Case No: 3302253/2022

EMPLOYMENT TRIBUNALS

Claimant: Ms Doreen Odamtten

Respondent: M& I t/a Jetmaid Cleaning Services Ltd

Heard at: Watford Employment Tribunal **On:** 6 June 2023

Before: Employment Judge Young

Representation
Claimant: Mr R Bullock (Counsel)
Respondent: Mr Iman Dehghani (Director)

RESERVED JUDGMENT

(1) The Claimant's claims for holiday pay and arrears of pay are dismissed upon withdrawal.

(2) The Claimant's claim for unfair dismissal is well founded and is successful. The Claimant is awarded £6,695.04 in compensation for unfair dismissal.

(3) The Claimant's claim for wrongful dismissal is well founded. The Claimant is awarded £759.22.

(4) The Claimant's claim for failure of the Respondent to provide her with a written statement of particulars of employment is well founded.

(5) The Claimant is awarded 2 weeks for failure of the Respondent to provide the Claimant with a written statement of particulars of employment. The amount of the award is £738.46.

(6) The recoupment regulations do not apply.

(7) The Respondent is ordered to pay the Claimant's costs of £651.00

REASONS

Introduction

1. The Claimant was employed as a cleaner from 4 April 2021 working at several clients of the Respondent. The Respondent owns a laundry shop and a cleaning service. The Claimant presented a claim form dated 17 February 2022 following a period of early conciliation from 28 December 2021 to 7 February 2022 when the ACAS EC certificate was issued. In the claim form the Claimant claimed unfair dismissal, notice pay, arrears of pay, holiday pay and other payments.

2. A preliminary hearing took place on 1 July 2022 before Employment Judge Skehan. By order dated 1 July 2022 Employment Judge Skehan ordered the parties to send each other disclosure by 29 July 2022 and exchange witness statements by 2 September 2022. Another preliminary hearing took place on 1 March 2023, where neither party attended. However, by order dated 13 March 2023, Employment Judge Shrimplin noted that the Respondent had failed to comply with any of Employment Judge Skehan's orders. The Respondent was given a strike out warning and requested to respond no later than 12 April 2023 if objecting.

The Hearing and Evidence

3. The hearing was listed for 1 day at 10am in person. Initially the Respondent did not attend. The Tribunal clerk contacted Mr Iman Dehghani, the sole Director of the Respondent and asked if the Respondent would attend. The clerk told me that Mr Dehghani said that he was not feeling well, that he had not received notice of the hearing and that he had taken a covid test and that if the matter could be put off for another day, then he would prefer that. I told the clerk to tell Mr Dehghani, that as the Respondent was local, they were given 20 minutes to attend the Employment Tribunal. If they wish to make an application to postpone the hearing and if they were too ill to attend, they should provide medical evidence to the Tribunal, and if they were well enough to attend, they could make an application to postpone at the hearing with medical evidence. I also told the clerk to tell Mr Dehghani that if he did make a postponement application there was of course the possibility that the Claimant would make an application for costs. Mr Dehghani did attend within 20 minutes and the hearing proceeded on the basis of both parties attendance. Mr Dehghani confirmed he did not have covid.

4. The Claimant attended with Counsel Mr Bullock representing her. Mr Dehghani explained that he was feeling very unwell as he was suffering from hay fever symptoms and that he was not able to access his emails so he did not see the notice of hearing. Nevertheless, Mr Dehghani explained that he wished to get the matter over and done with and that he wanted to go ahead with the hearing. I told Mr Dehghani that if he

was feeling unwell at any point, that he could have a drink of water and he should let me know that he wanted to take a break. Mr Dehghani agreed.

5. I clarified with the parties the documents that I had been provided with was a bundle which included the Claimant's witness statement. I referred the parties to EJ Shrimplin's order dated 13 March 2023. However neither party had received the order setting out the proposed timetable, so I proceeded without further referring to the order.

6. Mr Bullock confirmed that the Respondent had been sent the bundle and the Claimant's witness statement. Mr Dehghani said that the bundle was sent to his wife and that he did not currently have access to the email. Mr Bullock agreed to send the Claimant the email with the bundle and Mr Dehghani confirmed that he had indeed received it and had access to the bundle on his phone. I asked the Respondent what documents he had if any that he relied upon. Mr Dehghani indicated that he had some texts and emails that he wished to refer to. I asked Mr Dehghani to provide the dates of the texts and emails and who they were between so that Mr Bullock could ascertain whether the Claimant had knowledge of the texts and whether they had been disclosed. Mr Dehghani indicated that the documents had not previously been disclosed to the Claimant. I said that if he wished to rely upon he documents he should show them to Mr Bullock first and that Mr Bullock may have an application to make about the late disclosure.

