EMPLOYMENT TRIBUNALS

Claimant: Mrs H Witts

Respondent: Solos Consultants Ltd

Heard at: Nottingham Employment Tribunal

On: 22, 23 and 24 May 2023

Before: Employment Judge K Welch, sitting alone

Representation
Claimant: Mr N Brockley, Counsel
Respondent: Mr G Gunstone, Counsel

RESERVED JUDGMENT

1. The claimant's claim for unfair dismissal fails and is dismissed.

2. The claimant's claims for wrongful dismissal, unlawful deductions from wages and holiday pay are well founded and succeed.

3. The claimant's claim under section 11(1) of the Employment Relations Act 1999 ("ERelA") that the respondent failed to allow her to be accompanied to a disciplinary meeting fails and is dismissed.

4. The respondent failed to provide the claimant with a written statement of her employment in accordance with section 1 of the Employment Rights Act 1996 ("ERA").

5. A remedy hearing has been listed for 26 January 2024.

REASONS

Background

1. The claimant was employed by the respondent from 1 September 2004 until her dismissal on 1 February 2022. The claimant brought a claim on 29 April 2022, following a period of ACAS early conciliation from 1 February 2022 until 4 March 2022.

The proceedings

2. The hearing took place at Nottingham Employment Tribunal and all parties and their witnesses attended in person. I was provided with an agreed bundle of documents and a skeleton argument prepared by the respondent which contained a chronology. This chronology was agreed by the claimant save for some minor points, and the caveat that some of the commentary provided as part of the chronology favoured the respondent's case.

3. The parties attended the hearing and I dealt with preliminary issues before spending the rest of the first morning reading. Evidence commenced in the afternoon of the first day and continued on the two remaining days. Submissions were heard on the afternoon of the third day and I reserved my decision.

4. I heard evidence for the respondent from:

    a. Mr Lee Witts, Director and Shareholder of the respondent and brother -in-law of the claimant;

    b. Mrs Nicola Witts, Director and Shareholder of the respondent and wife of Lee Witts (referred to as Nikki Witts); and

    c. Ms Jennie Powell, employee of the respondent;

5. I heard evidence for the claimant from:

    a. The claimant herself;

b. Mr Stephen Dodd, former employee of the respondent.

6. It was agreed that the hearing would deal with liability only, and the agreed list of issues made this clear. However, the decision on liability would consider Polkey as to whether the claimant would have been fairly dismissed in any event had a fair procedure been followed. It was confirmed that I would not consider whether the claimant would have remained in employment for long had the dismissal not taken place, since this seemed to me to be more appropriate to deal with at the remedy stage. Therefore, the issues were agreed between the parties as follows:

Unfair dismissal

7. What was the reason for the claimant's dismissal (the asserted reason being the fundamental breakdown of the relationship of trust and confidence between the claimant and the respondent (through Lee Witts))? The respondent contends that it is entitled to rely upon the existence of some other substantial reason of such a kind as to justify the dismissal of the claimant within the meaning of section 98(1)(b) Employment Rights Act 1996 (ERA).
8. If the reason proven is a prime facie fair reason, did the respondent act fairly in dismissing the claimant in all the circumstances?
9. Was the claimant's dismissal within the band of reasonable responses?
10. If the dismissal was unfair, should there be a finding in relation to Polkey on the basis that the claimant would have been fairly dismissed in any event if a procedure had been used that was fully compliant with the ACAS code?
11. Should the Tribunal conclude that the principles of Polkey apply, what was the chance that the claimant's dismissal would still have taken place (in percentage terms) had a fair procedure being adopted and by what date would such a dismissal have occurred?

12. What was the chance of the job not continuing (whether by the claimant's choice or the respondent's choice or decision) taking it together with the chances of obtaining fresh employment by assessing a period of weeks as being the appropriate amount of compensation?
13. Should there be a finding of contributory fault?
14. To what wages was the claimant entitled within the meaning of section 27 ERA?

Findings of fact

15. The respondent is a small family business, having approximately 8 employees, including the Directors/shareholders of the business, at the time of the claimant's dismissal.
16. The respondent company was originally set up by two brothers and one of their wives in 2003. The equal shareholders who were all Directors were the claimant's husband, Shaun Witts, his brother, Lee Witts, and his brother's wife, Nikki Witts. This meant that Shaun Witts had 33% of the shareholding, with Lee Witts, and his wife, Nikki, having a 33% shareholding each. The claimant was not a Director or shareholder of the respondent.
17. The respondent initially carried out recruitment services in the Nottingham area. The claimant joined the company on 1 September 2004 as a part time administrator.
18. There was a dispute over whether the claimant had ever been provided with a contract of employment. The respondent's evidence was that the claimant was provided with a written contract on the commencement of her employment in 2004, and that Nikki Witts could recall a time that her husband had gone through the claimant's contract with the claimant. However, no record of it was found in the respondent's files following the claimant's dismissal.
19. The claimant's evidence was that she was never provided with a written contract

of employment. I prefer the evidence of the claimant in this regard. Whilst I accept that employees were generally given contracts of employment by the respondent, I think it more likely that the claimant, due to being the wife of one of the Directors/ shareholders, was not given a written contract. Lee Witts, Shaun Witts and Nikki Witts were also not given written contracts of employment and I accept the claimant's clear evidence that she had never been provided with one.

