the size and administrative resources of the respondent's undertaking?

    (iv) Was there a likelihood of the claimants being dismissed in any event?

    (v) Was there any failure to comply with a provision of the ACAS Code of Conduct?

    (vi) Should there be a deduction for contributory conduct on the part of the claimants?

        a. Was there culpable or blameworthy conduct?
        b. Did the conduct actually cause or contribute towards the dismissals?

    (vii) Did the claimants do something so serious that the respondent was entitled to dismiss without notice?

11. For the claimants' claims of unfair dismissal the focus under section 98(4) ERA 1996 was on the reasonableness of the respondent's decisions and it was immaterial what decision I would myself have made about the claimant's conduct. For the breach of contract claims I had to decide whether each claimant was guilty of conduct serious enough to entitle the respondent to terminate the employment without notice.

12. In light of the claimants' representative's indication at the start of the hearing that the breach of contract claims effectively included the additional claims for unpaid wages and holiday pay, which I understood to refer to the notice period, and it was not indicated that any claims for wages or holiday were advanced beyond that period, no additional issues for those claims were identified.

Findings of Fact

13. I explain the reasons for my findings below only where these were in dispute between the parties and were relevant to the determination of the claims. The evidence in support of the general matters of narrative is that of Mr James Crampsie and the documents in the bundle.

14. In general, but not exclusively, where matters were in dispute between the claimants and Mr Crampsie, I preferred the evidence of Mr Crampsie. This is because I found Mr Crampsie's oral and written evidence to be clear, considered, and where possible supported by documentary evidence, such as the notes of the disciplinary meeting, the invitation to disciplinary letters, and the outcome of disciplinary hearing letter. The credibility and reliability of the evidence of both claimants was undermined by the fact that they both maintained in written and oral evidence that Mr Crampsie had not taken any notes at the disciplinary hearing on 25 May 2020. I reject this for the reasons detailed at paragraph [56-57] below. The credibility and reliability of the evidence of the second claimant was also undermined because of my findings about her evidence in relation to mitigation of loss as outlined at paragraph [71] below.

15. The first claimant was employed by the respondent from 5 May 2016 until his dismissal without notice on 25 May 2020. His role was as a driver. He is a Polish national.

16. The second claimant was employed by the respondent from 27 March 2017 until her dismissal without notice on 25 May 2020. Her role was as a driver. She is a Polish national and the wife of the first claimant.

17. The respondent is a timber merchant in south London which employs around 37 staff. These are made up of drivers, sales assistants, yard workers, telesales representatives, accountants, and office assistants.

18. The contractual notice periods to be given by the respondent were one week up until the claimants' second complete year of service, and thereafter one additional week for each complete year of service, up to a maximum of twelve weeks.

19. The respondent's handbook includes at paragraph 1.3 that '*Any conduct that is detrimental to the best interests of the Company … will normally be treated as gross misconduct.*'

20. General duties at paragraph 1.4.3 include '*To obey the reasonable and lawful instructions of the Company'.*

21. Paragraph 2.2 states that '*Persistent lateness or repeated unauthorised absence will normally be treated as gross misconduct'*

22. Paragraph 5.4 states that '*Holidays must be arranged at the mutual convenience of both you and the Company … All applications for holiday must be obtained from your supervisor or manager. You are only allowed to take holidays if the Company has approved them in advance'.*

23. Paragraph 5.8 states that '*Upon termination of your employment you will be entitled to pay in lieu of any holiday accrued in your last holiday year but not taken*'.

24. Paragraph 5.9 states that '*The Company may require you to take (or not to take) any outstanding accrued holiday entitlement during your notice period'*.

25. The respondent's disciplinary policy is summarised as follows. There are three clear stages. Firstly, investigation by the company. Secondly, a disciplinary hearing. This includes that before the hearing the employee will be given details of the allegations made against them, at the hearing they will have an opportunity to respond to those allegations and, if appropriate, to call and question any relevant witnesses. The decision of the disciplining officer is to be confirmed in writing as soon as possible following the disciplinary hearing. Thirdly, employees have a right to appeal at any stage of the procedure. This is to be exercised in writing within 5 working days of receiving written notification of the disciplinary sanction.

26. Paragraph 1.4.3 states that employees will '*Have the most appropriate level of management hear any disciplinary matter or appeal. Where the manager in question was directly involved in the issues in dispute or under review, an alternative person with appropriate seniority will deal with the matter.'* Examples of gross misconduct in the policy include a refusal to carry out duties or reasonable instructions and any other matter which in the reasonable opinion of the Company constitutes gross misconduct.

27. The respondent faced difficult trading conditions at the outset of the coronavirus pandemic. It was located in a borough which was at a high risk of covid. Following the announcement of the UK government furlough scheme the respondent explained to its employees, including the claimants, at a whole staff meeting held outside that if they were prepared to agree to a period of furlough leave then the respondent may not need to progress with consultation about potential redundancies. All but 4 employees were asked to be placed on furlough and the company stopped trading for a period of time. A skeletal staff, including James Crampsie, was retained to

deal with customer enquiries, updated social media accounts and the website, and receive goods.

