EMPLOYMENT TRIBUNALS

Claimant: Ms L Crossman

Respondent: Walsh Solicitors

HELD AT: Manchester **ON:** 2, 3 & 4 April 2024 (and in chambers 21 June 2024)

BEFORE: Employment Judge Johnson

MEMBERS: Ms C Nield
Ms T Cole

REPRESENTATION:

Claimant: Mr L Bronze (counsel)
Respondent: Mr S Roberts (counsel)

JUDGMENT

The judgment of the Tribunal is that:

(1) The unlawful deductions complaints raised within paragraph IV (i) and (ii) of the grounds of complaint are out of time contrary to section 23 Employment Rights Act 1996 and are dismissed.

(2) The claimant did assert a statutory right on 2 March 2021 in accordance with section 104 Employment Rights Act 1996 by informing Ms Walsh that she had not been paid overtime and holiday pay.

(3) However, this was not the reason or principal reason for the claimant's dismissal. Accordingly, the complaint of unfair dismissal by reason of asserting a statutory right is not well founded and is dismissed.

(4) The claimant was unfairly dismissed which means that the complaint of ordinary unfair dismissal under Part X Employment Rights Act 1996 is successful.

(5) The compensatory award for unfair dismissal will be subject to an uplift of 15% in accordance with section 124A Employment Rights Act 1996.

(6) The compensatory award for unfair dismissal will be further subject to a reduction of 10% reflecting the claimant's contributory conduct in accordance with section 123(6) Employment Rights Act 1996.

(7) The complaint of wrongful dismissal is well founded which means that it is successful.

(8) The complaint of unlawful deduction from wages contrary to section 13 Employment Rights Act 1996 is well founded and succeeds in relation to paragraph IV (iii) of the grounds of complaint in the sum of £194.70, which related to a deduction involving an alleged overpayment on 31 May 2021.

(9) The complaint that the claimant was not permitted to be accompanied in accordance with section 10(3) Employment Relations Act 1999 is well founded which means that it is successful.

(10) Unless the parties reach an agreement as to remedy, the case will proceed to a remedy hearing where the quantification of loss will be determined. A separate Notice of Remedy Hearing will be sent to the parties in due course.

REASONS

Introduction

1. These proceedings arose from the claimant's employment with the respondent as a solicitor specialising in criminal litigation work from 31 October 2016 until her dismissal 29 April 2021.

2. The case is primarily concerned with the respondent's decision to dismiss the claimant in connection with alleged misconduct while she was working her notice following her resignation. It involves questions relating to ownership of a Facebook account, the right to vary account details and matters relating to data of those whom the claimant has represented and clients and potential clients of the respondent.

3. The claimant presented a claim to the Tribunal on 6 August 2021, following a period of early conciliation with ACAS from 4 June to 14 July 2021. She identified complaints relating to unfair dismissal, notice pay, holiday pay, arrears of pay and other payments. The grounds of complaint explained that there was also a complaint of automatic unfair dismissal arising from the assertion of a statutory right not to have wages deducted and a failure to provide her with the right to be accompanied contrary to section 10 Employment Relations Act 1999, (ERelA).

4. The response was presented on 7 September 2021 and accompanied by a grounds of resistance. The claim was resisted. Jurisdiction was raised as a potential issue with any allegation taking place before 5 March 2021 being out of time in accordance with the relevant legislative provision for each complaint. The dismissal was asserted as being fair being one related to the potentially fair reason of conduct. The other complaints were also disputed.

Issues

5. The parties had a agreed a list of issues at the PHCM before Employment Judge (EJ) Ross on 26 April 2022. They had not been varied since that date although on day 1 of the final hearing, Mr Roberts confirmed that the respondent conceded that the claimant had not been overpaid in relation to paragraph IV(iii) of the grounds of complaint and judgment could be entered in relation to the wages complaint for £194.70.

6. The list of issues was relatively concise and could be found within the revised final hearing bundle at pages (pp) 47-8.

Evidence used

7. The claimant gave evidence in support of her case.

8. She also wished to rely upon the evidence of her former colleague Miss Farooq who had supported her during the disciplinary process and appeal. She had been reluctant to give evidence and it is understood that when her employment ended with the respondent, she signed an undertaking not to become involved in litigation. However, sensibly, Mr Roberts had explained to the respondent before the hearing began that it would be contrary to public policy to rely upon such an agreement regarding the giving of relevant evidence in the Tribunal proceedings. Miss Farooq was also subject to a witness order made by Judge Dunlop on 25 March 2024.

9. The respondent relied upon the following witnesses and in this order:

    a) Mr Basharat Ami Khan (former partner of the respondent business at the time of the claimant's dismissal).

    b) Mr Terence Walsh (owner and director of the respondent company).

    c) Andrew Brown (dismissal appeal officer).

    d) Rumah Hama (note taker at the disciplinary hearings).

10. Mr Brown, Ms Hama and Mr Khan's statements were served on the claimant a week following the original date for exchange of witness evidence, (29 January as opposed to 22 January 2024). Although Mr Bronze had been instructed to object to the inclusion of this evidence in support of the respondent's case, the Tribunal concluded that there was no little prejudice suffered by the claimant because of this delayed service. Any prejudice could have been remedied by the claimant providing supplemental witness evidence

from either herself or somebody else. She had decided not to provide any further evidence and Mr Bronze was reminded that he could cross examine the respondent's witnesses about the way their late produced statements were prepared. Accordingly, it was in the interests of justice and in accordance with the overriding objective to allow these statements to be used as part of the respondent's case.

11. An agreed final hearing bundle had been prepared including the proceedings, documents, and correspondence. The respondent who had been responsible for completing the bundle decided to repaginate the bundle shortly before the final hearing and this required renumbering of page references to the bundle within the claimant's and Mr Walsh's witness statements. This was helpfully carried out with the assistance of Mr Bronze.

12. Additional bundle provided by Mr Bronze on behalf of the claimant made available on day 1. It contained information relating to Ms Farooq and WhatsApp messages, SMS text message, minutes and a letter. Although Mr Roberts disputed the relevance of all of the documents, he did not object to their inclusion.

13. Additional documents of SMS messages between the claimant and Mr Walsh on 19 June and 26 June 2019 were disclosed by the claimant on day 2 although their production had been warned the day before and where permitted to be added to the documents before the Tribunal.

Findings of fact

14. The Tribunal has made findings of fact based upon what it believes was more likely than not to have happened and applying the evidential test of balance of probabilities. The Tribunal has considered all of the evidence but has only referred within these findings of fact to those matters which are relevant to the determination of the list of issues.

15. The respondent (Walsh solicitors) is a solicitors practice and a limited company. The managing director and effective owner of the business is Mr Walsh. He had been a solicitor for many years, but in late 2015 he established the respondent business which operates in the Stockport area. He had the intention of making the business a multi disciplinary practice which would offer the services a member of the public would typically use including civil litigation, family, and criminal law.