20. In any event, there was no evidence that the claimant had removed the contract, and there would have been no reason for her to do so, since it would have been substantially out of date; having changed roles, hours and pay since her commencement in 2004.

21. The claimant's role expanded during her time with the respondent, such that it encompassed many different aspects by the time of her termination, including HR, Governance, Compliance together with other duties.

22. In July 2011, the respondent decided to start a residential lettings business, trading under the name Solos Residential, but still part of the respondent company. The claimant, together with her husband, Shaun Witts, Steve Dodds and another employee continued to work in the recruitment side of the business. Nikki Witts, Jennie Powell and at least one other employee worked in the residential arm of the business. Mr Lee Witts was involved in both sides of the business, although he was not actively involved in recruitment, but focussed on the financial aspects.

23. There was a serious dispute between the two couples, who effectively managed the respondent business between them. It appears to have started at some point following the formation of Solos Residential.

24. The claimant and her husband felt strongly that the shareholding should be split

equally between the two couples and not 33% for the claimant's husband and 66% for Lee and Nikki Witts. Also, the claimant and her husband believed that either the claimant should be made a Director of the company, as was the case for Nikki Witts, or alternatively, that only the two brothers, Shaun and Lee Witts should be Directors.

25. Despite the unequal shareholding between the two couples, it was agreed between the parties that, should the respondent's business be sold, the proceeds would be split 50:50 between the couples ie 50% to Lee and Nikki Witts and 50% to Shaun and Helen Witts, but this was not set down in any form of written agreement. The claimant and her husband felt, understandably, that this should be reflected in writing to secure their position, but whilst Lee Witts and Nikki Witts intended to abide by this verbal agreement, they were unwilling to change the shareholding or enter into any form of shareholder agreement to reflect this. This caused friction between the couples which became increasingly fractious. Evidence of Shaun Witts requesting, either that the claimant was made an equal shareholder or Nikki Witts steps down as a Director, appear at page 44, which Shaun Witts forwarded on to the claimant.

26. Lee Witts and Shaun Witts' mother passed away in January 2018, and as she had taken on the role of peacemaker between the two couples, this added to the difficulties in their ongoing relationships.

27. Solos Residential was sold on 31 December 2018, with the staff involved in that part of the business staying with the respondent. These staff moved over to work in recruitment, although from evidence it appeared that this was recruitment in different areas to those undertaken by Shaun Witts' side of the business. It was therefore separate from the recruitment business carried out by Shaun Witts and his team, and there remained two teams working in the

respondent business.

28. I am satisfied that these difficulties affected the working and personal relationships between the four individuals, including the claimant, such that it became increasingly difficult for the four individuals managing the business to work together.
29. There was clear evidence that the open plan office in which they all worked was set into areas, and that "battle lines" were drawn at times, with individuals either being in the camp of Shaun and Helen Witts or that of Lee and Nikki Witts. The evidence of Stephen Dodds and Jennie Powell confirmed the difficult working environment within the workplace.
30. There were various points at which different individuals considered that there had been a marked deterioration in the relationship between the parties, creating a poor atmosphere in which to work. However, it is sufficient to say that following the sale of Solos Residential, there were major differences between the two couples and the staff were caught in the middle of this situation. Both parties refer to 'whispering' taking place in the open plan office and I am satisfied that the two couples were working against one another during this period. There was some evidence that parts of the business continued to prosper, but it was clear that this was not a good working environment for anyone.
31. A mediator was therefore instructed to try and resolve the differences between the brothers in or around March 2019. The email report following the mediation dated 21 March 2019 [P102-3] referred to the business suffering and declining as a "*result of the feud between you*". It also stated that the "*proposal for some 'working from home' on both sides can be a useful step in the short term/ medium term to improve the office environment…*".

32. The mediation was not successful, although at some point following this outcome, both the claimant and Nikki Witts began to work from home. It is unnecessary to consider who initially suggested this, but it was preferable for both individuals not to attend the offices to carry out their respective roles due to the difficulties between them.

33. Shortly after the mediation, Lee Witts became aware of private emails sent between the claimant and her husband on the respondent's work email system. These were not complimentary about Lee Witts with Shaun Witts referring to him as "*WAC*" [P108] (which Lee Witts believed to stand for "what a c*nt" although the claimant said this meant "what a clown") and as a clown [P50]. They also referred to other employees, who were in Lee and Nikki Witts' camp as "*little bastard*" and a "*pair of clowns*". Whilst most of these comments were from the claimant's husband and not the claimant herself, there was no evidence that she admonished him for these comments, and therefore on the face of it, appeared to agree with them.