7. We took a short break for Mr Dehghani to gather the documents he wished to rely upon and show them to the Claimant. After the short break, Mr Bullock made an application to exclude the documents on the grounds that the Respondent had failed in totality to comply with EJ Skehan's order dated 1 July 2022 to exchange witness statements and disclosure of relevant documentation to the Claimant. Mr Bullock submitted that the Respondent's conduct was unreasonable and it was not in accordance with the overriding objective to allow the Respondent to rely upon documents that were not previously disclosed. Mr Dehghani's response to this application was that the company was only him and his wife and since Covid the company was in debt to the tune of £100,000. The Respondent did not have a solicitor and did not have resources to defend the case.

8. I ruled that I was going to limit the Respondent's evidence to the documents in the bundle and that the Respondent's ET3 would stand as the Respondent's evidence in the case. The Respondent would not be allowed to introduce any further documentary evidence.

9. I then agreed the issues with the parties (see below)

10. I asked Mr Dehghani to take the stand to give his evidence. Mr Dehghani then told me that he wished to take some advice about applying for a postponement and he was not able to take the stand at that moment as he felt very unwell. I decided with the consent of the parties to take the lunchtime adjournment early to give Mr Dehghani a chance to recuperate and take advice.

11. Following that break, and after I agreed the issues with the parties, just before Mr Dehghani was to give evidence on behalf of the Respondent, Mr Dehghani stated that he had been sick in the toilet and that he did not want to go ahead with the hearing and that he now wished to make an application for a postponement. I asked Mr Dehghani what was the grounds of his application. Mr Dehghani stated that the application was made on the basis that he was just sick in the toilet and that he was not feeling well and that he really wished that he could carry on. Mr Bullock objected to the late application made. I ruled that the application for postponement was denied. It was made late in the day, Mr Dehghani had been able to proceed earlier when not feeling well and that providing breaks should be sufficient to allow him to give evidence. It was not within the overriding objective to postpone the hearing at this late stage.

12. I therefore heard evidence from both Mr Dehghani and the Claimant. Mr Bullock had provided written submissions that had been provided to the Claimant. Due to the shortness of time and the simplicity of the issues to be decided in the case, both parties were given 10 minutes for oral submissions. I explained to Mr Dehghani what submissions were and that Mr Bullock would go first so that he had an opportunity to respond to anything that Mr Bullock raised in his submissions. I asked Mr Bullock to focus on the issue of the date of dismissal as this had arisen as an issue during the evidence of Mr Dehghani and I had his written submission on the other issues. Mr Bullock stated that in the first instance the Claimant had been expressly dismissed by the Respondent in the email of 15 November 2021 when Mr Dehghani had written *"…I don't think there is any point for you to be with us anymore"*.**[p39]** In the alternative, that the Respondent's conduct was sufficient to amount to a repudiatory breach of contract. I clarified with Mr Bullock as to whether he was at this late stage arguing that this was a constructive unfair dismissal. Mr Bullock confirmed that he was but only as a last resort. Mr Dehghani's submissions were in summary that the Claimant was represented. She had representation from no win no fee solicitors. She was taking the Respondent to court so that she could go on holiday. Mr Dehghani stated that the Respondent is not a big company. He said the Respondent had lost 45% of its customers due to energy prices. He stated that the Respondent was deeper in financial trouble than a year before and that the company was on the edge of bankruptcy. If an award of more than £700 was made, then he could not afford to pay it. Even after the Claimant left she got holiday pay. Mr Dehghani insisted that everything has been paid to the Claimant. Mr Dehghani said how could I tell the Claimant to go. He said should I have written to her and given her 2 weeks' notice? Mr Dehghani insisted that the Claimant could have answered his calls and spoken to him. Mr Dehghani concluded with he respected whatever the Employment Tribunal decided.

The Claims and Issues

13. There was an issue as to the name of the Respondent. The most recent Employment Tribunal documentation referred to the Respondent as Jetmaid cleaning services Ltd, removing reference to M&I t/a in the name which was contained in the claim form and response form. When

I asked the parties about the correct name of the Respondent. The Respondent clarified that the correct name of the Respondent was the name on the claim form and response form – M & I t/a Jetmaid cleaning services Ltd. The Respondent explained that they took over a company called Jetmaid Cleaning services Ltd in April 2018 and that since then the company has been known as M & I t/a Jetmaid cleaning services Ltd and this was the correct name of the Respondent. The Claimant accepted this as the name of her employer as this was the name on the Claimant's pay slip.

