EMPLOYMENT TRIBUNALS

Claimant: Miss A Rainbird

Respondent: Match Skin Salon Ltd

Heard at: London South Employment Tribunal **On:** 20 May 2019

Before: Employment Judge Tsamados

Representation
Claimant: In person
Respondent: Mr S Hoyle, Legal Consultant

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is as follows:

1) The claimant was unfairly dismissed.
2) There will be a 60% reduction to any compensatory award.
3) A remedy hearing will be arranged for the first convenient date after 3 September 2019.

REASONS

Claims and issues

1. By a claim form which was received by the Employment Tribunal on 27 June 2018 following a period of Early Conciliation from 21 June to 21 June 2018, the claimant, Miss Rainbird, has brought complaints of unfair dismissal, entitled to a redundancy payment, entitlement to notice pay and entitle to outstanding wages, against her ex-employer, the respondent, which trades under the name Match Skin Salon. In its response received by the Tribunal on 8 August 2018 the denied all of the claimant's complaints.

2. At the start of the hearing I apologised that I would only be able to speak quietly because I had an extremely sore throat as well as a cough. I did point

out that if during hearing I was unable to speak at all we might have to adjourn.

3. I set out the various complaints raised and explained less formally that set out below what the Tribunal had to decide in respect of each. I also identified that the correct name of the respondent is Match Skin Salon Ltd of which Ms Jasmine Johal is a director.

Unfair dismissal

3.1 Does the claimant have two years' qualifying service in order to bring the complaint of unfair dismissal? Prior to the hearing, the date of the effective date of termination ("EDT") was disputed. This is defined in section 97 of the Employment Rights Act 1996 and is the date on which a contract of employment ends. The respondent's position was that the EDT was 20 April 2018 although the email informing the claimant of the termination of her employment was only sent on 5 June 2018. The claimant said it was 10 May 2018 which was the date of her last meeting with the respondent at which she was made redundant. At the start of the hearing, the respondent accepted that the EDT could not be backdated and could only be when the dismissal was communicated to the claimant.

3.2 What is the potentially fair reason for dismissal and if more than one (as certainly appears from the claim form and the response), what was the principal reason? In essence, the respondent's case is that the claimant was dismissed summarily for gross misconduct. The claimant's case is that she was made redundant.

3.3 Was this a fair reason having regard to the test of reasonableness within section 98(4) of the Employment Rights Act 1996 and the band of reasonable responses test?

3.4 The claimant is seeking compensation only. If successful, then should the tribunal make any reduction to any compensation it awards in respect of the principles contained within the case of **Polkey** and/or in respect of any contributory fault by the claimant which brought about her dismissal?

3.5 There was very little evidence from the claimant as to what attempts she has made to find alternative employment after her dismissal and what income or Social Security benefits she has received. I therefore indicated to the parties that we would deal with liability first of all and remedy thereafter if the claimant was successful in any of her claims.

Redundancy payment

3.6 The claimant is seeking a redundancy payment which she says is in the sum of £2000. This arises as a damages for breach of contract complaint rather than in respect of a statutory entitlement. The respondent denies that there was such a contractual entitlement.

Unauthorised deductions from wages

3.7 The claimant alleges that she is owed one week's wages from April 2018 and her full pay for May 2018. The respondent's position is that the claimant received statutory sick pay ("SSP") for the week in question in April 2018 and that she received her full pay in May 2018.

Evidence

4. The respondent provided me with a bundle of documents consisting of 154 pages, which I will refer to as "R1" and the page number where needed. The claimant also provided me with a bundle of documents running to 87 pages. I will refer to this as "C1" and the page number where needed.

5. I heard evidence from the claimant and respondent by way of written statements and in oral testimony. The claimant's witness statement was at C1 1-6 and the remainder of C1 were appendices to her statement. There were a number of witness statements from witnesses who are not present at the hearing to give testimony. I advised the parties would affect the amount of weight given to their statements.

