Case Number: 1304779/2023

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant:	**Miss Rosie – Ann Hollis**
Respondent:	**Busy Bears Nursery Limited**
SITTING AT:	**Birmingham (Midlands West Employment Tribunal) By Video in public**
ON:	**11 April 2024**
BEFORE:	**Employment Judge G Smart (sitting alone)**

RESERVED JUDGMENT

On hearing for the Claimant in person and Mrs Rita Rupal, Director, for the Respondent:

1. The Claimant's claim for wrongful dismissal and notice pay succeeds.

2. The Claimant's claim for holiday pay succeeds.

REASONS

1. The issues to be decided

1.1. The issues were discussed and agreed at the start of the hearing. They were as follows:

1.1.1. Dismissal was admitted by the Respondent;

1.1.2. The fact that the Claimant was entitled to a notice period of 3 calendar months was common ground as was the fact that the Claimant would be entitled to accrued but unpaid holiday for the notice period if it was found that a notice period should have been afforded to the Claimant.

1.1.3. The parties agreed that the Claimant was dismissed on 11 April

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2023 summarily;

1.1.4. The Claim was presented on 29 June 2023 after the required conciliation contact via ACAS. The Claim was therefore in time.

1.1.5. It was accepted by the Respondent that the Claimant was on a pension scheme where the contributions were 3% for the employer and the Claimant's wage was agreed to be £13.50 gross per hour.

1.1.6. The annual leave year was not in dispute and the figures calculated in the Claimant's schedule of loss were not disputed except for the fact the Respondent had not performed the annual leave calculation themselves.

1.1.7. No other defences were put forward about liability or remedy.

1.1.8. The Claimant had made two other allegations apart from the claims for pay. She argued the manner for the dismissal was unfair and was also in breach of the Respondent's policies.

1.1.9. I explained that the manner of the dismissal was not actionable under breach of contract and that the Claimant had insufficient service to claim unfair dismissal, which had been confirmed by the Tribunal previously.

1.1.10. The Claimant also sought a clean reference because she says she was having difficulty obtaining employment. However, this is not something the Tribunal has the power to order, which I also explained to the parties.

1.1.11. The issue that was left to be decided was simply, did the Respondent have grounds to summarily terminate the Claimant's contract of employment without notice or payment in lieu of notice?

1.1.12. If the Respondent was not entitled to dismiss summarily, then the notice pay and holiday pay claims would succeed.

2. <u>The hearing</u>

2.1. Both parties were unrepresented. The Respondent had access to legal advice via Citation.

2.2. The Claimant had prepared by collating a bundle of 90 pages, producing a witness statement, submitting a schedule of loss and including what

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she says were all the relevant documents she had in her possession.

2.3. The Respondent had submitted a separate bundle of documents of 13 pages in length and its statement was very similar to its annex to the ET3 form defending the Claim.

2.4. The Respondent had not received the full bundle of documents prepared by the Claimant. Therefore, Mrs Rupal was allowed 10 minutes (by agreement) to read it and cross refer it to what she had received already.

2.5. After this adjournment, Mrs Rupal confirmed the only documents she had not seen was the Claim form and the schedule of loss. Clearly the Respondent had been served with the claim form previously because it had submitted a defence and had notice of the hearing. However after reading the schedule of loss, Mrs Rupal was content to continue with the hearing.

2.6. Neither party had prepared any cross-examination questions. I allowed both sides 30 minutes to prepare any questions they had.

2.7. After that adjournment, I asked both parties whether there were any more documents they thought were relevant and needed to be included in the bundles. Both sides answered no. The documentary evidence was therefore the Claimant's bundle of 90 pages and the Respondent's bundle of 13 pages.

2.8. After the Claimant was sworn in and was answering questions, Mrs Rupal sought to look on her computer for additional documents to challenge the Claimant's answers. These documents were not disclosed, not in either of the bundles and were therefore not in evidence.

2.9. I enquired as to how many documents Mrs Rupal sought to adduce. She said she had quite a few. I adjourned to check the case management history.

2.10. The parties were sent a case management order by the Tribunal on 28 December 2023. I confirmed that the parties had received it and both said they had. It read as follows:

"(1)The Claimant must provide to the Respondent and the Tribunal by 25thJanuary 2024a document –a "Schedule of Loss" –setting out how much in compensation and/or damages the Tribunal will be

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asked to award the Claimant at the final hearing in relation to each of the Claimant's complaints and how the amount(s) have been calculated.