28. The claimants received the terms of the furlough agreement by letter sent to them. All affected employees, including the claimants, agreed to the terms. The description of the scheme states that '*It is initially envisaged by the Government that the Scheme will continue until 31 May 2020 but this may be reviewed.'* The letter expressly provides at paragraph 1 that '*For the duration of the time that you are furloughed you will remain an employee, subject to all of your normal terms and conditions of employment*' and at paragraph 1.3 that '*You will remain furloughed unless and until such time as either: 1.3.1 the Company asks you to return to work … .'* The letter was digitally signed by the first claimant on 31 March and second claimant on 30 March 2020.

29. I find that there was no set period of notice required to be given to the claimants under the furlough agreement to return to work. This is because of the plain words used in the agreement. I do not find that the wording of the agreement supports the claimants' argument that they would not be required to return to work until 31 May 2020. This is because that part of the document only sets out the period envisaged by the UK government as to the length of the scheme. Also, the wording of the document is too vague to give it the meaning sought by the claimants. I do not find that the wording of the document supports the claimants' argument that, as a matter of contract, they should receive written notice of any return to work instruction. I find that as a matter of contract the respondent did not need to provide written notice to the claimants of being asked to return to work and be recalled from furlough.

30. Whilst the claimants sought to rely on guidance, said to be from ACAS, to the effect that any end to a furlough period should be in writing, no such guidance was provided in the hearing bundle. At the end of the hearing I indicated that if any such guidance was relied upon it could be sent to the Tribunal. No such guidance was provided to me after the hearing. However, even if ACAS did provide any such guidance, in my judgment this would only amount to an indication of good practice and did not create any additional formalities for the respondent to comply with as a matter of law.

31. It was alleged by the first claimant during cross-examination that Mr Crampsie had told the employees in a staff meeting that there would be no work until 31 May, and that the end of furlough would be indicated by text or email. However, I do not find this to be the case. This suggestion was not included in the first claimant's witness statement and is not corroborated by any other reliable evidence. Also, the suggestion that the respondent was required to give written notice because of its own oral undertaking is different to that advanced in the first claimant's witness statement, namely that this obligation arose as a result of ACAS guidance.

32. The respondent did not set a minimum period for the furlough arrangements because its intention was to review the period generally. The respondent adopted this position because of the unique circumstances of the pandemic which were fluid at the time.

33. The respondent converted a 'Goods In' yard into a drive through collection point and planned to reopen for business whilst keeping its indoor and existing trade counters closed to customers. By mid-April 2020 the respondent was in a position to recall a number of key staff from furlough and decided to recall 16 employees, including the claimants. The respondent needed an increase in drivers to transport heavy and bulky materials. Mr Crampsie, a manager at the respondent, asked his executive assistant Mrs Magda Kruzynska to call those 16 employees to inform them that they were needed to return to work and give them one week's notice of this. Mr Crampsie considered this to be a reasonable management instruction.

34. During the same period the respondent had very little, if any, administrative support. The respondent relied on Mr Crampsie to conduct HR matters as best as he could and there was no wider support available from an administrative team. Mr Crampsie had many other duties during this period and HR functions were not a priority. The respondent was operating on a skeletal staff and during challenging conditions.

35. Mrs Kruzynska spoke to both claimants on 20 April 2020. Mrs Kruzynska informed Mr Crampsie immediately after the phone call that both claimants had been in the same car together in Poland. The accounts of the parties differ as to the content of the call.

36. Mr Crampsie's evidence is summarised as follows. Mrs Kruzynska told him that the first claimant had explained to her that they had only just finished a mandatory period of quarantine in Poland and the second claimant then informed her that as a result of this neither of the claimants would be returning to work on 27 April 2020. Mrs Kruzynska also said to Mr Crampsie that the second claimant had told her that she (Mrs Kruzynska) should lie to Mr Crampsie and say that they had only just started the two week period of quarantine so could not return on 27 April due to Polish restrictions. Mr Crampsie's evidence was that Mrs Kruzynska did not feel comfortable being involved in deceiving the company and therefore told Mr Crampsie what she had been told.

37. The second claimant's evidence was that the 20 April 2020 telephone call was not as Mr Crampsie described. She describes it as a friendly call during which she was informed that the company would partially reopen within the next 24 hours. She denied stating that she and the first claimant had finished a two-week period of quarantine. This is because this would not have been possible on account of them having arrived in Poland on 19 April 2020. She also would not have later sent Mrs Kruzynska a text message asking whether the company had reopened if she already knew this as a result of a phone call on 20 April 2020. She denied having been recalled from furlough to be back at work on any particular date.

38. The first claimant's evidence was that, during this phone call, Mrs Kruzynska spoke to them and said that, perhaps, the firm would reopen in 24 hours, but there was no specific reopening date given and no request to return to work.

39. I resolve this factual discrepancy only in so far as is necessary to determine this claim. I find that Mrs Kruzynska called the claimants on 20 April 2020 in order to discuss returning to work. I find that Mr Crampsie genuinely believed that the content of the call was as is set out in his evidence, namely that the claimants had been asked to return to work, with a week's notice, and that the second claimant asked Mrs Kruzynska to lie about their whereabouts. This is because his account is consistent with the later documentary evidence. I find that Mr Crampsie formed his belief on the basis of what Mrs Kruzynska told him. Also, my finding is supported by the fact that there is no direct evidence to contradict Mr Crampsie's account as to what he was told by Mrs Kruzynska. This because the claimants were not present for that conversation.

