EMPLOYMENT TRIBUNALS

Claimant: Louise Windram

Respondent: Rankin Travel Ltd

Heard at: Manchester ET (CVP) **On:** 9 June 2022 & 16 August 2022

Before: Employment Judge Poynton
(sitting alone)

Representation
Claimant: In person
Respondent: Miss Murphy (Consultant)

RESERVED JUDGMENT

1. The respondent's application to strike out the claimant's claim is dismissed.

2. The claimant's complaint that she was unfairly dismissed by the respondent is well-founded. The respondent failed to carry out a reasonable investigation and failed to follow a fair disciplinary and appeal process and the decision to dismiss the claimant was unfair.

3. Having regard to the **Polkey** principle (**Polkey v AE Dayton Services Ltd [1988] ICR 142)**, if the respondent had carried out a fair procedure there was a 100% chance that the claimant would have been fairly dismissed. Accordingly, the compensatory award shall be reduced by 100%.

4. The claimant contributed to her dismissal to the extent of 100%, to be applied to the basic and compensatory awards for unfair dismissal. Any award is therefore extinguished.

REASONS

Introduction

1. The claimant, Mrs Rankin, was employed by the respondent, Rankin Travel Ltd, as a travel consultant from 28 May 2019 until her employment

terminated on 2 September 2021.

2. ACAS was notified under the early conciliation procedure on 2 November 2021 and the certificate was issued on 22 November 2021. The ET1 was presented on 21 December 2021. The ET3 was received by the tribunal on 14 February 2022.

3. The claimant brought a claim for unfair dismissal.

4. This was the final hearing of the claim. The hearing on 9 June 2022 was listed via CVP before me. I heard the respondent's evidence in full but there was insufficient time remaining to hear the claimant's evidence in full. I adjourned the hearing and the hearing on 16 August 2002 is the re-listed final hearing. I apologise on behalf of the Tribunal for the delay in the parties receiving this reserved judgment.

Preliminary issue

5. At the hearing on 9 June 2002, before I heard any evidence, I had to deal with a preliminary issue.

6. The respondent applied to strike out the claim under Rule 37(1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 on the grounds of the claimant's failure to comply with case management orders and/or that the claim had not been actively pursued. The respondent had given warning of this in their letter to the claimant and the Tribunal of 26 May 2022.

7. The Tribunal had issued an order on 21 January 2022 setting out the steps to be taken to ensure that the case would be ready for hearing.

8. On 18 March 2022, the Tribunal reminded the parties that they should comply with that order.

9. The claimant failed to provide the respondent with a document setting out her calculation in respect of lost earnings and other losses in accordance with the case management order. The claimant failed to provide the respondent a witness statement in accordance with the case management order.

10. The respondent asked me to strike out the claimant's claim on the basis that the respondent had not had opportunity to fully consider the claimant's case prior to the hearing and that this led to an imbalance between the parties.

11. The claimant accepted that she had not complied with the order. Her explanation was that she was under a lot of stress and was not aware of what she needed to do. She advised me that her state of mind at the time meant that she did not know what to write. She also asked me to consider that she could not afford legal representation. She explained that it was not possible for her to accurately quantify her lost earnings as she did not receive payslips. She confirmed that she had set out an approximate calculation and that she would provide that to the respondent and the

tribunal during the adjournment. She also confirmed that she had prepared a witness statement and that she would provide this to the respondent and the tribunal during the adjournment.

12. In deciding whether to strike out the claimant's claim for non-compliance with an order, I have had regard to the overriding objective set out in Rule 2 of seeking to deal with cases fairly and justly. This requires me to consider all relevant factors, including what disruption, unfairness or prejudice has been caused; whether a fair hearing would still be possible; and whether striking out or some lesser remedy would be a proportionate response.

13. A proportionate response requires me to consider whether there is a less drastic means of addressing the claimant's failures and achieving a fair trial for the parties. The striking out of the claimant's claim would be a draconian step that would mean that the claimant was unable to continue to advance their case as pleaded.

