EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT **RESPONDENT**

THOMAS BLAKEY V WAYFAIRER TRAVEL LIMITED

HELD AT PEMBROKESHIRE LAW COURTS ON: 10 & 11 FEBRUARY 2025

BEFORE: EMPLOYMENT JUDGE S POVEY

REPRESENTATION:
FOR THE CLAIMANT: **IN PERSON**
FOR THE RESPONDENT: **MR LUDLOW (COUNSEL)**

JUDGMENT having been sent to the parties on 17 February 2025 and written reasons having been requested in accordance with Rule 60(4) of The Employment Tribunal Procedure Rules 2024, the following reasons are provided:

REASONS

Background

1. This is a claim by Thomas Blakey ('the Claimant') against his former employer, Wayfairer Travel Limited ('the Respondent). The Claimant began ACAS Early Conciliation on 30 September 2024 and it ended on 18 October 2024. He presented his claim to the Employment Tribunal ('the Tribunal') on 23 October 2024.

2. The Claimant brings complaints of unfair dismissal, unpaid wages and unpaid notice pay. The Claimant says that he was dismissed on 3 July 2024 and that his dismissal was unfair. He also says that he was not paid any wages from April 2024 and was not given any notice of his dismissal nor paid in lieu of any notice period.

3. The claim is resisted in its entirety. The Respondent says that the Claimant was not dismissed. Rather, the Respondent says that the parties ended the Claimant's employment by mutual agreement with effect from 1 April 2024. As there was no dismissal, there can be no unfair dismissal. The Respondent does not dispute that the Claimant was not paid any wages from April 2024 nor given notice nor paid in lieu

of notice but again relies on the assertion that the Claimant's employment had ended by agreement on 1 April 2024.

4. The parties agreed that the primary issue in this case was how and when did the Claimant's employment end. The Claimant says it ended on 3 July 2024 by way of a letter received from the Respondent, giving him written notice that his employment had been terminated. The Respondent says it ended by mutual agreement on 1 April 2024.

5. Although pleaded, the Respondent no longer pursues its alternative argument that if the Claimant was dismissed on 3 July 2024, that dismissal was on grounds of conduct and was fair.

6. In essence the claim stands and falls on my determination of how and when the Claimant's employment with the Respondent ended.

The hearing

7. I heard oral evidence from the Claimant and for the Respondent, from Jason Stevens, its Chief Executive Officer. I was provided with 348 page bundle of documents to which I was referred ('the Bundle'). I received written submissions from Mr Ludlow for the Respondent and oral submissions from the Claimant.

8. The Claimant is a litigant in person. I explained the process and procedures to him, checked his understanding, encouraged him to ask questions and gave him guidance throughout. I was satisfied that the Claimant was able to fully engage in the process and present his claim to the best of his abilities.

The applicable law

9. The applicable legal provisions were set out accurately in Mr Ludlow's written submissions and are uncontroversial. I did not repeat them in my oral judgment and reasons (save where specifically referred to in those oral reasons) but include Mr Ludlow's written summary at Appendix 1 to these written reasons, so far as they related to liability.

Findings of fact

Observations on the oral evidence

10. I begin with some observations on the evidence I heard.

11. I found the Claimant's evidence to be measured, consistent and plausible. He made appropriate concessions, and much of what he recalled found support in the contemporaneous documentary evidence before me. Importantly, the Claimant was able to provide first-hand accounts of the primary issues for me to determine, namely the ending of his employment with the Respondent.

12. In contrast, and as emerged during his oral evidence, Mr Stevens was not directly involved in the ending of the Claimant's employment. Rather, his evidence about what was proposed or agreed between the parties came second-hand. He was only able to share what he had been told by others, most notably Chloe Roger (the Respondent's Head of Legal) and Adrian Message (until recently, the Respondent's Chief Financial Officer).

13. Whilst Mr Stevens did his best to assist the Tribunal in his evidence, he was materially limited in what he was able to actually address because, as it were, he was 'not in the room' when the relevant events I have to decide occurred. It followed that his evidence necessarily attracted less weight.

14. I was told that Ms Roger is still employed by the Respondent and that Mr Message only left the Respondent's employment late last year. No reasons or explanations were provided for why they have not provided witness statements nor attended to have their evidence tested. I was told by Mr Stevens that Ms Roger drafted his witness statement for these proceedings but the Respondent did not, for reasons unknown, feel it was appropriate for her to provide a similar but first-hand account of the Respondent's dealings with the Claimant regarding the ending of his employment.