34. There was no disclosure of similar emails between Lee Witts and his wife, Nikki but I was satisfied that both couples had little respect for each other and the working relationship between all four of the senior management team comprising of the two couples, was poor.

35. The emails between the claimant and her husband referred to interactions in the workplace and the claimant was noted as saying to her husband about Lee Witts on 12 February 2019, "*Can you ever trust him again? I hope not.*" [P50]. She admitted in evidence to often venting in private emails to her husband, which is natural, but it does reflect the poor relationship between the claimant and Lee Witts in particular.

36. The claimant's son, who was also working for the respondent, decided to

arrange a trip for colleagues to Alton Towers in September 2019. He sent around an email inviting colleagues but before doing so, emailed his mother, the claimant, asking if he had to email everyone. Her response was, "*If people are paying for themselves then it's a private matter and you can ask whoever you like*." He listed the individuals he was intending to invite, which markedly did not include Lee or Nikki Witts. Her response was "*That's a very obvious division. I think you'd be better doing it verbally as a casual thing*" [P131-2].

37. Whilst it was noted that the claimant had previously stated in 2017 that she was not "*joined at the hip*" with her husband, it is clear from the emails that this was a dispute which badly affected the two couples and their working relationships, and that the claimant also felt strongly that the division between the shareholdings and Directorships should be split equally between the two couples.

38. The claimant had attempted to try and ensure that both sides did not escalate matters in June 2019, saying, "*I think everybody needs to put the weapons down and take the emotion out of the situation. Every decision needs to be in the company's best interests*." [P123]. I note that this shows that the claimant was trying to get the parties to work together, but, unfortunately, this did not materialise in practice.

39. During the pandemic most staff worked from home, including the claimant, which meant that interaction between her and Lee and Nikki Witts was limited, although I am satisfied that there were ongoing problems between them, but that these were not brought to a head because the workforce was not attending the office, and they did not have to work in close proximity to one another.

40. There was email evidence from 10 December 2020 [P129] from Lee Witts to the claimant's husband, Shaun Witts, which referred to the claimant, "*barg[ing] into*

my office whilst I was on the phone and refus[ing] to leave. She then continued to threaten me again and be disrespectful. I'm sure the behaviour constitutes [to] gross insubordination and misconduct…. This cannot be allowed to happen again Shaun. We all need to remain calm, civil and professional and to show some respect whilst a permanent solution can be found to this situation."

41. The claimant was off with stress in December 2020. The claimant returned to work as she was concerned about her job. She acknowledged in an email, that she felt "*under pressure to come back to work when your dispute with Shaun leads to threats of legal action again. Unfortunately what affects Shaun also affects me…*"[p161].
42. Lee Witt's reply stated, "*if you remember correctly Helen it was yourself and Shaun who first started the threats [and] to bring me and my family down…".* The claimant did not respond to deny this.
43. The claimant's children were also working for the respondent around this time. They had been placed on furlough and so had not been working at the respondent's offices.
44. Towards the end of September 2021, Lee Witts considered what would happen at the end of furlough when staff were due to return to the office. Lee Witts informed the claimant that he was relieving her of some pressure by instructing external HR support on 21 September 2021 [P166] as it was difficult for her to be impartial in decision making and processes that affected the claimant's children. He also stated that "*Confidentially, due to reduced workflow and the consequential need to reduce our ongoing overheads, we may, unfortunately, need to consider redundancies.*" The claimant says that she felt this was an act of malice, since these included her family members.
45. This process was put on hold following Shaun Witt's intervention, and the

claimant's children were placed on paid leave following the end of their furlough until after the claimant's employment had been terminated.

46. Following this, the two couples discussed the possibility of a mutually agreed exit for the claimant and Shaun Witts from the respondent. This would have also included the claimant's children leaving the respondent's employment.

47. In or around October 2021, the claimant wrote an article for NG16 magazine, titled "*New Beginnings*" [P188]. The covering email stated that she was "*off to pastures new*" [P172]. This article was prepared when the claimant believed that agreement could be reached on the sale of her husband's shares to Lee and Nikki Witts and her and her family's departure from the company, although, unfortunately, this did not subsequently materialise.

48. The two brothers tried to agree Heads of Terms for Lee and Nikki to buy out Shaun Witts' shares in the company. Although a monetary figure was agreed in late 2021, as evidenced by an email on 16 November 2021 [P173], the subsequent Heads of Terms were not agreed. This agreement would have resulted in the claimant's employment being terminated, since Shaun Witts refers to, "*…me and my family to walk away*". Matters deteriorated again between the brothers, which undoubtedly affected the relationship between the claimant and both Lee and Nikki Witts.

49. In January 2022, Lee and Nikki Witts decided to suspend payments of dividends to the three shareholders. An email confirming this was sent to Shaun Witts and Nikki Witts by Lee Witts [P258]. Lee Witts had done this with the intention of bringing Shaun Witts back to the negotiating table to agree an exit for him, the claimant and their children, but this did not happen. Instead, Shaun Witts resigned with immediate effect from the company on 23 January 2022 [P259].

