EMPLOYMENT TRIBUNALS

Claimant	**Respondent**
Razan Alsnih	**Al Quds Al-Arabi Publishing & Advertising**

Heard at: London Central

On: 19 – 21 April 2023;
19 June 2023
In chambers: 20 June 2023

Before: Employment Judge Lewis

Interpreters: Mr Ahmad Nabil Bouitieh (19 – 21 April 2023)
Mr Haider Al-Jubouri (19 June 2023)

Representation

For the Claimant: Mr J Neckles, PTSC Union

For the Respondent: Mr A Shellum, Counsel

JUDGMENT

Unfair dismissal

The claimant was unfairly dismissed. There is no deduction for Polkey or contributory fault / conduct.

The tribunal does not order reinstatement or re-engagement.

The tribunal awards **£1,730.75** basic award and **£17,999.80** compensatory award.

The recoupment regulations apply. The prescribed period is 13 February 2020 to 20 June 2023 (the date of this decision). The prescribed element is £6,054.96.

The amount by which the compensatory award exceeds the prescribed element is £11,944.84.

Breach of contract (notice pay)

The claimant was not given notice of dismissal. She is awarded **£1,563.70** net as damages (pay in lieu).

Holiday pay

The claim for holiday pay succeeds. The claimant is awarded **£9,230.40** gross (160 x £57.69). The claimant is responsible for paying tax on this.

Pay arrears (unauthorised deductions

The claim for unauthorised deductions, being pay arrears for January and February 2020 succeeds. The claimant is awarded **£1,496.15** gross (£1,150 + £346.15). The claimant is responsible for paying tax on this.

REASONS

Claims and issues

1. The claimant brought claims for ordinary unfair dismissal, notice pay, holiday pay and pay arrears.

2. There was a preliminary issue at which the tribunal decided the claimant was an employee.

3. At the start of the hearing, the respondent indicated that it accepted the claimant was entitled to notice pay, pay arrears and holiday pay. There were just some issues regarding calculation of the daily rate for holiday and whether the period of pay arrears and notice overlapped.

4. The respondent was prepared to concede the unfairness of the dismissal on procedural grounds if the claimant accepted that the reason for dismissal was conduct. The claimant did not accept this. She believed the true reason was that she had raised various issues about her contract and pay. It was therefore necessary for me to decide in the usual way whether the dismissal was unfair. In practice, I doubt it made any difference to the length of the hearing - I would have had to hear essentially the same evidence in order to decide issues of Polkey and contributory fault. Mr Neckles withdrew his application for a preliminary decision on whether unfairness should be conceded by the respondent.

5. It was agreed that I would hear all the evidence on liability, remedy and the request for reinstatement at the same time.

6. The remaining issues were therefore:

Unfair dismissal

6.1. Has the respondent shown the reason for the dismissal?

6.2. Is the reason of a kind which can justify dismissal?

6.3. Was the dismissal fair or unfair in accordance with s98(4) of the Employment Rights Act 1996, applying the band of reasonable responses?

6.4. Did the respondent unreasonably fail to comply with the ACAS Code on Disciplinary and Grievance Procedures? If so, would it be just and equitable to increase any compensatory award and by what percentage up to 25%?

6.5. If the dismissal was unfair on procedural grounds, what adjustment, if any, should be made to the compensatory award to reflect the possibility that the claimant would still have been dismissed (and fairly) had a fair and reasonable procedure been followed?

6.6. Would it be just and equitable to reduce the amount of the basic award for conduct prior to dismissal pursuant to s122(2)?

6.7. Would it be just and equitable to reduce the compensatory award for contributory fault pursuant to s123(6)?

6.8. Should the claimant be reinstated?

6.9. Calculation of compensation.

Notice

6.10. The respondent accepted notice ought to have been given. This was not a dismissal for gross misconduct. The issue was whether notice had in fact been given and worked prior to the agreed termination date of 6 February 2020.

Pay arrears for January and February 2020

6.11. Did the respondent make unauthorised deductions from wages in January and February 2020?

6.12. If so, in what sum?

Holiday pay

6.13. The respondent accepted the claimant was entitled to holiday pay in respect of her entire employment ie 160 days.

6.14. Mr Shellum floated whether the respondent would seek to argue that the claimant had in fact been given paid holiday when in Syria in 2018. However, given EJ Nicolle's fact-finding during the preliminary hearing that the claimant had never been given paid holiday, he decided not to pursue that.

6.15. The issue was therefore the daily rate.

Procedure

7. I proposed at the outset that I first hear evidence and make a decision on liability, we have a pause for me to make a decision, and then if the claimant was successful, we return on day 3 to deal with compensation including the application for reinstatement. Both representatives however were keen that I should hear the evidence on remedy (including as relevant to reinstatement) at the same time as that on liability. As it was what the parties wanted, I agreed. It had the advantage that if we unexpectedly ran out of time, I had sufficient information to reserve a decision.

8. In the event, we did not complete the evidence in three days and had to return for one further day of evidence on liability and remedy.

9. The tribunal heard from the claimant and, for the respondent, from Sana Aloul and Pat Sundram. There was an agreed trial bundle of 486 pages and a supplementary bundle called 'Razan Updated Documents' of 26 pages, and a finally amended schedule of loss entitled 'CCF 001592'. A document 95A was further disclosed by the claimant during the proceedings. Mr Shellum provided written closing submissions and Mr Neckles also provided me with a number of case reports.