15. I am reminded that the Respondent has had the benefit of legal advice and assistance throughout these proceedings. As such, the decision not to obtain evidence from Ms Roger and Mr Message must be viewed as an informed decision (as oppose to an oversight or an error).

16. The effects of that decision, whatever the reasons for it, manifested itself several times in respect of the findings I was required to make. The allegations made by the Respondent about the Claimant's lack of engagement in the business during 2023 and into 2024 was, to a great extent, premised upon alleged conversations between Claimant and both Ms Roger and Mr Message, as were the purported discussions pertaining to the alleged mutual agreement to terminate Claimant's employment.

17. I heard evidence from the Claimant as to those alleged conversations. I did not hear from either Ms Roger or Mr Message. At its highest, Mr Stevens was only able to tell me what Ms Roger and/or Mr Message had told him had been said in those meetings and during those conversations.

18. There are a number of disagreements between the parties. I have only determine those disagreements which were necessary and relevant to the issues I had to decide.

<u>Relevant findings of fact</u>

19. So far as relevant and by way of a brief background, the Claimant founded the Respondent with Harry Prowse in 2012. It is a luxury travel company, offering bespoke travel experiences. The Respondent grew and became a successful business. In December 2017, Mr Stevens invested in the Respondent and became an equal one-third shareholder with the Claimant and Mr Prowse. The three of them continued to grow the business over the next four years, establishing offices in the UK, Thailand and Uganda.

20. In March 2021, Mr Prowse admitted to the Claimant that he had a gambling addiction and had stolen funds from the Respondent to finance that addiction. The Claimant and Mr Stevens removed Mr Prowse from the business. The Claimant and Mr Stevens became 50/50 shareholders. They continued to successfully grow the business.

21. The Claimant had started the business with the intention ideally of exiting once it reached a valuation whereby he would realise around £3million from his shares. In the summer of 2023, discussions began between the Claimant and Mr Stevens (along with CFO, Adrian Message) for the Claimant to exit the business by way, primarily, of a share buy back agreement. That process resulted in heads of terms being signed by the parties by 26 January 2024.

22. It is alleged by the Respondent that, in particular, during 2023 and into 2024, the Claimant lessened the work he was doing for the Respondent and disengaged from the business (helpfully summarised at paragraphs 36.1 & 36.3 of the Respondent's written submissions). This was denied by the Claimant.

23. In my judgment, the evidence relied upon by the Respondent for this assertion was somewhat lacking and did not bear the weight of the allegation being placed upon it. Taking them in turn (from Mr Ludlow's written submissions):

    23.1. Having a three month sabbatical in 2019, having disagreements about management styles with Mr Stevens and the impact of Mr Prowse's behaviour and departure from the Respondent were of limited, if any relevance, to the alleged disengagement. Rather, they appeared to be the ordinary and reasonable reactions from a co-founder who had dedicated his working, and much of his non-working, life to setting up and growing the business.

    23.2. Mr Stevens view that from 2022, when the Claimant reduced his working week to four days, he was only working 15-20 hours was an assertion wholly unsupported by any corroborative evidence.

    23.3. The allegation that between March 2023 and May 2024, the Claimant's wife (who was until February 2024 also employed by the Respondent) was producing numerous presentations and articles instead of the Claimant was based upon a misunderstanding of metadata (which recorded the Claimant's wife as authoring the

presentations, a term which in reality refers to the fact that the documents were produced on a laptop registered to Claimant's wife).

23.4. There were two allegations pertaining to emails and comments from Ms Roger, which questioned the Claimant's commitment to the Respondent (in November 2023 and February 2024). Again, they were assertions unsupported by evidence, even more so in respect of Ms Roger, from whom I have not heard and who's views and opinions remain untested.

23.5. The Claimant provided a plausible and reasonable explanation for why he pulled out of the 2023 Christmas party (namely, he was in the process of exiting the business, did not want to be a distraction and was concerned that he would be unable to hide his emotions from his colleagues, who were unaware of the ongoing negotiations and exit strategy).

23.6. Finally, the Respondent alleged that the Claimant admitted to Ms Roger on 27 November 2023, and to Mr Message (on a date unspecified) that he was not working for the Respondent anymore, that he no longer belonged to the company and he wanted out. Save that it was not in dispute that the Claimant was negotiating his exit from the Respondent, the rest of those alleged admissions were denied by the Claimant. As already referred to, the Respondent decided for its own reasons not to call any evidence from Ms Roger or Mr Message. It follows that the Claimant's recollection that he made no such admissions is incapable of direct challenge. Given my findings as to the Claimant's overall credibility, I found that those admissions were not made.

