EMPLOYMENT TRIBUNALS

Claimant: Ms D Hill

Respondent: Able Healthcare Ltd

Heard at: Watford Employment Tribunal (in public; by video)

On: **21 February 2022**

Before: Employment Judge Quill (sitting alone)

Appearances
For the claimant: Ms S Khaliq, solicitor
For the respondent: Ms B Samuels, solicitor

RESERVED JUDGMENT

(1) The effective date of termination was 26 December 2020.

(2) The start date of the Claimant's employment was 2 January 2019.

(3) The final hearing is still as notified to parties by Notice of Hearing dated 15 August 2021 (so is for one day, on 11 March 2022, starting at 10am). That hearing will take place fully remotely by video.

(4) As presented, the claim did not include a complaint of unfair dismissal and I do not allow an amendment to add that complaint.

REASONS

Introduction

1. As per the notice of hearing dated 11 November 2021, the parties were informed that that there was to be a public preliminary hearing on 21 February 2022, and that:

> The Claimant's application to add on the claim of unfair dismissal shall be determined at a Preliminary Hearing (open) together with a factual determination of the Claimant's start date and her effective date of dismissal. The hearing will be listed or half day on the first available date. The parties shall exchange witness

statements within 21 days from the date of this letter. A Preliminary Hearing bundle shall be agreed and prepared by the Respondent within14 days thereafter. Written submissions to be exchanged no later than 7 days before the Preliminary Hearing.

2. The crux of the dispute is that on the Claimant's case, the Respondent did not have the right to terminate with immediate effect, and, therefore, the EDT was not until 2 January 2021, which would have been the expiry of 1 week's notice (the applicable statutory minimum notice period). The Respondent argued that it did have the right to terminate without notice, and that the EDT was 26 December 2020.

3. As both parties understood: if the Claimant was correct about EDT, then the Claimant would have had had 2 years' continuous service by the EDT; if the Respondent was correct about EDT, then the Claimant had less than 2 years' continuous service by the EDT.

The Claim as presented

4. There was early conciliation from 9 March 2021 to 26 March 2021. The claim was presented on 22 April 2021, less than one month after the end of early conciliation.

5. The complaints as itemised were:

   5.1 Wrongful dismissal / breach of contract / failure to give notice of dismissal

   5.2 Unlawful deduction from wages (relating to alleged non-payment for 15 December 2020 to 31 December 2020)

   5.3 Failure to make (full) payment in lieu of unused holiday entitlement upon termination

6. There appears to be no dispute that, for each of those 3 complaints, the claim was presented in time (though, for avoidance of doubt, that was not a matter which was for me to formally decide at the preliminary hearing and so, if there is a dispute, that will be addressed at the final hearing.)

7. As noted in Box 11, the Claimant was represented by solicitors at the time the claim was presented. That firm has continued to represent the Claimant, up to and including this preliminary hearing.

The Response as presented

8. The Respondent admitted an underpayment of payment in lieu of unused holiday entitlement, but disputed the amount.

9. The Respondent denied that the Claimant was entitled to notice, asserting that there had been a repudiatory breach of contract by the Claimant which, by a telephone conversation on 26 December 2020, the Respondent had accepted, bringing about an immediate and lawful termination of the employment contract.

10. It denied the Claimant's factual assertions about unlawful deductions. Further, it asserted that, in any event, the Claimant was only entitled to salary up to 26 December 2020.

11. The response was received on 16 June 2021, which was in time. A copy was forwarded to the Claimant's representative by the tribunal by email on 16 July 2021, with copy of a standard letter (sent to both parties) stating the response had been accepted and the file would be referred to an employment judge.

The Proposed Amendment

12. On 15 July 2021, the Claimant's representative wrote to tribunal seeking strike out of the response under Rule 37. In reality, the email was an assertion that the tribunal should issue a judgment under Rule 21. The Claimant's representative had not yet seen the response (and did not know that the response had been on time).

13. Following a review by a judge under Rule 26, a one day hearing was listed and case management orders made. The hearing date was to be 11 March 2022, and the orders included exchange of statements by 25 October 2021. The case was therefore to be fully ready for hearing by 25 October 2021. This information was supplied to parties by email on 15 August 2021.

14. On 25 August 2021, the Claimant's representative made an amendment application by email copied to the Respondent's representative. There were two matters raised:

    14.1 That the Claimant wished to allege her contractual notice period was 3 months (rather than 4 weeks, as specified in the claim form)

    14.2 That the Claimant wished to add a claim of unfair dismissal

15. In each case, the assertion was that the amendment application was being made because the Claimant had not possessed a copy of her employment contract at the time of presentation of the claim, but that she now had it. She stated that a start date of 2 January 2019 was in the employment contract. The email observed (correctly) that a start date of 4 January 2019 had been entered into box 5.1 of Claim Form ET1 and that a start date of 2 January 2019 had been entered into box 4.1 of Response Form ET3.

16. By email dated 13 September 2021, the Respondent's representative confirmed that there was no objection to the first proposed amendment (about length of notice).

17. The Respondent objected to the amendment to add an unfair dismissal claim. It confirmed that (as per its response), it regarded 2 January 2019 as the correct start date. It stated that allowing the amendment would prejudice the Respondent. It stated that the Claimant had less than 2 years' service, and explained its argument. It submitted additional objections on 15 September 2021. In both cases, the objections were copied to the Claimant's representative.

18. Upon consideration of the application and objections, on 20 October 2021, a judge made a case management decision which is reflected in the Notice of Hearing dated 11 November 2021, as quoted in the introduction to these reasons.

19. By email dated 17 November 2021, the Claimant's representative objected to the preliminary hearing, and proposed that, instead, the final hearing be extended to 2 days, and it deal with all issues (including length of service and the amendment application and with – by implication – both parties being ready and able to deal with the unfair dismissal claim at the final hearing).