10. Each witness provided a witness statement. The claimant had made a minor adjustment to hers following the one which she had exchanged. Miss Sundram called her witness statement her 'second' witness statement. Her first witness statement had been written for the preliminary hearing on employee status and was in the trial bundle. The relevant elements were reproduced in her second witness statement. The claimant said she had written her witness statement in Arabic, used google translate to translate it into English, and then given it to Mr Neckles to straighten out the grammar.

11. An interpreter was available for the claimant and Ms Aloul to call on if they felt uncertain about what was being said or how to express themselves. In addition, the claimant wanted her cross-examination to go through the interpreter. Although her English is good, she felt more comfortable in court to speak her first language. The interpreter had some connection difficulties in the afternoon of day 1. We agreed to proceed in his absence, but I told Ms Aloul that if at any point she felt she would like his assistance, we would stop. In the event, she felt able to complete her evidence without any interpretation.

12. Ms Aloul was recalled on day 2 at the respondent's request to give further evidence and a further witness statement to explain the system used prior to Viber and how the systems differed.

13. By way of a general comment on the witnesses, I did not find any of them very satisfactory. The evidence given by everyone was vague and there was little agreement on the facts. Miss Sundram was able to give useful evidence regarding pay matters. However, on matters concerning the claimant's general conduct or performance, I found her evidence of little value. She does not understand or speak Arabic and knew little first-hand about the newspaper systems, or the Viber App or indeed the claimant's performance. She tended to repeat without question what she had learned from Ms Aloul. It was impossible to assess whether these were matters she recalled having been said by Ms Aloul at the time during her daily conversations, or whether she was repeating what Ms Aloul said later at the time of the dismissal in order to justify the dismissal, or in some cases, whether she was just repeating what was in Ms Aloul's witness statement and oral evidence. Although Miss Sundram wrote the 6 February 2020 dismissal letter, she was effectively writing what Ms Aloul told her to, and did not appear to have applied independent thought to the matter.

Fact findings

14. The respondent newspaper considers itself similar to The Guardian in terms of professionalism and content, although it is much smaller. It is published only in Arabic.

15. The claimant started her employment with the respondent in February 2014, initially as Social Media Assistant. In about 2016, she was made an Online News Editor.

16. The respondent initially had two Online News Editors and two supervisors. This has now increased to 11 Online News Editors, two of whom were supervisors.

17. There were somewhere between 22 - 30 members of staff altogether (clear evidence was not given on this). Sana Aloul was the Editor-in-Chief.

18. The respondent had standard contracts for employees which stated that disciplinary and grievance procedures were available from Miss Sundram. Ms Aloul had not been given such a contract because she was not regarded as an employee. She was considered a self-employed freelancer.

19. The claimant worked from home and would take news from various sources, eg news agencies, social media etc. The respondent contends that it dismissed the claimant because of her refusal to use the new Viber platform, together with performance issues. The claimant alleges that she was dismissed because of disputes arising about her pay and requests for a written employment contract. She says she constantly raised these issues,

especially after she was instructed to work in the office mid 2019 and following her trip to Syria in August 2019. Apart from as mentioned below, I was given little precise detail about how and when she raised these issues. This made it hard to assess whether the employment relationship changed as a result.

20. The respondent introduced its Online section in about 2006. Initially it simply reproduced the print newspaper with 3 to 4 additional on-line stories each day. On this small scale, it was possible for the supervisors or Ms Aloul to check the topic of stories (which they would often propose) and if sensitive, the actual content. Gradually the number of daily Online stories was increased and not all stories were checked.

21. In 2017, the respondent introduced Viber, an Online platform for the Online team to use. By this time, the Online team was publishing around 100 – 120 stories each day and live news 24 hours / day. The team had got larger and it was impossible for the supervisors to review every article published. Viber was a more efficient system for keeping track of who proposed to write what stories and whether stories on certain topics had already been written and published. Use of Viber was not immediately mandatory.

<u>The claimant's general performance</u>

22. The respondent said that the claimant's general performance became unsatisfactory and that the Viber platform made it easier to monitor and control the content of her articles before publication. The respondent did not satisfy me that it genuinely believed there was any real problem with the quality of the claimant's articles or her performance in that sense. The claimant had been allowed to write articles and put them up on site with minimal supervision since 2016. Given that the respondent believed she was a freelancer with no rights, I would not have expected her to be retained in post for so long if it was thought that she was doing a bad job.

23. It is clear from this and the emphasis of the oral evidence, that the real concern was that the claimant occasionally published articles on topics which had been covered by a colleague the previous day or shortly beforehand. The claimant was not the only person who did this. The purpose of Viber was to prevent this happening. Viber made it much easier for writers and managers to check that articles were not duplicated and that acceptable topics and headlines had been chosen. These were the main concerns which the respondent had with the claimant's performance. Use of Viber would also alert supervisors more efficiently to when sensitive topics needed to be checked.

24. The respondent put a batch of WhatsApp messages into the trial bundle designed to show the claimant's performance was poor. With a couple of exceptions, they were on the point of duplicated topics. The ones of potential relevance are as follows.

25. On 18 October 2018, a message from Ms Aloul asking the claimant to check the news before publishing (there were two spelling mistakes in the heading); The claimant said she had noticed, but when she put the article onto Microsoft WORD, the letters had changed for some inexplicable reason. The claimant says that was a technical issue outside her control.

26. On 15 July 2019, Facebook had removed one of the claimant's news items and warned the site they might unpublish it. I was given no further detail of what the issue was.

27. In October 2019, Lamis Anas sent a WhatsApp stating 'scary mistakes by Razan'. The claimant says and I accept that she was told anything about this complaint. It was not made clear to me what the mistake was.

