Case Numbers: 3201848/2023
3202207/2023

EMPLOYMENT TRIBUNALS

Claimant: **Ms Jenny Goldthorp**

Respondent: **Goldthorp Fabrications Limited**

Heard at: **East London Hearing Centre (by Cloud Video Platform)**

On: **13 and 14 March 2024**

Before: **Employment Judge Gardiner**

Representation

Claimant: In person

Respondent: Mr Katz, consultant

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

1. The Claimant was an employee of the Respondent.

2. The following complaints are well founded and therefore succeed:

    a. The Claimant was constructively dismissed and that dismissal was an unfair dismissal contrary to Section 94 Employment Rights Act 1996.

    b. The Claimant was wrongfully dismissed in breach of contract in not being give 12 weeks' notice pay.

    c. There was an unauthorised deduction of the Claimant's wages.

3. The Claimant's complaint of a failure to pay accrued holiday pay is not well founded and is dismissed.

4. The Claimant is entitled to a 20% uplift on the remedies awarded for the complaints that have succeeded to reflect the failure to comply with the ACAS Code of Conduct on Grievance Procedures (Section 207A TULCA 1992).

5. The Claimant is entitled to two week's pay for the Respondent's failure to provide her with a statement of employment particulars (Section 38 Employment Act 2002).

REASONS

1. This is the Final Hearing of a claim for unfair dismissal, wrongful dismissal, unauthorised deduction of wages, and failure to pay holiday pay brought by the Claimant, Ms Jenny Goldthorp, against the Respondent, Goldthorp Fabrications Limited.

2. Only two witnesses have given evidence – the Claimant and the Respondent's Managing Director, Mark Goldthorp. They each had prepared a witness statement which cross referred to documents in an Agreed Bundle of Documents. That bundle totalled 162 pages. In addition, a few other documents were either attached to the Claimant's witness statement or were introduced by the Claimant at the start of the hearing.

3. The issues to be determined are set out in the Updated List of Issues which is attached to these Reasons.

Findings of fact

4. The Respondent company was incorporated in 2006. At incorporation, the two equal owners of the business were Mark Goldthorp and his brother Steven Goldthorp.

5. When the company started in Autumn 2006, at a point before the Claimant was a shareholder, the Claimant received what was described as a "salary" of £910 a month [122] through the payroll system. She was not issued with an employment contract or a statement of employment particulars. She did not have a job description. She was involved in issuing invoices to clients for work carried out. According to Mr Goldthorp, the Claimant taught herself how to run the finance function within the business, which included invoicing customer accounts and statements, calculating and paying VAT, and paying corporation tax. On occasions, this work was also carried out by the Managing Director, Mark Goldthorp.

6. In December 2006, the Claimant was paid an adjustment to increase the hourly rate she had received for 32 hours work the previous month. In February 2007, the Claimant and Jane Goldthorp, the spouse of Steven Goldthorp, each acquired a 25% shareholding. This was done for tax reasons. Jane Goldthorp was a sleeping

partner – she did not have any active role in the business at any point. In March 2007, the Claimant was paid an additional 6 hours for an additional six hours of work. From April 2007 she received £1040 per month. On 23 July 2007 the Claimant and Mark Goldthorp married. Thereafter, the Claimant became pregnant and gave birth to her son. The same payment arrangement continued throughout this period. A nanny was engaged and, according to the Claimant, thereafter she worked from 9am until 5pm on Tuesday to Thursday. When her son started at school her hours became 9am until 3pm. There appeared to be no change to her pay.

7. At some point, the Claimant started using the email accounts@goldthorpfabrications.com for her work on behalf of the company. She was issued with a laptop and a mobile phone for use when engaged in company business. She did not work for any other business or market her services to other organisations apart from working for the Respondent.

8. By May 2014, she was still apparently receiving £1040 per month [124]. This remained the position until May 2015 when she was appointed to the Board of Directors and designated the Finance Director. Neither the Claimant nor Mr Goldthorp is able to explain why she became a Director at this point. It appears that the Claimant may have asked to do so. Mr Goldthorp accepts that the additional status of Director did not change her day-to-day duties and responsibilities.

9. At that point, the monthly payment reduced to £730 so that each of the Directors received the same sum. She did not complain about the reduction at the time. She continued to carry out the same duties.