14. The parties were referred to the list of issues as set out in EJ Skehan's order dated 1 July 2022. The Respondent was asked whether they dismissed the Claimant and if so when? Mr Dehghani said it was accepted that the Claimant was dismissed. He wasn't sure about the date. I referred Mr Dehghani to the date of leaving in the Claimant's P45 which stated 12 November 2021. Mr Dehghani said that this was the correct date of dismissal. However the Claimant disputed the date of dismissal as 12 November 2021 and said the date was 15 November 2021. In the circumstances the date of termination was added as an issue. I asked Mr Dehghani what was the reason the Claimant was dismissed. Mr Dehghani explained that the Claimant was rude to him and his family and that he had received a complaint from a customer and that the Claimant unjustifiably delayed returning from holiday without communicating with the Respondent. I asked the Claimant what were her claims for holiday pay, arrears of pay and notice pay. The Claimant withdrew her claim for holiday pay and explained that she was no longer claiming in respect of any arrears of wages as she had been paid for her wages and holiday pay in June 2022. I also explained to Mr Dehghani what Polkey was and contributory conduct.

15. The list of issues were agreed as follows :

<u>Unfair dismissal</u>

15.1 What was the effective date of termination?

15.2 What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The Respondent asserts that it was a reason relating to the Claimant's conduct.

15.3 If so, was the dismissal fair or unfair in accordance with section 98(4) ERA, and, in particular, did the Respondent in all respects act within the so-called 'band of reasonable responses'?

<u>Remedy for unfair dismissal</u>

15.4 If the Claimant was unfairly dismissed and the remedy is compensation:

15.4.1 if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been

dismissed had a fair and reasonable procedure been followed or have been dismissed in time anyway?;

15.4.2 would it be just and equitable to reduce the amount of the Claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to section 122(2) ERA; and if so to what extent?;

15.4.3 did the Claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

15.5 Did the Respondent unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase any compensatory award, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 ("section 207A")?

Wrongful dismissal

15.6 Did the Claimant fundamentally breach the contract of employment by an act of so-called gross misconduct? N.B. This requires the Respondent to prove, on the balance of probabilities, that the Claimant actually committed the gross misconduct; if so, did the Respondent affirm the contract of employment prior to dismissal?

15.7 Did the Respondent unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to increase any damages, and if so, by what percentage, up to a maximum of 25%, pursuant to section 207A and Schedule A2 of the Trade Union & Labour Relations (Consolidation) Act 1992?

Findings of fact

16. The following findings are made on a balance of probabilities. All references in square brackets are a reference to the bundle page numbers.

17. The Claimant worked for the Respondent as a cleaner. The Respondent is a small business which employed 6 people at the time of the Claimant's dismissal. Mr Dehghani and his wife ran the business.

18. During the COVID pandemic the Claimant did not work on Mondays but did work on Saturdays and would have some of her income topped up with furlough payments. It was accepted that the Claimant's furlough payments were based upon the average hours the Claimant did per month.

19. The Claimant would be driven to her place of work on any particular day and would receive a text from Mr Dehghani on a Monday night for when the driver would come and pick up the Claimant to clean the Respondent's customer's premises. In 2020 the Claimant did not take any annual leave and so agreed with the Respondent that she would be able to carry over 2 weeks of her 2020 annual leave in to 2021 as long as she took this 2 week annual leave by the end of September. This was because in September the Respondent's laundry shop would be closed and so the Respondent would be able to find staff to cover the Claimant. The Claimant would also be able to take her 2021 leave when she wished and go on holiday for as long as she wished. The Claimant went on annual leave on 16 September 2021 for 2 weeks. However, the Claimant delayed her return by a week and returned on 6 October 2021. The Claimant was prepared to come back to work immediately and texted the Respondent from the airport to say she had landed. On 20 October 2021 the Claimant texted Mr Dehghani that she needed to attend a funeral. The sending of the text was not contested by Mr Dehghani, but what was contested was that the Claimant told Mr Dehghani it was a friend's funeral. The Claimant says she told Mr Dehghani it was her uncle's funeral. Nothing turned on this point so I do not make a finding on whether the Claimant told the Respondent it was her uncle's funeral or her friend's.

20. In the same text the Claimant said she would need 2 days off to attend the funeral at the end of October. However, the Claimant says she did not receive a response from Mr Dehghani and so she did not return to work. The Respondent says he received the text on 20 October 2021 and responded on 26 October 2021 agreeing to let the Claimant take another week off and return to work the following week. The Claimant did not however return the following week. The Respondent chased the Claimant on 1 November and 3 November 2021 asking the Claimant to return to work and respond to him regarding her whereabouts. Again these texts were not in the bundle and I did not see them. However, I find that the Claimant did not return to work when expected and that is why the Respondent texted her at the beginning of November 2021.

21. The Claimant did return to work eventually, because on 11 November 2021, the Claimant was in the company van when the driver Mr Jabbar's foot slipped on the accelerator and the Claimant says she was thrown from side to side at the back of the van. She did not have her seat belt on. The following day, on 12 November 2021, the Claimant attended work for 6 hours. However, the following day, 13 November 2021, the Claimant had to call in sick to cancel her shift as she was experiencing pain on the right side of her head and body where she had hit the other side of the van. The Claimant visited A & E on the Saturday, where the Doctor who attended her prescribed her medication and recommended that she stay away from work. The Claimant asked the doctor for a sick note so that she could follow his recommendation. The Doctor advise the Claimant to speak to her GP.

