EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4103480/23 Hearing at Edinburgh on 18, 19 and 20 October 2023

Employment Judge: M A Macleod

Ms K Smart — **Claimant In Person**

MS Alba Pharma Engineering Limited — **Respondent Represented by** Ms E Mayhew-Hills Consultant

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that the claimant's claims of unfair dismissal and unlawful deductions from wages both fail, and are dismissed.

REASONS

1. The claimant presented a claim to the Employment Tribunal on 23 June 2023, in which she complained that she had been unfairly dismissed and unlawfully deprived of holiday pay.

2. The respondent submitted an ET3 in which they resisted the claimant's claims.

3. A Hearing was listed to take place on 18, 19 and 20 October 2023 in the Employment Tribunal, Edinburgh. The claimant attended and appeared on her own behalf. The respondent was represented by Ms Mayhew-Hills.

4. Each party presented a bundle of productions, to which reference was made by the parties in the course of the Hearing. References to the respondent's bundle are prefaced by "R", and to the claimant's bundle by "C".

5. The respondent called Neil Gordon MacRae, Director, as a witness. The claimant gave evidence on her own account.

6. At the start of the Hearing, the claimant objected to the inclusion of a report by a Forensic Handwriting Expert (R130ff) as irrelevant to the issues before the Tribunal. She disputed the terms of the report, and also objected to it on the basis that it had been added to the bundle after the Tribunal's ordered deadline of 23 August 2023. As a result, she had had no opportunity to seek her own expert about the conclusions reached. In any event, she did not consider it to be relevant to the termination of her employment, but to matters bearing on her role as shareholder and director.

7. She also pointed out that there had been disagreement between the parties as to what should be included in the joint bundle, which had been prepared relatively late in the day, and accordingly she considered it necessary to present her own bundle of documents.

8. The claimant went on to raise again an application for disclosure which she had previously made to the Tribunal, and had had refused. I declined to permit her to raise this matter again.

9. Ms Mayhew-Hills argued that the handwriting report was relevant because it dealt with the question of whether or not the respondent's director had signed a particular document, and gave rise to issues of credibility.

10. As to the disclosure issues, she confirmed that her colleague had dealt with this and that she could not therefore make any comment on the delay.

11. She also asked for time to review the bundle presented by the claimant.

12. I adjourned the hearing in order to consider matters and to allow the respondent to review the claimant's bundle of documents.

13. On resumption I intimated that I could see no relevance in the handwriting report in determining the issue before me; I considered that it would be contrary to the interests of justice to allow it to be included when the claimant had had little time to review and consider how to respond to it; and that even if there may be assistance provided to the Tribunal in determining issues of credibility by including the report, they would be likely to be outweighed by the risk that the Tribunal would be distracted by an irrelevant issue which might be taken into account in reaching a decision in this case. I considered the claimant's objection to have considerable force, and accordingly I instructed that the handwriting report be removed from all copies of the bundle and not relied upon, as it was inadmissible. That document was therefore removed, and the bundle therefore moved from R129 to R159.

14. Ms Mayhew-Hills advised that having reviewed the claimant's bundle she did not object to the Tribunal receiving it, but indicated that she may raise objections in the course of the Hearing based on relevance or timing of the documents.

15. She did, however, object to the inclusion of a document at C161 and C162 owing to concerns about a potential breach of GDPR. The claimant did not contest the removal of these 2 documents from her bundle (without accepting that there was such a breach). I made clear that it is not for the Tribunal to adjudicate upon GDPR breaches.

16. Based on the evidence led and information presented, the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

17. The claimant, whose date of birth is 5 August 1987, commenced employment with the respondent on 12 February 2018, initially as a Personal Assistant, carrying out general administrative duties. When she joined the respondent, Neil MacRae, who had founded the company, was operating the business as a sole trader, and she acted as his PA.

18. The claimant and Mr MacRae developed a close personal and professional relationship.

19. On 18 May 2018, Mr MacRae decided to form a limited company, MS Alba Pharma Engineering Ltd. He granted the claimant a 25% shareholding in the new company, and retained the remaining 75% himself. The new company had two directors, Mr MacRae and the claimant. Towards the end of 2018, the respondent appointed the claimant to be Director of Operations.

20. The respondent's business specialises in the installation and maintenance of machines designed to clean and sterilise pharmaceutical production systems. Mr MacRae is a qualified engineer. At the time when the claimant's employment started, there was one other employee, named Nicole. She subsequently left, and a Mr Bryson was employed on a temporary contract thereafter. When the claimant was suspended by the respondent, there were three employees in total in the business.

21. In September 2022, the claimant was absent from work. Mr MacRae was of the view that she had absented herself on annual leave without authorisation, and sent a letter to her dated 18 September 2022 (R246) advising her that he understood that she had been absent from work since 15 September 2022, but had made no contact to explain the reason for her absence or its likely duration. He pointed out that the Company's Absence Reporting Procedure required her to contact the Company by 10am on the first day of absence, and that failure to follow that procedure would be a disciplinary matter. He asked her to contact him urgently.

22. Following this, a number of issues arose between the parties. Mr MacRae became concerned that the relationship between them had deteriorated, and sought to set up mediation in order to try to resolve matters. That mediation never took place.

23. The respondent was concerned about certain communications in which the claimant had engaged with clients and others, and about a number of other actions, but wished to try to resolve the issues by way of mediation rather than proceeding down a formal process. Mr MacRae sought the advice of Croner, an HR Consultancy, throughout.

24. On 11 February 2023, the respondent wrote to the claimant (123) to inform her that she was suspended from her employment with immediate effect *"pending an investigation into your alleged conduct on the 7th of February 2022 - namely, speaking to another customer that a director of the company is 'hostile' and 'uncommunicative' which could harm the customer's confidence in the company causing financial and reputational* damage. "Suspension was on full pay.

