EMPLOYMENT TRIBUNALS

Claimant: **Mrs H Harris**
Respondent: **Coco Blush Boutique International Limited**

Heard at: **Newport** **On:** **16 and 17 July 2024**

Before: **Employment Judge R Brace**

Representation
Claimant: Mr W Cowley (CAB)
Respondent: Mrs S Eskins (Director)

JUDGMENT

The judgment of the Tribunal is as follows:

Unfair Dismissal

1. The complaint of unfair dismissal is well-founded. The Claimant was unfairly dismissed.

2. The Respondent unreasonably failed to comply with the ACAS Code of Practice on Disciplinary and Grievance Procedures 2015 and it is just and equitable to increase the compensatory award payable to the Claimant by 25% in accordance with s 207A Trade Union & Labour Relations (Consolidation) Act 1992.

3. There are no exceptional circumstances that make an award of an amount equal to two weeks' gross pay unjust or inequitable. It is just and equitable to make an award of an amount equal to four weeks' gross pay. In accordance with section 38 Employment Act 2002 the Respondent shall therefore pay the Claimant a sum £2,177.32.

4. The Respondent shall pay the claimant the following sums:

   (a) A basic award of **£1,632.99**; and

   (b) A compensatory award of **£9,030.03.**

Note that these are actual the sums payable to the Claimant after the 25% uplift has been applied to the compensatory award and that when the proceedings were begun the Respondent was in breach of its duty to provide the Claimant with a written statement of employment particulars.

Notice Pay

5. The complaint of breach of contract in relation to notice pay is well-founded.

6. The Respondent shall pay the Claimant **£1,088.66** (2 x 2 weeks' gross pay) as damages for breach of contract. This figure has been calculated using gross pay to reflect the likelihood that the Claimant will have to pay tax on it as Post Employment Notice Pay.

Holiday Pay

7. The complaint in respect of holiday pay is well-founded. The Respondent made an unauthorised deduction from the Claimant's wages by failing to pay the Claimant for 33.23 days' holidays accrued but not taken on the date the Claimant's employment ended.

8. The Respondent shall pay the Claimant **£3,617.75**. The Claimant is responsible for paying any tax or National Insurance.

Written Itemised Pay Statements

9. The Respondent failed to give the Claimant written itemised pay statements as required by section 8 Employment Rights Act 1996 in the period 1 April 2023-5 August 2023.

Summary

In summary, the Respondent shall pay the Claimant the following sums:

Wrongful dismissal (A)	2 x £544.33		**£1,088.66**
Basic award (B)	2 x 1.5 x £544.33		**£1,632.99**
Compensatory award			
Prescribed element			
Loss of earnings to 5 August 2023 for 10 weeks (to date of new	£4,546.70		

employment)	(10 x £454.67)		
Adjustments – Uplift to the compensatory award for failure by the employer to follow the ACAS procedures @25%	£1,136.68		
Total Prescribed Element		£5,683.38	
Non-Prescribed Element			
Future loss of earnings	£0.00		
Loss of statutory rights	£500.00		
s.38 EA 2022 s.1 statement (4 weeks' pay)	£2,177.32		
Adjustments – Uplift to the compensatory award for failure by the employer to follow the ACAS procedures @25%	£669.33		
Total Non-Prescribed Element		£3,346.65	
Total Compensatory Award (C)			**£9,030.03**
Holiday Pay (D) **S.13 ERA 1996**	33.23 days' accrued untaken annual leave x £108.87		**£3,617.75**
Total =			**£15,369.43**

(A)+(B)+(C)+(D)			

WRITTEN REASONS

1. Reasons for the judgment were given orally at the hearing and at the hearing, both parties asked for written reasons also to be provided in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013.

2. These written reasons, save for the brief synopsis of the legal issues, are in essence the written version of the oral reasons provided to the parties on the second day of the hearing.

Background

3. In this case, the Claimant had entered into Early Conciliation on 10 August 2023 and that ended on 21 September 2023 [I]. She filed her claim on 26 October 2023 [2] in which she claimed that her employment with the Respondent at its Newport 'Coco Blush' store had commenced in June 2021 and had ended on 5 August 2023 after an altercation on that date.