40. I have some difficulty in accepting the claimants' evidence because of the concerns I have set out elsewhere as to their credibility and reliability. However, taking into account the lack of contemporaneous record of the conversation, and the lack of direct evidence from Mrs Kruzynska as to the contents of that call, I am unable to make a reliable finding of fact as to the exact words which were said by the claimants. I am able to objectively find that that the reopening of the company was mentioned by Mrs Kruzynska because this is common to both parties' evidence and is consistent with a later message sent by the second claimant as outlined below.

41. The evidence of Mr Crampsie, which I accept and find to be correct as a matter of fact, is that both claimants speak a good level of English. Mr Crampsie had never previously had problems communicating with either claimant, he had socialised with both claimants, and they got on well with non-Polish speaking colleagues. The claimants had also received training delivered in English.

42. The respondent did not take any action at that point because it wanted to give the claimants the opportunity to attend work on 27 April 2020.

43. On 4 May 2020 the second claimant sent a text message at 18:52 to Mrs Kruzynska stating, in Polish, '*hi Madzia, do you know when they will reopen the brothel?*. The reference to Madzia is to Magda Kruzyunska. She responded '*we have been working since last Monday that is why I called you'*. The second claimant then stated '*sorry to bother to you, don't say anything to the bald man, we will come to work on Monday'*. The translations of these text messages were confirmed by the oral evidence of the claimants. The reference to '*the bald man'* is a reference to Mr Crampsie. The reference to '*the brothel'* is a reference to the company.

44. The respondent did not take any action against the claimants at first because they were working in an extremely challenging situation as a result of the pandemic with reduced staff and did not prioritise deciding how to handle the claimants at that stage. Also, the respondent had a high level of need for drivers, including HGV drivers, which included one of the claimants. This was also the case later on at the time of dismissal.

45. On 5 May 2020 the first claimant telephoned Mr Crampsie. Again, at this point the accounts of the parties differ. Mr Crampsie's evidence was that the first claimant apologised for what had been said on the 20 April 2020 call to Mrs Kruzynska. Mr Crampsie reiterated that the period of furlough had ended and both claimants were expected back at work immediately to resume their roles. The first claimant responded that he and the second claimant had driven through the night and were now back in England, at their home in Mitcham, and would therefore return immediately. Mr Crampsie suggested that the first claimant attend work the same day to organise his shift patterns and work. The claimant indicated that he would do that. Mr Crampsie received a further call on that day from the first claimant's sister using the first claimant's phone. She told Mr Crampsie that both claimants were in fact still in Poland and the first claimant felt bad about not telling the truth.

46. The claimants' evidence of the 5 May 2020 call was that this call did not involve a request by the respondent for the claimants to return to work. The first claimant states that he made this call because they had not heard anything from the respondent about returning to work. He stated that during that call Mr Crampsie asked why they were not in Poland, and the first claimant replied that it was mainly due to Covid and his wife's asthma. He accepts stating that they were already in London, but that this was a mistake which was later corrected by his sister who speaks better English than he did.

47. I resolve this factual discrepancy only in so far as is necessary to determine this claim. I find that Mr Crampsie genuinely believed that the content of the call was as is set out in his evidence. This is because it is consistent with the later documentary evidence. I have difficulty in accepting the claimants' evidence because of the concerns I have set out elsewhere as to their credibility and reliability. For those reasons I find that during that phone call Mr Crampsie did request that the claimants return to work. I also find that this is more likely than not because it is consistent with the first claimant's admission that during the call he stated that they were in London (albeit incorrectly). This is more likely to have been the case if the claimants were being asked to return to work. It was also the case that the respondent had reopened and therefore would have had a business need for the claimants to return to work. The fact that the claimants soon returned to London is also consistent with them being aware of having been recalled from furlough. I also find that during that call the first claimant stated, incorrectly, that the claimants were in London when they were in fact in Poland. However, I also find that whatever the reason for this, that incorrect statement was corrected a short time later by the first claimant's sister. This finding is consistent with the evidence of the first claimant and Mr Crampsie. However, I cannot rule out there being a miscommunication in circumstances where the parties were speaking on the phone and there being no contemporaneous record of exactly what was said, also taking into account the fact that English is not the first claimant's first language. The fact that the first claimant's level of spoken English was good enough for work and social purposes does not preclude a miscommunication.

48. On 11 May 2020 the first claimant attended the respondent's site. He met with Matthew Crampsie, the Respondent's transport manager, and told him that he had driven across Europe from Poland and had just returned. Matthew Crampsie instructed the first claimant to return home and self-isolate due to the risk of catching covid-19 whilst travelling across Poland.

49. James Crampsie then decided to review the situation. He decided that the claimants' conduct may amount to gross misconduct if proven and no credible explanation could be provided. He decided that no further investigation was required because the allegations revolved around statements made over the telephone and the fact that neither claimant had attended work when asked to. No contemporaneous notes of the telephone calls were made. He also decided to conduct the hearing because he was aware of the contents of what was said. The respondent also had a significantly reduced staff and was trading under very difficult conditions due to the pandemic. The other directors of the business were shielding in line with government guidance.

50. Both claimants were invited to attend a disciplinary hearing by letter dated 22 May 2020. The hearings were scheduled for 25 May 2020 and heard sequentially on that day.