25. The letter went on: *"Whilst suspended you shall not enter Company premises nor should you make contact with any member of the Company's staff, customers, clients or agents without permission from myself or a more senior manager. Failure to comply with this instruction will be regarded as an act of Gross Misconduct and may result in disciplinary action. "*

26. The claimant professed to be extremely shocked when she received this letter. She maintained that she did not know what this was about.

27. She contacted Mr MacRae to ask him what this was about, and he referred her to the letter. She told him she believed she could not be suspended as a shareholder and director.

28. The claimant then contacted her solicitors, whom she had instructed to act for her in the ongoing dispute about shareholdings in the company, Shepherd and Wedderburn LLP. They wrote to the respondent's

solicitors, Addleshaw Goddard LLP, on 17 February 2023 (R125), and in the course of that letter, which dealt with a number of matters, they protested that Mr MacRae did not have the authority to suspend the claimant, nor were there reasonable grounds to do so. They also advised that since the ciaimant could not be suspended from her shareholder or director duties, she would be returning to work.

29. The solicitors also referred to a letter sent to the claimant on 6 February 2023 inviting her to attend a meeting with a consultant from Peninsula, an independent HR company, on 20 February 2023 (R122), and asked what the purpose of this meeting was.

30. The respondent became aware that the claimant was contacting customers while on suspension, and took steps to prevent her from doing so.

31. As a result of the respondent's instructions, Croner carried out an investigation on their behalf into a number of issues arising from the claimant's conduct. Tamla Phillips, of Croner Face2Face, met with the claimant on 28 February 2023 to conduct an initial investigation meeting, and subsequently spoke to Mr MacRae in order to ingather further information.

32. Having carried out their investigation, Ms Phillips produced a lengthy report (R161ff). At paragraph 123, she set out her recommendations, which were that the claimant should be invited to a disciplinary hearing to answer 8 allegations of misconduct.

33. Mr MacRae accepted the recommendation, and sent the claimant a letter inviting her to a disciplinary hearing to take place on 24 March 2023 by video conference, dated 21 March 2023 (R189).

34. The letter explained:

"The hearing will discuss the following matters of concern:

1. *It is alleged that you have caused the company to lose faith in your integrity namely, inappropriate actions and behaviours exhibited during your employment. Further particulars being:*

    a. *Extending your annual leave on 15th and 16 September 2022 without prior authorisation as per procedure and authorising the extension yourself.*

    b. *Using company funds to pay for private work on your flat on 9 September 2022 totalling £1,279.20.*

    c. *Failure to follow procedures when invoicing clients and failing to meet set deadlines.*

    d. *Requesting ACCRAFILE to exclude two company directors from any communications for personal gain.*

    e. *Inappropriate text message sent to a customer bringing the company and director into disrepute and possible loss of client.*

    f. *Changing the company's passwords for Indeed on 21 February 2023 whilst suspended with no authorisation.*

    g. *Fraudulently changing the email address associated with Neil MacRae's credit card without permission to your own email address.*

    h. *Failure to notify your Employer of an upcoming Sheriff Hearing scheduled for 2nd March 2023. "*

35. Enclosed with the letter were copies of the documents to be relied upon, together with the investigation letter, the contract of employment, the Employee Handbook and an email trail relating to a former employee.

36. The claimant was unable to attend on the scheduled date, due to illness, and accordingly the hearing was rescheduled until 29 March 2023 (R192).

37. The disciplinary hearing was conducted by Sam Dickinson of Croner Face2Face, by video conference. Mr Dickinson went through the allegations with the claimant and also spoke separately to Mr MacRae.

38. He set out his conclusions in his report, in relation to each of the allegations.

39. With regard to allegation (a), Mr Dickinson found that there was a history and pattern of the claimant authorising her own annual leave, over a period of years, with no prior objection. He found that this occurred with other directors, and in any event that a 5 month period to investigate the matter was not reasonable. He did not, therefore, uphold this allegation.

40. Allegation (b) concerned the claimant's use of company funds. Mr Dickinson concluded that the claimant did not breach any company policy or legislation in taking a director's loan; and that in any event, the relevant invoice was corrected to a director's loan before the end of the financial year and quarter. He did not, therefore, uphold this allegation.

41. Mr Dickinson addressed allegations (c) and (d) together. These allegations related to actions taken in relation to the Singapore-based company, MS Alba Pharma Engineering PTE Ltd. He decided that since the claimant was not an employee of the Singapore company, the allegations could not be upheld, and also that the claimant was not subject to UK jurisdiction and employment law in Singapore.

42. Allegation (e) asserted that the claimant had sent inappropriate text messages to a customer bringing the company and director into disrepute, and possible loss of a client. Mr Dickinson found that there was a blurring of professional and personal lines between the claimant and Mr MacRae, and the evidence suggested that both parties were responsible for this. He upheld this allegation as poor judgement, and deemed it to be Serious Misconduct.

43. Allegation (f) asserted that the claimant had changed the company's passwords for Indeed on 21 February 2023 while suspended, with no

authorisation. Indeed is a website on which the respondent had an account for the purpose of posting advertisements to recruit staff. Mr Dickinson found that the claimant had changed the company's password, and recommended that a new company account be created for use by professional emails only. He upheld this allegation as Serious Misconduct.

44. With regard to allegation (g), he found that while there was evidence that the claimant changed the email address associated with the credit card account of Mr MacRae, no fraudulent transactions were made by the claimant. In addition, she provided evidence that she could access the account to see disputes, and as this was a company credit card, this would be reasonable. Accordingly, Mr Dickinson did not uphold this allegation.

45. Allegation (h) related to the alleged failure to notify the respondent of a forthcoming Sheriff Court hearing. He decided that the claimant had contacted the correct people to change the point of contact to Mr MacRae, and further the claimant had no access to her emails and would have lost their ability to contact the relevant authority once access was removed. He did not uphold this allegation.

46. At the conclusion of his report, Mr Dickinson advised, at paragraph 129, that he recommended that the claimant receive a written warning. He noted at paragraph 132 that it was a matter for the respondent to decide whether they wished to accept any or all of the recommendations.