4. She brings claims of:

    a. Unfair dismissal;
    b. Wrongful dismissal/notice pay;
    c. Holiday pay under the provisions of the unlawful deduction from wages provisions of ERA 1886; and
    d. Failure to provide a written statement of terms and conditions of employment and that she had not had payslips for over a year but that some had been provide after her dismissal.

5. No additional unlawful deduction from wages claims, in respect of any other salary or otherwise were brought and this was confirmed by the Claimant's representative. No claim (brought as breach of contract or otherwise) in respect of failure to make employer pension contributions up to termination were included in the claim form despite such amounts being included in the Claimant's Schedule of Loss. Again, it was confirmed by the Claimant's representative that such a claim was not before this Tribunal. No application to amend was made.

6. The Claimant's representative confirmed that the Claimant was not claiming that her employment had ended on 18 August 2023, on the expiry of notice that had been given on 4 August 2023, but that her employment had ended on 5 August 2023, when she was summarily dismissed. It was not argued that the events of 5 August 2023 amounted to a constructive dismissal but that the actions of the Respondent amounted to an actual dismissal by the employer on 5 August 2023.

7. The Tribunal had written witness statement evidence from Claimant. From Suzanne Eskins, director and shareholder of the Respondent on behalf of the Respondent, her written statement referenced her ET1 and ET1 attachment [31][36] and all three documents were accepted as her statement evidence. Both witnesses were subject to cross examination and questioning from the Tribunal.

8. I also had an agreed bundle of some 141 pages (the 'Bundle') and the parties were informed that unless I was taken to a document in the bundle it should not be assumed that I would read it. References in these written reasons to pages in that Bundle are denoted by [ ].

9. No reasonable adjustments were required by either party and no applications were made by either party but some time was spent at the outset of the hearing working through the claims as the Respondent was a litigant in person being represented by its director. A list of issues was prepared and emailed by the clerk to the parties before the commencement of the evidence as is attached to this judgment and written reasons as an Appendix.

10. After a short adjournment for continued reading, which gave the parties the opportunity to review the list of issues, the evidence commenced on the morning of the first day with the evidence from Mrs Eskins which completed by lunchtime. The cross examination of the Claimant and Mrs Eskins for the Respondent as well as summing up completed by the end of the first day.

11. Judgment on liability, with oral reasons, was given on the morning of the second day.

12. No further live evidence was required by the Claimant as Mrs Eskins did not wish to cross-examine her, accepting that she had fully mitigated any losses in obtaining alternative employment.

13. There was then a short adjournment where the parties were given the opportunity to agree figures for weekly pay (gross and net) and the daily rate of pay (gross) and those agreed figures were then used in the remedy decision.

14. Despite the provisions regarding potential uplift for failure to consider the ACAS procedures and on whether it was just and equitable to award 4 weeks' pay under s.38 Employment Right Act 1996 being explained to Mrs Eskins and Mrs Eskins being given the opportunity to make submissions, she declined to do so. After hearing further submissions from the Claimant on such issues and following a further adjournment, an oral remedy was delivered.

Facts

Background

15. The Respondent is a limited company that operates as a store selling women's clothes and accessories and trades as 'Coco Blush', from premises at 6 Commercial Street in Newport. It employs approximately 4 people.

16. Mrs Eskins' statement evidence set out that she is the sole director and sole shareholder of the Respondent company. Companies House documentation in the Bundle [49-58] supported that evidence. She also gave statement evidence that she is also the sole bank signatory. I accepted that evidence.

17. What her statement evidence did not contain however, was any information relating to the fact that the Respondent had only taken over ownership of the business, that traded as Coco Blush in Newport, in October 2021.

18. In live evidence, and in response to questions from both the Claimant's representative and the Tribunal, Mrs Eskins confirmed that she had taken control of the business in October 2021. When asked what that meant, she confirmed that the limited company that is the Respondent, acquired the Newport Coco Blush business in October 2021 from a company which Mrs Eskins referred to as Supersonic Retail Limited, a company she confirmed was owned by a Mr Tariq Ahmed. Whether Coco Blush Newport had previously been operated by him personally or through that, or indeed another corporate vehicle or limited company that was managed/owned by him, was not in evidence before me.