16. The claimant (Ms Crossman), is a solicitor of more than 10 years' experience, having qualified in 2008. She explained that she had worked at 3 different law firms before she began working with Walsh solicitors in October 2016. Her specialist area of work is criminal law and over the years she had inevitably developed (as she put it), *'a large client base'.*

17. Mr Walsh explained that he knew Ms Crossman from attending local court hearings and that she often acted as a duty solicitor. This meant she would have access to many potential clients and he convincingly explained that a

solicitor's firm with a criminal law team would like to have *'…any many duty solicitors as possible.'*

18. We accept that there is real problem within the legal profession of the age profile of solicitors practising criminal legal work and that it has become less attractive due to limited legal aid funding being available. Understandably, this has made this area of work less attractive to younger solicitors and Ms Crossman would have been a welcome addition to Walsh solicitors.

Contract of employment

19. Ms Crossman signed a contract of employment with Walsh solicitors on 31 October 2016. It was dated 1 November 2016 and clause 1 confirmed the start date as being 1 November 2016, (p101). Her job title was Duty Solicitor at the Stockport Office. However, clause 3 also explained that *'You will act as Head of Criminal Law at Stockport'.*

20. Her job description in clause 4 was brief and essentially confirmed that her job title meant that she fulfilled the role of duty solicitor and headed the criminal law team in Stockport. The Tribunal were unsure as to whether the 'team' consisted solely of Ms Crossman or include other lawyers working for Walsh's Stockport office.

21. Clause 6 of the contract dealt with salary and when Ms Crossman began her employment with Walsh solicitors, she received £35,000 per year, payable monthly in arrears on the last day of each month. As she initially only worked 4 days per week, her salary was temporarily reduced to £28,000 per year until 1 April 2017, which was the date that the duty solicitor contract with the Legal Aid Agency commenced.

22. In relation to the duty work, Ms Crossman was expected to carry out these duties as part of her normal working week of 9am to 17:30pm Monday to Friday with no additional remuneration beyond normal salary being paid, (p102). This was understood to involve attending police stations when clients had been arrested. However, clause 6 goes on to explain that if Ms Crossman undertook duty work outside of normal working hours after 18:00pm on working days and at any time during weekends and holidays, she would receive additional payments. The contract explained that she would receive 40% for police stations, which was 40% of the fee paid by the Legal Aid Agency for that activity, (p102). This would mean that Walsh solicitors would receive the balance of 60%.

23. Clause 9 of the contract required Ms Crossman not to take any other work on during working hours, (p102). Importantly, there was a non-solicitation provision in clause 16, which provided an agreement that Ms Crossman would not:

    'for the period of twelve months after ceasing to be employed under this Agreement without prior written consent of the Director [Mr Walsh] contact or deal with any clients that has ever been a client of the firm, (p104).

Mr Walsh confirmed that this was a commonly used clause in contracts of employment for solicitors. Ms Crossman described that she:

'…agreed, very reluctantly. I saw it and was concerned about it. My husband said it was 'not worth the paper it was written on'.

She said that Mr Walsh said the same thing to her when she raised this clause with him following her receipt of the draft contract.

24. Mr Walsh in cross examination confirmed that clients could go to whichever solicitor they wanted to. He added that insofar as it is relevant, clause 16 was routinely included within contracts of employment for solicitors, but that neither party expected that it would be deployed following a solicitor's resignation. However, the employer's unwillingness to delete such a clause suggests a belief that it remain an important part of any contract of employment.

25. Finally, clause 17 provided terms for Notice of Termination which required 3 months written notice of termination from Ms Crossman. In contrast, Walsh solicitors only had to provide 1 months written notice of termination to her.

Facebook accounts

26. Social media has become an increasingly important marketing and client communication tool for legal practices. This is especially the case, for those representing individual members of the public. Social media contact allows them to be easily informed of those solicitors who provide services for particular areas of law.

27. Although the name of a law firm might initially be important to a client, once they have used a particular solicitor, it will be that solicitor whom they ask for and wish to seek out, should further legal advice and assistance be required. This is especially the case in criminal work, where a person might require assistance on numerous occasions.

28. Social media was not officially mentioned within the contract of employment, although the requirements to work exclusively for Walsh solicitors during working hours, meant that any independent work by Ms Crossman during her employment should not be inconsistent with her duties to her employer.

29. Ms Crossman had an impressive understanding of the power of social media to market legal services. Upon starting work with Walsh Solicitors she asked if she could set up a Facebook page so that her former clients who used her with previous employers could see that she had moved firms. This would be beneficial to her in retaining this client base and to Walsh solicitor's in her bringing new clients to the business.

30. There was some dispute over the origins of Ms Crossman's Facebook account while at Walsh solicitors. She says that she used her personal Facebook account which was titled *'Lucy Crossman'* and which included a

profile picture of her face. During her employment, this remained a personal account with none of her colleagues at Walsh solicitors being able to post on it.

31. Mr Walsh argued that while Walsh Solicitors already had their own Facebook page, this related to the firm's Haslingden office and recalled Ms Crossman suggesting that a separate Stockport page be set up. He believed that he had asked her to set up a Facebook account on behalf of the firm and denied that the account was her property. This was supported by Mr Khan. However, on balance we preferred Ms Crossman's evidence about her use of the platform. Walsh solicitors had limited experience of using Facebook. They had previously established a site but we were not shown evidence to suggest that they really utilised in the way that Ms Crossman used her account with her posting frequent updates. Many businesses attempt to embrace new developments in social media, but this field is only productive when frequent posts are made to refresh the account and to ensure they maintain a good following and profile which affects how easily they accessed amongst the many accounts operating in the legal field.

32. To have a business account on Facebook, we accepted Ms Crossman's evidence that a person had to firstly have a personal account with the platform, hence her use of the Lucy Crossman Facebook page. However, this allowed her to establish a business page titled '*Lucy Crossman Solicitor'* and which could be accessed through the business account. Both the personal and business accounts used the same profile picture, but on 23 November 2016, she posted on her personal account, *'updated her cover photo',* and included the logo of Walsh solicitors, (p263). Her profile picture on an undated screenshot of her Lucy Crossman site, stated that she was *'Solicitor/Head of Crime at Walsh Solicitors.,* (p261).

33. Mr Walsh was not involved in Ms Crossman's posts and his knowledge of what she was posting appeared to be restricted to his own search against her profile like any member of the public could do. Mr Walsh did not really exert or attempt to exert any control over the site and was acquiescent to this form of marketing while Ms Crossman worked for his firm.