20. By letter dated 16 January 2022, the parties were notified that a judge had considered the Claimant's application and it was refused.

21. The Claimant also made applications on 30 November 2021 and 13 January 2022, but their subject matter is not relevant for present purposes.

The Issues for the Preliminary Hearing

22. For the preliminary issue, I suggested the following list of issues and both representatives confirmed that it was agreed:

    22.1 What was the start date of employment?

    22.2 What was the effective date of termination? Deciding this will include:

        22.2.1 When was the purported decision to terminate with effect from 26 December 2020 communicated to Claimant?

        22.2.2 Has the Respondent proved that it was entitled to terminate the contract without notice?

23. I pointed out that, in effect, if I made a decision that the Respondent proved that it was entitled to terminate the contract without notice then that is going to be a decision which is binding at the final hearing, even though, technically, disposal of the breach of contract (failure to give required notice) complaint was not an issue for this hearing. Both sides acknowledged that they understood that.

24. Ms Samuels confirmed that the Respondent accepted that it had the burden of proof on this point.

25. Two of the points in that list were resolved by agreement. Namely that the Claimant had started work on 2 January 2019 (and had continuous employment since then) and that the Claimant was told by phone on 26 December 2020 that the Respondent was treating her employment as terminated with immediate effect.

26. I also had to decide the amendment application. If I found for the Respondent on the EDT point, then it was accepted that the Claimant had less than 2 years' service. The Respondent objected to the amendment even if I found in the Claimant's favour on the EDT and raised matters including about time limits for the unfair dismissal complaint. I confirmed those submissions would be taken into account for the amendment application, but that time limits had not been listed as a preliminary issue in their own right.

The Hearing and the Evidence

27. I had an agreed bundle of 320 pages, and an agreed supplementary bundle of a further 6 pages. Although not in the bundle, both sides confirmed that they had copies of the notice of hearing, the Claimant's amendment application and the Respondent's objection.

28. From the Claimant, I had a main written statement, and a supplementary statement, served after sight of Ms Kukadia's statement. The Claimant was the only witness on her side and she swore to the accuracy of both statements and was questioned by the other side and by me.

29. From the Respondent, I had a written statement from Ms Ani Kukadia. She was the only witness for the Respondent, and she swore to the accuracy of both statements and was questioned by the other side and by me.

30. The hearing took place fully remotely by video. The Claimant's representative had made an application requesting this. I do accept that the confirmation that the request was granted was only sent to parties on Friday 18 February 2022. Even so, I regard it as self-evident that such an application should only be made if the representative is satisfied that they have the facilities to participate in such a hearing. I was therefore surprised to be told that the Claimant's solicitor was unable to join by video because her home broadband was not up to the task. She asked permission to be allowed to participate by phone. In other words, she dialled into the video room, and everyone else could hear her, and she could hear us, but she could not see us, and we could not see her. The Respondent's representative had no objections.

31. I asked both representatives to confirm if they were satisfied that a fair hearing could take place, in all the circumstances, including that evidence/cross-examination would be required, and findings of fact would be needed, and taking account of the time lost by the attempts made to have the Claimant's solicitor join. They each confirmed that they were satisfied that a fair hearing could take place, and they wanted to continue. We got properly underway about 30 minutes into the 3 hour hearing slot.

32. Towards the end of the hearing, there was one brief glitch in which some or all attendees were disconnected, including me, but we were able to resume almost immediately. This was after evidence and submissions and while we were discussing other matters and it did not affect the fairness of the hearing.

33. Other than as mentioned above, there were no connection problems.

The findings of fact

34. The Respondent is a limited company which provides care and support. The Claimant started working for the Respondent as an employee on 2 January 2019. From no later than March 2019, she was full-time and employed with job title "Registered Homes Manager". She was referred to in her contract as "Registered Manager" of premises which I will call FL.

35. The Claimant was given a written contract to sign. The version in the bundle (pages 27-35) was signed on 10 March 2019 by the Claimant and is not signed by the Respondent. The Claimant gave her signed copy of the document to the Respondent in March 2019, and did not keep a copy for herself, and nor was she given back a version signed by the Respondent.

36. The duties set out in the contract were at clauses 1.3 to 1.19, and the termination clauses were 9 to 12. At clause 13, the disciplinary and grievance procedures in the handbook were mentioned, and were said to be non-contractual. The clauses included the following:

> 1.14 Ensure that Director, Line Manager, Ofsted, SW, Parents are well informed of any incidences and that communication is clear.
>
> 1.19.1 Use her best endeavours to promote and protect the interests of the Company and shall not do anything which is harmful to those interests; …
>
> 1.19.4 Comply with the Company's policies and procedures (including any variations thereof), …
>
> 1.19.6 Ensure compliance with the requirements of the relevant regulators from time to time, including but not limited to the provision of all reports on the residents required by them
>
> 9.2 The Employment shall be subject to immediate termination by the Company by notice in writing if the Employee: …
>
> 9.2.2 Commits any breach or fails to observe any terms of this Agreement or shall neglect or fall (otherwise than by reason of accident or ill health) or shall refuse to carry out the duties required of him (sic) under this Agreement; or …
>
> 9.2.4 Shall be guilty of any dishonesty or gross or persistent misconduct; …

37. At the FL premises the Respondent carries out activities for which OFSTED is a regulator. On 30 September 2020, OFSTED issued two compliance notices. Each notice stated: "*In order to remain fit for registration you must comply with the requirements of the Act and in particular the Children's Homes (England) Regulations 2015*." Each went on to say that OFSTD considered that the Respondent was failing to comply with the legal requirements for the registration of FL and set out the particular legal requirements that the Respondent had failed to meet, the evidence that had been taken into account, and details of steps that the Respondent was obliged to take to remedy the failures, including the timescales for so doing.

