



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss T Golding  
**Respondent:** Holland Properties Ltd  
**Heard at:** East London Hearing Centre  
**On:** 27<sup>th</sup> and 28<sup>th</sup> April 2022  
**Before:** Employment Judge Illing

## Representation

Claimant: In Person  
Respondent: Mr Stephen Wyeth (Counsel)

JUDGMENT having been sent to the parties on 30<sup>th</sup> May 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

*This has been a remote hearing, which has not been objected to by the parties. The form of remote hearing was (CVP). A face-to-face hearing was not held, because it was not practicable, and all issues could be determined in a remote hearing.*

### Procedural history

1. This case was issued on 3<sup>rd</sup> July 2022 and listed for a preliminary hearing on 1<sup>st</sup> December 2022. Due to an administrative error, the notice was not received by all parties and the case was relisted.
2. On 2<sup>nd</sup> February 2022, Employment Judge Fowell conducted a case management hearing and prepared case management orders for the parties to comply with. A case summary and list of issues were also prepared. The list of issues are considered within this Judgment.
3. EJ Fowell had also helpfully prepared an estimate for timings, which provided for the Claimant, who was in-person, to give her evidence first.

4. Further to the case management orders, the Respondent submitted an amended Particulars of Response. The Orders had permitted an amended response with regard to the commission claim by the Claimant. In submitting its amendment, the Respondent also added an alternative reason for dismissal, being misconduct.
5. On 24<sup>th</sup> April, the Claimant had submitted to the Respondent a transcript of a meeting recorded on 19<sup>th</sup> November 2021. The Respondent requested that this was considered for the hearing.

### **The hearing**

6. Bundle of 334 pages
7. Transcript of recording of meeting on 19<sup>th</sup> November 2021 of 7-pages.
8. Witness evidence from:
  - 8.1. Miss Tierney Golding (9-pages)
  - 8.2. Mr Sheldon Cole (9-pages)
  - 8.3. Mrs Susana Valdez (6-pages)

### **Conduct of the Hearing**

9. The case was listed for a 2-day full merits hearing before me. At the outset of the hearing, I was informed of a number of matters that would impact on the ability of the Tribunal to hear both liability and remedy of the claim. This included delays due to a fire alarm, IT issues and medical issues. These occurred, or were known of, immediately prior to the start of the hearing and, where appropriate, the scheduling was modified. As a consequence, the hearing would be to determine liability only, including any Polkey, contribution and or Acas uplifts if so determined. A further hearing for remedy only would be listed, if required.
10. The Claimant informed the Tribunal that her claim for holiday pay had been resolved and that this claim should be dismissed upon withdrawal.

### **Summary**

11. The Respondent company is a letting company and Mr Sheldon Cole (Managing Director) had taken over the business in June 2021. Mrs Valdez was the head of sales and letting. Miss Golding worked for the company from 2015 until her dismissal on 31<sup>st</sup> January 2022 as a Lettings and Sales negotiator.
12. The company say that she was dismissed for “some other substantial reason” but plead misconduct as an alternative fair reason for dismissal in the amended particulars of response. In closing submissions, the Respondent confirmed that it does not depart from what was said in the original case management order, that is the dismissal is for “some other substantial reason” and the “some other substantial reason” being a breakdown in working relationships.
13. It is the Claimant’s position that her dismissal was due to the dispute between the new owner of the business and the previous owners.

14. The complaints presented are now as follows:
  - 14.1. Unfair dismissal under section 98 Employment Rights Act 1996.
  - 14.2. Unlawful deduction of wages under section 13 Employment Rights Act 1996 in respect of outstanding commission payments.

