



## EMPLOYMENT TRIBUNALS

**Claimant:** Ms K. Herbert

**Respondent:** Main Group Services Ltd

**Heard at:** Cambridge **On:** 29 March 2023 (Full Merits Hearing)

**Before:** Employment Judge Boyes (Sitting Alone)

Representation

Claimant: Mr Searle, counsel

Respondent: Ms Ralph, litigation consultant

## RESERVED JUDGMENT

**The claimant's unfair dismissal claim is well founded. The claimant was unfairly dismissed.**

**The claimant was summarily dismissed in breach of contract. The claimant is entitled to damages equivalent to one month's salary for breach of contract.**

**The claimant's holiday pay claim is dismissed.**

**The claimant's written statement of particulars of employment did not fully comply with the requirements of section 1 of the Employment Rights Act 1996. The claimant is awarded compensation of two week's pay.**

**There will be a further hearing (1 day) to determine remedy.** This will include consideration of whether any award should be reduced for any contributory conduct on the part of the claimant, whether a *Polkey* reduction should apply and whether there should be any adjustment relating to the Acas Code of Conduct.

## REASONS

1. The claimant claims unfair dismissal and that she is owed notice pay and holiday pay. The respondent denies all claims.

### **The Proceedings/Hearing**

2. After a period of early conciliation through ACAS from 2 June 2022 to 17 June 2022, the claim form (ET1) was lodged with Tribunal on the 17 August 2022.
3. The respondent filed a response to the claim (ET3).

4. The claimant gave evidence. She adopted her witness statement. She was cross examined by the respondent and asked questions by me.
5. The claimant called one further witness, Donna Anderson (by video). She is the claimant's sister. She adopted her witness statement. She was cross examined by the respondent and asked questions by me.
6. The respondent called two witnesses. These were Thomas Swannell, Operations Manager, and Anna Swannell, Managing Director. Both was cross examined by the claimant and asked questions by me.
7. During cross examination Thomas Swannell was asked about a previous conviction. Ms Ralph objected on the basis that it was a spent conviction. There was no basis for such an objection as the respondent had introduced character evidence both in the statements provide and in live evidence. In any event, I had no regard to Mr Swannell's conviction when weighing the evidence before me. The events leading up to that conviction were not in a workplace environment and occurred in an entirely different context.
8. There was a significant number of documents in the trial bundle the relevance of which was not apparent. At the commencement of the hearing, I made both parties aware that if any particular document was not referred to in a witness statement or its relevance explained to me then I was not going to have regard to it.
9. Both parties made oral closing submissions.
10. I reserved Judgment as there was not sufficient time for judgement and reasons to be given on the day of the hearing.

### **Documents**

11. As well as the documents held on the Tribunal file, the Tribunal had before it a bundle (prepared by the claimant) of 353 pages. There were also statements from two individuals, Leanne Regan (Mr & Mrs Swannell's niece) and Ruth Dyer (a former employee). These individuals were referred to as character witnesses. Neither gave live evidence before the Tribunal.

### **Issues to be determined**

12. The issues that the Tribunal is required to decide are:

#### **Unfair dismissal**

- i. On what date was the claimant dismissed
- ii. It is not disputed that the claimant was dismissed. However, there is a dispute as to the date of dismissal (20 May 2022 or 22 July 2022).
- iii. What was the reason or main reason for dismissal. The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.
- iv. If the reason for dismissal was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

- there were reasonable grounds for that belief;
- at the time the belief was formed the respondent had carried out a reasonable investigation;
- the respondent otherwise acted in a procedurally fair manner;
- the dismissal was within the range of reasonable responses.

**Wrongful dismissal / Notice pay**

- i. What was the claimant's notice period?
- ii. Did the respondent dismiss the claimant with immediate effect on 20 May 2022
- iii. Was that a breach of contract?
- iv. Was the claimant paid for that notice period?
- v. If not, was the claimant guilty of gross misconduct or did the claimant do something so serious that the respondent was entitled to dismiss without notice?

**Holiday Pay**

- i. Did the respondent fail to pay the claimant for annual leave the claimant had accrued, but had not been taken, when their employment ended taking into account the following:
  - What was the claimant's leave year?
  - How much of the leave year had passed when the claimant's employment ended?
  - How much leave had accrued for the year by that date?
  - How much paid leave had the claimant taken in the year?
  - Were any days carried over from previous holiday years?
  - How many days, if any, remain unpaid?

**Findings of Fact**

13. Where there is no dispute between the parties as to a particular fact, my findings of fact are recorded below without any further explanation. Where the facts are not agreed by both parties, I have explained why I prefer one party's account over the other. Where the facts are not clear, I have explained why I have made the finding of fact concerned.
14. My findings of fact are as follows:

**The respondent**

15. The respondent is a scaffolding and brickwork company, offering Commercial Scaffolding and Brickwork Services across the UK. The claimant's managers were Thomas Swannell, Operations Manager, and Anna Swannell, Managing Director. Mr and Mrs Swannell are the claimant's brother-in-law and sister-in-law. Anna Swannell is the claimant's husband's sister. At the time that the ET3 was completed the respondent had six employees.

**The claimant**

16. The claimant commenced employment with the respondent on 28 October 2018. The claimant was employed by the respondent in the role of Office Manager. The claimant was initially contracted to 35 hours a week, from 8:30 to 16:30 Monday to Friday. In 2019, however, the claimant requested her working

hours be changed to 8:30 to 16:00. The respondent agreed to this change. There was no change made to the claimant's salary.