10. In around 2016, employment contracts were drawn up for the Respondent's staff. No employment contracts were drawn up for the Claimant, for Mark or for Steve Goldthorp.

11. In the period leading up to 2019, the relationship between the Claimant and Mark Goldthorp broke down. In 2019 they divorced. Notwithstanding this split, the Claimant continued in her Finance role and continued to receive monthly payments from the Respondent.

12. In 2019 the Claimant contracted shingles and started working from home. With the onset of the Covid Pandemic, the Claimant continued working remotely. She did not return to the office. Relevant paperwork was dropped off at the Claimant's house every two weeks and the Claimant carried out the required work from home. Completed work was then collected when further work was delivered.

13. In early 2022, Ms Jordan Pearce started working for the Respondent. She worked in areas that the Claimant had previously carried out.

14. On 5 January 2023, the Respondent received a letter from HMRC indicating that a total of £280,926 was owed in VAT and Corporation Tax. It also recorded an

arrangement whereby the Respondent had agreed to pay £15,607.03 a month. The final payment was due on 11 June 2024.

15. On 2 February 2023, the Claimant wrote to HMRC responding to this letter about the total amount of the debt. She asked if the late payment surcharges could be removed [65].

16. On 8 February 2023, Mr Goldthorp emailed the Claimant at accounts@goldthorpfabrications.com to advise her that Ms Pearce had now left and before she had left Ms Pearce had given "Jake and [himself] a crash course in putting customer invoices on and providing remittances" [66]. He enclosed statements for several customers appearing to show that there were invoices outstanding stretching back for a period of 12 months or more.

17. Around this time, the Claimant noticed that her access to Sage was being restricted. She raised this with Mr Goldthorp who told her on 18 March 2023 that the invoicing was now being done in the office.

18. On 21 March 2023 [71], Mr Goldthorp wrote to the Claimant saying that he had noticed that she had made incorrect PAYE payments "unless there's something you know that I don't".

19. On 11 April 2023, HMRC wrote again to the company warning of winding up action because the company had not submitted tax returns.

20. On 14 April 2023, the Claimant wrote to Mr Goldthorp as follows, which was sent by email on 18 April 2023 [72] [74]:

> "I am writing to you because there needs to be some clarity about decisions you have made without consulting me.
>
> Little by little you have been stripping responsibilities of a job role I fulfilled for 16 years away, and I've only learnt of your decisions by blunt text or email telling me you have passed these responsibilities to others.
>
> Can you clarify when said responsibilities will be passed back to me?"

21. The Claimant was paid the usual gross monthly payment of £730 per month towards the end of April 2023. Due to a change in the tax code, this meant that she received a lower net payment at the end of April 2023. She now accepts that this lower sum for April 2023 was not an unauthorised deduction of wages.

22. In an email dated 25 April 2023, Mark Goldthorp informed the Claimant that financial dealings could not be conducted in isolation at her home address. The email blamed her for missing tax returns and payments to HMRC. She was told that the Respondent had now instructed an independent accountant to assist and hopefully rectify the proceedings. She was also told that she could no longer claim

business expenses in relation to work carried out at home; would not be able to take dividends in relation to her shareholding; and that company shareholders owed approximately £12,000 back to the business. No breakdown or explanation was given for the latter sum [75].

23. There is a dispute as to whether this email was ever sent to the Claimant at the time. No standard email heading with a time and date is included in the bundle. The Claimant is adamant that she did not see this email until 27 May 2023. The most likely explanation is that the letter was drafted but never sent at the time; or if it was sent then by that point, the Claimant no longer had remote access to the accounts@goldthorpfabrications.com email address. I accept the Claimant's evidence that she did not see this email until it was posted to her on 25 May 2023 together with a subsequent email. If she had received this email at the time, then it is likely she would have chosen to respond.

24. In a document on [78], Mr Goldthorp wrote that "Steven and I will now be taking an hourly wage when we attend the workplace daily to manage our employees, answer telephone calls, continue sales and ensure all our orders are manufactured and delivered". I take the view that this document was also not sent. There is no standard email subject line showing this letter was sent as an email attachment.