19. It was accepted in evidence by Mrs Eskins that she was both familiar with the Transfer of Undertakings (Protection of Employment) Regulations 2006 ("TUPE",) and that she accepted that the contract of employment of the Claimant transferred to the Respondent in October 2021 by reason of TUPE, although she tells me that she neither had a list of existing employees at the point of transfer, nor copies of any contracts of employment of employees employed on the transfer, nor can she explain why this had been the case.

20. Mrs Eskins had also been involved in the business that operated the Coco Blush Newport store prior to the TUPE transfer, as she has been historically involved in Mr Ahmed's wider businesses, providing administration services and support for him and that included administration and support for his Coco Blush Newport business. After taking over Coco Blush Newport in October 2021, she continued to provide administration support for Mr Ahmed's other businesses, which she confirmed in live evidence still includes other stores, that are also branded as 'Coco Blush' but at other locations. Mrs Eskins also gave evidence that Mr Ahmed has a desk in her office upstairs at 6 Commercial Street which he uses for paperwork for his other businesses.

21. There is a dispute between the parties regarding Mr Ahmed's continued involvement in Coco Blush Newport, with the Claimant's claiming that it has always been her understanding and belief that Mrs Eskins was only the accountant or 'book-keeper', as she termed it, for that business. She believes that Mr Ahmed is still the de facto owner of the business and it was her evidence that Mr Ahmed has always run the business. She supported that view by giving evidence that he brought cash to the store each week to pay

staff wages, cash which Mrs Eskins placed into envelopes and then gave to the staff; that he also gave instructions to the staff, including when to place items in a Sale and telling her, in front of Mrs Eskins, that she was responsible for the Coco Blush Newport shop.

22. The Claimant also gave live evidence, in response to question from Mrs Eskins, that she had not been aware that there had been any handover of ownership of the business and that she had believed that Mr Ahmed continued to employ her.

23. Whilst Mrs Eskins' evidence was that since October 2021, Mr Ahmed had just been her wholesale supplier, providing her with stock for the Coco Blush store in Newport, she was unsure as to whether the staff were accustomed to taking instruction from Mr Ahmed.

24. I accepted the Claimant's evidence and I found on the evidence that was before me, that Mr Ahmed was likely still involved in the business as more than just a supplier of stock and that despite being the sole shareholder and director of the Respondent, on balance of probabilities Mrs Eskins permitted Mr Ahmed to manage the staff and in that regard, irrespective of any legal separation of Mr Ahmed's ownership of the business of Coco Blush in Newport, Mrs Eskins had, at the minimum, permitted him to have authority and de facto control of the staff of the Respondent, including over the Claimant.

25. The Claimant claims that she started her employment on 26 June 2021.

26. Whilst this date was originally disputed by the Respondent, on questioning Mrs Eskins accepted that:

    a. the Claimant's employment had pre-dated the TUPE transfer to the Respondent and had transferred to the Respondent in October 2021 when the Respondent had acquired the business from Mr Ahmed, or one of his limited companies;
    b. that the Claimant had continuity of employment from her previous employment at Coco Blush at Newport;
    c. that she had seen the Claimant working in the Coco Blush Newport Store prior to August 2021; and
    d. that the Claimant's employment had commenced prior to August 2021.

27. I also accepted the Claimant's evidence in relation to the specific start date, which was also supported by copies of a contemporaneous document of Whatsapp exchanges between the Claimant and a woman known as Sheree [69] who, Mrs Eskins accepted, had been the previous shop floor manager before the Respondent had acquired the Coco Blush Newport business and had been responsible for setting work rotas.

28. I therefore found that the Claimant commenced her employment on 26 June 2021, and that this was the date for the purposes of calculating continuity of employment for the purposes of the unfair dismissal claim.

29. The Respondent has contended that the Claimant was on a zero hours contract but Mrs Eskins accepted in evidence that:

    a. she has no evidence to support such a claim, that it was just her 'understanding';
    b. she did not request contracts of employment from the previous owner of the business;
    c. that the pattern of hours worked by the Claimant, as reflected in the payslips that had been produced in the Bundle was not symptomatic of a zero hours contract, but rather a standard pattern of 40 hours per week; and
    d. that she did not, in any event dispute that the Claimant had been an employee.