50. The claimant's employment continued, and she continued working from home

with minimal contact with Lee or Nikki Witts.

51. On 28 January 2022, Lee Witts emailed the claimant to invite her for a discussion about her employment now that her husband had resigned and referencing her article in the magazine indicating her departure [P182]. The email stated that this was to "*discuss your future employment with the Company*." It went on to say, "*Relations have been strained for a considerable period of time and with the sudden resignation of Shaun [Witts] this week, this has, of course, caused us concern and we feel that it is important to clarify the relationship between you and the Company moving forwards*." It referred to the article in NG Magazine suggesting that she had left or intended to leave the respondent's employment.

52. The claimant sent an email confirming that she would like to be accompanied to the meeting and queried why her salary for January was less than she would normally receive [P181]. She was told that there was no statutory right to be accompanied as the meeting was "*not a performance review, disciplinary, grievance or appeal meeting and so there is no statutory right to be accompanied to it, however, depending on who it is that you intend to bring, I may be open to you bringing a companion. Please confirm their identity and I will get back to you one way or the other*." [P180].

53. Having stated that she would like to bring a work colleague, it was agreed that she could do so and this was confirmed in an email on 31 January 2021 [P179]. Lee Witts asked the claimant to confirm who would be accompanying her. The claimant confirmed that as that neither of her children felt comfortable attending, she would be unaccompanied.

54. The meeting went ahead on 1 February 2021 at 9am. Neither Lee Witts nor the claimant were accompanied to the meeting. There were no notes from this

meeting.

55. Lee Witt's evidence was that he had not made a decision to dismiss the claimant prior to the meeting taking place.

56. The meeting was not a pleasant one, with Lee Witts saying that he thought their relationship was toxic and that the claimant had created a pack mentality which he says was not denied by the claimant. He considered it was in the respondent's best interests for one of them to leave, as he despised the claimant and saw her as a threat to the respondent's business. Lee Witts referred to the magazine article for NG, and the claimant's evidence was that he got increasingly angry with her during the meeting.

57. The claimant's evidence was that she queried during the meeting why she had not previously been disciplined if there was cause for concern over her behaviour, but that Lee Witts did not answer this.

58. At the end of the meeting, the claimant was told that her employment was to end and that she would be paid her 3 months' pay in lieu of notice.

59. At 6.10pm on the same day, Lee Witts sent an email to the claimant dismissing her from the respondent's employment [P176-177]. The dismissal was said to be due to a fundamental breakdown of trust and confidence in the relationship with the claimant. The claimant was paid in lieu of notice, but at a reduced salary, which is discussed below. She was also paid her holiday pay, calculated using the same reduced salary. The letter said it was "*clear that …we cannot work together any longer*". It referenced that there was concern that the working relationship would deteriorate further in light of Shaun Witts leaving the respondent's employment and that Lee Witts, could not "*keep ignoring [the claimant's] contempt, threats and aggression by avoiding dealing with [her].*"

60. The claimant was not given the right to appeal the decision. The respondent

stated that as the decision had been taken by the Managing Director, Lee Witts, there was no one with appropriate seniority to hear such an appeal and he was unable to appoint an external person. It stated, *"….it seems futile to put all parties through the motions of an appeal with a high probability that the appeal officer will reach the same conclusion that [Lee Witts], as Managing Director, can no longer work with [the claimant]. The principal reason for [the claimant's dismissal] is 'some other substantial reason' and so this is not like a conduct or performance dismissal where someone can independently review the evidence an [Lee Witt's] decision*."

<u>The claimant's salary</u>

61. For a number of years prior to January 2022, the claimant received the monthly sum of approximately £3,450 into her bank account as a net amount from the respondent. Her payslip showed only approximately £2,400 as net pay being paid to the claimant. The respondent stated that the claimant was given £1,000 a month, reflected in her payslip as commission, although it was apparent that no commission was payable to the claimant since she did not work in sales at any time during her employment with the respondent.

62. Also, the respondent stated that the claimant was paid an additional amount of £1,200 a month to reflect an amount for dividends that would have been paid to the other directors.

63. There was a document prepared by the respondent [P224], which was a statement showing how money paid to the claimant came from the other Directors' accounts. This was not seen by the claimant, and she would have only known the net amount she received into her bank account and that this did not mirror the amount stated in her payslip.

64. The claimant gave evidence, which I accept, that she asked Lee Witts about the

amount differing in her bank account to what was in her pay slip, but was told that this was the most tax efficient way for the respondent to pay her.