**Findings of fact**

15. The Respondent is a letting company based in Westferry Road, London. The current owners acquired the business in June 2021.
16. The Claimant commenced employment on 2<sup>nd</sup> November 2015 as a Trainee Lettings Negotiator. The contract of employment dated 3<sup>rd</sup> November 2015 provides for an annual salary of £14,000 gross per annum and commission at 10% of any fees brought into Holland Properties on sales and lettings.
17. The Claimant advised the Tribunal that whilst a Trainee, she did not receive commission. She stated that she started to receive commission in or about June 2017 and continued to do so. This is not disputed by the Respondent.
18. In May 2018 the Claimant's annual salary was increased to £17,000 gross per annum and again in March 2020 to £20,000 gross per annum.
19. Following the sale of the business to Mr Cole in June 2021, Ms Valdez was appointed as the Sales and Lettings manager and was the Claimant's manager. At this time 2 of the former owners of the business had been employed, but are no longer in the Respondent's employment.
20. It is common ground that there is an ongoing legal case between the Respondent and the former owners.
21. In June 2021, the Respondent engaged Vincenzo Ruocco, as a Property Consultant.
22. Following the takeover, the Respondent introduced changes to its practices which included for example:
  - 22.1. A trial period for the Claimant to do progressions until 25<sup>th</sup> August 2021.
  - 22.2. A change as to how applicants would be assigned.
  - 22.3. A requirement for the Claimant to chase landlords for long term unpaid fees,
  - 22.4. A requirement for the Claimant to obtain a £250 holding deposit from an applicant.
23. Difficulties began to arise between Mrs Valdez and the Claimant from about September 2021.
24. In about June / July 21 the Claimant was invited to attend a training session. The bundle does not include the email inviting her to attend, nor does it contain her reply. It is the Claimant's position that the invitation to attend training was optional and given that it would incur a cost, that she had already attended the training and that she had lots of work to do, she gave evidence that she had

replied to confirm that she would not be attending. It is the Respondent's evidence from Mr Cole that he wanted the whole team to attend the training as a team building exercise. I find that whilst the original email may have stated that the training was optional, it was a reasonable management instruction for Mr Cole to require all employees to attend a training event.

25. On 27 August 2021 [105] the Claimant was advised that her work on progressions was complete. The Claimant asserts that she is owed commission for progressions that completed after August amounting to £575.10. That is for tenants who moved in during September. It is the Respondent's position that no commission is owed. The ET3 and amended response states that the Claimant did not fulfil the terms of the bonus and that it was discretionary. No argument from the Respondent was put forward in oral evidence.
26. Page 103 of the bundle I am told shows August 2021 commissions at 7.5% with a progression uplift of 2.5%. The page is undated. The Claimant accepted in evidence that this was August 2021. The Claimant contends that the 2.5% is in relation to her trial role in progressions, so her actual commission was 7.5%. I find that her commission at this time was 7.5%.
27. After August 2021, the Claimant's commission was increased to 17.5%.
28. On 30 September 2021 the Claimant raised a complaint to her manager that the applicants were being unfairly assigned, meaning that Mr Ruocco was being given more applicants than her. It is the Claimant's position that Mr Ruocco was on a lower commission and therefore cheaper. [111]
29. By email of the same date, Mrs Valdez replied to the Claimant that she needed to focus on what's ahead. [110]. The email went further and detailed other opportunities the Respondent believed that they had provided for the Claimant, including restructuring her role and an increase in commission to 17.5% for sales fees.
30. At this time Mrs Valdez sought advice from the Respondent's external HR provider who advised that there should be a meeting to discuss the current issues and what needs to improve because if the employment relationship breaks down further then they would have no option to dismiss. She was advised to give clear guidance as to expectations in relation to performance, attitude and following reasonable requests, the aim being to improve the employment relationship.
31. On 4<sup>th</sup> October 2021 the Claimant was called into a meeting with Mr Cole and Mrs Valdez without warning. It is the Claimant's position that Mr Cole raised issues with her mood in the morning, with how she answered a call, with her timekeeping, that she hadn't participated in the training and that he wanted more effort overall. It is the Claimant's position that this was unfair. It is the Respondent's position that this was an informal conversation. Both Parties agreed that the conversation had started with Mr Cole stating that he wanted to address the "elephant in the room". I find that this was an informal meeting to address concerns by the employer in relation to the working relationship with the Claimant. There was no disciplinary sanction, nor any record placed on her personnel file.