51. The written allegations against the first claimant are summarised as follows. His conduct was unsatisfactory because he was not available for work within a reasonable period having been contacted by the respondent, was absent without authority, and had ignored government advice to travel across Europe and thus removed himself from an available pool of staff. It was also alleged that he had contacted James Crampsie by telephone, had stated that he was ready for work and back in London, and had agreed to attend the premises to discuss coming back for work. However, a short time later a relative of his had informed Mr Campsie by telephone that the first claimant was actually still in Poland.

52. The written allegations against the second claimant are summarised as follows. Her conduct was unsatisfactory because she was not available for work within a reasonable period having been contacted by the respondent, was absent without authority, had ignored government advice to travel across Europe and thus removed herself from an available pool of staff. It was also alleged that she told the respondent's office, when asked about her ability to return to work, that she was unable to return to the UK due to a minimum 14 day quarantine period in Poland plus travelling time, which was foreseeable and not subject to consultation with the respondent.

53. The claimants were informed that James Crampsie would conduct the hearing and they were entitled to be accompanied. No objections to the disciplinary process were raised by the claimants at that time. They were warned that a finding of gross misconduct could lead to dismissal without notice or pay in lieu of notice. The letter was sent by email and in response the first claimant responded to confirm their attendance.

54. Mr Crampsie's notes of the disciplinary hearing are at pages 202a-b of the bundle. The notes of the first claimant's hearing state that he was in Poland

for a few weeks. When asked '*Why did you visit Poland'* he responded with words to the effect of '*Wife asthma – clean air'*. When asked '*Why no AL booked?*' he responded '*Thought was OK to go*'. It stated he understood the furlough agreement. When asked '*Why did you tell me in the UK and work attend work same day when actually in Poland?*' he responded '*Sorry. Good previous record. Apology. Thought would have time to return to UK*.'

55. The notes of the second claimant's hearing state that, when asked, she was in Poland for nearly 2 weeks before Mrs Kruzynska had contacted her checking she was available to work. When asked why she was abroad on holiday she said words to the effect of '*Asthma – health – scared covid'*. It confirmed that she had understood the furlough agreement. When asked *'Did she seek to mislead [unclear] in claiming 2 wks quarantine still to serve?'* she responded '*Sorry'* and when asked '*Why?'* the notes record '*No answer. Mariusz claims they are good people who needed time.'*

56. The claimants' oral and written evidence was that Mr Crampsie did not in fact take any notes and it was argued on their behalf that this document was, in effect, a fabrication, and was not written at the time. Mr Crampsie confirmed under oath that he did take notes and that notes were real. I find that the document in the bundle is an accurate copy of the notes actually taken by Mr Crampsie in his notebook. This is because the pagination in the book is consistent with Mr Crampsie's explanation that it was a notebook for general use and not indicative of a forged standalone document. The notes do not purport to be a verbatim and comprehensive record of the meeting and the questions to be asked appear to have been drafted in advance. The style of the responses to the questions has the hallmarks of being contemporaneous notes as opposed to an account of the meeting drafted after the event. I do not consider there is any clear and reliable evidence to show that they have been fabricated.

57. Also, the explanation in the notes, as given by the claimants, for them travelling to Poland is that of the second claimant's asthma. These notes were disclosed by the respondent late but before the witness statement of the claimants were finalised. The claimants address these notes in their witness statements. However, the claimants did not include the asthma explanation in their claim forms, particulars of claim, or legal correspondence subsequent to the disciplinary hearing. The first written example available of the asthma explanation from the claimants was in the claimants' witness statement. However, if these notes were not an accurate reflection of the meeting, there is no clear and reliable evidence as to how Mr Crampsie would have known to include the asthma explanation in them because the claimants did not put this in writing until their witness statements, after the notes were disclosed. Although it is claimed in the first claimant's evidence that he mentioned this reason during the 5 May 2020 phone call, I do not consider it credible to suggest that Mr Crampsie remembered that specific detail of a phone call (in respect of which he did not take any notes) to include in later notes of the disciplinary hearing which he fabricated at a much later date.

58. Having found that these notes are an accurate reflection of the disciplinary hearing, I reject the evidence of the claimants that there was in fact no such

disciplinary hearing and they were just told by Mr Crampsie that their employment was terminated with an immediate effect. This is because their account is not supported by the documentary evidence and Mr Crampsie's account is. I also note that the first claimant states that he was verbally dismissed at around 12:00. However, the invitation to the hearings stated that they would start at 11:00. The timing of the dismissal decision as accepted by the first claimant is more consistent with Mr Campsie's evidence that the hearings had started, were held back to back, he adjourned to consider his decision, and that he reconvened the hearings about an hour after the adjournment to explain his decision to each claimant.

59. No independent note taker was present due to the pressures on the respondent from the pandemic. The meeting was held outside due to covid-19 and was held in the builder's merchant yard at the respondent's premises. This was closed to the public and not operational at the time of the hearings. Both claimants attended and acted as the accompanying colleague for each other. Neither raised any issues with the format of the meeting.

60. I find as a matter of fact that the notes were an accurate record of the key parts of the disciplinary hearings. This is because they were contemporaneous notes of the hearing. I find that when it was put to the first claimant that he had told Mr Crampsie that he would attend work on the same day, when he was in fact in Poland, he responded 'Sorry', mentioned his good previous record, offered an apology, and stated words to the effect that the thought he would have time to return to the UK. I find that when it was put to the second claimant that she had sought to mislead the respondent in respect of having two weeks of quarantine remaining she responded 'sorry' and did not provide an explanation.