34. Ms Crossman may have had two or more Facebook accounts at the relevant time, but they all derived from the same source. While they would identify her current employer, they included a mixture of business and personal posts which appeared to be easily accessed. We concluded that ultimately, the real brand here was *Lucy Crossman the solicitor,* as opposed to *Lucy Crossman, a solicitor working for a particular firm or organisation.*

35. Nonetheless, this did blur the personal and the professional sides of Ms Crossman's life and on balance of probabilities, this did mean that Walsh solicitors clients would or at least could have a relationship with her on this platform. Inevitably, this had the potential for confusions to arise between the parties to the proceedings as to its ultimate control.

<u>Events leading to the claimant's resignation</u>

36. Ms Crossman seemed to have a reasonably happy working relationship with her employer until the beginning of 2021, when she believed she had been underpaid holiday pay entitlement receiving 1 day rather than 5 day's pay.

37. She then identified an issue where she was refused an out of hours duty payment which her employer believed started and finished before 6pm. However, she argued that as her hours of work finished at 5:15pm, she was working out of hours from that time until 6pm. The Tribunal finds on balance of probabilities that this is contrary to what she agreed in her contract of employment which provided for additional payments to be triggered after 6pm, (or 18:00 hours).

38. These two incidents resulted in Ms Crossman having an argument with Mr Walsh and ultimately this then led to her decision to resign.

39. Ms Crossman firstly enquired with the *Duty Solicitor Queries* email address operated by the Legal Aid Agency (LAA), on 30 March 2021 and the notice required to be removed from her firm's Duty rota with the LAA. The following day the LAA confirmed that under their contract with Walsh solicitors, if Ms Crossman resigned at that time, she would remain included on the Duty rota for a period up to and including 1 October 2021, (p120).

40. Ms Crossman resigned giving notice by email to Mr Walsh on 16 April 2021, confirmed her contractual notice period of 3 months and deducted accrued holiday entitlement asserting that her last day of employment would be 1 July 2021, (p127). She confirmed that her name would be removed from the next duty roll beginning in October 2021 in accordance with her enquiries with the LAA.

41. The Tribunal were not taken to any written acknowledgement from Walsh Solicitors, but Ms Crossman's WhatsApp communications with Ms Farooq confirmed that some sort of discussion had taken place and Mr Walsh was accepting of the resignation, (p130). Ms Crossman recorded in her message sent at 11:34 on 16 April 2021, that:

    'Not sure how I feel about the niceness. I don't trust it [followed by a laughing emoji].

    Then Tribunal found that this supported a concern that a lack of trust was developing on Ms Crossman's part concerning her employer.

42. Mr Walsh said that he understood the resignation was prompted by Ms Crossman wishing to work on a self-employed basis.

43. While working her notice, Ms Crossman received notification from Vodafone that her work phone number was going to be cut off from 26 April 2021. She said that when she raised this notification with Mr Walsh, he did not provide any reassurance. She decided on 23 April 2021 to change her Facebook profile to a new personal telephone number, (p131). Mr Walsh argued that this issue was not raised and had Ms Crossman done so, he would have resolved the matter.

44. The evidence was limited and contradictory. There was an absence of any supporting documents from Ms Crossman showing the message that she received from Vodafone in late April 2021 and limited oral evidence provided. On balance, the Tribunal does not accept that she was the victim of a deliberate act by her employer to limit her phone use. Indeed, Walsh solicitors had little to gain from such an action. Accordingly, on balance of probabilities, we concluded that preparing for her imminent exit from the business, Ms Crossman decided to establish a personal number to ensure business continuity of her personal brand.

45. We do accept however, that these actions had little impact upon her employer. During Ms Crossman's remaining time with Walsh solicitors, they continued to receive referrals and instructions from clients who had initially sought to contact Ms Crossman and she continued to refer them to the firm. Being without her own personal LAA contract, she could do little else.

46. However, her actions led to a disciplinary process being commenced.

Disciplinary Process

47. This process arose from Ms Crossman's decision change her contact details on the Lucy Crossman Facebook pages and the discovery by Mr Walsh on Sunday 25 April 2021. It was brought to his attention by a colleague who had been searching online against Ms Crossman's name.

48. His concern was that Ms Crossman's actions meant that she was beginning to operate on a self employed basis while working out her notice period and was doing so with the purpose of *'poaching'* Walsh solicitors' clients. He also expressed concern that there may be data protection issues in that personal data controlled by the firm would be held by a third party account over which they had no control.

49. He said that he raised his concerns with the ICO the next day. He also said that he instructed Ms Crossman to reinstate the previous contact details, but in response she swore at him. Ms Crossman denies swearing in the way described by Mr Walsh, but regardless of this dispute, she continued to operate Facebook using her new contact details and believed that she owned and controlled the administration of the Lucy Crossman Facebook sites.

50. Shortly afterwards, she was handed a letter signed by Walsh solicitors, written in the first person but not identifying the author, (pp136-7). She was warned that disciplinary action was being considered and that if so, she was at risk of summary dismissal. The allegations under investigation where as follows:

'When you commenced employment with Walsh Solicitor you were provided with a work email and work mobile telephone. As head of crime for the firm you managed a facebook page used to promote the criminal defence department. For the avoidance of doubt Walsh solicitors are the data controllers of the facebook page.'

It then went on to say the following:

'On or around Friday 23rd April you have altered this facebook page and removed Walsh Solicitors from the page. You have in addition altered the email address to a personal email from a works email address and and changed the mobile number to a none work mobile. Consequently, Walsh Solicitors no longer have any control.'

'Upon discovery of this action we have contacted the Information Commissions Officer who have confirmed that the facebook page falls within control of the data controller of Walsh Solicitors'

'The disciplinary will consider by your actions you have destroyed the trust and confidence between you and Walsh Solicitors that will result in your summary dismissal for gross misconduct. We note that this is your second data protection issue in the last 12 months'.

51. A disciplinary hearing was arranged for 27 April 2021 and Ms Crossman was informed that she could be accompanied.

52. A second letter was sent to Ms Crossman also on 26 April 2021 relating to the ICO discussion and seeking an undertaking from her that as Walsh solicitors did not authorise her taking data which they possessed, she had no details regarding the clients in her personal possession. (pp138-9).

53. Mr Walsh produced a copy of the ICO referral within the hearing bundle (pp311-4) and it appears to have been logged on 27 April 2021 as it referred to the suspension letter being given to Ms Crossman '

54. The disciplinary hearing took place on 27 April 2021. Ms Crossman said she had insufficient time to prepare and this is a fair observation to make given that she had been suspended the previous day and considering the complicated nature of the allegations made.