30. She further accepted that the Respondent had not provided a written contract of employment to the Claimant.

31. I found that the parties had not reached any agreement that the Claimant had a zero hours contract. Rather, from my review of the Respondent's payslips within the Bundle, and from the live evidence given by the Respondent which accorded with the evidence from the Claimant, in at least the 8 months leading to the termination of the Claimant's employment in August 2023, the Claimant was routinely working 40 hours per week and on occasions, longer.

32. Mrs Eskins also accepted that the Claimant would be responsible for the sales, would cash up and recruit staff from time to time, particularly when she was on annual leave, and would be responsible for employee rotas; that it could be said that the Claimant had 'partly' played a managerial role, as she put it.

33. I therefore found that at the time of her dismissal in August 2023, the Claimant had been employed as shop floor manager, and had continuous employment from 26 June 2021 i.e. over 2 years by August 2023 and the Claimant therefore had sufficient qualifying service to bring a claim for unfair dismissal against her current employer, the Respondent.

34. I further found that the Respondent had failed to provide the Claimant with a section 1 ERA 1996 statement of mains terms and conditions.

35. There is a dispute between the parties as to the Claimant's rate of pay. The Claimant's evidence was that it was agreed that she would be paid the sum of £11.00 net, not gross, per hour, that this was the amount agreed 'after stoppages' as she termed it, and that she would, and did on a weekly basis, receive her wages by way of payment in cash of:

    a. £440, for the weeks that she worked 5 days;
    b. £528, for the weeks that she worked 6 days; and
    c. A flat £90.00 for any additional Sunday worked.

36. I accepted that evidence, evidence which was supported by the Respondent's own Pay Details [123].

37. I did not accept Mrs Eskins' evidence, that payment to the Claimant of such wages had been in error, an error she says that she had made repeatedly from the beginning of the tax year whereby she had mistakenly not deducted tax and NI before paying the Claimant; a mistake which she accepts that she had only sought to rectify on termination of employment when she deducted from the Claimant's final salary, sums that she had calculated and asserted had been due and owing for tax and NI since April 2023.

38. Mrs Eskins tells me she is an ACCA qualified certified accountant and, as indicated, has a separate business assisting companies, including Mr Ahmed, in running their payrolls. In those circumstances, such evidence that she had made a repeated mistake in relation to deductions for income tax and national insurance, is just not credible.

39. Furthermore, Mrs Eskins also admitted that she did not give payslips to the Claimant since at least April 2023 and that the payslips that were in the Bundle had been created at the termination of the Claimant's employment.

40. I therefore found that payslips had not been provided to the Claimant in accordance with s.8 Employment Rights Act 1996 and that the payslips that were in the Bundle did not reflect the wages agreed or the amounts that had been paid to the Claimant since April 2023.

41. Rather, the amounts that had been agreed to be paid for the hours worked, and that had been paid, were reflected in the Respondent's own document as manuscript figures at [123] and that it was more likely than not that these were the agreed and net payments that the Claimant was to be paid after tax and national insurance deductions.

42. I therefore found that it was agreed that the Claimant's rate of pay was £11.00 per hour (net,) and not £11.00 per hour (gross).

43. The Respondent's position is that the Claimant's employment ended on 18 August 2023, after Mrs Eskins had given the Claimant two weeks' notice to terminate her employment on 4 August 2023.

44. On arriving at work on 4 August 2023, Mrs Eskins had handed the Claimant a letter, giving the Claimant two weeks' notice of termination and confirming that her last working day would be 18 August 2023 [84]. The letter gave no reason for dismissal.

45. It is accepted between the parties that Mrs Eskins just gave the Claimant the letter and went back upstairs, off the shop floor and that no other discussion took place between the two that day.

46. Whilst Mrs Eskins gave evidence that her reason for terminating the Claimant's employment was documented in her diary, she had not disclosed

any contemporaneous notes from that diary, despite disclosing various other extracts from the same diary. I therefore found that it was likely that there were no other relevant extracts, concluding that if there had been that had supported her defence to the claim of unfair dismissal, she would have produced them. She had not.