28. On 1 November 2019, Ms Aloul sent the claimant a message on Viber which said 'Since you are now included in the group on Viber, do communicate with the group and put the headline of the news you are preparing, and we might need your help in reports suggested for publishing if there is need for that, for example if you wrote the headline of a news item you published yesterday, we could have avoided the mistake.'

29. On 4 November 2019, a Viber message pointed out the claimant had published a news item which had been published by someone else on the site 3 days earlier. A second message asked her to communicate with the group and put on Viber the headline of any news item she was publishing.

30. It was put to the claimant in cross-examination that on 24 November 2019, Ms Aloul had sent her a screenshot showing that the claimant had published a news item about Michael Jackson which had already been published the day before. This was how it was characterised by the respondent in the bundle too. The claimant told the tribunal that it was her who had found two similar articles published successively by different colleagues and she had drawn it to Ms Aloul's attention. The claimant said she had documentary evidence of this. Mr Shellum took instructions and then confirmed the claimant's account was correct. I have to say that this little example caused me to have some caution about the extent to which I could rely on the other WhatsApps as showing the full picture.

31. On 26 November 2019, Ms Aloul sent the claimant a WhatsApp stating that the news item about Trump welcoming a dog had been published on the respondent's site the previous day. 'Please communicate with the group on Viber, from today, so they can tell you of the news item which was already published or not'. The claimant replied that she had searched the site and also asked Ms Aloul and Anwar (the on-line editor) before publishing. Ms Aloul replied that it had been published the previous day, and that the chance to avoid mistakes was greater when the claimant wrote on the group platform.

<u>Working in the office</u>

32. In about the middle of 2019, the claimant had been instructed to work from the office. Her pay was increased to £1500.

33. The respondent says the claimant was required to work at the office in order to supervise her work. The claimant says this is untrue and she was told the reason was that the respondent wanted its London Online editors to be in the office – a policy they happened also to be applying in Jordan.

34. I find on the balance of probabilities that the claimant's explanation is correct. Looking at the WhatsApp messages, there is very little evidence of performance issues prior to mid July 2019. No other documentary evidence was given on that point. No specifics were given. There is no evidence of any discussion with the claimant about her overall performance at any stage. Moreover, the respondent did not provide any detail or explanation as to how monitoring would be different and would take place if the claimant happened to be in the office. If there really were performance issues that required in-person monitoring, it is surprising that the respondent did not first try simply talking to the claimant, or, since it regarded her as a freelancer with no rights, simply dismiss her as it did later.

The claimant's visit to Syria

35. The claimant went to Syria for 20 days in about August 2019 due to family circumstances and she worked for the respondent while she was there. Her pay for that period was reduced to £1200. When she queried this, she was told the reason was that Middle East pay rates were less.

The instruction to use Viber

36. The first time the respondent insisted on the claimant use Viber was November 2019, when Djamal Abu Taleb (her supervisor) joined her into the group without her consent. I accept this because it is consistent with the 'now' in Ms Aloul's email of 1 November 2019. Viber was mentioned before that, but not in any way which suggested it was mandatory.

37. The claimant told the respondent that she objected to having Viber on her personal mobile phone. She said she was getting disturbed by the amount of messages, day and night, which came through the Viber app. She asked the respondent to be provided with a separate mobile phone – or at least a different number so that she could switch it off when she was not at work. She was concerned about the flood of notifications coming through 24/7.

38. The respondent told the claimant that she could mute the Viber notifications on her phone. The claimant did not think that was an acceptable solution. She believed she would still receive the messages visually on her mobile screen whenever she picked it up for personal calls to friends and family. The respondent told the tribunal that it is possible to remove the visual notifications too. The claimant says that it is not possible. I do not know whether it is possible or not. I was given no further evidence on that. Nor was I given any evidence that this aspect was discussed between the parties. As

this aspect does not appear to have been discussed, I find on balance that the claimant was not shown how to switch off visual notifications and that she believed it was not possible.

39. The claimant says that Ms Aloul and Mr Abu Taleb were annoyed when she objected to putting Viber on her phone and that they told her she should buy a different number from her own pocket. I accept this evidence. My strong impression from the evidence in these proceedings is that Ms Aloul believed the claimant ought not to have objected as none of her colleagues did. Ms Aloul also said when questioned in the tribunal that she believed the claimant was a freelancer and therefore felt she should use her own phone.

40. Ms Aloul says that in view of the claimant's objections, she instructed an IT technician (Mijan Kani) to put Viber on the claimant's office laptop instead. Looking ahead, there is no document suggesting this was done until after the claimant's access to the website was blocked on 8 January 2020. In what was effectively the dismissal letter dated 6 February 2020, Miss Sundram said that Viber had been installed on her laptop. The claimant said in her response on 11 February 2020 that it had never been installed. When cross-examined in the tribunal, Miss Sundram said she asked the technician personally whether he had installed it and he confirmed to her that he did so. She said she had asked at the time of the claimant's letter and again 3 days before the hearing. She says she did not ask when he did so.

41. I accept the claimant's statement that Viber was never installed on her laptop. Ms Aloul says she is the one who gave the instruction, but Miss Sundram says she was the one who checked at the time and 3 days prior to the hearing that the instruction had been actioned. I find that contradictory, especially as Miss Sundram also told the tribunal that she was not au fait with the Viber App and did not use it. If what the respondent's witnesses say is true, knowing it was a key matter of disagreement, why did they not get a brief confirmatory statement from the technician, especially if he was asked only 3 days prior to the hearing? Why did they not ask him to tell them when he installed it? I also note that when Ms Aloul was asked whether she had checked with the technician (whose name she knew), she simply said no; she did not say that Miss Sundram had checked, which I would have expected her to know. In addition, Ms Aloul told me the instruction was given in June / July 2019. That does not seem consistent with Ms Aloul's email of 1 November 2019, which does not refer to any laptop, and which prompted discussions about the mobile phone.

