EMPLOYMENT TRIBUNALS

Claimant: Salomey Tretu

Respondents: Ocado Central Services Limited

JUDGMENT AND REASONS

Heard at: London South (by CVC)
On: Wednesday 20, Thursday 21 and Friday 22 March 2023
Before: Employment Judge G Phillips

Appearances
For the claimant: Mr Leonard Lennard
Respondent: Ms Monique Bouffe, of Counsel

JUDGMENT

1. The Claimant was fairly dismissed by the Respondent.

REASONS

1. I shall, for ease, refer to the parties as the Claimant and the Respondent. No disrespect is intended by using these impersonal terms. References to page numbers [xx] are to the Bundle of documents that the parties had prepared for the purposes of the hearing.

2. The Tribunal convened on 20, 21 and 22 March 2024 for a full merit hearing by CVP to consider the Claimant's claims of unfair dismissal and unlawful deduction of wages in respect of holiday pay. The Claimant was employed by the Respondent as a personal shopper at its Customer Fulfilment Centre in Erith. The Respondent provides logistics, engineering and technology services to online retailers globally. (The ET1, dated 05.08.2022 [2-21], also included claims of sex discrimination, automatically unfair dismissal (maternity), breach of contract in respect of notice pay and unlawful deduction of wages in respect of maternity pay which were dismissed upon withdrawal at the Case management hearing in July 2023 [56]). The Respondent in its ET3 Response (dated 20.09.2022 [22-23]) denied all the claims.

3. Although the case had originally been listed to be heard in Ashford in person, I understand that the parties received a notice from the Tribunal shortly before the day of the hearing, to the effect that it would take place by CVP. The case did proceed by CVP, save that Mr Lennard and Ms Bouffe attended in person on the second day to make their submissions. All parties were cross-examined remotely via CVP.

4. I was not addressed by either party nor did I hear any evidence on the holiday pay issue. I therefore assumed that this was no longer in dispute. No point was taken by Mr Lennard about this assumption when I delivered my oral judgment on Friday 22 March. This claim was therefore focused solely on whether or not the Respondent fairly dismissed the Claimant.

Brief summaries of arguments

5. The Claimant says she was unfairly dismissed by the Respondent. She argues that she had a continued right to work in the UK at all material times as a matter of immigration law. The Claimant says that she was dismissed while her right to work was still extant, that the Respondent had no evidential basis to believe she did not have a continued right to work, failed to make reasonable enquiries and relied upon a mistaken understanding of the legal position regarding her right to work. She says the dismissal was both substantively and procedurally unfair.

6. The Respondent says, despite numerous requests, the Claimant failed to provide evidence of her continued right to work in the UK. It contends that the Claimant's dismissal was because she was unable to provide documents to prove her right to work. It submits the potentially fair reason for the dismissal was illegality, or, in the alternative, it relies upon some other substantial reason. The Respondent contends that the Respondent made a number of attempts to follow up with the Claimant about the necessary evidence, and that it acted reasonably in the circumstances in dismissing her on 3 May 2022.

Evidence and submissions

7. Ms Bouffe had prepared a short written opening, which was presented at the start of the hearing. Witness statements were provided by the Claimant, Emma Butters, who carried out an investigation and made the decision to dismiss, Sam Bamforth, HR, and Chris Taylor, who heard the appeal. All gave oral evidence and were cross examined. I was also able to ask questions of my own. In addition, there was an agreed Bundle of some 350 documents. The Respondent sent over two additional documents at the start of the second day, in response to issues that arose on the first day of the hearing. This first of these was an email chain to which the Claimant's termination letter [116] was attached. The second was a Home Office supporting guidance note on right to work checks. Mr Lennard also sent over as part of his authorities and submissions, the Home Office Guidance on section 3(C) Immigration Act applications.

8. Oral submissions were made at the end of the evidence, which I have endeavoured to briefly summarise below. (Mr Lennard subsequently supplied a written version of his closing submissions). I took account of all the oral evidence, written documentation, and oral and written submissions in reaching this decision. A short ex tempore oral judgment was given by me on the morning of the third day of the hearing, however, this document is the formal record of my judgment in this case and gives my detailed reasons for it; it draws upon and expands that earlier oral judgment. To the

extent that there are inconsistencies between what was said orally and this written judgment, this written judgment should be taken as reflecting the correct and final version. Following the delivery of my extempore oral judgment, Mr Lennard orally requested full written reasons. He subsequently followed that up with a written request pursuant to Rule 62(3) Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013.

Facts

9. There was little dispute between the parties about the key facts or events. I have set out below a Chronology of the key dates and events:

15 April 2019 – The Claimant stars her employment as a Personal Shopper (packing goods bought by customers for delivery purposes) at the Respondent's Customer Fufilment Centre in Erith. She remains employed there until her dismissal in May 2022. At the time she had limited leave to remain in the UK until 30 September 2021. C's terms and conditions [60, 65] include at §23 a paragraph headed "Your legal right to live and work". "Your employment with Ocado is subject to you having the legal right to work in the UK. You're required to provide us with appropriate evidence such as .. your passport and original work permit or visa entitling you to work in the UK. It's a condition of your employment that you notify us immediately in writing of any changes to your right to live and work in the UK."

12 July 2021 - C begins maternity leave, which is due to end on 12 July 2022

6 August 2021, 2 & 28 September - R emails C for an update on her employment status as her right to leave is due to expire on 30 September 2021 [66, 67, 68]

28 September 2021 – C's solicitors apply for a fee waiver [69-70, 133]

30 September 2021 – C provides verbal consent to R to do an ECS check and R records C's verbal confirmation of a renewal application for right to remain [71]

14 October 2021 - R checks for positive verification from Home Office using what is known as the Employer Check System (ECS) [72]

27 October – ECS result confirms a Positive Verification notice [73-74]; R is entitled to rely on this for a 6-month period, until 28 April 2022

31 December 2021 – HO request further information re fee waiver [75, 165]

9 February 2022 – Waiver application is refused and fresh fee waiver application is submitted [204]

24 March 2022 – R emails C seeking permission from her to make further ESC check [76]; no response is received to this request

28 March 2022 - C receives fee waiver confirmation [77-79; 130]; this document refers to a code in regard to fee waiver, which is valid for 10 days;

25 April 2022 - R asks for update from C on employment status; C subsequently supplies copies of biometric appointment letter and acceptance of application [82-88; 100-]

26 April 2022 – C applies for renewal of her leave to remain; confirmation of C's application to extend is at [90, 135] – this says no fee is required; [C also has a document showing she has a biometric appointment on 14 June 2022 [91]]

