EMPLOYMENT TRIBUNALS

Claimant: **Mrs J Prodger**

Respondent: **ATN Marketing Limited**

Heard at: **Birmingham** **On:** **24/5/22, 25/5/22 and 14/6/22**

Before: **Employment Judge Beck**

Representation

Claimant: Mr Blitz, counsel
Respondent: In person, assisted by Mr Tennant, Deputy Managing Director

RESERVED JUDGMENT

1. The claimant's complaint of unfair dismissal is well founded and succeeds.
2. The claimant's complaint of unlawful deduction from wages is well founded and succeeds.
3. The claimant's complaint of breach of contract (notice pay) succeeds.
4. The claimant's complaint of failure to pay the National Minimum Wage is not well founded and is dismissed.

REASONS

Introduction

1. The claimant, Mrs J Prodger, was employed by the respondent ATN Marketing Limited as a territory sale executive. She commenced employment with the company on the 30/3/04.

2. The claimant presented her ET1 claim form on the 26/6/20. The parties agreed at a case management hearing on the 29/7/21 before Employment Judge Kelly, that the claimant was given notice to terminate her employment by the respondent on the 10/1/20. She was dismissed on the 30/1/20, and her notice period of 12 weeks ended on the 3 /4/20. The claimant's effective date of termination was the 3 / 4/20.

3. The claimant brings complaints of unfair dismissal, breach of contract – failure to pay notice pay, unlawful deductions from wages, and breach of contract – failure to pay the National Minimum Wage.

4. The respondent contests all complaints, and states the claimant was dismissed for a fair reason, based on her capability and/ or conduct, it did not make unlawful deductions from wages, and had not failed to pay the claimant the National Minimum Wage. In relation to the notice pay claim, the respondent's case is the claimant committed gross misconduct on the 30/1/20, and was therefore not entitled to notice pay after this point.

5. Employment Judge Kelly conducted a case management hearing on the 29/7/21, and identified the issues for determination in this case, which are replicated below in the issues section. The parties accepted at the commencement of the hearing on the 24/5/22, that the list reflected the matters for determination by the tribunal.

6. Both parties accepted for the purposes of the unfair dismissal claim, the claimant was an employee, who had 2 years' service, who had made her claim within the 3-month statutory time limit.

7. The respondent has provided a 181-page bundle for the hearing. I have also received a 9-page statement from Mr Allen, dated 17/2/22.

8. In response to Employment Judges Kelly's direction 4.1 from the 29/7/21 case management hearing, the respondent confirmed by letter dated 9/9/21 which defects in process it conceded. The respondent accepted it did not warn the claimant in advance that the meeting on the 10/1/21 could result in dismissal, and did not inform the claimant of her right to appeal the dismissal decision. The respondent also accepted it did not consider alternative employment for the claimant.

9. On the 24/5/22, the respondent made an application for 3 additional documents to be adduced in evidence, which the claimant objected to. The respondent conceded the 3 documents were summaries of information already contained in the bundle. On the basis the information was already before the tribunal, and there was no prejudice to the respondent, I excluded the 3 documents.

10. During the cross examination of Mr Allen, on day 1 of the hearing, it became apparent that the 2 documents attached to an e mail dated 24/7/19 from Mr Allen to Mrs Prodger at page 45 of the bundle, were not in the bundle. The respondent checked overnight and confirmed the analysis figures x 2 which it had attached to the email were not in the bundle. The respondent did concede that figures provided at page 73, gave some of the analysis. The respondent made an application to adduce the x2 analysis documents in evidence, which the claimant opposed. I did not allow this late evidence to be adduced, but allowed cross examination to be paused whilst Mr Allen explained the significance of the information contained at page 73.

11. Mr Allen gave evidence on behalf of the respondent, and Mrs Prodger gave evidence, both parties being cross examined by the other.

12. At the conclusion of the hearing on the 14/6/22, there was insufficient time for me to hear final submissions from the parties. Therefore, it was agreed that the parties would provide written submissions to the tribunal by the 12/8/22. I have considered a 33-page submission from Mr Blitz dated the 29/6/22, and a 16 – page undated submission submitted by Mr Tennant for the respondent.

Issues for the tribunal to decide

Unfair dismissal

13. a) What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996?

The respondent asserts that it was a reason relating to the claimant's capability and/or conduct.

b)If so, was the dismissal fair or unfair in accordance with section 98(4) Employment Rights Act (1996), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses

In particular the claimant relies on the following:

i) Non-compliance with the ACAS Code of Practice as set out in paragraph 20 of the Particulars of Claim;

ii)Unequal treatment with colleagues whom the claimant says were performing in a similar way;

iii)There was no warning prior to entering the meeting on the 10th January 2020 that a dismissal decision would be taken in the meeting;

iv)No support was provided to help improvement;

v)No consideration was given to alternative employment.