6. I clarified that each party had copies of the statements and bundles.

Findings

7. I set out below the findings of fact the Tribunal considered relevant and necessary to determine the issues I am are required to decide. I do not seek to set out each detail provided to the Tribunal, nor make findings on every matter in dispute between the parties. I have, however, considered all the evidence provided to me and have borne it all in mind.

8. The claimant was employed as Salon Manager by the respondent at its salon, Match Skin Salon, in Hove, from 1 May 2016 until her dismissal which was communicated in a letter dated 5 July 2018. Her duties involved working as a beauty therapist. From the claimant's payslips it is apparent that she was paid £2,083.33 gross which was £1,690.13 net monthly in arrears at the end of each month.

9. The "owner" of the salon, more properly a director of the limited company Match Skin Salon Ltd, is Ms Jasmine Johal, who was responsible for managing the business on a day-to-day basis and performing anti-ageing beauty treatments. At the time of the claimant's employment, there were two other employees, Chloe and Monica.

10. It is apparent from the evidence and the documents provided in the bundle, that the claimant was not issued with a written statement of her terms and conditions of employment as required under sections 1 and 2 of the Employment Rights act 1996. Whilst Ms Johal refers in later email correspondence to the claimant's contract of employment, she accepted in oral evidence that this was a mistake and that she was referring to the respondent's handbook at R1 22 to 27. This is dated August 2017 and starts at page 29 and goes on to page 35 and is therefore simply an extract from a

handbook. The claimant's evidence was that she had not seen it before its appearance within the respondent's bundle.

11. At the time of the events in question the claimant was pregnancy. However, the respondent was unaware of this.

12. The claimant was absent from work due to a fractured elbow from 20 April 2018 until 18 May 2018, for which she provided a statement of fitness to work from her GP (a C1 11).

13. Ms Johal's evidence was that the salon was struggling financially and had been for some time. In the claimant's absence, she had taken over as Salon Manager.

14. The claimant received her wages for April 2018 but there was a shortfall of 1 week. The respondent's position is that this represented payment of SSP which is only payable after the first 3 days of absence.

15. In view of the shortfall in wages the claimant decided to return to work sooner than her medical certificate indicated. She saw her doctor on 8 May 2018 who allowed her to return to work on light duties. The claimant emailed Ms Johal on that day to inform her and enclosed a scan of the medical certificate (albeit a reverse copy). The email is at C1 12. It would appear from the claimant's witness statement and from the exchange of emails at C1 13, that Ms Johal was reluctant to let the claimant return before she had fully recovered. However, Ms Johal asked the claimant to come in for a meeting which was then arranged for 11 am 10 May 2018.

16. The claimant's evidence was that at the meeting Ms Johal said that she did not need the claimant, she no longer had a manager position and her intention was to run the business in a different manner going forward. The claimant's further evidence was that after some discussion as to the her ability to return to work pending full recovery from injury, Ms Johal offered the claimant the one week shortfall in her April wages and her full pay for May 2018 to be paid at the end of May as well as £2000 cash to be received at the end of June 2018. The claimant also stated that Ms Johal promised to write down the reason for redundancy and to provide a written reference. The claimant's case is that this was a concluded agreement and that she was made redundant on that date and did not return to work again.

17. Ms Johal's evidence was that she had a casual meeting with the claimant in which she offered her redundancy. However, the claimant never accepted this and continued in the respondent's employment.

18. Email correspondence at C1 14 and 15 refers to the meeting, to the promised reference and to arrangements for payment of the one week shortfall in April and for payment of the May wages at the end of the month. Further that the claimant would receive £2000 cash at the end of June. In addition, Ms Johal refers to the preparation of a statement containing what would appear to be post termination restrictive covenant as per the claimant's contract of employment, which the claimant queries.

19. On balance of probability I find that the conversation took place the way in which the claimant has described in evidence as supported by the email correspondence. However, from the correspondence it seems clear that a final agreement as to the terms, beyond the amount and arrangements for the monetary payments, was not reached.