14. The respondent submitted that it would be necessary for an additional witness, Mr Murphy, to provide a witness statement in response to some of the comments made by the claimant during the course of the preliminary discussions held this morning.

15. This is a claim for unfair dismissal. It is not disputed that the claimant was dismissed by the respondent. The issues for the tribunal to determine in an unfair dismissal claim include the principal reason for dismissal. The respondent's position is that this is due to the claimant's conduct in that she breached the terms and conditions of her employment with the respondent by carrying out work for another business without the express written permission of the respondent. The claimant's position is that this was due to the claimant having questioned her salary and working pattern following a period of furlough and flexi-furlough. Both positions relate to the claimant's conduct.

16. The respondent's ET3 response to the claim and Ms Humpage's witness statement set out the respondent's position and provide details of the events leading up to the claimant's dismissal. The decision to dismiss the claimant was taken by Dr Rankin, as evidenced in paragraph 23 of the witness statement of Ms Humpage. As Mr Murphy was not the dismissing officer nor was he the investigating officer, I concluded that any evidence from him would not add to the evidence that was already before me.

17. I concluded that there was sufficient evidence before me and that I could hear from the parties present on these issues to be able to make a fully informed determination.

18. In terms of remedy, which would only arise in the event of the claimant's complaint of unfair dismissal succeeding, the tribunal would need to hear evidence on financial losses, the steps the claimant has taken to replace her lost earnings, for what period of loss the claimant should be compensated, whether there was a chance that the claimant would have been dismissed if a fair procedure had been followed, whether the claimant contributed to her dismissal by blameworthy conduct.

19. I concluded that there was sufficient evidence before the tribunal in the bundle of documents before me (running to 73 pages) which included details of the claimant's annual salary and the additional documents filed, together with the oral evidence that the claimant and Ms Humpage would be able to provide for a fair hearing to take place.

20. Having concluded that a fair hearing could take place and considered the overriding objective to deal with cases fairly and justly, which includes avoiding delay and saving expenses, I decided that the application should be refused. Ms Murphy and her witnesses would be allowed time to consider the additional documents provided by the claimant and I would permit reasonable supplemental questions.

21. I heard the respondent's evidence in full, allowing additional time for the respondent's representative to put reasonable supplemental questions to the respondent's witness.

Issues for the Tribunal to decide

22. Having dealt with the preliminary issue, the issues for me to decide were agreed as follows:

Unfair dismissal

(1) Was the claimant dismissed?

(2) What was the reason or principal reason for dismissal? The respondent says the reason was the claimant's conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

(3) Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

a. there were reasonable grounds for that belief;
b. at the time the belief was formed the respondent had carried out a reasonable investigation;
c. the respondent otherwise acted in a procedurally fair manner;
d. dismissal was within the range of reasonable responses.

Remedy for unfair dismissal

If the claimant was unfairly dismissed generally:

(4) Should she be entitled to a compensatory award? And, if so, how much?

(5) Should a reduction be made on the basis of failure by the claimant to mitigate her losses?

(6) Should a "Polkey" reduction be made? And, if so, how much?

(7) Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

(8) Did the respondent or the claimant unreasonably fail to comply with it by failing to carry out an investigation into the claimant's conduct?

(9) If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

(10) If the claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?

(11) If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?

23. I indicated that, although the Polkey and contributory conduct issues concerned remedy and would only arise if the claimant's complaint of unfair dismissal succeeded, I would consider them at this stage as they were so interwoven with the evidence to determine the claims.

Procedure, documents and evidence heard

24. The claimant was a litigant in person.

25. There was a paginated file of documents before me running to 73 pages. References to page numbers throughout this judgment refer to the paginated file of documents. Further documents produced prior to the hearings and during the hearings were as follows:

a. A screenshot of the claimant's Instagram page dated 11 May 2019;
b. A statement from the claimant;
c. A screenshot of a WhatsApp message exchange between the claimant and Ms Humpage.
d. A copy of the claimant's final payslip and a breakdown of the calculations of gross pay for that payslip;
e. Bank statements from the claimant showing income received since her employment with the respondent was terminated;
f. The claimant's P60;
g. The claimant's calculation of her losses.