22. The Claimant contacted her GP and asked for the sick note. The Claimant's GP surgery recommended that the Claimant self-certify and that she needed to obtain a form for self-certification from her employer. The Claimant had not been off work before and so was unfamiliar with

the procedure, so the Claimant sent a text to Mr Dehghani asking him for a self-certificate due to her accident. This text was not in the bundle. However, the Respondent did not contest the Claimant's assertion that she sent this text so I accepted the Claimant's evidence on this point. However, Mr Dehghani's response was contained in a text on 15 November 2021 which criticised the Claimant for being rude to him and his wife and denied the Claimant had an accident in the van. The text also said that *"I don't think there is any point for you to be with us anymore because I don't know…".* **[p39]** The text was unfinished in the bundle, but the Claimant said that after the text said "I don't know", what followed was summarised as "what you are going to do next."

23. The Claimant took the statement in the 15 November text of "*I don't think there is any point for you to be with us anymore"* that she was being dismissed. The Claimant said this was confirmed in a text from Mr Dehghani dated 19 November 2021, where he said he couldn't trust her to come back after the customer complained **[p40]**.

24. During his evidence, Mr Dehghani retracted his position that the Respondent had dismissed the Claimant. Mr Dehghani's evidence was that his intention was that the Claimant would be suspended for 2 weeks and then he and the Claimant could have a face to face afterwards and he would ask her to come back to work. The Claimant was a good cleaner and her clients liked her, he did not want to lose her. He was losing customers when she did not work as he could not cover her shifts and that she would only work for the customer that she wanted to clean for and he would have to cover the customer that she did not want to clean for. When he was asked about whether he dismissed the Claimant. Mr Dehghani said he did not understand what the word dismissal meant. He said he did not sack the Claimant. However, when I asked Mr Dehghani if he told the Claimant that she would be suspended for 2 weeks and then he and the Claimant could have a face to face afterwards and he would ask her to come back to work, he said that he did not. Neither did Mr Dehghani write to the Claimant and ask her to come back to work. I found Mr Dehghani's dramatic about turn, improbable and I did not accept his evidence that he did not know what a dismissal was or that his text of 15 November 2021 was supposed to convey that the Claimant was not dismissed but suspended.

25. Mr Dehghani confirmed that he did not follow the ACAS code of practice on disciplinary and grievance procedures as he did not know what it was, and had not dismissed an employee before or since. Mr Dehghani confirmed that he did not interview any witnesses to the misconduct he alleged against the Claimant and he did not interview the Claimant. When asked about whether he investigated the allegations against the Claimant, he said that nothing happened for him to investigate.

26. Mr Dehghani said he was told by a customer that the Claimant was rude but did not tell the Claimant this whilst she was employed. Mr Dehghani did not provide any details of this rudeness and so I do not accept that Mr Dehghani was told about the Claimant being rude to a customer. Mr Dehghani said that the Claimant was rude to him on her return from holiday as she did not say hello. The Claimant denied not

saying hello to Mr Dehghani on her return from holiday as she said that was not her way. I preferred the Claimant's evidence on this point.

27. Mr Dehghani's evidence was that he was adamant there was no injury so there was no accident. The Claimant had not made an accident report and he was told by his insurance that without a report or injury a claim could not made. Mr Dehghani swore on his kids life that the Claimant was faking the injury. I find that Mr Dehghani was adamant that the Claimant could not bring a claim for injury in accordance with his insurance.

28. Mr Dehghani asserted the Claimant was the reason why a driver left the Respondent's employ because she had shouted at the driver whilst he was driving. Mr Dehghani said the driver claimed it was her shouting that caused his foot to slip off the accelerator which caused the accident on 11 November 2021 with the Claimant in the back of the company van. However, not only did Mr Dehghani not tell the Claimant this but I did not accept that Mr Dehghani was in fact told this by the driver as it was not in any of the text messages before the Tribunal. If Mr Dehghani had been told this by the driver, I would have expected him to have told the Claimant. I did accept Mr Dehghani's evidence that the Claimant did not respond to his messages for her to return to work until the fifth week she had been off work. Mr Dehghani accepted that he did not tell the Claimant about his concerns regarding her conduct which he said was throughout her employment until sending her the text dated 15 November 2021. At the point of the Claimant's dismissal, Mr Dehghani had only been in business for himself for 4 years and had previously been an employee elsewhere. Neither did he write to the Claimant to inform her of her right of appeal. Mr Dehghani did not give the Claimant a letter confirming suspension.