20. Ms Johal did not have any issues with the claimant's work prior to her absence on sick leave. However, soon after their meeting on 10 May 2018 her attitude towards the claimant changed drastically when she received a call from a client referred to as PB. PB wanted to book an appointment for IPL (Intense Pulse Light) treatment. He told Ms Johal that he had seen the claimant on four occasions and had one session with another member of staff and had paid in cash. He also said to her that the appointments had been at 9 am in the morning (which is before the salon opened at 10 am). Ms Johal checked the PB's consultation form and the diary and noticed that only one appointment was recorded and there was also one deleted appointment. She became suspicious and performed an audit which disclosed that there were 87 missing Dermapen needles (another treatment), deleted entries on the diary system and many other concerns.

21. Ms Johal asked the claimant to come in the questioning on two occasions, but the claimant refused. In oral evidence the claimant explained that she wanted to know what Ms Johal wanted to question her about on the first occasion and on the second wanted to know proof she had of the allegations that she was making. She said she was anxious not to be put in a stressful situation because of her pregnancy, although she accepted that Mr Johan was unaware that she pregnant.

22. Ms Johal then carried out a further audit of the bookings focusing on the Dermapen treatment which were carried out solely by the claimant. Each treatment requires a single use needle cartridge. The respondent's procedure is that each client completes a consultation form on arrival for their first treatment to check for contra indications, these are then filed and the treatments carried out. Ms Johal found at least 10 consultation forms were completed which indicated that each client had been in for treatment, but their appointment was then cancelled in the diary. The appointments did not appear on the datasheet, which is generated in the early hours of the morning and no text, email or phone call had been received (presumably notifying the salon of appointments).

23. Ms Johal telephoned one of these clients, ML, who confirmed that she purchased a course of four Dermapen treatments administered by the claimant. She had completed a consultation form, but no appointments were entered into the diary and there was no record of the respondent receiving any payment from her.

24. After undertaking a full stock check, Ms Johal determined that 33% of the Dermapen needles were unaccounted for. In the past, Ms Johal had queried why the claimant was ordering so many needles, to which claimant responded that she occasionally used two needles per treatment.

25. In an email to Ms Johal dated 22 August 2018, the manufacturer confirmed that it is only ever necessary to use one needle cartridge per treatment, very rare to use two and if this was the case, the treatment price would increase accordingly (at R1 52). Invoices showing purchase by the respondent of the Dermapen needles at the relevant time are at R1 111 to 145.

26. Ms Johal determined that around 50% of the consultation forms were missing from the Dermapen consultation form file which would account for the remainder of the missing needles. She checked with a duplicate account for each client was set up, but it was not. She assumed that the forms had been removed from the file so as to hide the evidence of the treatments. She further determined that the missing needles would account for a loss of around £11,000 of the respondent's income.

27. Ms Johal prepared a spreadsheet as part of an investigation which is at R1 53 to 59. This shows that the total used needles of 261 less missing needles of 87, which equals one third missing. From this she concluded that the claimant was taking one needle in every three for unauthorised usage.

28. At paragraphs 13 to 22 of her witness statement, Ms Johal sets out the details of 10 clients for which she determined the claimant had carried out Dermapen treatment for which treatment took place but was not recorded within the respondent's diary system. These are matters that were not raised with the claimant at the time and only came to light when witness statements were exchanged. The claimant attempted to deal with these allegations in evidence but for reasons set out below this proved difficult.

29. Ms Johal sent an email to the claimant on 23 May 2018 asking her to come into the Salon for a meeting, at her earliest convenience and to bring the company laptop (at R1 37). At this point her investigation was ongoing. Ms Johal then sent a further email to the claimant on 24 May 2018 in which she stated that since their last meeting (presumably on 10 May 2018) certain things had come to light which they needed to discuss urgently totally changed the situation. She requested that the claimant arranged to see her at her earliest convenience (R1 39).