61. Mr Crampsie adjourned both hearings to consider his decision. He took into account that neither claimant had disputed the allegations put to them. He formed the view that it was clear that both had taken leave without permission or informing the respondent and both had attempted to deliberately mislead the respondents with the second claimant asking Mrs Kruzynska to falsify an account and the first claimant claiming not telling the truth in his later call. He concluded that each matter, individually and cumulatively, amounted to gross misconduct. He considered whether any sanction less than summary dismissal would be appropriate. He took into account a degree of remorse he felt from the first claimant. He concluded that the severity and multitude of the breaches was such that only summary dismissal was appropriate. This took into account the fact that both were employed as sole drivers for most shifts, entrusted with expensive assets, and he felt that he had little choice given the resulting inability to trust that they would act honestly and in the best interests of the company whilst representing the respondent in branded vehicles.

62. The hearings were reconvened after around an hour and Mr Crampsie explained his decision to each claimant. Mr Crampsie stated that he would set out his reasons in writing but this was refused by the claimants and they stated that they did not want to receive further written confirmation of the outcome. Mr Crampsie stated to the claimants that they had a right of appeal

to another director and that if they wanted to do this it should be in writing within 5 working days. Although Mr Crampsie's account is disputed by the claimants, I prefer Mr Crampsie's account as more reliable and credible for the same reasons as set out elsewhere in this decision.

63. Neither claimant submitted an appeal at that time. As a result of a misunderstanding on the part of Mr Crampsie, he states that the claimants were paid notice pay.

64. The claimant's legal representative sent a letter for each claimant to the respondent by email dated 17 June 2020. This was responded to by the respondent by letter dated 10 August 2020. I accept Mr Crampsie's explanation that the delay was a result of the initial email going to his junk folder. The 17 June 2020 letters are headed '*APPEAL AGAINST DISMISSAL. REQUEST FOR FULL WRITTEN STATEMENT OF REASONS FOR DISMISSAL'*. They state in similar terms that '*Whilst our client will provide detailed reasons of her appeal once she will [sic] received the requested statement, at this juncture she would provide the following grounds and reasons of her appeal.'* It provides grounds of appeal and requests that an appeal meeting be arranged.

65. It was alleged in the 17 June 2020 letters, and in the claimants' evidence, that they were on pre-booked annual leave between 22 and 29 April 2022. They claim that this was authorised by the respondent. However, I accept Mr Crampsie's evidence, and find as a matter of fact, that the respondent uses web/app-based software to make annual leave arrangements which, if authorised, would have sent the claimants an email. There was no documentary evidence in the bundle to suggest that authorisation was given. The claimants did adduce evidence of a later cancelled flight/holiday booked for the relevant period and claim it would be unlikely for them to book flights without prior approval of annual leave by the company. However, I find it is more likely than not that the respondent did not authorise annual leave for this period. This is because it is not supported by documentary evidence. It was alleged by the second claimant under cross-examination that the reason for the claimants not having any documentary proof of annual leave having been authorised was that everything had disappeared from the system after the dismissal. However, I do not accept her evidence in part because this important point was not made in her original witness statement. Further, it does not explain the absence of an email from the software confirming that annual leave had been authorised. Also, I accept Mr Crampsie's explanation that if annual leave for that period had been authorised then the claimants would have been paid 100% of their pay, as opposed to 80% under furlough. I also take into account that the suggestion that part of the time in Poland was authorised as a result of annual leave was not raised until the claimants' representative's' letter of 17 June 2022. I also note that this would not cover the entirety of the unauthorised period in any event.

66. The respondent reply of 10 August 2020 explains that the disciplinary hearing took place on 25 May 2020, it was held outside due to social distancing guidance, and includes that the claimants were advised to leave after the hearing and given the choice to return in an hour, or the next day,

for a decision to be made. It records that the claimants were offered a copy of the dismissal notice but declined it.

67. The reasons for dismissal of the first claimant included that:

'*It was established that there was no request for annual leave for the time your client spent on holiday in Poland. It was established that your client was indeed unavailable for work when contacted about the reopening of the company following a one month shut down … Most importantly, and the action that contributed the most to the decision to dismiss your client, a decision not taken lightly, was that it was established during the hearing that your client had sought to mislead the company by lying about the fact that he was back in the country and ready for work. Your client said in a phone call to me that he was home, in Norbury, London and available for work. I suggested he pop in to the workplace to discuss this. He agreed and said he was on his way. A short time later I received a call from his sister, who said to me that Mariusz was a good man and had made a mistake by telling me that he was in the UK where in fact he was still in Poland. When asked about this during the disciplinary hearing, your client apologised and stated he was planning to travel back coming that weekend and it was wrong to not tell the truth. Misleading … is without doubt, compatible with gross misconduct.'*

68. The reasons for dismissal of the second claimant included that:

'*It was established that there was no request for annual leave for the time your client spent on holiday in Poland. It was established that your client was indeed unavailable for work when contacted about the reopening of the company following a one month shut down … Finally it was established during the hearing that your client had sought to mislead the company by lying about the time already spent in Poland before being contacted to return to work. Your client asked my assistant, Magda, a polish native, speaking fluent Polish with no misunderstanding possible due to English being a second language. Your client asked Magda to lie to me on her behalf, stating the majority of a 14 day compulsory lockdown must be completed before returning to the UK. This was despite your client having already completed the bulk of the 14 day quarantine … '*

69. The letters continue in similar terms to state that the claimants did not contact a director to pursue an appeal. They then state that a relevant director had been asked to consider any appeal if received within 14 days of the date of the letter.