26. There was a written witness statement from Ms Humpage, Operations Manager for the respondent. Ms Humpage gave evidence for the respondent. The claimant was the only witness for herself.

27. I considered all the written and oral evidence notwithstanding whether it is addressed specifically in this decision.

Findings of Fact

28. It is not the Tribunal's purpose to resolve each and every last dispute of fact between the parties. My function is to make such findings of fact as are necessary to answer the issues in the claim and to put them in their proper

context. On that basis, and on the balance of probabilities, I make the following findings of fact.

29. The respondent is a small business providing travel arrangement services for companies. The respondent company employs 6 people. The director of the respondent company was Dr Rankin. I am satisfied by Ms Humpage's evidence that Dr Rankin was at all times the controlling mind of the respondent's business, particularly insofar as the events that lead to the dismissal of the claimant. The respondent company has basic employment policies and procedures and access to sub-contracted payroll and HR services.

30. There was initially some disagreement between the parties as to the date on which the claimant commenced employment. The ET1 claim form completed by the claimant stated that her employment with the respondent commenced on 15 May 2019. The terms and conditions of the claimant's employment [pages 36-41] stated that the claimant's employment commenced on 28 May 2019. I heard evidence from the claimant that she accepted that her employment with the respondent commenced on 28 May 2019 and that she had made an error when completing the ET1 claim form. I find that the claimant's employment commenced on 28 May 2019. The parties agreed that the claimant's employment was terminated on 2 September 2021 following her dismissal.

31. The claimant had had no disciplinary issues during her employment.

32. On 19 April 2019, the claimant signed a written statement of terms and conditions of employment [pages 36-41]. The relevant clause is as follows:

> *17 Confidentiality and Duties*
>
> *17.2*
> *During the term of the Employee's employment the Employee shall devote his/her whole time/attention and abilities to the business and affairs of the Employer. The Employee shall at all times act in the Employer's best interests and shall not during the course of the Employee's employment, without the Employer's prior written consent, be employed or engaged in any other capacity for any other entity or on the Employee's own account.*

33. The claimant was employed by the respondent as a travel consultant for 37.5 hours per week.

34. The claimant's annual salary when her employment started was £25,000.00. There were payslips before me [pages 32-33 of the bundle and in the further documents produced prior to and during the hearings] showing that at the time her employment was terminated, the claimant's annual salary was £28,000.00.

Lockdowns and furlough

35. Following the Covid-19 lockdown in March 2020, the respondent placed

most of its employees, including the claimant, on full furlough on 18 April 2020. Paragraph 2 of Ms Humpage's witness statement [pages 27-31] confirmed that she was not placed on furlough.

36. The respondent's letter to the claimant dated 17 April 2020 [pages 50-51] shows that there was no variation to the claimant's salary or to her contractual hours of employment at this point.

37. I heard evidence from the claimant and Ms Humpage that the claimant and other employees were paid their full salary from March 2020 until November 2020.

38. The employees went on to "flexi furlough" in August 2020

39. I heard evidence from the claimant and Ms Humpage that in September 2020, a Zoom call took place with the employees. Neither the claimant nor Ms Humpage could be specific as to the date but both agreed that the call had taken place. Both the claimant and Ms Humpage gave evidence that during the course of that call, the employees agreed that they would offer to accept 80% of their salaries in order to assist the respondent company. I accept the claimant's evidence that she felt that this was preferable to the respondent company potentially going out of business and her finding herself without a job during the pandemic.

40. The claimant's and respondent's evidence as to the basis of the reduction to salary differed. Ms Humpage states at paragraph 6 of her witness statement that the contractual working hours had not changed. In her oral evidence, Ms Humpage advised that the employees were on a "rolling rota" responding to the needs of the business at the time, as there was not enough work for everyone to return on a full-time basis. Ms Humpage confirmed in her oral evidence that the contractual hours did not reduce but the hours worked were less due to the impact of the Covid-19 lockdowns on the travel industry. Ms Humpage further stated that in any event, the claimant was not working 80% of her contractual hours during the whole period of flexi furlough.