28 April 2022 ECS "protective" period expires [73-4]

28, 29, 30 April 2022 - R calls and emails C for an update – asks for documents to prove (i) date of application for fee waiver; (ii) date she received outcome of fee waiver application and (iii) date she made application to extend leave – with confirmation of receipt [108-9, 128, 181]

28 April 2022 – C supplies note referring to fee waiver application [82]; C provides document showing confirmation of receipt of her application to extend leave and her biometric appointment [83-4]; Emma Butters clarifies that the application made in September was for a fee waiver and that a renewal application was made two days before [83]; questions are asked about dates and the status of the application and of the need to review with legal [83]

29 April - exchanges with R's lawyers about the situation: advice says that if application was made within 10 working days of the outcome of the fee waiver application "no dismissal", otherwise dismiss if cannot provide relevant documents [294]

29 April 2022 - C says she will get further information from her solicitor [see eg 105, 109]

R gives C an extension to supply the relevant evidence of her right to work by 3 May 2022 to take account of the bank holiday [110]

3 May 2022 – R makes further efforts to contact C [110, 111]; R is still missing at this stage documents to prove (i) date of application for fee waiver; (ii) date of receipt of outcome of fee waiver application; R holds investigation [112] and dismissal meeting [in the evening with Ms Butters as investigating and dismissing officer [113-115]; decision is taken to dismiss C [116]; [Mr Lennard disputes that the 3 May was the Effective Date of Termination - see discussion below]

4 May 2022 - C is informed by a letter attached to an email (as in the two pages of additional documents handed down by Ms Bouffe on the second day of the hearing) of her dismissal; C is given 14 days to appeal and provide evidence of her right to work [116]

4-5 May 2022 - C provides some additional documents to HR (via a different email to the one used to send the letter of dismissal) [118]

<u>9 May 2022 [117-125]</u>

10.25 - C says she cannot access the pdf as it keeps going "round and round" and checks password

10.42 – C says she cannot access miocado [121]

13.51 - R confirms password is correct (from the two pages of additional documents)

13.56 - R's HR department replies to C's emails on 4/5 May, to say the documents provided don't change the dismissal and provide details re the appeal; [117]

17.05 – C says that she doesn't think it is right for R to dismiss her while she is on maternity leave and is not happy about being sent an email she could not open; refers to an application for a fee waiver, which was accepted in April and asks what proof is required; attaches the April 26 confirmation receipt regarding her application [122-3]

18.26 - C says she does not understand why she should be dismissed when she is on maternity leave, her documents are with the home office and she has sent proof as to where the process is so far; says she cannot open the pdf [117]

[Mr Lennard says this was the Effective Date of Termination]

10 May 2022

09.53 - C says she has received the email but could not open it, that she has been dismissed without notice or warning and says this is not fair, that the home office is "a bit slow with document" (from the two pages of additional documents)

10.01 – R sends details re appeal and says C has 14 days from when received the letter to appeal [117]

10.39 - R asks for confirmation that C can open the document and provides further details for appeal (from the two pages of additional documents)

12.11 – C says she wishes to appeal but can't open the pdf: "I have no idear I have only 3 days left since I was dismiss just got no yesterday [sic]" (from the two pages of additional documents)

12.17 – C sends email saying she intends to appeal and has asked her lawyer to send over the documents [125]

13.29 – R resends dismissal letter with new password sent via text (from the two pages of additional documents)

13.40 – R asks if C is still having access issues; asks for more details if 12.17 email is her appeal [124]

13.57 – C says she can't open the pdf (from the two pages of additional documents)

14.16 – R sends password by email to allow it to be cut and pasted into the password box (from the two pages of additional documents)

11 May 2022 – 13.20 C submits appeal, encloses HO fee waiver decision document, and biometrics appointment letter [126-7, 138]

30 May 2022 - Appeal hearing is heard by Chris Taylor [154-157]

31 May 2022 – C is notified that her appeal has been unsuccessful [159]

05 January 2023 – C is notified by Home Office that she has been granted permission to remain in the UK for 30 months [160-163].

10. There were a number of references during the evidence and submissions to Home Office Guidance notes, (some of which were different versions of the same Guidance but with different dates). These included:

a. "Employer right to work checks supporting guidance" dated 17 January 2022;

b. "Fee waiver: Human Rights-based and other specified applications" v 6.0 dated 8 April 2022 [261 – 286; 297];

c. Leave extended by section 3C IA 1971 (and leave extended by section 3D in transitional cases) v 12.0 dated 08 August 2023 [321 onwards];

d. Home Office guidance: 14.11.23 [227-260] Validation, variation, voiding and withdrawal of applications;

e. Gov.uk guidance on "Get a visa application fee waiver from inside the UK" [288]

Issues – unfair dismissal

11. The fact of dismissal was not in issue (although Mr Lennard disputed that the EDT was 3 May 2022). The following matters fell to be determined by me:

a. What was the effective date of termination in this case?

b. What was the reason for the Claimant's dismissal? The Respondent's case is that the Claimant was dismissed for illegality (S98(2)(d)) Employment Rights Act 1996 ("ERA") or some other substantial reason (s98(1)(b)).

c. Was the dismissal fair or unfair under the general principles contained in s 98 (4) ERA?

d. As far as whether dismissal was a proportionate response in the circumstance, it is necessary to apply what is known as the band of reasonable responses test.

e. As far as procedural fairness is concerned, the Claimant says that the Respondent (1) should not have allowed Ms Butters to act as both investigating and dismissing officer; (2) failed to carry out a proper investigation, in particular by failing to follow up on an Employer Check Service check; and (3) disadvantaged the Claimant by password protecting her dismissal letter, meaning she was unable to access it.

f. If the Claimant was unfairly dismissed, what is the appropriate remedy? Did the Claimant contribute to the decision to dismiss? Should there be any uplift for breach of the ACAS code?

Relevant law

Effective date of Termination

12. Section 97 of the Employment Rights Act deals with the meaning of "Effective date of termination". So far as relevant here, it provides

> (1) Subject to the following provisions of this section, in this Part "the effective date of termination"—
>
> (a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,

> (b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and
>
> (c) in relation to an employee who is employed under a limited-term contract ….

Unfair dismissal

13. Reason. An employer first has to prove that the reason for the dismissal falls within one of the potentially fair categories listed in s 98 (2) ERA 1996. If there is no potentially fair reason then the dismissal is automatically unfair and reasonableness does not need to be considered. There are five potentially fair reasons for dismissal under section 98 of ERA 1996: capability or qualifications, conduct, redundancy, breach of a statutory duty or restriction and "some other substantial reason" (SOSR).

14. So far as material, section 98 provides as follows:

> "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
> (2) A reason falls within this subsection if it
> ……..
> (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.

10. It was said by Cairns LJ in *Abernethy V Mott Hay & Anderson* [1974] IRLR 213, at 215 that:

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be a set of beliefs held by him, which cause him to dismiss the employee."

