EMPLOYMENT TRIBUNALS

Claimant: Ms Samantha Kittelsen

Respondent: Mr John Kittelsen t/a Speedwell Cars

Heard at: **London South Employment Tribunal (by CVP)**
On: 7 and 12 December 2023

Before: **Employment Judge T Perry**

Representation
Claimant: Mr M Todd (Counsel)
Respondent: Ms G McGrath (Litigation Consultant)

RESERVED JUDGMENT

1. The Claimant's clam for unfair dismissal is well founded and succeeds.
2. The Claimant's claim for unpaid accrued holiday pay is well founded and succeeds.

REASONS

Evidence

1. I was provided with a bundle running to 172 numbered pages (176 pages including the index).
2. The Claimant gave evidence from a written witness statement.
3. For the Respondent Mr John Kittelsen, Mrs Suzanne Kittelsen and Mr Terry Short gave evidence from written witness statements.
4. I heard oral submissions from both sides.

The issues

5. The Claimant brings a claim for unfair dismissal.

6. During the cross examination of the Claimant Ms McGrath initially sought to suggest that the Claimant was not an employee of the Respondent. However, Ms McGrath later confirmed that it was accepted the Claimant was an employee of the Respondent.
7. There is a dispute about whether the Claimant was dismissed by the Respondent. The Claimant's case is that she was expressly dismissed or alternatively that she was constructively dismissed. The Claimant says that if she resigned it was in response to a breach of the implied term of trust and confidence by the Respondent. Namely, the Claimant says that her father verbally abused her throughout employment (reaching a peak in early August 2022), and that on 8 August 2022 she was given a warning for lateness and not allowed to do her duties. The Claimant says that amounted to a fundamental breach in that it was behaving in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and that it was done without reasonable and proper cause.
8. To be a dismissal the Claimant must have resigned in response to that breach (it does not have to be the only or even principal reason for resignation) without having previously affirmed the contract.
9. If there was a dismissal, it is for the Respondent to prove what was the sole or principal reason for the dismissal (if it was a constructive dismissal the sole or principal reason for the breach of contract).
10. The Tribunal has to decide if that reason was a potentially fair reason under section 98 Employment Rights Act 1996. The Respondent seeks to rely on "some other substantial reason" in that the Claimant had said on 8 August 2022 that she was not returning to work and that she did not then return to work thereafter. This reason was not pleaded but was raised at the start of the hearing and was fully aired during closing submissions.
11. The Tribunal has to decide if the respondent act reasonably in all the circumstances in treating its reason as a sufficient reason to dismiss the claimant under section 98(4) Employment Rights Act 1996 taking into account the factors listed therein.
12. The Claimant brings a claim for payment of accrued untaken holiday pay during the last year of her employment under the Working Time Regulations 1998.

Findings of fact

13. The Respondent, John Kittelsen, is a sole trader trading under the name Speedwell cars (SC). The Claimant is his daughter.
14. SC is classic car refurbishment and sales business. It operates from the same site in West Byfleet as a related business Wheel Wizard Ltd (WW) which operates via a limited company of which Mrs Suzanne Kittelsen is the sole director. WW's business is car repair and servicing.
15. SC is VAT registered and WW is not.
16. WW does not operate a payroll. It engages all its staff as contractors. I accept the evidence I heard that from Mr Short that he worked for (or provided services to) both SC and WW. I accept the evidence I heard that there was a degree of cross referral of work between SC and WW and that, on occasion, work done by one company might be accidentally invoiced by the other but that this was regularised after the event.
17. In around 2016 the Claimant, who has three children, separated from her partner.
18. In December 2018 Mr Kittelsen was involved in a car accident. It appears that he suffered significant physical injuries in this accident as well as being diagnosed with PTSD and prescribed anti-depressants. Mr Kittelsen's ability to run the Respondent's business was severely affected and Mrs Kittelsen took on more of these responsibilities.
19. Between February and April 2019, the Claimant and her children moved in with Mr and Mrs Kittelsen after her house was sold. Thereafter the Claimant moved back to the Reading area where two of her children attend school.
20. Over the summer of 2019 the Claimant began to do work for the Respondent as a general administrative and sales assistant to help her mother. Around the end of the school holidays in September 2019 the Claimant's work became more formalised. On the limited evidence before me I find that the start date of the Claimant's employment was 1 September 2019.
21. In October 2020 Mrs Kittelsen had a stroke.
22. At some point, Mr Kittelsen brought a personal injury claim in respect of his car accident, for the purposes of which in February 2022 the Claimant produced a witness statement describing changes in Mr Kittelsen's personality. These are described as extreme and immediate. The Claimant

describes Mr Kittelsen as being much more aggressive and calling her an idiot or stupid. She describes Mr Kittelsen blaming her for his mistakes and being unpleasant to other staff including Mr Short.