38. Where the notices referred to "the manager" that was a reference to the Claimant. Ms Kukadia is a director of the Respondent, and she is the "Responsible Individual".

39. One notice (which I will call "the First Notice") appears, with covering letter at pages 78 to 84 of bundle. It addresses what OFSTED found was a failure to comply with regulation 13, "the leadership and management standard". It stated that during an assurance visit to FL on 21 and 22 September 2020, the inspector found "serious shortfalls in the leadership and management of the children's home. These

shortfalls have had a detrimental impact on children's experiences and have put children at risk of harm." Amongst other things, it referred to: repair work that had been outstanding for a long time. It also referred to failing to follow children's care plans and risk assessments and failing to adhere to contact arrangements. In particular, it stated:

> The manager has failed to routinely monitor and review records of incidents at the home. The inspector identified numerous records that have not been monitored. There have been significant practice shortfalls that have led to children being put at risk, such as staff working outside of contact arrangements

40. One notice (which I will call "the Second Notice") appears, with covering letter at pages 85 to 93 of bundle. It addresses what OFSTED found was a failure to comply with regulation 12, "the protection of children standard". The evidence referred to (again as found by the inspector on 21-22 September 2020) included incidents on 20 May and 4 and 5 July 2020. I do not need to discuss those. However, it also refers to an incident on 12 September about which I need to make findings of fact. I will do so using the expressions Child, Friend and Town, the meaning of which is known to the parties.

41. What is not in dispute between the parties is that on 12 September 2020, the Claimant was not on duty. The most senior employee at FL that day was the Deputy Manager ("Deputy"), who is the Claimant's daughter. Child was living at FL and Child has a social worker, SW. A member of staff, whom I will call Worker, was due to take Child on an agreed and prearranged trip for some leisure activities. Part of this involved meeting another child, Friend, whose parents were going to take him to the prearranged meeting place (and collect him from there at the end of the day). Worker is Deputy' partner.

42. On the Claimant's account, what happened next was that Worker received a message, while en route, to say that Friend's parents' car would not start, and they could not get to the meeting place. Worker, according to the Claimant, did an on the spot risk assessment and decided to collect Friend from Friend's parents' home. This was in Town. The Claimant admits that the Respondent's staff knew that Child's home address was in Town, but denies the Respondent had been given information about the specific address. The Claimant asserts that no staff member could, therefore, have known the distance between Friend's address and Child's home address.

43. On the Claimant's account, when Child found out about the diversion to collect Friend, Child texted his family and for that reason Child's mother and siblings were present at Friend's address. There was some brief interaction between them and Child. Worker dealt with that and got on the road with Child and Friend. At the end of the day, he dropped Friend back at his parents' and Child's mother was again present and had some further interaction with him.

44. On the Claimant's account, Deputy contacted SW to report the matter. The Claimant also states that (from what she was told at the time), Deputy informed the Responsible Individual, Ms Kukadia, about the incident. The Claimant did not contact the Local Authority Designated Officer ("LADO") about the incident. On her account, this was because – based on many years' experience – this was not

the type of incident that needed to be reported. She said that if Worker had done something to put Child at risk, then that would have had to be reported, but he had not, and so no report was needed. She also did not personally check with Ms Kukadia that she, the Responsible Individual, had been informed.

45. Furthermore, and more generally, the Claimant states that she was not responsible for the incident, and for making internal reports (within the Respondent) about it, because that would have been Deputy's responsibility, as the senior person on duty at the time. She also states that SW has lied about the matter. She states that SW did not contact her, the Claimant, to request any information from her (either about the incident itself, or about what disciplinary action had been taken, or about what steps to report the matter had been taken).

46. The OFSTED report regarded the events of 12 September 2020 as being two separate failures which created risk: one when collecting Friend, and one when dropping Friend off. Taken literally, the report suggests that the risk of harm on the first occasion was to another young person (not Child or Friend) and the "further risk of harm" on the second occasion was to Child. However, on a fair reading, the inspector was suggesting that both visits created a risk to Child and both created a risk to the other young person (for the reasons which are elaborated on in the report).

47. On 14 September, the Claimant had a meeting with Worker, also attended by the Deputy Manager. A file note was produced, and the Claimant informed Child that the matter would be discussed with SW. SW was contacted by Worker.

48. The Claimant's account to me was that she regarded the 12 September incident as a safeguarding concern and appropriate action was taken. This was to place file note on the file, to update risk assessment, and for there to be meeting with SW, and it was placed in the incident log on the same date (12 September) by the Deputy Manager.

49. The Claimant's account was that the arrangements for Child were such that he was able to have contact with his family, so long as it was supervised. She said that it was true that he was not allowed to go to his mother's address, but there was nothing to specifically rule out Child going to Friend's address (in the circumstances of 12 September, ie a brief and supervised attendance).

50. After the OFSTED notices were received, the Respondent decided there should be an investigation. The investigation was conducted by an external consultant, Platinum Care Consultancy

51. The Claimant was interviewed on 19 October 2020. The 19 October meeting was audio recorded by the Claimant, with permission, and the Claimant sent her detailed comments and corrections on the minutes. The Claimant was interviewed again on 5 November 2020 as part of the investigation. She was interviewed on 23 December 2020 as part of a disciplinary hearing, and received the audio recording of that after her dismissal and before the appeal hearing. She was interviewed again on 2 February 2021 as part of her appeal hearing, and received the audio recording not long afterwards.

52. I am satisfied that, in these circumstances, I can rely on the transcripts/excerpts of transcripts in the bundle as evidence of what the Claimant said at the time, including in response to questions about particular documents, even where the particular documents in question are not part of the hearing bundle.