24. For all those reasons, I did not find that the Claimant ceased or diminished his work for the Respondent, or otherwise disengaged from the Respondent as alleged or at all during this period.

25. The focus of this case was on an exchange of emails between Ms Roger and the Claimant on 24 & 25 January 2024. It began with an email from Ms Roger at 20:55 on 24 January 2024 and referred to a discussion between the Claimant and Ms Roger which had taken place earlier that day.

26. Ms Roger purported to set out in her email the topics that, in her words, had been '*raised*'. They included the following (at [155] of the Bundle);

> 2. Your current salary: we agree that in exchange for your services and proper handover, your current salary will remain until signature of the Share Buyback Agreement or ultimately the 1 April 2024.

27. On 25 January 2024, the Claimant responded to Ms Roger's email of the previous day, as follows (at [154] of the Bundle):

> Many thanks and I will sign the HoTs [Heads of Terms] as attached, please prepare the DocuSign.
>
> My comments to your suggestions below in red.

28. In response to Point 2 of Ms Roger's email of 24 January 2024, the Claimant responded as follows (in red, at [155] of the Bundle):

> So long as termination of employment is tied to payment of tranche 1 that is fine yes.

29. That was reference to the heads of terms, specifically Clause 2, whereby the share buyback would be paid in four tranches, the first tranche being for 36 ordinary shares at an agreed price of £100,000.08 (at [297] of the Bundle). The Claimant's response on 25 January 2024 was that he was agreeable to his employment terminating upon signing the share buyback agreement and the payment of the first tranche.

30. In his evidence, Mr Stevens claimed that the Claimant and Ms Roger had agreed orally on 24 January 2024 that the Claimant would remain employed until completion of the corporate deal or 1 April 2024 at the latest (per Paragraph 13 of his witness statement). Mr Stevens relied upon Ms Roger's email of 24 January 2024 as confirmation of that agreement.

31. The Claimant says that there was never any such agreement between him and Ms Roger on 24 January 2024 and that the first he heard about the proposal that his employment would terminate on 1 April 2024 was when he received Ms Roger's email of 24 January 2024. In his evidence, that proposal was suggested by Ms Roger, presumedly at the direction and on behalf of the Respondent.

32. Again, I have only heard evidence from one party to that discussion on 24 January 2024, namely the Claimant. I have heard nothing from Ms Roger. Mr Stevens evidence of an oral agreement being reached on 24 January 2024 came from what Ms Roger told him. I preferred the Claimant's account that there was no oral agreement on 24 January 2024 for the following reasons:

    32.1. The Claimant has provided direct evidence that there was no oral agreement. That evidence has been tested at trial. The Respondent has provided no equivalent, direct evidence.

    32.2. In his response to Ms Roger's email of 24 January 2024, the Claimant explicitly refers to "*your suggestions*", contemporaneous evidence consistent with the Claimant's recollection that there was no agreement and what followed from Ms Roger were suggestions being made by and on behalf of the Respondent.

    32.3. If any doubt remained, it was utterly dispelled by the Claimant's response of 25 January 2024 that any termination of his

employment was only agreed to if tied to payment of the first tranche.

33. On 13 March 2024, Mr Message emailed the Claimant asking to meet to "*talk through a proposed financial structure that will meet the Capital designation for the payment of a total consideration of £2.5m for your shares"*. In other words, the Respondent approached the Claimant to restructure the proposed share buy back (and not, as recalled by Mr Stevens, the other way round). The upshot of that restructuring was not materially in dispute – the first tranche payment, due to be paid on completion of the deal, was reduced to £10,000, a new share division was required and a loan note structure would be adopted. The Claimant discussed the proposals with his legal advisors and the revised proposals were eventually issued by the Respondent for consideration in May 2024 (a revised proposal which, for reasons I don't need to go into, was never concluded between the parties).

34. The key take away from the proposal was that the first tranche reduced from £100,000 to £10,000.

35. There was evidence of the Claimant continuing to work on behalf of Respondent after 1 April 2024. At [163] – [169] of the Bundle was an email chain from 28 March 2024 to 8 April 2024 between the Claimant, Mr Message and David De Campo, an external broker, regarding raising funds for the Respondent.