That formulation by Cairns LJ was approved by the House of Lords in *Devis v Atkins* [1977] ICR 662. It is not for the employment tribunal to consider the substance of the employer's reasons at the section 98(1)(b) stage (provided they are more than "*whimsical or capricious*" [*Harper v National Coal Board* [1998] IRLR 260 at para 8, referred to in *Scott v Richardson* at paragraph 17]). It is important not to conflate the questions of whether there was a potentially fair reason with the question as to whether it was a fair dismissal in the circumstances. They are two separate stages of the process.

11. In *Klusova v London of Borough of Hounslow* [2007] EWCA Civ 1127, Lord Justice Mummery said, at para 11, that "*it was accepted by the Council (rightly in my view) that a reasonable belief that Ms Klusova was not entitled to work in the United Kingdom would not satisfy the requirements of section 98(2)(d) ERA. Only an actual*

statutory bar on Ms Klusova working here would bring her case within this specific ground of dismissal". At para 12, dealing with section 98(1)(b) ERA, Mummery LJ commented that "*a genuine, though mistaken, belief by the Council that it was unlawful to employ her would be "some other substantial reason" for dismissal*".

12. As Griffiths LJ observed in *Kent County Council v Gilham* [1985] ICR 233, if on the face of it the employer's reason could justify the dismissal, then it passes as a reason and the enquiry moves on to s98(4) and the question of reasonableness.

13. Unfairness Where there is a potentially fair reason for dismissal, a tribunal must then proceed to decide whether the employer acted reasonably or unreasonably in treating that reason as a sufficient reason for dismissal. The material statutory provisions are set out in section 98 (4) Employment Rights Act 1996, which, so far as relevant, are as follows:

> "(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

14. The burden of proof in establishing the reasonableness of the dismissal is neutral and the test is an objective one – *Boys and Girls Welfare Society v Macdonald.*

15. In addition, case law makes clear that "a decision to dismiss must be within the band of reasonable responses which a reasonable employer might have adopted" - *Iceland Frozen Foods v Jones*. The Court of Appeal in *Madden* and subsequently in *Whitbread v Hall* and *Post Office v Burkett* reiterated that in applying the law of unfair dismissal in section 98 ERA 1996, the correct approach for a tribunal to adopt was the approach set out by the EAT in *Iceland Frozen Foods v Jones,* namely that it was not for a tribunal to substitute its own view as to an employer's conduct and that tribunals should determine in each case whether the decision to dismiss falls within the 'band of reasonable responses' which a reasonable employer might have adopted towards the employee's conduct.

16. Acas Code of Conduct on disciplinary and grievance procedures. The Acas Code makes clear that whenever a disciplinary or grievance process is being followed, it is important to deal with issues fairly. It sets down a number of elements to this including that (i) employers should carry out any necessary investigations, to establish the facts of the case; and (ii) 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.

Immigration and the right to work

17. Under the Immigration, Asylum and Nationality Act 2006 ("IANA") it is a civil and criminal offence to employ under a contract of service (s.25 IANA) someone who does not have right to work. A civil penalty of up to £20,000 (prior to 24 February 2024) may be imposed if an employer employs someone without the right to undertake the work for which they are employed – s.15 IANA. A criminal offence will be committed if an employer knew or had "reasonable cause to believe" that the employee did not have the appropriate immigration status. On summary conviction, an employer may receive an unlimited fine or imprisonment of up to six months (or both) – s.21 IANA.

18. Section 3C of the Immigration Act 1971 sets out when leave to remain can continue pending a variation application:

> (1) This section applies if —
>
> (a) a person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of the leave,
>
> (b) the application for variation is made before the leave expires, and
>
> (c) the leave expires without the application for variation having been decided.

19. As made clear in the HO Guidance on s3(C) "*Leave extended by section 3C IA 1971 (and leave extended by section 3D in transitional cases)*", v 12.0, dated 08 August 2023 [321 onwards], the purpose of section 3C of the Immigration Act 2017 is to prevent a person who makes an in-time application to extend their leave from becoming an overstayer while they are awaiting a decision on that application (as well as while any appeal or administrative review they are entitled to is pending). Because a person with leave to remain who has applied to extend their leave may not get a decision from the Home Office before their current leave expires, section 3C extends permission to remain so as to preserve their status and entitlements until they get a decision on their application from the Home Office. This is often referred to as 'section 3C leave'. To fall within 3C, an application to extend their leave must have been submitted before the previous leave expired, that leave must have then expired and the individual must be waiting for the Home Office decision. If the application is refused, section 3C leave continues while the person has a pending appeal (as long as the appeal was lodged within any given deadline). If the courts accept an 'out of time' appeal, section 3C leave will 'resurrect' from the date the appeal was lodged.

20. Applying for a fee waiver prior to a grant of leave expiring was agreed by both parties to extend leave under Section 3C [77-79].

21. The Immigration Rules, which lay down the practice to be followed in the administration of the Immigration Acts for regulating entry into and the stay of persons in the United Kingdom and contained in the statement laid before Parliament on 23 March 1990, set out at Rule 34, the process for making a valid application for leave to stay in the UK. They state, in particular at Rule 34G(4) (my emphasis added): "Date of application (or variation of application) for permission to stay*"*:

> 34G. For the purposes of these rules, and subject to paragraph 34GB, the date on which an application is made is:
> (1) where the paper application form is sent by post by Royal Mail, whether or not accompanied by a fee waiver request form, …; or
> (2) where the paper application form is sent by courier, or other postal services provider, the date on which it is delivered to the Home Office; or

(3) where the application is made via the online application process, and there is no request for a fee waiver, ….; or

(4) *where the online application includes a request for a fee waiver, the date on which the online request for a fee waiver is submitted, as long as the completed application for permission to stay is submitted within 10 working days of the receipt of the decision on the fee waiver application".*

34GA. *Where an application is rejected as invalid that decision will be served in accordance with Appendix SN*.
34GB. Where a variation application is made in accordance with paragraph 34BB, ….
34GC. Where a partner, child or other dependent is included in the variation application ….."