55. Present at the hearing were Mr Walsh, Mr Hanna as note taker, Ms Crossman and Ms Farooq as her representative/support. A copy of the respondent's note was eventually provided during the hearing, (pp316-7). Ms Crossman's response to the allegations was that once the Vodafone notice was received, she needed to ensure she remained contactable to clients and it was necessary to obtain her contact details to replace the work details which had been cancelled. Mr Walsh challenged the chronology provided by her, but Ms Crossman maintained her position. She was recorded in the note as expressing a concern that she would be asked to surrender her phone by her employer. What is telling from the interaction between the parties as recorded in the note, is that there was a mutual suspicion which had been existing for some time. This meant that they were trying to *second guess* what the other party was doing to maximise their position against the other.

56. Unfortunately, Mr Walsh appeared to be concentrating on *catching out* Ms Crossman and little time was spent in exploring the likely truth behind the

issue. This gave a clear inference that Mr Walsh had already made his mind up and was not interested in exploring how a misunderstanding may have arisen. In total the meeting was recorded in the respondent's note as lasting 10 minutes, which was surprisingly brief taking into account what was under discussion.

57. Ms Farooq was then asked to leave so that a separate meeting could take place concerning what was described in Ms Farooq's note as *'a separate issue'*. The argument advanced by Walsh solicitors is that this request was made because the disciplinary hearing had concluded. They said that the second meeting was not part of the disciplinary process. However, this was not supported by the note. Mr Walsh argued that the second meeting focused upon the question of data and the second letter (referred to above), which was sent on 26 April 2021 and sought an undertaking from Ms Walsh concerning her use of any personal data which they believed was controlled by Walsh solicitors.

58. This was a problematic way of dealing with things, especially considering the mistrust on both sides and the connections between the disciplinary matters and the data issues. The only way that Walsh solicitors could have fairly compartmentalised these two matters would have been to expressly identify the process before the meetings took place in writing and clearly stating that the second meeting was unrelated to the disciplinary process and information obtained there would not be used when considering the outcome of that process.

59. As it was, Ms Crossman was given far too little notice and the format of the afternoon's proceedings was not properly set out. Mr Walsh was a decision maker in both meetings and the Tribunal finds that he displayed a fixed belief as to Ms Crossman's wrongdoing without properly investigating the incident with an open mind. By failing to allow Ms Farooq to continue supporting Ms Crossman was unreasonable. Indeed, the way one meeting drifted into another, meant there was a serious risk of discussions taking place which might affect the outcome of the disciplinary proceedings.

60. The disciplinary outcome letter was sent on 28 April 2021 and explained over 2 ½ pages that Ms Crossman was dismissed for gross misconduct, and that her answers to the questions regarding change of contact details was *'inconsistent and implausible'.* Additionally, there were concerns regarding the breaches relating to GDPR which have been referred to the Solicitors Regulatory Authority (SRA). This is understood to relate to a missing USB stick which was found by member of the public on 3 July 2020. While briefly alluded to in the invitation letter to the disciplinary hearing and the dismissal letter, this older issue did not appear to be part of the disciplinary matter under investigation. Additionally, we were not provided with evidence that demonstrated it was the subject of a previous disciplinary warning under an earlier process.

61. The respondent did concede that there was no evidence that Ms Crossman had diverted clients away from Walsh solicitors. However, her unilateral changing of her contact details without discussing the matter with her

employer gave her control over referrals of clients. We do not therefore consider that her actions were consistent with the behaviour of a reasonable employee and it would serve to undermine some of the trust and confidence that Walsh solicitors could have in her, (pp144-6). Nonetheless, this is a matter which could have been ameliorated by the parties engaging a sensible discussion about the Facebook accounts and eliminating any misunderstandings that might have arisen. This failure was primarily the fault of the respondent as employer and a more considered approach before proceeding to a disciplinary hearing would have been a reasonable way to respond.

62. Ms Crossman was notified of her right of appeal. This was submitted in writing on 7 May 2021 and delivered by hand to DLS Solicitors in Alderley Edge. Mrs Shawcross at this firm was identified by Walsh solicitors as being the appeal hearing manager would hear this stage of the procedural process. Unfortunately, it turned out that she could not act because of personal circumstances and accordingly, another person outside of the respondent's practice was sought to fulfil this role, (p210-1).

63. The core of Ms Crossman's appeal was that the matters under investigation could not amount to gross misconduct and that the sanction of dismissal was in any event too severe. In she argued that the reference made to a previous GDPR breach involving a USB stick was irrelevant.

64. Mr Brown, who was appointed as the appeal manager in place of Mrs Shawcross had originally worked at Walsh solicitors but left in 2016. An appeal note of the hearing was available in the hearing bundle and Mr Brown gave evidence in support of the respondent's case, (pp323-329). His evidence was focused upon the question of the alleged data breach and he did not pay attention to the procedure of the disciplinary process or the issues raised by Ms Crossman.

65. The Tribunal found Mr Brown's oral evidence during the hearing to be not particularly helpful. Surprisingly, when asked by Mr Bronze that his role was to rubber stamp the original decision made by Mr Walsh, he conceded that this was the case. We had no reason to believe that he had misheard the question asked and concluded that he had misunderstood his role as an appeal hearing manager in accordance with the ACAS Code of Practice.

66. Mr Brown did not provide convincing evidence that he managed the appeal hearing in a way which effectively considered the grounds of appeal raised by Ms Crossman. Importantly he conceded that the limit of his 'remit' as appeal manager was to make a recommendation and he did not reach a decision which differed from that made at the original hearing. Ms Crossman's dismissal was therefore upheld.

67. Mr Brown communicated his decision in the appeal by sending a short letter to Ms Crossman dated 19 May 2021, confirmed the appeal was upheld, (p223). No explanation as to why he had upheld the dismissal was provided within this letter.

The Information Commissioner's Office (ICO) referral

68. Mr Walsh decided to notify the ICO asserting that Ms Crossman had been asked to manage Walsh's Facebook account since 2016 and following her giving notice of her resignation on 16 April 2021, she had *'put her personal email and personal phone number on the account.'* He added that Ms Crossman when asked by him, confirmed she did not know that she would need an ICO registration to hold a business account on Facebook, (pp65-7). He described Mrs Crossman whom he did not identify at this stage *'has gone rogue'.*

69. The SRA eventually resolved the referral concerning the USB stick on 21 July 2021 following Ms Crossman's dismissal, which concluded with an agreed outcome that she be rebuked, that the decision be published and she pay the costs of the investigation being £300. It was acknowledged that Ms Crossman admitted her conduct and showed insight and the error arose from her failure to realise the USB stick was lost as she was furloughed due to Covid at the time the device was found.

70. While this matter was relevant to an ICO referral, we did not accept on balance that it formed a material factor in the decision to dismiss and was referred to within the disciplinary process, simply to add weight to the allegations against her. The real issue was the change of facebook details while Ms Crossman was working her notice period.