36. What happened thereafter, so far as relevant, was as follows:

    36.1. No first tranche payment was made to Claimant (since the deal was not concluded).

    36.2. The Respondent paid the Claimant's salary at the end of March 2024.

    36.3. The Respondent did not pay the Claimant his salary at the end of April 2024.

37. On 29 April 2024, the Claimant emailed Ms Roger, copied to Mr Stevens, querying why he had not been paid his April salary, as follows (at [153] of the Bundle):

> There was some confusion for me on Friday regarding salary for April, as I had in my mind that I was to receive a salary until the deal kicks in. I can see in point 2 of the below email thread[1] you mention 1 April as the end of my salary and my comment was that termination of my employment linked to payment of first tranche was acceptable.
>
> As I have not received any communication about termination of my employment, I did not think salary in March was my final salary. I was surprised therefore when Killian told me he had been informed that my

[1] A reference to the email exchange of 24 & 25 January 2024, discussed above.

> salary ceased last month – though I see from the below[2] where this confusion stems from.
>
> I would like to request salary for April…

38. This email was consistent with the Claimant's evidence that no deal had been agreed for him to leave employment on 1 April 2024 and that any termination had to be tied to payment of the first tranche. Again, this was contemporaneous, consistent evidence of the terms upon which the Claimant would be prepared to agree to end his employment and those terms had been neither accepted nor acceded to by the Respondent. There had still been no payment of the first tranche.

39. In response, Ms Roger emailed the Claimant on 1 May 2024 (at [152] of the Bundle):

> I understand why you may be surprised and confused about the changes to your compensation. However, I was certain that you were aware your salary would stop on 1st April.
> …
>
> In good faith I would like to suggest a compromise. I propose that the Company pays you £5k today. This amount will then be deducted from the proceeds of your first month's sales deal.

40. I make the following observations on Ms Roger's email:

    40.1. If the Respondent believed that there was a mutual agreement to terminate the Claimant's employment with effect from 1 April 2024, why did Ms Roger understand why the Claimant "*may be surprised and confused about the changes to your compensation*"?

    40.2. Ms Roger did not say, in terms, that the parties had agreed to terminate the Claimant's employment. Her response was far more cautious and circumspect ("*I was certain that you were aware your salary would stop on 1 April*"). Ms Roger may well have had such certainty but awareness and agreement are very distinct and not the same thing. It is noteworthy that Ms Roger made no reference to any mutual agreement in her email.

41. Again, because of the decision the Respondent made about how to resist this claim, I have been provided with no other explanation for what Ms Roger meant or what she believed or thought. I must therefore take the email at face value and give it its ordinary meaning. As such, and when faced for the first time with clear indication that the Claimant did not believe that he had agreed to his employment being terminated, the Respondent's response made no reference whatsoever to a mutual agreement to terminate. That omission undermines its case now and supports the Claimant's claim that there was no mutual agreement.

[2] Again, a reference to the aforementioned email exchange of 24 & 25 January 2024.

42. In response to Ms Roger's email, the Claimant sought clarification as to whether the £5,000 would be deducted from the proposed first tranche, which still, at that time stood at £100,000 per the signed heads of terms of January 2024 (since the revised proposal was not provided to the Claimant until later in May 2024). Ms Roger confirmed, in effect, that the £5,000 was an advance on any payments due to the Claimant under the corporate deal being negotiated (at [151] of the Bundle). Both parties agree that what the £5,000 was not was wages.

43. Upon receipt of the May 2024 restructure of the corporate deal, the Claimant sought legal advice. He also received advice on his employment position, which led to the Claimant's solicitors emailing Ms Roger on 12 June 2024 as follows (so far as relevant) regarding the non-payment of his salary (at [204] of the Bundle, in black type):

> Discussions between [the Respondent] and [the Claimant] to date firmly tie any termination of his employment to the corporate deal and more specifically that his salary payments will continue until at least tranche 1 payment has been made in respect of the corporate deal.

44. I pause to note that the instructions the Claimant was giving to his solicitors were wholly consistent with what he had proposed to Ms Roger on 25 January 2024, what he had raised with Ms Roger on 29 April 2024 when he did not receive his salary and with his claim today.

45. The solicitors went on:

> [The Claimant] remains employed by the company until such time as his employment is terminated and accordingly he is entitled to his salary and benefits as normal;. The corporate transaction has not been finalised/concluded therefore it appears to us that any withholding of his salary amounts to an unlawful deduction from his wages. Please can you explain the position.

