



EMPLOYMENT TRIBUNALS

Claimant: Miss Elizabeth Kenyon

Respondent: Mr Steven Carter

Heard at: Bristol (remotely by VHS) **On:** 21 September 2023

Before: Employment Judge Leverton (sitting alone)

Representation

Claimant: In person

Respondent: Mr Edward Holmes, Solicitor

RESERVED JUDGMENT

The claims for unauthorised deductions from wages, holiday pay and notice pay are well-founded.

The Respondent's contractual counterclaim is not well-founded and is dismissed.

The Respondent is ordered to pay the Claimant a total of £4,390.23, comprising £1,703.23 (gross) for unauthorised deductions from wages, £107 (gross) for payment in lieu of unused annual leave due on termination, and £2,580 (net) as damages for failure to give contractual notice.

REASONS

Claims and background

1. By a claim form presented on 1 March 2023, the Claimant brought the following claims:
 - a. unpaid wages under Part II of the Employment Rights Act 1996 ('ERA') (unauthorised deductions from wages);

- b. holiday pay for annual leave accrued but not taken on termination of employment under regulation 14 of the Working Time Regulations 1998 (SI 1998/1833) ('WTR'); and
 - c. damages for failure to give notice under the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (SI 1994/1623) (the 'Extension of Jurisdiction Order').
2. The Claimant says that she is due a total termination payment of £5,110.23, comprising unpaid wages for the period 1–16 December 2022 (£1,703.23), pay in lieu of one day's unused annual leave due on termination (£107), and one month's notice pay (£3,300). All the figures she gives are gross, without deductions in respect of tax and national insurance contributions.
3. The Respondent concedes that the Claimant is entitled to unpaid wages and holiday pay, as set out above. He does not accept that she is entitled to notice pay: his case is that he was entitled to dismiss her summarily (i.e. without notice) because she was in fundamental breach of contract.
4. The Respondent brings a contractual counterclaim for £100 on the basis that the Claimant did not provide her passwords when she returned her work laptop and mobile phone to him. He originally claimed £359 to replace these items but he confirmed at the hearing that he only seeks the cost of having them unlocked by an IT specialist.
5. There had appeared to be a dispute about employment status, but the Respondent conceded at the hearing that the Claimant is to be regarded as both a worker and an employee for the purposes of the relevant statutory provisions.

Evidence and procedure

6. The Claimant appeared in person and gave evidence at the hearing. The Respondent also gave evidence. He was represented by his solicitor, Mr Holmes. I had before me a 75-page electronic bundle of documents, which included witness statements from both parties, and a 30-page supplementary bundle from the Respondent. Where I consider it may be helpful, I have included page references to the main bundle in square brackets below.

Findings of fact

7. I find the following facts on the balance of probabilities, based on the evidence I heard and the documents before me.
8. The Claimant was employed in the Respondent's business, Dorset Media, from 17 October 2022 as Head of Sales and Marketing. It is a small, family-owned business that sells advertising at a local sporting venue. Both parties were initially under the impression that she was self-employed. The terms of her engagement are set out in an email from the Respondent dated 30

September 2022 [27]. Her role was largely managerial and this is reflected in the email, which states that she was required 'to take total control of the sales team and all aspects of marketing', and 'to create and implement all sales and marketing reporting procedures and expectations from all members of staff'. In addition to supervising the sales team, the Claimant was responsible for recruitment, business development, setting up new office systems, and setting up training and induction processes. She also took on some sales activities.