32. On 4<sup>th</sup> November 2021 Ms Valdez sought advice from the external HR team in relation to the claimant in relation to working hours [129]. She also raised a number of issues including the following:
- 32.1. Questioning and contesting new procedures.
  - 32.2. Details of the new roles that had been offered and refused.
  - 32.3. That she is often late in the morning.
  - 32.4. That she had accused a colleague of lying.
  - 32.5. That Ms Valdez cannot continue to change the plans of the office to suit the Claimant.
33. One specific issue was in relation to an email exchange between Mrs Valdez and the Claimant regarding 4 Cumberland Mills Square. On 17<sup>th</sup> November 2021 [166 – 167] Mrs Valdez emailed the Claimant with regards to a failure to follow procedure, in that offers without physical viewings were to be avoided. In evidence Mrs Valdez asserted that to do this and for the tenants to move in without written confirmation that there had not been a viewing, could lead to complaints. Additionally, the Claimant had not told Mrs Valdez of this transaction, specifically in that the prospective tenants were abroad. Mrs Valdez explained that this procedure was to protect the company and gave the Claimant a warning. In evidence, I find that the Claimant accepted the reason for the procedure. I find that it was a reasonable instruction for Mrs Valdez to require the Claimant to follow this procedure.
34. The Claimant responded to Mrs Valdez on 19<sup>th</sup> November 2021 [164] with the full details of the offer and that she thought that the warning was incorrect. The Claimant went further to state that she felt that the email from Mrs Valdez had been irrationally sent as she thought that she had followed the procedures correctly.
35. The Claimant also added that she believed that Mr Ruocco had behaved in the same manner, but without receiving a warning.
36. This email was sent as a reply to all, which included the accounts team, which Mrs Valdez had initiated.
37. On 19<sup>th</sup> November 2021 Mrs Valez asked the Claimant if she would like to chat. This conversation has been recorded by the Claimant without Mrs Valdez's knowledge or consent. The Claimant has transcribed the meeting and the Respondent has agreed to its inclusion in the hearing but has not had the opportunity to review it against recording itself.
38. I find that the recording was covert and the telephone was recording before the conversation had begun. During this conversation, Mrs Valdez asked the Claimant for a chat in private. The Claimant wanted to stay within the open plan office. It was the Claimant's position that there were few employees in and that the issues were for everyone to hear. It is the Respondent's position that they wanted to speak in private with the Claimant.

39. A number of the issues previously raised were discussed. This included:
- 39.1. The failure to follow procedures regarding the client living abroad and the lack of viewing of the property. It was the Claimant's position that Mrs Valdez would know about this from the correspondence. It was Mrs Valdez's position that the Claimant should have told her about this issue. [Transcript Pg 1]
  - 39.2. That the Claimant believed that she gets into trouble for matters that Mr Ruocco has also done but has not been in trouble. It was Mrs Valdez's position that she would also speak to Mr Ruocco, in private. I find that Mrs Valdez would speak to them equally. [T2]
  - 39.3. It was the Respondent's position that the Claimant had been offered opportunities ahead of Mr Ruocco [T4], which the Claimant had declined.
40. Mrs Valdez asked the Claimant "what are we gonna do" and I find that this was a genuine attempt to resolve the differences. Mr Cole joined the meeting and wanted to move this to a private room. I find that Mr Cole made a reasonable management request to move the meeting into a private room, which the Claimant refused. [T5]
41. The Claimant told Mr Cole that she would only meet with Mr Cole at a scheduled meeting. I find that there was an impasse as Mr Cole would not schedule a meeting. The meeting culminated with the Claimant being asked to go home for the day. [T6]. He also agreed to have a further meeting with her on Monday 22<sup>nd</sup> November 2021.
42. At the conclusion of this meeting the Claimant was sent home. From the evidence heard by the Tribunal, I find that it was Mr Cole who suspended the Claimant.
43. The suspension was confirmed by letter of 19<sup>th</sup> November 2021 [195] stating that her suspension was as a result of her failure to follow reasonable management requests on numerous occasions regarding informal meetings, following company procedures and new practices. The reason for the suspension was because of the affect to other employees. The allegations also included her completing crosswords during working hours with pictures taken from company CCTV.
44. The letter of the 19<sup>th</sup> November also invited the Claimant to a disciplinary meeting on 3<sup>rd</sup> December 2021 and that she had the right to be accompanied.
45. The disciplinary meeting took place on the 3<sup>rd</sup> December 2021 and the meeting notes are recorded in the bundle [203 – 210]. Neither Party raised an issue with the content of these notes. The meeting was chaired by Mr Danny Shaw, the external HR advisor with Mrs Valdez.
46. The outcome of the disciplinary meeting was that the Claimant received a first written warning for failure to follow reasonable management requests. I find that this outcome was reasonable in all of the circumstances.
47. The Claimant did not appeal this disciplinary sanction.
48. The Claimant returned to work from suspension on 6<sup>th</sup> December 2021. At this time an issue was raised due to the Claimant being unable to evidence her covid