(2)The Claimant and the Respondent shall prepare full written statements containing all the evidence they and their witnesses intend to give at the final hearing. All relevant documents, in chronological order and with page numbers, must be attached to the statements. The statements must: have numbered paragraphs; be cross-referenced to the documents; contain only evidence relevant to issues in the case. They must provide copies of their written statements and documents to each other on or before 22nd February 2024 and must bring 2 spare copies to the final hearing for the Tribunal's use."

2.11. It therefore appeared that the Claimant had complied with all the case management orders and the Respondent had not despite, in my view, clearly producing a bundle that appeared to be compliant with the orders.

2.12. I asked the Respondent what it thought *"All relevant documents … must be attached to the statements"* meant. Mrs Rupal responded by saying that this meant she should include all the documents that she *"deemed were relevant".* Of course, that is not what this order meant. Mrs Rupal is not an unintelligent woman and had access to legal advice. It was not for her or her company to decide what was relevant and what wasn't, that was to be determined by the cases of both sides and by the Tribunal.

2.13. The other reason why Mrs Rupal said she did not provide relevant documents is that she claims she misunderstood the Claimant's case and thought the case was purely about the Claimant alleging the Respondent had failed to follow its contractual disciplinary procedure and the manner of her dismissal.

2.14. Again, I do not believe Mrs Rupal was providing a straightforward answer. The Claim was obviously about notice pay as well as the way in which the Claimant was dismissed. The notice pay box in the ET1 had been ticked. The Claimant provided a calculation as to what she was saying she was owed, first in the ET1, second in the Schedule of loss and finally in her witness statement. All of these documents are requesting notice pay.

2.15. It is also the case that the Claimant made a stark accusation in her case. She alleged that she was not ever given any documentary

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evidence supporting why she was accused of gross misconduct. Not at the time, not afterwards when she said she wanted to appeal and not in these proceedings.

2.16. Having now considered the evidence and heard the Respondent's explanations for why it has breached the Tribunal's orders, I believe the Claimants allegation is a well founded one. I have concluded the Respondent has deliberately withheld disclosure for this case both before and after proceedings were commenced. The Respondent has only paid lip service to disclosing relevant documents to the Claimant.

2.17. It was discussed whether a limited number of documents could be sent to the Tribunal within the hearing window for the case, 3 hours, half of which had now already expired. The Respondent said it would have difficulty finding, collating and emailing those documents to the Claimant and Tribunal quickly.

2.18. Consequently, I disallowed any further documents to be admitted in evidence from the Respondent. It was too late. It would unduly prejudice the Claimant who had complied with the Tribunal's orders and it was simply not just to allow another opportunity before liability was determined. To allow further documents would not place the parties on an equal footing if the Claimant was having to respond to new documents late and whilst she was still under oath.

2.19. The hearing concluded after the parties both summed up their cases and I reserved my judgment because time had run out.

3. Findings of fact

3.1. The Claimant was employed as a Deputy Nursery Manager on 23 May 2022 working 40 hours a week.

3.2. On 1 September 2022, she was promoted to Nursery Manager on the same hours but with an increased wage earning £13.50 an hour under a written contract of employment.

3.3. In her contract of employment the Claimant was to commence on a 6-month probationary period.

3.4. Also in the contract the Claimant was entitled to 5.6 weeks annual leave per leave year including bank holidays. Her holiday year ran 1 September – 31 August.

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3.5. The annual leave accrual rate was stated in the contract as being 1/12 for each completed month worked during her first year of employment, at page 36 in the bundle.

3.6. The contract stated that upon termination of employment the annual leave due would be a proportion of the full annual leave entitlement, at page 37 in the bundle.

3.7. Under the heading notice periods, it stated under the subheading *"Notice to be given by the employer to the employee"* "Three months" also at page 38 in the bundle.