70. No appeal was sought by the claimants or their legal representative after the 10 August 2020 letter. They also did not send any communication requesting an appeal or enquiries about to their earlier request for one to be arranged.

71. The second claimant's oral and written evidence was that she did not find new work until 12 October 2020 when she signed a contract for flexible employment with Pertemps Recruitment Partnership Limited. Her schedule of loss also suggested that she did not work for the period between her

dismissal and starting in that role. However, her bank statements disclose payments from Hill House Inl Jr on or around 30 June 2020, 31 July 2020, 30 September 2020, and 30 October 2020. Under cross-examination the second claimant stated that these payments were in respect of work done for Hill House Junior before her dismissal. The second claimant did not produce any documentary evidence to corroborate her oral evidence. I find that that it is more likely than not she was in alternative employment for the relevant period. This is because the amounts paid are at the end of the month, as opposed to in a lump sum which is more likely to be how any outstanding arrears of pay is likely to have been paid. Also, it is not corroborated by documentary evidence. This detracts from the credibility of her evidence generally.

72. The ACAS conciliation period was between 15 July 2020 and 15 August 2020 and the claims were presented to the Tribunal on 14 September 2020.

73. Mrs Magda Kruzynska did not appear as a witness or provide a witness statement to the Tribunal.

Relevant law

74. Section 94 ERA 1996 confers on employees the right not to be unfairly dismissed. The respondent admits that it dismissed the claimant within section 95(1)(a) ERA 1996. Section 98 ERA 1996 deals with the fairness of dismissals. The employer must show that it had a potentially fair reason for the dismissal within section 98(2) ERA 1996. If so, I must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

75. In ascertaining the reason for a dismissal I often need look no further than the reasons given by the appointed decision maker. However, if that is an invented reason, it is my duty to penetrate through the invention rather than allow it to affect my own determination: *Royal Mail Group Ltd v Jhuti* [2019] UKSC 55.

76. Misconduct is a potentially fair reason under section 98(2)(b) ERA 1996.

77. Section 98(4) ERA 1996 provides that the determination of whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 this shall be determined in accordance with the equity and the substantial merits of the case.

78. Following the guidance in *Burchell* 1978 IRLR 379 and *Post Office v Foley* 2000 IRLR 827 I must decide whether the employer had a genuine belief in the employee's guilt. I must decide whether the employer held such genuine belief on genuine grounds and after carrying out a reasonable investigation. In deciding whether the employer acted reasonably or unreasonably within section 98(4) ERA 1996 I must decide whether the employer acted within the band of reasonable responses open to an employer in the

circumstances in all aspects of the case, including the investigation, grounds for belief, penalty imposed and procedure followed. It is immaterial how I would have handled the events or what decision I would have made and I must not substitute my view for that of the reasonable employer: *Iceland Frozen Foods Limited v Jones* 1982 IRLR 439.

79. An investigatory meeting is not mandatory. In *Miller v William Hill Organisation* EAT 0336/12 it was acknowledged that there is a limited to the steps an employer should be expected to take to investigate an employee's alleged misconduct and how far they should go depends on the particular case. Where an employee admits an act of gross misconduct and the facts are not in dispute it may not be necessary to carry out a full investigation: *Boys and Girls Welfare Society v Macdonald* 1997 ICR 693 EAT.

80. In considering procedural fairness I take into account all of the circumstances of the case, including the size and administrative resources of the employer and the principles of natural justice, including: whether the employee knows the case against him; whether there has been undue delay at any stage; whether the employee has had a chance to put his case; whether the employee is given a fair hearing and has the opportunity to be accompanied to the hearing; whether, where possible, the disciplinary hearing is held by independent third parties with sufficient seniority; and whether the employee is given a right of appeal.

81. Payments in lieu of notice, being payments relating to the termination of employment rather than to the provision of services, are not wages: *Delaney v Staples* [1992] 1 AC 687.

Conclusions

(i) *Reason for dismissal*

82. I find that the reason for the claimants' dismissals was their conduct as it was found to be by the respondent. This is summarised as follows. For the first claimant this was not being available for work when no annual leave had been requested, being unavailable for when recalled from furlough, and misleading the respondent as to when he was back in the UK. For the second claimant this was not being available for work when no annual leave had been requested, being unavailable for work when recalled from furlough, misleading the respondent in respect of being abroad, and requesting Mrs Kruzynska to mislead the respondent

83. This is because I accept the clear and cogent evidence of Mr Crampsie as to the reason for dismissal which is consistent and supported by the written reasons for dismissal dated 10 August 2020. I do not find that the evidence demonstrates that the claimant was dismissed for any other reason or that this was an invented reason of the type considered in *Jhuti*.

84. I find that the reason was a substantial reason of a kind which can justify dismissal, namely the claimants' conduct. I therefore find that the respondent has satisfied the requirements of section 98(2)(b) ERA 1996.