41. The claimant's oral evidence was that the reduction to 80% salary was on the basis that her contractual hours were also reduced to 80%, i.e. a 4-day week.

42. There was no documentary evidence before me to corroborate the claimant's position that there had been a reduction to contractual hours. I found that Ms Humpage was consistent in her explanation of the reduction to the claimant's salary and that there was no reduction to contractual hours.

43. I find that the claimant agreed to accept a reduction of 20% in her annual salary with effect from November 2020 but that there was no agreement that her contractual hours had also been reduced by 20%.

Other employment

44. I heard oral evidence from the claimant that she accepted that she agreed

to the terms and conditions of employment with the respondent [pages 36-41].

45. I heard oral evidence from the claimant that she had carried out work for Le Beauté Clinic in a self-employed capacity during the period of her employment with the respondent. She confirmed that the work was carried out on Thursday evenings and Sundays and that she did not consider that it interfered with her employment with the respondent.

46. I had a text printout of a WhatsApp message exchange between the claimant and Ms Humpage on 30 July 2021 [page 34]. In that exchange of messages, the claimant stated that she had been doing a job since being furloughed.

47. I was referred to a screenshot from Le Beauté Clinic dated 11 August 2021 [page 43] which showed a post from the claimant which stated:

> *My microneedling offer is still available at just £45 per session…*

48. I have noted that this was on a date that the claimant was signed off as not fit for work. I find that the claimant was offering beauty treatments for Le Beauté Clinic during her employment with the respondent.

49. The claimant did not have written consent from the respondent to carry out this work. The claimant accepted this in her oral evidence.

50. I heard oral evidence from the claimant that she sought permission from Ms Humpage to take on a job whilst on furlough. The claimant provided the Tribunal and the respondent with a screenshot of a WhatsApp message exchange between her and Ms Humpage. The date of the exchange is not stated in the screenshot although the claimant did confirm during the course of her evidence that it was dated 30 December 2020. At 14:28, the claimant sent Ms Humpage a message that read:

> *I am just letting you know I am looking for a job whilst I'm furloughed as I cannot survive on what my wage will be, if I do get a job are you able to keep me on furlough for the week I would usually work? i.e. 11th jan?*

51. Ms Humpage responded at 17:37:

> *Hi. Totally understand that, i've had to cut back alot. What are you applying for and will it be full time? Just so I know how to do the rota*

52. The claimant responded at 17:40:

> *Just starting to look now, really struggling to be honest as Richard has been off with his bad knee (needs an op) but I will let you know as soon as I know. Will probably be okay for January but will let you know either way*

53. Ms Humpage responded at 18:17:

Ok no problem. I will leave you down for 11th. Keep me updated

54. I find that the WhatsApp messages do not amount to written permission being given for the claimant to undertake a second job. I find that the messages reflect the claimant advising her line manager of her intentions. I find that there was no evidence that the claimant notified Ms Humpage or Dr Rankin that she had obtained another job whilst on furlough.

55. I heard oral evidence from the claimant that Ms Humpage had offered to be a referee for an application for a position with the NHS. Ms Humpage stated in her witness statement and also in her oral evidence that the claimant had approached her about a volunteering position with the Covid-19 vaccination programme. Ms Humpage stated that the claimant did not advise her at any point that she had accepted a job in the NHS.

56. I find that the claimant did ask Ms Humpage to be a referee but this does not constitute the granting of permission by the respondent for the claimant to undertake work for another business whilst employed by the respondent company.

57. Ms Humpage was consistent in her evidence that Dr Rankin decides all employment-related issues. She stated that he would ask her opinion on matters but that ultimately the final decision would be his.

58. I accept Ms Humpage's evidence that Dr Rankin would be the person to make the final decision on whether to grant permission for an employee to carry out work for another business whilst employed by the respondent company.