30. In response, the claimant sent an email to Ms Johal on 28 May 2018 in which she asked if Ms Johan could outline what things have come to light briefly in an email. She stated that she was confident that resolving it by correspondence was the most efficient route at this stage (R1 44).

31. Ms Johal emailed the claimant later that day in which she stated that the claimant had now refused her request to come in for a meeting and that she was being investigated for dismissal for gross misconduct and at this point in time the investigation was ongoing. This is at R1 43 to 44). The email continued:

    "I was alerted when a customer called to book a course of treatment, saying that he had been treated by you in the past on several occasions, when I found his consultation form, there were missing entries in the diary, he also said that he paid in cash although this money has never been put through the till.

I have had my suspicions in the past, due to the large number of dermapen needles being used, having done a very quick check this does not tie up with appointments.

There are a number of appointments that seem to have been cancelled by you, although we have the completed consultation form and day reports that back-up the job was not cancelled on the day.

At the moment, a forensic examination is being carried out of stock, appointments, receipts etc. with a view to passing all of this evidenced on to the Sussex police.

You will be informed of the findings in due course."

32. The claimant responded by email an hour later expressing her deep concern by the tone of the content of Ms Johal email. She unequivocally and categorically denied any wrongdoing and expressed her sorrow that after two years of service, helping the business to build a strong customer base and delivering excellent customer care, Ms Johal had chosen to treat her in such an unfair manner. The email also referred to Ms Johal's repeated avoidance of addressing the issue of following redundancy formalities and that it appeared that she now wished to use these allegations to avoid making payments due to her. The email is at R1 45.

33. Ms Johal's evidence is that given the claimant's refusal to attend the meeting to discuss the allegations, she decided to review the evidence. I have no reason to question this. Ms Johal came to the conclusion based on the evidence that the claimant was guilty of gross misconduct. She sent an email to the claimant on 5 June 2018 in which she notified her that she was dismissed for gross misconduct (at R1 46 to 47).

34. The email further stated that in view of the matters that had come to light in the claimant's absence and the findings reached, the offer of redundancy was not on the table and the redundancy payments will not be made because of the gross misconduct. The email purported to terminate the claimant's employment on 20 April 2018 this being her last day at work.

35. The email then went on to list 16 issues/reasons for the claimant's dismissal. These went further than issue involving the unrecorded Dermapen treatments and contained matters which had not been raised by Ms Johal in her email of 28 May 2018 to claimant.

36. One allegation was that the claimant had made sexual advances towards Ms Joel on two occasions. In oral evidence Ms Johal stated that this was not the reason for claimant's dismissal but something that she simply wished to discuss with her. This allegation is denied by the claimant. I do not propose to go any further into this matter.

37. A further allegation was that cash was missing from the till and the claimant was the only other keyholder (presumably to Ms Johal). Again, Ms Johal indicated in her oral evidence that she had no further proof that the claimant

was responsible for this and was not pointing the finger at her in particular but wanted to ask questions of her at the meeting she had requested.

38. In oral evidence the claimant stated that given the nature of the allegations, in particular as to sexual advances and theft, she believed there was no point at that stage in attending a meeting with Ms Johal.

39. In evidence the claimant set out her position regarding the accusations levied against her from the limited information is available to her and from talking to work colleagues.

    39.1 With regard to the allegation that she had seen a male client in secret (PB), she was aware that this person telephoned the Salon on 4 May 2018 to book an appointment with her for IPL skin rejuvenation treatment and Ms Johal spoke to him but could not find his name in the online diary. She presumes this led Mr Johal to think that the claimant seen him in secret. She then asked a member of staff called Chloe to find the consultation form, which Chloe did. This further led Ms Johal to believe that the claimant had seen the client in secret. The claimant denies that this was the case. From what the claimant remembers of this client, the appointments had been made prior to the introduction of the Salon's online diary system and were contained in the old paper diary. As far as the claimant remembers, she carried out a patch test to check for allergies and saw the client for a single treatment after that. The client paid Ms Johal directly, as at that time the claimant had no access to the till. The diary system was introduced in November 2016 and Ms Johal undertook the task of moving the names from the paper diary as well as the on the consultation forms to the online diary. The claimant suggested that most likely she overlooked this client.