29. The Claimant was not paid after 15 November 2021. Mr Dehghani stated that the Claimant was provided with a contract of employment at the start of her employment like he sent to all the other members of staff and that the Claimant confirmed to HMRC that she had received a contract of employment in July 2020. Mr Dehghani said the contract of employment was sent to an address that he found out that the Claimant did not live at. He accepted that the contract of employment was not returned by the Claimant but sought to say that the contract of employment had a term in it saying that if it was not signed it was take to have been accepted after 1 month. However, no contract of employment was provided in the bundle or evidence that one was sent to the Claimant. The Claimant stated that she was never sent a contract of employment and neither were her former colleagues. She denied that HMRC asked her if she had received a contract of employment from the Respondent. The Claimant stated that she was asked about the minimum wage she received and any PIP payments by HMRC. I prefer the Claimant's evidence on this point.

30. The Claimant earned on average £1600 gross per month. The Claimant received a payment for outstanding arrears of pay and holiday pay on 6 June 2022 from Mr Dehghani, which the Claimant agreed included the correct amount for her holiday pay.

31. The Claimant was in a new role where she said she worked 25 hours per week. The Claimant worked 10-15 hours less than she did in her job with the Respondent. However, in January 2023 the Claimant increased those hours to 30 hours per week as extra over time was available. The Claimant was no longer suffering a loss of wages from mid November 2022.

Law

Unfair dismissal

32. The first issue to determine is the effective date of termination. The relevant date is not the decision to terminate employment, or an earlier date when employment was said to have terminated, but rather the date that this is communicated. It should be noted that if ambiguous words are used in communicating the dismissal or the termination, it is an objective test: the tribunal should (broadly speaking) take into account all the surrounding circumstances and how a reasonable employee would have understood them, in light of those circumstances.

33. Where an employee has received an ambiguous letter, the EAT has said that the interpretation *"should not be a technical one but should reflect what an ordinary, reasonable employee… would understand by the words used'. It added that 'the letter must be construed in the light of the facts known to the employee at the date he receives the letter*" (*Chapman v Letheby and Christopher Ltd 1981 IRLR 440, EAT)*.

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

35. The reason for dismissal is "*a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee*". (Abernethy v Mott Hay and Anderson [1974] ICR 323, CA.)

36. Under s98(4) ERA 1996 *"… the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and shall be determined in accordance with equity and the substantial merits of the case."*

37. Tribunals must consider the reasonableness of the dismissal in accordance with s98(4) ERA 1996. However, Tribunals have been given guidance by the EAT in British Home Stores v Burchell [1978] IRLR 379; [1980] ICR 303, EAT as to how to deal with misconduct dismissals. There are three stages: (1) did the Respondent genuinely believe the Claimant was guilty of the alleged misconduct? (2) did they

hold that belief on reasonable grounds? (3) did they carry out a proper and adequate investigation?

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

39. Finally, tribunals must decide whether it was reasonable for the Respondent to dismiss the Claimant for that reason.

40. The question is whether dismissal was within the band of reasonable responses open to a reasonable employer. It is not for a tribunal to substitute its own decision.

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

42. Included in applying the reasonable responses test, the Tribunals must also take into account the ACAS Code on Disciplinary and Grievance Procedures ("Code"). By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question.

43. Failure by any person to follow a provision of the Code does not however in itself render him liable to any proceedings. However, the Code is also relevant to compensation. Under section 207A, if the claim concerns a matter to which the Code applies and there is unreasonable failure by either the employer or the employee to comply with the Code, there can be an increase or reduction in compensation (respectively) according to what is just and equitable of up to 25%.

44. Under s122(2) ERA 1996, the Tribunal shall reduce the basic award where it considers that any conduct of the Claimant before dismissal was such that it would be just and equitable to do so.

45. Under s123(6) ERA 1996, where the Tribunal finds the dismissal was to any extent caused or contributed to by any action of the Claimant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable.

46. Where the dismissal is unfair on procedural grounds, the Tribunal must also consider whether, by virtue of Polkey v AE Dayton Services [1987] IRLR 503 HL, there should be any reduction in compensation to reflect

the chance that the Claimant would still have been dismissed had fair procedures been followed.

47. Under s123(1) ERA 1996, the amount of the compensatory award shall be such an amount as the tribunal considers just and equitable in all the circumstances having regard to the law sustained by the complainant in consequence of the dismissal insofar as that loss is attributable to action taken by the employer.

48. S123(4) ERA 1996 *says "in ascertaining the loss referred to in subsection (1) the tribunal should apply the same rule concerning the duty of a person to mitigate his loss as applied to the damages recoverable under the common law of England and Wales…"*

49. Burden of proving mitigation is not on the employee, but on the employer to provide evidence that the employee has unreasonably failed to mitigate their loss.-(Sanha v Facilicom Cleaning Services Ltd UKEAT/0250/18)

50. The general rule regarding compensation for unfair dismissal is that an employee must give credit for new earnings and this is set off against the overall loss in the relevant period (Ging v Ellward Lanc Ltd [1991] ICR 222 EAT). The relevant period being either to when the loss stops or up to the date of the trial which ever comes sooner.