23. Mr Short disputes this characterisation of Mr Kittelsen's behaviour but overall I accept that the change in personality described in the Claimant's witness statement for the purposes of the personal injury claim is correct. I believe Mr Short was reluctant to criticise his employer out of loyalty and concern for his ongoing employment. There is no reason for me to doubt the accuracy of the statement from February 2022.
24. Mrs Kittelsen suggested that the changes in her husband's behaviour were limited only to the months immediately following the accident but I do not accept that this is correct. Mrs Kittelsen herself accepted that the relationship between her husband and the Claimant was volatile and I find that this was, in no small part, due to Mr Kittelsen's aggressive behaviour after the accident.
25. For these reasons I accept the Claimant's description of Mr Kittelsen's aggressive behaviour relating to incidents involving customers in early August 2022 and that Mr Kittelsen referred to the Claimant either as a moron or as acting like a moron. I consider on the balance of probabilities that Mr Kittelsen said "fucking moron".
26. In the same February 2022 witness statement the Claimant comments on her lengthy commute. She stated that she was not happy relying on her oldest son to collect her two younger children from school and contrasted her 1.5 hour drive home after finishing work towards 6pm with her previous employment at their school which was both shorter and significantly cheaper. The Claimant described this commute (together with the behaviour of her father) as exhausting.
27. Mr Short described seeing the Claimant applying for jobs whilst at work. There was a CV for the Claimant included in the bundle. I find that on the balance of probabilities the Claimant produced this. It is inherently unlikely that anyone else would have done. This refers to the Claimant looking for work closer to home due to the length of her commute.
28. On or around 2 August 2022 there was an incident involving Mr and Mrs Kittelsen in which Mrs Kittelsen was knocked to the ground. The Claimant took Mrs Kittelsen to the police station. Mrs Kittelsen went to stay with the

Claimant for a few days. Mr Kittelsen was arrested by the police and was bailed on condition that he not speak to his wife. The Claimant did not then attend work for several days.

29. On 7 August 2022 at 13:16 Mr Kittelsen messaged the Claimant to say "Getting back to the question of work, I understand from mum that u were getting your old job back & starting in September. I don't have a job for you, in fact I hope I never see u again. You have caused a split in the family to which it may never recover. You are a thoroughly nasty, despicable, person, to whom I feel ashamed to call my daughter."
30. There is a reference in this message to Mr Kittelsen having understood from his wife about the Claimant returning to her old role at her children's school from September. Mr Short also refers in his witness evidence to the Claimant saying that she was leaving as the role and her commute were too much of a strain on her family life. Mrs Kittelsen refers in her statement to conversations at around this time with the Claimant about her working in her oldest son's restaurant whilst looking for work. Mrs Kittelsen refers to an interview at a BMW agent and a possible role at a film studio. I find that the Claimant had over the summer of 2022 been discussing with several people the fact that she was intending to stop working for the Respondent and to look for work closer to home.
31. The Claimant replied to her father's message on 7 August 2022 at 14:13 stating that she was employed by the Respondent (SC) and that if dismissed without notice she was entitled to six months pay plus outstanding holiday. The Claimant said she would be in work tomorrow between 10 and 3pm and asked that Mr Kittelsen be professional towards her.
32. The Claimant attended work on 8 August 2022. I accept on the balance of probabilities that when she attended she was given a verbal warning for lateness by Mr Kittelsen and that Mr Kittelsen then stayed in the office meaning the Claimant was not really able to perform her duties. I prefer the Claimant's evidence on this point as it is consistent with the tone of the message sent by Mr Kittelsen the day before that he did not want the Claimant at work.
33. Mrs Kittelsen moved out of the Claimant's house around this time. I find on the balance of probabilities that this was on 8 August 2022. I do not think it was earlier as Mrs Kittelsen recalled in evidence that the Claimant attended

work on one of the days when she was staying with the Claimant. I think it likely that it was not on or after 9 August 2022 otherwise the discussion referred to below as taking place on 8 August 2022 would have happened in person rather than over the phone. I find that the impetus to leave the Claimant's house was Mrs Kittelsen's other daughter telling her to leave because of the sister's anger at the role the Claimant had played in taking Mrs Kittelsen to the police regarding the incident on 2 August 2022, which had resulted in Mr Kittelsen being arrested.