53. Although the investigators (Caplen-Kingston and Wells), the person who conducted the disciplinary hearing (Hickman) and the person to who conducted the appeal hearing (Hart) were not witnesses, on the face of the respective documents, they each compiled a detailed report (which was sent to the Respondent) having looked at documentary evidence and interviewed witnesses. The reports each contain a list of documents which were viewed by the author. Some of the items they looked at are not in the hearing bundle, but I am satisfied that I have enough information – including what the Claimant said to report authors about the documents – to make findings about the contents of those.

54. I have taken account of the fact that the Claimant's belief is that the investigation was not fair, was biased, and did not give her the chance to comment properly on minutes and evidence. She raised a grievance about the investigation (before the disciplinary hearing) and appealed against the decision to reject that grievance.

55. Based on the evidence in the reports, and the other documents in the hearing bundle, I make these findings.

    55.1 The Claimant has significant experience in the sector, and has been a registered manager prior to joining the Respondent and has had other senior positions of responsibility within various organisations providing care.

    55.2 The Claimant was aware that her responsibilities included compliance issues, and meeting OFSTED standards. She was responsible for managing risk to the children using FL and its staff. She was aware of the need to comply with the care plans drawn up for each child by social services, and to ensure that staff did so. Amongst other things, she was aware that such care plans might place restrictions on where the child could visit and/or with whom the child could have contact.

    55.3 12 and 13 September were a weekend. The Claimant was in work on Monday 14 September. She did not commence annual leave until the following Monday, 21 September

    55.4 The risk assessments said Child was not allowed <u>unsupervised</u> access (as opposed to not allowed any access at all) with family members. There had been a police investigation which was relevant to the issue of what contact was permitted. That investigation had concluded, but social services had not instructed that the risk assessments had changed. The Claimant was aware of the contents of the risk assessments.

    55.5 In the interview on 19 October 2020, the Claimant said that Friend lived "3 doors down the road" from Child's home address. In the tribunal hearing, she said it was "three streets away". Either way, it is my finding that the Claimant ought to have concluded that it should have been obvious to Worker that there was a significant chance that Friend's home address was not far from Child's

home address, and that if Worker did not know Child's home address then - rather than that being a point in Worker's favour - that meant that the risk factor associated with taking Child to Friend's address cannot have been properly assessed by Worker.

55.6 In both the internal proceedings and the tribunal hearing, the Claimant said there were no restrictions on Child going to Town. However, the Claimant was aware that SW had informed the Respondent that it was "not advisable" for Child to go to Town.

55.7 SW told the investigators that the Respondent had been told that Child was not to "go anywhere near his home address". I accept that SW did say this and that documents in the Respondent's possession reflected it. I do not accept that the information given to the Respondent was that the restrictions on Child going near his home address only applied when he was on his bike. The restrictions about where he could go on his bike were just recognition that, if on his bike, he should not be taken even a few miles from Town, because he could travel several miles – to Town – by bike. My finding is that it was obvious to the Claimant that the restriction could not be interpreted as meaning that he could be taken to a very short distance from his home (or from Town), provided that he was not on his bike at the time.

55.8 The Claimant accepted the accuracy of the file note of 14 September 2020 which referred to Deputy informing Child of the possibility of Worker getting into trouble. The Claimant explained this by saying that she assumed that Deputy meant that SW might jump to the wrong conclusions, namely that Worker had deliberately gone to the location with the intention of allowing Child to see his family. I do not accept that that is the only issue that the Claimant and Deputy had in mind. I am satisfied that Claimant and Deputy were aware that social services would be concerned about the events of 12 September 2020 even in the absence of a suggestion that Worker and Child had pre-planned the contact with Child's family. The whole point of having a pre-arranged meeting place, away from Friend's home, was that Child and Worker were not supposed to go to Friend's home.

55.9 There was no notification on file of a report to the Responsible Individual or LADO about the 12 September 2020 incident. Ms Kukadia denied having been informed about the incident. I am satisfied that she was not informed. She had little, if anything, to gain by giving false information to the investigators about this point. In any event, the Claimant does not claim to have witnessed Ms Kukadia being informed by Deputy, or to have seen any documentary evidence that Ms Kukadia was informed. To the extent that the Claimant suggests that such documents might exist but have been concealed by the Respondent, I reject that suggestion.

55.10 There was no record of the event in the House Log.

55.11 On 5 November 2020, the Claimant gave similar answers as she gave during the tribunal hearing for not informing LADO. She said that Worker "did not put the child at risk at all. There was no risk to him seeing his family." In the internal appeal, she reiterated that she does not agree that she should have

made a report to LADO, but, even if she is wrong about that, it is not a sackable offence (Page 285). In the tribunal hearing, she gave examples of what she considered reportable (eg of excessive physical restraint) and said that the type of thing which occurred on 12 September 2020 was not like that.

55.12 Contrary to her evidence to the tribunal, in the internal proceedings, the Claimant said that what occurred on 12 September 2020 was not something which was a safeguarding concern. My finding is that she did not log it as a safeguarding concern, or seek to ensure that Deputy logged it as such.

55.13 The Claimant signed a document on 1 March 2020 which said that she, the Claimant, would have management responsibility for Worker, but if there were any concerns raised about Worker, another manager would investigate. She did not report the 12 September incident to any other manager. Her account to the internal proceedings was that she did not report it because she did not see it as a serious matter, or as a safeguarding concern.

55.14 The Claimant was also aware that a risk assessment had been conducted about Worker being Deputy's partner. The Claimant was aware that that stated that that Deputy was not to have management responsibility for Worker and that if Deputy became aware of any concerns she must report them immediately to a manager who was not the Claimant (her mother) and to the Responsible Individual and follow safeguarding and other relevant policies.