47. The Respondent seeks to rely on the Claimant's conduct as a fair reason for dismissal, relying on an incident dating back to four months' previously, to April 2023, when it is agreed that the Claimant and her husband went to 6 Commercial Street premises on a Sunday.

48. It is the Claimant's evidence that she and her husband had been told to go there by Mr Ahmed to collect money that the Claimant's husband was owed by Mr Ahmed for work he had undertaken.

49. I preferred the Claimant's evidence and was not persuaded by the evidence from Mrs Eskins that the conduct of the Claimant, whether in April 2023 or subsequently. was as described by Mrs Eskins within her statement evidence set out in the ET3 [31] or the attachment to the ET3 [36]. Rather, I concluded that had the conduct been as described by Mrs Eskins, she would have raised these issues with the Claimant and I found that she had not, neither in the written Whatsapp exchanges with the Claimant from that day or subsequently [83], or indeed verbally.

50. Mrs Eskins accepts that she had not, at any time, spoken to the Claimant regarding any conduct and that no investigation at no time had taken place.

51. In those circumstances, I concluded that on balance of probabilities the Claimant had not committed any misconduct as alleged by the Respondent and that without warning, investigation or established reason for dismissal, the Claimant had been given notice to terminate her employment by Mrs Eskins on behalf of the Respondent on 4 August 2023.

52. The Claimant immediately called Mr Ahmed and asked him who she was employed by. He gave her the Respondent's name and directed her to a framed confirmation of that sited the wall of the store. The Claimant informed him that she had received the letter of termination and in response, her evidence is that he called her a 'bully', 'toxic' and 'spiteful'. She responded that she was going to take further action. She carried on working that day and did not speak further to Mrs Eskins. Likewise, Mrs Eskins made no attempt to speak to the Claimant.

53. The Claimant attended work on the following day, Saturday 5 August 2023. Mrs Eskins was not in the building. The Claimant waited until 10am to ascertain if Mr Ahmed would be visiting the store to deliver stock and on concluding that he would not be, called him to ask when she would be paid. Her evidence is that he responded by telling her '*Have I never fucking paid your wages'* and that he threatened her, telling her '*I will fuck you up'* or words to that effect and that he knew where she lived.

54. Mr Ahmed has not been called to give evidence by the Respondent and it is not in dispute that Mrs Eskins was not a party to that conversation. However it is not in dispute that after that conversation between the Claimant and Mr Ahmed, the Claimant telephoned the police, who attended the Newport Coco Blush store. At some point, Mrs Eskins also arrived at the store.

55. Whilst the Claimant had given written statement evidence that Mr Ahmed had told her that he 'wanted everyone gone' from the store and wanted the keys back to the store, in live evidence the Claimant clarified that when Mrs Eskins attended the store, it had been Mrs Eskins that had told her that Mr Ahmed had wanted her gone and the keys back and that she had then closed the shop.

56. Mrs Eskins gave evidence that she had no knowledge of and played no part in the conversation between the Claimant and Mr Ahmed that day. Whilst that might be the case, it is agreed that at some point Mrs Eskins closed the shop and the Claimant did not return to work again.

57. I found that Mrs Eskins took no steps to intervene or reassure the Claimant that day. Rather, she communicated to the Claimant that Mr Ahmed wanted her gone, took the keys from the Claimant, closed the shop and made no further contact with the Claimant, despite the Claimant not attending work after that date, save for writing to her on 15 August 2023 [89] to provide her with the pay-slips she had created for the period 2 April – 19 August 2023,.

58. The Claimant took the conduct of Mrs Eskins that day as meaning that she was dismissed that day with immediate effect. I found that this was an understandable and reasonable conclusion for her to have reached taking into account my findings that Mrs Eskins:

    a. Had, without warning or explanation the previous day, already given the Claimant notice of two weeks to terminate her employment;
    b. Had told the Claimant that day that Mr Ahmed wanted her gone, in response to the Claimant asking him about her pay, irrespective of whether Mrs Eskins was party to the conversation;
    c. had taken the store the keys from the Claimant and closed the shop; and
    d. did not again contact the Claimant save for sending her the letter of 15 August despite the Claimant not attending work again.