17. The claimant's role included: day to day running of the office; overseeing accounts; overseeing health and safety requirements and ISO standards; overseeing payroll; overseeing finances; arranging meetings; working with the sales and purchase ledgers; working with administration staff and individuals across the business at all levels; and covering office duties in the absence of administration staff.
18. There is a dispute between the parties as to the end date of the claimant's employment. The claimant asserts that it ended on the 20 May 2022. The respondent asserts that it ended on the 22 July 2022. I make my finding in this respect below.

#### Terms and Conditions of Employment

19. On the 17 July 2018 there was an email exchange between the claimant and Anna Swannell about the key terms of the claimant employment.
20. The claimant states that she first received a contract of employment on the 2 October 2019. The respondent states that the claimant was provided with a contract of employment immediately upon the commencement of her employment. Therefore, the respondent's position is that the contract of the 2 October 2019 is the second contract that the claimant signed. Anna Swannell stated in live evidence that the claimant thought that the original contracts were too basic so were re-done. She confirmed that the respondent does not have a copy of the first contract.
21. There are two parts to the claimant's contract, a Schedule [328] and the main body of the contract [327, 329-345].
22. The front page of the contract [327] says "Issue Oct 19". At section 1.1 it states "*This contract of employment is made this 28<sup>th</sup> Oct 2018...*" The contract is signed by Anna Swannell and the claimant on the 2 October 2019.
23. Under the claimant's contract of employment dated 2 October 2019, the respondent was required to give the claimant one month's notice of the termination of her employment.
24. In the schedule before the Tribunal it also states that the Sick Pay was "*Full pay (as agreed)*".
25. In the schedule it refers to Thomas Swannell as the person that the claimant reports to.
26. Section 15 and 16 of the contract deal with disciplinary rules and unsatisfactory work and misconduct. Sections 18, 19 and 20 specify the respondent's disciplinary procedures. Section 21 details the appeals procedure. The grievance procedure and grievance appeal procedure are laid out at section 22.
27. A non exhaustive list of types of conduct which may amount to gross or serious misconduct can be found at section 15.1. At 15.1.10 it includes "*rudeness or insubordination to any of its customers or any conduct which may put at risk the employer/customer relationship*". At 15.1.12 it includes "*persistent disobedience, without cause, of reasonable instructions, given by the company*".
28. At section 16 there is a list of the type of conduct or unsatisfactory work that may lead to dismissal after a prior warning has been given. There is a non

exhaustive list of examples which include negligence, carelessness or general lack of capability in performance of the employees duties, bad timekeeping and the provocative use of insulting or abusive language.

29. There is also an employee handbook [261-322] which provides further examples of gross misconduct, the disciplinary/capability procedure and appeal procedure. In respect of the disciplinary procedure it is explicitly stated that this does not form part of employee's terms and conditions of employment. The list of examples that would ordinarily be deemed serious enough to constitute gross misconduct includes "*serious instances of: [...] Serious cases of bullying, aggressive, threatening or intimidating behaviour or excessive bad language*"

#### Chronology of Events

30. As a result of the first national lockdown due to the coronavirus pandemic, the respondent placed the claimant on furlough leave under the Coronavirus Job Retention Scheme from March 2020 until 30 September 2021.
31. Over the period 12 March 2021 to 20 October 2021, the claimant made nine separate loans to the respondent ranging from £3,000 to £15,000. These loans were to assist the respondent with cashflow. They were repaid.
32. In November 2021, the claimant was informed by the respondent that she would no longer be entitled to receive enhanced company sick pay pursuant to the contract.
33. In December 2021, the claimant agreed to take a salary reduction from £40,000 to £35,000 for a period of six months.
34. On 13 May 2022, the claimant accessed a digital copy of her contract of employment on the respondent's system. This was done without the knowledge of the respondent. She amended the section entitled '*Rate of Pay*' so as to read "*£35,000.00 (reduction from Dec 2021 for 6 months) then back to £40,000*". The claimant denies making any other amendments. She states that she did notice that the schedule still referred to her being entitled to full pay during periods of sickness absence. She states that as she had not received any written correspondence about this and had received full pay when she was absent from work due to Covid she concluded that the change had not been implemented and therefore left the wording in the contract.
35. The respondent asserts that there was also a paper copy of the schedule which had handwritten amendment. As I understand it (and the evidence before me in this respect unclear) the amendment that was made was to confirm that the claimant was no longer entitled to full pay when she was sick. The respondent's position is that this paper document can no longer be found.
36. The evidence before me regarding the various versions of the claimant's contract was far from clear. On balance, I accept that there was a copy of the schedule which had handwritten amendments on it confirming that the claimant was no longer entitled to full pay when sick. However, I am not persuaded, on the evidence before me, that that document was disposed of by the claimant as was suggested by Anna Swannell. There is no evidence to suggest that this was the case.
37. Having considered all of the evidence before me in the round, I did not form the view that the claimant had amended her contract so as to give the impression that she was still entitled to full sick pay. Indeed, it is the respondent's evidence that the amendment removing full sick pay was recorded by hand. It is not

suggested that the digital version recorded the removal of full pay when sick. Others knew about this change in any event. It seems to me more likely that she accessed the document in order to record that her reduction in salary was a temporary rather than permanent change.