Remedy for unfair dismissal

14. If the claimant was unfairly dismissed and the remedy is compensation:

i)if the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed/ have been dismissed in time anyway? See: Polkey v AE Dayton Services Ltd [1987] UKHL 8; paragraph 54 of Software 2000 Ltd v Andrews [2007] ICR 825; [W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604];

ii)would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to section 122(2) Employment Rights Act (1996); and if so to what extent?

iii)did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent; and if so, by what proportion, if at all, would it be just and equitable to reduce the amount of any compensatory award, pursuant to section 123(6) Employment Rights Act (1996)?

iv)Should there be an increase of up to 25% in award for the respondent's failure to comply with the ACAS Code of Practice on Disciplinary Proceedings?

v)Did the claimant fail to reasonably mitigate her loss by trying to find alternative employment?

Unauthorised deductions

15. Did the respondent make unauthorised deductions from the claimant's wages in accordance with section 13 Employment Rights Act (1996) by failing to pay all sums due between 10th and 30th January 2021 and if so, how much was deducted?

Breach of contract

16. (a) The claimant is claiming for underpayment by reference to the National Minimum Wage over a number of years.

b) The claimant is claiming a further sum as notice pay.

It is accepted in principle that there was a 12-week notice entitlement. The respondent accepts that 12 weeks' pay has not been paid. It is agreed that the respondent terminated the claimant's contract of the 10th January 2020, and the claimant's employment actually ended on 30th January 2020. The respondent alleges that the claimant committed a gross misconduct of taking a car on 30th January 2021. If the respondent can show a gross misconduct prior to dismissal, this could relieve it of its obligation to pay further notice pay. The claimant argued that any breach was waived by the respondent in allowing the claimant to continue working and it cannot rely on the breach to avoid notice payment.

Remedy

17. a) If the claimant succeeds, in whole or part, the Tribunal will be concerned with issues of remedy and in particular, if the claimant is awarded compensation and/or damages, will decide how much should be awarded.

b) Did the claimant unreasonably fail to comply with a relevant ACAS Code of Practice, if so, would it be just and equitable in all the circumstances to decrease any award and if so, by what percentage (again up to a maximum of 25%)?

Applicable law

Section 95(1) Employment Rights Act (1996) provides that for the purposes of this part, an employee is dismissed by his employer if (and subject to subsection (2) only if)-

(a) the contract under which he is employed is terminated by the employer (whether with or without notice);
(b) he is employed under a limited term contract and that contract terminates by virtue of the limiting event without being renewed under the same contact;
(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

Section 98 (1) and (2) Employment Rights Act (1996) provides:

(1) In determining for the purposes of this part whether the dismissal of an employee is fair or unfair it is for the employer to show-
  (a) the reason (or, if more than one, the principal reason) for dismissal, and
  (b) that it is a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
(2) A reason falls within this subsection if it
  (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
  (b) relates to the conduct of the employee,
  (c) is that the employee was redundant, or
  (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

Section 98(4) Employment Rights Act (1996) provides: Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)-

(a) depends on whether in the circumstances (including the size and administrative resources of the 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.

Article 3 [Employment Tribunals] Extension of Jurisdiction (England and Wales) Order (1994) provides that proceedings may be brought before an [employment tribunal] in respect of a claim of an employee for the recovery of damages or any other sum (other than a claim for damages, or for a sum due, in respect of personal injuries) if -

(a) the claim is one to which section 131(2) of the 1978 Act applies and which a court in England and Wales would under the law for the time being in force have jurisdiction to hear and determine;

(b) the claim is not one to which article 5 applies; and

(c) the claim arises or is outstanding on the termination of the employee's employment.

Section 86 (1) Employment Rights Act (1996) The notice required to be given by an employer to terminate the contract of employment of a person who has been continuously employed for one month or more -

(a) is not less than one week's notice if his period of continuous employment is less than two years;

(b) is not less than one week's notice for each year of continuous employment if his period of continuous employment is two years or more but less than twelve years, and

(c) is not less than 12 weeks' notice if his period of continuous employment is twelve years or more.

Section 13(1) of the Employment Rights Act 1996 provides that an employer shall not make a deduction from wages of a worker employed by him unless 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 the worker has previously signified in writing his agreement or consent to the making of the deduction. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to Section 23 of the Employment Rights Act 1996.