- test and her refusal to wear a face mask. No further issue was raised regarding this.
49. On 25<sup>th</sup> January 2022 the Claimant raised a question with Mrs Valdez [221] stating that “As a note, I was looking at my employment contract. It states my commissions are to be 10% but I’m getting 7.5%”. Mrs Valdez responded on 26<sup>th</sup> January 2022 to confirm that it was being looked into. I find that it was being looked into.
  50. On 27<sup>th</sup> January 2022, the Claimant received an invitation to a meeting to discuss recent issues at the Company, the breakdown in the working relationship and the personality clashes that are having a serious impact on the mental health of everyone [231]. The meeting was scheduled for Monday 31<sup>st</sup> January 2022. The Claimant was advised that she could be accompanied and that one outcome of the meeting may be the termination of her employment. The Respondent’s response refers to this meeting as a further disciplinary meeting [36] as does Mr Cole in his witness statement [18 of the witness statement bundle].
  51. The meeting took place on 31<sup>st</sup> January 2022 chaired by Mr Cole. Prior to the meeting the Respondent sought advice from their external HR provider, who provided a script [234 – 235] and guidance [232].
  52. The meeting was recorded and transcribed by the Claimant. [259 – 264]. This was a covert recording. The Respondent did not provide their own notes for the bundle.
  53. It is the Claimant’s position that she did not know what the allegations were against her nor who was saying what as the discussion referred to colleagues and not to individuals with names.
  54. In evidence from Mr Cole that the allegations were within the meeting discussion and included the following:
    - 54.1. Why do you think the working relationship is so bad?
    - 54.2. Going on that question, have you noticed the damage that it’s having on the other employees especially Susanna?
    - 54.3. Obviously, you had a meeting with Su and Danny on 3<sup>rd</sup> December regarding similar issues?
    - 54.4. Clash, personality clash, no you haven’t noticed?
    - 54.5. No animosity between you and Vincenzo (Mr Ruosso)?
    - 54.6. No animosity between you and Susanna?
  55. Mr Cole admitted in evidence that it had not taken any formal witness statements or record of complaints from any other colleague in the business. Nor were examples of arguments or argumentative behaviour recalled during the hearing.
  56. It was the Claimant’s position that this meeting came was an ambush, she felt that she had been trying to make more effort and that she had begun to enjoy coming into work. It was also her position that she had been absent for a lot of

the time between 6<sup>th</sup> December 2021 and 25<sup>th</sup> January 2022 due to annual leave and the Christmas break. She believed that the meeting was because she had raised a question regarding her commission.