25. A further letter was posted by the Respondent on 25 May 2023 and received on 27 May 2023 [79]. It was received by the Claimant at the same time as the correspondence dated 25 April 2023. It accused the Claimant of illegally withdrawing a dividend from the business account and taking home a month wage, despite not conducting any work. It accused Ms Goldthorp of engaging in illegal accounting. It said that, on advice, she would not receive a monthly wage whilst work was not being conducted. It stated that the company could no longer afford to pay her whilst they were paying an alternative to conduct her job. It did not invite the Claimant to return to the office to continue working. Rather, it informed her that she no longer had access to the Lloyds business account. In paying dividends to shareholders of £2,500 on 2 May 2023, it accused her of "repetitive, detrimental, illegal and immoral action which cannot continue". It did not suggest there was any room for discussion or negotiation. Rather it said that he had "no choice but to act in the best interest of Goldthorp Fabrications". Despite Mr Katz's arguments to the contrary, this letter did not welcome her return to the office to continue her work.

26. On 10 July 2023, the Claimant responded to the letters of 25 April and 25 May, saying that these had been received on 27 May 2023. This is further contemporaneous confirmation that she did not receive them at or shortly after the dates on the documents.

27. She complained about what she described as "discrimination" and "bullying". She said that there was no longer a position for her as the Respondent had given her duties to others, "so you have technically made me redundant without a fair process". She asked how could she do work which he had given to others. She noted that he had locked her out of the bank account and limited her access to

Sage. She alleged that decisions had been made to force her out. She ended her letter saying that the letters were confusing her employment with her shareholding. It was clear from the wording that she regarded herself as an employee [81].

28. The letter was headed "Without Prejudice". This was the same style of heading as earlier correspondence. It continued that earlier correspondence. It was not headed "Grievance" nor did it contain the words "Grievance" in the body of the letter. It was not reasonable for the Respondent to regard it as a grievance.

29. She sent a further letter dated 21 July 2023, although this was apparently received on 14 August 2023. Again, it was headed "Without Prejudice". It did not refer to itself as a grievance. She sent another letter on 1 August 2023. It was again headed "Without Prejudice". It complained about the lack of response to her letters on 14 April and 10 July, adding that she had been asking him to clarify her employment status [84]. She reiterated that her job responsibilities had been passed onto others. There was no response to this letter.

30. She sent a further letter on 8 August 2023. This letter was headed "Formal Grievance". It was not headed "Without Prejudice". It set out the areas of her complaint, namely "Failure to pay, Failure to provide with payslips and breach of contract of employment". It also complained that there had been a failure to clarify her employment status [85].

31. Despite this reference to the Claimant raising a formal grievance, on 16 August 2023 the Respondent sent a response to the letters of 1 and 8 August 2023 [86]. She was not invited to a grievance meeting to discuss the grievance. Rather the two-page letter purported to decide her three-line grievance without giving her any further opportunity to make her case or to clarify her complaints. The letter purported to clarify her employment status. It equated her status with that of the other shareholders who were conducting work for the Respondent. It said that there was a discrepancy between her and a normal employee under an express contract of employment, in that she continued to receive pay even though she did not work. Whilst it described her as an Office Holder, this appeared to be in her role as Shareholder. No reference was made to her role as Director.

32. So far as failure to be paid was concerned, it wrongly stated that she had "not conducted any work over the past few years". It accepted that her access to Sage was restricted [87].

33. On 22 August 2023, the Claimant was signed off work on sick leave for four weeks [127].

34. On 5 September 2023, the Claimant sent a letter resigning as an employee and also resigning as Director with immediate effect. There were various reasons given in bullet points for resigning. This included failing to pay her salary from May 2023; failing to follow a fair grievance procedure in connections with her grievances; making a number of false allegations against her; and removing her responsibilities.

She stated that she had been in an unfit state to make any decisions until that point.

35. The resignation letter concluded by asking the Respondent to ensure that any further correspondence was directed to her solicitors.

36. There was subsequently a grievance hearing which the Claimant attended. It considered the grievance contained in the letter dated 5 September 2023. It was conducted by an independent consultant. He produced a report partially upholding the grievance. The grievance outcome letter was sent to the Claimant on 2 November 2023, enclosing the report from the independent consultant. The Claimant was offered the opportunity to appeal against the grievance outcome. She chose not to do so.

Legal principles

37. In order to bring a claim for unfair dismissal, the claimant must have the legal status of an employee and must have had that legal status for at least two years.