55.15 The Claimant's account about repairs has been consistent throughout and matches what she said during the hearing. Namely, (as well as problems associated with getting work down during lockdown), she had discussed the matters with Ms Kukadia, explaining what work was needed and why, and Ms Kukadia had refused to authorise the expenditure.

56. After the disciplinary interview on 23 December, the Claimant was told that it would be early in the new year before the Claimant had outcome. The report was to be submitted to the employer and it would be for employer to decide on the outcome.

57. The report was completed. It bears the date 25 December 2020. I have not seen evidence about when the Respondent received the full report. However, for the preliminary issue that I have to decide, it does not necessarily matter whether Ms Kukadia was able to read the full completed report, or a draft version, or received just a summary, by 26 December.

58. On 26 December 2020, the Claimant was told by phone that she was dismissed with immediate effect. Her appeal document (314-320) states that Ms Kukadia made the initial phone call, then handed over to someone else who conveyed the decision. I am satisfied that the decision had been made by Ms Kukadia on behalf of the Respondent and that the Claimant understood at the time that that was the case. The Claimant's email sent around 8pm on 26 December confirms she understood that.

59. In the same document, the Claimant referred to her start date of employment as being 2 January 2019. Ms Kukadia, in her written statement for these proceedings, quite correctly pointed out that that is what the Claimant wrote on 26 December

2020. In contrast, in the Claimant's written statement, does not address this point head on. I do note what is in paragraph 12 of that statement, which refers to what the Claimant believes that the Respondent ought to have understood based on the contents of the 26 December document. I do not consider that the Respondent was under any duty to correct anything which the Claimant said in the document. She said the start date was 2 January 2019 (and the Respondent believed that to be correct) and the termination date was 26 December 2020 (and the Respondent believed that to be correct too).

60. In her supplementary statement, the Claimant says she could not remember why she wrote "my start date was 2nd January" on 26 December 2020. She says that by the time she instructed solicitors (so prior to 22 April 2021, which is when claim was submitted) she had become convinced that her start date was 4 January 2019. Her written statement leaves open the possibility that she had known the correct start date on 26 December 2020, but later forgot or made a mistake about it. In cross-examination, her position hardened, and she said that she believes that the mistake was in the 26 December email. In other words, that, as of 26 December 2020, she firmly believed that her employment start date was 4 January 2019, but made a typo and wrote "2nd January" by mistake.

61. My finding on this point is that the Claimant was attempting to be honest in her answers to me, and she was attempting to be honest in her supplementary written statement. However, on the balance of probabilities, my finding is that as of 26 December 2020, the Claimant was aware that her employment had started on 2 January 2019.

    61.1 For her to know, on 26 December 2020, the correct start date, it could have been because she had a vague memory of that that specific date in mind, and/or that she knew it was the first working day after New Year, and looked at a calendar and (correctly) inferred the date had been 2 January 2019.

    61.2 For her to consciously believe, on 26 December 2020 that the start date was 4 January, then one possibility is that she believed she started work on a Friday and checked the calendar. Another is that she had the date "4th" specifically in mind. However, if she did believe that on 26 December, then while (according to her) firmly believing that 4 January was correct her fingers she hit a different key on the keyboard. Mistakes certainly do happen, even when the keys are only diagonally adjacent. However, other keys are nearer to "4" than "2".

    61.3 Of these two possibilities, I think the former is more likely. If it were necessary for me to decide specifically how and why the later confusion about 4 January arose then my finding would be that it arose because the Claimant said in her 26 December email that, had the Respondent waited until 4 January to dismiss her, she would have been employed for 2 years. However, she did not mean "if you wait until 4th January [which is the anniversary of my employment] I will then have been employed for 2 years". What she meant, as is clear from the document as a whole, was: "if you wait until 4th January [which is the date you previously told me would be the earliest date for decision] I will by then have been employed for 2 years".

61.4 It seems likely to me that someone read the document later and misunderstood the reference to 4 January. I do not need to decide, on the balance of probabilities, if that is the exact reason for the error in the ET1. However, on balance of probabilities, I find that there was not a typo in the 26 December 2020 document, and, at the time, the Claimant believed the correct start date was 2 January 2019.

61.5 So, in summary, by February 2022, the Claimant has come to honestly believe that she has always believed her start date was 4 January. However, she is mistaken. In December 2020, she did know (or at least was able to correctly work out) that her start date was 2 January 2019.

62. On 26 December 2020, the Claimant also received a letter confirming dismissal. The letter, like the phone call, stated that the dismissal was with immediate effect, and without notice or pay in lieu of notice. I reject the Claimant's suggestion (based on the contents of the P45 or otherwise) that the Respondent intended the dismissal to be with notice or pay in lieu of notice.

63. The letter first identified the allegations which had been investigated. The first 3 numbered paragraphs (and the sub paragraphs to those) replicate the contents of the letter inviting her to the disciplinary hearing. The first two of those both relate to alleged failures to take appropriate action after the 12 September incident. The third relates to the repair issues.

64. The letter said that the conclusions on those allegations were:

> I considered your actions to be unsatisfactory because;
>
> 1) Your failure to implement correct reporting procedures, including contact with social workers, safeguarding concerns, personal relationship ask assessments, failure to discuss matters with LADO and therefore a failure in your role as a Registered Manager
>
> 2) Your failure to ensure an accurate record was taken of the incident regarding … on 12 September contributed to the Company receiving a Compliance Notice from Ofsted on 30 September 2020
>
> 3) Your failure to comply with regulations 13(1)(a), (b) (2) (a) (h) contributed to the Company receiving a second Compliance Notice from Ofsted on JO September 2020.
>
> 4) Your actions are not what we would expect of someone in your position and as a result, we have lost trust and confidence in your ability to perform your duties to a level we would reasonably expect.