57. It was the Respondent's position that there had been further issues and Mr Cole determined that nothing had changed and that there was a personality clash with other team members. He determined that the sanction would be dismissal with pay in lieu of notice. This outcome was confirmed in writing by a letter of 31<sup>st</sup> January 2022 [246]. It explained that "we [the Company] are now in a position where you have demonstrated that there is an unbearable and untenable breakdown in the employment relationship and there are clear personality clashes between yourself and several other members of team and it is beginning to have seriously damaging consequences on the performance of the business and the mental health of other team members. We cannot allow the constant arguments and bickering to continue to affect our small business."
58. It is the Respondents primary position that the reason for the dismissal was some other substantial reason on the grounds of the breakdown of the working relationship. It is their alternative position that the reason for the dismissal was conduct.
59. It is the Claimant's position that she was unfairly dismissed and that the reason for the dismissal was because of her connection with the previous owners and the ongoing legal case between them and the Respondent.
60. On 3<sup>rd</sup> February 2022 the Claimant emailed Mr Cole and Mr Shaw stating that she was appealing this as unfair dismissal. She states that "I believe your mind was already made up prior to any meeting and nothing I could do or say would change that." She also asked for a copy of the disciplinary policy [265]. There is no evidence to support that the Respondent progressed the Claimant's email as an appeal against her dismissal. I find that this was an appeal against dismissal.

## The law

61. Unfair dismissal s. 98(1), (2) and (4) ERA 1996
62. The relevant sections are as follows:

### **General.**

(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.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,



(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) “capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) “qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) 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.

63. Unlawful deduction of wages s.13 ERA 1996

64. Part 2, sections 13 to 27B, Employment Rights Act 1996, sets out the statutory basis for a claim of unauthorised deduction from wages. Employment Rights Act 1996, section 13, provides in particular as follows:

*(1) An employer shall not make a deduction from wages of a worker employed by him unless—*

- (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or*
- (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.*

*(2) In this section “relevant provision”, in relation to a worker's contract, means a provision of the contract comprised—*

- (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or*
- (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.*

*(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*

*(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.*

*(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.*

*(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct*

65. Acas Code of Practice for disciplinary and grievances. This is Section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992 which provides:

**207A Effect of failure to comply with Code: adjustment of awards**

(1) This section applies to proceedings before an employment tribunal relating to a claim by an employee under any of the jurisdictions listed in Schedule A2.

(2) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employer has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

(3) If, in the case of proceedings to which this section applies, it appears to the employment tribunal that—

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

(b) the employee has failed to comply with that Code in relation to that matter, and

(c) that failure was unreasonable,

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, reduce any award it makes to the employee by no more than 25%.

(4) In subsections (2) and (3), "relevant Code of Practice" means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes.

## Submissions

66. Both representatives provided oral submissions.
67. For the Claimant, she submits that she embraced the new ownership. She was given a new role, which included progressions and she performed well.
68. The Claimant confirmed that she raised concerns about the following:
- 68.1. That the allocation of applicants wasn't fair.

- 68.2. That landlords should see the offers so that they could decide if they like the offer.
- 68.3. That her offers weren't being progressed as others were.
- 68.4. That she was being asked to chase for money on the let onlys, that was not legally owed to the business.
- 68.5. That it was unlawful to ask for a deposit of more than 1-week of rent. The request for £250 was more than a week on occasion.
69. It is the Claimant's position that it is not that she didn't do as instructed, but that she was raising her concerns because these problems could become bigger concerns for the business. She was raising the concerns to support the business.
70. The Claimant stated that she started recording meetings because she felt that she was being treated unfairly and that she was being pushed out.
71. The Claimant was aggrieved about the CCTV pictures which were sent to her. She submits that she was reading a property magazine.
72. The Claimant accepted the first written warning as she enjoyed her work and wanted to make it work. The issue with the mask and covid test were nothing. She had had the test and she showed it to Mrs Valdez when the result came through.
73. The Claimant submits that there was an increase in complaints and workload for Mrs Valdez. If she had known that Mrs Valdez needed more support, she would have given it.
74. It is the Claimant's position that she didn't and still doesn't know the reason for her dismissal. That there was no evidence in the bundle or from the witnesses for anything after the first written warning. If there had, the Respondent would have sought assistance from HR, but they didn't for anything specific.
75. It is the Claimant's position that following the first written warning, she was making the effort and that this was accepted by the Respondent's witnesses in cross-examination.
76. The Claimant asserts that she did appeal even though she didn't know the process. By the time she had a reply 2-weeks later, she was too unwell to deal with the appeal process.
77. For the commissions, it is the Claimants position that the extra 2.5% was due to progressions and does not bring her commission up to 10%.
78. The August commissions for progressions, which were due at the end of September, still haven't been paid.
79. For the Respondent, Counsel utilised the list of issues as his template for his closing arguments. This was as follows:
  - 79.1. That it is appropriate to reflect on the s.98 (1) & (4) of the ERA and recent cases note the importance of this reflection.