The claimant's concerns about her reduction in salary and subsequent events

59. I accept that the claimant had concerns about the reduction in salary and that she mentioned those concerns to Ms Humpage. I find that the first occasion on which the claimant raised those concerns was the WhatsApp messages on 30 December 2020.

60. Ms Humpage scheduled the claimant to work on Friday 6 August 2021.

61. The claimant advised Ms Humpage in the WhatsApp message exchange on 30 July 2021 that if required to work on the day requested, she would have to sacrifice a day's pay for the job she had been doing since being furloughed and that she would lose £100-£120 per week for that day.

62. I further accept that the claimant discussed her concerns on 5 August 2021 with Mr Murphy, who provided a sub-contracted payroll service to the respondent company. I find that the telephone call did not resolve the claimant's concerns. I find that the claimant had failed to understand that the 20% reduction in salary did not mean that there was a commensurate reduction in hours.

63. On 6 August 2021, the claimant attended her GP and was signed off as not fit for work.

64. There was some dispute between the parties as to whether the claimant had refused to work on Fridays. I heard from Ms Humpage that the "rolling rota" frequently meant that employees were not asked to work on a Friday. Ms Humpage was consistent in her evidence that there had been no reduction to contractual hours and that shifts during flexi furlough were allocated based on the needs of the business.

65. Having heard the claimant's oral evidence, I find that the claimant was only willing to work 4 days per week due to her misunderstanding that her contractual hours had been reduced when she agreed to accept a reduction of 20% to her salary in late 2020.

66. The claimant stated that during the telephone conversation with Mr Murphy on 5 August 2021, she had refused to work on Friday 6 August 2021 due to a doctor's appointment. I find from the evidence of the WhatsApp message the claimant sent to Ms Humpage on 30 July 2021 that the reason that the claimant was unable to work for the respondent on Friday 6 August 2021 was that she was engaged in work for another business on that day.

The investigation

67. I heard evidence from Ms Humpage that following her concerns that the claimant was refusing to work on Fridays. Ms Humpage could not be specific as to the dates of her investigation in her oral evidence. Paragraph 22 of Ms Humpage's witness statement suggests that these investigations were carried out after she had notified Dr Rankin in August 2021 that the claimant was refusing to work. I find that those investigations were carried out in August 2021.

68. Ms Humpage looked at the claimant's Facebook page and Instagram page and found that the claimant was offering beauty treatments at Le Beauté Clinic and also as Louise Michelle Beauty.

69. Ms Humpage passed the result of her investigation to Dr Rankin which included the screenshot [page 43]. I accept Ms Humpage's evidence that Dr Rankin was the decision-maker and that she played no further role in the disciplinary process.

Dismissal

70. The claimant was dismissed on 2 September 2021 by way of the letter from the respondent [pages 54-56]. The letter sets out the reasons for dismissal as:

    (1) You are unwilling and/or unable to work for the Company during the working hours specified in your contract of employment;
    (2) You are carrying out work for other businesses without prior written consent of the Company, which is a material breach of your contract of employment;
    (3) You have failed to follow instructions from your superiors; and
    (4) The essential elements of trust and confidence in the

employer/employee relationship have irretrievably broken down.

Reason

71. I heard oral evidence from Ms Humpage as to the reasons for the claimant's dismissal. She was consistent in her evidence that the primary reason for the claimant's dismissal was that she had breached the terms and conditions of her employment by working for another business without written permission from the respondent. I find that the primary reason for the claimant's dismissal was that the respondent believed that the claimant had breached the terms and conditions of her employment.

Relevant Law

Unfair Dismissal

72. Section 94 of the Employment Rights Act 1996 confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111. The employee must show that s/he was dismissed by the respondent under section 95. In this case the respondent admits that it dismissed the claimant on 3 September 2021.

73. 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.