22. The Immigration Rules at 34G(4), are reflected in the Home Office Guidance note titled "*Fee waiver: Human Rights-based and other specified applications*" v 6.0 dated 8 April 2022 [261 – 286; 297], particularly in the last paragraph on page 4. This states that once a fee waiver is granted, an applicant then has ten working days to apply to extend their leave to remain [300]: "*Requests for a fee waiver made by those who have current Leave to Remain, and whose leave expires whilst their fee waiver request is being considered, will be allowed 10 working days from the actual date of their fee waiver decision to submit an application for Leave to Remain or Further Leave to Remain. After this, their leave will be treated as expired.".* This Guidance also elsewhere states: *"If an applicant is granted a fee waiver, they will be issued with a Unique Reference Number (URN) to be used when applying for LTR online. This application must be submitted within 10 working days of the actual date of the fee waiver decision and they must then make a Service and Support Centre (SSC) appointment within 17 working days. Failure to do this could result in the URN no longer being valid and a new fee waiver application may be required. The applicant will now need to carry out the following: apply for LTR within 10 working days of the fee waiver decision and make an SSC appointment within 29 days."*

23. There is a system available to an employer, known as the Employer Check Service (ECS). The ECS is used to request verification from the Home Office that an individual has the right to work in the UK when they have an outstanding application or appeal and cannot present valid right to work documents when required. Permission from the employee is required to use the service. This service provides a means for an employer to prevent liability for a civil penalty and establishes a statutory excuse against liability for a penalty. A Positive Verification Notice (PVN) is a positive confirmation of a person's right to work from the Employer Checking Service. This will provide the employer with a statutory excuse for six months from the date specified in the PVN. Such checks can be done by an employer where an employee has made an application for leave to amend and is awaiting the outcome. It allows an employer to verify a person's right to work once they have made an application. It provides an employer with protection in these cases, usually for a period of 6 months.

24. The Home Office Guidance note, "*Employer right to work checks supporting guidance*" dated 17 January 2022, in particular at page 20, under the heading "*when to contact the Home Office to verify right to work*" in order to establish a statutory excuse, includes at point 5 thereof "*You are satisfied that you have not been provided with any acceptable documents because the person has an outstanding application*

with us which was made before their previous permission expired … and therefore cannot provide evidence of their right to work".

25. Separately, there is a process, albeit that it appears not yet to be fully in force and which had only been recently introduced at the time of these events, which was intend to replace the Biometric Resident Permit physical card system, which allowed for an online check of a right to work. The system operated by the use of a share code, provided to the employee, which the employee could share with the employer, which would then allow the employer, via a Home Office online checking service on GOV.UK, to check there and then whether a person has a right to work and, if so, the nature of any restrictions on that person's right to do so.

Submissions

Claimant.

26. Mr Lennard made a number of oral submissions, which he subsequently followed up with a more detailed set of written submissions. He also referred me during the hearing to the Claimant's representative's response [220-222] to the Tribunal, pointing to some additional law and case law.

27. In brief, the Claimant, through Mr Lennard, argued she had a continued right to work in the UK as a matter of immigration law, and that the Respondent had no evidential basis to believe she did not, and failed to make reasonable enquiries. The Claimant says that she was dismissed while her right to work was still extant, that the Respondent failed to make appropriate inquiries and relied upon a mistaken understanding of the legal position regarding her right to work. It says the dismissal was both substantively and procedurally unfair.

28. During his submissions, Mr Lennard referred me, in particular, to the following cases:

> *Gisda Cyf v Barratt* [2010] IRLR 1073, which concerned a summary dismissal by letter and looked at on the effective date of termination and when notification to the Claimant occurred. The Supreme Court rejected the argument that conventional principles of contract law should be used to interpret the EDT. It held that notice served by letter was only effective when the employee opened and read the dismissal letter or had a reasonable opportunity of doing so.
>
> *Klusova v London Borough of Hounslow,* CA 2007- looking at s 98(1)(b) and 98(2)(d) ERA leave to work dismissals;
>
> *R (on the application of Pathan) v SS HO*, SC 2020, which looked at the effect of s3C IA 1971 on the right to work; and
>
> *Rachabattuni Ram v J D Wetherspoon,* EAT 2011, [2011] UKEAT 0080 which also looked at the effect of s3C IA 1971 on the right to work.

29. Mr Lennard cited the *Rachabattuni Ram* case, which dealt with an appeal and cited the decision of the Court of Appeal in *Klusova* (a case concerned with a person with limited leave and the renewal of a further leave application to remain), where Mummery LJ had made clear (Mr Lennard's emphasis added):

> *"A person lawfully in the United Kingdom under a limited right to remain and entitled to undertake employment who made a valid application to extend her leave to remain before it expired was permitted by virtue of section 3C of the Immigration Act 1971 to continue in employment when the leave expired pending determination of her application."*

Underhill J further referenced Mummery LJ's comments in Klusova:

> *"Under the relevant immigration legislation, if a person who has limited leave to remain in the UK applies to the Secretary of State for variation of the leave and the application for variation is made before the leave expires, and the leave expires without the application for variation having been decided, the leave is extended by the legislation during any period when the application for variation is neither decided nor withdrawn: section 3C of the Immigration Act […]."*

Before concluding in the following terms:

> *"On a careful reading of that rule, the limit (in the present case, the five year limit) deriving from the work permit operates to set the limit of the period of the leave to enter, but it does not form part of the condition that attaches to that leave, which is only that the employee should continue to work in the approved employment (i.e., in the present case, for the Respondent). The extension effected by section 3C thus extended the entitlement to work, subject to that condition." … It is for that reason, no doubt, although it was not spelled out, that the Court of Appeal expressed itself in the way that it did in Klusova."*

30. In the *Pathan* case, a decision of the Supreme Court**,** which Mr Lennard submitted "should be regarded as a point in principle or practice in consideration of the operation of section 3C", he said the majority view of Lord Kerr, Lady Black and Lord Briggs prevailed. Mr Lennard referred me, in particular, to paragraphs 103, 113 and 101. He submitted that it was stated that Mr Pathan's leave to remain would have expired on 15 October 2015, but for his application for further leave. In those circumstances, he said section 3C operated to extend his expiring leave pending his further application and any administrative review or appeal of the decision on that application. Paragraph 101 of the judgment reads as follows:

> *"By section 3C of the Immigration Act 1971, when a person applies for variation of his leave to remain before that leave expires, if it then expires before a decision is taken, the leave is automatically extended to the point at which the appropriate period for appealing a refusal comes to an end. By virtue of subsection (2), the existing leave will be extended during any period when (a) the application is neither decided nor withdrawn; or (b), if the application has been decided and there is a right of appeal against that decision, an appeal could be brought; or (c), if an appeal has been brought, that appeal is pending, or (d), an administrative review of the decision could be sought or is pending."*

31. In the Claimant's solicitor's letter of 4 April 2023 [44-45] to the tribunal seeking to strike out the defence (the application was refused) reference was also made to the Supreme Court case of *Mirza & Others* [2016] and the Court of Appeal case of *Iqbal and others* [2015], which are both authority for the proposition that s3C does not apply to an application to extend or vary leave which has been rejected. The

relevance of these cases is that the Home Office here had not rejected the Claimant's application.