34. After the Claimant left work on 8 August 2022 she spoke to Mrs Kittelsen by telephone. During this conversation I find that the Claimant first said that she was "not going back" and that the Claimant asked Mrs Kittelsen to ask if her father would pay her for the next three months whilst she secured a job. In response I find on the balance of probabilities that Mrs Kittelsen agreed to do this as she also did not want the Claimant to return to work. I consider it inherently more likely that the Claimant would have been the one saying she was not returning to work rather than Mrs Kittelsen telling the Claimant not to return to work given a) the message from Mr Kittelsen on 7 August and b) the way the Claimant had been treated by her father on 8 August.
35. The Claimant did not then return to work at the Respondent.
36. Ultimately, Mrs Kittelsen did not ask her husband to pay the three months' money requested by the Claimant.
37. I accept that Mr Kittelsen swore at the Claimant when they spoke accidentally by phone on 22 August 2022.
38. The Claimant started a new role on 1 November 2022 at Oakbank School.

The Law

Multiple employment

39. Whilst there is no reason why there cannot be separate employers for separate work, in employment law, as a matter of policy the courts have tended strongly to oppose any idea that an employee can be employed by two (or more) employers at the same time on the same work. This was reaffirmed clearly in **Patel v Specsavers Optical Group Ltd** UKEAT/0286/18 (13 September 2019, unreported).

Dismissal or resignation

40. Section 95 Employment Rights Act 1996 states that

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if)—

(a)the contract under which he is employed is terminated by the employer (whether with or without notice),

…

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

41. Where there is a dispute as to whether there has in fact been a dismissal at all, the burden of proof falls on the employee to show a dismissal. The standard of proof is that of the 'balance of probabilities' ie whether it was more likely than not that the contract was terminated by dismissal rather than, for example, by resignation or by mutual agreement between employer and employee.

42. Perhaps the best overall approach to this is the test proposed by Sir John Donaldson in **Martin v Glynwed Distribution Ltd** [1983] IRLR 198, at 519: *"Whatever the respective actions of the employer and employee at the time when the contract of employment is terminated, at the end of the day the question always remains the same, "Who really ended the contract of employment?"*

43. In the recent case of **Omar v Epping Forest District Citizens Advice** 2023 EAT 132, the EAT reviewed the law on dismissal. The current state of the law is summarised in the head note as follows:

    a. *There is no such thing as the 'special circumstances exception'; the same rules apply in all cases where notice of dismissal or resignation is given in the employment context.*
    b. *A notice of resignation or dismissal once given cannot unilaterally be retracted. The giver of the notice cannot change their mind unless the other party agrees.*
    c. *Words of dismissal or resignation, or words that potentially constitute words of dismissal or resignation, must be construed objectively in all the circumstances of the case in accordance with normal rules of contractual interpretation. The subjective uncommunicated intention*

of the speaking party are not relevant; the subjective understanding of the recipient is relevant but not determinative.

d. *What must be apparent to the reasonable bystander in the position of the recipient of the words is that:*
    i. *the speaker used words that constitute words of immediate dismissal or resignation (if the dismissal or resignation is 'summary') or immediate notice of dismissal or resignation (if the dismissal or resignation is 'on notice') – it is not sufficient if the party merely expresses an intention to dismiss or resign in future; and,*
    ii. *the dismissal or resignation was 'seriously meant', or 'really intended' or 'conscious and rational'. The alternative formulations are equally valid. What they are all getting at is whether the speaker of the words appeared genuinely to intend to resign/dismiss and also to be 'in their right mind' when doing so.*
e. *In the vast majority of cases where words are used that objectively constitute words of dismissal or resignation there will be no doubt that they were 'really intended' and the analysis will stop there. A Tribunal will not err if it only considers the objective meaning of the words and does not go on to consider whether they were 'really intended' unless one of the parties has expressly raised a case to that effect to the Tribunal or the circumstances of the case are such that fairness requires the Tribunal to raise the issue of its own motion.*
f. *The point in time at which the objective assessment must be carried out is the time at which the words are uttered. The question is whether the words reasonably appear to have been 'really intended' at the time they are said.*
g. *However, evidence as to what happened afterwards is admissible insofar as it is relevant and casts light, objectively, on whether the resignation/dismissal was 'really intended' at the time.*
h. *The difference between a case where resignation/dismissal was not 'really intended' at the time and one where there has been an impermissible change of mind is likely to be a fine one. It is a question*

of fact for the Tribunal in each case which side of the line the case falls.

i. The same rules apply to written words of resignation / dismissal as to spoken words.