3.8. It was common ground that the employee handbook was contractual. It says as follows at the end of the contract of employment at page 43 in the bundle: *"I have read, understood and am willing to abide by the terms and conditions laid down in the Employee Handbook and accept that they form an integral part of this Contract of Employment."*

3.9. Further, the handbook itself stated at page 54 in the bundle *"It is important for you to read the Handbook carefully as this, together with your Contract of Employment, sets out your main terms and conditions of employment."*

3.10. Under the heading of gross misconduct, Mrs Rupal stated that the Respondent had relied upon the following bullet points:

"• Deliberate failure to comply with the published rules of the Nursery including those covering cash handling, security, health and safety, safeguarding, equal opportunities, the duty of candour, the Internet, etc.

• Deliberate falsification of records.

• Being in unauthorised possession of Nursery property.

• Behaviour likely to bring the Nursery into disrepute.

• Refusal to carry out reasonable duties or instructions."

3.11. On 6 March 2023, the Claimant passed her 6-month probationary period as confirmed by the email from the Respondent's Jenny Truslove its Group Quality, Education and Safeguarding Manager by email at page 44 in the bundle. They said to the Claimant *"Your dedication to the setting and strong work ethic has been noted, and I'd like to thank you*

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for your hard work during this probationary period" and *"Following this we can start in earnest to make progress on the settings development plan".*

3.12. Clearly, the nursery already had a development plan and considered the Claimant to be a competent and hardworking manager.

3.13. On 2 April 2023, the Respondent received an anonymous whistleblowing concern from Ofsted in a letter at page 13 in the Respondent's bundle. It said:

"We have received the following information about your provision:

- concerns regarding lack of learning and development for children
- concerns there is a high turnover of staff
- concerns a child does not currently have a key person
- concerns regarding the hygiene of the premises, garden and the nursery is very cluttered
- concerns regarding staff's lack of knowledge of policy and procedures
- concerns regarding the lack of regular two-way flow of information with Parents.

The information suggests that you may need to take action to remain compliant with the requirements of registration. We are passing this information to you so that you can take appropriate action.

You need to keep a record of the action you take but you do not need to write to us to tell us what you have done. We suggest you keep a record in your complaint log.

We will review your record when we carry out the next inspection of, or next visit to, your provision."

3.14. In my judgment, the letter was not a letter that was a particularly serious one for the Respondent to receive. Yes it needed to be taken seriously, but it didn't disclose issues that are very serious in nature requiring immediate action. Indeed, the letter had also come from the regulator, but the regulator did not want any formal response to it and simply asked for the Respondent to deal with any issues found - in house. The allegations are also vague and very broad. If this had been of utmost importance to the regulator containing very serious issues, then in my judgment and as the Claimant argued, the regulator would have taken a more active role in it, wanted to see the Respondent's response to it, and/or it would have triggered a visit to the nursery by Ofsted.

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3.15. This letter effectively sealed the fate of the Claimant's employment. Mrs Rupal said in her witness statement *"after a number of support visits and performance reviews, a discussion was held on Tuesday 04/04/2023 where the Claimant was dismissed, pending investigation, following a number of incidents and performance issues which had resulted in internal staff and parent body complaints and eventual Ofsted communication regarding "management concerns" following a written complaint to Ofsted."* Consequently, in my judgment, the Respondent took the approach of "sack first, investigate later" to the Claimant's employment.

3.16. On 4 April 2023, a meeting took place between the Claimant, Ms Truslove and a Tom Bevington. The Claimant had no warning of that meeting and she was called to it whilst she was on shift. This was not challenged by the Respondent.

3.17. At the meeting, by surprise, the Claimant was informed *"it isn't working".* She says she was provided with no other information, asked to hand over her keys and laptop and when she asked whether she would be paid for a notice period she says she wasn't not provided with an answer. I believe her. The Claimant gave straightforward clear answers to questions at the hearing. The same was not true of the Respondent.

3.18. For example, Mrs Rupal stated in her statement that there were *"…a number of support visits and performance reviews, a discussion was held on Tuesday 04/04/2023 where the Claimant was dismissed…."*, which would appear at face value to suggest there were performance concerns with the Claimant prior to her dismissal. Mrs Rupal later confirmed that these visits and reviews included probationary review meetings, which I clearly resulted in very positive feedback without any concerns being raised at all and the Claimant passed her probationary period. The Respondent's evidence could not be taken at face value.

3.19. On 5 April 2023, the Claimant emailed Mrs Rupal asking what the reason for dismissal was, the notice period applicable and what the appeal process was, at page 45 in the bundle.