65. I accept the claimant's evidence that her salary for working for the respondent resulted in the net amount of £3,450 being paid to her every month for a number of years, prior to this being reduced in January 2022.
66. Whilst the respondent may have accounted for this in various ways, I do not accept that this alters the amount that the claimant was entitled to receive whilst her employment continued.
67. In January 2022, not only did the respondent not pay the additional £1,200 a month, which was said to be in respect of dividends and paid for by the other directors, but also removed the £1,000 payment for commission. The respondent considered that these payments were discretionary, but I do not accept that to be the case.
68. I find that the claimant was entitled to receive £3,450 a month net in respect of her wages. This means that her claim for unlawful deductions from salary for the month of January 2022 succeeds, as does her claim for the difference in salary for her notice pay and for her holiday pay calculations.
69. Turning now to holiday, the claimant was entitled to receive pro rata holiday pay for the holiday year 1 January 2022 to 31 December 2022. She gave evidence that she had not taken any holiday during that period, and I accept this evidence.
70. I do not accept that the holiday sheet [P257] showing the claimant's holiday entitlement as 12.5 days was correct. I accept the claimant's evidence that she was entitled to 36 days' holiday a year. She is therefore entitled to receive pro-rated holiday entitlement from 1 January 2022 until termination on 1 February 2022.

Submissions

71. I heard oral submissions from both parties, and the respondent provided a written summary of facts. Both parties referred me to cases, which I considered before coming to my decision. The claimant relied upon the following cases:
    a. Treganowan v Robert Knee & Co Ltd [1975] ICR 405;
    b. Skyrail Oceanic Ltd t/a Goodmos Tours v Coleman [1980] IRLR 226;
    c. Turner v Vestric Ltd [1981] IRLR 23;
    d. Mears v Salt and others UKEAT/0522/11; and
    e. CSC Computer Sciences Ltd v McAlinden and others [2013] EWCA Civ 1435.
72. The respondent relied upon a bundle of authorities, including:
    a. Polkey v A E Dayton Services Ltd [1988] A Claimant 344;
    b. Perkin v St George's Healthcare NHS Trust [2005] EWCA Civ 1174;
    c. Ezsias v North Glamorgan NHS Trust UKEAT0399-401/09;
    d. Rentplus UK Ltd v Coulson [2022] EAT 81;
    e. Andrews v Software 2000 Ltd UKEAT 0533/06;
    f. Nelson v BBC (no 2) [1980] ICR 110;
    g. Contract Bottling Ltd v Cave [2015] ICR 146; and
    h. W Devis & Sons Ltd v Atkins [1977] ICR 662.
73. To the extent that any issue mentioned by either party is not referred to below, that should not be taken as any indication that I have not considered the issue, but rather that the submissions set out below is a summary, rather than a repeat of the full submissions made by each representative.
74. The claimant's oral submissions were that the claimant should not be fixed with knowledge and accused of adopting everything her husband does or says. They were not "joined at the hip" as stated by the claimant in 2017.

75. The evidence of Jennie Powell should be wholly disregarded and was "unmeritworthy". There was no evidence of misconduct on the part of the claimant and no disciplinary action had been taken against her.

76. The respondent should have tried to improve the relationship (Turner v Vestric Ltd). There was no substantial and/or justified reason for the claimant's dismissal. Whilst there had been an ongoing problematic relationship, nothing had changed to justify her dismissal. The claimant was able to continue working with her brother-in-law.

77. The claimant's wages were uncontrovertibly £3,450 net per month relying upon the cases of CSC Computer Sciences ltd v McAlinden paragraphs 12 and 20, and Mears Ltd v Salt paragraphs 24-31.

78. The claimant, therefore, invited the Tribunal to conclude that her dismissal was unfair, was a breach of the ACAS code of practice, that there had been unlawful deductions from pay and a failure to permit the claimant to be accompanied.

79. The respondent's oral submissions were that it had proved the reason for dismissal was clearly some other substantial reason. This was a toxic family relationship and it was surprising that it lasted as long as it did. It was then necessary to look at the overall fairness of the dismissal, and the size of the business played an important part and provided context for this.

80. It is not a statutory requirement for the Code of practice to be followed, but it can be taken into account when assessing fairness. However, when taken overall, the respondent considered the dismissal was fair.

81. It is a matter of fact whether the claimant was provided with a contract. The respondent asserts that she was. Even if she was not given one, no compensation should be awarded due to there being exceptional circumstances, as the claimant was responsible for ensuring staff were provided

with written contracts.

82. The claimant was allowed to be accompanied to the meeting after which she was dismissed.
83. The holiday list in the bundle provided evidence that the claimant's holiday entitlement was 12.5 days only.
84. The claimant's weekly wage was clearly set out in her payslips, which identified her salary and £1,000 per month commission. Whilst the commission was paid consistently, this was a discretionary payment which could be withdrawn. The dividend payment was a monthly payment from the Directors to the claimant, on which those Directors paid tax. This was a gift to the claimant and fell outside of the employment relationship.
85. The respondent went through contentious and non-contentious facts as set out in its prepared submission.
86. The respondent contended that it had followed a reasonable procedure in the circumstances, but, if it was found that it was not compliant, had a fully compliant procedure been followed, there was a hundred percent probability that the claimant's employment would have been terminated in any event.
87. If the Tribunal was against the respondent on this, any compensation should be reduced due to the claimant's contributory conduct, being her personal role in poisoning relationships and preventing them from being improved.