9. The Claimant was remunerated by a retainer of £3,000 gross per month, and she also received a monthly £200 car allowance and a monthly £100 expenses allowance. The sales target for the Claimant's team, consisting of two sales consultants at her joining date, was stated to be £12,000 per month, or £6,000 each, excluding VAT. It is clear from the email dated 30 September that the Claimant was not included in this target. She was entitled to a £150 bonus if the sales team met their targets, and 10 per cent commission on sales over £12,000. The target would increase by £6,000 for each new sales consultant who joined the business, and the Claimant's bonus and commission would also increase.
10. The Respondent provided the Claimant with a business laptop and mobile phone. She worked fixed hours across 4.5 days per week and was contractually entitled to 25 days' holiday per year plus public holidays. Her holiday year started on 1 January. The contractual notice period was 'one month's notice period given by either party with immediate effect from [the] start date'.
11. Shortly after the Claimant joined the business, one sales consultant resigned. Another was dismissed in mid-November. During the two months that she worked for the Respondent, the Claimant focused on organisational matters, management, recruitment and business development. She created sales processes and a range of documents designed to streamline the pre- and after-sales paper trail. She devised a media pack template and put in place training and induction processes. She researched, tested and installed a new customer relationship management (CRM) system and uploaded data. She performed a website audit and arranged for a new site to be built. She performed a social media audit and arranged a social media management package with an external supplier. She also negotiated rates for outsourcing design work; restructured the sales, pay and commission structure to reduce costs; and conducted a recruitment process that resulted in eight candidates being interviewed and two new sales consultants being hired. One of them, Ken Taylor, started on 1 December 2022 and the other was due to start in the new year.
12. On 28 November 2022 the Respondent emailed the Claimant to request a sales forecast for the first quarter of 2023, based on the assumption that by then there would be four members of staff making sales. The Claimant gave a total sales target for that quarter of £87,000 and included herself in that figure, with a personal target of £6,000 per month from January to March 2023. She concluded: 'A little tricky to forecast but I hope this is realistic' [43–44]. The Claimant had not previously been included in the sales targets;

she had spent the first few weeks of her employment making sure that business processes were in place. However, she now regarded it as a case of 'all hands on deck' because she knew the business was in financial difficulty.

13. The Respondent contends that he held a performance meeting with the Claimant on Thursday 8 December 2022, at which he raised serious concerns about the lack of sales by both the Claimant and her team. He says that the Claimant assured him at that meeting that further sales were expected (one each from her and the new sales consultant, Ken Taylor, that day, and three each from her and Ken the following week), amounting to approximately £3,200. The Respondent says that the Claimant failed to make a sale that day as discussed, nor did she make the proposed three sales the following week. As a result, he felt that she had misled him.
14. I do not accept that the discussion on 8 December was a performance meeting. There was none of the documentation that one would expect in relation to a meeting of that nature, such as a written invitation and a set of minutes or (perhaps more realistically in a small business) a note or email summarising what was discussed. It is significant that the discussion took place in the main office, in the presence of Ken Taylor. It would not have been appropriate for the Respondent to hold a performance meeting with the Claimant in the presence of a new member of staff whom she was responsible for supervising. For these reasons, I consider that the Respondent's description of the meeting lacks plausibility. I conclude that it was an informal conversation about sales, during the course of which the Respondent enquired about sales figures and the Claimant outlined the sales that were in the pipeline. As it turned out, she and Ken did not achieve most of those sales within the short timeframe she gave.
15. The Respondent, understandably, was concerned about the sales figures. He had expressed his concerns to the Claimant informally, although there was no personal criticism aimed at her, and he had intimated that the business was in difficulty. This was one of the reasons why the Claimant included herself in the sales forecast for the first quarter of 2023.
16. During the week commencing 12 December 2022, the Claimant worked from home, despite being unwell with Covid. She says she informed the Respondent in a telephone call that she had tested positive for Covid; in his evidence, he said that he did not recall her doing so. However, the Respondent told the Tribunal that he remembered the Claimant was losing her voice during a phone call that week, and this supports her account that she was unwell. It is not necessary for me to reach a concluded view as to whether she told the Respondent that she had Covid.
17. On 13 December, the Claimant sent the Respondent an email setting out details of the sales she and Ken hoped to close in the near future and giving a 'cautious estimate' for the end of the week of £1,500 [45]. This was significantly less than the figure she had indicated at the meeting on 8 December. On 16 December, the Claimant achieved one sale worth £415.