3.20. On 6 April 2023, Mr. Sanjay Rupal responded as follows:

"Dear Rosie,
Following the receipt of your email via your line manager I can confirm the following as requested:

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1) The reason for the dismissal on Tuesday was on the basis of suitability.

2) As per your contract of employment you are required to work the 3 months notice period detailed therein.

Therefore can you please report to your line manager at 11am on Tuesday 11th April at Head Office (Radclyffe House, 66-68 Hagley Road, Edgbaston, Birmingham, B16 8PF) - I may also be available on Tuesday, if so I will be happy to discuss the reason for the decision made if you need more clarity.

3) You have the right to appeal at any stage in the disciplinary procedure if you are dissatisfied either with a disciplinary decision made against you or the level of penalty imposed. You should do this in writing to the Director within five days of receiving your confirmation of discipline letter.#

Kind regards
Sanjay Rupal"

3.21. It is clear therefore that at the point, the Respondent did not consider any gross misconduct to have occurred and had terminated the Claimant's employment on the 3 months' notice period in her contract of employment.

3.22. Between 6 April and 11 April 2023, the Respondent undertook what it called a review of the Claimant's setting and allegedly uncovered what it described later as being *"…a catalogue of issues and problems…".*

3.23. On 11 April 2023, the Claimant attended work as requested. However, her line manager was not present as the email from Sanjay Rupal said they would be. Instead, the Claimant was greeted by Tom Bevington and Sanjay Rupal as per her statement at paragraph 12. They called the Claimant into a meeting and this time dismissed her with immediate effect. The Claimant says she was again given no information about what the Respondent had found and why it had changed its position on the notice period. Effectively, the Claimant was given no opportunity to challenge any issues the Respondent had with her conduct or performance. I believe her. If this had been a meeting handled respectfully, straight forwardly and professionally, I would have expected to see a detailed description in witness statements, notes of the meeting, evidence of documents being provided to the Claimant showing the concerns they had any why this was such a serious issue.

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None of these things were present about the meeting itself.

3.24. The Claimant says at paragraph 13 of her statement that she asked why the disciplinary procedure was not followed. She says that she was informed that because she was under two years' continuous service, the Respondent was not obliged to follow the procedure. On balance, it is entirely plausible this was said to the Claimant in the circumstances, and was not challenged by Mrs Rupal at the hearing in any way. I therefore find this was the explanation given to her for why the Claimant was being treated like this and is also the reason why the Respondent behaved how it did, namely, to ambush the Claimant at each of the meetings it had with her in April 2023.

3.25. The specific allegations made against the Claimant were provided in a confirmation of dismissal email dated 11 April 2023 received by the Claimant later that day. These were said to be as follows at page 47 in the bundle:

"The following failures are cited as the reasons for this decision so far:

1. Failure to meet the statutory guidance '3.68.Providers must have arrangements in place to support children with SEN or disabilities.

Plans were not in use for children who are known to have SEN. Staff were not aware of current plans for the children they worked with, nor was there any documentation of these being supported. Children who had been identified as needed referral/ support, has not had referrals made, nor had interim support been put in place. This is a failure in the capacity as manager and SENDCO. This amounts to gross misconduct.

2. Failure to meet the statutory guidance '3.12. Providers other than childminders must record information about staff qualifications and the identity checks and vetting processes that have been completed (including the criminal records check reference number, the date a check was obtained and details of who obtained it). This amounts to gross misconduct.

Documents had not been updated to include details of staff DBS numbers, dates of checks, and no evidence of checks being completed using the update service.

3. Failed to maintain open and honest relationship with the LA – reported that a CIN child's SALT referral had been made, when in fact it had not. This constitutes a deliberate falsification of records which is

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again cited as an act of gross misconduct under the sub-section headed Gross Misconduct in the company employee handbook (page 26).

Other Points which have been noted that form part of the decision for the immediate termination of employment:

4. General hygiene, cleanliness, and tidiness of the building. Rotting vegetables found in kitchen documented by directors along with video footage.
5. Failure to maintain an accessible list of staff details including phone numbers.
6. Failed to recuperate fees / report any outstanding fees to the director in an acceptable time frame.
7. Failure to report serious maintenance concerns in the kitchen.
8. Failure to sign Kerry Millard up to her level 3 training in January 2023
9. Failure to sign up 2 members of staff to Citation employment services facility and 4 members of staff to Noodlenow
10. Staff certificates/references missing.
11. No files for CP children – deputy unaware of several CP issues
12. No pregnancy risk assessment for Rhea Giles
13. No fire drills or records of since September 2022

The company has taken the decision to formally terminate your employment following the uncovering of these failures and offences and although your last working day is 11th April 2023 the company will reserve its right to hold you responsible for any financial losses or damages to any element of the business and its employees/customers/reputation during the course of (but not limited to) your tenure as manager and will seek to recover these if deemed necessary."