Law

Submissions from the parties' counsel

71. The Tribunal has considered the statutory provisions applying to the issues in this case together with some well known caselaw as appropriate. Additionally, the Tribunal are grateful to both Mr Brown and Mr Bronze for their details submissions made as part of their closing arguments. Mr Bronze, referred to a significant number of cases and while they have not been repeated below, the Tribunal has considered them as part of its deliberations.

Automatically Unfair Dismissal (section 104 Employment Rights Act 1996)

Basic principles

72. This section identifies the following relevant provisions:

Section 104 Assertion of statutory right.

(1) An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee—

…

(b) alleged that the employer had infringed a right of his which is a relevant statutory right.

(2) It is immaterial for the purposes of subsection (1)—

(a) whether or not the employee has the right, or

(b) whether or not the right has been infringed;

but, for that subsection to apply, the claim to the right and that it has been infringed must be made in good faith.

(3) It is sufficient for subsection (1) to apply that the employee, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.

Unfair dismissal

Basic principles

73. Part X of the Employment Rights Act 1996 ('ERA') deals with complaints of unfair dismissal. Section 94 of the ERA confirms that an employee has a right not to be unfairly dismissed.

74. Under section 98(1) of the ERA, it is for the employer to show the reason for the dismissal (or if more than one the principal reason) and that it is either a reason falling within section 98(2) or for some other substantial reason of a kind such as to justify the dismissal of the employee holding the position he held. A reason relating to conduct is a potentially fair reason falling within section 98(2).

75. Under section 98(4) of the Employment Rights Act 1996, where the employer has shown the reason for the dismissal and that it is a potentially fair reason, the determination of the question whether the dismissal was fair or unfair 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 must be determined in accordance with equity and substantial merits of the case.

76. When determining the fairness of conduct dismissals, according to the Employment Appeal Tribunal in *British Home Stores v Burchell* 1980 ICR 303, the Tribunal must consider a threefold test:

a. The employer must show that he believed the employee was guilty of misconduct;

b. The Tribunal must be satisfied that he had in his mind reasonable grounds upon which to sustain that belief; and

c. The Tribunal must be satisfied that at the stage at which the employer formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

77. However, it is not for the Tribunal to substitute its own decision as to the reasonableness of the investigation. In *Sainsburys Supermarkets v Hitt* [2003] IRLR 23 the Court of Appeal ruled that the relevant question is whether the investigation fell within the range of reasonable responses that a reasonable employer might have adopted.

78. The requirement for procedural fairness is an integral part of the fairness test under section 98(4) of the Employment Rights Act 1996. When determining the question of reasonableness, the Tribunal will have regard to the ACAS Code of Practice of 2015 on Disciplinary and Grievance Procedures. That Code sets out the basic requirements of fairness that will be applicable in most cases; it is intended to provide the standard of reasonable behaviour in most cases. Under section 207 of the Trade Union & Labour Relations (Consolidation) Act 1992, in any proceedings before an Employment Tribunal any Code of Practice issued by ACAS shall be admissible in evidence and any provision of the Code which appears to the Tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining that question.

79. In *Polkey v Dayton Services Ltd* [1988] ICR 142, it was stated that if an employer could reasonably have concluded that a proper procedure would be "utterly useless" or "futile", he might be acting reasonably in ignoring it.

80. In *Taylor v OCS Group Ltd* [2006] IRLR 613, the Court of Appeal stressed that the Tribunal's task under section 98(4) of the Employment Rights Act 1996 is not only to assess the fairness of the disciplinary process as a whole but also to consider the employer's reason for the dismissal as the two impact on each other. It stated that where an employee is dismissed for serious misconduct, a Tribunal might well decide that, notwithstanding some procedural imperfections, the employer acted reasonably in treating the reason as sufficient to dismiss the employee. Conversely, the Court considered that where the misconduct is of a less serious nature, so the decision to dismiss is near the borderline, the Tribunal might well conclude that a procedural deficiency had such impact that the employer did not act reasonably in dismissing the employee.

81. Indeed, defects in the original disciplinary hearing and pre-dismissal procedures can be remedied on appeal. It is not necessary for the appeal to be by way of a re-hearing rather than a review but the Tribunal must assess the disciplinary process as a whole and where procedural deficiencies occur at an early stage, the Tribunal should examine the subsequent appeal hearing, particularly it procedural fairness and thoroughness, and the open-mindedness of the decision maker; see *Taylor v OCS Group Ltd* [2006] IRLR 613 CA.

82. In respect of certain claims, such as unfair dismissal and breach of contract, Section 207A of the Trade Union & Labour Relations (Consolidation) Act 1992 provides that where an employer or employee has unreasonably failed to comply with the Code of Practice, it may, if it considers it just and equitable in

all the circumstances to do so, increase or reduce compensation awards by up to 25% (this does not apply to any Basic Award for Unfair Dismissal).

83. The *Polkey* principle established by the House of Lords is that if a dismissal is found unfair by reason of procedural defects then the fact that the employer would or might have dismissed the employee anyway goes to the question of remedy and compensation reduced to reflect that fact. Matters a Tribunal should consider when dealing with this principle are as follows:

    (b) what potentially fair reason for dismissal, if any, might emerge as a result of a proper investigation and disciplinary process. Was it conduct? Was it some other substantial reason, that is a loss of trust and confidence in the employee? Was it capability?

    (c) depending on the principal reason for any hypothetical future dismissal would dismissal for that reason be fair or unfair? Thus, if conduct is the reason, would or might the Respondent have reasonable grounds for their belief in such misconduct?

    (d) even if a potentially fair dismissal was available to the Respondent, would he in fact have dismissed the Appellant as opposed to imposing some lesser penalty, and if so, would that have ensured the Appellant's continued employment?

84. Section 122(2) of the Employment Rights Act 1996 provides that where the Tribunal finds that any conduct of a Claimant before the dismissal was such that it would be just and equitable to reduce the amount of the Basic Award, the Tribunal must reduce that amount accordingly.

85. Section 123(6) of the Employment Rights Act 1996 provides that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the Claimant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable.

Wrongful dismissal

86. The Employment Tribunals Extension of Jurisdiction Order 1994 provides that proceedings for breach of contract may be brought before a Tribunal in respect of a claim for damages or any other sum (other than a claim for personal injuries and other excluded claims) where the claim arises or is outstanding on the termination of the employee's employment.

87. A claim for notice pay is a claim for breach of contract; *Delaney v Staples* 1992 ICR 483 HL.

88. In *Neary v Dean of Westminster* [1999] IRLR 288, it was held that conduct amounting to gross misconduct justifying summary dismissal must so undermine the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment.

89. In cases of wrongful dismissal, it is necessary for the Respondent to prove that the Claimant had actually committed a repudiatory breach of contract. See: *Shaw v B & W Group Ltd* UKEAT/0583/11.