    39.2 With regard to the overuse of the Dermapen needles. The claimant accepted that only one needle should be used per client, but she said that this does not account for faulty needles, needles used in training and needles used for treatments on Ms Johal personally. As a result, there would be a discrepancy in the number of needles used. The claimant raised this previously with Ms Johal who even informed her to start keeping the faulty needles so that they could replace them. The claimant kept them in a cupboard drawer in the room in which she worked.

    39.3 With regard to the allegations as to appointment cancellations. The claimant stated that Ms Johal was responsible for both booking and cancelling appointments. The diary is an online webpage to which Ms Johal has total access. Ms Johal had been running the reception on a day-to-day basis and even when she did not come to work, she would do it from home. The work phone was redirected to her mobile phone even when she was in the Salon. Ms Johal would call every morning and say which clients owed the Salon money and how much, and then she would check again at the end of each day. Ms Johal also checked the diary during the day to see if any of the staff had walk-ins or extra bookings and asked the claimant and Chloe to book them in after they finished their appointments, because she always mixed up times and

dates. In addition, she explained that not all clients having a consultation go on to have a treatment. The customer would fill in the consultation form, but the actual treatment would be on another day and not all clients came back after consultation.

39.4 With regard to allegations of sexual misconduct, the claimant denied this, and her position is that she is very hurt and offended by the allegations and she requests evidence of such behaviour.

39.5 With regard to the allegation of theft, the claimant's position is that this is a serious and unfounded accusation, which she finds deeply hurtful and offensive and affected greatly her at the time.

39.6 With regard to the allegation that the claimant was reusing the same Dermapen needles, the claimant denied this and points out that it contradicts her allegation that the claimant was using too many needles.

39.7 With regard to the allegation that the claimant was using surgical spirit when not supposed to, the claimant stated that this is used to wipe a client's face before Germaine de Cappuccino skin peeling facial and is a standard practice.

39.8 With regard to the allegation that the claimant was giving clients free appointments, the claimant denied this and states that the only occasion where she gave something extra was for CACI when clients would not react as expected and is offered as a correction because one half of the face would respond better to the currents than the other. This was with Ms Johal's approval.

39.9 With regard to the allegation that the claimant booked extra time appointments without additional payment, the claimant denied this and states that she was finished her appointments on time as she was always fully booked and was never late for her next appointment.

39.10 With regard to the allegation that following Ms Johal's audit it was determined that a substantial amount of cash was missing from the till. The claimant denied, this stating that she was never given a key for the new till. If either she or Chloe were given cash by clients, it was placed in a special box with a piece of paper set out the date and time it was taken and what the payment was for. She and Chloe requested clients pay by card because they would not be able to provide change because, having no access to the till.

39.11 The claimant stated that she found it very difficult to answer the allegations because they are fabricated and have no substance or truth. Further she stated that no evidence has been provided in support.

40. The claimant attempted to cross examine Ms Johal as to the allegations relating to the named clients at paragraphs 12 to 22 of her witness statement. However, it became clear during her questions, that the respondent had not

fully disclosed documents relating to the investigation that had been carried out. This included the paper diary that was previous kept and some of the day sheets in respect of the named clients MS and AH referred to in her witness statement. This made it very difficult for the claimant to respond beyond an explanation of the process for booking appointments and treatments and from her memory of events. It also made the tribunal's enquiry as to the reasonableness of the investigation and the conclusion reached more difficult. As I said to the parties, I am attempting to gauge what happened from what I have before me in terms of witness evidence and documents. The claimant was attempting to challenge the allegations and my concern is that she was not aware of the evidence of the investigation until she got the witness statement given her failure, rightly or wrongly, to engage with the matter at the time and it is clear that there are documents which have not been disclosed, which Ms Johal says were provided to her representatives but are not in the bundle.