Unfair dismissal

44. Section 98 ERA states

(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—

(b)relates to the conduct of the employee,

……

(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.

45. The burden is on the Respondent to show the sole or principal reason for dismissal and that it is potentially fair.

46. The classic statement of the reason for dismissal is per Cairns LJ in **Abernethy v Mott Hay and Anderson** [1974] IRLR 213 "A reason for the dismissal of an employee is a set of facts known to the employer, or it may

be of beliefs held by him, which cause him to dismiss the employee'."

47. If the Tribunal is not satisfied that the Respondent's reason is the real reason, it does not have to (but may want to) go on to find what the real reason for dismissal was (**Associated Society of Locomotive Engineers and Firemen v Brady** 2006 IRLR 576, EAT).

48. Once the employer has shown the reason for dismissal, it is then for the tribunal to determine whether the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal. That question is to be determined in accordance with equity and the substantial merits of the case and the circumstances to be taken into account include the size and administrative resources of the employer's undertaking. The burden as to fairness under s 98(4) ERA is neutral.

49. The Tribunal must assess the reasonableness of the employer's decision and must not substitute its view of the right course of action. There is a band of reasonable responses within which one employer might take one view and be acting fairly and another quite reasonably another view and still be acting fairly (**Iceland Frozen Foods Ltd v Jones 1982 IRLR 439)**.

50. The approach to be taken to procedural questions is a wide one. A Tribunal should view it if appropriate as part of the overall picture, not as a separate aspect of fairness **Taylor v OCS Group Ltd** [2006] IRLR 613. The Court of Appeal in **Sainsbury's Supermarket Ltd v Hitt** 2003 IRLR 23 CA is authority that the reasonable range of responses test applies to the whole disciplinary process and not just the decision to dismiss.

51. Before any dismissal arising from personality differences will be considered fair, the employer must show that not only is there a breakdown in the working relationship but that it is irremediable. So every step short of dismissal should first be investigated in order to seek to effect an improvement in the relationship (**Turner v Vestric Ltd** [1981] IRLR 23).

Conclusions

The Claimant's pay and her employment

52. The arrangements for the Claimant's pay were unusual. It is notable that there is no written agreement between the Claimant and either the Respondent or WW.
53. The Respondent's case is that the Claimant was employed by it on a fixed monthly retainer of £750, which varied only on a few instances when the Claimant had borrowed money from her father. Mrs Kittelsen essentially agrees and says that the Claimant was separately engaged as a contractor by WW and was paid at the rate of £13 an hour. The Claimant's bank statements record payments from WW as "Contract Labour".
54. It is the Claimant's case that there was only one employment, via the Respondent, and that all of this was remunerated at the rate of £13 per hour with the first £750 coming from the Respondent and the balance being paid by WW.
55. It was agreed that the Claimant recorded her hours in some kind on log book. Only one page of this book was included in the bundle. This is frustrating as a fuller copy of the log book could probably have allowed a reconciliation of hours worked against sums received. However, there was no suggestion that the Claimant recorded two separate sets of hours – one for the Respondent and one set for WW. In fact there is very little evidence about what work the Claimant did for the Respondent as opposed to for WW. I accept the Claimant's evidence that when she did work nominally under the auspices of WW this was done at Mr Kittelsen's request and under his control.
56. On balance I find that this was one employment paid via two separate entities. I find that the Claimant was paid a basic salary of £750 by the Respondent regardless of hours worked and that the total of the Claimant's working time was recorded in the log book and paid by WW at the rate of £13 per hour without any attempt to differentiate the time spent working between the two businesses. These two amounts together were the Claimant's total remuneration for work done. Work done for the Respondent was therefore paid in part by WW.
57. On the evidence before me, I find that the Claimant was an employee of the Respondent in respect of all the work she did both for the Respondent and WW and that the arrangement with WW was simply one manufactured in respect of payment. Accordingly, the Claimant is entitled to claim in respect

of her full salary from both WW and the Respondent, which was in reality simply one salary from two different sources.