74. In determining the principal reason for the claimant's dismissal, I had regard to the oral and written evidence provided by both parties. The claimant's position is that this was due to the claimant having questioned her salary and working pattern following a period of furlough and flexi-furlough. The respondent's position is that they dismissed the claimant because they believed she was guilty of misconduct by breaching the terms and conditions of her employment. Both the claimant's and the respondent's positions relate to the claimant's conduct. Misconduct is a potentially fair reason for dismissal under section 98(2). The respondent has satisfied the requirements of section 98(2).

75. Section 98(4) provides that the determination of the question of 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.

76. In assessing fairness in cases of misconduct dismissal, the Tribunal must apply the 'Burchell test', originating in **British Home Stores v Burchell [1980] ICR 303**, a decision of the Employment Appeal Tribunal,

subsequently approved in a number of decisions of the Court of Appeal. The test involves consideration of three aspects of the employer's conduct:

76.1. Did the employer carry out an investigation into the matter that was reasonable in the circumstances of the case?
76.2. Did the employer genuinely believe that the employee was guilty of the misconduct complained of?
76.3. Did the employer have reasonable grounds for that belief?

77. In determining 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 or whether that band falls short of encompassing termination of employment. The assessment should consider the fairness of all aspects of the case, including the investigation, the grounds for belief, the penalty imposed, and the procedure followed and not on whether the employee has suffered an injustice. 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**).

78. In a case where an employer purports to dismiss for a first offence because it is gross misconduct, the Tribunal must decide whether the employer acted reasonably in characterising the misconduct as gross misconduct, and also whether it acted reasonably in going on to decide that dismissal was the appropriate punishment. An assumption that gross misconduct must always mean dismissal is not appropriate as there may be mitigating factors (**Britobabapulle v Ealing Hospital NHS Trust [2013] IRLR 854**).

79. There was no dispute that the reason for dismissal, misconduct, was a potentially fair reason relating to the Claimant's conduct. The issue for me to determine was whether it was fair or unfair applying the general test in section 98(4) of the Employment Rights Act 1996. That required me to take into account the relatively limited size and resources of this employer as well as equity and the substantial merits of the case. I reminded myself of the case law summarised above.

Polkey

80. I agreed with the parties that if I concluded that the claimant had been unfairly dismissed, I should consider whether any adjustment should be made to the compensation on the grounds that if a fair procedure had been followed by the respondent in dealing with the claimant's case, the claimant might have been fairly dismissed, in accordance with the principles in **Polkey v A E Dayton Services Limited [1988] ICR 142 and** the subsequent guidance from the Employment Appeal Tribunal in **Software 2000 v Andrews & others [2007] ICR 825**.

81. In undertaking this exercise, I am not assessing what I would have done; I am assessing what this employer would or might have done. I must assess the actions of the employer before me, on the assumption that the employer

would this time have acted fairly though it did not do so beforehand (**Hill v Governing Body of Great Tey Primary School [2013] IRLR 274 at para 24)**.

Contributory fault

82. If an unfair dismissal complaint is well founded, remedy is determined by sections 112 onwards. Where re-employment is not sought, compensation is awarded through the basic award and compensatory award.

83. The basic award is a mathematical formula determined by section 119. Under section 122(2) the basic award can be reduced because of the employee's conduct:

> *"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."*

84. The compensatory award is primarily governed by section 123 as follows:

> *(1) Subject to the provisions of this section and sections 124, 124A and 126, 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….*
>
> *(6) 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……"*

85. The Tribunal must be satisfied that the action by the claimant was culpable or blameworthy, that it caused or contributed to the dismissal, and that it would be just and equitable to reduce the award. The leading authority is the decision of the Court of Appeal in **Nelson v British Broadcasting Corporation (No. 2) [1980] ICR 111**. Culpable behaviour need not amount to a breach of contract or a tort but is 'unreasonable in all the circumstances', though not all unreasonable conduct is necessarily culpable or blameworthy.