(ii) *Was the dismissal fair or unfair?*

85. In considering whether the dismissal was fair or unfair, applying the band of reasonable responses, I make the following findings.

86. I find that the respondent had a genuine belief in the claimants' misconduct. This is because I accept the clear, cogent and considered evidence of Mr Crampsie which is consistent with the correspondence evidence in the bundle, particularly the written reasons for dismissal dated 10 August 2020 and the written account of the allegations in the invitation to disciplinary letters dated 22 May 2020. I find that this is little, if any, evidence to demonstrate that the respondent had anything other than a genuine belief as to what had happened and the claimants' conduct.

87. I find that there were reasonable grounds for the respondent's belief. This is because Mr Crampsie had first-hand experience of the phone call of 5 May 2020, he had Mrs Kruzynska's account as to the phone call of 20 April 2020, and during the disciplinary hearing when the allegations were put to the claimants their response was 'sorry'. I find that it was reasonable for Mr Crampsie to treat this as an admission as to the misconduct alleged, particularly in light of no particular challenge being made during the disciplinary hearing itself.

88. I find that a reasonable investigation had been carried out by the respondent by the time of forming that belief. This is because the claimants did not actively or clearly dispute the allegations during the disciplinary process. In light of what effectively appeared to be an admission as to the relevant facts, in the circumstances of this case it was reasonable for no further investigation to be carried out. Although the claimants later through their lawyer sought to challenge the facts, no proper appeal was advanced in accordance with the respondent's reasonably adopted procedure. The claimants did not establish any clear or reasonable explanation as to why no appeal was lodged following the respondent's request that it be sent within 14 days of the 10 August 2020. I do not consider that the claimants' letters of 17 June 2020 constituted a proper appeal because it was clear from those letters that detailed reasons of any appeal would be provided following receipt of written particulars. No such detailed reasons were provided. In those circumstances, it was reasonable for the respondent to continue on the basis that there was no appeal, particularly in the absence of any correspondence sent by the claimants (or on their behalf) requesting an appeal hearing date or seeking anything further from the respondent.

89. I do not find that there was any unfairness in the procedure applied by the respondent. I consider that the claimants knew the case against them (this is set out in the invitation to the disciplinary hearing dated 22 May 2020), there was no undue delay, and that the claimants had an opportunity to put their case during a disciplinary hearing and on appeal. I consider that the claimants were given a fair hearing and had the opportunity to be accompanied at the disciplinary hearing. I find that the disciplinary hearings were held by a sufficiently independent individual with sufficient seniority. In

light of the claimants' effective admission as to the facts there was nothing procedurally unfair in the disciplinary hearing being carried out by Mr Crampsie, notwithstanding the wording of the respondent's disciplinary policy, given the effective admissions made and the challenging conditions of the pandemic. The claimants were warned that a potential outcome of the disciplinary hearings was dismissal. I do not consider that holding the hearing outside, during a time when working indoors was strongly discouraged, rendered the proceedings unfair. This is because the evidence does not show that this was a barrier to the claimants' participation or demonstrate any other form of unfairness. It is relevant that the hearings were reconvened after genuine deliberation by Mr Crampsie, and written reasons were ultimately provided to the claimants. I also find that any procedural imperfections in the process were readily explicable and justified by the serious and unprecedented consequences of the Covid-19 pandemic on a small employer without any administrative support in place. They do not, in my judgment, bring the fairness of the procedure outside of the range of reasonable responses.

90. I find that the wording of the respondent's policy includes that any conduct detrimental to the best interests of the company would normally be treated as gross misconduct, and that that the general duties of employees were to follow reasonable and lawful instructions, that absences required advance authorisation. I find that these provisions were capable of being engaged by the claimants' conduct.

91. I find that, although the claimants did have some mitigation available to them in the form of their length of service and previous good record, the evidence clearly shows that the respondent took this into account and gave it sufficient weight in its decision making. This is because it I accept the evidence of Mr Crampsie of this which is supported by the notes of the disciplinary hearings, expressly for the first claimant and implicitly for the second claimant.

92. I do not consider that the evidence has demonstrated any reason for Mr Crampsie to be untruthful about the process followed or motivation to conduct a sham or unfair dismissal. On the contrary, I conclude that the respondent would have been reluctant to dismiss the claimants in the circumstances of the pandemic and their business needs at the time.

93. I find that the respondent acted reasonably in treating the reason for dismissal as sufficient to dismiss the claimants in the circumstances. I accept Mr Crampsie's evidence that the conduct of the claimants amounted to a serious breach of trust which was important to their roles as drivers. I consider that the respondent was reasonable in concluding that the claimants' conduct amounted to gross misconduct because being unavailable for work during a time when the company had a high need for drivers, and misleading an employer, were both serious matters.

94. Dismissal in these circumstances, overall, was not outside the range of reasonable responses.

95. Overall, I do not find that any of the procedural imperfections raised by the claimants rendered the dismissal unfair, particularly taking into account the written evidence of effective admissions by the claimants as to the misconduct and the difficulties faced by the respondent as a result of Covid-19.

96. I do not find that any breaches of the ACAS Code of Conduct were clearly established on the evidence.

97. In light of my conclusions above, I find that the dismissal was fair. Accordingly, the claims for unfair dismissal is not well-founded and are dismissed. In light of this decision it is not necessary for me to determine issues of contributory conduct or the likelihood that the claimant would otherwise have been dismissed following a fair procedure.