- 79.2. With regard to the reason, the Respondent doesn't depart from the original grounds of response and the content of the case management orders. This was a dismissal for the loss in trust and confidence in the Claimant and her persistent intransigent and inflexible attitude. This is a two stage test:
- 79.3. Firstly, what is the substantial reason, the Respondent says there is from the reason above, either individually or a combination of behaviour.
- 79.4. The submission is that whilst there is no evidence of an issue, it doesn't mean that the issue didn't exist. Had the Claimant not covertly recorded the meeting on 19<sup>th</sup> November, there would be no record of her behaviour, where she was defiant and challenged the authority of her manager.
- 79.5. Secondly, does the substantial reason justify dismissal. This needs to be considered in the prism of s.98(4) and whether in all of the circumstances including the size and the resources of the employer and be determined in accordance with equity and substantial merits of the case.
- 79.6. It is submitted that the absence of an appeal does not invariably make the dismissal unfair, and it is to be determined in consideration of the just and equity in the case. If the Claimant did appeal, it wasn't pursued. The Respondent would not seek a reduction, but ask that no uplift is given.
- 79.7. The Acas Code has some bearing in relation to compensation but also on the decision and reasonableness. The Respondent gave authorities of **Lund v St Edmunds School, Canterbury UKEAT/0514/12/KN, Phoenix house Ltd v Stockman [2016] IRLR 849** to state that the Code could apply where common sense applies.
- 79.8. The business was a very small business and that the covert recordings evidence the problems being faced with the Claimant.
- 79.9. For SOSR, personality is not a reason, but how it manifests itself can be.
- 79.10. For the first written warning, the Respondent submits that the Tribunal cannot go behind the warning unless it was manifestly wrong.
- 79.11. The lack of evidence between January and December doesn't mean to show that there were no problems at the time. The failure to wear a mask, the failure of the covid test and phone on 6<sup>th</sup> December is evidence as to her failure to improve.
- 79.12. It is submitted that it is not for the Tribunal to step into the shoes of the employer and it is not a council of perfection, but what is just and equitable within the band of a reasonable response of a reasonable employer in all of the circumstances.

- 79.13. For Polkey, it is clear that the Claimant had issues with the new owners from the start and that the relationship was going in one direction and would have ended in March.
- 79.14. For contribution, the secret recordings demonstrate that the relationship was doomed and that the Tribunal should take her conduct into consideration.
- 79.15. Regarding commission, it is submitted that either there was a variation from the outset of the contract to 7.5%, which has been accepted by the passage of time, or she received 10% and that ended in August 2021, when it was increased to 12.5%.

## **Conclusions**

- 80. I have considered the list of issues as prepared for the case management and answer them as follows:
- 81. What was the reason for Miss Golding's dismissal?
- 82. In considering whether the company acted reasonably in all of the circumstances in treating that as sufficient reason to dismiss her, I have reflected on the wording of s.98 specifically subsections (1)(a)(b) and (4). In considering each in turn:
  - 82.1. It is for the employer to show, on the balance of probabilities, that the reason or principal reason for the dismissal and that it is either a reason falling within s.98 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.
  - 82.2. I find that the Respondent believed that the reason for the dismissal was on the grounds of the breakdown of the relationship. I conclude that the primary reason for the dismissal was on the grounds of the breakdown of the working relationship, being some other substantial reason. I also conclude that this was not the sole reason as this primary reason incorporated the original disciplinary outcome of the first written warning in December 2021.
  - 82.3. In considering the first stage of the test, that whether this reason for the dismissal could be justified I have considered the Claimant's position of the lack of evidence and details of allegations provided to her and I have addressed my mind to the Respondent's submissions that a lack of evidence does not mean that the circumstances were not able to justify dismissal.
  - 82.4. I find that the reason advanced by the Respondent could justify dismissal and so I move to the next question. Was the decision by the Respondent reasonable in all of the circumstances and in accordance with the equity and merits of the case s.98(4)?
  - 82.5. To determine this, I have taken into account the resources of the employer. I accept that this is a small employer of 15-employees, with an external professional HR department. It is notable to me that prior to the disciplinary hearing in December where the Claimant was issued with