46. Ms Roger replied on 14 June 2024. So far as relevant, her response to the solicitors query regarding Claimant's employment was as follows (at [204] of the Bundle, in red type):

> Please note that this has been agreed with [the Claimant] by email. Founder is not a position. As a founder he gets dividends. However, he used to work at [the Respondent], got a salary for his work. For your information there is no employment agreement in place for [the Claimant]. [The Claimant] agreed that he would get £5k per month and that starting last month (May), every sum would be deducted from the deal, monthly. You can imagine that otherwise the very long process of having this deal done would create a £5k monthly debit on the company to pay someone who is not working. I am certain [the Claimant] understands this.

47. It is unclear which email is being referred to by Ms Roger, in which it is alleged that Claimant had agreed. Is it the emails of January 2024 or of April/May 2024? The response also misunderstands company law (the Claimant does not get dividends because he is a founder – he gets them

because he is a shareholder). But again, glaringly and in the face of the most stark assertion to date that the Claimant's employment had not been lawfully terminated, Ms Roger did not contend that the Claimant's employment had ended by mutual agreement on 1 April 2024.

48. The Claimant's solicitors emailed Ms Roger again on 25 June 2024 (at [216] of the Bundle), highlighting that there had been no notice to terminate the Claimant's employment and as such the Claimant remained an employee, notwithstanding the non-payment of his salary.

49. In response, the Respondent issued a letter in Mr Stevens' name dated 3 July 2024, as follows (at [217] of the Bunde):

> Considering that you have decided to pursue the legal route regarding your salary, and as per your lawyer's suggestion, your employment agreement with [the Respondent] is terminated, effective immediately.

50. The letter recorded that the Claimant had been "*working without a formal employment contract*" and made a number of allegations about the Claimant's level of work and commitment to the Respondent before continuing:

> Given these circumstances and the absence of an employment agreement, there will be no notice period. Your last salary will be for June 2024. Given the company's current cash flow situation, your final due wages will be paid within the next 60 days, with your June salary being paid immediately.

51. Nowhere in that letter did the Respondent assert that the Claimant's employment had already ended by mutual agreement with effect from 1 April 2024. In fact, the letter was arguably at odds with the Respondent's own purported belief that the Claimant's employment had been terminated by mutual consent on 1 April 2024:

    51.1. If the Respondent believed the employment had ended on 1 April 2024, why not say so in the letter? Instead, the Claimant's employment could only be terminated "*effectively immediately*" if it still subsisted up to and including 3 July 2024.

    51.2. If the Respondent believed the employment had ended on 1 April 2024, why was it agreeing to pay the Claimant's salary for June 2024? Again, that was wholly inconsistent with the Respondent believing that the employment had in fact validly ended on 1 April 2024.

    51.3. In refusing to give the Claimant any notice period, the Respondent did not rely upon its purported belief that the employment had already ended. That would have been the logical basis upon which notice was not required (since notice need only be given if the employment is ended by one party unilaterally). Instead, the Respondent relied upon allegations regarding the Claimant's performance and the absence of an employment agreement (which had been referred to earlier in the letter).

52. In his evidence, Mr Stevens regretted sending the letter and said that in hindsight it did not reflect the true situation. He claimed that Ms Roger was not familiar with UK employment law (and neither was he).

53. In my judgment, that explanation did not assist the Respondent:

    53.1. If Ms Roger did not have knowledge of UK employment law, how could she be so sure (as Mr Stevens alleged she was) that employment contracts could be ended by mutual agreement and of the hallmarks of such mutual agreement (such that, on her advice, Mr Stevens said that it was clear to him that the employment contract with the Claimant had ended on 1 April 2024)?

    53.2. Mr Stevens says that as he was not familiar with UK employment law when he sought Ms Roger's advice. She too was unfamiliar with UK employment law and yet the Respondent took Ms Roger's advice and acted as they did. Why didn't the Respondent seek UK employment law advice? Why did Ms Roger, as a legal professional, not advise the Respondent to seek UK employment law advice, if it was outside of her expertise?

    53.3. In any event, a lack of legal knowledge does not explain why the letter of 3 July 2024, the response to Claimant's solicitors of 14 June 2024 or Ms Roger's email to Claimant of 1 May 2024 made any assertion that the Claimant's employment with the Respondent had terminated by mutual consent with effect from 1 April 2024.