3.26. Before the above allegations were written into the email of 11 April 2023, I am not persuaded that they were ever raised directly with the Claimant, discussed with her in any way and that she was effectively denied any opportunity to properly respond to them either at the time or during these proceedings. This Tribunal has not been provided with a single evidential document from the Respondent showing that any of the allegations are made out, adding credence to the Claimant's claim that she has not been provided with any documents about the allegations. Not only that, but she is then threatened with a potential damages claim.

3.27. Looking at the allegations the Respondent listed, in my view, the only allegations that appear to me to be serious ones are allegations 11 – 13 because of the regulatory critical or safety critical nature of the

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allegations, when taken at face value. Child Protection issues are of course critical to the business so are fire safety and employee safety issues if they are made out.

3.28. In response to allegations 11 and 12, the Claimant said in evidence that she believed child protection files were in place on her 'family' account, which she no longer had access to. She stated that the week before she was dismissed she recalled going through these with the deputy manager because child protection was shared between the two of them. When considering the pregnancy risk assessment, the Claimant stated she had started this with the employee, but was dismissed before it could be finished. The issue of fire drills was not put to the Claimant.

3.29. Not one single piece of evidence, other than the Respondent's say so in Mrs Rupal's statement, was before me to prove these allegations existed, who was responsible, who was ultimately culpable and to what extent the allegations (if made out) could be viewed by a reasonably informed person to, on balance, damage the relationship between the Claimant and the Respondent making summary dismissal justifiable.

3.30. The email containing the reasons for dismissal was marked without prejudice. I am not sure why, because it is clearly not an offer of settlement in any way and, at this point, there was not a Tribunal complaint. I have therefore considered it in evidence and no objection was made by the Respondent about it at the hearing.

3.31. After receipt of her dismissal email, on 14 April 2023, the Claimant unsurprisingly sought to appeal against the Respondent's decision, which I find was made by Sanjay Rupal. In her email, the Claimant sets out her case for appeal entirely consistently with her case before me, at page 48 in the bundle.

3.32. On 25 April 2023, Mrs Rupal wrote back to the Claimant inviting her to attend an appeal meeting on 2 May 2023.

3.33. On 28 April 2023, the Claimant wrote a response to Mrs Rupal. This was marked as without prejudice and could be said to contain an offer of settlement within it. However, both parties have disclosed this email. Both parties appear to rely on it and I therefore believe that both parties have waived any privilege that attached to it. The important parts of the email are as follows:

"I am writing to inform you that I will not be attending the appeal meeting on Tuesday 2nd May 2023, as I do not wish to appeal the decision. The

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fact that this meeting has been put in with only a few working days' notice given the bank holiday, without any evidence still being provided to me of the allegations in advance of this, demonstrates the continued lack of fair and objective process.

Unfortunately, I have lost faith and trust in the company following the way I have been treated and the complete disregard to the company policies that we agreed to in my contract and the employee handbook referenced and shared, agreed as my contractual terms."

and

"I am however continuing to appeal the process that the company have undertook and would like to clearly outline the following breaches of your own policies and procedures: …."

The Claimant then lists the specific points she wants to make about the process and says:

"Given that I have confirmed with my legal representative that the items above amount to wrongful dismissal, I am continuing to appeal the process that has been undertaken and will be seeking full payment of my final settlement including the three-month notice period, Annual leave and TOIL along with a clean employee reference. Should I not receive this as an out of court settlement, I shall be forced to take legal action through an employment Tribunal for wrongful dismissal.

Furthermore, I would like to raise additional concern in respect to the pay received today. My payslip states that I have been deducted 20 hours for sick leave. However, I was only sick for one day on the 23rd March 2023. I was not scheduled to work any over time on Friday 24th March 2023 and do not believe I was paid for any over time during that week."