specific details of the allegations against her, there is a record of advice being sought from HR in the lead up to this meeting.

- 82.6. Following the December meeting I find that there is no evidence of a similar kind. Whilst I have considered the Respondents submissions on this point, I accept that the Claimant has understood the requirements of her following the disciplinary meeting on 3<sup>rd</sup> December and that she has returned to work following suspension with the mindset to make the effort. In evidence, the Respondent's witnesses accepted that she had made the effort. Additionally, neither of the Respondent's witnesses could identify or provide any details of any specific argument or incident that would evidence an ongoing breakdown in the relationship. I conclude that the Claimant was making the effort as she asserts.
- 82.7. In considering the equity and substantial merits of the case, I am of the opinion that whilst there may have been differences between the Parties prior to December and that the relationship would take time to repair following the Claimant's return to work, I am of the opinion that whilst the Claimant was minded to engage in this process, the Respondent was not. I do not find that on balance of probabilities that the Respondent has shown that the dismissal was justified. There had been no further recourse to the Claimant formally or informally and I accept that the Claimant found the dismissal to be unexpected.
- 82.8. It is not for me to step into the shoes of the employer and I have taken into account all of the circumstances including the size of the business, the resources available to it, the previous circumstances immediately following the takeover of the business resulting in a first written warning and lack of further documentation subsequently. In determining the reasonableness of the Respondents actions, I must also consider whether the Respondent followed a fair procedure.
83. Was a fair procedure followed in coming to the conclusion to dismiss the Claimant?
84. I have considered the resources available to the Respondent in that it had an external HR department, which was available upon request. I find that the invitation letter to the disciplinary as dated 27<sup>th</sup> January 2022 did not sufficiently detail the allegations the Claimant was being asked to face nor were the allegations sufficiently clarified within the disciplinary meeting.
85. Whilst the Respondent states that this final meeting was not a conduct case, the lack of evidence in relation to the allegations against the Claimant is relevant. There is no requirement for a separate or lengthy investigation, but the Claimant is entitled to understand the allegations that she faced, and she did not.
86. I have found that the Claimant did appeal against her dismissal the grounds being that she felt that the decision was already made. This was not acted upon in a prompt or reasonable manner. I accept the Claimant's evidence that by the time a reply came, she was too unwell to deal with the matter and therefore did not pursue it.
87. I find that the procedure was unfair for the above reasons.