32. Relying on these cases, Mr Lennard submitted that as a matter of immigration law (particularly section 3C of the Immigration Act 1971 as amended) the Claimant had at all material times the right to work in the UK because she had a valid pending application to the Home Office at the time of her dismissal. He said that the HO Guidance on fee waiver was not relevant because the Claimant's application was not a Human Rights application. Mr Lennard contended that the Respondent should have followed its October 2021 ECS check, and says if it had done so, it would have got a further positive verification. He also contended that the onus to do this further follow-up ECS check, was something the Respondent was obliged to do and which would have confirmed the correct position. He said that once this date of 28 April had passed, it was inevitable that the share code route would not work. Mr Lennard submits that this failure by itself rendered any dismissal unfair. He argued that in the alternative the failure to do this meant that the Respondent failed to carry out a thorough investigation in all the circumstances of the case. He also argued that the Claimant had a claim for procedural unfairness, because she did not receive the password to her dismissal letter [149].

33. Mr Lennard said that the Claimant was on 12 months maternity leave between 12 July 2021 and 12 July 2022 and was still on maternity leave when she was dismissed in May 2022. He said that at no time was the Claimant's application for further leave rejected or treated as invalid. He says the Claimant's immigration application was subsequently granted and no Statutory Notice of objection was ever served [246]. He relies in this regard on the Claimant's Representative's email to the Respondent's Solicitors dated 15th September 2023, at paragraphs 3, 4 and 8 and 9 [220/221]. He also relied on the various email correspondence between her Housing and Immigration Solicitors [197–211**]** and in particularly, at paragraph 3 at [204].

34. Mr Lennard said that the Respondent was wrong to rely on the Home Office guidance [261] on fee waiver, in particular he says the 10 day rule had no application to that time limit – as opposed to the fee waiver application itself (in this regard he referred to the language at the bottom of [77] which is clearly in the context of the validity of the fee waiver) and did not render the Claimant's application in valid. He says the Claimant's application to the Home Office was not a Human Rights application and therefore this policy does not apply. He further argued that the Claimant's application was made before the expiry of the date in the ECS Notice, of 28 April 2022. He says the relevant Policy is the one at [227-260], namely the Home Office guidance on "*Validation, variation, voiding and withdrawal of applications*". He points out that it was open to the Home Office to reject the application for further leave to remain as "invalid", but points out, it did not treat it at any stage as such. This policy provides at page 20 [246-7]:

> *"If an application is invalid, even after a reminder has been sent to the applicant, and you are not applying discretion to treat an invalid application as valid then the application must be rejected as invalid using the appropriate rejection template as set out under each requirement heading in this guidance. The applicant must be refunded their application fee minus a £25 administration fee. If an applicant makes another application within 14 days, then the period of overstaying will be disregarded, in that, paragraph 39E of the Immigration Rules*

will apply but they will not have 3C leave." He says no "Notice of Invalidity" [246] was served on the Claimant.

35. As far as procedural unfairness is concerned, Mr Lennard contended that both at the time of the dismissal and appeal, the Claimant had not been provided with a copy of the dismissal letter, which was password protected, and for which the password was never provided. He said this rendered the dismissal unfair, as the Claimant was in no position to properly articulate her position or challenge the decision to dismiss in an informed way. He says the Claimant was unable to take professional advice at the time. In the circumstances, he says the Claimant was disadvantaged both at the dismissal and appeal stage and such disadvantage was not cured. He says that it was a procedural failing for Ms Butters to deal with both the investigation and the dismissal.

Respondent.

36. Ms Bouffe made oral submissions. The Respondent in its ET3 [11-23] denies the Claimant's claim for unfair dismissal in its entirety. The Respondent, through Ms Bouffe, contends that the Claimant's dismissal was because she was unable to provide documents in relation to her right to work. It submits the potentially fair reason for the dismissal was illegality, or, in the alternative, it relies upon some other substantial reason. The Respondent said that the dismissal was procedurally and substantively fair. The Respondent contends that the Respondent made a number of attempts to follow up with the Claimant about the necessary evidence, and that it acted reasonably in the circumstances in dismissing her on 3 May 2022.

37. Ms Bouffe referred me to the following cases:

Newcastle upon Tyne NHS Foundation Trust v Haywood [2017] EWCA Civ 153, in the context of the effective date of termination, where the key finding was that a letter has to be received to be effective. Receipt can occur even if the recipient never reads the communication or destroys it. The case decided that appropriate test for the purposes of s 97 ERA is when the letter comes to the attention of the employee and they have either read it or had a reasonable opportunity of doing so;

Nayak v Royal Mail Group, EAT 2016 - a right to work dismissal case on s 98(1)(b), which looked at s3C IA 1971 and also at the employer checking service;

Klusova v London Borough of Hounslow, CA 2007 (as above);

R v Agyarko v SS for HO, SC 2017*,* on the SS's discretionary power to grant leave even where it would not be granted under the Rules;

Baker v Abellio, EAT 2017, looking at s 98(1)(b) and 98(2)(d) leave to work dismissals based on a genuine but mistaken belief as to the position.

38. The Respondent says that the crux of the case is the issue of whether or not the Claimant had a right to work at the time of dismissal. The Respondent accepts that, at the time the Claimant began her employment, she had leave to remain and work, which was due to expire on 30 September 2021. The Respondent's position, as per the Immigration Rules and the Home Office guidance, is that the Claimant did not make her application for leave to remain until 26 April 2022, which it says was fifteen

days after the ten working days deadline had expired. Therefore, as of 11 April 2022, the Respondent submitted that the Claimant's leave to remain and therefore her right to work had expired.

39. The Respondent contends that it gave the Claimant a number of opportunities to provide further information so that it could confirm her right to work, particularly as it was conscious that she was on maternity leave. The Respondent had contacted the Claimant on the 25 April, 28 April, and 30 April 2022. The Claimant asked for more time to get documents from her solicitors and an extension was agreed until 3 May 2022. On 3 May 2022, the Claimant did not answer the Respondent's calls or voicemails.

40. The Respondent says in the circumstances, it had no choice but to terminate the Claimant's employment, in order to comply with its obligations under IANA. It says it extended her right to appeal from 7 to 14 days, to allow her further time to gather documentation. In the appeal meeting, the Claimant was given a further opportunity to provide documentation and log in to the Home Office's online service with a share code, which is a service that can be used to prove right to work. The Claimant was unable to do so and was unable to provide any further evidence of her right to work. In those circumstances, the Respondent dismissed her appeal.

41. As far as s 98(2)(d) ERA is concerned, Ms Bouffe submitted on the evidence and applying the law as set out in the Immigration Rules at 34G, and as referenced in various HO Guidance notes, the Claimant's application for leave after she received the fee notice conformation – was clearly out of time. While the Home Office may have had a discretion to ignore this (see *R v Agyarko at §4*), the Respondent did not, especially given the potential statutory penalties. Further, the respondent took legal advice [292-296] as it was clearly concerned about the effect of the fee waiver confirmation on time limits.