65. The letter then itemised three "further concerns". Suffice to say that the Respondent did not provide me with any evidence that the Claimant had conducted herself as alleged in the "further concerns". I am not satisfied, on the balance of probabilities, that she did those things.

66. The letter continued:

> Having carefully reviewed the circumstances and considered your responses, I have decided that your conduct has resulted in a fundamental breach of your contractual terms which irrevocably destroys the trust and confidence necessary to continue the employment relationship. The appropriate sanction to this breach is summary dismissal.
>
> You are therefore dismissed with immediate effect. You are not entitled to notice or pay in lieu of notice.

67. I am satisfied that the reason that the Respondent terminated the Claimant's employment what that Ms Kukadia did believe that the Claimant's conduct was as described in the letter, and she did think it was a fundamental breach of contract, and she did wish to respond to that breach by termination of the contract.

68. Ms Kukadia accepts that she was aware of the 2 year requirement for bringing an unfair dismissal claim, and that she was aware that the Claimant was close to that point, and that she knew the Claimant's employment started on 2 January 2019. She did not dismiss the Claimant because she wanted to avoid the Claimant reaching the 2 year mark; she dismissed her for the reasons stated in the letter. I think it more likely than not that the report's being done on Christmas Day (according to the date stated in the report) and the communication being done on Boxing Day were motivated by the fact that the Respondent believed was more advantageous to the Respondent to terminate in December, rather than leave it until on or after the 4 January date which Mr Hickman had mentioned. However, there is a distinction between the decision to do something (in this case dismiss an employee) and the decision about the date on which that thing will be done. I am satisfied that the former decision was not influenced by the 2 year qualification issue, though, the latter decision probably was.

69. The Claimant did have an appeal hearing. This was recorded and I accept the transcript in the bundle as accurate. The Claimant stated:

    69.1 She had a recording of the dismissal conversation

    69.2 The person she spoke to admitted that minutes of the 23 December meeting were not ready by 26 December, and that the Claimant had not yet received the audio recording of it

    69.3 That she had said on 26 December that her start date was 2 January

    69.4 That she had received the audio of 23 December by the time of the appeal hearing (on 2 February)

    69.5 That other people dismissed for gross misconduct, with immediate effect, had received pay in lieu of notice

70. The Claimant was notified about the decision on her appeal against dismissal, and the appeal was not upheld. Her grievance appeal was also not upheld.

71. The parties have had a dispute about the Claimant's data subject access request. All that I need note is that:

71.1 The Claimant was not given, at the time, full access to the disciplinary report or the appeal report. However, she did have recordings of the interviews, and has not disputed the accuracy.

71.2 The delay (or what the Claimant alleges was a delay) in providing a copy of her employment contract is part of what leads the Claimant to argue that her amendment request should be granted. Her case being that if the contract had been supplied earlier, she or her solicitors would have been able to spot that it said that the start of employment was 2 January in time to include a claim for unfair dismissal in the claim form.

The Law

72. Section 108(1) the Employment Rights Act 1996 ("ERA") states that the right of an employee not to be unfairly dismissed by their employer does not apply to the dismissal of an employee unless they have has been continuously employed for a period of not less than two years ending with the effective date of termination. The remaining subsections of section 108 create exceptions, none of which are alleged to apply in this case.

73. So, to have the right, an employee whose start date was 4 January 2019 would have to have an EDT that was no earlier than 3 January 2021 and an employee whose start date was 2 January 2019 would have to have an EDT that was no earlier than 1 January 2021. In this case, there is not alleged to be any period between the start date and the EDT which does not count towards the two year requirement.

74. The effective date of termination ("EDT") is defined by section 97.

> (1) Subject to the following provisions of this section, in this Part "the effective date of termination"—
>
> (b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, …
>
> (2) Where—
>
> (a) the contract of employment is terminated by the employer, and
>
> (b) the notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination (as defined by subsection (1)),
>
> for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.
>
> (3) In subsection (2)(b) "the material date" means—
>
> (a) the date when notice of termination was given by the employer, or
>
> (b) where no notice was given, the date when the contract of employment was terminated by the employer.

75. By section 86(1) ERA, where an employee has been employed for more than a month, but less than 2 years, the employer must give 1 week's notice when dismissing. Section 86(6) states:

> (6) This section does not affect any right of either party to a contract of employment to treat the contract as terminable without notice by reason of the conduct of the other party.

76. In Lancaster & Duke Ltd v Wileman UKEAT/0256/17, the Employment Appeal Tribunal analysed the interaction between sections 97(2) and 86(6). It was held that section 97(2) Employment Rights Act 1996 referred to "the notice required by section 86" and thus incorporated the entirety of that section, including subsection (6). That meant the deeming provision which extended the EDT (by adding the statutory minimum notice period) was subject to the employer's right to give no notice in the circumstances allowed by section 86(6).

77. In turn, that means that when deciding whether the EDT should be extended by section 97(2), a tribunal must decide whether, on the facts, the particular employer did have the right to terminate the particular employment contract without notice.

78. Only repudiatory breaches of contract by employees will justify so called "summary dismissal" (termination without giving notice). The decision about whether a breach of contract is repudiatory is essentially a question of fact and degree.

79. In Briscoe v Lubrizol Ltd [2002] EWCA Civ 50, the court of appeal approved the test set out in Neary and anor v Dean of Westminster 1999 IRLR 288: the employee's conduct "must so undermine the trust and confidence which is inherent in the particular contract of employment that the [employer] should no longer be required to retain the [employee] in his employment". In so doing, the court of appeal stated that the conduct should be viewed objectively. For the employer to prove that the breach was repudiatory, the employer does not necessarily have to prove that the employee intended to repudiate the contract.