51. The Court of Appeal decision Thorpe v Scope [2007] ICR 236 CA provides a summary the principles applicable to Tribunals deciding the question of how long the loss continues in respect of unfair dismissal compensation. Tribunals have a duty to make a just compensatory award that involves making predictions reliant on the evidence before it which seeks to establish how long the employment would have continued but for the dismissal. It was open to a Tribunal to assess a future period of loss or make a percentage reduction.

52. Garage Equipment Maintenance Co Ltd v Holloway UKEAT/0582/94 EAT agreed that where an employee obtains a permanent job but suffers a continuing loss between the old wage and new wage, Tribunals are to assess the difference between those wages and for how long that difference will continue.

53. Langley and another v Burlo [2007] ICR 390, CA affirms the Norton Tool Co Ltd v Tewson [1972] ICR 501 principle that it is good industrial practice to give full pay in lieu of notice to an employee who is dismissed without notice and that an employee's compensation should include a sum equivalent to the pay in lieu of notice which that employee should have been paid irrespective of whether the employee has found other work during the notice period.

Section 38 Employment Act 2002

54. By s.38 Employment Act 2002 ("EA 2002"), where a tribunal makes an award in claims including unfair dismissal and, when the proceedings were begun, the employer was in breach of his duty to provide the employee with written particulars of employment, the tribunal must,

subject to subsection (5), award 2 weeks' gross pay and may, if it considers it just and equitable in all the circumstances, increase the award to 4 weeks' pay instead.

55. According to s.38 (5) EA 2002 the duty on the tribunal to increase the award does not apply if there are exceptional circumstances which would make an award, or an increase under that subsection, unjust or inequitable.

Breach of contract

56. To determine the question of whether the dismissal was wrongful, that is in breach of the employee's contract, the tribunal should be not concerned with the reasonableness of the employer's decision to dismiss but with the factual question: Was the employee guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract? (Enable Care and Home Support Ltd v Pearson EAT 0366/09).

Costs

57. The Employment Tribunal Rules of Procedure ("Tribunal Rules") rule 75 states "*(1) A costs order is an order that a party ("the paying party") make a payment to—(a) another party ("the receiving party") in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative"*

58. Rule 76 of the Tribunal Rules provides for when a costs order may or shall be made, and under rule 76(2) it says "*Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party."*

59. Even if a party has breached an order or practice direction, it must first establish whether the power to make a costs order exists and, if so, go on to decide whether to exercise its discretion to award costs and the amount of any award – Lewald-Jezierska -v- Solicitors in Law Ltd & Others EAT 0165/06.

60. Costs in the Employment Tribunal are the exception and not the rule, but this does not import an additional general test of exceptionality. And in assessing whether a party has acted unreasonably, the Tribunal must look at the whole picture – Yerrakalva -v- Barnsley Metropolitan Borough Council & another 2012 ICR 420. 12.

Analysis/ Conclusions

Was there a dismissal?

61. The text message dated 15 November 2021 where the Respondent states

"*I don't think there is any point for you to be with us anymore*" on any objective reading conveyed an intention by the Respondent to dismiss the Claimant. Even if I was to conclude that the message was ambiguous, the conduct of the Respondent by failing to pay the Claimant from 15 November 2021 confirms the Respondent's intention to dismiss the Claimant. I did not accept the Claimant's argument in the alternative that this was a constructive unfair dismissal case. I have found the Respondent dismissed the Claimant via the 15 November 2021 text and the Claimant did not resign. Thus the facts of this case did not lend themselves for me to construe this case as a constructive dismissal case.

Effective Date of Termination

62. Since the text was the first time that the Claimant was told of her dismissal. The effective date of termination was 15 November 2021.

Reason for dismissal

63. Whilst the Respondent was concerned about the Claimant's failure to attend work following her holiday, it is clear to me that the Respondent had no intention of dismissing the Claimant for this behaviour. The Respondent was concerned about losing customers and did not want to lose the Claimant as she was a good worker and he needed her as he was short staffed. The Respondent did not warn or tell the Claimant about her behaviour because he needed the Claimant to continue to work for him and he was concerned that she would leave.