Law

88. In a case such as this one, where the respondent admits that it dismissed the claimant, the respondent must establish that the reason for the dismissal was one of the potentially fair reasons set out in section 98(1) or (2) of the Employment Rights Act 1996 ("the ERA").
89. Section 98(1) provides that:

"(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held..."

90. Section 98(4) of the ERA states:

"*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."

91. Where an employer seeks to rely upon some other substantial reason (referred to as 'SOSR' throughout this Judgment) as the reason for dismissal, the reason relied upon must be such as to justify the dismissal of the person holding the role that the claimant held. The reason must be substantial and genuine, not frivolous, or trivial. An employer is only required to show that the substantial reason for dismissal is a potentially fair one, it then falls to the Tribunal to decide whether the reason justifies the dismissal.

92. SOSR can include elements of conduct or capability, as shown by the decision of Huggins v Micrel Semiconductor (UK) Ltd in which the EAT upheld a finding

that a breakdown of trust and confidence caused or contributed to by an employee's conduct could be categorised as SOSR justifying a dismissal.

93. The dividing line between conduct or capability and SOSR can sometimes be thin, and Tribunals should be wary of attempts to relabel conduct or capability issues as SOSR for the convenience of the employer.

94. What is clear from the case law is that a breakdown in working relationships can amount to SOSR and justify a dismissal. This was the case in Ezsias, a case referred to by the respondent, involving the dismissal of a consultant whose working relationships with his colleagues had broken down. In that case, an internal enquiry concluded that interpersonal issues prevented the running of a harmonious and efficient department, and a number of senior members of the department wrote to the respondent's chief executive expressing their concerns. The respondent dismissed the consultant for a 'fundamental breakdown of trust and confidence' between the consultant and his colleagues, which it considered was largely due to his actions. The dismissal for SOSR was found to be fair and was upheld by the EAT.

95. Tribunals should, however, carefully examine cases in which the employer relies upon 'loss of trust and confidence' as the SOSR to justify the dismissal. The EAT and the Court of Appeal have cautioned against assuming that 'loss of trust and confidence' automatically justifies a dismissal, and stressed the importance of identifying why the employer considered it impossible to continue to employ the employee.

96. There are conflicting authorities on the question of whether the ACAS Code of Practice applies to SOSR dismissals. In Hussain v Jurys Inns Group Ltd EAT 0283/13 the EAT expressed the view that the ACAS Code should apply to a SOSR dismissal that was based upon a breakdown of mutual trust and

confidence. Conversely, in Phoenix House Ltd v Stockman 2017 ICR 84 the EAT held that the ACAS Code does not apply to SOSR dismissals based on a breakdown in the working relationship, although it accepted that parts of the Code should be applied.

97. The applicability or otherwise of the ACAS Code may depend on whether the procedure leading up to the dismissal was 'disciplinary' in nature.

98. It is necessary to consider whether the dismissal was fair in the circumstances, which include considering what, if any, procedure had been followed. Mr Justice Langstaff (President) provides authority that a failure to follow a procedure, including failures to have further meetings with an employee, would not automatically render a dismissal unfair in the case of Jefferson (Commercial) LLP v Westgate UKEAT/0128/12. He states at paragraph 25:

"*To have a further meeting to restate that position, which on the findings of fact would be all it could achieve, would be to require the parties to go through a meaningless charade simply for the sake of it. It is no part of a fair procedure to be conducted for the sake of it if the procedure is truly pointless.*"

99. Fairness should be considered in light of section 98(4) ERA which does not, in itself, provide any requirement to follow a particular procedure.

100. Where a Tribunal finds that a claimant has been unfairly dismissed, the respondent can be ordered to pay a basic award and a compensatory award to the claimant. Sections 119 to 122 of the ERA contain the rules governing the calculation of a basic award and include, at section 122(2), the power to reduce a basic award to take account of contributory conduct on the part of a claimant: "Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given)

was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly. “

101. The rules on compensatory awards are set out in sections 123 and 124 of the ERA and include, at section 123(6) the following: -

102. “Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.”

103. In Polkey v AE Dayton Services Ltd 1988 ICR 142, the House of Lords held that it is, in most cases, not open to an employer to argue where there are clear procedural failings, that following a different procedure would have made no difference to the outcome (i.e., the employee would still have been dismissed) and that accordingly the dismissal is fair. Their Lordships did however find that when deciding the amount of compensation to be awarded to an employee who has been unfairly dismissed, a deduction can be made if the Tribunal concludes that there is a chance that the employee would have been dismissed anyway had a fair procedure been followed.

104. Section 10 ERelA provides

“*10 Right to be accompanied*

(1) This section applies where a worker—

(a) is required or invited by his employer to attend a disciplinary or grievance hearing, and

(b) reasonably requests to be accompanied at the hearing.

(2A) Where this section applies, the employer must permit the worker to be accompanied at the hearing by one companion who—

(a) is chosen by the worker; and

(b) is within subsection (3)."