Employment status

38. Section 230 Employment Rights Act 1996 ("ERA") sets out the definition of "employee" and "contract of employment":

> (1) In this Act "employee" means an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment.
>
> (2) In this Act "contract of employment" means a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

39. Case law has established that personal service, control, and mutuality of obligation are required in an employee/employer relationship under the ERA. However, the focus must be on the statutory wording (*Uber BV and ors v Aslam and ors* 2021 ICR 657).

40. In *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1967] 2 QB 497:

> "A contract of service exists if these three conditions are fulfilled.
> (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.
> (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.
> (iii) The other provisions of the contract are consistent with its being a contract of service…'

> As to (ii). Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time and the place where it shall be done. All these aspects of control must be considered in whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted…"

41. Cotswold *Developments Construction Ltd v Williams [2006] IRLR 81*, citing *Stephenson v Delphi Diesel Systems Ltd [2003] ICR 471*:

> [para 23]: "'11. The significance of mutuality is that it determines whether there is a contract in existence at all. The significance of control is that it determines whether, if there is a contract in place, it can properly be classified as a contract of service, rather than some other kind of contract.'"

42. The EAT suggested the following questions should be considered when the case was remitted to the employment tribunal (para. 61):

(a) Was there one contract of a succession of shorter assignments?
(b) If one contract, is it the natural inference from the facts that the claimant agreed to undertake some minimum, or at least some reasonable, amount of work for [the company] in return for being given that work, or pay?
(c) If so, was there such control as to make it a contract of employment so as to give rise to rights of unfair dismissal, as well as a right to holiday pay?
(d) If there was insufficient control, or any other factor, negating employment, whether the claimant was nonetheless obliged to do some minimum (or reasonable) amount of work personally? [thereby having the status of worker]

43. In *Secretary of State for Business, Enterprise and Regulatory Reform v Neufeld* [2009] ICR 1183, the Court of Appeal gave guidance as to whether a director/shareholder would also satisfy the legal requirements to also have the status of employee – see paragraphs 80-90, endorsing the factors set out by Elias J in *Clark v Clark Construction* [2008] ICR 635. These can be summarised as follows: (1) There is no reason in principle why someone who is a shareholder and director of a company cannot also be an employee, even if the person has total control over the company; (2) Whether the shareholder/director is an employee is a question of fact for the tribunal; (3) In cases where matters have been dealt with informally it may be a difficult question as to whether the correct inference is that the shareholder/director was truly an employee; In considering the issue it will be necessary in particular to consider how the parties have conducted themselves, what they have actually done and how they have been paid. Payment of a salary points towards employment; merely payment by way of directors fees points away from it; (5) Where the conduct of the parties is inconsistent with the existence of a contract of employment or is in some areas not governed by such a contract, that will be an important factor pointing away from a finding that the shareholder/director is an employee; (6) It follows that the lack of any written employment contract or other record thereof, is likely to be an important consideration but tribunals should not seize too readily on the absence of a written agreement as justifying the rejection of the claim; (7) The fact that the shareholder/director has control of the

company or that his personal investment in it will stand to prosper with the company will be "part of the backdrop" but will not ordinarily be relevant to the issue and can and should therefore be ignored (see: Neufeld para [86]).

Constructive unfair dismissal

44. Where an employee has resigned and claims constructive unfair dismissal, the Tribunal first needs to decide whether the respondent was in fundamental breach of contract by the point of the resignation. Where, as here, the claimant relies on a course of conduct arguing that the events cumulatively amount to a fundamental breach of contract, the Tribunal must decide whether the conduct was calculated to or was likely to destroy or seriously damage the relationship of trust and confidence. The breach must be significant and go to the root of the contract of employment, or it must show that the employer no longer intends to be bound by one or more of the essential terms of the contract (*Western Excavating (ECC) Limited v Sharp* [1978] QB 761).

45. The Tribunal must then decide whether by words or conduct the claimant had so acted as to waive the breach and affirm the continued existence of the employment contract. If not, then the Tribunal must ask whether the resignation formed at least some part of the reason for the resignation.

Status of worker

46. Section 230(3) ERA sets out the definition of "worker":

> (3) In this Act "worker" (except in the phrases "shop worker" and "betting worker") means an individual who has entered into or works under (or, where the employment has ceased, worked under)—
> (a) a contract of employment, or
> (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual; and any reference to a worker's contract shall be construed accordingly.

Holiday pay

47. Both employees and workers have the right to a statutory minimum amount of paid holiday. This is a total of 28 days a year, including the statutory bank holidays. If there is accrued but untaken holiday on the termination of their employment, they are entitled to receive a payment for this accrued holiday. The payment is equal to their daily pay for the days that have accrued.