The total value of the sales achieved by the sales team during the period of the Claimant's engagement was around £3,600.

18. At some point, the Respondent audited the Claimant's telephone calls and emails for the week commencing 12 December 2022. The chronology of events set out in his ET3 and witness statement gave the impression that the audit took place before the Claimant was dismissed and formed an important part of the rationale for her dismissal. However, the Respondent stated in his oral evidence, and I accept, that he conducted the audit post-dismissal. This is consistent with the fact that he first referred to it in his email to the Claimant on 23 December 2022. The audit revealed that the Claimant made 58 calls and sent 39 emails during the period 12–16 December, when she was working from home. Call logs were included in the bundle. The Respondent considers this output to be inadequate and seeks to rely on it retrospectively to justify summary dismissal.
19. On 16 December 2022, the Respondent sent an email to the Claimant terminating her contract with immediate effect and stating that she would be receiving a new job offer. (The Respondent's witness statement referred to the dismissal having been communicated in a telephone call, but the Respondent said in his oral evidence that he was mistaken about that and in fact he sent the Claimant an email.) The Respondent told the Tribunal that he was unable to find that email, and the Claimant did not have it because it was sent to her work account, to which she no longer has access.
20. The email of 16 December came as a shock to the Claimant. There are suggestions in some of the subsequent email correspondence that she interpreted it as giving one month's notice, but I find that it was a summary dismissal, as the Claimant now accepts in her witness statement. This is consistent with the fact that the new contract the Respondent subsequently offered her would have started on 3 January 2023, whereas if she had been given a month's notice, one would have expected it to start in mid-January, at the end of her notice period.
21. On the following day, Saturday 17 December, the Respondent emailed the Claimant a new job offer [29]. He thanked the Claimant for her 'work input and enthusiasm' over the last two months. The Respondent said he had looked at the results and the sales forecasts and concluded they were 'unrealistic for at least the first three months'. He offered her a new contract starting on 3 January 2023 on reduced remuneration of £1,800 per month, with a notice period of one week on either side for the first three months. This was a sales position, not a management position, with a £5,000 monthly sales target for the Claimant and reduced sales targets for the rest of the team. The email concluded by saying it was not a decision the Respondent had taken lightly and it was 'nothing at all personal, just purely in the interests of the business'.
22. The Respondent contends that the dismissal was prompted by his concerns about sales targets not being met by the Claimant and her team, and the Claimant setting unrealistic targets. He says he explained in his email of 16 December that the Claimant was being dismissed because she had failed

to work diligently and conscientiously; failed to achieve sales targets; failed to devote her time to the company during working hours; failed to secure sales or make sales calls; and failed adequately to supervise and manage her team.

23. I do not accept that these were the reasons given by the Respondent at the time. That would be difficult to reconcile with the content and amicable tone of the parties' subsequent emails, the fact that the Respondent offered the Claimant a new contract as a sales consultant on 17 December, and his assurance on 19 December that the decision to terminate her contract was 'absolutely nothing personal' and 'as explained in my e-mail on Friday, December 16th, it is purely down to the sales figures to date' (see below). I find on the balance of probabilities that the email dated 16 December referred to the sales figures as the reason for termination but did not state that the Claimant was being dismissed for misconduct or poor performance.
24. The Claimant indicated that this was not the first time that the Respondent had dismissed staff and offered them a new contract on reduced terms. She said that this happened to two sales staff shortly before she joined Dorset Media. This was disputed by the Respondent, who said he had dismissed staff for incurring parking tickets and speeding fines. I do not need to resolve this conflict of evidence in order to reach a decision.
25. On 18 December 2022 the Claimant declined the offer of a new contract. In her email she said she had enjoyed working with the Respondent and believed she had gone 'above and beyond' in the last two months. She continued: 'Had I been privy to the full extent of the problems (staff and financing) before accepting the position my decision might have been different.' Her email concluded: 'I therefore stand by your email of last Friday giving me one month's notice to terminate our original agreement. This means that my last day of working commitment to [Dorset Media] will be Monday 16th January.' The Claimant requested payment for work carried out in December, one day's outstanding holiday pay, and payment for her notice period. She concluded: 'As we have both agreed, this is purely a business decision and I have no adverse feelings on a personal level as I am sure you don't either.' [71]
26. On 18 December at 12.46 pm, the Claimant emailed data from her Dorset Media email account to her personal email account. At this point, both parties were still under the impression that she had been self-employed. The data, which was included in the Respondent's supplementary bundle, consisted of eight pages of contact details for potential clients. The Claimant had purchased this list from Experian on 28 November for £158.93, intending to use it in connection with the Respondent's business. She had used her own credit card and she could not recall whether she had been reimbursed; the Respondent produced no evidence of reimbursement. The customer data turned out not to be relevant to the new job the Claimant subsequently obtained, and she has not accessed it since she sent it to her personal email account.