A claim about an unauthorised deduction from wages must be presented to an employment tribunal within 3 months beginning with the date of payment of the wages from which the deduction was made, with an extension for early conciliation if notification was made to ACAS within the primary time limit, unless it was not reasonably practicable to present it within that period and the Tribunal considers it was presented within a reasonable period after that.

Section 1 National Minimum Wage Act (1998) provides (1) that a person who qualifies for the national minimum wage shall be renumerated by his employer in respect of his work in respect of any pay reference period at a rate which is not less than the national minimum wage;

(2) a person qualifies for the national minimum wage if he is an individual who -

(a) is a worker;

(b) is working, or ordinarily works, in the United Kingdom under his contract, and;

(c) has ceased to be of compulsory school age.

(3) The national minimum wage shall be such single hourly rate as the Secretary of State may from time to time prescribe.

(4) For the purposes of the act 'pay reference period' is such period as the Secretary of State may prescribe for the purpose.

(5) Subsections (1) to (4) are subject to the following provisions of this act.

Section 17 National Minimum Wage Act (1998) provides (1) If a worker who qualifies for the national minimum wage is remunerated for any pay reference period by his employer at a rate which is less than the national minimum wage, the worker shall (at any time ('the time of determination') be taken to be entitled under his contract to be paid, as additional remuneration in respect of that period, (whichever is the higher of-

(a) the amount described in subsection (2) below and
(b) The amount described in subsection (4) below)

(2) (The amount referred to in subsection 1(a) above) is the difference between-

(a) the relevant remuneration received by the worker for the pay reference period; and

(b) the relevant remuneration which the worker would have received for that period had he been remunerated by the employer at a rate equal to the national minimum wage.

(3) In subsection (2) above, 'relevant remuneration' means remuneration which falls to be brought into account for the purposes of the regulations under section 2 above.

(4) The amount referred to in subsection 1(b) above is the amount determined by the formula (A/R1) X R2 where-

A is the amount described in subsection (2) above

R1 is the rate of national minimum wage which was payable in respect of the worker during the pay reference period and

R2 is the rate of the national minimum wage which would have been payable in respect of the worker during that period had the rate payable in respect of him during that period been determined by reference to regulations under section 1 and 3 above in force at the time of determination.

(5) Subsection (1) above ceases to apply to a worker in relation to any pay reference period when he is at any time paid the additional remuneration for that period to which he is at that time entitled under that section.

(6) Where any additional remuneration is paid to the worker under this section in relation to the pay reference period but subsection (1) above has not ceased to

apply in relation to him, the amount described in subsections (2) and (4) shall be regarded as reduced by the amount of that remuneration.

Regulation 6 National Minimum Wage Regulations (2015) provides - a 'pay reference period' is a month, or in the case of a worker who is paid wages by reference to a period shorter than a month, to that period.

Extract from ACAS Code of Practice 1 – disciplinary and grievance procedures

Whenever a disciplinary or grievance process is being followed it is important to deal with issues fairly. There are a number of elements to this:

- Employers and employees should raise and deal with issues promptly and should not unreasonably delay meetings, decisions or confirmation of those decisions.
- Employers and employees should act consistently.
- Employers should carry out any necessary investigations, to establish the facts of the case.
- Employers should inform employees of the basis of the problem and give them an opportunity to put their case in response before any decisions are made.
- Employers should allow employees to be accompanied at any formal disciplinary or grievance meeting.
- Employers should allow an employee to appeal against any formal decision made.

Remedy - Polkey

If the dismissal was procedurally unfair, what adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant would still have been dismissed had a fair and reasonable procedure been followed, in accordance with the principles in **Polkey v AE Dayton Services Ltd [1987] UKHL 8; Software 2000 Ltd v Andrews [2007] ICR 825; W Devis & Sons Ltd v Atkins [1977] 3 All ER 40; and Crédit Agricole Corporate and Investment Bank v Wardle [2011] IRLR 604.**

Remedy – Contributory fault

Where the tribunal considers that any conduct of the claimant before the dismissal was such that it be just and equitable to reduce the amount of the basic award to any extent the tribunal shall reduce or further reduce the amount accordingly S**ection 122(2) of the Employment Rights Act 1996 Act.**

Where the tribunal finds that the dismissal was to any extent caused or contributed by the action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding **Section 123 (6) of the Employment Rights Act (1996).**

Findings of Fact

18. The respondent's business is as a wholesaler and retailer of giftware's and home decorations. The claimant was a sales executive for the midlands / west area of the UK. She had a company car and travelled between customer's located in this region.

19. At page 56 of the bundle, representative's comparative sales figures, weeks 1-26 2018 / 2019 show the claimants total sales figures for 2019 as being 8.55% down overall. This compared to 10.79% 5.21%, and 11.2% increases for her 3 comparable colleagues.