Failure to provide a statement of employment particulars

48. All employees and workers have the right to receive a statement of employment particulars. If this has not been done by the point when the claim form is issued, and if at least part of the claim succeeds, then the claimant is entitled to be awarded a sum to reflect this failure. The sum must be two weeks pay and may be four weeks pay if the Tribunal considers this appropriate.

Conclusions

The Claimant's status

49. It is agreed between the parties that the role performed by the Claimant remained the same throughout, notwithstanding her becoming a shareholder after the first few months and becoming a Director in 2015.

50. The issue is whether these additional roles changed the status of her original role. As a matter of law, a person can be an employee or worker and also a shareholder at the same time. Many businesses have employee shareholder schemes. A shareholder is someone with a financial stake in the business. At the same time as the Claimant became a shareholder, Jane Goldthorp also became a shareholder in the business. She has never had any role in relation to the operation of the business. Whatever status the Claimant had in relation to the operation of the business was not altered by her additional status as a shareholder.

51. As a matter of law, a person can be a statutory Director and an employee or worker at the same time. There is no presumption that either status is inconsistent with being a statutory Director. There was no evidence that there was any discussion when the Claimant was appointed a Director that her prior status would alter at that point. Nothing changed in relation to how she carried out her role. Although her remuneration fell so that it mirrored what was being paid to the other Directors, that is a factor which does tend to indicate that her role was intended to mirror the role of the other Directors. That, in itself, does not indicate that her status changed, still less that the status of the other Directors was not that of employees.

52. So I must weigh up all the factors to decide whether the Claimant was subject to the Respondent's control in a sufficient degree to make her an employee and the Respondent her employer, and consider whether the other provisions of the contract are consistent with it being a contract of service. Considering the following factors, I have reached the conclusion that the Claimant's status was that of an employee:

    a. The Respondent provided the Claimant with equipment, namely a laptop and a mobile phone. The Respondent provided her with the Sage Accounting Software needed to carry out her responsibilities. She also used the Respondent's broadband when working from the Respondent's offices and the work email address on behalf of the Respondent.

b. The Respondent provided the Claimant with training in how to use the Sage Accounting Software. This training was provided by an employee of the Respondent and therefore was at the Respondent's expense.

c. The Respondent expected the Claimant to work in the office throughout the period she carried out the finance tasks until 2019, when she was permitted to work from home on medical grounds.

d. At a later point, the Respondent complained about the Claimant working from home and requested that she should have been working in the office.

e. In 2023, the Respondent denied the Claimant access to the Sage accounting software she needed to carry out her role. Whilst it provided her with access to the accounts, the access was only provided on a Read Only basis.

f. Up until 2015, the Claimant was paid what was described as a 'salary' and tax and national insurance were deducted at source in the same way as any other employee.

g. The Claimant was initially expected to work 16 hours a week. This expectation did not change at any point. At least initially, when she worked additional hours, she received additional pay.

h. It was never suggested that the Claimant was entitled to substitute someone else to carry out the work she was required to perform for the Respondent.

i. The Claimant was not in business on her own account, marketing her services to other companies and providing services to the Respondent as a client. It was never suggested that she could have offered her services to others. She did not have the equipment to do so, given that the laptop, the mobile phone and Sage accounting software all belonged to the Respondent.

53. Whilst it is true that the Claimant had some flexibility about when she carried out her work, that flexibility is not inconsistent with employment status. She was still expected to carry out her tasks on Tuesdays, Wednesdays and Thursdays. Furthermore, the fact that the Claimant's sister (who was engaged as a consultant to provide employment contracts) did not prepare a contract of employment for the Claimant or for other directors is irrelevant. The issue of employment status is a matter of law to be determined on a review of all the relevant facts. It is not a matter which is influenced by the views of third parties.

54. Having found that the Claimant was an employee, it is not necessary for me to go on to consider whether the Claimant was a worker.

Constructive dismissal

55. I have concluded that the Claimant was constructively dismissed. This is because there was a fundamental breach of her employment contract. She had not acted so as to waive her entitlement to rely on that breach by the time she came to resign. Her resignation was at least in part in response to the fundamental breach of her employment contract.