41. There was an ancillary dispute as to the return of a laptop by the claimant to Ms Johal. I indicated that this was not something I could do anything about and indeed I do not see that it is relevant to make any findings on the matter.

42. The claimant was fit to return to work on light duties from 8 May 2018 but did not return to work and was dismissed by email sent on 5 June 2018. The respondent through its representative accepted that if the claimant's dismissal took effect on 5 June 2018, then the claimant is due payment of wages for the period that she was at home which it calculated to be 27 days of which less than 20 were working days. The respondent did not accept that the claimant was underpaid in April 2018 in respect of the week she was absent from work due to ill health. For this period, she received SSP which is not payable for the first 3 days of absence.

43. I note that the payslip for April 2018 at R1 150 does not indicate any payment of SSP but compared with the earlier payslips at R1 146 to 140 shows a shortfall of £641.03 gross which is £427.47 net. SSP at that time was paid at £92.05 per week.

44. Ms Johal admitted that was unaware of the ACAS Code of Practices relating to the conduct of disciplinary processes although it was clear that she was using the services of Croner HR at that time.

45. I heard closing submissions from the parties which I have considered in reaching my decision. I asked the parties to address the issue of **Polkey** and contribution, explaining to the claimant what this meant. The respondent's representative submitted that there should be a high reduction in any compensation awarded because of the claimant's failure to engage in the investigative process and her failure to give an account. The claimant submitted that she did not engage because at the time she was stressed and scared, and she was pregnant. She further submitted that she did not hide anything or not answer. She denied everything and when she did, Ms Johal still did not provide any evidence and made even more allegations.

Relevant Law

46. Section 13 of the Employment Rights Act 1996:

'(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.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion…'

47. Section 98 (1), (2) and (4) of the Employment Rights Act 1996:

'(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a) "capability", in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b) "qualifications", in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) [In any other case where] the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.'

Conclusions

Unfair dismissal

48. I first considered whether the respondent had shown a potentially fair reason for the claimant's dismissal within section 98(1) and (2) ERA 1996. I find that the respondent has shown that the potentially fair reason is to do with conduct.

49. In particular, despite the conflated reasons and issues contained within the termination of employment e-mail at R1 46-47, it is clear that the respondent dismissed the claimant gross misconduct in respect of a number of occasions on which the claimant had carried out term appear in treatments on clients unbeknown to the respondent and for which she had received payments. The other matters listed in that email are either ancillary to that or were either put in gratuitously and in any event required further investigation with the claimant.

50. There was no redundancy dismissal as the claimant believed for the reasons set out below when dealing with the contract claim.

51. I then turned to consider whether this was a sufficient reason for the Claimant's dismissal within section 98(4) ERA 1996. This involves an examination of both the way in which the Respondent dismissed the Claimant (the process followed) and the reason for the dismissal (the substance).

52. I find that in terms of the procedure followed the respondent has not adhered to the principles contained within the ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2015). Indeed, the respondent was unaware of it, certainly at the time. The respondent has produced a copy of its disciplinary procedure at R1 26 from a staff handbook. Whilst the claimant denied ever seeing this at the time, respondent has not had regard to this procedure in any event.

53. It is clear from the ACAS Code of Practice that an employer, having carried out an investigation process, from which it decides there is a case to answer, must notify the employee of this in writing. This notification should contain sufficient information about the alleged misconduct and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting (at paragraph 9).

54. What happened in this case is that Ms Johal commenced an investigation, invited the claimant to effectively what was intended to be an investigatory meeting and in the face of the claimant's apparent refusal to attend simply moved to dismissal. As a result, the claimant was not notified that there was a case to answer, she was not provided with sufficient information about the alleged misconduct and its possible consequences and she was not able to

prepare to answer the case. No disciplinary meeting took place. A decision to dismiss was communicated, confusingly adding further matters, some of which were not reasons for dismissal but needed further investigation.