59. In those circumstances, I concluded that the words and actions of Mrs Eskins were unambiguous such that the Claimant's employment was clearly terminated by Mrs Eskins that day, rather than on the later date of the expiry of the notice that had been given the previous day.

Wrongful Dismissal / Contributory fault

60. For the purposes of the wrongful dismissal claim, the Tribunal has considered its own view on whether the Claimant was guilty of gross misconduct on 5 August 2023, i.e. did the Claimant do something so serious that the Respondent was entitled to dismiss without notice, I found that she had not.

61. Rather, she had simply requested confirmation as to when she would be paid and, following the conversation she had with Mr Ahmed, was told by Mrs Eskins on behalf of the Respondent that she was to go and for the Claimant to give the keys to the shop back to Mrs Eskins. As a result the Claimant's employment then ended that day with that intervening event and not on 18 August 2023.

62. In those circumstances, I found that the Respondent was not entitled to dismiss without notice.

Holiday pay

63. The Claimant claims that she is entitled to 5.23 days in respect of annual leave for the agreed leave year commencing 1 April 2023 up to the date of termination to 5 August 2023. This has been conceded by the Respondent, although it is claimed that there has been no unlawful deduction as the deduction in the last payment was required for tax and national insurance that the Respondent had repeatedly and constantly failed to deduct from the Claimant's wages for the whole of the tax year.

64. I would repeat my findings in respect of the rate of pay, and in those circumstances, I further find that the Respondent was not entitled to make the deductions for tax and National Insurance from the Claimant's last payment.

65. Although Mrs Eskins disputes that the Claimant was prevented or discouraged from taking annual leave in the leave year 2022/2023, Mrs Eskins did agree on questioning that the Claimant was entitled to carry over annual leave from leave year 1 April 2022-31 March 2023. In those circumstances, I do not need to make findings as to whether the Claimant was discouraged or prevented from taking annual leave to entitled her to carry over untaken leave.

66. As Mrs Eskins does not dispute that the Claimant has outstanding carry over leave of 28 days from 2022/2023, I found that on termination of employment the Claimant is entitled to be paid for untaken accrued annual leave on termination of 33.23 days as claimed, which includes both the leave carried over from 2022/2023 and the accrued untaken annual leave from 2023/2024.

The Law

<u>Unfair Dismissal</u>

67. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed.

68. The Claimant asserts that they were dismissed on 5 August 2023 and the employee must show that they were dismissed by the Respondent under section 95.

69. Section 98 of the 1996 Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the Respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the Respondent acted fairly or unfairly in dismissing for that reason.

70. In this case, the Respondent asserts that it dismissed the Claimant on 18 August 2023 because it believed they were guilty of misconduct. Misconduct is a potentially fair reason for dismissal under section 98(2). In this regard, the Respondent bears the burden of proving on balance of probabilities, that the Claimant was dismissed for a reason that related to one the potentially fair reasons set out in section 98(2) Employment Rights Act 1996 (ERA 1996).

71. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case.

72. In misconduct dismissals, there is well-established guidance for Tribunals on fairness within section 98(4) in the decisions in **Burchell 1978 IRLR 379 and Post Office v Foley 2000 IRLR 827**. When considering the fairness of the disciplinary process as a whole, the Tribunal also consider the employer's reason for dismissal as the two impact on each other (**Taylor v OCS Group Ltd 2006 ICR 1602 CA**).

73. The Tribunal must decide whether the employer had a genuine belief in the employee's guilt. Then the Tribunal must decide whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation. In all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed, in deciding whether the employer acted reasonably or unreasonably within section 98(4), the Tribunal must decide whether the employer acted within the band or range of reasonable responses open to an employer in the circumstances. It is immaterial how the Tribunal would have handled the events or what decision it would have made, and the Tribunal must not substitute its view for that of the reasonable employer (**Iceland Frozen Foods Limited** v **Jones 1982 IRLR 439, Sainsbury's Supermarkets Limited v Hitt 2003 IRLR 23, and London Ambulance Service NHS Trust v Small 2009 IRLR 563**).