105. Section 13(4) ERelA defines a disciplinary hearing as: *"(4) For the purposes of section 10 a disciplinary hearing is a hearing which could result in—*

(a) the administration of a formal warning to a worker by his employer,

(b) the taking of some other action in respect of a worker by his employer, or

(c) the confirmation of a warning issued or some other action taken."

106. Section 38 Employment Act 2002: Failure to give statement of employment particulars etc

"(1) This section applies to proceedings before an employment tribunal relating to a claim by a worker under any of the jurisdictions listed in Schedule 5….

(3) If in the case of proceedings to which this section applies—

(a) the employment tribunal makes an award to the worker in respect of the claim to which the proceedings relate, and

(b) when the proceedings were begun the employer was in breach of his duty to the worker under section 1(1) or 4(1) of the Employment Rights Act 1996 or (in the case of a claim by an employee) under section 41B or 41C of that Act, the tribunal must, subject to subsection (5), increase the award by the minimum amount and may, if it considers it just and equitable in all the circumstances, increase the award by the higher amount instead.

(4) In subsections (2) and (3)—

(a) references to the minimum amount are to an amount equal to two weeks' pay, and

(b) references to the higher amount are to an amount equal to four weeks'

pay.

(5) The duty under subsection (2) or (3) does not apply if there are exceptional circumstances which would make an award or increase under that subsection unjust or inequitable.

(6) The amount of a week's pay of a worker shall—

(a) be calculated for the purposes of this section in accordance with Chapter 2 of Part 14 of the Employment Rights Act 1996 (c 18), and

(b) not exceed the amount for the time being specified in section 227 of that Act (maximum amount of week's pay).”

Conclusion

107. This is a sad case on which to have to adjudicate, involving families and their relationships as employees within a small family company. However, it is necessary for me to do so, and I confirm that I have reached the following conclusions having carefully considered all of the evidence before me and the legal principles summarised above and in the submissions of the parties.

Unfair dismissal

108. It was accepted that the claimant was dismissed following the meeting she had with Lee Witts on 1 February 2022. Therefore, I have to firstly consider the reason for the dismissal and then go on to consider whether the dismissal was fair in all the circumstances.

109. I find the reason for the dismissal was SOSR, namely a breakdown in trust and confidence in the relationship between the claimant and the respondent. In particular, she could not work with Lee Witts and Nikki Witts, as the two sole remaining Directors of the respondent, and they could not work with her.

110. This is a potentially fair reason for dismissal and could justify the

dismissal of an employee holding the position which the employee held. The claimant's role was that of a senior manager within the small, family company, which would have necessarily involved dealings with the only two Directors of the company, particularly following Shaun Witts' resignation. Therefore, it was clear that dismissal for SOSR in these circumstances was justified for someone undertaking that role.

111. Turning to whether the dismissal was fair within section 98(4) ERA, I have to consider whether the respondent acted reasonably in treating the breakdown in the relationship as a sufficient reason for dismissing the claimant in the circumstances. I am not to consider whether I would have dismissed in these circumstances, but rather whether an employer acting reasonably could have done so.

112. What was patently clear, was that the working relationship between the claimant and Lee and Nikki Witts could not continue. The relationship was such that the parties were working away from the office in order to minimise interaction and avoid conflict. However, working together is inevitable in a small company. Whilst this had continued for some time prior to Shaun Witt's resignation and the claimant's dismissal, this was not something that could continue indefinitely.

113. I considered carefully why the existing working relationship, where the claimant worked from home and had reduced contact with Lee and Nikki Witts, could continue, and why it had been necessary to dismiss the claimant at this point. I am satisfied that, as the claimant's husband, Shaun Witts, had resigned from the respondent's employment, it would have been increasingly necessary for Lee and Nikki Witts to have had to discuss work issues directly with the claimant. The relationship had fundamentally broken down and this,

unfortunately, was irretrievable. I therefore consider that the respondent reasonably concluded that the working relationship could not continue in this format.

114. There was much evidence before me of the breakdown in the relationship, including that the mediator suggested that both the claimant and Nikki Witts work from home in 2019, from which the parties had not yet returned to work in the office after the Covid-19 pandemic had ended. There was also evidence from the witnesses about the strained working relationship. Finally, there was documentary evidence of emails between the claimant and her husband showing a lack of trust in Lee Witts, and between Lee Witts and his brother, which identified how strained the relationship between all the senior managers was.

115. The claimant's evidence was that she was willing to continue working for the respondent, although I have doubts as to whether she genuinely would have been able to do so following her husband's departure. In any event, I am satisfied that the respondent was not able to continue working with the claimant, and there were no other roles, which the claimant could have done in its small business, which would have enabled her to continue with limited interaction with either Nikki or Lee Witts.

116. I am satisfied that Lee Witts could not work with the claimant, that the meeting on 1 February confirmed in his mind that the situation could not continue and that the claimant's employment had to end. I do not consider that Lee Witts attended the meeting with a pre-determined outcome, but during the meeting, he concluded that he could not continue to work with the claimant and that one of them had to leave. As he was a Director and shareholder, he made the decision that the one to leave had to be the claimant.