ACAS Uplift

86. Where there has been an unreasonable failure to follow ACAS codes of practice on the part of the employer, the Tribunal is able to uplift an award by up to 25% if it considers it just and equitable to do so (section 207A(2) Trade Union and Labour Relations (Consolidation) Act 1992). The Tribunal is also able to reduce an award by up to 25% if it is considered just and equitable to do so in circumstances where an employee has unreasonably failed to comply with ACAS codes of practice (section 207A(3) Trade Union and Labour Relations (Consolidation) Act 1992).

Conclusions – Unfair Dismissal

Reason for dismissal

87. The letter of 2 September 2021 dismissing the claimant [pages 54-56] goes into some detail as to the events leading up to the claimant's dismissal and attempts to clarify the claimant's concerns in relation to her salary and working hours. I have concluded based on the written and oral evidence that the primary reason for the claimant's dismissal was that she had breached the terms and conditions of her employment.

Genuine belief

88. I am satisfied that Dr Rankin, as the dismissing officer for the respondent, held a genuine belief that the claimant was guilty of misconduct. Ms Humpage's evidence was clear that she had discovered on the claimant's Facebook page and on Instagram that the claimant had a second job offering beauty treatments. Ms Humpage was clear that she had looked at the claimant's Facebook and Instagram pages as she had encountered difficulties in arranging shifts with the claimant. Whilst the letter dismissing the claimant [pages 54-56] makes reference to the claimant refusing to work her contractual hours, the letter was clear that the claimant was being dismissed as she had breached her contract of employment in carrying out work for other businesses without prior written consent of the respondent. The evidence on behalf of the respondent was clear and consistent that the primary reason for the claimant's dismissal was that she was carrying out work for another business. I am satisfied that Dr Rankin genuinely held the view that the claimant was working for another business. I have also concluded from the evidence that the claimant was unable to work on Friday 6 August 2021 and am satisfied that Dr Rankin genuinely held the view that the claimant was unable to work due to the work she was carrying out for another business.

Reasonable grounds

89. The next question was whether the conclusion that the claimant was guilty of misconduct was based on reasonable grounds. The claimant accepted in her own evidence to the Tribunal that she had carried out work for Le Beauté Clinic during the time she was employed by the respondent. I was satisfied from the WhatsApp message exchange between the claimant and Ms Humpage together with the screenshot from Le Beauté Clinic that Dr Rankin's belief that the claimant had breached the terms and conditions of her employment was based on reasonable grounds.

Reasonably fair procedure

90. I then considered whether a reasonably fair procedure had been followed. I have concluded that the respondent failed to follow a fair procedure.

91. The main flaws in the procedure were that the respondent failed to inform the claimant of the basis of the problem and to give her an opportunity to

put her case in response before any decision was made.

92. The ACAS Code of Practice for Disciplinary and Grievance Procedures recommends that employees should be notified of the case against them in writing and that this notification should contain sufficient information about the alleged misconduct or poor performance and its possible consequences to enable the employee to prepare to answer the case at a disciplinary meeting.

93. The Code of Practice further recommends that at the disciplinary meeting, the employer should explain the complaint against the employee and go through the evidence that has been gathered. It goes on to say that the employee should be allowed to set out their case and answer any allegations that have been made.

94. It is troubling that Ms Humpage did not interview the claimant during her investigation. I find that a reasonable investigation would have sought the claimant's explanation for her carrying out work for another business.

95. I took into account the size and resources of the respondent but noting that they had access to a sub-contracted outsourced HR service, it was not unreasonable to expect them to have avoided these procedural flaws.

96. These procedural flaws rendered this an unfair dismissal and therefore the unfair dismissal complaint succeeded.

Sanction – band of reasonable responses

97. The claimant's terms and conditions of employment set out that employees *"shall not during the course of the Employee's employment, without the Employer's prior written consent, be employed or engaged in any other capacity for any other entity or on the Employee's own account.".* The claimant accepted in her evidence that she had signed and agreed to the terms of conditions. I conclude that the claimant must have been aware of the requirement for written permission to engage in employment with another business.

98. The claimant does not dispute that she has carried out work for Le Beauté Clinic. The claimant accepted in her own evidence that she did not have written permission from the respondent to engage in employment with another business.