47. The recommendation was based on Mr Dickinson's finding that 2 of the 8 allegations against the claimant should be upheld as Serious Misconduct.

48. It is important to consider the basis upon which he concluded that the 2 allegations should be upheld.

49. Allegation (e) related to an inappropriate text message sent to a customer, but the evidence reviewed by Mr Dickinson covered two separate communications, one an email and the other a text message.

50. The email was sent by the claimant on 8 November 2022 to a Sean Tovey, of MSD, in relation to a contractor induction (R266):

"Hi Sean

This is the link for the induction tomorrow. Not ideal as I know you have work on but maybe you can put it on while driving to site or let it play in the back ground so it looks like you're online (smiling emoji)"

51. This message was seen by John Noctor of MSD, Safety and Environment Specialist, who had arranged the Teams call for the induction. He contacted both Mr Tovey (in relation to another matter) and the claimant by email on 9 November 2022 (R264/5), and, addressing the claimant, stated:

"@Katherine. Smart MSD as a company provides a safety induction to each and every vendor to ensure that all vendors/visitors are aware of site rules, any potential hazards on site and how any emergencies are managed. It is very important information for your employees/colleagues to have. The inductions are facilitated online to improve efficiency when a vendor contractor arrives on site (it is also part of contractor compliance). Your comments highlighted below appear to show a disregard for the induction process here at MSD, can you revert with the following please:

- *Your point of contact (Contractor liaison here at MSD)*
- *Documented evidence as to how you intend to remediate your comments below and impress on your employees the reason/importance of attending an induction at a facility.*

Sean will not have access to the site until above requests are provided."

52. Shortly thereafter, Mr Noctor sent another email to the claimant to stress that she had not addressed the issues highlighted, and until she did, access would be on hold.

53. Mr MacRae wrote to MSD that afternoon to apologise for the claimant's comments and described himself as "a little lost for words" (R260).

54. Mr Dickinson found that such comments were irresponsible, and that the claimant should have been promoting company policy and procedures (paragraph 88)(R204).

55. The text message related to an exchange between the claimant and an individual called Dom, who was employed by Belimed, a Swiss client of the respondent. The exchange took place on Instagram. It is not clear from the disciplinary report nor the exchange itself what date the messages were sent.

56. The exchange reads as follows (R287):

Claimant:

"Hey, how are you? / just wanted to check if you've noticed any behaviour or character changes in Neil recently? Over the last few months he's become very hostile and uncommunicative with me. He said he was in hospital in Jan and you took him? What was he in for? Had he taken something?

I'm only reaching out to you as I know you're good friends and spent time together recently."

Dom:

"Hi Katherine, very busy at work but good thank you, how are you? mmh noo?! Why do you mean? I'm wondering why you asking me, especially regarding any character changes? He's as usual, at that day I saw him in plant in Sulgen and he had pain in the belly, late evening he called me because the pain increased so we went to the hospital, there they checked everything and gave him pain killers, I suggest you'll ask him for further details. .."

57. When asked about this in the disciplinary hearing, the claimant advised that Dom worked for a separate entity of Belimed, with which the

respondent did not work. She disputed that the message had an adverse impact on the business. She also presented evidence to show that she and Dom had exchanged personal as well as professional messages in the past.

58. Following receipt of the disciplinary report by Mr Dickinson, the respondent considered what to do. The report was sent to the respondent and also to Mr Dickinson's line manager at Croner Face2Face. Following receipt there was a further discussion between the respondent and Croner, and as a result, Mr MacRae was advised that he should dismiss the claimant rather than issue a written warning to him. The claimant was never told about this further discussion which took place between Mr MacRae and Croner Face2Face.

59. Accordingly, Mr MacRae wrote to the claimant on 28 April 2022 (R209). He set out his conclusions in relation to the findings made by Mr Dickinson. He accepted that where Mr Dickinson recommended that the allegation should not be upheld, it would not be upheld. He did point out that since the sum taken from the accounts was a director's loan (allegation (b)), that sum should be repaid to the company.

60. He did conclude, however:

"The two allegations of inappropriate text message sent to a customer bringing the company and director into disrepute and possible loss of client and changing the company's password for Indeed on 21 February 2023 whilst suspended with no authorisation are upheld.

These two allegations that have been upheld are serious, the impact/possible impact on the business are financial loss and reputational damage to the business. Due to the seriousness of the allegations, my decision is dismissal without notice with effect from 29 April 2023."

61. The claimant was offered the opportunity to appeal against the decision to dismiss her.

62. The claimant did submit an appeal by letter dated 4 May 2023 (213). Essentially, her grounds of appeal were:

    1. That the respondent had no authority to dismiss her;

    2. That the finding of gross misconduct was irrational or unduly severe; and

    3. That there was inadequate specification and reasons for the dismissal.

63. The respondent invited the claimant to attend an appeal hearing by video conference on 30 May 2023 at 9.30am, by letter dated 18 May 2023 (215).

64. The appeal hearing was conducted by William Barry of Croner Face2Face. The claimant attended, and was given the opportunity to speak to her appeal points. Mr Barry also took the opportunity to speak with Mr MacRae. Mr Barry prepared a report of the appeal (217ff), which attached a copy of the minutes of the appeal hearing (222ff).

65. In the course of the appeal hearing, it was noted that the claimant asked Mr Barry whether or not there was any other evidence from the respondent, to which he replied by saying that he had not been sent any more evidence. In response, the claimant said *"Ok, so yeah I was just kind of wondering if there's. If he's provided any evidence of financial reputational damage, because that's obviously what the kind of the dismissal is for saying that my actions have caused potential financial and reputational damage."*

66. Mr Barry concluded that there was no basis for suggesting that the respondent did not have the authority to dismiss her. As to the allegations relating to the finding of gross misconduct, he pointed out that the claimant asserted that the changing of the password on the Indeed account would have had no effect on the respondent's business. He found that Mr MacRae's position was that while the company was not hiring at that time, they relied upon the Indeed system to keep in touch with an Indian candidate, Mr Patel, who was due to start with the

respondent. Mr MacRae had told Mr Barry that the candidate was "almost lost" due to the actions of the claimant which disabled access to the Indeed account (paragraph 26)(220).