38. The claimant states that, on 20 May 2022, she was in the office with Thomas Ball, a self-employed bricklayer who managed the brickwork side of the business and Anna Swannell. They were searching for a disc for the tachograph programme in order to upload it onto staff computers and, as part of the search, she asked Anna Swannell whether she could look through Thomas Swannell's desk drawers. Anna Swannell agreed. When inspecting the desk drawers, she discovered notes and documentation setting out the cost of her employment to the business.
39. The claimant states that she did not tell anyone that she had found the documentation but found it extremely upsetting. She says that she also felt angry at the prospect of her role being terminated and often when she is angry, she begins to cry. She denies the allegation made by the respondent that she kicked and hit the printer or that she was shouting and screaming.
40. The claimant's version of events is disputed by the respondent. The respondent's position is that after Anna Swannell had finished for the day, she was informed by a sub-contractor who works in the office that the claimant unexpectedly lost her temper earlier in the day and began shouting/screaming. The sub-contractor also informed her that the claimant caused some damage to the printer by kicking it. Other concerns raised by the sub-contractor regarding the claimant included her behaviour in a professional environment, lack of care and attention to detail in her work, and refusing to carry out daily tasks that fell within her remit.
41. On 20 May 2022, at around 4.10pm, the claimant received a telephone call from Thomas Swannell who requested that she attend a meeting with him in the office early on Monday 23 May 2022 before any other members of staff arrived. She says that he explained that he wanted to discuss a few topics but did not provide any detail or mention Anna Swannell's involvement.
42. The claimant telephoned Thomas Swannell at around 4.15pm to request that the meeting take place that day. She claims that this was because she is a worrier and that she knew that she would be unable to enjoy her weekend otherwise. She was worried that her employment was going to be terminated because of the documentation that she had found in Thomas Swannell's desk.
43. The meeting therefore took place between Mr Swannell and the claimant at the respondent's offices at or just after 4.30pm on the 20 May 2022. Anna Swannell could not attend the meeting as she had caring responsibilities. There is a dispute between the parties as to what was said and what occurred during that meeting.
44. The claimant asserts that during the Meeting, Mr Swannell stated that he was not happy with the claimant's management of the office, namely that there were issues with 'bookings', suppliers were not being paid on time and he was unaware of the current cash flow of the company. She says that during the meeting he telephoned Anna Swannell to check whether something that the claimant had said in response to one of his concerns was correct. Further he stated that the claimant had been distracted at work as a result of spending too much time on her telephone.

45. The claimant asserts that in response to these allegations, she told Thomas Swannell that a number of these responsibilities did not form part of her job role. She says that she told Thomas Swannell that he was unable to take responsibility or admit wrongdoing.
46. The claimant states that it was the first time that any concerns had been raised with her in relation to her performance. She asserts that the atmosphere in the meeting became very heated and that Thomas Swannell had an aggressive demeanour and refused to acknowledge her point of view. She therefore began to cry. She says that Thomas Scannell then asked her what they could do to sort out the situation to which she replied that it was his decision as it was his business. She says that he then approached where she was sitting, placed both hands on the desk and stated that he thought the world of her. She states that she confirmed her commitment to the respondent and then said *"if it was anyone else in this position they would have walked years ago due to the goings on in the office, but it is only because of you two dickheads [in reference to Thomas and Anna Swannell] that I stayed"*.
47. The claimant's position is that this comment was a joke and was commensurate with the manner in which the claimant and Mr Swannell would normally communicate with each other.
48. The claimant says that Thomas Swannell then responded *"don't call me a fucking dickhead or my wife"*. She says that she attempted to explain to Thomas Swannell that the comment had only been a joke with reference to Thomas and Anna Swannell being her in-laws. She states that, in response, Thomas Swannell proceeded to dismiss the claimant without notice stating *"that's it you're sacked, pack your kit and fuck off"*. She says that she asked Thomas Swannell to confirm whether he had terminated her employment with the respondent to which Thomas Swannell confirmed *"yes I have now fuck off"*. She says that she then took items from her desk and left her office keys with Thomas Swannell.
49. The respondent's position regarding what happened at the meeting, as per Thomas Swannell's evidence, is as follows. In his witness statement he states that on returning to the office he noted a strange atmosphere and the claimant became very defensive. He says that as the meeting began, she was stabbing a pencil into a notepad. He states that he started to speak to her about an incident with a contractor that had happened earlier in the day, and she just began to shout and stamp her feet. Further into the conversation, he called Anna Swannell to ask her a question, as the claimant alleged she had told her not to do a task. He had asked the claimant to do this task, so she alleged to have conflicting instructions from them. Anna Swannell denied that she had told the claimant not to carry out the task. He states that at this point, the claimant started to scream and hit her head with her hand. He says that Anna Swannell was still on the telephone and heard all of this. She asked him to calm the claimant down, at which point he sat beside the claimant and asked her what they could do to help her personally and professionally. Rather than responding rationally, she screamed *"I'm not upset, I'm fucking mad"*.
50. He states that, after this, the claimant admitted that she had been taking far too many personal phone calls whilst at work. He states that he raised various other issues including the amount of time she was absent from the office during her working day to walk her dogs, issues raised about the

claimant by companies they work with, how she was treating other employees within the Company, as well as the administrative errors that kept reoccurring. He states that the claimant refused to take any responsibility for her actions.