74. If the Tribunal concluded that the dismissal was procedurally unfair, it should consider what adjustment, if any, should be made to any compensatory award to reflect the possibility that the Claimant would still have been dismissed had a fair and reasonable procedure been followed, in accordance with the principles in **Polkey** v **AE Dayton Services Ltd** [1987] UKHL 8; **Software**

2000 Ltd v **Andrews** [2007] ICR 825; **W Devis & Sons Ltd** v **Atkins** [1977] 3 All ER 40; and **Crédit Agricole Corporate and Investment Bank** v **Wardle** [2011] IRLR.

75. It was also agreed with the parties that if the Claimant had been unfairly dismissed, the Tribunal would address the issue of contributory fault, which inevitably arises on the facts of this case.

76. The Tribunal may reduce the basic or compensatory awards for culpable conduct in the slightly different circumstances set out in sections 122(2) and 123(6) of the Employment Rights Act 1996.

77. Section 122(2) provides as follows:

'Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce that amount accordingly.'

78. Section 123(6) then provides that: Where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

79. The Claimant indicated that she does not wish to be reinstated or re-engaged by the Respondent. If I concluded that the Claimant had been unfairly dismissed I am required to consider the question of the Claimant's loss, under section 123 of the Employment Rights Act 1996 which provides that subject to the provisions of this section and sections 124 and 124A, the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

80. The loss shall be taken to include:

    a. any expenses reasonably incurred by the complainant in consequence of the dismissal, and

    b. loss of any benefit which he might reasonably be expected to have had but for the dismissal.

81. In ascertaining the loss, the tribunal shall apply the same rule concerning the duty of a person to mitigate his loss as applies to damages recoverable under the common law of England and Wales or (as the case may be) Scotland.

82. In **Scope v. Thornett** [2007] IRLR 155 the Court of Appeal guides us as to our need to engage in a certain amount of speculation in the appropriate

circumstances. The Claimant must prove loss; the Respondent must establish a failure to mitigate loss (**Wilding** v **British Telecom PLC** [2002] EWCA Civ 349).

Unlawful deduction from wages

83. Employees are entitled to be paid in lieu of accrued but untaken holiday on termination of employment however the employment came to an end as a claim under Sections 13, 14, and 23 Employment Rights Act 1996, even if the contractual provisions made no provision for payment in lieu.

84. These provide insofar as is material as follows:

> **13 Right not to suffer unauthorised deductions.**
> (1) An employer shall not make a deduction from wages of a worker employed by him unless—
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction
>
> **14 Excepted deductions.**
> (1) Section 13 does not apply to a deduction from a worker's wages made by his employer where the purpose of the deduction is the reimbursement of the employer in respect of—
> (a) an overpayment of wages, or
> (b) an overpayment in respect of expenses incurred by the worker in carrying out his employment,
> made (for any reason) by the employer to the worker.

Conclusions

85. In relation to the unfair dismissal, in light of my findings that the Claimant was not dismissed on 18 August 2023, rather the Claimant was dismissed on 5 August 2023, for asking about her pay, I concluded that the Respondent has not proven that it had a potentially fair reason to dismiss of conduct and on that basis the unfair dismissal claim was well founded.

86. Further, whilst not required to do so as a result of that conclusion, even if I had concluded that the Respondent had proven a potentially fair reason for dismissal, in assessing overall fairness and the section 98(4) ERA 1996 test in the context of **BHS v Burchell** requirements, put simply I readily concluded that:

    a. There had been no investigation. Even taking into account the size of the Respondent organisation, the process adopted by the Respondent, of simply delivering a dismissal letter to the Claimant on 4 August 2023, then telling the Claimant the following day that Mr Ahmed wanted her gone, closing the shop and making no further contact with the Claimant, fell completely outside the range of reasonable responses;

b. The Claimant had never been spoken about any conduct: whether conduct from April 2023 (which I concluded could not have formed any part of the reason to dismiss taking place so far back in time to the decision to dismiss,) any subsequent behaviour or indeed her conduct on 5 August 2023; and
c. The Claimant was not afforded an appeal.

87. The Respondent had carried out no investigation into the Claimant's conduct such that it could not be said that any belief held by Mrs Eskins into the Claimant's guilt of any conduct could held on reasonable grounds.