54. The Claimant's solicitors' response was their letter of 9 July 2024 (at [218] of the Bundle). It is not necessary to repeat its contents, suffice to note that the author was aware of the provisions of UK employment law and set out in some detail where it was suggested the Respondent had erred.

55. Drawing all the evidence and findings together, I conclude as follows:

    55.1. The proposal that the Claimant's employment terminated on 1 April 20244 was a suggestion made by Ms Roger on behalf of Respondent in her email of 24 January 2024.

    55.2. The proposal was not accepted by the Claimant. Instead he put forward a counter proposal, namely that he would agree to his employment ending upon payment of the first tranche.

    55.3. There was no evidence of the Respondent agreeing to that proposal (nor has the Claimant ever suggested that the Respondent agreed to his counter proposal).

    55.4. It follows that there was no agreement between the parties that Claimant's employment would terminate on 1 April 2024.

56. That conclusion is self-evident from an ordinary reading of the email exchange between the Claimant and Ms Roger of 24 & 25 January 2024. It is reinforced by the following:

    56.1. That the Claimant continued working for the Respondent in the days immediately following 1 April 2024, wherein he continued his work of raising funds, which included the involvement of Mr Message (who did not question why the Claimant was continuing to work for the Respondent, if, as alleged by the Respondent and understood by Mr Stevens, Mr Message was aware it had ended on 1 April 2024).

    56.2. The Claimant's reaction when his salary for April 2024 was not paid and his immediate reference to his counter proposal regarding payment of the first tranche.

    56.3. The fact that Ms Roger on behalf of the Respondent made no reference to any mutual agreement to terminate the Claimant's in her subsequent correspondence.

    56.4. The fact that the Claimant's instructions to his solicitors were consistent with his position that he had not agreed to his employment terminating with effect from 1 April 2024 but instead tied such termination to the payment of the first tranche.

    56.5. The fact that the dismissal letter again failed to advance any case that the employment had ended by mutual agreement on 1 April 2024 and, for the reasons explained, undermined the Respondent's own purported belief that that was in fact what had occurred.

    56.6. Mr Stevens own written evidence, despite not being party to the discussions and negotiations, that the Claimant had "*expressed a wish for the termination of his employment to be tied to payment of the lump sum*" (Paragraph 14 of his statement), a wish which Mr Stevens understood but believed was unreasonable. As such, Mr Stevens own evidence is that what the Claimant wanted was not agreeable to the Respondent, the antithesis of mutual agreement.

57. It follows from those findings that the Claimant's employment did not terminate on 1 April 2024. Instead, it was terminated on 3 July 2024 by the Respondent's letter of the same date. That termination was not by consent or mutual agreement. It was unilateral by the Respondent and constituted a dismissal as defined by section 95 of the ERA 1996.

Analysis & conclusions

58. My findings of fact had a number of consequences for the complaints being pursued.

59. As the Claimant remained an employee until 3 July 2024, he was entitled to his salary from 1 April 2024 to 3 July 2024. It is not in dispute that he

was not paid his salary for that period and, as a result the complaint of unauthorised deductions from wages is made out and succeeds.

60. The Respondent was not entitled to dismiss the Claimant without notice. It was not alleged, quite properly, that the Claimant had fundamentally breached the terms of his employment contract, such that the Respondent was entitled to treat the contract as repudiated and dismiss him without notice (akin, for example, to a dismissal on grounds of gross misconduct). Rather, the Respondent's case is that they believed, albeit erroneously, that the employment had ended on 1 April 2024. In the absence of a relevant contractual term, the common law rule is that a reasonable period of notice must be given. What amounts to a reasonable notice period will depend on the facts of the particular case, including the employee's length of service, his or her status, and what is usual in the particular profession in question.

61. At the very minimum, the Claimant was entitled to statutory notice per section 86 of the ERA 1996. The amount is determined by the number of whole years of continuous employment up to the date of dismissal, capped at 12 weeks notice for those employed for 12 years or more. The failure to provide the Claimant with notice of dismissal is in breach of that statutory term of his contract of employment and, as such, the claim of breach of contract is made out and succeeds.

62. The Claimant was employed in excess of two continuous years. He therefore has protection against unfair dismissal, per section 94 of the ERA 1996. The burden of proof is on the Respondent to show the reason, or if more than one, the principal reason for terminating the Claimant's employment.