51. He asked the claimant why she was not fulfilling very simple tasks that were required of her, such as chasing owed monies from clients. He states that the claimant became irate and started to shout, "*Who would work for a pair of knobheads?*" to which he replied "*I beg your pardon*". He says that he told her that this was a completely inappropriate and unprofessional statement and that he felt shocked by her remark. He says that she then responded by screaming "*I didn't mean that, I meant fucking dickheads*". He then suggested that they left the conversation there to allow her some time to calm down over the weekend.
52. In live evidence, Thomas Swannell denied that he had told the claimant that she was dismissed. He did ask her to leave her key because he did not have his key and so asked her to leave her key. He said that this is not unusual because he never has his keys; he is always losing them. He confirmed that she did take the dog beds with her but he had mentioned the issues with having the dogs at work so this was not because she had been dismissed.
53. In her witness statement, Anna Swannell makes no reference to witnessing what was said at the meeting on the 20 May 2023. The first time this is referred to is in the document at page 250-351. It is accepted by the claimant that Thomas Swannell telephoned Anna Swannell during that meeting but not that she was privy to the conversation afterwards. Whilst Anna Swannell says in her witness statement at paragraph 14 that that the claimant became irate and used inappropriate language which was not in jest, it does not say in her statement that the claimant started to scream and hit her head or that she witnessed the conversation more generally.
54. There is a document entitled 'Tom Swannell - witness statement' [350-351] which is dated 20 May 2022. The claimant challenges the reliability of this document. This is because it was not disclosed to the claimant prior to the institution of proceedings.
55. In live evidence, Anna Swannell stated that her husband wrote the statement by hand and then she typed it as a Word document. It was then printed off but she did not save it. It was sent to the respondent's representatives as a PDF. She was asked how it became a PDF document and she replied that she dragged and dropped it to an email but did not save it. As I understand her evidence on this point, which was somewhat confusing, she copy typed it for a second time in order to provide a copy for the disciplinary proceedings.
56. In live evidence, Thomas Swannell stated that after the meeting he made a note of what was said. He was asked where those handwritten notes were and he stated that they in the office and he did not think that they were important for the Tribunal.
57. No meta data has been provided to show when the document was created or printed off either in Word or PDF. There is no reference whatsoever to the document in the investigation or disciplinary proceedings. The claimant states that she had never seen the statement until it was disclosed during the course of these proceedings. I would have expected the document to have been disclosed during the course of disciplinary proceedings had it been in existence



at that time. For those reasons I do not consider it to be a reliable document nor am I satisfied that it was created on the 20 May 2023.

58. I prefer the claimant's account of what happened at the meeting on the 20 May 2022. In particular I accept and find as a fact that Thomas Scannell said to her "*don't call me a fucking dickhead or my wife*", "*that's it you're sacked, pack your kit and fuck off*", and when the claimant asked if he had terminated her employment he replied "*yes I have now fuck off*".
59. I prefer the claimant's account to the account given by the respondent's witnesses because the claimant's account of what occurred on that date has been entirely consistent throughout including during her evidence to this Tribunal. The claimant documented her account of what occurred in the meeting soon afterwards in an email to the respondent. That account is entirely consistent with the claimant's account in evidence before the Tribunal. Further, I found the claimant's sister's account of her telephone conversation with the claimant, after the meeting of the 20 May 2022, to be credible.
60. Further, I do not consider the statement of Thomas Swannell dated the 20 May 2023 to be a reliable document for reasons that I have provided above. This casts doubt on the reliability of his account of what occurred on that date.
61. Further the account given by Thomas Swannell at the meeting makes no reference to the claimant being suspended during that meeting. At paragraph 4 of his witness statement it says "*I suggested we left the conversation there to allow her some time to calm down over the weekend*". His statement at 350-351 says similar. Again there is no reference to the claimant being suspended. Anna Swannell says in her witness statement at paragraph 14 that Thomas Swannell became very uncomfortable, asked the claimant to leave the premises and told her that the matter would be dealt with on the Managing Director's return. It is therefore very surprising that the claimant was later sent a letter on the 1 June 2022 [74] which states that she was "*verbally suspended from [her] employment pending investigation into the rude and objectionable behaviour and language that you exhibited during the conversation.*" This contradiction in the evidence casts further doubt over the reliability of what is said by the respondent's witnesses as to what occurred on the 20 May 2023.
62. The claimant has not returned to the office since the meeting of the 20 May 2022.
63. On 23 May 2023, Anna Swannell looked at the claimant's digital contract of employment. She asked the respondent's external IT consultant to check the computer system. They identified that the document had been amended and printed out.
64. On 24 May 2022, the claimant sent by email to Anna Swannell a letter dated 21 May 2022 which was also sent by recorded delivery on the same day. The letter records at paragraph 3 on page 2 [69], the claimant's version of what happened at the meeting.
65. Anna Swannell responded to the claimant by email on the same day stating that the claimant would be "*contacted shortly*".
66. On 31 May 2022, having not received a response to her letter of 21 May 2022, the claimant sent a further email to Anna Swannell chasing a response. Anna Swannell responded on the same day stating "*This is all in hand you will be contacted next week*".