27. On 19 December, the Respondent replied to the Claimant's email dated 18 December. He stated: 'There is absolutely nothing personal about the decision made, and I respect your decision to decline my offer. As explained in my e-mail on Friday, December 16th, it is purely down to the sales figures to date. I have to reiterate that your position was terminated on Friday December 16th 2022, with immediate effect. There should be no further contact with any Dorset Media staff or clients.' The Claimant sent a short reply insisting on her right to be paid up to 16 January 2023. [71]
28. Shortly after the Claimant declined the job offer, her work emails were shut down and her work phone was disconnected. The Respondent sent her a further email on 23 December 2022 [34]. The tone of that email was markedly different from his previous correspondence. He requested the return of all company equipment by 29 December and stated: 'Your position was terminated due to breaches of your job agreement, the terms listed in the offer on which you accepted the position, in particular, sales targets.' He referred to the meeting on 8 December, and the Claimant's subsequent revision of her sales projection. He also set out details of the calls made and emails sent by the Claimant during the week commencing 12 December, which had come to light as a result of his audit. He pointed out that she had achieved only one sale worth £415 in the two months that she had worked for Dorset Media. An attached schedule indicated that her termination date was 16 December 2022 and that the final payment due to her was £2,274. This related to work done in December and holiday outstanding on termination. It did not include notice pay.
29. On 27 December 2022, the Claimant emailed the Respondent to confirm that she had returned her laptop and phone [47]. She stated that she expected the outstanding payments to be made to her account at the end of the month and added: 'From now on all communication will be via your solicitor and I demand that you no longer e-mail or text me.' She has not been paid for the work done up to 16 December, her outstanding holiday or her notice period.
30. The basis of the Respondent's contractual counterclaim for £100 is that the Claimant did not give him her passwords when she returned her laptop and phone, and he will therefore have to pay for them to be unlocked by an IT specialist. This was stated in his grounds of resistance and is supported by a quote from We Fix [57]. The items are currently stored in the Respondent's garage, and at the date of the hearing he had not yet had them unlocked. The Claimant says she returned them to factory settings before she delivered them to the office, so her passwords are not required.
31. There is no reason for me to doubt the Respondent's account that he is unable to access the devices without the Claimant's passwords. I accept that the Claimant had attempted to reset them, but it appears that her attempt was unsuccessful. It strikes me that there was an easy way for the parties to attempt to resolve this. There is no evidence that the Respondent has ever requested the passwords from the Claimant, either personally or through his solicitor, nor did the Claimant provide them voluntarily after she received a copy of the grounds of resistance and became aware of the

counterclaim. This lack of communication and cooperation on both sides appears to be symptomatic of the breakdown of the working relationship.

Legal framework

Unpaid wages

32. Section 13 ERA provides, in so far as material:

‘(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.’

Holiday pay

33. Under regulation 13(1) WTR, a worker is entitled to four weeks’ annual leave in each leave year. Regulation 13A confers an entitlement to a period of additional leave of 1.6 weeks.