Failure to provide right to be accompanied

90. This case involves an allegation that the claimant was not permitted be accompanied at the hearing by a companion and which is a right protected by section 10(3) Employment Relations Act 1999, (ERelA).

91. This section provides the following:

Section 10 (ERelA) Right to be accompanied:

(1) This section applies where a worker—

(a) is required or invited by his employer to attend a disciplinary or grievance hearing, and
(b) reasonably requests to be accompanied at the hearing.

(2A) Where this section applies, the employer must permit the worker to be accompanied at the hearing by one companion who—

(a) is chosen by the worker; and
(b) is within subsection (3).

(2B) The employer must permit the worker's companion to—

(a) address the hearing in order to do any or all of the following—

(i) put the worker's case;
(ii) sum up that case;
(iii) respond on the worker's behalf to any view expressed at the hearing;

(b) confer with the worker during the hearing.

Section 13 (ERelA) Interpretation

…

(4) For the purposes of section 10 a disciplinary hearing is a hearing which could result in—

(a) the administration of a formal warning to a worker by his employer,

(b) the taking of some other action in respect of a worker by his employer, or

(c) the confirmation of a warning issued or some other action taken.

Unlawful deduction from wages

92. Section 13 of the Employment Rights Act 1996 ('ERA') provides that a worker has the right not to have their employer make an unauthorised deduction from their wages.

93. The exceptions are where a deduction is required or authorised by a statutory provision or a relevant provision of the worker's contract or where the worker has previously given in writing their agreement to the making of the deduction.

94. Section 14 ERA provides that section 13 does not apply where the deduction is made by the employer to reimburse an overpayment of wages.

Discussion

Out of time claim

95. This issue purely related to the question of whether Ms Crossman could rely upon any unlawful deductions from wages that arose prior to 5 March 2021, by applying the time limits provisions of section 23(2) ERA.

96. As was described in the introduction to the reasons of this judgment, the Tribunal were informed that judgment could be entered in relation to paragraph IV (iii) of the grounds of complaint in the sum of £194.70, which related to a deduction involving an alleged overpayment on 31 May 2021.

97. This case involved a claim where early conciliation began on 4 June 2021 and accordingly in accordance with section 23 ERA, any deductions which took place before 5 March 2021 is out of time unless it formed part of a series of deductions which ended on or after this date or where it was not reasonably practicable to do so.

98. The remaining complaints of unlawful deductions alleged in these proceedings relate to untaken holiday pay amounting to 4 days in the sum of £584.62 (paragraph IV (i)) and overtime wages owed for attendance at a Police Station amounting to £84.

99. Mr Roberts submitted that in reality those remaining deductions were made prior to the 5 March 2021 and were therefore out of time. Mr Bronze did not pursue this particular issue in any real detail, understandably focusing upon the more significant elements of the claimant's claim.

100. The Tribunal considered that the remaining complaints of unfair dismissal related to matters which, arose as single events in January 2021 for the holiday pay and February 2021 for the overtime wages and were therefore out of time. Any internal complaints raised about these payments by Ms Crossman took place no later than 2 March 2021. We did not hear any arguments that suggested it was not reasonably practicable for these complaints to be raised within Tribunal proceedings within the relevant time limit and therefore they cannot be allowed to proceed.

Automatic unfair dismissal – assertion of a statutory right

101. This allegation involved the question of whether Ms Crossman asserted a statutory right on 2 March 2021 by complaining to Mr Walsh that she had not been paid overtime and holiday pay.

102. Mr Roberts did accept that as there was no dispute that these complaints were made as alleged, they probably did amount to the assertion of a statutory right under section 104. The Tribunal agreed. Ms Crossman did raise these matters with Mr Walsh and they related to complaints involving pay which amounts to a statutory right under the ERA and working time legislation.

103. More importantly however, is the question of whether these actions resulted in their being the sole reason or a principal reason for Ms Crossman's subsequent dismissal by Walsh solicitors.

104. Mr Bronze asserted that the Tribunal should draw an inference that the dismissal was due to an *'inadmissible reason'* and this could include Ms Crossman's assertion of a statutory right. He reminded us that an employer is unlikely to admit that dismissal was for an inadmissible reason and that overt evidence would be made available during the hearing. Mr Roberts argued that these assertions that Ms Crossman's dismissal, '…*clearly had nothing to do with those matters'* as they involved minor complaints and which did not involve any real acrimony.

105. On balance, the Tribunal were not persuaded that the assertions (while protected section 104), played any role in the decision to dismiss Ms Crossman. Considering the evidence that we heard during the final hearing, the whole disciplinary process, while undoubtedly flawed, was solely provoked by concerns relating to the changes to Ms Crossman's contact details on Facebook while working her notice and not for any other reason.

Ordinary unfair dismissal

106. Mr Bronze understandably, referred the Tribunal to the *Burchell* test and which the Tribunal has identified within the Law section above.

Principal reason for dismissal

107. The first question that we must consider when determining a complaint of unfair dismissal is the identification of the principal reason applied by the respondent when deciding to dismiss Ms Crossman. In this case, the respondent relies upon her conduct and this can be a potentially fair reason under section 98(1) & (2) of the ERA.

108. Mr Bronze disputed that this could be the reason because Mr Walsh's identified reasons were muddled, especially as there was a disciplinary hearing and a separate data breach meeting. However, while we acknowledged that this case involved a dismissal arising from a problematic disciplinary process, the respondent genuinely believed that Ms Crossman was responsible for conduct which would justify a dismissal. However, this is a decision which is subject to scrutiny below and ultimately whether this was a decision that a reasonable dismissing officer could hold taking into account factors identified within *Burchell.*

Was the decision to dismiss fair?

109. Secondly, it is necessary to consider whether the decision to dismiss was fair by applying the provisions of section 98(4) ERA. Mr Roberts explained that this process arose from the discovery made during Ms Crossman by her employer, that she had changed contact details of her Facebook account which was clearly a Walsh solicitors business page and had previously had the firm's logo identified. He noted that Mr Walsh asked Ms Crossman upon this discovery, to remedy the position and it was only her refusal to agree and to use his words *'give any ground',* genuine concerns arose regarding her conduct towards her employer. Mr Bronze argued that the dismissal was *'substantively unfair as well as procedurally unfair'* and there was no misconduct on the part of Ms Crossman.

110. We therefore considered whether there was a reasonable investigation on the part of the respondent. Mr Roberts argued that the investigation was reasonable because what happened during the discovery of the Facebook changes and the subsequent meeting meant that no further investigation was required and he argued that neither Ms Crossman nor Mr Bronze has identified what further investigatory steps were required to maintain fairness.