67. As referred to above, on 1 June 2022, the claimant received a letter from the respondent entitled "*Suspension From Work*". As well as explaining that she had been suspended on the 20 May 2022, the letter states that an investigation will be undertaken and that the claimant will either be informed of when a disciplinary hearing will take place or, if no action is taken, be informed that she can return to work.
68. On 6 June 2022, the claimant responded to the suspension letter by email to Anna Swannell attaching a '*response to suspension letter*' dated the same day, denying that she had been suspended, reiterating that she had been dismissed by Thomas Swannell during the meeting and that the respondent's actions was an attempt by the respondent to "*back track*" and try to "*reinstate [her] through the back door*". The claimant stated that she had been to see her GP for stress and anxiety.
69. On 21 June 2022, the claimant's representative wrote by letter to the respondent asserting that the claimant had been dismissed during the Meeting. There was no response to this letter.
70. On 23 June 2022, the respondent wrote to the claimant to invite her to a disciplinary hearing on 27 June 2022 to "*discuss some concerns*" the respondent had about the claimant's conduct.
71. The claimant's representative replied on the 24 June 2022, reiterated the claimant's position that she had been dismissed and stated that she would therefore not be participating in the disciplinary investigation. It was asserted that the disciplinary investigation was a "*bogus disciplinary investigation*" and "*a crude attempt to retrospectively alter the sequence of events*".
72. The claimant received an email from Helen Pearson, Human Resources Consultant, Croner, on 27 June 2022 inviting the claimant to a video meeting to be conducted via Teams.
73. The claimant's representative subsequently responded to Ms Pearson on 27 June 2022 stating that as the claimant was no longer an employee she would not be participating in any disciplinary procedure. Later that day, Ms Pearson emailed the claimant requesting the claimant's written submissions in respect of a number of matters, that is raising invoices, chasing outstanding debtors, payment matrixes, notification of sick pay and holiday pay, the issuing of staff contracts, when the last changes were made to her contract and by whom and relating to verbal agreements regarding changes to her salary and sick pay. There is no mention of the events of 20 May 2022.
74. On 30 June 2022, the claimant received a further email from Ms Pearson chasing the claimant's written submissions.
75. The claimant received her salary for June on 1 July 2022. This was subsequently returned by the claimant to the respondent on the same day.
76. The claimant's representative wrote to Ms Pearson on 1 July 2022, reiterating the claimant's position.
77. On 11 July 2022, the claimant and her representative received a letter, by email and by post, from Anna Swannell inviting the claimant to a formal disciplinary hearing on 14 July 2022 at 09:30am. An investigation report prepared by Croner Face2Face was also provided. In the 'overview section' [80] it states

*“The concerns raised by the Employer initially related to H’s behaviour in the workplace, however a number of concerns have subsequently come to light, namely:*

- Failure to chase outstanding debtors & pay suppliers in a timely manner*
- Incorrect Invoicing resulting in delay receiving payments*
- KH amending her contract of employment without authorisation”*

78. The outcome of the investigation was that in each respect there was a case to answer and so the matter should proceed to a disciplinary hearing.
79. On 13 July 2022, the claimant received an email from Lisa Baynes, HR Consultant at Croner Face2Face providing a video link to the disciplinary hearing.
80. On 18 July 2022, the claimant received an email from Anna Swannell attaching a letter confirming that the disciplinary hearing had been postponed until 21 July 2022 to enable the claimant to attend. The claimant emailed Anna Swannell on the same day reiterating her position that she had been dismissed at the meeting on 20 May 2022.
81. On 22 July 2022, the claimant received an email from Anna Swannell attaching an 18 page disciplinary report prepared by Croner Face2Face and a letter confirming the claimant’s summary dismissal for gross misconduct.
82. The disciplinary report upheld the three allegations against the claimant and alleged that the claimant was an employee at the time of the disciplinary process for the following reasons:
- The claimant had not provided evidence that the claimant had been dismissed.*
  - The claimant had been paid throughout the disciplinary process.*
  - The respondent had followed their disciplinary procedure.*
  - The claimant had not appealed against her dismissal on 1 June 2022, nor has she raised a grievance.*
83. Anna Swannell wrote to the claimant on the 22 July 2022 to state that she was to be summarily dismissed. The reasons provided were as follows:
- “-You have failed to provide an acceptable explanation to any of the allegations*
  - I believe that you have displayed unsatisfactory standards of work namely that the Company has received complaints from customers with regard to the standard of your work in that you failed to pay a supplier*
  - I believe that you have displayed unsatisfactory standards of work, namely that the Company has received complaints from customers with regard to the standard of your work and attention to detail*
  - I believe that on 13th May 2022 you amended the terms of your contract of employment to more favourable terms without prior authorisation. Examples being but are not limited to, amending the terms of your contract to state that you are to receive an enhanced sick pay package prior to your planned operation in 2022.*

- *Furthermore, that this behaviour has resulted in a fundamental breach of contractual terms that irrevocably destroys the trust and confidence necessary to continue the employment relationship, and that it constitutes gross misconduct.*
- *I have been mindful of your long service with the Company*
- *In mitigation, I have taken into consideration the fact that you had several personal circumstances during your employment that impacted your performance and as a company we stand by the fact that our approach towards yourself was consistently fair and supportive.”*

84. The letter also states that the claimant has a right of appeal against the decision. The claimant did not appeal against the decision because she stated that the disciplinary process was a sham.
85. On 25 July 2022, the respondent sent to the claimant by email her P45, a payslip detailing a final payment of £6,817.78 (which included a payment in lieu of 37.5 days accrued holiday entitlement) and a reference.

#### The claimant's conduct/capability

86. There is nothing in the evidence before the Tribunal to indicate that any form of disciplinary proceedings had been taken against the claimant prior to her dismissal. I find that the claimant has not been subject previously to disciplinary proceedings or given any warnings.
87. On the evidence before me, I accept that the respondent had some issues that it wanted to raise with the claimant regarding certain aspects of her work.
88. Thomas Swannell stated that the intention was to have an informal chat on 23 May 2023 so there were clearly matters that the respondent wanted to discuss. Some were raised in the meeting of the 20 May 2022.
89. However, in view of my findings above, the reason for the claimant's dismissal on the 20 May 2023 was the claimant's critical and intemperate comment about Thomas Swannell and Anna Swannell.
90. It is clear from the documentary evidence before the Tribunal that the performance related issues referred to in the investigation and disciplinary report, and relied upon by the respondent as the reasons for dismissing the claimant, were only actually raised with the claimant after the 20 May 2022. These issues were therefore only raised after the claimant was dismissed.