34. Regulation 13(3) WTR provides (in so far as material): *‘A worker’s leave year, for the purposes of this regulation, begins (a) on such date during the calendar year as may be provided for in a relevant agreement...’.*

35. Regulation 14 WTR deals with payment for untaken leave on termination of employment:

‘(1) Paragraphs (1) to (4) of this regulation apply where –

(a) a worker’s employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect (“the termination date”), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be –

(a) such sum as may be provided for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula –

$$(A \times B) - C$$

where –

A is the period of leave to which the worker is entitled under regulation 13 and regulation 13A

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.'

36. Regulation 16 WTR provides for statutory holiday pay to be calculated according to the 'week's pay' formula in sections 221 to 224 ERA.

Notice pay

37. The Extension of Jurisdiction Order allows employment tribunals to hear some contractual claims brought by employees, including claims for damages in respect of unpaid notice pay, provided '*the claim arises or is outstanding on the termination of the employee's employment*' – Article 3. Where an employee has brought tribunal proceedings against an employer under the Order, the employer may bring a counterclaim for damages provided '*the claim arises or is outstanding on the termination of the employment of the employee against whom it is made*' – Article 4.
38. In order for an employer to be entitled to dismiss an employee without statutory or contractual notice, it is generally accepted that the employee must have committed an act which fundamentally undermines the employment contract (in other words, repudiatory conduct by the employee going to the root of the contract) – *Wilson v Racher 1974 ICR 428, CA*. Moreover, the conduct must be a deliberate and willful contradiction of the contractual terms or amount to gross negligence – *Laws v London Chronicle (Indicator Newspapers) Ltd 1959 1 WLR 698, CA*, and *Sandwell and West Birmingham Hospitals NHS Trust v Westwood EAT 0032/09*. However, subsequent case law has established that a contractual analysis is not necessarily required.
39. In *Mbubaegbu v Homerton University Hospital NHS Foundation Trust EAT 0218/17* the Employment Appeal Tribunal (The Honourable Mr Justice Choudhury) stated at paragraph 32:

'It is quite possible for a series of acts demonstrating a pattern of conduct to be of sufficient seriousness to undermine the relationship of trust and confidence between employer and employee. That may be so even if the employer is unable to point to any particular act and identify that

alone as amounting to gross misconduct. There is no authority to suggest that there must be a single act amounting to gross misconduct before summary dismissal would be justifiable or that it is impermissible to rely upon a series of acts, none of which would, by themselves, justify summary dismissal... [C]onduct amounting to gross misconduct is conduct such as to undermine the trust and confidence inherent in the relationship of employment. Such conduct could comprise a single act or several acts over a period of time. Where it is the latter, it is not a case of the employer "collecting sufficient ammunition against [the employee] to dismiss"... Rather, it may be, as it was in this case, that upon examination of a series of acts..., the employer finds that it has lost confidence that the employee will not act in that way again.'

40. Where there has been a repudiatory breach by the employee that has not been waived or affirmed by the employer, *'the employer is not prevented from relying on that breach as justifying summary dismissal because it had itself decided to breach its contractual obligations or was looking for a reason to justify dismissal or was motivated by its own financial interests'* – *Williams v Leeds United Football Club* 2015 IRLR 383, QBD.
41. An employer can justify summary dismissal by reference to a repudiatory breach that is only discovered after termination – *Boston Deep Sea Fishing and Ice Co v Ansell* 1888 39 ChD 339, CA; *Palmeri and ors v Charles Stanley and Co Ltd* 2021 IRLR 563, QBD.

Implied contractual terms

42. It is well established that employees are subject to some obligations that fall to be implied from the nature of the contract itself. These include the implied duty of mutual trust and confidence, the duty to render faithful service, the duty to exercise reasonable care and skill in performing their duties, and the duty to obey reasonable instructions. Other terms may be implied on the basis of the tests established by case law – for example, if a term is necessary to give the contract business efficacy or is so obvious that the parties must have intended it.