117. It does not matter who is to blame for the breakdown, what matters is that by the time the claimant was dismissed, the relationship between her and the two remaining Directors had broken down and Lee Witts concluded that this could not be fixed.

118. Given the history of the difficult relationship, and that the claimant could not work in the respondent's offices with Nikki Witts, I do not consider that this conclusion was an unreasonable one to have reached.

119. I do not consider that SOSR was used to mask the real reason for the claimant's dismissal. There was historic conduct of the claimant, which may, in the past, have justified disciplinary action and possibly dismissal, which was not pursued at that time, or subsequently. I accept that no action was taken because of the claimant's senior position in the business, being part of the management team of the respondent and being "family", as was referred to in evidence from the respondent's witnesses. As her husband was a Director/ shareholder of the respondent, it was not considered appropriate to discipline her.

120. . The decision to dismiss was made because the employment relationship had completely broken down and could not be repaired. Therefore, I consider that the reason for the dismissal was substantial and genuine and was not frivolous or trivial. Whilst I considered whether the real reason for the dismissal was the claimant's conduct, I do not accept this to be the case.

121. The claimant contended that the respondent should have tried to improve the relationship before dismissing her. I consider that this would not have proved successful, particularly in light of how long the relationship had been broken and had become irremediable.

122. I am therefore satisfied that in the circumstances, including the size

and administrative resources of the respondent, the respondent acted reasonably in treating SOSR as a sufficient reason for dismissing the claimant and that dismissal was within the range of reasonable responses.

123. The procedure followed was not compliant with the ACAS code of practice. However, I do not consider that the Code applied to this dismissal. This was not dismissal for conduct or capability, but a genuine consideration that the relationship had broken down, and that the claimant's employment could not continue.

124. I also considered whether the failure to invite the claimant to a further meeting to discuss her possible dismissal rendered her dismissal unfair. I note that an employer is usally expected to follow some kind of procedure prior to dismissal, and may have had a follow up meeting with the claimant after the meeting on 1 February and/or an appeal hearing. However, noting the case of Jefferson above, I am satisfied that a further meeting or an appeal hearing would have been utterly futile in this case. Lee Witts had decided that the relationship was irreparable and a further meeting would have made no difference to the outcome.

125. Even had the ACAS Code applied to this dismissal, or, contrary to my findings, the dismissal was unfair on procedural grounds, I consider that there was a 100 per cent chance that the claimant would have been dismissed at the meeting on 1 February had a fully compliant procedure been followed. It was inevitable that the claimant's employment would have terminated due to the breakdown in the relationship between the claimant and Lee and Nikki Witts. Therefore, there would be a 100% reduction in any compensation on Polkey principles,

126. For these reasons I find the claimant was dismissed for some other

substantial reason and that her dismissal was both procedurally and substantively fair. The unfair dismissal claim therefore fails and is dismissed.

127. It was not necessary for me to consider whether confidential information had been removed from the respondent's organisation and/or whether the claimant and her husband had commenced a competing business to the respondent, as the respondent suggested I should. I do not consider that this was the principal reason for the claimant's dismissal in any event.

128. As I have found that the claimant's wages should have been the net sum of £3,450 per month, there was an unlawful deduction from wages during January 2022, when she received less than her contractual entitlement.

129. The claimant's notice pay, which was based upon her incorrect salary, was also wrong, and therefore, her claim for wrongful dismissal, being the balance of her notice pay, succeeds.

130. The claimant's claim for holiday pay also succeeds. The holiday year ran from 1 January to 31 December in each year. The claimant was entitled to 36 days' holiday per year, including bank holidays. Therefore, she is entitled to a pro rata amount for her holiday for the 2021 holiday year, calculated using her net rate of pay of £3,450 per month.

131. I find that the meeting on 1 February 2022 was a "disciplinary hearing" in accordance with section 11(4) ERelA, Since it satisfied section 11(4)(b) ERelA involving "*the taking of some other action in respect of a worker by his employer".* Therefore, the right to be accompanied to the hearing applied to the claimant.

132. However, the claimant was not denied the right to be accompanied. She requested to be accompanied by a colleague of her choice and this was ultimately agreed by Lee Witts. She chose to attend without being accompanied,

but this does not mean that the right was infringed. I therefore do not find that there has been any breach of section 10 ERelA giving rise to a valid complaint under section 11 of that Act.

133. Finally, the claimant's claim for failure to provide a written statement of terms under s1 ERA succeeds on the basis that she was not provided with one at the time of the commencement of her employment or subsequently. I note that the claimant was herself responsible for providing contracts for other staff members in the latter part of her career, but this does not, in my view, mean that she should not have been provided with one by the respondent. This claim therefore also succeeds.

134. The case has been listed for a remedy hearing on 26 January 2024. The parties are to notify the Tribunal that the hearing may be vacated should agreement be reached on compensation.

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Employment Judge Welch

Date: 28 June 2023

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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