55. That decision contained no indication of a right of appeal as required by paragraphs 26 to 29 of the ACAS code. In any event, I do acknowledge that the respondent is a small company and that Ms Johal did say that there was no one else that the appeal could have gone to, even if it had been offered.

56. I therefore conclude that the claimant's dismissal was unfair on procedural grounds.

57. I then turned to consider the sufficiency of the reason for dismissal with reference to the test of reasonableness set out in section 98 (4) ERA 1996. I also had regard to the test contained within **BHS v Burchell** [1979] IRLR 379, EAT relating to conduct dismissals. This requires me to consider the following:

    57.1 Whether the employer believed that the employee was guilty of misconduct;

    57.2 Whether the employer had in mind reasonable grounds upon which to sustain that belief; and

    57.3 At the stage at which the employer formed that belief on those grounds, whether s/he had carried out as much investigation into the matter as was reasonable in the circumstances.

58. When assessing whether the **Burchell** test has been met, the Tribunal must ask itself whether what occurred fell within the 'band of reasonable responses' of a reasonable employer. This has been held to apply in a conduct case to both the decision to dismiss and to the procedure by which the decision was reached. (**Sainsbury's Supermarkets v Hitt** [2003] IRLR 23, CA).

59. In addition, I remind myself that I must be careful not to substitute my own decision for that of the employer when applying the test of reasonableness.

60. Starting with the investigation. I take into account that the respondent is a small organisation consisting of a director and at the time three employees. However, it was apparent that the respondent had engaged the services of Croner HR, who it had turned to for advice in producing the handbook (an extract from which is at R1 24 to 27) and in advising as to payment of SSP as the email at C1 9 indicates. It is clear that the respondent undertook an extensive investigation, and this was limited by the claimant's failure to engage in the process. However, the investigation grew over time and many of the additional matters raised in the termination letter were only put to the claimant at that point. But on the central issue which led to the claimant's dismissal for gross misconduct the investigation was as much as was reasonable in the circumstances.

61. During the Tribunal hearing the claimant was faced with having to defend herself from the detailed allegations regarding the 10 named clients and she identified certain inconsistencies and documents missing from the enquiry. Had she participated in the investigation she could of course have raised these matters there and then when faced with that detail.

62. On the basis of the materials that the respondent considered during the investigation, including information from a number of clients that the claimant had taken cash payments for treatments not recorded in the respondent's internal systems (in respect of PB, ML and MG), the lack of record of appointments and the large number of unaccounted Dermapen needles, I find that it was reasonable for the respondent to reach the conclusion that the claimant had been providing treatments without the respondent's knowledge and had retained the money received for payment. Of course, this is looked at purely from the reasonableness of the respondent's conclusions and is not saying that this what the claimant actually did.

63. From this I find that the respondent had a genuine held belief that the claimant was guilty of the gross misconduct identified above.

64. I further find that in the circumstances the dismissal falls within the band of reasonable responses.

65. I then turn to consider the case of **Polkey v A E Dayton Services Ltd** [1987] IRLR 503 in which the House of Lords held that a dismissal may be unfair purely because the employer failed to follow fair procedures in carrying out the dismissal. This is the so-called "**Polkey** reduction" whereby any compensation awarded for unfair dismissal may be reduced by a percentage to reflect the likelihood that the employee would still have been dismissed, even if fair procedures had been followed.

66. It is of course difficult to apply this with precision, but on the basis of the evidence I was provided with and heard, it does seem to me that the biggest difficulty for the claimant is that several of the clients stated to Ms Johal that they had treatments which she could not find recorded in the respondent's systems and had paid cash for the treatments to the claimant which had not been credited to the respondent.

67. I considered the deficiencies in the documentation and the general impression I formed that Ms Johal effectively controlled all aspects of the business including the making of appointments and taking and accounting for payments.