80. In jargon terms, the phrase "gross misconduct" is sometimes used as a shorthand for the type of conduct (or misconduct) by the employee that will entitle the employer to implement a summary dismissal. Written contracts of employment (as well as staff handbooks, etc) often list examples of the things that will be considered "gross misconduct". While such lists are potentially relevant to the decision, it is ultimately the court or the tribunal which will decide if particular acts or omissions by the employee amounted to a repudiatory breach.

81. In Adesokan v Sainsburys Supermarkets Ltd [2017] EWCA Civ 2, the court of appeal had to consider circumstances in which an employer had purported to summarily dismiss, relying on a contractual term which referred to "gross misconduct". It was necessary for the court to consider whether there was a relevant distinction between "gross misconduct" and "gross negligence". In particular, it was necessary to consider whether there was a distinction between those phrases where the employee's acts and omissions were alleged to have breached the implied term that neither party to a contract of employment will, without reasonable and proper cause, act in a manner calculated or likely to destroy or seriously damage the relationship of trust and confidence.

82. In paragraph 21, the court considered Neary, and noted that the duties of the particular contract are relevant, as is the type of conduct in question. At paragraph 22, the court noted that the trial judge had rejected a submission that gross misconduct was limited to cases of dishonesty or intentional wrongdoing and approved the trial judge's citation from Sinclair v Neighbour [1967] 2 QB 279, which stated the analysis of whether the employer had the right to dismiss without notice should include:

> even if falling short of dishonesty the manager's conduct was nevertheless conduct of such a grave and weighty character as to amount to a breach of the confidential relationship between master and servant such as would render the servant unfit for continuance in the master's employment and give the master the right to discharge him immediately.

83. In Adesokan, in upholding the trial judge's decision that the employer had been entitled to dismiss without notice, the court stated:

> 23. The focus is on the damage to the relationship between the parties. Dishonesty and other deliberate actions which poison the relationship will obviously fall into the gross misconduct category, but so in an appropriate case can an act of gross negligence.
>
> 24. The question for the judge was, therefore, whether the negligent dereliction of duty in this case was "so grave and weighty" as to amount to a justification for summary dismissal. …
>
> 26. … the judge was entitled to find that this was a serious dereliction of his duty. He found that this failing constituted gross misconduct because it had the effect of undermining the trust and confidence in the employment relationship. The appellant seems to have been indifferent to what in the company's eyes was a very serious breach of an important procedure. …
>
> 28. As to the other two arguments, I do not accept that the contract did preclude a finding of gross misconduct. As [employee's counsel] conceded in argument, the examples of gross misconduct do in fact envisage acts of negligence constituting gross misconduct in an appropriate case, and furthermore, they are in any event only examples. There is no rational basis for her alternative point that the negligence must affect third parties before it can constitute gross misconduct.
>
> 29. Nor, in my view, was the judge wrong to say that the dereliction of duty constituted a serious breach of policy or procedure. In my judgment, it is a natural construction of that example of misconduct for it to include acts which undermine the operation of a policy or procedure even if they are not direct breaches of it. In any event it was a serious breach of the standards expected of him, and therefore fell within the definition of gross misconduct in the Company's Disciplinary and Appeals Policy.

Submissions

84. It was suggested on the Claimant's behalf that the employer had deliberately terminated so as to prevent the employee acquiring two years' service, and that the employer's (alleged) failure to comply with the time limits for dealing with a data subject access request was relevant as the written contract stated the start date of 2 January 2019 and the delay meant that the employee and her solicitors did not see the document until around August 2019. It was suggested that, had they seen the document in time, they would have realised the Claimant did meet the qualifying period (by extending the EDT as per section 97(2) ERA) and an unfair dismissal claim would, in those circumstances, have been submitted within the relevant time limit.

85. The Respondent's position was that it had been entitled to summarily dismiss the employee. Part of the submissions were that the Claimant had been deliberately dishonest, by intentionally seeking to cover up the actions of Worker and Deputy.

Analysis and conclusions

86. In relation to the repairs, the Respondent has not proven to me that the Claimant's actions amounted to a breach of her contract of employment. Further, it has not proved that (even if there was a breach) it was not affirmed by the Respondent. On the contrary, on the balance of probabilities, I am satisfied that the Respondent did know that there was repair work which had not been done, and it had known about this for several months, without making a decision to purport to accept a repudiatory breach by the Claimant for failing to oversee the completion of this work.

87. To repeat what I said in the findings of fact, for the "further concerns" as per the 26 December 2020 written confirmation of dismissal, I am not satisfied, on the balance of probabilities, that the Claimant did those things.

88. I am, however, satisfied that (a) the Claimant committed a repudiatory breach of contract and (b) the Respondent brought about termination of the employment contract by "accepting" that repudiation, not having previously waived the breach or affirmed the contract. My reasons are as follows.

89. The incident of 12 September 2020 was a sufficiently serious one that it should have been reported to the Responsible Individual (aka "the Director", as per the definition in Clause 5 of the contract). In the Second Notice (in the penultimate paragraph of page 87) OFSTED describes why, from the inspector's point of view, there had been risk of harm to two children. It also points out there were two incidents (collecting Friend, then, some time later, dropping Friend off) in which Child was (i) taken to Town and (ii) taken near to Child's home address and (iii) in contact with family members. The incident was not reported to the Responsible Individual and this was a breach of Clause 1.14 of the contract.

90. The incident of 12 September 2020 was sufficiently serious that it should have been properly logged internally as a safeguarding incident. The Second Notice specifies that the appropriate plans for Child's care had not been followed, and that there had been risk of harm. In her evidence at the tribunal hearing, the Claimant agreed that it was a safeguarding incident, and claimed that it was properly recorded internally. However, the investigation found otherwise. Furthermore, during the internal proceedings, the Claimant's account was that the incident was not serious and did not need to be recorded as a safeguarding incident. Therefore, notwithstanding the file note of 14 September 2020 which was created, there was a breach of clauses 1.14, 1.19.4 and 1.19.6.