42. I do not believe that the respondent ever instructed Viber to be installed on the claimant's laptop. As I have said, Ms Aloul believed that the claimant should be cooperative like her colleagues, and anyway, that as a freelancer, she should be prepared to put it onto her phone or pay for an alternative mobile line if that bothered her.

<u>Lead up to termination</u>

43. On 8 January 2020, the respondent blocked the claimant's access to the respondent's system. This was on Ms Aloul's instruction. As I have said, at that time, Ms Aloul believed the claimant was a self-employed freelancer (her expression). Ms Aloul says the reason for blocking access was the claimant's failure to use Viber.

44. The claimant emailed Ms Aloul on 13 January 2020 to say that as a result of her account being blocked on the company's website, she had been unable to record work she had carried out. She referred to issues she had previously raised concerning her contract and wages deductions and feeling that she had been victimised because of her race. She said she had contacted a trade union representative, Mr Neckles of PTSC, and authorised him to make contact. She said she would be submitting a grievance later that day.

45. Later on 13 January 2020, the claimant sent a written grievance to Ms Aloul. She said her grievance was against Ms Aloul who she believed had bullied, harassed, and / or victimised and discriminated against her because of her race. She said she had been told her pay was reduced while working for a short period in Syria 5 months previously because the rates in the Middle East were less. She said this was blatant discrimination against her, because none of her colleagues who were originally from the Middle East had their salaries reduced when they travelled. She noted in the letter that she had queried the deduction, and in a meeting she had then asked Ms Aloul to reconsider her salary and provide a written contract. The claimant described how this had developed into an argument; Ms Aloul had said 'take it or leave it' and had referred her to the business manager, Miss Sundram. Miss Sundram had repeated the message. The claimant had said she was not leaving and Ms Aloul had shouted at her. Mr Abu Taleb had told the claimant the next day to go back to working from home. The claimant said that on 9 January 2020, Mr Abu Taleb had called her and said Ms Aloul insisted on the claimant using Viber. The claimant said she had again asked to be provided with a private number, and half an hour later she found she was blocked out.

46. The claimant concluded: 'My understanding of all that that Mrs Aloul is trying to escalate pressure, so I quit the job or give the company an excuse to fire me. I also consider the treatment I am receiving amounts to harassment, bullying and victimisation on grounds of my race'.

47. Although the claimant refers to the date of 9 January 2020 as when she was blocked on the system, I think it more likely that the date was 8 January 2020 as the respondent states.

48. On 20 January 2020, the claimant emailed Ms Aloul again asking why she was being blocked and prevented from doing her job and whether she was on suspension. She asked for a copy of her written particulars under s1 of the Employment Rights Act.

49. Miss Sundram, the Business Manager, replied on 21 January 2020 that the claimant had never been an employee. However if she continued to have a grievance regarding her freelance relationship with the company, they

would look into it as a matter of courtesy. The respondent then instructed solicitors.

50. On 6 February 2020, Miss Sundram wrote to the claimant, stressing again that she was not an employee, but was a freelancer on a monthly retainer Nevertheless, the respondent was prepared to hear her grievance as a matter of courtesy. The letter went on to say that, as the claimant was aware, her work had not been of the required standard over the past year, and she had been given the opportunity to work in the office (on increased pay) rather than from home. The letter continued:

'You were then asked use 'Viber' to keep in contact with your colleagues, although you indicated this does not work when you travel to Syria. As you did not want Viber on your mobile phone, we arranged for our IT technologist to put Viber onto your computer. Shortly thereafter you stopped using Viber on your computer'.

The letter went on to say that coming into the office to improve performance had not worked out and the claimant had therefore been allowed to return to working from home or wherever she wished. The letter said the claimant was asked to use Viber so she could be supervised from home. 'This you refused to do and as a result, we stopped your work'.

Finally the letter noted the allegations of racial victimisation and bullying and asked the claimant to set out her complaints so they could be dealt with.

51. The claimant responded on 11 February 2020. She pointed out that she had never been given any feedback or warning to suggest her work was not up to standard. She had not been supervised when in the office. She had been allowed to return to working at home and remained unsupervised. She had been given authority to post her articles on line without the need to discuss them with anyone. The claimant said in her letter that everything had been fine until she asked for a formal contract and a salary increase.

52. The claimant asked her status following cancellation of her online account as she was confused. Was it disciplinary action or dismissal? She had received no explanation. Regarding Viber, she said an IT technician had never installed it on her laptop as alleged. She said she had asked for a business phone number but this had been refused and she had been told to use her personal phone number or buy another phone number for use on a company laptop which she had refused. As Miss Sundram was saying she had not received the grievance, the claimant said she would resend it.

53. The parties have now agreed that the effective date of termination was 6 February 2020. There is a dispute as to whether any notice was given on 8 January 2020. The claimant says it was not, and all that happened on 8 January 2020 was that her access to her Online account was cancelled. The respondent argues that notice was given on 8 January 2020. I will deal with this in my conclusions.

54. On 5 March 2020, the claimant attended the premises for a meeting about her grievance with Miss Sundram. The claimant attended with her trade union representative (Mr Neckles). Miss Sundram cancelled the meeting because she felt uncomfortable not having a legal representative of her own present, if Mr Neckles was going to be there. The claimant emailed Miss Sundram on 23 March 2020, suggesting they rearrange the meeting and giving a large number of dates which Mr Neckles could not make. On 24 March 2020, the respondent's solicitors responded to Mr Neckles that a meeting seemed impossible at the moment, and suggesting that he set out the complaint in writing, and they could then speak on the phone regarding the issues. There is no document in the trial bundle indicating that Mr Neckles replied.