20. Representatives Road performance reports at pages 159 – 162 in the bundle show for the period September – December 2019, the claimant's had 61 order taking visits compared to her colleagues 34, 65 and 86 for the same period.

21. Representatives Order taking visit summary for weeks 1 –52, 2018/19, shows the claimant took 211 orders. Her colleague's figures were 213, 204, 64 and 56 order taking visits for the same period. Page 168.

22. The company had a disciplinary procedure, included at page 40 of the bundle (in the claimants' written particulars). The procedure required 2 oral warnings a written warning, and a final written warning before dismissal could occur. If an initial oral warning was given, it was deemed to be informal and not kept on the file.

23. There were no oral or written warnings recorded on the claimant's employment record. I therefore find that the claimant was not issued with any warnings which have been recorded on her employment record.

24. The claimant was not advised until the 24/7/19 e mail from the respondent, of the complaint from the customer (Nine to Eleven) at the 2018 trade show regarding a failure to visit.

25.The claimant had part of her territory removed from her in February 2019. The bundle does not contain details of how this decision was made. The claimants' sales targets were not reduced.

26. On the 5/4/19 the claimant attended a general sales meeting with the respondent. She was not given a verbal warning on that occasion.

27. The respondents own internal procedures at page 40 of the bundle, required an oral warning in circumstances where a person's work was unsatisfactory. I have found that no oral warning was given to the claimant on the 5/4/19. The procedures do not require a note of the first oral warning to be kept on file. The procedure outlines this would then form the basis of a second oral warning which is placed on the file.

28. The respondents statement dated 17/2/22 paragraphs 4 and 5 refer to aspects of the claimants' written particulars which she was said to be in breach of. Reference was made to her only achieving her sales targets and objectives in relation to both sales value and activity one in 15 years. It also referred to the claimant not staying overnight in the 15 years of her employment, never supplying details of the personal usage of her company car, or details of expenses, and not selling actively over the working hours of 9am to 5.30pm. It is surprising that details of action taken by the respondent in respect of these

alleged breaches are not contained in the bundle. This is particularly so given some of the allegations relate to the whole of the claimants 15-year employment record. I have found the claimant did not have any entries on her disciplinary record. The respondent did not advise of any actions taken in relation to the alleged breaches of contract referred to above. Therefore, I do not find it necessary to consider them further, no reference is made to them in the respondents e mails setting out his concerns with regard to the claimant's performance on the 24/7/19 and 6/8/20.

29. On the 24/7/19 page 45, the respondent emailed the claimant including 2 sets of analysis figures, indicating her performance was inadequate. The email referred to analysis for the first 23 weeks of 2019, and comparative sales figures for sales representatives for 2018 / 2019. These 2 attachments were not in evidence before the tribunal. However, in the body of the e mail some of the analysis was replicated as below. The claimant contended the figures in the email were inaccurate, based on other documents in the bundle provided by the respondent showing different analysis. I accept that through cross examination of the respondent, the following corrections to the figures quoted in the 24/7/19 e mail were established:

(a)the figure quoted of 72 account visits in 105 days (over the first 23 weeks of 2019) was incorrect, 79 visits were undertaken. Page 58.

(b)the claimant's Christmas sales for 2018 /2019 were incorrect. Sales were up from 2018 to 2019, from £18,103 to £19,630. £19,630 was incorrect, the correct figure was £22,844. The increase was from £18,103 to £22,844. Page 156.

(c) the claimant's discontinued sales increased from £4,768 to £14,480 from 2018 to 2019.

(d)the claimant's everyday sales from 2018 / 2019 were down from £105,193 to £70,555. £70,555 was incorrect, the correct figure was £78,692. The drop in sales was therefore £105,193 to £78,692. The percentage decrease in sales was 25.19%, not the 49.1% stated in the email.

30. The respondent in his e mail dated 24/7/19 conceded all the representatives were showing a decrease in everyday sales.

31. The claimant was not invited to and did not attend a meeting in person with the respondent from July – December 2019.

32. On the 4/8/19 the respondent emailed the claimant, putting her on a trial. This was defined in the e mail as 100 account visits in 67 days and that the account visits should be genuine order taking visits. This was the only criteria set by the respondent. The trial period was from the 4/9/19 - 6/12/19.

'Once the autumn fair is over on Wednesday 4th September, you have sixty-seven possible days until the end of November. I expect a huge improvement in your performance over those trial days.

My definition of huge improvement is achieving over 100 account visits in the 67 possible days. I feel I need to warn you that we shall monitor that the account visits are genuine order taking visits and that there are no delaying of orders at autumn fair.