3.34. The Respondent made no response to the appeal and contended that the Claimant had failed to follow through with the appeal. Mrs Rupal also contended that the reason documents were not provided was because the Claimant had not followed through with the appeal.

3.35. Upon reading the Claimant's email as a whole, it is quite clear that the Claimant is not appealing the decision to dismiss her because she felt at the time, that she by then could not trust the Company. She does however wish to pursue the part of the appeal about the way in which she was treated. The letter ends with the Claimant confirming she is

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continuing the appeal about the process undertaken by the Respondent.

3.36. Consequently, the Respondent failed to respond to the outstanding appeal points. I am also not persuaded that the appeal process would have made any difference to the documents the Respondent would have provided to the Claimant. If a Tribunal order for disclosure has not resulted in the Respondent producing documents that would support its case for gross misconduct allegations, then I am entirely convinced the Claimant's appeal letter wouldn't have either despite Mrs Rupal's arguments to the contrary.

4. <u>The Law</u>

Wrongful dismissal/breach of contract

4.1. Breach of contract is a common law claim not based on statute. However the power to consider a wrongful dismissal complaint in the Employment Tribunal is provided for by the **Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.**

4.2. If a contract is breached, then damages are payable to place the parties where they would have been had the contract been fulfilled properly in the normal course of the relationship or damages are payable if they were in contemplation of the parties at the time the contract was entered into. In both cases, the damages must be a probable result of the breach **Hadley v Baxendale (1854) 9 Exch. 341.**

4.3. What is "probable" is decided using a commonsense approach **Galoo Limited v Bright Grahame Murray [1994] WLR 1360.**

4.4. Damages for the manner of a wrongful dismissal are not recoverable following **Johnson v Unisys Ltd [2001] UKHL 13.**

4.5. When considering the burden of proof, the burden usually rests with the person who is asserting something to be a factual allegation and the standard of proof is on the balance of probabilities as summarised by HHJ Auerbach in **Hovis Limited v Louton [2021] UKEAT/1023/20/LA.**

4.6. Therefore, it was for the Claimant to prove that the contract had come to an end at the hand of the Respondent. If that was proven, then it was for the Respondent to prove why it said it was justified in terminating the Claimant's contract of employment.

4.7. The test about what justifies summary dismissal is helpfully summarised

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in a number of cases namely **Briscoe v Lubrizol Limited [2002] EWCA Civ 508, Dunn and Davidson v AAH Limited [2010] EWCA Civ 183** and **Palmeri v Charles Stanley & Co Limited [2021] IRLR 563 (HC).** The test is brought together, after reviewing all the authorities, at paragraph 42 in **Palmeri** as follows:

"42. The test I am required to apply for that is variously formulated in the authorities. It includes considering whether, objectively and from the perspective of a reasonable person in the position of Charles Stanley, Mr Palmeri had "clearly shown an intention to abandon and altogether refuse to perform the contract" by repudiating the relationship of trust and confidence towards Charles Stanley ***(Eminence Property Developments v Heaney [2011] 2 All ER (Comm) 223****). In a case like this "the focus is on the damage to the relationship between the parties"* ***(Adesokan v Sainsbury's Supermarkets Limited [2017] ICR 590 per Elias LJ paragraph 23****). There is relevant analogy with the formulations in the employment cases: "the question must be — if summary dismissal is claimed to be justifiable — whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service."* ***(Laws v London Chronicle [1959] 1 WLR 698, pages 700-701****) It must be of a "grave and weighty character" and "seriously inconsistent – incompatible – with his duty as the manager in the business in which he was engaged"* ***(Neary v Dean of Westminster [1999] IRLR 288, paragraph 20)****, or "of such a grave and weighty character as to amount to a breach of the confidential relationship between employer and employee, such as would render the employee unfit for continuance in the employer's employment" (****Ardron v Sussex Partnership NHS Foundation Trust [2019] IRLR 233 at paragraph 78).***

4.8. In addition, unlike the situation in unfair dismissal, after discovered misconduct can justify a summary dismissal even if the decision maker at the time did not know of the conduct at the time they made their decision. **Boston Deep Sea Fishing v Ansell (1888) (39) Ch D 339** at 364 **and Cavenagh v William Evans Ltd [2013] 1 WLR 238,** paragraph 5.