Law

55. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is either a reason falling within subsection (2), eg conduct, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

56. Under s98(4) '… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) 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 shall be determined in accordance with equity and the substantial merits of the case.'

57. Tribunals must consider the reasonableness of the dismissal in accordance with s98(4). However, tribunals have been given guidance by the EAT in British Home Stores v Burchell [1978] IRLR 379; [1980] ICR 303, EAT. There are three stages:
(1) did the respondents genuinely believe the claimant was guilty of the alleged misconduct?
(2) did they hold that belief on reasonable grounds?
(3) did they carry out a proper and adequate investigation?

58. Tribunals must bear in mind that whereas the burden of proving the reason for dismissal lies on the respondents, the second and third stages of Burchell are neutral as to burden of proof and the onus is not on the respondents (Boys and Girls Welfare Society v McDonald [1996] IRLR 129, [1997] ICR 693).

59. Finally, tribunals must decide whether it was reasonable for the respondents to dismiss the claimant for that reason.

60. I have reminded myself that the question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for me to substitute my own decision.

61. The range of reasonable responses test (or, to put it another way, the need to apply the objective standards of the reasonable employer) applies as much to the question of whether an investigation into suspected misconduct was reasonable in all the circumstances as it does to other procedural and substantive aspects of the decision to dismiss a person from his employment for a conduct reason. The objective standards of the reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. (Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23, CA)

ACAS Code

62. In reaching their decision, tribunals must take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question. A failure by any person to follow a provision of the Code does not however in itself render him liable to any proceedings.

63. The Code is also relevant to compensation. Under section 207A, if the claim concerns a matter to which the Code applies and there is unreasonable failure by either the employer or the employee to comply with the Code, there can be an increase or reduction in compensation (respectively) according to what is just and equitable of up to 25%.

Polkey and contributory fault

64. Where the dismissal is unfair on procedural grounds, the tribunal must consider whether, by virtue of Polkey v AE Dayton Services [1987] IRLR 503, HL, there should be any reduction in compensation to reflect the chance that the claimant would still have been dismissed had fair procedures been followed.

65. Under s122(2) of the Employment Rights Act 1996, the tribunal shall reduce the basic award where it considers that any conduct of the claimant before dismissal was such that it would be just and equitable to do so.

66. Under s123(6), where the tribunal finds the dismissal was to any extent caused or contributed to by any action of the claimant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable. The employee's conduct must have been culpable or blameworthy. The first question is whether the employee's conduct caused or contributed to the dismissal. The second is whether it would be just and equitable to reduce the compensatory award and by how much.

67. When deciding the appropriate percentage to deduct for contributory fault, the tribunal should take into account any reduction it has already made under the Polkey principle.

68. The tribunal's approach to issues of contributory fault (and gross misconduct) is different from its approach when considering whether or not the dismissal was fair. In respect of contributory fault and gross misconduct, the tribunal may make its own findings on disputed facts on the evidence which it has heard (London Ambulance Service NHS Trust v Small [2009] IRLR 563, CA.)

Re-employment

69. Under s113 – s117 of the Employment Rights Act 1996, a tribunal can make an order for reinstatement or re-engagement.

70. An order for reinstatement is an order that the employer shall treat the complainant in all respects as if he or she had not been dismissed. When considering whether to make an order for reinstatement, the tribunal must take into account (a) whether the complainant wishes to be reinstated; (b) whether it is practicable for the employer to comply with an order for reinstatement, and (c) where the complainant caused or contributed to some extent to the dismissal, whether it would be just to order his or her reinstatement.

71. An order for re-engagement is an order, on such terms as the tribunal may decide, that the claimant be engaged by the employer, or by a successor of the employer or by an associated employer, in employment comparable to that from which he was dismissed or other suitable employment. The tribunal must take into account (a) any wish expressed by the claimant as to the nature of the order to be made; (b) whether it is practicable for the employer (or a successor or an associated employer) to comply with an order for re-engagement, and (c) where the claimant caused or contributed to some extent to the dismissal, whether it would be just to order his or her re-engagement and (if so) on what terms.

72. What is 'practicable' means more than merely possible, but 'capable of being carried into effect with success'. (Coleman v Magnet Joiners Ltd [1975] ICR 46, cited by British Airways PLC v Valencia UKEAT/0056/14.) Loss of the necessary mutual trust and confidence between employer and employee can make re-employment unpractical. (Central & North West London NHS Foundation Trust v Abimbola UKEAT/0542/08.) A genuine belief in the guilt of an employee of misconduct, even if there are no reasonable grounds for it, is a factor which should be taken into account. (ILEA v Gravett [1988] IRLR 497; cited by British Airways PLC v Valencia UKEAT/0056/14.)

73. Under s116, where an employer has engaged a permanent replacement for a dismissed employee, the tribunal shall not take that fact into account in deciding whether it is practicable to comply with an order for reinstatement or

re-engagement unless the employer shows (a) that it was not practicable to arrange for the dismissed employee's work to be done without engaging a permanent replacement, or (b) that (i) the replacement was engaged after the lapse of a reasonable period, without the employer having heard from the dismissed employee that he or she wished to be reinstated or re-engaged, and (ii) when the employer engaged the replacement it was no longer reasonable for it to arrange for the dismissed employee's work to be done except by a permanent replacement.