I am sorry after so many years to write to you on this basis and put you on this trial, but I must protect the company in these challenging times This trial gives you the opportunity of protecting your call rates for the benefit of the company...'

33. The respondent stated figures were provided to the claimant to help her consider accounts which had been dormant, but I have not found any evidence of this in the bundle.

34. On the 27/919 the respondent emailed the claimant removing the Mill House Leeds account from her, giving it a new North East Representative who had just joined the company and would be based in Huddersfield. Orders up to the 30/9/19 from this customer would be credited to the claimant.

35. From the 27/9/19 to the 6/1/20 no e mails were sent from the respondent to the claimant, based on the contents of the bundle.

36. On the 6/1/20 the respondent e -mailed the claimant explaining he felt she had failed her trial.

'I wish to review your performance against the 100 plus order taking visit criteria that I asked you to achieve. I should like to comment on the attached as follows:

1)you actually worked only 50 of the possible 67 days – taking 17 days off.
2) I use the phrase 'taking off' as there is no evidence in your activity reports that you used these days prospecting. Thus, they will have to be counted as holidays.
3)of the 50 days you worked you took 48 orders and therefore less than one order taking visit per day worked.
4)you achieved 48 order taking visits in 67 possible days and therefore you achieved 0.71 order taking visits over the possible days.

It seems to me that you rarely do two order taking visits in a day and take numerous days off without any justifiable reason.

I expect an immediate response to this email, because I feel you have totally failed your trial'.

37. On the 8/1/20 the claimant replied to the respondent by e mail.

'Even though you are dissatisfied with my work performance and you appear to make it clear you no longer wish for me to remain in the business, there are ways and means to treat people, in a more fair and professional manner, not by setting a target that you know and I know is totally unachievable.

In relation to the target set, I am on par with my colleagues with the number of order taking visits'.

38. I have not been provided with copies of the claimant's timesheets in the bundle. The claim in the e mail dated 6/1/20 that she took 17 days off out of 67 days of the trial is not substantiated. The claimant advised she worked during the whole period, and I have no other evidence to the contrary.

39. On the 10/1/20 the claimant and respondent met at a pub near the Dronfield office. The respondent had requested the claimant attend the meeting, by e mail

sent on the 9/1/20. No one else was present and the parties agree it was an amicable meeting. The respondent told the claimant he was dismissing her for poor performance, and asked her to take her notice from this date. The claimant agreed at the meeting to work until the end of January, and subsequently did so. No notes taken at this meeting have been made available to the tribunal.

40. On the 22/1/20 the claimant e mailed the respondent seeking clarification of the outcome of the meeting dated 10/1/20.

41. On the 28/1/20 the respondent invited the claimant to a meeting on the 30/1/20.

42. During the meeting on the 30/10/20, the claimant stated the respondent had the words 'option 1 sack' written on his papers. The respondent conceded this in cross examination and I accept this was the position. The claimant's states the respondent was aggressive and insulting in the meeting and would not let her write anything down. She offered to work the February trade show, and her full three months' notice, but was informed her area had already been divided up and this could not be changed. She was asked to hand over the keys to the blue Skoda. She states she was told no one in the company liked her, apart from S Derrick, and the respondent stormed off, so she drove home in the blue Skoda. She denies the respondent told her to wait.

The respondent accepted in his statement there was a heated argument at the meeting, but not that he was aggressive or insulting. He did not accept trying to prevent the claimant writing anything down, and didn't recall telling the claimant her area had been reallocated. The respondent conceded in cross examination he may have said no one in the company liked her, apart from S Derrick. He maintained he specifically told the claimant to remain and not to leave.

The respondent concedes it is likely he said to the claimant no one in the company liked her. I find this was said, and the parties at this point were in a heated argument. I find it more likely than not, given the escalation of tensions that the respondent did leave abruptly and the claimant drove off in the blue Skoda company car. I do not accept that the respondent had given an instruction to the claimant not to leave the premises in the car.

43. The claimant did not receive any written communication from the respondent clarifying the outcome of the 10/1/20 and 30/1/20 meeting.

44. On the 2/3/20 the claimant emailed the respondent to clarify that her employment was terminated and the date it was effective from.

'...I have had no communication with you since our meeting on the 30th January 2020, this is over a month ago.... please confirm you have terminated my employment with stone the crows and what date this was effective from, if you could come back to me within 7 days'.