111. Mr Bronze submitted that no steps were taken to investigate the allegations that Walsh solicitors had identified when inviting Ms Crossman to a disciplinary hearing. While some of the background facts may already have been known, he reminded the Tribunal that there is a minimum requirement for the investigatory process.

112. The Tribunal concluded that Mr Walsh failed to consider the *ACAS Guide: Discipline and Grievances at Work (2019)* and should have noted that

an informative section headed *'Investigating cases'* provides helpful guidance for employers considering disciplinary action. In particular:

'…the nature and extent of an investigation will depend upon upon the seriousness of the matter and the more serious it is then the more thorough the investigation should be'.

While Mr Walsh believed he had the facts available already, it was *his understanding* of the facts and while the Code confirms that it is not always necessary to hold an investigatory meeting, this involved serious allegations which not only could result in Ms Crossman's dismissal, but raise significant concerns about her professional standing and the trust and confidence that the respondent and others might have in her, including the ICO and SRA. Moreover, there was a danger that Mr Walsh had jumped to conclusions had an informal discussion with Ms Crossman and which was somewhat fraught and emotional. This was a case where the involvement of another member of staff could have enabled a swift, concise, effective and fair investigation to take place.

113. We did consider whether the investigation effectively took place at the disciplinary hearing, but it was handled poorly, Mr Walsh was too closely involved with the initial decision to commence disciplinary action and the meeting was too brief. The process was carried out too quickly taking into account the nature of the allegations, an investigation or at least a fair investigation was not carried out with the disciplinary hearing taking place the day after the notice of process and was approached with the dismissing officer already having made up his mind as to there being gross misconduct.

114. We then considered whether the dismissing officer had a genuine and reasonable belief? Mr Roberts submitted that this was clearly the case, when consideration was given to Mr Walsh's belief as the dismissing officer, that was genuinely and reasonably held based upon a complete loss of trust and confidence in Ms Crossman arising from her actions relating to Facebook.

115. Mr Bronze argued that Ms Crossman had always displayed honesty while working for Walsh solicitors and this was supported by the original referral to the SRA which Mr Walsh had made following the loss of the USB stick. He argued that Mr Walsh's previous behaviour suggested that he could not reasonably have believed that Ms Crossman had done anything wrong.

116. Our decision was that Mr Walsh as disciplinary hearing officer genuinely held a belief that Ms Crossman had carried out acts of misconduct and that these were gross in nature. However, we were unable to accept that these were reasonably held. As we have already noted, a degree of suspicion had developed between both sides during Ms Crossman's notice period and Mr Walsh appeared to see the worst in her behaviour concerning the Facebook changes and it stoked his fears about a solicitor secretly mobilising the firm's criminal clients to move with Ms Crossman when her employment ended.

117. While this might have been a genuine concern, it is unfortunate that no investigation was attempted so that questions could be asked so that Mr Walsh could be properly informed before making his decision. There were genuine concerns about trust and confidence and Ms Crossman was not behaving as transparently as she could, but to some extent this was prompted by previous matters that had arisen, including the ending of the Vodafone contract. Insight into these matters could have been obtained through a more measured process with a disciplinary investigation. We were unable to accept that the added issues relating to matters of data whether in relation to Facebook contact details or the USB stick were genuinely held and concluded that these were added to provide additional weight to the whole disciplinary process over and above the basic issues of trust and confidence.

118. Then, we needed to consider whether the decision to dismiss Ms Crossman was something which fell within the band of reasonable responses available to an employer relating to the conduct found to have taken place? Mr Roberts argued that it was appropriate to dismiss her. He emphasised that clients are important to a business and Ms Crossman had behaved in a way which was inconsistent with the relationship between the respondent and *their* clients. He noted that during his submissions that *'…the key problem is that the claimant thinks that they were her clients'.*

119. Not surprisingly, Mr Bronze disagreed and expressed concern that there was no evidence that Mr Walsh considered alternatives to dismissal and if so, why they were not realistic. The Tribunal agreed that dismissal was not within the range of reasonable responses based upon the information available to Mr Walsh. But even if an investigation had taken place, the background issues while a cause of concern, could not amount to misconduct which was sufficiently serious to justify a dismissal. We do not accept that any consideration was actually given to alternative sanctions but this is not surprising as the whole process was conducted with the aim of dismissing Ms Crossman. Moreover, the question of the USB stick was not adequately dealt with and created an additional confusion as when it had originally happened, there was no suggestion that this was really a concern for the respondent and it did not give rise to disciplinary action at the time it took place.

120. Moving on to the question of fair procedure, the Tribunal noted Mr Roberts' acknowledgement that the process was short, but long enough for Ms Crossman to obtain advice and long enough to get a colleague to support her. A lengthier process would not have made any difference, he argued and it was entirely proportionate and appropriate given the nature of the actions under investigation. He added that Ms Farooq was allowed to attend the disciplinary part of the hearing and appeal.

121. Mr Roberts also acknowledged that Mr Brown *'was not the best witness'* and was experienced with disciplinary hearings rather than appeals, but he reminded us that his decision was within the context of disciplinary process and not a court of law. Importantly, he said that Mr Walsh was not involved with the appeal and Mr Brown was left to deal with this part of the process without interference and arrived with an open mind and this was

apparent from the notes. Accordingly, Mr Roberts submitted that there was a fair process in the all the circumstances and the dismissal was fair.

122. Mr Bronze on the other hand, reminded the Tribunal that while the respondent was a small business with relatively few employees, the nature of the issues which were the subject of the disciplinary action and the potential consequences (as already discussed above), meant that a rigorous investigation should have taken place. This was certainly consistent with the ACAS Code and Mr Bronze was correct in asserting that the respondent should have explored the available evidence to consider whether there were explanations that could be given for Ms Crossman's behaviour which lessened or eliminated any issues of conduct.

123. An even handed approach was not adopted and this was particularly important considering the potential consequences which could have affected Ms Crossman's career.

124. There were real problems with the disciplinary hearing and while Ms Farooq was available for the disciplinary part of the hearing, this separation of the meeting into two with disciplinary and then data related matters was too artificial and involved the same chair considering both matters and not having sufficient safeguards in place to ensure genuine separation.

125. We did conclude that Mr Walsh did not question the process, dealt with it in an uncritical way and on balance we must find that he had made already his mind up about what he was going to decide. The disciplinary hearing played no role in the determination of the dismissal consequently.

126. Finally, while the appeal could have been an opportunity for previous errors to be corrected, Mr Brown unfortunately was not competent to act in the role of appeal hearing officer. To some extent, he has the Tribunal's sympathies as he appeared to be very much the 'understudy' and second choice for this role. He was someone who had not been involved previously with the case. But his evidence persuaded the Tribunal that he did not understand what his role should be, focused only on elements of the matters which led to the dismissal decision being reached and believed all he could do was make a recommendation. The Tribunal were not taken to a disciplinary procedure within the hearing bundle, but we were satisfied that there was no meaningful appeal.