67. With regard to the interaction with Belimed, the claimant continued to argue that this had no adverse impact on the company's business, but Mr MacRae provided printouts which showed that there were no sales for April and May 2023.

68. In addition, Mr Barry made reference to a copy of a letter which was provided by Mr MacRae, sent to the claimant by Belimed on 19 May 2023 which requested that she return all Belimed IP sent by herself, in response to which the claimant questioned the request, and discussed her dismissed by the respondent.

69. Mr Barry concluded that *"there are reasonable grounds to dismiss these points of Appeal on the basis that KS's actions have caused the Company significant financial detriment and reputational damage. As a Director of the Company it is reasonable to expect that KS would be aware of the impact in openly discussing her dismissal, as an Employee, with a major client would have. WBA [Mr Barry], therefore, finds that the findings of the Disciplinary Hearing are correct, and the decision to dismiss represents a proportionate response."*

70. Mr Barry therefore concluded his report by recommending that the claimant's dismissal should be upheld (paragraph 35)(220).

71. It is useful to consider the evidence which Mr Barry referred to in his report, about which the claimant was questioned before this Tribunal. Mr Barry was not a witness in these proceedings.

72. On 19 May 2023, Besart Frey, Head of Quality & Regulatory Affairs, Belimed Life Science AG, wrote to the claimant (482) requesting the return of Intellectual Property belonging to Belimed Life Science. Although Mr Frey did not refer to the claimant's dismissal, the letter followed the termination of her employment by the respondent, and included the

statement that *"during your employment with Alba Pharma Engineering, you were involved in projects and activities relating to Belimed Life Science. It has come to our attention that you may still have intellectual property belonging to Belimed Life Science... it is essential that they are returned promptly to ensure the protection of our intellectual property rights and to maintain the confidentiality of sensitive company information..."*

73. That letter was sent to the claimant via the respondent. The claimant responded (485):

"Dear Martin and Besart,

I hope this email finds you well.

I received the attached letter via my solicitor last week regarding the return of company documents. Firstly, my solicitor found this strange and questioned why it was not sent to me directly? Secondly, I feel it best at this time to update you on the current situation within MS Alba Pharma Engineering Ltd.

There has been an ongoing dispute between myself and Neil Macrae since January 2023. I will not go into the details however, I wish to inform you that, contrary to what you may have been told I am still an active Director within MS Alba Pharma. In the letter I received it states that I am no longer an employee and although I have been dismissed, this dismissal is currently being appealed, and if not successful, will be going to tribunal. This is on the grounds that Neil does not have the authority to bind the company on such decisions as we are both 50-50 owners of the company and that there is no evidence to his claims.

I am happy to cooperated (sic) with Belimed Life Science as I have developed very good relationships with all the people I have worked with over the years. I am asking that you bear with me at this moment in time until we have resolved the internal dispute then I will send you all the

requested documents and files. I can assure you that all intellectual property remains secure.

Lastly, please note that I do not have access to my work email address anymore as this was deleted by Neil in February during the dispute.

Please feel free to call me on ... if you would like to discuss the matter in more depth."

74. This particular exchange was not discussed with the claimant by Mr Barry and no reference to it appears at any stage in the internal proceedings other than in the appeal report (220).

75. Mr MacRae wrote to the claimant on 5 July 2023 (229) to confirm that the outcome of the appeal was that the dismissal was upheld. That concluded the internal process.

76. Following the termination of her employment on 29 April 2023, the claimant applied for a number of roles as Executive Assistant. She has had one interview, with McEwan Fraser Legal, in a digital marketing role, in August 2023. As at the date of the Tribunal Hearing, the claimant had not received any confirmation as to the outcome of the interview, though she remained optimistic that this was a good possibility. She enrolled in a variety of courses at the West of Scotland College, in Financial Analysis, Lean Management and Team Leadership, which she studied online.

77. The claimant presented a number of documents (594ff) with regard to her attempts to obtain alternative employment.

78. Since her dismissal by the respondent, the claimant has not received any salary nor obtained any other paid employment. She has not applied for state benefits. She has received dividends from the respondent arising from her shareholding since her employment ended. She remains, as previously indicated, a director and shareholder in the respondent's business.

79. When employed by the respondent, she made a contribution of £11.20 per month towards her occupational pension, and her employer made a contribution of £8.40 per month.

80. From November 2022 she was given the use of a Range Rover Sport up to the date of her dismissal. She made no contribution towards her use of this vehicle, which she handed back upon dismissal. She also benefited from private medical insurance, which ended upon dismissal.

Submissions

81. Ms Mayhew-Hills, for the respondent, made a short oral submission in which she invited the Tribunal to find that the respondent had a genuine belief in the claimant's guilt, that it was reasonable to have such a belief, and that dismissal was reasonable in all the circumstances.

82. It is not for the respondent, she submitted, to prove intent, nor to demonstrate that actual reputational damage was caused to the business, but just that it could have been. The respondent worked throughout with a professional HR company, and followed all their advice. They conducted an investigation hearing, a disciplinary hearing and an appeal hearing.

83. She asked the Tribunal to find that the claimant's dismissal was fair. If the Tribunal were against her, she invited the Tribunal to find that the claimant had contributed to her own dismissal, and that if there were any procedural flaws, the claimant would have been dismissed in any event.

84. The reason for dismissal was conduct. A thorough investigation was carried out by the respondent, and a fair procedure followed.