42. As far as the "some other substantial reason" route is concerned, Ms Bouffe submitted that a mistaken but reasonable belief in a state of affairs was sufficient (see the *Klusova* and *Baker v Abellio* cases). What is important is such cases, is was there a genuinely and reasonably held belief.

43. The Respondent said in regard to the Claimant's procedural unfairness claim, that the first time it was aware the Claimant had not received the password to the dismissal letter, was in this claim. The Respondent had understood per the correspondence at [149] that the Claimant did manage to open her letter. Her appeal was brought and this issue was not raised during the appeal meeting [154-156].

44. In regard to the ECS check, the Respondent contends that it was under no obligation to do an ECS check where an individual had failed to make an in-time application, and that such a check would not have assisted in the circumstances. It says that the Home Office advises that an employer wait at least 14 days until after an application is submitted, and that generally a check takes around 5 days. The Respondent contents it would have had to wait until 10 May 2022 to do the check, during which time the Claimant would have been illegally employed by the Respondent. *Whilst there is a grace period of 28 days to allow for the aforementioned waiting times, this only applies where an in-time application has been made, which the Claimant had failed to do.*

45. The Respondent says the attempt in the appeal meeting to have the Claimant log in to the Home Office site with a share code was a quicker and more effective means of checking the Claimant's right to work.

46. Should the Tribunal find that the dismissal was an unfair one, the Respondent maintained that there was a 100% chance that the Claimant would have been dismissed in any event, and therefore asked for a 100% *Polkey* reduction.

47. For the reasons set out above, the Respondent says that at the time of dismissal, the Respondent reasonably believed that the Claimant had lost her right to work and that it therefore had a legal duty to terminate the Claimant's employment in order to comply with its obligation to prevent illegal working, as per its obligations under the relevant immigration legislation.

Conclusions

48. There is no dispute that, at the time the Claimant began her employment, she had leave to remain and work. This was due to expire on 30 September 2021. The Claimant made an application for a fee waiver on 28 September 2021, and received the outcome on 28 March 2022. By applying for the fee waiver prior to the grant of leave expiring, the Claimant's leave to remain and work was extended under Section 3C Immigration Act 1971 [77-79].

49. The Respondent relies on the Immigration Rules as set out in the Home Office Guidance, to the effect that once a fee waiver is granted, an applicant has ten working days to apply to extend their leave to remain. The Respondent's position, as per the Guidance, is that the Claimant did not make her application until 26 April 2022, which was some fifteen days after the ten working days deadline had expired. Therefore, as of 11 April 2022, the Respondent said the Claimant's leave to remain and therefore her right to work had expired.

Effective date of termination

50. There was an issue as to the effective date of termination**,** although nothing material turns on it. As set out in section 97 ERA 1996, there are different formulations for determining the effective date of termination (a statutory concept). For termination on notice it is the day upon which the notice expires. For termination without notice it is the date upon which the termination takes effect. In this regard I was referred to two cases: Mr Lennard referred me to the Supreme Court case of *Gisda Cyf v Barratt* [2010] IRLR 1073. Mr Lennard said, in the context of s 97 ERA, the EDT was when the dismissal letter was seen, open and read. Ms Bouffe referred me to the Court of Appeal decision in *Newcastle upon Tyne NHS Foundation Trust v Haywood* [2017] EWCA Civ 153, which considered *Gisda Cyf* and other authorities. The court said the appropriate test for the purposes of s 97 ERA is when the letter comes to the attention of the employee and they have either read it or had a reasonable opportunity of doing so. (Although I was not referred to it, chronologically and in terms of aithorities), I should also mention the Supreme Court decision of *London Branch v Geys* [2013] IRLR 122, which also considered this point, and where the Supreme Court ruled that if given by post, notice has to be received and communicated to the employee to be effective. For present purposes the case is relevant only insofar as it stresses the need for notification of dismissal (or resignation) in clear and unambiguous terms, so that both parties know where they stand. The *Gisda Cyf* and *Newcastle* cases that I was referred to, were about the second of the s 97 ERA formulations.

Conclusion on EDT

51. The appropriate test for the determination of the "effective date of termination" for the purpose of unfair dismissal claims under the Employment Rights Act 1996 is the

date on which the employee opened and read the letter summarily dismissing her or had a reasonable opportunity of doing so. In this present case, there is no issue that the Claimant received the dismissal letter by email on 4 May. However, it was password protected, and although she had the password, she still could not access it. There were further attempts to access it on 10 May. There is no doubt that the email and letter were received by the Claimant in this case on 4 May but there were issues accessing it. I find that that on the facts, by 9 May, the Claimant was aware that she had been dismissed (at 17.05, the Claimant says that she doesn't think it is right for the Respondent to dismiss her while she is on maternity leave [122-3] and at 18.26 she says she does not understand why she should be dismissed when she is on maternity leave [117]). Although she does not appear to have been able to access the details in the dismissal letter until 10 May, I therefore find that the EDT for the purposes of this case is 9 May.

Reason for dismissal

52. As set out above, a reason for the dismissal of an employee is a set of facts known to the employer, or it may be a set of beliefs held by him, which cause him to dismiss the employee. Two potentially fair reasons were relied upon by the Respondent, on whom the burden of showing a potentially fair reason lies –

> s.98(2) (d) ERA 1996 - 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 – I will refer to this as the illegality reason for shorthand.
>
> s 98(1) (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held

53. In *Klusova v London of Borough of Hounslow* which both parties referred to me to parts of, Lord Justice Mummery said, at para 11, that "*it was accepted by the Council (rightly in my view) that a reasonable belief that Ms Klusova was not entitled to work in the United Kingdom would not satisfy the requirements of section 98(2)(d) ERA. Only an actual statutory bar on Ms Klusova working here would bring her case within this specific ground of dismissal*". At para 12, dealing with section 98(1)(b) ERA, Mummery LJ commented that "*a genuine, though mistaken, belief by the Council that it was unlawful to employ her would be "some other substantial reason" for dismissal*.

Conclusion on reason for dismissal

54. As far as the illegality argument is concerned, I do not feel able on the evidence as presented to find as fact that the Claimant was working illegally at the time of her dismissal. She had on the facts at the time of her dismissal in early May 2022, an extant pending application for further leave to remain. Even though on an analysis of the relevant Immigration Rules at 34A, B and G, that application appeared to have been made outside the relevant time limits and so would appear to fall outside the protection of s3C IA 1971, it had not been rejected or queried by the Home Office at that time and indeed was subsequently approved without demur.