63. The Respondent's primary case is that it issued the termination letter of 3 July 2024 on the erroneous belief that the Claimant's employment had already ended on 1 April 2024 and the letter was, in effect, confirmation of that. As found, the Claimant's employment had not terminated on 1 April 2024. As such, and even taking the Respondent's defence at its highest, a mistaken belief that the employment had already ended is not one of the potentially fair reasons for dismissal under section 98 of the ERA 1996. It follows that the dismissal was unfair.

64. It was also contended by the Claimant that the dismissal was automatically unfair per section 104 of the ERA 1996, as it followed his solicitors' demands to the Respondent that it pay him his wages, which had been unlawfully withheld. In other words, the reason for the Claimant's dismissal was the assertion of his statutory right not to suffer unauthorised deductions from wages. In my judgment, and as required by section 104:

    64.1. The Claimant's solicitors' emails of 12 & 24 June 2024 included assertions that the Respondent had breached the Claimant's statutory right not to have his salary withheld without authorisation.

64.2. That assertion was made in good faith at the time (consistent with the Claimant's belief, subsequently exonerated in these proceedings, that his employment had not ended by mutual agreement on 1 April 2024).

64.3. The Claimant's assertion, via his solicitors, of his statutory right was the principal reason for his dismissal on 3 July 2024. That is evident from the opening paragraph of the letter of 3 July 2024 (at [217] of the Bundle):

> Considering you have decided to pursue the legal route regarding your salary, and as per your lawyer's suggestion, your employment with [the Respondent] is terminated, effective immediately.

65. The reference to "*your lawyer's suggestion"* is presumedly a reference to their email of 25 June 2024, wherein they correctly stated that the Claimant's employment could only be terminated with notice served in accordance with "*statute and any implied contractual provisions*" (which on an ordinary meaning was a reference to the statutory and any contractual notice provisions). On an ordinary reading of the dismissal letter, the reason for the dismissal was "*pursuing the legal route regarding your salary*", the manner of the dismissal was "*per your lawyers suggestion*"

66. For those reasons, the principal reason for terminating the Claimant's employment on 3 July 2024 was that he asserted a statutory right. It follows by virtue of section 104 of the ERA 1996 that the complaint of automatic unfair dismissal is made out and succeeds.

Approved by:

EMPLOYMENT JUDGE S POVEY
Dated: 25 February 2025

Order posted to the parties on

27 February 2025

Kacey O'Brien

For Secretary of the Tribunals

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APPENDIX 1

Extract from Respondent's written submissions

…

Relevant law[3]

4. Section 13 ERA 1996 [Employment Rights Act 1996] materially provides that:

> (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.

5. Section 94(1) ERA 1996 provides than an employee has the right not to be unfairly dismissed.

6. Section 97(1) provides the definition of the effective date of termination ('EDT'). The EDT is a statutory concept which has to be determined on an objective basis.

7. Section 104 ERA 1996 (automatic dismissal for assertion of statutory right) materially provides:

> (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—
>
> (a) brought proceedings against the employer to enforce a right of his which is a relevant statutory right, or
>
> (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;

[3] Harvey on Industrial Relations and Employment Law ('Harvey'); IDS Employment Law Handbooks ('IDS').

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

8. There can be no successful claim for unfair dismissal unless there has been a dismissal as defined by the legislation. It is for the employee to prove that he has been dismissed within the meaning of the relevant provision. If the fact of dismissal is disputed it is for the employee to satisfy the tribunal on this point. If he fails to do so, he will lose his case[4].

9. However, an employment contract can also be terminated by: (1) resignation of the employee; (2) termination by agreement between the employer and the employee; and (3) termination by operation of law, including frustration of contract. None of these situations count as a dismissal in law.

10. The parties having agreed to make a contract can at any time agree to unmake it; each may agree to release the other from further performance, and the contract is thereby discharged by mutual consent. When this happens there is no dismissal.

11. In **Riley v Direct Line Insurance Group PLC** [2023] EAT 118, [2023] IRLR 952, HHJ Shanks summarised the position about consensual termination as follows at [22-23]:

> 22. In order to bring a claim for unfair dismissal there must be a "dismissal" for the purposes of section 95 of the Employment Rights Act 1996 ("ERA"). The relevant provision in this case is section 95(1)(a) which provides that there is a dismissal if "…the contract under which [the employee] is employed is terminated by the employer (whether with or without notice)".
>
> 23. The authorities establish the following relevant propositions of law:
>
> (1) Whatever the respective actions of the employer and employee at the time when the contract is terminated, at the end of the day the question always remains the same: "Who really terminated the contract?" (see: Sir John Donaldson MR in ***Martin v MBS Fastenings*** [1983] IRLR 198). The issue is one of causation.
>
> (2) Termination of the contract of employment by the freely given mutual consent of both the employer and the employee is not a dismissal under section 95(1)(a) (see: ***Birch v University of Liverpool*** [1985] IRLR 165).
>
> (3) The question of how the contract was terminated is ultimately one of fact and degree and the tribunal must look at the realities rather than the form of the relevant transactions.
>
> (4) Because of the consequences for the employee that flow from a finding of consensual termination the tribunal must be astute to find