85. The claimant was not able to deliver an oral submission, on the basis that the Hearing had to be drawn to a conclusion quickly due to a change in the personal family circumstances of the respondent's representative. It was agreed that she could present her submission in written form. The claimant did so, and I summarise her submissions here.

86. The claimant invited the Tribunal to prefer her evidence to that of Mr MacRae in the event of any divergences. She said that she had tried to give her evidence in an honest and open manner, and submitted that Mr MacRae was neither a reliable nor a credible witness. He would give evidence on which he was specific and adamant, but when confronted with documentary evidence would change his position. For example, he maintained that he was unaware that the claimant had proceeded with a Sheriff Court Small Claim against a former employee, but then admitted that he had been aware of it when he saw the documentary evidence of communications during cross-examination. She gave other instances of contradictions and inconsistencies.

87. The claimant went on to complain that a fair procedure was not followed in dismissing her. She argued that it was obvious that the decision was pre-determined, in that Mr MacRae had arranged to meet her in February to discuss the current circumstances within the business, which indicated that he wanted her out of the business. She maintained that there was an underlying reason, the personal dispute in January 2023 when she asked the claimant to vacate a flat which she had let to him.

88. She was not given details of the investigation meeting of 28 February 2023.

89. The investigation was biased, and Mr MacRae's version was preferred over hers.

90. The disciplinary report and transcript were not made available to her during her employment.

91. Evidence was taken into account of which she was unaware, at the appeal stage, notwithstanding that she had asked the appeal manager whether he intended to rely upon any new evidence, to which he replied no.

92. The involvement of Croner in the decision to dismiss her, particularly following the recommendation of a written warning, without alerting the claimant to these discussions, was unfair.

93. The claimant maintained that Mr MacRae did not act reasonably in dismissing the claimant for the reasons which he did.

94. She also argued that Mr MacRae did not have the legal authority to dismiss or suspend the claimant under the respondent's Articles of Association.

95. With regard to the alleged procedural unfairness, the claimant complained that there were a number of issues. As an example, she said that the comment with regard to the Health and Safety induction had already been dealt with, and it was unfair to raise that again 3 months later.

96. She also criticised Mr MacRae for having pursued a number of disciplinary matters which he should not have, and which were never taken any further.

97. The finding that the claimant's actions amounted to gross misconduct was irrational and too severe. The Indeed account was never the property of the company, there has been inadequate specification of the allegations and no proof has been offered that a reasonable person would find could impact the business with financial loss and reputational damage.

98. A quorum of directors is two, and accordingly Mr MacRae had no authority to dismiss her.

99. The claimant complained that certain deductions were made without authority from her final salary.

The Relevant Law

100. In an unfair dismissal case, where the reason for dismissal is said to be conduct, it is necessary for the Tribunal to have regard to the statutory provisions of section 98 of ERA. The Tribunal considered the requirements of section 98(1) of the Employment Rights Act 1996

("ERA"), which sets out the need to establish the reason for the dismissal; section 98(2) of ERA, which sets out the potentially fair reasons for dismissal; and section 98(4) of ERA, which sets out the general test of fairness as expressed as follows:

> "Where the employer has fulfilled the requirements of sub-section (1), the determination of the question whether the dismissal was 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 employers 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 the equity and substantial merits of the case."

101. Further, in determining the issues before it the Tribunal had regard to, in particular, the cases of **British Home Stores Ltd v Burchell [1978] IRLR 379** and **Iceland Frozen Foods v Jones [1982] IRLR 439,** to which we were referred by the solicitors in submission. These well known cases set out the tests to be applied by Tribunals in considering cases of alleged misconduct.

102. **Burchell** reminds Tribunals that they should approach the requirements of section 98(4) by considering whether there was evidence before it about three distinct matters. Firstly was it established, as a fact, that the employer had a belief in the claimant's conduct? Secondly, was it established that the employer had in its mind reasonable grounds upon which to sustain that belief? Finally, that at the stage at which that belief was formed on those grounds, was it established that the employer had carried out as much investigation into the matter as was reasonable in all the circumstances of the case?

103. The case of **Quadrant Catering Ltd v Ms B Smith UKEAT/0362/10/RN** reminds us that it is for the employer to satisfy the Tribunal as to the potentially fair reason for dismissal, and he does that by satisfying the Tribunal that he has a genuine belief in the misconduct alleged. Peter Clark J goes on to state that "the further questions as to whether he had reasonable grounds for that belief based on a reasonable investigation, going to the fairness question under section 98(4) of the Employment Rights Act 1996, are to be answered by the Tribunal in circumstances where there is no burden of proof placed on either party."

104. The Tribunal reminded itself, therefore, that in establishing whether the Respondents had reasonable grounds for their genuine belief, following a reasonable investigation, the burden of proof is neutral.

105. Reference having been made to the **Iceland Frozen Foods Ltd** decision, it is appropriate to refer to the well-known passage from that case in the judgment of Browne-Wilkinson J:

> *'Since the present state of the law can only be found by going through a number of different authorities, it may be convenient if we should seek to summarise the present law. We consider that the authorities establish that in law the correct approach for the industrial tribunal to adopt in answering the question posed by S.57(3) of the 1978 Act is as follows:*
>
> *(1) the starting point should always be the words of S.57(3) themselves;*
>
> *(2) in applying the section an industrial tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the industrial tribunal) consider the dismissal to be fair;*
>
> *(3) in judging the reasonableness of the employer's conduct an industrial tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;*

(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;

(5) the function of the industrial tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair. '

Discussion and Decision

106. In this case, the claimant complains primarily of unfair dismissal, and accordingly I address this complaint first.

107. The reason for dismissal was said by the respondent to have been gross misconduct. That is a potentially fair reason for dismissal. The basis for the finding was that the claimant was found to have sent inappropriate text messages to a customer bringing the company and director into disrepute, and changing the respondent's password on Indeed while suspended.

108. It is necessary then to consider whether the respondent genuinely believed that the claimant had committed these acts of gross misconduct.