56. I deal with each of the alleged conduct said to be, individually or cumulatively, a breach of the implied term of mutual trust and confidence, and therefore a fundamental breach of the employment contract:

    a. Remove responsibility for invoicing the Claimant without explanation. This responsibility was removed from the Claimant in February or March 2023 when the Claimant was denied access to the Sage Accounting Software. At the time, the Respondent changed the password to prevent her from using this software. I have found that the emails purporting to explain the reason for this were not received until 27 May 2023. There was therefore a delay of two or three months in providing an explanation for this.

    b. Deducting wages unlawfully from 18 April 2023. I do not find that there was an unauthorised deduction of wages in April 2023. The Claimant was paid the same gross amount. The net amount was lower than the previous month because a new tax year had started; and the Claimant's tax code had changed. However, it is agreed that the Claimant was not paid her monthly salary during May, June, July and August 2023. In each of those months, she received nothing. I do not agree with the Respondent's submission that this was because she was not ready willing and able to work. As is clear from the letter dated 25 May 2023, the Claimant was not being paid because "we can no longer afford to pay you whilst we are paying an [independent accountant] to conduct your job" as a result of omissions that had occurred in the finances. Therefore, this was an unauthorised deduction of wages.

    c. Fail to follow an ACAS compliant disciplinary process. It is clear from the language used in their letter dated 25 May 2023, that the Respondent regarded her as guilty of misconduct, even though there had not been any disciplinary process. It referred to her actions as "repetitive, detrimental, illegal and immoral".

    d. Fail to follow an ACAS compliant grievance process. The letters dated 14 April 2023, 10th July 2023 and 1 August 2023 were not formal grievances. At most they amounted to informal grievances. The ACAS Code encourages employer and employee to try to resolve complaints informally before formalising a grievance. When the Claimant considered that her attempts to resolve the matters she was raising informally were unsuccessful, she chose to formalise them by raising a formal grievance on 8 August 2023. At that stage, she was entitled to have these matters investigated and to discuss

them at a grievance hearing. No attempt was made to invite her to a grievance hearing. Instead, she was told that her grievance was rejected.

57. The cumulative effect of these matters that the Claimant has established was to destroy or seriously damage the relationship of trust and confidence. It was therefore a fundamental breach of contract.

58. There was also an express and separate breach of contract in each of the months when the Claimant should had been paid and was not paid. This would have been towards the end of May, June, July and August 2023. This failure to pay was a further fundamental breach of contract.

59. The closest incidents to the date of the resignation which either were or were part of a fundamental breach of contract were the written response on 16 August 2023, less than three weeks before the date of the resignation letter, and the failure to pay the salary for the month of August 2023. As a result, there was no substantial delay before the decision to resign. Furthermore, the Claimant did not do anything during that period to indicate that she was waiving any breaches and would be willing to continue to work for the Respondent notwithstanding the way she had been treated.

60. I accept that the reasons set out in the resignation email were genuine reasons that had prompted her resignation. Thus, at least part of the reason for the resignation was that the Respondent was in fundamental breach of the employment contract. I do not accept that the resignation decision was made as a result of the breakdown in her relationship with her former husband. She had continued working despite their divorce in 2019. Nor do I accept that she resigned on grounds of ill health. Although she had had a sick certificate since 22 August (a period of about 14 days), there is no evidence to suggest that this deterioration in her health led to a change in her attitude towards her role at the Respondent.

61. Therefore, the Claimant was constructively dismissed. I do not accept that this dismissal was a fair dismissal. If the Respondent regarded her as guilty of gross misconduct, then it ought to have followed a fair disciplinary process.

Wrongful dismissal

62. The parties agree that the Claimant's notice period would have been 12 weeks, given that if an employee, she would have been employed for more than 12 years. As a result, she would be entitled to receive twelve weeks' notice of dismissal, unless she had committed a fundamental breach of her employment contract entitling the Respondent to dismiss her without notice.

63. The Respondent argues that there was no entitlement to notice pay because she was guilty of gross misconduct in six respects listed in the Amended List of Issues prepared at the start of the hearing. These respects are wide ranging. The way in which this issue has arisen needs to be noted. When the Respondent prepared its

grounds of resistance, it denied that the Claimant was entitled to notice pay (paragraph 42). It did not explain the basis of the denial. In particular, it did not allege that there had been a fundamental breach of contract by the Claimant or provide any particulars of these breaches. Clarification of sorts was provided only in the Respondent's witness statement. The points were further clarified at the start of the Final Hearing.