55. Taking account of amongst other things

- the wording at [111] from Ms Bamforth, to code this dismissal as SOSR
- the wording in the decision to dismiss [115]: "therefore we cannot prove Salomey's right to work in the UK"
- the wording that was included in the dismissal letter [116] around the failure to provide documentation to validate her status: "you failed to provide documentation to validate your status regarding your right to work in the UK",
- the discussions at the appeal meeting [154 onwards]
- the subsequent appeal letter [159]
- the reliance placed on the HO Guidance note

in my judgment, the appropriate reason for the Claimant's dismissal was "some other substantial reason", namely that the Respondent believed that Ms Tretu was not entitled to work in the United Kingdom and that it would be unlawful to continue to employ her.

Was this a genuinely held belief?

56. Even if the belief turns out to be mistaken, that does not prevent it from being a section 98(1)(b) reason for the dismissal (see the EAT in *Baker v Abellio*). I find that this was a genuine belief based on sound evidence – to mention some of the key factors that informed my decision here:

- the Claimant had an express contractual obligation to keep the Respondent informed about her immigration status [60 at §23];
- the Claimant did not in fact keep the Respondent accurately up to date in a timely fashion;
- the HO policy documents referred to the need to make an application for further leave to remain within 10 days after the fee waiver was confirmed [260];
- the fee waiver was confirmed on 28 March 2022 - [77-79]; but no application was put in until 26 April;
- the Respondent was aware of the 10-day rule and had taken legal advice about it [206, 292-296]
- Both Ms Butters and Ms Bamforth explained in their evidence that the Respondent had initially understood that the Claimant had submitted an application for leave to remain in September 2021; it was only much later that they discovered that it was a fee waiver application; when they discovered the date of the actual application for leave, they were puzzled as to what this was and why it had been made; this state of affairs required further investigation and threw up the issue about the 10 day rule;

Applying s 98(4) ERA 1996, was the dismissal for the reason found, fair and reasonable?

57. It is well known that the considerations here cover two areas - the substantive reason for the dismissal and procedural fairness. Taking the substantive reason first, the Q I have to ask myself is did R act reasonably in all the circumstances in treating this as a sufficient reason to dismiss the Claimant. Put another way, was dismissal a proportionate response in the circumstances? This involves the application of what

is known as the band of reasonable responses test. The appropriate test is whether the dismissal of the Claimant lay within the range of conduct that a reasonable employer could have adopted. Tribunals should not, when considering these matters, look at what they would have done but should judge, on the basis of the range of reasonable responses test, what the employers actually did.

58. The Respondent says it was required by law to dismiss the Claimant because given the criminal and civil liabilities it potentially faced under immigration legalisation, it had no option in the absence of any further evidence, but to dismiss her. It says it did so reluctantly and, in the hope, that if further evidence was available, she could apply for her job back. Mr Lennard said it was clear throughout that the Claimant had a valid application pending and was covered by s3(C) of the Immigration Act.

Conclusions on reasonableness – the substantive reason

59. I find the Respondent acted reasonably in all the circumstances in treating these facts as a sufficient reason to dismiss the Claimant. Given the belief the Respondent had formed, and the factual matters I have set out above at even if that belief turned out to be wrong, in my judgment there was no alternative available to them, in the light of the statutory penalties that can be imposed on an employer if they are found to employ someone who does not have the right to work. They could not suspend the Claimant, as this would be a continuation of her employment and they could not leave her on maternity leave as that still maintained an employment relationship.

Conclusions on reasonableness – procedural unfairness

60. Moving on to procedural unfairness, Mr Lennard brought to my attention a number of specific concerns:

> (1) that Emma Butters should not have acted as both investigating and dismissing officer; (2) investigation and the dismissal took place on the same day within a matter of hours; (3) the Respondent failed to follow the Acas Code in terms of not following a fair procedure; and (4) that any defects were not cured by the appeal

61. Mr Lennard submitted the same person acting as both investigating and dismissing officer is unheard of. I accept that in a disciplinary context having the same person as investigating officer and dismissing officer is not considered to be ideal; however, this was not a disciplinary or a grievance matter; there was no misconduct accusation here. The investigation hearing was followed in short order by the dismissal meeting. This would I accept be unusual in a disciplinary context; however, in this case, the Respondent had contacted the Claimant orally, and had explained the position to her and she had not got back to them by the deadline that had been discussed. I accept the Respondent was genuinely concerned by this juncture that it might be employing someone who had no legal right to remain. In those circumstances, given the potential penalties, time was of the essence. I do not find that the Claimant was put at any unfair or unreasonable procedural disadvantage by this; there was in any event an appeal, albeit only a review as opposed to a full rehearing, but Mr Taylor had had no previous involvement in the matter. Further, this was not a disciplinary or grievance hearing. As such, I do not accept that the Acas code has any statutory authority.

(5) that the Respondent reached its conclusion without evidence and without making proper inquiry; it failed to carry out a proper investigation, in particular by its failure to do a follow up Employment Check;

62. I repeat the matters set out at paragraph 56, that there were reasonable grounds to sustain the Respondent's belief that the Claimant had not make a valid in time application for leave to remain.

63. On the 14 October 2021, on the basis that the Claimant's leave to remain had expired and (wrongly understanding at that time) that she had put in a further application, which had not yet been determined, the Respondent did a check for positive verification from Home Office using the Employer Check System (ECS) [71]. This system protects an employer from civil and criminal liability it subsequently turns out that someone was employed by them who did not have leave to remain; it provides them with a statutory excuse. In a way it mirrors the protection which s 3C of the IA 1971 gives an employee who has made an in-time application for further leave, but whose leave has expired before the outcome of that application is known.

64. On 27 October, the ECS result confirmed a Positive Validation [73-74]. The Respondent was entitled to rely on this for a 6-month period, until 28 April 2022. This document has a paragraph in it which specifically referred to an employer's follow up, in the sense that the statutory excuse is time limited; if an employer wishes to continue to rely on the statutory protection, it will need to do a further ECS. In this case, I find that the Respondent believed that the Claimant's application was made outside that 10-day period referred to in the Home office guidance (page 20 of the Guidance) (and, although this was not known to the Respondent at the time; as became apparent during the hearing, this 10-day rule reference was underpinned by the Immigration Rules at 34G). According to the HO Guidance, the Claimant's application for leave was not valid, and so the Respondent did not believe that it could use the ECS system to check the position.