45. The respondent replied by email dated 8/3/20, to the claimant's email dated 2/3/20.

'Your employment with ATN Marketing Limited was terminated during our meeting of the 10th January 2020, when you were given 3 months' notice in line with the number of years that you have worked for the company. You were fully

aware of this termination.... I sincerely hoped before our meeting on the 30th January 2020 that outstanding matters could be resolved in a spirit of compromise as you had indicated during our meeting of the 10th....'

46. The respondent has in his statement and evidence stated that the claimant took additional days off (over the 14 days granted) at Christmas 2019, and had a 24-day yearly holiday entitlement. The respondent did not clarify the number of additional days taken. The respondent's evidence was that the claimant took 43 days off in 2019, and that these were non-working days that did not include statutory holidays. The respondent stated that if the claimant did not visit a customer, and there was no evidence of any activity on her activity sheets, he treated that as a non-working day. The respondent alleges there were 43 days when the claimant did not visit customers. There are no activity logs / or holiday records in respect of the claimant included in the bundle.

The claimant accepted in cross examination there were 25 days between 4/2/19 and 8/7/19 when she didn't take an order, but did not accept she wasn't working on those dates. She confirmed in evidence she had taken 17 working days as leave over Christmas, and that usually she took 14 days. There is no claim made for holiday pay by the claimant.

Conclusions

Was the reason for dismissal a potentially fair one?

47. The respondent has to show on the balance of probabilities that a potentially fair reason for dismissal exists. In this case the respondent relies on conduct and or capability. I have to consider the set of facts known to the decision maker, Mr Allen or beliefs held by him at the time he made the decision to dismiss, 10/1/20. The reason need only to 'relate to' capability and / or conduct, capability bring very broad and including not just skills and aptitude. The burden of proof on the respondent at this stage is not a heavy one.

48. The respondent in his e mails dated 24/7/19 and 4/8/19 puts the claimants conduct and capability in issue. In the 24/7/19 email a downturn in everyday sales, failures to visit customers and feedback from a customer complaining of a failure to visit are referred to. At this time the respondent attached 2 documents to his e mail which he states showed an analysis of the claimant's sale figures, and those compared to other sales representatives. Whilst those documents are not before the tribunal in evidence, I accept the respondent did attach documents to his e mail. In the August 2019 e mail, reference to the level of account visits and setting a target for the number of visits to be achieved in 100 days is set.

49. Therefore I conclude that the respondent has discharged his burden of proof to establish a potentially fair reason for dismissal exists, namely conduct or capability.

Was the dismissal fair / unfair and within the band of reasonable responses

50. I have considered in accordance with section 98(4) ERA (1996) the circumstances, including the size and administrative resources of the respondent.

The respondent confirmed in his ET3 form that he employs 53 people in his business, and there is no HR department.

51. I have taken into account the respondents' admissions that it did not warn the claimant that the meeting on the 10/1/20 could result in a dismissal decision, that it did not inform her of the right to appeal against dismissal, did not consider alternative employment, or provide written confirmation of dismissal until the 8/3/20 e mail.

52. I have considered the ACAS Code of Practice 1 Disciplinary and Grievance Procedures (2015), which applies in cases where poor performance is alleged. It requires issues to be raised and dealt with promptly, employers to carry out necessary investigations to establish the facts of the case, employers should inform the employee of the basis of the problem and allow them to put their case, allow employees to be accompanied at a formal disciplinary meeting, and allow an appeal against any decision made.

53. In this case the initial communication was by e mail. The respondent by e mail dated 24/7/19 gave the claimant 2 sets of analysis figures as attachments, and drew attention to figures contained within them. The e mail did not contain an invitation to the claimant to a meeting to discuss matters, or even an opportunity for the claimant to respond with her comments on the figures in writing by a certain date. There was reference to a customer complaint dating back to 2018 which had not been mentioned to the claimant before. The e mail did not set out that this was to be treated as a first written warning for the claimant, as the ACAS Code recommends, or set out that failure to improve could lead to a final written warning, or dismissal.

54. It is clear for my findings of fact at paragraph 24, the respondent had concerns about the claimant's performance dating back to 2018, stemming from the customer complaint at the trade show, and in evidence said he had begun looking more closely at claimants' sales figures and conduct from this point. If he has concerns regarding the claimant’s conduct or performance in 2018, It would have been reasonable for this to have been raised with the claimant at an earlier point, to allow the claimant an opportunity to respond.

55. The claimant was placed on trial by e mail dated 4/8/19. She was not given an opportunity to put her case in person, in response to the e mail of the 24/7/19, before the respondent made the decision to place her on trial. She was entitled to attend a meeting where she was able to refute any allegations of poor performance, before the respondent made any further decisions. In accordance with the ACAS code, she would have also been entitled to be accompanied in such a meeting. There is no evidence before me that she had any input into the one target set of 100 account visits in 67 days. I am satisfied on the evidence that this was the only criteria against which the claimant was being assessed.