Other

74. I bear in mind the law applicable to the notice pay, holiday pay and deductions claims, but as there was very little in dispute on those, it is not necessary for me to set it out here.

75. I took account of all the cases referred to me by the representatives. I have not referred to and described them all here as it would make these Reasons very lengthy indeed. Mr Shellum provided me with written submissions and I do not repeat here the cases and propositions referred to. Mr Neckles did not provide written submissions, so I list here the majority of the additional cases which he referred to: Devis v Atkins [1977] IRLR 314; Holmes v Qinetiq Ltd [2016] IRLR 664; Iceland Frozen Foods Ltd v Jones [1982] IRLR 439; King & others v Eaton Ltd (No.2) [1998] IRLR 686, CS; Laws v London Chronicle (Indicator News) [1959] 1 WLR 698, CA; McKinney v Newham LBC UKEAT/501/13; Moyes v Hylton Castle Working Men's Social Club & Institute [1986] IRLR 482; Salford Royal NHS Foundation Trust v Roldan [2010] IRLR 721; Scottish midland Co-operative Society Ltd v Cullion [1991] IRLR 261; Strouthos v London Underground Ltd [2004] IRLR 636, CA; Weddel & Co Ltd v Tepper [1980] IRLR 96, CA; Sainsbury Supermarkets Ltd v Hitt [2002] EWCA Civ 1588.

Conclusions

Unfair dismissal

76. The claimant was dismissed on 6 February 2020. I believe that the principal reason for dismissal was that the claimant refused to use the Viber App on her personal mobile unless the respondent provided a separate mobile or phone line. This was against a backdrop of an argument about her pay and contract. However, the correspondence at the time and the Whats Apps in November 2019, show that use of Viber was the key issue. In addition, an email from the claimant to her representative on 15 October 2020 shows she understood that use of Viber was the issue ('This is to show the unreasonable volume and time of communication via Viber which I used to receive on my private and personal mobile number day and night and that was the main reason for terminating my employment'.).

77. Refusal to use Viber falls within the category of conduct, and was a potentially fair reason for dismissal. The question is whether the dismissal

was actually fair in the particular circumstances, applying the band of reasonable responses test.

78. Applying the three stage test in British Home Stores v Burchell, first, did the respondent genuinely believe the claimant was guilty of misconduct? I find that it did. Ms Alsnih and Miss Sundram believed that the claimant's failure to use the Viber App was misconduct.

79. The next question is whether the respondent carried out a proper and adequate investigation? I find that it did not. It did not fully investigate the contextual circumstances.

80. By the time Mrs Alsnih arranged for the claimant's access to the website to be blocked on 8 January 2020, her mind was made up, even though she did not actually communicate a decision to terminate at that point.

81. No investigation was carried out and no disciplinary hearing was held. The claimant knew the respondent wanted her to use Viber, but she was never told her job was at risk if she did not. The respondent argues that there was no need for an investigation because there was no dispute as to the nature of the alleged misconduct. However, there were matters to clarify. Was the basis for the respondent's belief in the misconduct that the claimant refusing to use Viber altogether? Did the respondent make clear its bottom line expectations regarding use of Viber? What did the claimant understand? Was the laptop option ever properly discussed? Was there a misunderstanding? The respondent did not investigate whether it was really feasible to switch off the audible notifications and whether the screen would still be filled with visual notifications, and if it was possible to switch those off, how the claimant would catch up on notifications she had missed. Nor did it explore whether, even if these things were feasible, the claimant understood that. In the tribunal she indicated she did not think it was possible to avoid visual notifications.

82. The third BHS question is whether the respondent held that belief on reasonable grounds. I find that it did not. This is largely because it did not carry out a proper investigation in order to be informed of all the facts and exactly what the claimant was saying and why.

83. I therefore do not consider the Burchell test was satisfied, because the ambit of the alleged misconduct in which the respondent believed was not investigated.

84. In any event, as a separate matter, the procedural failings in this case make the dismissal unfair. To repeat what I have said above, no formal investigation nor disciplinary hearing was held before minds were made up. There were oral and Whats App instructions to use Viber, but these do not replace the need for a disciplinary hearing. The claimant was not told her job was at stake. There was no discussion about the respondent's contention in the 6 February 2020 email that Viber could be and had been installed on her laptop, and whether that would be a solution. There was no discussion about

whether the visual notifications could be removed off the screen and if so, how to do that.

85. Further, this is all in the context that the claimant had received no prior disciplinary warnings on the matter. The tenor of the Whats App messages in November 2019 (and I have been shown none since then) is a long way from dismissal or even disciplinary. The fact is that the respondent did not see the need to follow proper procedures because it believed the claimant was self-employed. The dismissal is therefore unfair for procedural reasons.

86. This is not one of those cases referred to by Mr Shellum where an employer may exceptionally dismiss without following a proper procedure because there has been a breakdown in working relations and a procedure would follow no useful purpose. It is not that kind of case. That would be recharacterising a conduct dismissal. At the time of the decision to block the claimant's access to the website, there had been a few arguments over pay and terms, but no major breakdown of working relations. The tenor of the WhatsApp messages in November do not suggest anything of that extreme nature. There was no reason at all why a normal disciplinary meeting could not have been held prior to 8 January 2020.

87. Matters did deteriorate with the claimant's grievance of 13 January 2020, but there was still no reason why a disciplinary meeting could not have been held.