Breach of contract

98. As outlined above, at paragraph [11], for the unfair dismissal claims my focus was on the reasonableness of the respondent's decision. However, for the claimants' claims of breach of contract I must consider my objective findings of fact as to whether each claimant did something so serious as to justify the respondent dismissing them without notice.

99. I do not find, objectively, that the claimants' journey to Poland at the start of the coronavirus pandemic was necessarily something so serious that it would justify the respondent terminating their employment contract without notice. This is because both claimants were Polish nationals and it has not been clearly established on the evidence adduced in these claims that the journey was not permitted at the relevant time bearing in mind that they were allowed to travel by the respective border agencies. Whilst this journey rendered them unavailable for immediate work, both claimants were at the time on furlough arrangements and therefore there is considerable mitigation available to them. Although I do find that they were recalled to work by the respondent, and were not immediately able to do so, in the unprecedently circumstances of the pandemic I do not find that this alone was so serious as to justify dismissal without notice.

100. In the absence of direct evidence, or a contemporaneous note, as to the exact content of the 20 April 2020 call, I have not made a finding, above, that it was more likely than not that the second claimant requested Mrs Kruzynska to mislead Mr Crampsie. Equally, whilst I find that the first claimant did incorrectly state his location to Mr Crampsie during the 5 May 2020 call, in light of this having been rectified by his sister within a short space of time, I have not objectively made a finding that he acted dishonestly. Whilst both claimants appeared to accept the allegations as put to them during the disciplinary, and in light of this the respondent was reasonable in acting on that basis (as outlined above), I would require more direct and corroborated evidence in order to make objective findings, myself, as to exactly what happened for the purposes of a breach of contract claim.

101. In light of these findings, the first and second claimant's claims for breach of contract by reason of dismissing without notice are well-founded. I stress that this decision, compared to my decision above in respect of unfair dismissal, is explicable as a result of the different focus I must have in assessing a different type of claim, and evidence required in order to support it.

Other claims

102. In light of the claimants' representative confirming at the start of the hearing that the unpaid wages/holiday pay claims effectively formed part of the breach of contract claim, and my finding on this above, I only deal with these claims for completeness and in so far as is necessary.

103. Noting my findings above on breach of contract, the claim for that period as a wages claim does not succeed in the alternative. There is no need for it to do so. In any event, applying *Delaney v Staples* [1992] 1 AC 687, payment for a notice period is not wages.

104. Although I note that the particulars of claim for each claimant raises the suggestion that there may have been other unlawful deductions from wages, this was not raised as an issue during the hearing, the claimants' representative put the wages/holiday claims as just effectively the breach of contract claim, and other matters relating to wages or holiday did not form part of the agreed list of issues. These elements of the claim did not therefore appear to be pursued. In any event, the evidence adduced did not clearly establish any unpaid wages (generally) or non-payment holiday accrued but untaken.

105. In addition, I note from the schedules of loss that the first claimant sought to claim 6.4 days holiday for the period 1 April 2020 to 22 June 2020 and the second claimant sought to claim 5.9 days holiday for the period 1 April 2020 to 15 June 2020. In light of the successful breach of contract claim, the respondent was entitled as a matter of contract to require these days to have been taken during the notice period, and therefore no actual loss (or, at least, additional loss) would have arisen in any event. I am also not persuaded that holiday would necessarily have accrued (during the notice period), in any event. This is because it was not a notice period the claimants actually worked.

106. For those reasons, the claims for unauthorised deductions of wages and holiday pay are not well-founded and are dismissed.

Remedy

107. My provisional view, subject to further submissions and evidence, is that each of the claimants will be entitled to notice pay as the remedy for the breach of contract claims. It is unclear to me on the evidence what this would be. This is because paragraph [37] of the statement of Mr Crampsie states that arrangements were made for both claimants to be paid in full in lieu of notice. This evidence was not clearly challenged by the claimants. However, the claimants do refer to three and four weeks' notice pay being unpaid (at

paragraph [13] of the particulars of claim) and this is included in their schedules of loss.

108. In my judgment it is likely that the question of remedy can be properly resolved without an oral if the amount in question is not determined between the parties by consent. The parties are directed as follows:

1. Within 14 days of the date of sending of this judgment the parties must attempt to reach agreement on the question of remedy for the breach of contract claims. If agreement is reached then this must be communicated to the Tribunal for the remedy to be ordered by consent.

2. If no agreement is reached:

    a. the claimants must send to the respondent and Tribunal within 21 days of the date of sending of this judgment all material relied upon in respect of calculation of remedy, including any written submissions;

    b. the respondent must send to the claimant and Tribunal within 14 days of receipt of the claimants' material all material relied upon in respect of calculation of remedy, including written submissions;

    c. the claimant must send to the respondent and Tribunal any reply to the respondent's material within 7 days of receipt; and

    d. a determination on remedy will be made without an oral hearing unless an application for an oral hearing is made by the parties.

3. All communications to the Tribunal must be marked '*FAO EJ B SMITH'*.

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Employment Judge Barry Smith
Date: **18 January 2023**

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
Date: **8 February 2023**

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FOR EMPLOYMENT TRIBUNALS