109. In this case, and in this Hearing, reference to the respondent essentially means reference to Mr MacRae. He was the only other Director in the business, and he took the decision to dismiss the claimant.

110. In my judgment, Mr MacRae did believe that the claimant had committed these acts of gross misconduct. In his evidence he was straightforward and sincere about his view of the claimant's actions, and I was prepared to accept his evidence as credible on this point.

111. Then, the Tribunal must determine whether or not the respondent had reasonable grounds upon which to find that the claimant had been guilty of gross misconduct.

112. Out of the allegations levelled at the claimant, 2 were upheld by the respondent, following the investigation and disciplinary process carried out by Croner Face2Face.

113. The first allegation upheld was allegation (e), namely "Inappropriate test message sent to a customer bringing the company and director into disrepute and possible loss of client".

114. On closer examination, this allegation actually covered 2 points: firstly, the email sent by the claimant to a client, Sean Tovey, in relation to an induction, providing the link to the induction (R266):

"Hi Sean

This is the link for the induction tomorrow. Not ideal as I know you have work on but maybe you can put it on while driving to site or let it play in the back ground so it looks like you're online (smiling emoji)"

115. This led to serious concern being expressed by John Noctor, Safety & Environment Specialist of MSD Ireland (265), in which he suggested that her comments appeared to show a disregard for the induction process at MSD. The respondent shared that concern.

116. No explanation was given by the claimant in relation to this allegation.

117. In my judgment, the respondent had reasonable grounds to consider that the claimant was guilty of misconduct in treating a health and safety induction with such disregard to a client, and that this act was capable of damaging the respondent's relationship with that client and bringing the company into disrepute. Mr MacRae was very upset by this, and was anxious about the impact that this would have upon his company's reputation for health and safety, which is critical in the pharmaceutical industry. The fact that there was no explanation given and no response

made by the claimant to the client adds to the respondent's justifiable concern about her communication here.

118. This took place in November 2022.

119. The second communication dealt with under this heading was the Instagram message to Dom, working for Belimed, an important customer of the respondent.

120. In that message, the date of which has not been clarified, the claimant asked about whether or not Dom had noticed "behaviour or character changes" in Mr MacRae; said that he had become "very hostile and uncommunicative" with her; and asked why Dom had taken Mr MacRae to hospital in January 2023, in particular "Had he taken something?"

121. The claimant did seek to defend this allegation, on a number of bases: that she and Dom were personal friends as well as professional colleagues; that the arm of Belimed for which Dom worked was not directly the client of the respondent; that there was no evidence that any business had been lost as a result of this exchange; and that she was expressing concern for Mr MacRae.

122. In my judgment, the respondent had reasonable grounds for treating this message as an act of misconduct, and to view it with considerable concern. The respondent is and was a small company, to whose fortunes Mr MacRae as founder and director was crucial. For all the claimant's protestations, her message represented an attempt to undermine Mr MacRae in his position within the company. It fell into a mixed context, of personal and professional relationships, but the professional aspect of the relationships is what was important. Many people who work together may also have personal relationships, but what is said within those personal relationships may also have a significant impact on the professional relationship.

123. The claimant's message was clearly intended to be critical of Mr MacRae, to someone who had a professional relationship with him, and by asking

about Dorn's knowledge of a private medical matter relating to Mr MacRae crossed over a line of what might have been acceptable in the professional field. Asking if he had "taken something" did clearly insinuate, as Mr MacRae felt, that he had taken some form of drug.

124. Dorn's reaction to the message is significant, in my view, as he plainly expresses considerable discomfort, and asks why she was asking him about this.

125. In my judgment, the respondent was entitled to regard the claimant's message, and her reaction to being asked about it, as disingenuous; and to consider that her intention was to undermine and cast aspersions on Mr MacRae's character and standing with his largest customer. It cannot have been designed to advance the interests of the respondent, and it is not surprising that the respondent considered this to be an act of disloyalty and thus appropriately categorised as misconduct.

126. The second allegation which was upheld by the respondent was point (f), "Changing the company's passwords for Indeed on 21 February 2023 whilst suspended with no authorisation".

127. There is no doubt that the claimant did change the password on the company's Indeed account on 21 February 2023 and that she was suspended when she did so.

128. The claimant maintained that she did nothing wrong (in the course of the internal processes) in doing this, because this was, in fact, her personal Indeed account, to which she had allowed the company to have access for recruitment purposes, and that she had not breached any condition of her suspension by doing this. She also argued that the respondent had no active recruitment processes ongoing on the account at that time. Further, she submitted to this Tribunal that Mr MacRae had given false evidence about his ability to contact the candidate with whom they had been communicating through the account, pointing out that the candidate had been able to send a WhatsApp message to him at this point.

129. In the suspension letter sent to the claimant, (R123/4), it was stated that "Whilst suspended you shall not enter Company premises nor should you make contact with any member of the Company's staff, customers, clients or agents without permission from myself or a more senior manager. Failure to comply with this instruction will be regarded as an act of Gross Misconduct and may result in disciplinary action."

130. In my judgment, the claimant's actions in changing the Indeed password for the respondent while suspended did amount to an act of misconduct. There was no proper reason for the claimant to have done this, and at no stage did she attempt to advance a particular reason why it would have been in the interests of the respondent to have changed the password. In the disciplinary report, it was noted that she had said that since this was her personal account, she was reclaiming it for herself. In the Tribunal Hearing, she consistently repeated her assertion that it was a personal account and had never been the property of the respondent.

131. Whatever the reason for allowing the respondent to use what had been set up as a personal account, that changed the account from a personal to a company account, or at worst a shared account. The abrupt removal of the respondent from the account, at a point where they were engaging with a candidate for recruitment to the business, at best inhibited their ability to communicate with him and, potentially, with future recruits, but at worst deliberately prevented them having access to important information and facilities for recruitment. By making contact with Indeed, it was open to the respondent to find that she had made contact with an agent of the company, in contravention of the suspension conditions.