88. The dismissal was therefore procedurally unfair.

89. I find that the dismissal was also unfair on substantive grounds. Applying the band of reasonable responses, no reasonable employer would dismiss an employee for refusing to put an intrusive work-related App on their personal mobile phone, using their personal number. No reasonable employer would refuse to pay for a separate phone or line. I accept that it was reasonable for the respondent to insist on their staff, including the claimant, using Viber. It was up to the respondent to decide if it found that the most practical process. What was unreasonable, was the expectation that the claimant put it on her personal mobile. It meant she could not separate her home and work life. There were practical alternatives. The respondent could have paid for an alternative phone or phone line. It is not unusual for employers to provide company phones.

90. Another alternative would have been to install the App on the claimant's laptop in a way which did not interfere with her personal phone. For reasons I have explained in the fact-findings, I do not believe that this was done.

91. I therefore find the dismissal was also substantively unfair.

<u>Polkey</u>

92. Had the respondent followed a fair procedure by properly investigating and holding a disciplinary hearing, but still dismissed the claimant for not

accepting the App on her own private phone, the dismissal would still have been unfair.

93. It may be that the claimant would have been able to explain her position, more explanations could have been given by the respondent, installation on the laptop could have been explored or agreement reached to provide a separate phone. The claimant would have accepted those alternative options – she was always clear that her specific objection was use of her private phone and line – and so she would not have been dismissed.

94. I therefore make no Polkey deduction.

Conduct and contributory fault

95. The claimant's conduct was her refusal to put Viber onto her personal mobile phone and phone line. I do not consider that conduct to be blameworthy. A reasonable employer would not have expected her to do this. She told her employer she was willing to put it onto a separate line or phone if the respondent provided this.

The ACAS Code

96. The respondent conceded breach of the ACAS Code on Disciplinary and Grievance Procedures and that an uplift of 25% should be awarded. I would in any event have made those findings. While I accept the respondent was a fairly small employer, it had access to solicitors, and it new about disciplinary procedures, because these were referred to in its employees' contracts. It may have thought the claimant was not an employee, but even if it perceived her as freelance, she had worked for the respondent for nearly 6 years. The respondent did not show her the basic courtesy of having a meeting, telling her its concerns, that she risked dismissal and listening to what she had to say, before abruptly cutting off her access to the website and dismissing her a few weeks later.

Reinstatement

97. I do not order reinstatement. The claimant says she wants reinstatement. I am not completely convinced of that, but she has had difficulty finding a permanent job in the time since losing her job, so I give her the benefit of the doubt.

98. However, I do not think it is at all practicable. I do not think reinstatement is capable of being carried out with success. There has clearly now been a breakdown of trust and confidence between the claimant, Ms Aloul (in particular) and Miss Sundram. This is a fairly small employer where Ms Aloul, as editor-in-chief, has a prominent role in managing content and would have frequent interactions with the claimant. Ms Aloul already demonstrated a level of distrust and hostility towards the claimant by arranging for her access to the website to be blocked on 8 January 2020 without prior warning that that would happen. There was then no disciplinary hearing prior to termination on

6 February 2020. This indicates to me unsatisfactory communication and a lack of goodwill. The claimant's grievance on 13 January 2020 referred to a shouting match a few days before, and stated her belief that Ms Aloul was deliberately trying to pressurise her into leaving the job. I cannot see how the parties could practically work together if that was the claimant's belief. When questioned in the tribunal as to whether she genuinely wanted reinstatement, the claimant said she had loved her job and 'As long as I am treated in a just way, this is my right'. This answer suggested to me that disputes would simply continue if the claimant went back to work with the respondent.

99. My view is reinforced by the way Ms Aloul and the claimant gave evidence. I do make allowance for the artificial tensions which litigation causes. But even making that allowance, they both clearly felt a high level of grievance about and hostility toward the other. I could not see any prospect of a conciliatory approach by either. The claimant asserted that she wanted reinstatement because she 'loved her job'.

100. I have not taken (and don't need to take) into account the fact that the claimant also accused Ms Aloul of harassment, bullying, victimisation and discrimination because of race, which Ms Aloul took very badly. I do not think it is an appropriate consideration against reinstatement that an employee has alleged race discrimination, or that such allegation has upset the employer. Making such an allegation is a protected act, unless the allegation is made in bad faith. I am not in a position to say whether the claimant made such an allegation in bad faith or not, since that would open up areas of enquiry not covered in this case.

<u>Compensation for unfair dismissal</u>

101. The basic award is agreed at £1,730.75 (5 x £346.15 gross weekly pay, bearing in mind the claimant's age). The parties had agreed that the weekly gross weekly pay was £346.15 (£1500 x 12 divided by 52).

102. The claimant provided a long list of her attempts to find alternative employment. The respondent did not argue that she had failed to mitigate her loss. The claimant's loss of earnings from 13 February 2020 (the day after her notice period expired, which has been separately awarded) to the last day of the hearing (19 June 2023) is calculated as follows.

102.1. Number of weeks 13 February 2020 – 19 June 2023: 175 weeks. The parties agreed that weekly net pay was £312.74. The latter was an agreed approximation using an on-line tax calculator. 175 x £312.74 = £54,729.50.

102.2. During this period, the claimant earned £2,435.00 after tax from Levant News and £11,550 before tax from AlGhad TV. The claimant did not pay tax on the £11,550 because she was below the tax threshold.

102.3. This leaves a balance of loss of earnings of £40,744.50 (£54,729.50 less £2,435.00 and £11,550),

103. An award for loss of statutory rights was agreed at £900. However, the claimant's schedule of loss suggests 2 (representing two years) x £300, and wrongly calculates that that equals £900. Mr Shellum did not spot the error. I am also unclear where £300 comes from. Following the general principle suggested and accepted, I shall award £700 for loss of statutory rights (2 x £346.15 being gross weekly pay, and rounded up).