88. As regards procedure generally, I find that no procedure was adopted by the Respondent and concluded that no reasonable employer would have decided to dismiss the Claimant in these circumstances.

89. My conclusion is that the dismissal was unfair and the Claimant's claim for unfair dismissal was well-founded.

90. Whilst the lack of any procedure would render the dismissal unfair, the most important aspect was substantive, namely the Respondent's failure to identify clearly the circumstances in which the Claimant's conduct might lead to dismissal. Thus, even if the procedural shortcomings had been made good, the Claimant's dismissal would still have been unfair and no deduction is therefore appropriate.

91. I further concluded that there was nothing in the Claimant's conduct that could lead the Respondent to reasonably come to the conclusion that the Claimant had done anything on 5 August 2023, that could be said to be culpable conduct which contributed significantly to the dismissal.

Wrongful Dismissal

92. For the reasons which are set out above, it is not established that the Claimant's conduct, in asking about her pay on 5 August 2023, could on any level be said to have amounted to a fundamental breach of contract. I therefore find that by summarily dismissing the Claimant, the Respondent acted in breach of the Claimant's contract of employment.

93. The Claimant is entitled to compensation representing payment in lieu of statutory entitlement to notice of two weeks.

94. For the reasons set out above I find that the Claimant was both unfairly and wrongfully dismissed.

Holiday

95. Having found that:

a. the Claimant was entitled to carry over 28 days' annual leave from 2022/2023;

b. that 5.23 days remained untaken for the period 1 April 2023 to the date of termination of employment on 5 August 2023; and
c. the Respondent was not entitled to deduct the amounts that had been deducted from the Claimant's last payment in respect of the tax and national insurance,

the complaint of unauthorised deductions from wages in respect of 33.23 days holiday pay was well-founded and that the Respondent made an unauthorised deduction from the Claimant's wages in respect of accrued untaken annual leave on termination of employment.

96. I also concluded that:

a. the Respondent failed to give the Claimant written itemised pay statements as required by section 8 Employment Rights Act 1996 in the period 1 April 2023 – 5 August 2023**;** and

b. when these proceedings were begun the Respondent had been in breach of its duty to provide the Claimant with a written statement of employment particulars.

Remedy

97. Time was given for the parties to agree weekly gross and net pay as well as daily gross pay which they did as follows:

a. Gross weekly pay: £544.33

b. Net weekly pay: £454.67

c. Gross daily pay: £108.87.

98. The Respondent did not seek to challenge that the Claimant had failed to mitigate her loss, the Claimant's evidence being that her losses ceased when she had obtained new employment In November 2023.

99. I awarded the Claimant a basic award, based on a gross weekly pay of £544.33, and a compensatory award of 10 weeks' net pay, at the agreed rate of £454.67 per week, the Claimant confirming that she was seeking neither reinstatement nor reengagement.

100. I further award the sum of £500 in respect of loss of statutory rights.

101. Likewise, I concluded that this Respondent has had plenty of time to resolve the position on lack of s.1 Statements, following the TUPE transfer nearly two years' previously in October 2021 and has failed to provide any explanation for that failure and in those circumstances it was just and equitable to award the Claimant 4 weeks' gross pay for such failure.

102. After considering submissions on ACAS uplift and s.38 Employment Act 1996, I further concluded that the description by Mr Cowley, the Claimant's representative, of a 'desertion of the Code' was accurate and

concluded that there be an uplift of 25% to the unfair dismissal compensatory award in that;

a. the Claimant had not been warned about any conduct;

b. had not been given any chance to explain herself;

c. there had been no investigation;

d. no disciplinary hearing; and

e. no right of appeal,.

103. I award the Claimant the sum of two weeks' pay in respect of wrongful dismissal, at the gross weekly pay of £544.33, and a sum in respect of 33.23 days accrued untaken annual leave, at the rate of £108.87 per day.

104. I also concluded that the Claimant was entitled to a declaration for failure to be provided with itemised pay statements for the period 1 April – 5 August 2023.

Employment Judge R Brace

19 July 2024

JUDGMENT & WRITTEN REASONS SENT TO THE PARTIES ON 23 July 2024

FOR EMPLOYMENT TRIBUNALS Mr N Roche