99. Had the matter been dealt with following a fair procedure, I would have found that the decision to dismiss was within the band of reasonable responses. The claimant accepted that she was carrying out work for another business during the time she was employed by the respondent. I have concluded from her signature on the terms and conditions of her employment that the claimant was aware that written permission from the respondent to engage in work for another business was required. I have considered the size and resources of the respondent. The respondent is a small business providing travel arrangement services for businesses. The Covid-19 pandemic had a hugely detrimental impact on the travel sector. The respondent had a genuinely held belief that the claimant had breached

the terms and conditions of her employment. The claimant does not dispute that she did not have the required written consent for the work she was doing for another business. I am therefore satisfied that had a fair procedure been followed, the decision to dismiss was reasonably open to the respondent in these circumstances as it fell within the band of reasonable responses of a reasonable employer.

Conclusions – Polkey

100. Miss Murphy invites me to find that the respondent followed a fair procedure in its investigations. The respondent accepts that it did not meet with the claimant following the outcome of its investigations but asks me to find that the claimant was dismissed for a fair reason. The respondent's position is that a meeting would not have altered the outcome as it was clear to them that the claimant had breached the terms and conditions of her employment.

101. The claimant asks me to find that the respondent did not follow a fair procedure as she was not notified of the issue in writing and she was not invited to a disciplinary meeting.

102. I reminded myself that I am not assessing what I would have done; I am assessing what this employer would or might have done. I must assess the actions of the employer before me, on the assumption that the employer would this time have acted fairly though it did not do so beforehand.

103. I find that had the respondent met with the claimant and properly considered the claimant's length of service and explanation for her actions, together with the fact that the claimant had had no previous disciplinary action taken against her during her employment, it is inevitable that the respondent would still have dismissed the claimant. In making that assessment, I take into account the contractual term that written permission was required and that the claimant did not have that written permission. I also take into account that the claimant accepts that she has been working elsewhere during her employment with the respondent, that she accepts that she did not have written permission and that I have concluded that the claimant was unable to work for the respondent on Friday 6 August 2021 due to the work she was carrying out for another business.

Conclusions – Contributory fault

104. I accept that the claimant was confused about the 20% reduction to her salary and that her view was that this meant she was only required to work 4 days per week for the respondent. I accept, having heard the claimant's evidence, that she was struggling financially with the reduced salary during furlough. However, I have concluded that the claimant's contractual hours had not been adjusted and that the offer by the employees to accept a 20% reduction to salary during the time that they were furloughed was not an offer to reduce their contractual hours by 20%. I have also concluded that the claimant was aware that written permission from the respondent was

required.

105. In the circumstances, I consider that in carrying out work for another business, the claimant not only contributed to, but caused, the dismissal. The claimant accepts that she was working for another business during the time of her employment with the respondent. The claimant also accepts that she did not have written permission from the respondent to carry out work for another business. I consider it just and equitable for the basic and compensatory award to be reduced by 100% to reflect that the claimant's conduct was the primary cause of the dismissal and that the claim for unfair dismissal succeeded only on procedural fairness.

Unfair Dismissal Award

106. For the reasons set out above relating to contributory fault and reduction because a fair procedure would have produced the same result. I find that any award that may have been payable is extinguished.

107. As any award that may have been payable to the claimant is extinguished and nothing is payable, I did not need to decide on the ACAS uplift point as it was academic. However, if the issue had remained live, having concluded that the respondent had failed to follow a fair procedure, for the reasons set out above I would have found that there had been a failure on the respondent's part to comply with the ACAS Code of Practice. The respondent dismissed the claimant without giving her the opportunity to respond to the allegations against her, contravening the basis principles of procedural fairness. I would have concluded that it was just and equitable to increase the claimant's compensatory award by 20% to reflect the absence of procedural safeguards afforded to her.

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Employment Judge Poynton

Date: 2 November 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

2 November 2022

FOR EMPLOYMENT TRIBUNALS