4.9. The motives of the parties are also irrelevant, meaning that if a party was already going to commit a breach of contract by denying an employee their notice, that does not prevent that party from relying on conduct that then happened or was later discovered to have happened giving the employer the right to summarily dismiss an employee, which it would otherwise not have had. This means that it is legally legitimate to terminate an employee's contract and then look for reasons to justify the

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summary dismissal after the event **Williams v Leeds United Football Club [2015] IRLR 383.**

4.10. In **Mbubaegbu v Homerton University Hospital NHS Foundation Trust UKEAT/0218/17**, it was held that it is possible for gross misconduct to be justified through a series of breaches taken collectively, even if each one in itself would not have passed the threshold. Of being described as gross misconduct.

4.11. I also reminded myself that damages for breach of contract are not punitive. They are compensatory. Therefore, if a person was dismissed in a sharp or oppressive manner, the employer cannot be penalised in damages after **Johnson** above. Consequently, the usual damages recoverable for a wrongful dismissal claim is for the whole or part of the unpaid notice period that would have taken place had proper notice been given.

4.12. Consequently, there is no test of reasonableness for the dismissal and no band of reasonable responses. Unfairness is irrelevant when considering a breach of contract case. A person is entitled to terminate a contract if grounds exist even when acting capriciously or without knowledge of the grounds that existed at the time until after the dismissal. After justification of a dismissal is therefore allowed at common law.

Holiday pay – breach of contract

4.13. Holiday accrual arrangements in the contract of employment can be actioned either as a breach of contract, under Regulation 30 of the Working Time Regulations 1998 or as an unlawful deduction of wages claim for breach of section 13 of the Employment Rights Act 1996 dependent on the circumstances.

4.14. Statutory annual leave entitlements can only be recovered under the statutory regime.

4.15. In this case, the Claimant and Respondent agree, that if the Claimant had been worked her notice period, then she would have been entitled to payment for any accrued but untaken annual leave accrued during the notice period.

4.16. Therefore, entitlement to accrued but untaken statutory leave has been considered by me under **Regulations 14 (2) and 30 of the Working Time Regulations 1998.**

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5. Discussion and conclusions

5.1. The first point to note here is that there were in fact two terminations of the contract of employment. The first took place on 4 April 2023. On that occasion, the Respondent terminated the contract on notice, which it had the right to do regardless of any alleged breach of contract by the Claimant. This was not a summary termination of employment and I find was therefore an act that was inconsistent with there being any serious breach of contract in contemplation of the Respondent at that time.

5.2. I am not persuaded that as of 4 April 2023, there was any breach of contract by the Claimant so serious as to amount to a breach of trust and confidence by her so serious or incompatible with her employment to warrant summary termination as outlined in the various tests mentioned in **Palmeri**. The Respondent did not argue its case as being such.

5.3. When considering the second termination of the contract of employment, which was a summary termination of employment during the notice period on 11 April 2023, the situation had changed and the Respondent then considered there were sufficient grounds to summarily terminate the contract of employment. If the allegations at paragraphs 11 – 13 of Respondent's email were made out, even if the evidence for them was found after the summary dismissal took effect, the Respondent would have had a perfectly legal defence to the Claimant's claims regardless of the insensitive way in which this situation was handled by it.

5.4. I have also considered the case in light of the decision in **Mbubaegbu.** Again, if all of items 1 – 13 were proven, then that would have been ample justification for cumulative gross misconduct justifying summary dismissal in my judgment.

5.5. However, applying the burden of proof described in **Louton,** there is simply no documentary evidence supporting the Respondent's factual assertions. The Respondent needed to prove that it could justify why it summarily dismissed the Claimant. It has failed to discharge its burden.

5.6. In response to the allegations alleged, the Claimant gave evidence that sounded plausible and reasonable. Without any corroborating evidence from the Respondent either through other witnesses or any documents relevant to the allegations or inspections it said it carried out, it has not met its burden of proving that the allegations made either before during

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or after 4 April 2023 were capable of being factually alleged, let alone amounting to gross misconduct with the Claimant being culpable for them.