Dismissal or resignation

58. In both the particulars of claim attached to the ET1 (paragraph 31) and in her witness statement (paragraph 24) the Claimant says the express words of dismissal were from Mrs Kittelsen on 8 August 2022 telling the Claimant not to return to work. As set out above, I do not accept that was what Mrs Kittelsen said. Rather, I prefer that it was the Claimant who said she was not going back and Mrs Kittelsen who agreed that she did not want her to go back either.
59. In submissions, Mr Todd for the Claimant invited me to find that the express dismissal was contained in the WhatsApp message sent by Mr Kittelsen on 7 August 2022 in which he stated "I understand from mum that u were getting your old job back & starting in September. I don't have a job for you, in fact I hope I never see u again."
60. Would it have been apparent to a reasonable bystander in the Claimant's position at the time that these were words of immediate dismissal or was this merely an intention to dismiss in the future? Would it be apparent these words were consciously really intended? I can take into account the context that Mr Kittelsen was clearly responding to an understanding that the Claimant was leaving to start another job the following month.and evidence of what happened afterwards, which is that the Claimant sent a message back referring to what she considered the correct notice she would need to receive and that she then attended work the following day and was given a written warning.
61. In effect there is a tension here between the words themselves "I don't have a job for you, in fact I hope I never see you again" and the context both before those words that Mr Kittelsen was reacting to an understanding that the Claimant was leaving and after them when the Claimant attended work the following day and (rather than being sent away – as one might have expected) being instead given a written warning.
62. However, on balance I find that the words on 7 August 2022 did amount to a dismissal. Notwithstanding the contextual factors mentiond above, which do muddy the waters, I think the words "I do not have a job for you. In fact I hope I never see you again" are sufficiently clear and would be understood

by the reasonable bystander to have constituted words of immediate dismissal. I also find that it would have been apparent to a reasonable bystander that were consciously really intended.

Unfair dismissal

63. The Respondent seeks to argue that any dismissal was due to the Claimant saying on 8 August 2022 that she was not returning to work and then failing to return to work after 8 August 2022. This is said to be for the potential fair reason "some other substantial reason".
64. This rationale clearly does not work to justify a dismissal that was conveyed on 7 August 2022. Accordingly, the Respondent has not met the burden of showing its stated reason for dismissal.
65. In fact, I consider that what was principally operating in Mr Kittelsen's mind that led him to dismiss the Claimant on 7 August 2022 was his reaction to the Claimant's involvement in taking Mrs Kittelsen to the police station on 2 August 2022. I find this is what Mr Kittelsen was referring to when he said of the Claimant that she had caused a "split in the family to which it may never recover" and why he described her as "a thoroughly nasty, despicable, person."
66. I also find that Mr Kittelsen was motivated to some extent (although it was not the principal reason for dismissal) by his belief that the Claimant was intending to leave employment in the near future anyway. There was clearly good reason for Mr Kittelsen to believe this given the Claimant had been discussing the same with her colleagues and family. Although only a provisional view, the parties may find it instructive to note that it does appear to me very likely that (due largely to the length of her commute) the Claimant would have resigned her employment at around the time of the new school term starting in September 2022 in any event.
67. Whilst the Respondent's actual principal reason for dismissal might be said to fall within the potentially fair heading of "some other substantial reason" due to be breakdown in the relationship between the Claimant and her father, even if potentially fair in principle, in this case the Respondent was acting outside the band of reasonable responses when it dismissed the Claimant for this reason. Importantly, there was both a total lack of process surrounding the decision to dismiss and there was no attempt to consider or investigate alternatives short of dismissal.

68. Accordingly, the Claimant's claim for unfair dismissal is well founded and succeeds.

Holiday pay

69. In the absence of any evidence of a relevant agreement for the purposes of Regulation 13 Working Time Regulations 1998, the Claimant's work year was the anniversary of the commencement of her employment on 1 September 2019.
70. The Claimant's full leave year had accrued by the time of her dismissal.
71. In the absence of any holiday records or payslips showing the payment of holiday pay, I do not accept the Respondent's evidence that the Claimant had taken annual leave in January 2022 and February 2022. The Claimant was not paid for accrued untaken holiday pay on termination of employment when she should have been.
72. I accept that the Claimant's normal working hours varied and so did the amount she was paid. The Claimant was paid for the hours that she worked and those hours could vary.
73. Accordingly, whist the Claimant is owed holiday pay the amount of that pay is to be determined (together with compensation for unfair dismissal) at a remedy hearing based on the number of hours actually worked in the 52 week reference period before dismissal.
74. The parties are again encouraged to explore resolving the dispute between them before that takes place.

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Employment Judge **T Perry**

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Date 20 December 2023

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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