#### **Holiday Pay**

91. The claimant holiday entitlement was 28 days per year plus bank holidays. The company holiday year runs from January to December of each year. There is no contractual provision for the carrying over of unused leave to the following leave year.
92. The claimant was paid 37.5 days in lieu of accrued holiday on the termination of her employment. This is broken down on the payslip for July 2022 in to 2.5 days for 2020, 28 days holiday for 2021 and 7 days holiday for 2022. The claimant states that she had accrued 56 days holiday at the date of dismissal. The claimant asserts that she is owed pay in lieu for an additional 18.5 days accrued leave for 2020 and 7 days accrued leave for 2022 [Schedule of Loss - 140-141].

93. The claimant does not assert that she is owed any accrued leave for 2021.
94. For the holiday year of 2022 the claimant took 7 days holiday [259]. For the period 1 January 2022 to 20 May 2022 her pro rata leave entitlement was 10.8 days. She was paid for 7 days accrued but untaken leave on termination. She was therefore paid in excess of her accrued entitlement by 3.2 days.
95. There is a dispute between the parties as to what annual leave the claimant used in 2020. The respondent's position is that by the point that the claimant was furloughed in 2020 she had already used most of her holiday entitlement between January and March 2020; she had only 2.5 days remaining.
96. The dispute is not about whether or not the claimant was absent from work during this period but rather whether the time that the claimant took off in January to March 2020 constituted holiday rather than some other form of paid leave. Anna Swannell's evidence is that the claimant was absent for six weeks in 2020 when her mother was ill and subsequently passed away. Three days of these days were classed as bereavement leave and the remainder was holiday. The claimant's position is that there was no agreement that the time she took off was to be taken as holiday. In live evidence, Anna Swannell stated that during a telephone conversation that she had with the claimant, the claimant indicated that she would use her holiday entitlement during that period and she confirmed that that was fine.
97. I prefer Anna Swannell's evidence in this respect. I consider it unlikely that the claimant would have expected to be paid for such an extended period on some unspecified basis rather than utilise her holiday entitlement.
98. I find that the claimant had 2.5 days accrued but unused holiday left in 2020 and that she was paid in lieu of this sum upon the termination of her employment.

## **The Relevant Law**

### **Date of dismissal**

99. In this case there is a dispute as to whether or not the claimant was dismissed on the 20 May 2022. Where there is a dispute as to whether or not an individual was dismissed, the burden of proof in terms of demonstrating that there was dismissal in the circumstances claimed falls upon the employee.
100. The general principle is that once notice has been given by the employer to the employee to terminate the contract of employment it cannot be withdrawn by the employer, only by agreement between the employer and employee (*Harris and Russell Ltd v Slingsby* 1973 ICR 454, NIRC).
101. In exceptional circumstances, such as when the words spoken in anger were immediately withdrawn, then there may be no dismissal (*Martin v Yeomen Aggregates Ltd* 1983 ICR 314, EAT).

### **Unfair Dismissal**

102. The question of whether or not an individual was unfairly dismissed is a two stage process. The first stage is that it is for the respondent to show a potentially

fair reason for dismissal, and secondly, if that is done, the question then arises as to whether the dismissal is fair or unfair.

103. The reason for the dismissal and the reasonableness of the dismissal is based on the facts or beliefs known to the employer at the time of the dismissal (as per *W Devis and Sons Ltd v Atkins* 1977 ICR 662, HL). However, a Tribunal should consider facts that came to light during the appeal in considering whether the employer's decision to dismiss was reasonable (as per *West Midlands Co-operative Society Ltd v Tipton* 1986 ICR 192, HL).
104. In an unfair dismissal case in which the employee had been employed for two years and no automatically unfair reason is asserted, the burden lies on the employer to show what the reason or principal reason for dismissal was, and that it was a potentially fair reason under section 98(2) of the Employment Rights Act 1996 ("ERA"). Once that is done there is no burden on either party to prove fairness/unfairness.

### ***Reason for dismissal***

105. Section 98(2) ERA identifies a number of potentially fair reasons for dismissal which include conduct. In this case, the respondent says that the claimant was dismissed because of her conduct, although capability issues were also raised.

### ***Fairness***

106. Section 98(4) ERA specifies the test to be applied by the Tribunal in order to determine whether a dismissal is fair or unfair. It reads as follows:

*"Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) -*

*(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and*

*(b) shall be determined in accordance with equity and the substantial merits of the case."*

107. In conduct dismissals, there is well-established guidance for Tribunals on the approach to be taken when assessing fairness under section 98(4). This can be found in the cases of *British Home Stores v Burchell* 1978 IRLR 379 and *Post Office v Foley* 2000 IRLR 827. The Tribunal must decide whether the employer had a genuine belief in the employee's misconduct. The Tribunal must then decide whether the employer held such genuine belief on reasonable grounds after carrying out a reasonable investigation. The Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. The Tribunal must take in to account all aspects of the case including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4).
108. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the

reasonable employer (*Iceland Frozen Foods Limited v Jones* 1982 IRLR 439, *Sainsbury's Supermarkets Limited v Hitt* 2003 IRLR 23, and *London Ambulance Service NHS Trust v Small* 2009 IRLR 563).