64. It seems to me that what led Mr Dehghani to send the text dismissing the Claimant, was that the Respondent was worried about a claim arising in respect of the accident that the Claimant had in a work van. Mr Dehghani accepted in evidence that he had not reported the accident to his insurers as he believed there was no injury, but he said there was no injury so no claim could be made. Mr Dehghani was vehement in his evidence going so far as to swear on his children's lives that the Claimant was faking an injury. This was clearly unnecessary and over the top. Until the Claimant claimed that she was injured by the accident, the Respondent appeared to do nothing about the misconduct Mr Dehghani claimed the Claimant had engaged in. But once the Claimant raised the spectre of her suffering a possible claim for injury from the accident, that is when the Respondent decided that he could no longer trust the Claimant and she had to go. In my view, the Respondent considered that the Claimant's claim that she had suffered an injury would mean that she would make a claim, yet Mr Dehghani had already been told by his insurance that the Claimant could not make a claim. Mr Dehghani knew a claim for injury by the Claimant could result in costs to him and the company and he wanted if at all possible avoid those costs as his company was already in significant debt and that is why he dismissed the Claimant. I was not convinced that the Claimant was making up the accident. In the Respondent's ET3 they accepted that an accident of some kind took place. The Respondent denied that the Claimant experienced injury resulting from it. It was not necessary for me to make any findings about whether the

accident happened or not as that was not the reason the Respondent put forward as the reason why the Claimant was dismissed.

Reasonableness of the dismissal

(a) Burchell test

65. Turning to the question of whether the Respondent had reasonable grounds to believe the Claimant was guilty of the misconduct and whether that belief was genuine I find that they did not. The Respondent did not genuinely believe the Claimant to be guilty of this misconduct. There was clearly no reasonable investigation by the Respondent. Whilst the Respondent's ET3 complained that the Respondent had evidence of complaints from customers and staff, when asked Mr Dehghani said a customer said the Claimant had been rude. However, he did not provide any names or dates of complaints he said he got from customers or staff. Furthermore, when Mr Dehghani was asked why didn't he have an investigation into the Claimant's misconduct, he stated in evidence there was nothing to investigate. The Respondent's position was also inconsistent with Mr Dehghani's assertion that the Claimant was a good cleaner. The Respondent did not have a genuine belief that the Claimant was guilty of misconduct following a reasonable investigation.

(b) Did the Respondent adopt a fair procedure?

66. The Respondent accepted that they did not follow the Code, there were no warnings of misconduct of any kind or meetings before the dismissal and the Claimant was not told of a right of appeal against dismissal. At no point did Mr Dehghani think to ask the Claimant about his concerns and this was not the conduct of a reasonable employer. A reasonable employer would have asked the Claimant about her behaviour before drawing conclusions, particularly where the Respondent considered the Claimant a good worker and did not want to lose the Claimant. I find the Respondent in breach of the Code. To dismiss the Claimant without a meeting or warnings is not within the range of reasonable responses of an employer.

Polkey

67. The next question to consider is if a fair procedure had been followed would the Claimant have been fairly dismissed in any event? The answer to that question must be a no. The alleged rudeness and delay to return from work would not have resulted in the Claimant's dismissal for the reasons already stated. However, I did consider Mr Dehghani's evidence that the business was now on the verge of bankruptcy and carrying over £100k of debt, not least because of the reduction of clientele and because of the sudden increase in energy bills. Thus on a balance of probabilities the Respondent's business would have ceased trading in 2023 and the Claimant's employment would have terminated in 2023 and most certainly by 2024.

Contributory conduct

68. I find that the Claimant did not contribute to her dismissal. The Claimant's request for a self-certification was as a result of information received by her GP. It was unclear to me why the Claimant's GP advised her to ask for a self-certification form from her employer and did not provide a sick note as requested. But nothing more was needed from the Respondent in response to the Claimant's request than to request a sick note from the Claimant's GP and that self-certification was not the appropriate process where the Claimant was not fit to return back to work. The Claimant's request was not misconduct. The Claimant's rudeness and delay in returning from annual leave did not contribute on the facts to the Claimant's dismissal. I therefore find no contributory conduct on the part of the Claimant.

Failure to provide written statement of particulars of employment

69. The Respondent did not provide any documentary evidence to support their assertion they sent the Claimant a contract of employment. I find there was a failure to provide the Claimant with a statement of particulars of employment.

Wrongful dismissal.

70. I must consider whether the Claimant committed an act of gross misconduct entitling the Respondent to dismiss the Claimant without notice. Unlike the Claimant's unfair dismissal, I need to decide whether I find the Claimant guilty of misconduct serious enough to entitle the Respondent to terminate the Claimant's employment without notice. The Claimant's actions of not returning to work, appear to be motivated by the arrangement that the Claimant came to in 2021. The Claimant was under the impression that she could take all of her annual leave including the two week annual leave in 2021. That meant the Claimant thought that she could take 6 weeks holiday in the year. At no point did the Respondent say that the Claimant could not take the annual leave, the issue appeared to be the lack of communication with the Respondent. That does not in my view amount to gross misconduct. I was not convinced that the Claimant was rude to Mr & Mrs Dehghani or a customer. It follows that I find that the Claimant was wrongfully dismissed and is entitled to be paid 2 weeks' notice pay.