5.7. Whist I reminded myself that after discovered conduct could justify a summary dismissal following **Willaims, Ansell and Cavanagh,** the Respondent has failed to persuade me that any after discovered grounds for summary dismissal existed following the decision to terminate employment on 11 April 2023. No after discovered conduct was relied upon by the Respondent after 11 April 2023 despite saying in its email of that date that the allegations justifying dismissal were as per the list they had collated *… "so far".*

5.8. There was therefore no active case put forward for after discovered misconduct despite this document alluding to it.

5.9. Consequently, without any other justification being put forward for why the contract of employment was terminated without contractual notice usually due, the Claimant has proven that the Respondent has breached her contract of employment and is therefore entitled to both notice pay and any accrued annual leave that would have accrued had she been allowed to work the remainder of her notice period.

5.10. In my view, the right to notice pay, is a loss stemming from the breach that would have been in contemplation of the parties both upon entering the contract and would have arisen in the normal course of the employment relationship after **Galoo** and **Baxendale,** as the Respondent effectively admitted.

5.11. The Claimant's claim for both unpaid annual leave in breach of the Working Time Regulations 1998 and notice pay after a wrongful dismissal are well founded and succeed.

Disposal

6. I have noted that neither side has put forward a case or submissions about breaches of the ACAS code of practice which applies to breach of contract claims about misconduct and holiday pay claims. I have also noted that the Claimant has indicated in her claim form that she has managed to mitigate some of her losses by taking up temporary ad hoc agency work. I believe it is just to take this into account in calculating the damages due to the Claimant.

7. These issues have the ability to increase or decrease the compensation due to the Claimant.

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8. Both parties are unrepresented despite having possible access to legal advice. I have therefore explained the law about the ACAS code below for the benefit of both sides. This is not advice, but a statement of the law. Both sides may find it beneficial to seek advice about the below orders before compliance.

9. I make the following case management orders:

 9.1. The Claimant is to send to the Respondent copies of documents proving all her earnings between 11 April 2023 and 4 July 2023 **within 14 days of the date this order is sent to the parties.** These might be for example pay slips or extracts of bank statements (excluding/redacting irrelevant personal information) proving wage payments.

 9.2. The ACAS Code of Practice about disciplinary and grievance procedures applies to numerous types of claim in the Employment Tribunal including breach of contract and holiday pay claims. The law about it is that if the Claimant unreasonably breaches any part of the code, then any compensation awarded can be reduced by up to 25% depending upon the breach. Similarly, if the Respondent unreasonably breaches any part of the code then any compensation can be uplifted by up to 25% for depending upon the breach. There are some cases where both parties may have breached the code with both a reduction and uplift applying. A link to the ACAS Code is found here:

 https://www.acas.org.uk/acas-code-of-practice-on-disciplinary-and-grievance-procedures/html

 9.3. Both sides have **a further 14 days from the date the Claimant provides her pay information** to make arguments in writing about the ACAS code of practice and whether they argue the other side has unreasonably breached it, if so how and to what degree, by reference only to the documents and statements that were referred to at the hearing before me to which this judgment relates. Such written arguments are to be emailed to the Tribunal for my attention on or before this deadline.

 9.4. After receipt of the above information, I intend to come to a decision about the amount of compensation due as soon as is practicable and will then send the compensation order out in writing. This is to save time and expense of both sides and the Tribunal, and also to consider the issues proportionately to the issues left in dispute.

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9.5. I am conscious that these case management orders have been made without either party being given a chance to comment on them. Consequently, if either party wishes to propose any amendments to the orders or would like to be heard at a hearing, rather than make its ACAS code submissions in writing, either party has 14 days from the date this order is sent to them to make representations in writing to the Tribunal. If neither party makes any representations about holding a remedy hearing or otherwise, by this deadline, then they shall be deemed to agree to the orders as proposed in this judgment.

9.6. I remind the parties under Rule 3, that the Tribunal is obliged to promote settlement of disputes between the parties where appropriate. If the parties can come to an agreement about the amount of compensation via ACAS conciliation or otherwise, they are encouraged to do so and to notify the Tribunal if an agreement is reached.

About these orders

10. These orders must be complied with even if this document is received after the date for compliance has now passed.

11. If any of these orders are not complied with, the Tribunal may: (a) waive or vary the requirement; (b) strike out the remedy claim or the remedy response; (c) bar or restrict participation in the proceedings; and/or (d) award costs/preparation time in accordance with the Employment Tribunal Rules.

EMPLOYMENT JUDGE SMART

26 May 2024

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