109. In considering the fairness of the dismissal, the appeal should be treated as part and parcel of the dismissal process (*Taylor v OCS Group Limited* [2006] ICR 1602). The Tribunal's task under S.98(4) of the ERA, is to assess the fairness of the disciplinary process as a whole. Where procedural deficiencies occur at an early stage, the Tribunal should examine the subsequent appeal hearing, particularly its procedural fairness and thoroughness, and the open-mindedness of the decision-maker.
110. The range of reasonable responses test that applies to substantive unfair dismissal claims must also be used when assessing the reasonableness of the investigation [as per *J Sainsbury plc v Hitt* 2003 ICR 111, CA].
111. In *Newbound v Thames Water Utilities Ltd* [2015] IRLR 734 CA, the Court of Appeal stated that Tribunals should not consider the band of reasonable responses as one which is infinitely wide, and to focus on the statutory language and the words "in accordance with equity and the substantial merits of the case" at section 98(4)(b) of the ERA.
112. In the unfair dismissal context, a finding of gross misconduct does not automatically mean that dismissal is a reasonable response. An employer should consider whether dismissal would be reasonable after considering any mitigating circumstances [*Brito-Babapulle v Ealing Hospital NHS Trust* [2013] IRLR 854]. The employee's length of service and disciplinary record are relevant [*Trusthouse Forte (Catering) Limited v Adonis* [1984] IRLR 382] as well as the attitude of the employee to his conduct (*Paul v East Surrey District Health Authority* [1995] IRLR 305). However, even if the misconduct in question is not correctly characterised as 'gross misconduct', this does not necessarily mean that the employer cannot reasonably dismiss [*Quintiles Commercial UK Ltd v Barongo* EAT 0255/17]

### **Wrongful dismissal**

113. An employer will be in breach of contract if they terminate an employee's contract without the contractual notice to which the employee is entitled, unless the employee has committed a repudiatory/fundamental breach of contract which would entitle the employer to dismiss without notice. As per *Laws v London Chronicle (Indicator Newspapers) Ltd* 1959 1 WLR 698, CA. for behaviour to amount to a repudiatory breach, it must disclose a deliberate intention to disregard the essential requirements of the contract.
114. A repudiatory breach can include circumstances in which the breach is one that amounts to gross misconduct.

### **Holiday Pay**

#### Statutory entitlement to holiday

115. Under the Working Time Regulations 1998 ("WTR") a worker is entitled to 5.6 weeks' (28 days) annual leave in each leave year [Regulations 13 and 13A WTR]. Regulation 30 WTR 1998 provides for a complaint to an employment Tribunal that the employer has failed to pay the worker the whole or any part of any amount due under Regulations 14(2) or 16(1) WTR.

116. The WTR do not make any provision for carrying forward any unused leave from the 4 weeks' leave into a following holiday year unless regulation 13(10) applies (see below). Employers and workers can agree to carry over any of the additional 1.6 weeks' additional statutory leave into the next leave year (but not beyond) by means of a relevant agreement [regulation 13A(7)].
117. The general rule under the WTR is that a worker is only entitled to be paid in lieu of holiday accrued but untaken in the final leave year [regulation 13(9)(a)]. If they only worked part of the final year, they will be entitled to be paid in lieu of such part of the pro rata entitlement that they accrued but did not take as leave.
118. The WTR were amended by The Working Time (Coronavirus) (Amendment) Regulations 2020 on the 26 March 2020 which inserted the following:
- (10) Where in any leave year it was not reasonably practicable for a worker to take some or all of the leave to which the worker was entitled under this regulation as a result of the effects of coronavirus (including on the worker, the employer or the wider economy or society), the worker shall be entitled to carry forward such untaken leave as provided for in paragraph (11).*
- (11) Leave to which paragraph (10) applies may be carried forward and taken in the two leave years immediately following the leave year in respect of which it was due.*
- (12) An employer may only require a worker not to take leave to which paragraph (10) applies on particular days as provided for in regulation 15(2) where the employer has good reason to do so. [...]*
119. Regulation 17 of the WTR provides that:
- “17. Entitlements under other provisions***
- Where during any period a worker is entitled to a rest period, rest break or annual leave both under a provisions of these Regulations and under a separate provision (including a provision of his contract), he may not exercise the two rights separately, but may, in taking a rest period, break or leave during that period, take advantage of whichever right is, in any particular respect, the more favourable.”*
120. There are exceptions, developed in case law, allowing the 4 weeks' WTR leave (but not the additional 1.6 weeks' leave) to be carried over in situations where the worker was unable to take leave such as during sick leave, maternity leave, when prevented from taking that leave by the employer or where the employer has not taken sufficient steps to encourage workers to take their holiday entitlement.

## **MY CONCLUSIONS**

### ***Date of dismissal***

121. It is not disputed that the claimant was dismissed. However, there is a dispute as to the date on which dismissal occurred. For the reasons that I have provided above, I find that the claimant was summarily dismissed on the 20 May 2022.
122. I find that the subsequent investigation and disciplinary proceedings were contrived in order to seek to show that a fair procedure had been followed. I reach this conclusion for the following reasons. Firstly, I have found that the claimant was dismissed on the 20 May 2022. Secondly, the inconsistency in the



respondent's case regarding as to whether or not the claimant was suspended on 20 May 2023 is significant and undermines the reliability of the respondent's assertions. Further, there is nothing in the evidence before me to suggest that the respondent made any attempt to contact the claimant in the week of the 23 May 2022. This is despite the respondent receiving a letter outlining the claimant's account of what occurred on the 24 May 2023. If the respondent understood the claimant still to be employed at that juncture, I find that it would have told the claimant this. Instead, there was no substantive response from the respondent to the claimant until the 1 June 2022. Whilst I accept that the respondent was seeking advice during this time, that does not explain why there is no communication from the respondent stating that the claimant had misunderstood the situation and that she had not been dismissed.