56. It was accepted that there was no contact between the parties during the trial period until the 6/1/20 e mail from the respondent. The ACAS code requires a fair opportunity to be given to improve, and support and resources should be made available to do so. As per my findings at paragraph 33 the respondent did not provide assistance to the claimant to improve her performance during this period.

57. During the trial period on the 27/9/19, the Mill Houses Leeds account was removed from the respondent. Apart from an e mail communicating this change, I

have not seen any evidence that the target for the trial period of 100 order taking visits was reconsidered, in light of the loss of this account by the claimant on order after the 30/9/19, with 2 months of the trial period left to run. See finding of fact, paragraph 34. I conclude it would have been reasonable for the claimants target to have been reconsidered / reduced.

58. In relation to the trial period, 4/9/19 - 6/12/19, and my findings at paragraph 38, I conclude that the claimant did work for the whole of the 67-day trial period.

59. The claimant as the respondent had conceded was not told in advance the 10/1/20 meeting could result in dismissal. As provided by the ACAS code, she was entitled to attend that meeting accompanied, and be given an opportunity to respond. The respondent in his e mail had set out his concerns in relation to the trial, the meeting was held 4 days later with no indication it could result in dismissal.

60. At the meeting on the 10/1/20, the respondent concedes alternative employment was not considered, and the claimant was not advised of her right to appeal against the decision.

61. As described above at paragraphs 52-60, the ACAS code was not followed, and I find the procedure adopted was outside the range of reasonable responses that a reasonable employer might have adopted in these circumstances and so I conclude it was unfair. The breaches of ACAS Code 1 Disciplinary and Grievance Procedures (2015) relate to paragraphs 9,10, 11, 12, 13, 18, 22 of the code.

62. It is necessary in my view to comment on the uses of language by the respondent in his e mail to the claimant dated 24/7/19. The use of expressions such as ‘absolute rubbish’, ‘to add insult to injury’, ‘poor excuses’ does not convey the impression of a reasonable employer who is keeping an open mind, and seeking to engage with the claimant to address any poor performance issues, or provide an opportunity for improvement.

Polkey / Contributory Negligence / ACAS uplift

63. The claimants written submissions in respect of Polkey were that the claimant was not performing poorly, she was on par with her colleagues, and would not have been dismissed, even if a fair procedure was adopted. The claimant states that a warning would be the most a fair process could have resulted in for the claimant, indicates that this would not attract deduction under Polkey. A reduction based on contributory negligence is not appropriate, based on her conduct before dismissal. The claimant seeks a 25% uplift for failing to comply with the ACAS Code.

64. The respondent's written submissions are that a significant Polkey reduction is appropriate. Dismissal was not an inevitability and the claimant had numerous opportunities to show improvement, showed a lack of engagement and contributed to her own dismissal. The respondent's position in written submissions is that the claimant would have been dismissed sooner, if more formal procedures were followed.

65. I have taken into account both parties' representations on the issue of a Polkey reduction in their written submissions. I am required to consider whether any adjustment to compensation should be made on the grounds that if a fair process had been followed by the respondent in dealing with the claimant's case, the claimant might have been fairly dismissed.

66. I take the view that if the respondent had followed correct procedures, the claimant would not have been dismissed. The claimant has no disciplinary record, and sales figures contained as findings at paragraphs 19,20 and 21 indicate that the claimant was broadly achieving sales comparable with her colleagues. No other representative was placed on trial. At paragraph 30 I made a finding that the respondent in his e mail 24/7/19, accepted all representatives had a downturn in everyday sales. The respondents' own procedures did not provide for immediate dismissal for poor performance. The ACAS Code outlines that dismissal for a first matter of poor performance should not occur unless it is serious, I do not consider that to be the case here, 48 order taking visits in 67 days would not have resulted in dismissal.

67. I do not find the claimant contributed to the dismissal by her actions, for reasons given in paragraph 66.

68. I have found that the respondent acted in breach of the ACAS Code of Practice, and that the breaches of the code were unreasonable. I have to consider whether it is just and equitable to apply an uplift to the compensatory award to reflect the breach of the code. The claimant in written submissions invites me to allow the full 25% uplift. I note from the respondent's written submissions that this point has not been addressed. The respondent is entitled to make submissions on the point, see my direction at paragraph 79 below.

Breach of contract

69. I refer to my finding of fact at paragraph 42 above. I do not find the claimant had breached her contract in these circumstances, or committed an act of gross misconduct, her contract had been terminated before she drove away.