Discussion and conclusions

Unpaid wages

43. The Respondent accepts that the Claimant is owed payment for work done from 1 December 2022 until the termination of her contract on 16 December. He did not attempt to argue that a deduction was authorised by the Claimant's contract or that she had previously agreed to one in writing. I am satisfied that the Respondent's failure to make this payment amounts to an unauthorised deduction from the Claimant's wages under section 13 of the Employment Rights Act 1996, and I award the Claimant the gross figure of £1,703.23.

Holiday pay

44. The Claimant has no express contractual right to be paid in lieu of holidays on termination of her employment, and she therefore relies on regulation 14 WTR, which provides for a payment in lieu of unused statutory leave where a worker's employment is terminated during the course of the leave year. The Respondent accepts that the Claimant is entitled to one day's holiday pay, and I award the agreed gross sum of £107.

Notice pay

45. The main dispute between the parties relates to notice pay. I have found that the Claimant was dismissed with immediate effect on 16 December 2022. She was not paid for her notice period and she claims that the Respondent was in breach of the terms of her contract, which entitled her to one month's notice.

46. The Respondent says that he was entitled to dismiss the Claimant summarily (that is, without notice) because she was in fundamental or repudiatory breach of contract. He contends that the Claimant was in breach of the following implied contractual terms:

- a. the duty to work diligently and conscientiously to achieve her sales targets;
- b. the duty to devote her time at work to securing sales;
- c. the duty to effectively supervise and manage her team;
- d. the implied term of mutual trust and confidence.

47. The Respondent relies on *Mbubaegbu v Homerton University Hospital NHS Foundation Trust* as authority for the proposition that it is possible for a series of acts demonstrating a pattern of conduct to be of sufficient seriousness to undermine the relationship of trust and confidence between employer and employee so as to justify summary dismissal, even if the employer is unable to point to any particular act that, on its own, amounts to gross misconduct. He makes the point that the Claimant's sales forecasts were revised downwards following the meeting on 8 December 2022 and that she and Ken Taylor did not achieve all the sales she had forecast. It is apparent that this caused him concern.

48. The Claimant was subject to the implied duty of trust and confidence that is central to every employment relationship. She was also subject to implied duties to render faithful service within the terms of her contract, and to exercise reasonable care and skill in performing her side of the contract. These duties are well established in law.

49. I do not accept that the Claimant had a personal sales target at the relevant time or was required to devote her time to securing sales. The target of £12,000 mentioned in the Respondent's email dated 30 September 2022 related to the two sales consultants. The Claimant included herself in the sales forecast she provided on 28 November 2022, but the figures she gave related to the first quarter of 2023, by which time she had already been dismissed. It is disingenuous for the Respondent to assert that she failed to meet those sales targets. She was under no express or implied duty

personally to make sales. There may well have been a mutual expectation that she would do so voluntarily from time to time, and the evidence indicates that she made one sale and had hoped to make more, but the focus of her role, particularly in the first few weeks, was management, business development and recruitment.