### **Unfair Dismissal**

#### ***Reason for the Dismissal***

123. When identifying the reason for dismissal, I must first make findings as to the employer's own reasons for dismissal, and then assess how those reasons should be characterised in terms of the statute.
124. The respondent relies upon misconduct and capability in its letter of dismissal. However, the matters relied upon were not raised with the claimant prior to the 20 May 2023. In particular, on the respondent's own account, the amendments to the schedule to the claimant's contract was not discovered by Anna Swannell until the 23 May 2022.
125. The claimant was dismissed summarily on the 20 May 2022 in the heat of the moment because of her behaviour on that date, namely her comments about Anna and Thomas Swannell. I find that the reason for her dismissal on that date was her conduct at that meeting.
126. The respondent has therefore shown that a potentially fair reason for dismissal existed, namely conduct. Given what was said by the claimant in the meeting, I accept that Thoams Swannell would have had a reasonable belief based on reasonable grounds that conduct was the reason for dismissal.

#### ***Fairness***

127. The claimant was summarily dismissed. She made the comment concerned and was immediately told that she was dismissed. The claimant sought clarification from Mr Swannell and he confirmed that he was dismissing her. The company's disciplinary procedure was not followed.
128. As the claimant was summarily dismissed without any warning and with no attempt whatsoever to follow the disciplinary procedure prior to her dismissal on the 20 May 2022, the dismissal was procedurally unfair. The claimant had no warning that she was to be dismissed and no opportunity whatsoever to state her case before the decision to dismiss was made. On that basis alone the dismissal was unfair within the meaning of section 98(4) of the ERA.
129. Further, on the facts of this case, I do not consider that the respondent acted reasonably in all the circumstances in treating the claimant's conduct on the 20 May 2022 as a sufficient reason to dismiss her. She made a one off comment to her line manager about him and a director of the business. The commented was made during a heated meeting. Whilst her comment was not acceptable there is no suggestion that she had made such comments previously.

130. Further, whilst not determinative in itself of whether or not the dismissal was unfair, this one off comment did not amount to gross misconduct or misconduct so serious to justify summary dismissal for reasons that I have provided above.
131. Taking into account all of the circumstance of this case, including that the respondent is a small employer but obtains services from an external human resources provider, I find that the respondent acted unreasonably in treating the claimant's conduct on the 20 May 2022 as a sufficient reason for dismissing her. I do not consider that dismissal in such circumstances was within the range of reasonable responses available to the respondent.

**Breach of Contract (Wrongful Dismissal)**

132. The claimant was not given notice of the termination of her employment nor was she paid in lieu of that notice.
133. The reason for the claimant's dismissal was the comments that she made to Thomas Swannell at the meeting on the 20 May 2023.
134. Considered in context, I do not find that the claimant's comments amounted to a repudiation of the whole contract. There is no history in this case of insolence or offensive comments on the part of the claimant. The claimant's behaviour in making the comments that she did was a one off incident which occurred during a meeting which the claimant had asked to be brought forward because she was anxious about her employment being terminated having, earlier in the day, discovered a document detailing the cost of her employment to the business. Although her comments were inappropriate and regrettable, they did not justify summary dismissal. In essence, the conduct when considered in context was not so serious so as to amount to a repudiatory breach of contract.
135. Further, the claimant's written contract provides a non exhaustive list of the sort of behaviour that will amount to gross misconduct or serious misconduct warranting summary dismissal. Further examples are given in the employee handbook. In the contract of employment itself, the types of misconduct listed as gross misconduct do not include the use of insulting abusive language within the workplace, only rudeness and insubordination towards customers. Notably "*provocative use of insulting and abusive language*" is behaviour that may justify dismissal after a prior warning is given. The claimant's behaviour falls squarely within the 'unsatisfactory work and misconduct' as identified at section 16 of her contract and not serious or gross misconduct as identified at section 15. The summary dismissal of the claimant was therefore contrary to the terms of the her contract of employment.
136. There is nothing in the employee's handbook that changes this interpretation. The claimant's comments were not of such seriousness to be "*Serious cases of bullying, aggressive, threatening or intimidating behaviour or excessive bad language*".
137. The claimant was dismissed in breach of contract. The claimant is entitled to be paid damages equivalent to one month's pay.

**Holiday Pay**

138. As per my findings above, on the termination of her employment the claimant was paid in lieu of 2.5 days accrued but unused holiday for 2020. She had used the remainder of her holiday entitlement for that year in January to March 2020 and so is not owed any further sum for that year. For 2022 she was paid for 7 days accrued but unused holiday. As per my findings above she was overpaid

for that period by 3.2 days. She is therefore not entitled to any further payment for accrued but unused holiday.

**Written statement of particulars of employment**

139. In contravention of section 1(4)(h) of the ERA, the claimant's written statement of particulars of the employment did not specify her place of work. I award the claimant two weeks' pay in respect of this failure.

**Employment Judge Boyes**

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**Date: 27 June 2023**

**Reserved Judgment and Reasons Sent to The  
Parties On 27 June 2023**

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