70. The fact that there was no contact from the respondent to the claimant, concerning the car until the claimant emailed the respondent on the 2/3/20, to clarify her position, supports my finding. I would have expected an employer, acting in circumstances where they say the employee has committed gross misconduct, to have been in contact with the employee immediately, not leave the matter 6 weeks until the employee contacts them.

71. Therefore I find that the claimant was entitled to the remainder of her notice pay, for the period 31/1/20 - 3/ 4/20, a period of 9 weeks. The claimant's evidence that she was paid £1,013.76 in February 2020 and £961.27 in March 2020 has not been challenged. The claimant has been unable to provide wages slips for the 2-month period, and says they were not provided to her. At paragraph 27 of the respondent's statement dated 17/2/22 there is an acceptance that the full 12 week notice period has not been paid, on the basis of a mistake regarding the inclusion of commission in the salary, £2,674 has been paid. The claimant's complaint for breach of contract succeeds.

National Minimum Wage Claim

72. In respect of the claim for National Minimum Wage arrears going back to February 2014, Regulation 2 Deduction from Wages (Limitation) Regulations (2014) applies. The regulations apply to all claims brought for unlawful deductions from wages involving pay, which are brought after the 8/1/15. Complaints in relation to deductions can only be made before 2 years ending with the date of presentation of the complaint. In this case the ET1 claim was made on the 26/6/20. Therefore, claims can only be made in respect of wages for the period 26/6/18 - 26/6/20.

73. I have considered the claims for January 2019 and February 2019. The wage slips provided in the bundle are at page 147. January 2019 shows gross pay (which can include commission) of £1263.39. There were 21 working days between 1/1/19 and 30/1/19. The claimant worked 37.5 hours a week as per her contract, assuming a 1-hour lunchbreak. This would be 7.5 hours x 21days totaling 157.50 hours worked that month. £1263.39 divided by 157.50 hours equates to an hourly rate of £8.02. The National Minimum Wage for the period 1 /4 /18 - 31/3/19 was £7.38. In February 2019 the total gross earnings were £1240. 60. There were 20 working days between 1/ 2/19 and 28/2/19. 7.5 hours x 20 days totals 150 hours. £1240.60 divided by 150 hours is £8.27 per hour.

74. Therefore I find the complaint for arrears of the national minimum wage not well founded and is dismissed.

Unlawful deduction from wages

75. I made a finding at paragraph 39 above, that the claimant worked from the 10/1/20 meeting until the 30/1/20 meeting. Therefore, she was entitled to receive her salary in full for this period. I note in the claimant's schedule of loss at page 110 she has reduced her claim for statutory notice pay from 12 to 9 weeks, for the period 31/1/20 - 3 / 4/20, to reflect the fact she has claimed for her wages for this 3-week period.

76. On the basis no holiday records have been produced by the respondent showing the dates which the claimant took off in January, in addition to her Christmas leave, and no specific evidence was given by the respondent in respect of this, I find that the claimant is entitled to be paid in full for working the period 10/1/20 - 30/1/20. However, the claimant did accept in her own evidence she took 17 days leave over the Christmas period, which appears to be an additional 3 days. I accept the pay slip in the bundle at page 148 for the period January 2020 shows a salary of £926.84 being paid. The claim for unlawful deduction from wages succeeds, for the balance of wages due, however this should take into account the additional 3 days holiday taken.

Remedy

77. On the information in the bundle, and in the absence of pay slips for the claimant for February and March 2020, whilst accepting in principle monies are outstanding, I am unable to ascertain what notice pay and salary are due. The claimants' schedule of loss indicates payments of £1,974.96 in total in February /March 2020, the respondent indicates it has paid £2674.00 regarding notice pay.

78. In relation to January 2020, the claimant indicates the salary received should have been £1,326.31, £926.84 being paid according to the salary slip at page 148, it not being clear how the claim for £399.47 is calculated. I invite the claimant to set out the details of its calculations and to correspond with the respondent to see if the figures can be agreed between the parties, in respect of notice pay and arrears of salary.

79. I invite the parties to consider whether they are able to agree remedy in this matter regarding the unfair dismissal complaint, given my indications in respect of Polkey and contributory negligence. If the respondent wishes to make any representations in respect of the ACAS uplift in writing, should remedy be agreed, I will consider those also.

80. If the parties are able to agree remedy, I would invite counsel for the claimant to submit within 28 days an agreed order. If the parties are not able to agree remedy, notify the tribunal within 28 days requesting the matter be listed for a remedy hearing.

I confirm this judgment has been electronically signed

Employment Judge Beck

Date 24/10/22