127. Accordingly, we must conclude that there was not a fair procedure in all the circumstances and had the respondent taken the time to think matters through, they could have produced a much better process to ensure that whatever decision was reached, it was based upon a proper investigation and evaluation of Ms Crossman's behaviour.

128. Consequently, we are unable to accept that a fair procedure would have resulted in a dismissal and for the purposes of *Polkey* no percentage reduction is appropriate.

129. In terms of section 124A ERA, the Tribunal finds that there should be an uplift to the compensatory award of 15% because of the significant failure by the respondent to follow the relevant ACAS Code.

130. Finally, we also considered the question of contributory fault and did have some criticism for Ms Crossman, even if her actions should not have resulted in her dismissal. We did find that while the cancellation notice for Vodafone was a genuine concern, we were not satisfied that she fully explored a mutually agreed and transparent solution to her work phone and social media use with her employer before resorting to the drastic action that she took regarding her contact details. As we have already mentioned, this was not helped by her suspicion that she was being sabotaged by her employer and as evidenced by contemporaneous social media messages once she had given her notice of resignation.

131. While this might be the case however, any misconduct was relatively minor and certainly not gross. We have therefore determined that there should be a modest reduction for contributory fault and a deduction to the compensatory award of 10% is determined in accordance with section 123(6) ERA.

Wrongful dismissal/breach of contract

132. Mr Roberts in his submissions said that Ms Crossman was responsible for acts of gross misconduct and in being found to have carried out the activities identified within the dismissal decision, there was a breach of the implied term of trust and confidence that exists between employers and employees. This was because Ms Crossman was determined to treat the respondent's clients as hers and considering the earlier issues regarding the USB stick, which held confidential client data belonging to her previous employer Tranters, it revealed that she was prepared to take client data from a previous employer.

133. He added that the background facts revealed that Ms Crossman took steps to remove herself from the Walsh duty solicitor rota with the LAA before she resigned, had set up a separate limited company called *'Legally Blonde Limited'* on 28 April 2021 and changed her Facebook contact details. Accordingly, he concluded that Walsh solicitors were entitled to dismiss Ms Crossman without notice and without her being entitled to any notice pay.

134. Mr Bronze asserted the contrary view to Mr Roberts and submitted that the respondent acted in breach of the claimant's contract. The Tribunal agrees and we do not find that there was sufficient evidence to demonstrate that Ms Crossman was responsible for conduct which could amount to a repudiatory breach. The matter relating to the USB stick was not a real concern for Walsh solicitors at the time it happened some time before the Facebook issue and the limited company involved the purchase of name which might be useful for the future rather than an attempt to set up a rival parallel firm to Wash solicitors. Ms Crossman gave credible evidence to the Tribunal that she was surprised the company name was still available and

said *'it was so bad, it was good'* and owning the name was the main reason for purchasing it, rather than its immediate use as a company.

Wages (section 13 ERA)

135. The Tribunal considered the previously agreed payment which forms part of the judgment and refers to the discussion regarding time limits in section 23 ERA. No further consideration is therefore required.

Right to be accompanied (section 10 ERelA1999)

136. Mr Roberts considered this issue as part of his general submissions relating to the complaint of unfair dismissal. Essentially, he argued that while with hindsight, Mr Walsh or those assisting him, could have let Ms Farooq attend the whole hearing and not just what they believed was the disciplinary hearing, such a concession would not have made any difference to the overall fairness of the dismissal. But additionally, Ms Crossman was allowed to be accompanied by Ms Farooq during what was the disciplinary hearing.

137. Mr Bronze submitted that Ms Crossman should have been allowed to have Ms Farooq available throughout the entirety of the meeting which led to her dismissal and she should not have been asked to leave when the meeting was said to transition to one dealing with data issues rather than disciplinary issues.

138. The Tribunal notes that Ms Farooq was an appropriate person to accompany Ms Crossman being a work colleague and that she attended the disciplinary hearing which took place at her request. While the respondent believed that this right continued throughout the disciplinary hearing and that it was only ended when the disciplinary hearing ended, we do not agree that this was correct. While the respondent may have believed that there were two separate meetings, for the reasons given above, the Tribunal concluded that the separation was artificial and there was a genuine risk that matters discussed before Mr Walsh in one meeting could be used and conflated with the matters that were supposed to be considered in the other.

139. In practical terms therefore, the whole meeting was a disciplinary hearing and there really was no need to ask Ms Farooq to leave. This amounted to a breach of section 10 ERelA and accordingly, for part of the disciplinary process, Ms Crossman was denied the right to be accompanied.

140. For the avoidance of doubt, we do not accept that during the meeting that she did attend, Ms Farooq was prevented from putting forward Ms Crossman's case and we accept Mr Roberts' submission that she adopted the role when attending that Ms Crossman required of her companion under section 10.

Conclusion

141. Accordingly, the Tribunal reaches the following decision in relation to this claim:

a) The unlawful deductions complaints raised within paragraph IV (i) and (ii) of the grounds of complaint are out of time contrary to section 23 Employment Rights Act 1996 and are dismissed.

b) The claimant did assert a statutory right on 2 March 2021 in accordance with section 104 Employment Rights Act 1996 by informing Ms Walsh that she had not been paid overtime and holiday pay. However, this was not the reason or principal reason for the claimant's dismissal.

c) The claimant was unfairly dismissed.

d) The compensatory award will be subject to an uplift of 15% in accordance with section 124A Employment Rights Act 1996.

e) The compensatory award will be further subject to a reduction of 10% reflecting the claimant's contributory conduct in accordance with section 123(6) Employment Rights Act 1996.

f) The complaint of wrongful dismissal is well founded which means that it is successful.

g) The complaint of unlawful deduction from wages contrary to section 13 Employment Rights Act 1996 is well founded and succeeds in relation to paragraph IV (iii) of the grounds of complaint in the sum of £194.70, which related to a deduction involving an alleged overpayment on 31 May 2021.

h) The complaint that the claimant was not permitted to be accompanied in accordance with section 10(3) Employment Relations Act 1999 is well founded which means that it is successful.

142. The question of remedy will now be dealt with at a remedy hearing and the parties will be informed of this hearing within a separate Notice from the Tribunal. The parties may agree to take their owns steps in terms of preparing for that hearing as appropriate, or alternatively can jointly write to the Tribunal with a proposed agreed list of case management orders in preparation for the remedy hearing, for consideration by Judge Johnson.

_____

Employment Judge Johnson

Date 28 June 2024

JUDGMENT SENT TO THE PARTIES ON

1 July 2024

FOR THE TRIBUNAL OFFICE

Notes

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/