132. The reality is that the claimant interfered with the respondent's ability to use their Indeed account, without obtaining their permission or even telling them that this was what she was doing. Again, it is clear that the claimant was not acting in the interests of the respondent when doing this, and that she was undermining their interests. The respondent was entitled, in my view, to regard this as an act of misconduct on her part.

133. It is my judgment, therefore, that the respondent had reasonable grounds on which to conclude that the claimant was guilty of misconduct on the basis of these findings.

134. In addition, the claimant accepted before this Tribunal that her actions did amount to misconduct, and that she should not have acted in this way. While she did not explain why she had done so, this concession is important in reinforcing the respondent's view that the claimant required to be subject to disciplinary action.

135. The next question is whether the respondent reached their findings following a reasonable investigation.

136. In my judgment, they did. They asked an independent company to investigate the allegations, many of which were not upheld. They accepted the conclusions of that investigation and disciplinary process, and in my judgment, that was entirely reasonable. At each stage the claimant was made aware of the allegations made against her (other than on suspension), she was given the opportunity to defend herself against those allegations, with a representative if she chose, and her defence was carefully noted and considered. When she was dismissed, she was given the right to appeal against that decision, and again that appeal was considered by an independent consultant following a hearing at which she could have been represented.

137. The investigation was comprehensive. It led to the allegations being reduced to 2 essential points, and the other allegations which had been raised were then dropped or not upheld, a conclusion accepted by the respondent on the recommendation of the independent consultant.

138. Accordingly, I have concluded that the investigation was reasonable.

139. I turn then to considering whether or not the procedure which was followed was fair.

140. On this question, I consider that there are a number of complaints which the claimant has raised about the procedure followed, summarised as follows:

- The claimant was unaware of the allegations against her when she was suspended;
- The disciplinary hearing was conducted by an independent consultant, who recommended that she be found guilty of serious misconduct, and issued with a final written warning; however, following that hearing and the production of the report, a further meeting took place with senior consultants employed by Croner Face2Face, leading to the recommendation made to Mr MacRae that dismissal was appropriate;
- The claimant was not made aware of that further discussion or that a different recommendation had been made;
- At the appeal hearing, the claimant was assured that no new evidence was being taken into account; however, correspondence with Belimed was in fact taken into account and used to reinforce the dismissal decision. She did not know that such evidence was being considered and therefore had no opportunity to defend herself against a new allegation.

141. I take these points in turn.

142. It is not uncommon for employees to face a suspension meeting without having full details of the allegation which has been made against them, and for further matters to be added during the course of the investigation. Of itself, so long as the claimant is given a subsequent opportunity to see the information on which the allegation is based and present an effective response to what the employer is saying, it appears to me not to amount to an unfairness in the process for the suspension meeting not to contain all the information which is subsequently relied upon by the employer.

143. The process which followed the submission of the disciplinary report to the respondent in this case was confusing and, to the claimant, surprising. She was clearly not aware that the respondent had had further discussions with Sam Dickinson's manager following his report, nor that those discussions had altered the recommendation being made to them.

144. I heard no evidence from Mr Dickinson's superiors, nor indeed from anyone from Croner Face2Face. The content and nature of this discussion was not made known to the Tribunal, other than Mr MacRae's relatively general statement that it was felt that a written warning would not be an adequate response to the claimant's actions. Mr MacRae himself took the decision to dismiss, but it is quite clear that he would not have done so had he not been given the advice he was.

145. While it is somewhat unsatisfactory for the Tribunal (and undoubtedly for the claimant) that the terms of that discussion and new recommendation were not laid out in this Hearing, the question for the Tribunal is whether a fair process was followed. In my judgment, while not representing best practice, the process whereby a recommendation was made to Mr MacRae, and he then translated that into a decision, was not an unreasonable one. It would have been much better had the respondent told the claimant that this additional discussion had taken place, but a full investigation was carried out and ultimately it was for Mr MacRae to make the decision which, on the evidence, he did.

146. The additional information which was taken into account by the respondent at the appeal stage was not presented in evidence by anyone directly involved in it. The claimant was unaware of the additional information being considered, and Mr MacRae was not involved in the discussion. The appeal report produced by Mr Barry stated (R220) that as a director of the company the claimant should be aware of openly discussing her dismissal with a major client and the impact that that would have.

147. I have concluded that the claimant was assured that no further evidence would be relied upon at the appeal stage by the respondent, and that Mr Barry, the consultant responsible for the appeal subsequently took further information into consideration, namely the correspondence by the claimant to Belimed confirming that she had been dismissed. That correspondence was in the context of a request by Belimed to recover their intellectual property from someone no longer employed by the respondent (R482), to which the claimant replied by informing them that there was an ongoing dispute between herself and Mr MacRae, and that she was appealing her dismissal and if unsuccessful then going to Tribunal.

148. However, I would make the following observations about this matter:

- Firstly, the appeal outcome letter makes no reference to this issue;

- Secondly, the appeal report by Mr Barry makes reference to this in disapproving terms, but speaks of her position as a director, knowing the impact of discussing her dismissal as an employee with a client. No further conclusion is drawn by Mr Barry about this, and accordingly (since I did not hear evidence from Mr Barry and Mr MacRae did not expand upon it), I interpret this as a reference to her position as director and not as an employee, and therefore not relevant to the appeal against dismissal;

- Thirdly, it is not clear why Mr Barry saw this in critical terms. It is apparent from Belimed's letter that the reason why they were seeking the return of their intellectual property was that the claimant's employment with the respondent was over. They refer to her employment with the respondent in the past tense ("during your employment with Alba Pharma Engineering, you were involved...") and thus must be taken to have known already that the claimant's employment had ended. Whether they were aware that she had been dismissed on conduct grounds is not clear, but

the matter, if it were to be the subject of a finding by the respondent, should have been investigated further;

- Fourthly, the claimant's conduct over this matter was not creditable. Belimed's correspondence betrayed an anxiety that intellectual property belonging to them should not remain in her hands now that she was no longer entitled to it. The claimant's response expresses empathy and understanding but then asks the company to bear with her. In other words, while she did not refuse outright to return the materials to them, she took no steps to do so. Why this was so is entirely unclear.