88. In considering the difference a fair procedure would have made, I have considered this carefully. Whilst I will not step into the employer's shoes, I am of the opinion that a fair procedure would have made a difference. I have found that the Claimant was minded to make the extra effort and had made the extra effort to engage with the Respondent and if the Respondent had engaged with her, dismissal was avoidable both in the short and long term.
89. I find that the Respondent did not act reasonably in all of the circumstances in treating the breakdown in the working relationship as sufficient reason to dismiss the Claimant and the decision to dismiss falls outside of the band of a reasonable employer in all of these circumstances.
90. Did the Claimant contribute to her dismissal by her conduct?
91. I have considered this at length. I agree that there was some justification for the first written warning, but this case is in relation to the dismissal. I have found that I believe that the Claimant had made the effort and was engaged in her work. I accept that not all evidence in a case is recorded, however, this is a circumstance where the Respondent sought regular advice up to and including the first warning. There is nothing to note thereafter.
92. It is the Respondents position that the covert recordings are evidence of the Claimant's culpable conduct. Whilst it is never appropriate to record anyone without the consent of all parties, I accept the Claimant's position that she believed that she was being treated unfairly.
93. I do not accept that the Claimant has contributed to her dismissal and there will be no reduction in any award.
94. In summarising, I accept that a dismissal process need not be a Council of Perfection, it is about what is just and equitable in all of the circumstances. I find that the Claimant had accepted the warning and was embracing her employment with the new owners. I do not find that it was either just or equitable to dismiss in all of the circumstances I have detailed.
95. I find that the Claimant was both substantively and procedurally unfairly dismissed and that a hearing should be listed for remedy.
96. With regard to the claim for commission at 10%. I have reviewed the contract and find that the contract was varied at the point of time the Claimant began to receive commission. She has received commission for some 4-years without complaint, it was therefore varied to 7.5%. I can understand why the Claimant raised this with her employer and accept that the employer was considering this question. There is therefore no award for commission on this basis.
97. With regard to the claim for commissions from July and August 2021 that were due to be paid in September 2021, in the absence of argument from the Respondent as to how the Claimant has not fulfilled the terms of the bonus or the provision of a reason within Part 2 s.13(1) ERA to permit a deduction, I find that this bonus payment is due. This will be listed to be heard at a remedy hearing.
98. Should an uplift be awarded in respect of the company's alleged failure to follow the Acas Code in relation to her dismissal?

99. I have first considered whether the Acas Code applies in these circumstances of SOSR and have had regard to the following cases:
- 99.1. **Lund v St Edmunds** and **Phoenix House v Stockman** and also **Rentplus UK Ltd v Coulson [2022] EAT 21**. This latter case providing a consideration of the former two cases. I understand that the Acas Code is a matter of substance rather than form and can apply where common sense applies.
100. I have also had regard to the Acas Code itself.
101. This is a case where I have found the following failures in the disciplinary process:
- 101.1. A failure to provide sufficient information about the alleged misconduct or poor performance.
- 101.2. Failure during the meeting to explain the complaint and allegations and to go through evidence.
- 101.3. Failure to allow the employee to present evidence and answer the case.
- 101.4. Failure to provide the Claimant with an appeal.
102. The Acas Code states:
- This Code sets out the basic requirements of fairness that will be applicable in most cases; it is intended to provide the standard of reasonable behaviour in most instances.*
103. This dismissal was in relation to the Claimant's behaviour and I find that there is a fine line of distinction between conduct and performance and behaviour in these circumstances and that common sense would dictate that the Code applies. The dismissal outcome also took into account the first written warning from the December disciplinary meeting and referred to similar conduct for both meetings, including the working relationship and personality clashes.
104. In addressing the questions raised within **Rentplus**, I find the following:
- 104.1. This is a claim to which the Acas code applies. The Respondent had engaged the disciplinary process from the outset.
- 104.2. I find that there was a failure to comply with the Acas code in relation to the dismissal. As detailed above, whilst this was not an outright failure, there was a failure by the Respondent.
- 104.3. Was the failure unreasonable? I find that it was. Even with the resources available to it, the Respondent was in a position to evidence its concerns, to inform the Claimant and to provide the Claimant with the opportunity to appeal. In finding that the dismissal could have been avoided had the code been complied with, I find also that the failure was unreasonable.
105. I find it just and equitable in the circumstances to award an uplift of 10% to the Claimant's award, to be determined at a Remedy Hearing.



**Remedy**

106. The Judgment of the Tribunal is that:
- 106.1. The Claimant was unfairly dismissed.
  - 106.2. That the Claimant did not contribute to her dismissal and no Polkey reduction shall apply.
  - 106.3. That the Respondent did fail to follow the Acas Code in relation to her dismissal and that a 10% uplift shall be applied.
  - 106.4. That the claim for commission at 10% fails.
  - 106.5. That the claim for commission for July and August 2021 succeeds.
  - 106.6. That the claim for holiday pay is dismissed on withdrawal.
  - 106.7. That this matter is listed for a remedy hearing for the above Judgments.

**Employment Judge Illing  
Dated: 24 July 2023**