91. The risk assessment stated that Deputy was not to have managerial responsibility for Worker, but Deputy oversaw the liaison with SW that took place in connection with the 12 September incident, including replying to SW's emails seeking further information. At the tribunal hearing, the Claimant's arguments for why she was not at fault for the way in which the 12 September incident was dealt with, on the day, and immediately afterwards, included stating many times that she was not on duty on 12 September and (therefore) it was Deputy's responsibility to take various actions. The Claimant breached clause 1.19.4, by failing to ensure that Deputy complied with the requirements of the risk assessment, and by the Claimant seeking to place managerial responsibility for Worker onto Deputy.

92. The risk assessment stated that, while the Claimant could have managerial responsibility for Worker, if there were any concerns raised about Worker, another manager would investigate. The Claimant breached clause 1.14 and 1.19.4 by failing to report Worker's actions to (the Responsible Individual and/or) another manager for a decision about whether to take any disciplinary or other action in relation to the Respondent and by failing to comply with the requirements of the risk assessment. Even to the extent that the Claimant now claim that Deputy was fully responsible, and/or that no further action was required, the Claimant knew that no other manager was being included in the discussions and decisions.

93. The Claimant puts forward various reasons for why the 12 September incident was not dealt with inappropriately. Apart from her assertions that it was reported to the Responsible Individual and/or logged appropriately in the Respondent's internal documents (which are assertions which I have rejected), she suggests that Worker effectively did nothing wrong, and made a judgment call which he was entitled to make. Her arguments include: no specific ban on Child being taken to Town; the Respondent and its staff not knowing Child's address; no specific ban on going to Friend's address; police investigation into a certain matter having concluded; Worker was able to supervise; Child would have been disappointed and upset if the day's activities had had to be cancelled. However, Worker failed to follow the plans for Child which had been given to the Respondent. OFSTED regarded this as sufficiently serious to use it as part of its reasons for issuing a compliance notice, and yet the Claimant did not treat it as serious enough to require internal investigation (or, more specifically, given the risk assessment, to require referral to another manager for consideration). The Claimant's justifications for not treating it as sufficiently serious state/imply that the Respondent's staff were justified in disregarding the plans if they thought the plans were (i) out of date, eg as a police investigation had concluded or (ii) would cause disappointment to Child if followed.

94. These breaches were grave and weighty. As registered manager the Claimant was responsible for ensuring that there was compliance with policies by staff, but she breached them herself. As per its compliance notice, OFSTED considered that the Respondent was in breach of its obligations. That was a result of the Claimant failing to (as a minimum) ensure that the Responsible Individual was informed of the incident, and that the incident was properly recorded in internal documents as a safeguarding incident. She ought to have also handed over decision-making about what action (if any) to take in relation to Worker's conduct to another manager. Instead, on her own account, she did not even closely supervise what action Deputy took in relation to Worker's conduct, despite knowing that the risk assessments stated that Deputy was not to have managerial responsibility for Worker.

95. The Respondent alleges that potentially the Claimant deliberately failed to follow up, and that she was seeking to cover up the actions of Deputy and/or Worker due to family connections. However, that argument is effectively "it was so obvious that (i) proper internal recording, and (ii) a report to Responsible Individual and (iii) a hand over to some other manager were needed, that the only inference is that you deliberately and dishonestly failed to do so". In my judgment, that last inference is unnecessary, because I am satisfied that it was indeed obvious that those things needed to be done. I am satisfied that the Claimant's failure to do them was a serious dereliction of her duty. Her failures had the effect of

undermining the trust and confidence in the employment relationship and that is so regardless of whether the Claimant, deliberately and consciously, sought to cover up a relevant matter to help out a relative, or whether she disregarded the policies for other reasons. As I have already said:

95.1 I reject the argument that, in fact, the safeguarding concern was recorded properly in internal documents;

95.2 I reject the argument that Ms Kukadia was, in fact, informed, and/or that it was Deputy's responsibility, not the Claimant's, to ensure that was done;

95.3 I reject the argument that the matter was so minor that there was no need to ask another manager to decide whether there were any concerns in relation to Worker that needed to be addressed.

Outcome and next steps

96. Therefore, the Respondent dismissed on 26 December 2020 in circumstances in which it was not required to give notice. Section 86(6) ERA applies, which means that, even taking account of section 97(2) ERA, the EDT was 26 December 2020.

97. I do not give permission for the claim to be amended to add unfair dismissal. The balance of injustice and hardship is, that by refusing the amendment the Claimant is only losing the right to bring a claim which could not succeed anyway because of section 108. Whereas, if I granted the amendment, the Respondent would potentially have to prepare witness evidence to address the alleged fairness of the decision.

98. In terms of time limit arguments, and the reasons for making the amendment request as late as August 2021, I rejected the Claimant's assertion that she had believed in December 2020 that her start date was 4 January 2019. I did not, therefore, accept her arguments that the Respondent was to blame for the fact that the wrong start date was included in the ET1 or that the Claimant and her solicitors could not reasonably have been expected to know the start date before reading the ET3. In any event, the Claimant and her solicitors did have the Claimant's email of 26 December 2020 (also referred to in the appeal hearing, audio of which was supplied to the Claimant) which referred to a start date of 2 January 2019.

99. The hearing therefore remains as listed, save that I agreed to compromise that it could take place by video (acceptable to both parties) rather than in person.

Employment Judge Quill

Date: 1 March 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

.....1 March 2022, GDJ.....