ACAS Code

71. I find that the Respondent unreasonably failed to follow the Code in totality. I find this is because the Respondent did not provide the Claimant with notice of any of the allegations against her in order for her to provide a defence or mitigation, or notice of the consequences of her conduct. The Respondent did not provide the Claimant with a meeting within which to answer allegations against her or a right of appeal against the decision. Notwithstanding the reason for dismissal was not a fair reason and did not amount to gross misconduct. In the circumstances I find there should be an uplift of the maximum of 25% to reflect the total failure by the Respondent.

Remedy

72. The Claimant obtained a new job working for Premier Inn as a cleaner on 3 December 2021. Whilst that new role was at a lower rate of pay and was initially for significantly fewer hours than her job with the Respondent, I find that the Claimant's loss did not continue beyond 31 December 2022. The Claimant's schedule of loss does not claim losses continuing beyond 12 months from the date of dismissal. Furthermore, the Claimant was able to increase her hours by doing overtime to offset the difference between her job working for the Respondent and her new job.

73.

Claimant's Details

Date of birth of claimant	19/10/1972
Date started employment	01/04/2019
Effective Date of Termination	15/11/2021
Period of continuous service (years)	2
Age at Effective Date of Termination	49
Final hearing date	06/06/2023
Date by which employer should no longer be liable	15/11/2022
Contractual notice period (weeks)	2
Statutory notice period (weeks)	2
Net weekly pay at EDT	303.69
Gross weekly pay at EDT	369.23
Gross annual pay at EDT	19,199.96

74. The Claimant's award for unfair dismissal is as follows:

Basic award

Basic award Number of qualifying weeks (3) x Gross weekly pay (369.23)		1,107.69
Total basic award		**1,107.69**

Compensatory award (immediate loss)

Loss of net earnings Number of weeks (79.1) x Net weekly pay (303.69)		24,021.88
Plus loss of statutory rights		500.00
Plus Expenses incurred		50.00
Less sums obtained, or should have been obtained, through mitigation		-19,628.56
Earnings	11,885.76	
Premier Inn (03/12/2021 to 02/12/2022)	-11,885.76	
Failure to mitigate	8,807.01	
Total compensation (immediate loss)		**3,879.11**

Adjustments to total compensatory award	
Plus failure by employer to follow statutory procedures @ 25%	969.78
Compensatory award before adjustments	**3,879.11**
Total adjustments to the compensatory award	**969.78**
Compensatory award after adjustments	**4,848.89**

7. Summary totals	
Basic award	1,107.69
Compensation award including statutory rights	5,587.35
Total	**6,695.04**

75. The Claimant‘s award for wrongful dismissal is as follows:

Damages for wrongful dismissal	
Loss of earnings Damages period (2) x Net weekly pay (303.69)	607.38
Plus failure by employer to follow statutory procedures @ 25%	151.84
Total damages	**759.22**

76. The Claimant’s award for failure to provide written particulars of employment is as follows:

Failure to provide written particulars	
Number of weeks (2) x Gross weekly pay (369.23)	738.46
Total	**738.46**

77. The Claimant’s total award for all claims is as follows:

Sub totals	
Basic award	1,107.69
Wrongful dismissal	759.22
Compensation award including statutory rights	5,587.35
AFTER COMPENSATION CAP OF £19,199.96	**7,454.26**

SUMMARY TOTALS

Unfair dismissal & Wrongful dismissal award	7,454.26
Award for failure to provide written particulars	738.46
Total	**£8,192.72**

Costs

78. The Claimant made an application for costs on the grounds of the Respondent's failure to comply with any of the Employment Tribunal's orders regarding case management as set out in EJ Skehan's order dated 1 July 2022. Mr Dehghani's response was the Respondent did not have the resources to comply with the order and that any order for costs of more than £700 would result in the bankruptcy of the Respondent. Mr Dehghani had already informed me of the Respondent's current debt of £100k. The Respondent had been warned in EJ Skehan's order that failure to comply with the orders could result in costs. The Claimant had provided the Respondent with a schedule of their costs in the bundle which was completed by November 2022 when the case was first supposed to be heard. The Claimant has incurred additional costs in dealing with the Respondent's failure to comply with the Tribunal's order and the Respondent had warning of the Claimant's application and the amount of those costs as it was included in the bundle.

79. In the Claimant's application before me, £1,250 including VAT of Counsel's fee was added to the schedule of £6,510 totaling £7,760. I remind myself of Mummery LJ's comments in the Court of Appeal case of Yerrakalva that costs are the exception, not the rule. However, applying Yerrakalva and looking at the whole picture it is my view that the circumstances warrant a costs award. The Respondent had plenty of warning of the possibility of costs and could have complied with EJ Skehan's order at any time before the hearing on 6 June 2023. I take into consideration the Respondent's current financial difficulties. Mr Dehghani told me that an award of more than £700 would cause the Respondent to go into bankruptcy. I award £651 in costs.

Employment Judge **Young**

Date 19th July 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

25 July 2023

GDJ
FOR EMPLOYMENT TRIBUNALS