50. Nor do I accept that the Claimant's performance or conduct justified summary dismissal, even adopting the 'pattern of conduct' approach set out in *Mbubaegbu*. On the contrary, the Claimant appears to have made a large contribution to the business in the short period of time for which she was employed. I have no doubt that the Respondent was genuinely concerned about the sales figures, but at no point leading up to the Claimant's dismissal did he indicate that he regarded her as underperforming. For the reasons I have already given, it is not plausible that the discussion on 8 December 2022 was a performance meeting. As it turned out, not all the sales that were forecast by the Claimant came into fruition. She may have been over-optimistic in her forecast, but that is said with the benefit of hindsight and I do not consider it to be a serious performance issue justifying summary dismissal.
51. It is also relevant, in my view, that one sales consultant resigned shortly after the Claimant joined Dorset Media, and another was dismissed in mid-November. After that, there was a period of around a fortnight when there were no sales consultants in post. The Claimant recruited Ken Taylor, who joined on 1 December 2022, but he would have required a period of induction and time to settle in before he became fully effective. Viewed in that context, it is hardly surprising that the sales figures were lower than the Respondent might have hoped.
52. If the Respondent had held serious concerns about the Claimant's sales performance or the way in which she was managing her depleted sales team, I do not think he would have offered to re-employ her in a sales position on 17 December 2022. His offer of re-employment, communicated the day after termination, fundamentally undermines his assertion that he was dissatisfied with her performance and that she was dismissed because she was in breach of trust and confidence or, indeed, any other express or implied contractual term.
53. The Respondent relies on two matters that came to light after the Claimant's employment was terminated. The first is the Claimant's work output during the week commencing 12 December 2022, when she was working from home. She had by this point assumed responsibility for some sales duties, and this would have necessitated phone calls and emails. Nevertheless, her managerial and organisational responsibilities continued to be an important aspect of her role. Furthermore, the evidence indicates that she was unwell that week; she was therefore unlikely to have been working at full capacity. In these circumstances, I cannot conclude that the Claimant's outgoing calls and emails were below reasonable expectations, nor that she failed to devote her working hours to the Respondent's business.

54. The second matter that came to light after the Claimant's dismissal was that she had sent Experian data to her personal email account on 18 December. Her contract had already been terminated by this point and she was no longer subject to an implied duty of fidelity or confidentiality in respect of the data. There was no post-termination restrictive covenant relating to the use of confidential information, and the data did not amount to a trade secret; it was freely available for purchase online. It is also relevant that the Claimant had bought the data herself at a time when both parties considered her to be self-employed, and there was no evidence that the Respondent had ever reimbursed her. Arguably, therefore, it was never the Respondent's data, but even if it was, I do not consider that the Claimant was in breach of any express or implied duty by sending it to her personal email account after her employment had ended.
55. I conclude that the Claimant did not commit any fundamental breach of contract such as to justify dismissal without notice. She was contractually entitled to one month's notice, and her summary dismissal amounted to a breach of contract. The gross notice payment to which she is entitled is £3,300, but damages for breach of contract must be awarded net to reflect the Claimant's actual loss if the contract had been properly performed. The net sum that she would have received after deductions for basic rate tax and national insurance contributions is approximately £2,580, and I award her that amount under the Extension of Jurisdiction Order.

Employer's contract claim

56. The final question is whether the Claimant was herself in breach of any express or implied term of the contract by failing to provide passwords for her laptop and phone when she returned them to the Respondent.
57. There was no express term in the Claimant's contract dealing with the return of company property. Nevertheless, I am prepared to accept that a duty to return company property may have arisen as an aspect of the implied term of mutual trust and confidence. Alternatively, I consider it arguable that there was an implied duty to return the Respondent's property in a usable state, subject to fair wear and tear, on the basis that such a term is so obvious that the parties must have intended it.
58. The Claimant returned her phone and laptop on 27 December 2022. She did not become aware that the Respondent also required her passwords until he submitted his grounds of resistance in response to her ET1. She makes the point that the Respondent has not contacted her to request the passwords. Equally, I note that she did not voluntarily provide them when she became aware of the counterclaim.
59. If the Respondent had asked the Claimant for her passwords at any point, she might well have been under an implied duty to comply with that reasonable request, but he did not. I do not consider there to be any basis for implying a contractual term to the effect that the Claimant was under a duty to provide her passwords to the Respondent. Many employees, on leaving their employment, would hand back their electronic devices in the

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expectation that the employer's IT department or external IT contractor would do whatever was necessary to prepare the items for use by another member of staff. I do not think that the implied term on which the Respondent seeks to rely is so obvious that the parties must have intended it. The Claimant was not in breach of any express or implied term of her contract, and the Respondent's counterclaim is accordingly dismissed.

Employment Judge Leverton

Date: 11 October 2023

Judgment & Reasons sent to the Parties:
31 October 2023

FOR THE TRIBUNAL OFFICE