65. Mr Lennard sought to argue in the context of the ECS check, that

    a. The date of 28 April 2022, which was the expiry date of the ECS check that was done by the Respondent in October 2021, was significant for the Claimant's immigration status as, he argued, it extended her time for making a valid application;

    b. the ECS PVN that the Respondent received, imposed an obligation on the Respondent to do a follow up before 28 April: Mr Lennard referred in this context to section 4 of the Notice, [73], which stated "The result of this check is valid for 6 months. It expires on 28 April 2022. You should carry out a follow-up 'right to work' check on or before this date". Mr Lennard says that "the Respondent cannot be permitted to take advantage of its own failings";

    c. no consent was needed from the Claimant for the Respondent to make a further ESC check: the consent she had given for the first ESC check was, he said, still valid. In her evidence, the Claimant said she understood her initial consent still applied, so she did not believe she needed to give it again.

66. I did not accept any of these submissions.

a. I do not find that the ECS system had anything to do with the Claimant's immigration status. In particular I do not find that the date of 28 April had any relevance as far as the Claimant's immigration status was concerned. It was a system for employers;

b. I also do not find that the ECS system or the first PVN, imposed any obligation on an employer to do a follow up. It is, in my assessment, entirely a matter of choice for an employer whether they use the ECS system or not; further, there is evidence that the Respondent did try to do a timely further check, on 24 March 2022 but the Claimant did not provide her consent;

c. In my assessment – Ms Bouffe referred me to the Guidance on this – for data protection reasons, given the sensitive personal nature of the underlying information, further consent was needed from the Claimant for the Respondent to make a further ESC check in order to comply with data protection laws. In this case, the Respondent had in fact asked the Claimant for permission, on 24 March 2022**,** (and see also Mr Lennard's written submissions, at paragraph 5, where he sets out this request in full) but the Claimant had not responded**.** Mr Lennard submitted (§ 20 of his written submissions) that there was no evidence to show that the Respondent's emails were received by the Claimant. However, there was no dispute that the email address used was correct, and there was no "bounce" back message. In the circumstances, I believe these emails were received. The Claimant's evidence on this was essentially that she was not particularly attentive to emails at these times.

67. Further, there are set out in the HO Guidance a number of situations where an ECS should be applied for, and on the facts as known to the Respondent, the situation they believed the Claimant to be within, did not fall within those situations.

68. Mr Lennard said that this was a classic s3C Immigration Act 1971 case. I do not disagree with him on many aspects of what he said about this. I was referred by him to the Home Office document on the operation and purpose of s3C. This makes clear at page 6, that to come within in section 3C an in-time application must be made; where such an application has been made and the application is not decided before the leave to remain expires, the section 3C will extend the existing leave until the application is decided. On the facts and evidence as presented to me, the Claimant's original leave to remain ended on 30 September 2021. While no application to extend was made before that date, an application for a fee waiver was made on 28 September [69-70] and that application it was agreed by all fell within the s 3C IA exemption, such that the Claimant's right to remain was continued. That position existed up and until the fee waiver was finally determined on 28 March 2022. On 24 March 2022, the Respondent had sought permission from the Claimant to make a further ESC check [76]. Had the Respondent received such permission at that time, then it appears very likely that the ESC would have confirmed a positive verification, as at that time the fee waiver application was still pending and so was still covered by the s3C IA state of affairs. Indeed, on the face of it, if the Claimant had provided consent at any time up until at least 11 April 2022, it appears very likely that the ESC would have confirmed a positive verification. It is impossible to guess what result would have been returned once the 10-day period was passed. The Respondent, based on the HO Guidance [see eg 290, 292, 317], and its lawyer's advice [292-296], concluded that there had not been a valid application and hence

they could not use the ESC. Even if they were wrong about this, as I have stated above, in my assessment they had reasonable grounds to believe it was the correct position.

69. The problems here really arose from the existence of 10-day rule, which the Respondent was in my judgment entitled to take account of given the potential penalties that it faced. While the HO has a discretion to discount irregularities, an employer does not. The reality is, as we now know, is that the HO do not appear to have raised any concerns about the delay or the validity of the application for further leave to remain, and indeed in January 2023, granted the Claimant a further period of leave to remain of 30 months.

> (6) the Claimant could not access her dismissal letter and had to exercise her right to appeal without full information, which "was by itself manifestly and unreasonably unfair".

70. On the evidence before me, I have found that Claimant was aware of her dismissal on 9 May 2022. On the face of the email exchanges, by 10 May she had a reasonable opportunity to access the dismissal. By 10 and 11 May [125, 126-7] when making her appeal, it is clear she was aware of the time limits and the fact that there was an issue on documentary evidence as she then provided further documents. She did not complain about this at the appeal and I do not find that she was procedurally disadvantaged by the problem with the dismissal letter.

71. Overall, and in conclusion I do not find that any of these matters whether individually or collectively are such as to render this dismissal procedurally unfair.

72. Further I do not find that when looked at in the round it could be said that the R's processes here were unfair or unreasonable – they made a number of efforts to contact the C to discuss the problem – both by email and by calling her; they did manage to speak to her; they extended the time for her to get back to them until after the bank holiday; they extended the appeal time and tried to get access to her information, albeit without success, via the share code. Ultimately Mr Taylor indicated the Claimant was free to reapply to Ocado if she did get the correct evidence [157].

73. Mr Lennard raised a point as to whether the Home Office Guidance applied to this case at all. He said that It was headed "Human Rights and other applications" and said that the Claimant's application was not a human rights application. I am not an immigration law expert and no submissions were made to me as to what might or might not be a "human rights application" under UK immigration law. However, I noted that the letter from the Home Office to the Claimant's solicitors dated 5 January 2023 [40], refers to the Claimant having been "granted permission to stay in the UK as a Family Member under the Immigration Rules on the parent 10-year route to settlement". The second paragraph of this letter refers to being satisfied that a refusal "would lead to unjustifiably harsh consequences and would breach your right to respect for private and family life under Article 8 of the European Convention on Human Rights". Further, it appeared to me that charging a fee for making an application on these grounds, could well be said to amount to a breach of human rights law. Further and in any event, I note that the title of the HO document includes "and other applications". I did not therefore agree that this document could not apply

to these facts. Finally, and in any event, the Immigration Rules, which underlie the HO policy document, do appear to apply to the Claimant's situation.

74. Therefore, I find that this was a fair dismissal.

75. I would like to add, as has been made plain on a number of occasions during the hearing, this is not a case about any misconduct by the Claimant; while there were some delays and failures to respond on her part, she was on maternity leave, and was looking after a young family. In practical terms, while it is hard to see what more she could have provided to the Respondent by way of documents to reassure them, the problems here arose because of the 10-day rule, which in my judgment the Respondent could not ignore.

General matters

76. You can appeal to the Employment Appeal Tribunal if you think a legal mistake was made in an Employment Tribunal decision. There is more information here: *https://www.gov.uk/appeal-employment-appeal-tribunal*

Employment Judge Phillips
26 March 2024