64. I did not prevent the Respondent from raising these points. But in so doing, I noted in the course of the evidence that I was not in a position to adjudicate on complex matters of tax and accountancy on the very limited evidence available. Furthermore, the Claimant had not been given proper notice of the precise points relied upon; and therefore had not been given the opportunity to put in relevant evidence.

65. The onus is on the Respondent to prove that the matters relied upon constitute a fundamental breach of contract. Specifically, apart from three or four examples included in the bundle, I cannot determine whether there was a failure to update customer statements correctly; a failure to send customer invoices; or a failure to keep up with rebate payments. Both the Claimant and Mr Goldthorp appear to have had communications with HMRC about the appropriate level of payments. It appears at one point that Mr Goldthorp agreed to reduce the payments to be made to the Revenue. It is unclear whether this had an effect on the level of any penalty. In the same way, whilst it is clear that there was the threat of winding up proceedings, I cannot determine whether the failure to make all tax payments was specifically the Claimant's fault or the result of the same cashflow difficulties that had apparently prevented the Claimant from being paid from May 2023 onwards.

66. It is clear that the Claimant made a dividend payment in April 2023. However, I have found she was not sent the written communications instructing her not to do this because of the amount apparently owed by shareholders to the Respondent.

67. As to whether she declined to meet with the other shareholders, a failure to meet would have been an action taken by her in her role as a shareholder, not as an employee. Therefore, this could not be a basis for a finding of breach of contract in any event.

68. In all the circumstances, I do not accept that the Respondent has established that it was entitled to dismiss the Claimant without notice. The Claimant is entitled to be paid the notice pay she would have received had she not been dismissed.

Statement of employment particulars

69. There was a failure to provide the Claimant with a statement of employment particulars. Under Section 38 Employment Act 2002, where this is the case, there is an entitlement to either 2 or 4 weeks' pay. The Tribunal must award 2 weeks' pay and if it considers it just and equitable to do so, may award four weeks' pay.

70. I consider that it would be just and equitable to award two weeks' pay. Although the Claimant has never had a statement of employment particulars, she did have the opportunity to have an employment contract provided for her when she took advice from her sister in relation to the lack of employment contracts at the Respondent. For whatever reason, she decided she did not want or need an employment contract.

Holiday pay

71. As an employee, the Claimant is entitled to be paid her accrued but untaken holiday as at the date of dismissal. I find that the Claimant had not accrued any untaken holiday by the date of dismissal. In each calendar year, she would have accrued the pro rata equivalent, given her working hours, for 28 days holiday, including Bank Holidays. This will be less than 28 days. She has not proved that she has not taken her full holiday entitlement during either of the last two years of her employment. As a result, her holiday pay claim fails.

Unauthorised deduction from wages

72. For the reasons given above, there was an unauthorised deduction from wages over the period from 1 May 2023 until 5 September 2023. The Claimant is entitled to be paid the salary she should have received over this period.

ACAS Code

73. There was a failure to follow the ACAS Code when the Claimant raised a grievance on 8 August 2023. Whilst there was a written outcome to the grievance, there was no grievance hearing or any investigation other than the outcome letter. That grievance outcome letter did not offer the Claimant the right to appeal. As a result, it would be appropriate to increase all awards by 20% to reflect the extent of the failure to follow the ACAS Code.

Remaining issues

74. The remaining issues to consider by way of remedy are:

    a. What sum should be paid to the Claimant in respect of her notice period? This may depend on whether the Respondent would have been willing to offer her work during this period, and if so, her fitness to do the work.

    b. What sum should the Claimant receive as compensation for unfair dismissal?

        i. Basic award
        ii. Compensatory Award
        iii. Loss of statutory rights

c. What is two week's pay for failure to provide a statement of employment particulars?

75. A remedy hearing via CVP will be listed with a time estimate of 1 day to decide the remedy due to the Claimant. The parties should co-operate to exchange any further documents relevant to remedy, prepare a remedy bundle, and agree a date for exchange of any witness statements in relation to remedy in sufficient time before the date set for the Remedy Hearing. If the parties are unable to agree directions they are to contact the Tribunal at the earliest opportunity asking that the Tribunal issue directions, setting out the directions that each party is proposing.

Employment Judge Gardiner
Dated: 17 April 2024