- Fifthly, I have concluded that this matter has not had an impact on the overall fairness of the process followed, on the basis that it did not relate to the claimant's dismissal but to her directorship of the respondent.

149. Accordingly, I have come to the conclusion that the procedure which the respondent followed in reaching the decision to dismiss the claimant was fair and reasonable.

150. The final issue under this heading, then, is whether dismissal was a sanction which fell within the band of reasonable responses open to a reasonable employer.

151. The claimant argues that the sanction was too severe, and suggests that the decision to dismiss her was pre-determined.

152. In her evidence before me, however, the claimant accepted that there was an element of wrongdoing on her part in relation to the two allegations which were upheld by the respondent, and when I asked her whether she would have accepted a final written warning, if the respondent had issued one, she said she would have.

153. I am very conscious that it is not for me to substitute my own decision for that of the employer in this case, nor to suggest that had I been the employer I might have taken a different decision. It is necessary only to

consider whether, in all the circumstances and having regard to equity and the substantial merits of the case, dismissal was an outcome which was within that band of reasonable responses.

154. I have concluded that dismissal was within the band of reasonable responses in this case. The actions of the claimant did amount to misconduct of a serious or gross nature. She acted against the interests of her employer. She sought to undermine Mr MacRae's, and the company's, reputation by making criticisms of him and them to an important client, which had the potential effect of damaging the company's standing with that client. Potential damage to the interests of the respondent is what they require to show here, and in my judgment, they have proved that her actions could well have damaged the interests of the company with that important client. Mr MacRae gave evidence that the relationship with Belimed was damaged and came to an end thereafter.

155. The claimant herself accepted that she had been guilty of wrongdoing, and that a final written warning would have been appropriate for her - she did not use that phrase but the fact that she would have accepted a final written warning amounts to the same - and accordingly, given the close relationship of the claimant to Mr MacRae, the level of trust which he had to invest in her and the small size of the company, I consider that dismissal by Mr MacRae was within the band of reasonable responses open to a reasonable employer.

156. I see no basis for the claimant's assertion that her dismissal was pre-determined. The respondent's representative's regular appeal to the fact that Mr MacRae had followed the advice of an experienced HR company does not, in any way, insulate the respondent from criticism if they take a decision which the Tribunal may consider to be unfair or unreasonable. However, I am persuaded in this case that Mr MacRae was conscious of the close relationships involved in the company and sought to obtain independent advice from Croner Face2Face so as to ensure that he was checking his decisions with them. The advice he received was to drop the

majority of allegations laid against the claimant, and he accepted that advice. There is no basis for suggesting that had Croner Face2Face told him to drop all of the allegations he would not have done so. It appears to me that Mr MacRae was very reluctant to take any decision without obtaining their endorsement.

157. I accept that the concerns which Mr MacRae had about being able to continue to trust and work with the claimant were entirely genuine and well-founded given her actions on the allegations which were upheld. I reject the contention that he had made his mind up at an early stage to dismiss her. Rather, he made his mind up at an early stage to allow an independent body to carry out the investigation and make recommendations to him, so that he was being given external guidance at each step. In my judgment that is inconsistent, in this case, with the suggestion that he had pre-determined the decision to dismiss the claimant.

158. Accordingly, it is my judgment that the claimant's claim that she was unfairly dismissed by the respondent fails, and is dismissed.

159. The claimant also claimed that she had suffered an unauthorised deduction from her final salary, namely for £1,279.20 and £96, labelled "Joiner Work Flat" and "Courier" respectively.

160. She maintained that she did not consent to the deduction of these payments from her salary.

161. Very little evidence was heard about this matter from the perspective of a claim for unlawful deductions from wages. I heard evidence about the sum of £1,279.20 having been removed from the business by the claimant, and that that was concluded following investigation to have been a Director's Loan. However, there was no evidence about any further discussions about this matter by either party.

162. In order to reach a conclusion about this it is necessary to establish the facts on the balance of probabilities. The payslip in question (R553) does

exhibit deductions having been made from the claimant's final pay, with entries claimed by the claimant.

163. This document was not, however, referred to in evidence by either party. It was not put to Mr MacRae that this deduction had been made unlawfully. Indeed, the respondent made no reference to this claim in their (albeit necessarily truncated) submissions.

164. I was not referred to any contractual provisions which might entitle the respondent to reclaim a directors' loan from a departing employee, and so it is not clear what basis there might have been for such a deduction. Clearly a loan may be recovered - it is by definition in the nature of a loan that it is to be repaid - but whether it may be recovered by deduction from salary without further ado is entirely unclear.

165. It is clear that the claimant has made such a claim in her ET1 and that she has, further, made reference to it in her submissions. However, without evidence on this matter, I cannot draw any conclusions about whether or not there was, in fact, a deduction from the claimant's salary and, if so, whether there was a lawful (contractual or statutory) basis for the deduction.

166. In these circumstances, I have concluded, somewhat reluctantly, that the evidence does not allow me to reach any judgment on this claim, and therefore that the claimant has not proved that there was an unlawful deduction from her wages. This claim fails and is therefore dismissed.

167. While I appreciate that the claimant will be disappointed by this outcome, I would observe that she is to be commended for the articulate and clear way in which she presented her case, especially in her questioning of Mr MacRae. Although from time to time it was necessary to remind her to keep the questions relevant to the issues to be determined in this Hearing, her questions were admirably pointed, concise and direct.

168. I am therefore grateful to both parties for their presentation of their cases, and for the courtesy shown to the Tribunal.

Employment Judge: MacLeod Date of Judgment: 15 November 2023

Entered in register: 15 November 2023 and copied to parties