104. This brings the sub-total for the compensatory award to £41,444.50 (£40,744.50 + £700).

105. No deductions are made by reason of Polkey or for contributory fault or conduct prior to dismissal.

106. An uplift of 25% is applied to the compensatory award, ie 25% of £41,444.50 is £10,361.12, bringing the total to £51,805.62.

107. The statutory cap on the compensatory award for dismissal in February 2020 was £86,444 or, if lower, 52 weeks' gross pay. The latter applies in this case. The claimant's gross pay for 52 weeks was £17,999.80 (52 x £346.15).

108. The claimant made a somewhat vague claim that compensation should include loss of an auto-enrolment pension which she ought to have been given during employment. I was not given sufficient legal or factual argument to deal with this claim. In any event, I accept Mr Shellum's suggestion that it is not necessary for me to do so because the figure which I have arrived at already considerably exceeds the cap on the unfair dismissal compensatory award.

Recoupment

109. The recoupment regulations apply. The prescribed period is 13 February 2020 to 20 June 2023 (the date of this decision).

110. The prescribed element is £6,054.96.

111. The amount by which the compensatory award exceeds the prescribed element is £11,944.94.

112. The above calculation of the prescribed element was as follows:

Sub-total compensatory award of £51,805.62 was reduced by the statutory cap to £17,999.90. This is a reduction on 35%.

The original prescribed element was £17,299.90 (£17,999.90 less £700 for loss of statutory rights). This is now reduced as a prescribed element under regulation 4(2). £17,299.90 reduced by 35% = £6,054.96.

This means that of the total compensatory award of £17,999.90, £6,054.96 is the prescribed element and £11,944.94 is the balance.

Notice pay

113. The respondent accepts the claimant was entitled to notice. It was not suggested she was dismissed for gross misconduct. It is undisputed that the length of notice was the statutory minimum, ie 5 weeks based on 5 whole years' service.

114. It is agreed that the claimant's employment terminated on 6 February 2020. I find that the claimant was not given notice on 8 January 2020 or any time prior to that. The claimant asked in her email of 20 January 2020 about the significance of being blocked from her account. No one had told her she was being dismissed or, in more neutral language, that the relationship was terminated.

115. Ms Aloul says in her witness statement that Mr Abu Taleb told the claimant on 8 January 2020 that her contract was terminated immediately. I do not accept this evidence for several reasons. First, this sounds like he said the claimant's employment was terminated with immediate effect, whereas the parties have agreed the effective date of termination was 6 February 2020. It says nothing about Mr Abu Taleb giving any notice. Further, the claimant denies Mr Abu Taleb told her this. The respondent has not brought Mr Abu Taleb to the tribunal to confirm that important point. Ms Aloul did not give any further detail of what Mr Abu Taleb allegedly said about termination. If he had told the claimant that, then I would expect the claimant to have mentioned it in her email of 13 January 2020, but she does not. She expresses herself in a way which suggests she believes her employment is continuing but she has been blocked from being able to perform her duties. Then on 20 January 2020, she emails again to ask why she is being prevented from doing her job and whether she is suspended.

116. I doubt that the respondent had thought through what it was doing in terms of terminating the relationship. It had in mind that the claimant was not an employee, so it was not following usual procedures. The parties have agreed the effective date of termination was 6 February 2020. I think the idea that notice was given on 8 January 2020 is an artificial construct after the event. Apart from anything else, the respondent believed the claimant was a freelancer and had no employment rights. It did not even hold a disciplinary meeting with the claimant before dismissing her. It is very unlikely in those circumstances that it would have felt the need to give notice.

117. Pay in lieu of notice is awarded net of tax. The claimant's net weekly pay was agreed as £312.74. 5 x £312.74 = £1,563.70. The claimant is therefore awarded £1,563.70 net as damages (pay in lieu).

Holiday pay

118. At paragraph 25 of his judgment for the preliminary hearing, EJ Nicolle made a clear fact-finding that 'the claimant did not receive holiday pay at any time during her engagement'. Mr Shellum did not seek to argue that he could go behind that.

119. Mr Shellum accepted therefore that the claimant could claim pay in lieu of statutory holiday for the entirety of her employment. This was clearly on the basis that the respondent treated the claimant as self-employed and not eligible for statutory paid holiday.

120. The parties agreed the number of days holiday over that period would have been 160. This is paid gross. The dispute was only regarding the daily rate. During the hearing, it emerged that the difference between the claimant's calculation and the respondent's calculation was that the latter was calculated on the basis of a 6 day week (which the claimant worked), and the former erroneously based it on a 5 day week. It was therefore eventually agreed that the daily rate was £57.69 (£346.15 divided by 6).

121. The amount owed is therefore 160 x £57.69 = £9,230.40 gross. The claimant is responsible for paying tax on this.

Pay arrears

122. It is accepted that the claimant's gross pay entitlement for January and February 2020 was £1500/month. It is further accepted that she was paid £350 in January (leaving £1,150) and nothing for February, when she was employed for one week up to 6 February 2020. The sum owing for February 2020 was agreed at £346.15 gross.

123. Had I accepted that the claimant was given notice on 8 January 2020, then these sums would not have been owed in full, because there would have been duplication. However, I found that notice was not given..

124. There were therefore unauthorised deductions from the claimant's pay of £1,496.15 gross (£1,150 + £346.15) for January and February 2020. The claimant is responsible for paying taxon this.

Interest

125. Interest is not awarded on claims of this nature (although there are provisions on unpaid awards).

Employment Judge Lewis

Dated: 20 June 2023

Judgment and Reasons sent to the parties on:

22/06/2023

For the Tribunal Office