[4] Harvey on Industrial Relations and Employment Law, Division DI Unfair Dismissal2. Termination by the Employer. A. Introduction: The concept of dismissal, paragraph [201]; IDS Employment Law Handbooks, Volume 15 – Unfair Dismissal, Chapter 1 – Dismissal.

clear evidence that a termination was indeed free and consensual. Such a conclusion cannot apply if there is deceit, coercion or undue pressure, in particular if the employee is under direct threat of dismissal by the employer. Conversely, where there has been negotiation and discussion and an opportunity for the employee to seek legal advice, a consensual termination may properly be inferred.

(5) There is a distinction between an employee consenting to the termination of his employment and consenting to being dismissed by his employer. The latter analysis has often been considered appropriate in cases where employees volunteer for redundancy (probably as a matter of fairness because entitlement to a statutory redundancy payment itself requires a "dismissal") but the existence or non-existence of a redundancy situation is not determinative.

12. The EAT in **Riley** upheld the tribunal's determination that on the facts there had been a consensual termination. The employee's claims of unfair dismissal and discriminatory dismissal therefore failed.

13. Frequently, an employee will contend that mutual agreement to terminate was preceded by a threat of dismissal. If satisfied that the employee was told to 'resign or be dismissed' then this will be construed as a dismissal. For such a construction to apply, the operative cause of the agreement must be the threat of dismissal and not the promise of financial or other inducements: see **Sheffield v Oxford Controls Ltd** [1979] IRLR 133, [1979] ICR 396. It was held that the financial inducements rather than the threat of dismissal were the operative cause of the employee's departure and that he had resigned.

14. The key question will be 'who really terminated the contract?' per Sir John Donaldson MR in **Martin v MBS Fastenings** [1983] IRLR 198. Has there been a threat of dismissal? Has notice to terminate the contract already been given to the employee and agreement between reached during the notice period? If so, then a finding that the reality is that there was a dismissal may be expected.

15. Where these features are absent and the employee volunteers to leave, the pendulum is likely to swing towards a finding of consensual termination. Where there has been negotiation and discussion coupled with an opportunity to seek legal advice, then it may be properly inferred that the employee chose to resign: **Sandhu v Jan De Rijk Transport Ltd** [2007] EWCA Civ 430, [2007] IRLR 519.

Statutory minimum notice requirements

16. Section 86 ERA sets out the rights of employer and employee to minimum notice:

86 Rights of employer and employee to minimum notice.

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

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

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

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

17. Section 86 does not affect the right of either party to waive their notice rights or the right of the employee to accept pay in lieu of notice – see section 86(3). However, an employee who waives the right to notice under this provision also waives the right to a payment in lieu of notice: **Trotter v Forth Ports Authority** [1991] IRLR 419, Ct Sess (Outer House). According to Lord Coulsfield, when the right to notice has been waived, the termination of the contract of employment without notice does not constitute a breach of contract and therefore no damages are due to the employee.

Contractual notice period

18. In the absence of an express contractual term as to notice, a court or tribunal may be prepared to imply a term at common law that reasonable notice be given. The length of notice will depend on such factors as the custom and practice in the area, trade or profession, and the employee's status and length of service: **Hill v CA Parsons and Co Ltd** [1971] 3 All ER 1345, CA.

19. In **(1) Reda (2) Abdul-Jalil v Flag Ltd** (No.63 of 2001), the Privy Council (In the Court of Appeal of Bermuda) held at [57]:

> "The true rule, which is not confined to contracts of employment but applies to contracts generally, is that a contract which contains no express provision for its determination is generally (though not invariably) subject to an implied term that it is determinable by reasonable notice: see Chitty on Contracts (28th Ed.) at para. 13-025. The implication is made as a matter of law as a necessary incident of a class of contract which would otherwise be incapable of being determined at all. Most contracts of employment are of indefinite duration and are accordingly terminable by reasonable notice in the absence of express provision to the contrary…"