68. I also considered that cash payments were put into a special box because the claimant as well as Chloe had no access to the till. This evidence whilst not put to the respondent was not challenged. I consider that the claimant was unrepresented whereas the respondent was professionally represented. All in all, it did seem to me that there was a margin by which it was possible that the claimant could have provided adequate explanation for the apparent provision of unaccounted treatments and the receipt of unaccounted payments. Do the best I can I put the **Polkey** reduction at 60%.

69. I then turned to consider the extent to the dismissal was caused or contributed to by any action of the claimant. If so, I can reduce the compensatory award proportionately as I think fit. This is known as contributory fault.

70. There are two questions to consider: firstly, did the claimant's conduct cause or contribute to the dismissal; and, secondly, if so, by how much would it be just and equitable to reduce the compensatory award? The conduct in question must have been culpable blameworthy.

71. The conduct in question is the same as considered under **Polkey**. From the evidence I heard, I form the viewed that the claimant had good reason not to participate in the investigation without having further detail of the allegations made against her and the evidence to support this, particularly when those allegations were extended considerably in the termination letter. My conclusion is that the reduction for this conduct has been made under **Polkey** and it would not be just and equitable to make a further reduction.

72. At the remedy hearing I will consider whether to make an award of compensation in respect of the respondent's failure to provide written particulars of employment as required by section 38 of the Employment Act 2002. This allows me to consider an award of two or four weeks' gross pay, subject to the statutory cap on a week's pay, as extra compensation. At that hearing I will also consider whether to increase or decrease any award of compensation by up to 25% for any unreasonable failure by either party to follow the ACAS code of practice. Comes from section 207A of the Trades Union Labour Relations (Consolidation) Act 1992.

Redundancy payment

73. Having considered the evidence, I appreciate that what the claimant is seeking is damages for breach of contract in respect of what she says was a concluded agreement to pay her £2000 to leave her employment by way of redundancy. Whilst there certainly was a discussion as to arrangements for payment of certain monies in return for ending the claimant's employment this never reached a final agreement. It is clear that the claimant was expecting some formal arrangements and there was ongoing discussion as to the written terms of agreement, the provision of a reference and as to post termination restrictive covenants. The claimant did not return to work although she was declared fit to do so with light duties from May 2018 onwards because Ms Johal wanted her to be fully fit to return before doing so. In the interim, the claimant was at home, discussions as to her leaving began and then the discussions were superseded by the matters giving rise to the claimant's eventual dismissal on 5 June 2018.

74. I therefore find that the claimant is not entitled to damages for breach of contract as claimed there being no contract on which to base this.

Unauthorised deduction from wages

75. With regard to the complaint in respect of the underpayment of wages in April 2018, the respondent is required to provide an explanation with calculations in support of the underpayment in respect of the last week of April that the claimant was off sick. This is set out paragraph 43 above and as I stated there is no indication within the payslip as to why there is an underpayment of wages or what it relates to. On the face of it this amounts to an unauthorised deduction from wages. Subject to that explanation I will determine whether there has in fact been such a deduction and if so in what amount.

76. With regard to the non-payment of wages for the month of May 2018, I find that there was an unauthorised deduction from the claimant's wages for the entire month. This needs to be quantified by both parties. That calculation should reflect that for part of the month up until 7 May 2018, the claimant was unfit to work and from 8 May 2018 until the end of the month she was fit to return to work on light duties, but the respondent did not allow her to return. It seems to me that she was entitled to be paid her wages subject to reduction to the SSP rates from the 1 to 7 May 2018 and thereafter her full wages for May 2018 and indeed her wages until dismissal on 5 June 2018.

Further disposal

77. So as to allow the parties the opportunity to resolve this matter without further consideration by the tribunal, a remedies hearing will be listed for the first convenient available date after 3 September 2019.

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Employment Judge Tsamados
Date 25 July 2019