EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4110361/2021

Held in Glasgow on 1, 2 and 3 March 2022

Employment Judge B Campbell
Tribunal Member L Brown
Tribunal Member M McAllister

Ms C Hernandez	**Claimant** **Represented by** **Mr L McKay,** **Trainee Solicitor**
Evolve Accountancy Limited	**Respondent** **Represented by** **Ms S Kerr and** **Mr P Oszdalik**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the tribunal is that:

1. The claimant was dismissed from her employment with the respondent on 31 March 2021;

2. The claimant's dismissal was unfair;

3. The claimant was not given notice of the termination of her employment by the respondent, or any payment in lieu of notice;

4. The claimant was entitled to 24 days of annual leave per calendar year;

5. The claimant was not provided with a written statement of employment particulars;

6. The claimant was not provided with written reasons for her dismissal, having made a request for them;

7. An unlawful deduction was made from the claimant's wages; and

8. A further hearing is to be fixed to deal with any resulting issues relating to remedy.

REASONS

INTRODUCTION

1. This claim arises out of the claimant's employment with the respondent which began on 1 August 2016 and ended on 31 March 2021. Those dates were agreed between the parties. What was not agreed was whether the claimant's employment came to an end by resignation, dismissal or mutual agreement.

2. There were a number of ancillary complaints in relation to the claimant's employment and its termination, which are dealt with below.

3. The claim had been the subject of a degree of case management before this full hearing. In particular, a case management preliminary hearing before Employment Judge Robison took place on 2 December 2021 and separately various applications for orders, including witness orders and strike out, were dealt with.

4. It was decided that this hearing would deal with questions of liability only, and any determination of remedy required would be by way of a further hearing.

5. The claim was heard in person on 1 and 2 March 2022 and the tribunal reserved judgment, deliberating on 3 March 2022 before this judgment was agreed.

6. The claimant was represented by Mr McKay who is a trainee solicitor. The respondent effectively represented itself by way of Ms Kerr, who is its director and principal, assisted by her father Mr Oszdalik.

7. We were conscious to explain the conventions and rules of employment tribunals to the parties where relevant, especially in recognition of the respondent not having legal representation.

8. The tribunal heard evidence from the claimant. The respondent was given the opportunity to lead evidence but elected not to do so preferring to put forward their case by way of cross-examination of the claimant. The parties had helpfully agreed a joint bundle of documents. Where relevant, page numbers from the bundle are referred to below in square brackets. The parties each provided oral closing submissions on conclusion of the evidence, which were noted in reaching a decision on the various issues below.

9. At the outset of the hearing the respondent indicated that it wished to contest that the claimant had been its employee. Given that the response contained a number of indicators that employment status was accepted, and said nothing positively to suggest that this was a contested point, we made the respondent aware that to pursue that issue would require the response to be amended, with possible consequences for the remainder of the hearing. Having allowed the parties a brief adjournment to consider their positions, Ms Kerr confirmed that she did wish to apply to amend the response form so that the question of the claimant's employment status was contested. Having listened to the basis of the application, and the claimant's response via Mr McKay, the tribunal adjourned again to consider its decision. We decided to refuse the application on the basis of reasons given orally, but summarised as follows:

   a. At the above mentioned preliminary hearing on 2 December 2021, EJ Robison identified the legal issues to be determined at the full hearing. Those did not include the question of whether the claimant had been an employee of the respondent. If the respondent considered the claimant's employment status to be in question the matter could have been raised at that point, or at the latest on receipt of the written note which followed;

   b. There was a significant amount of evidence to suggest the claimant had been an employee, including in particular the response form

itself. The respondent accepted the claimant's dates of employment as being correct, and described her as an Associate. Her pay figures, before and after tax, were specified, as were her hours of work. She was said to have worked her notice period. It was narrated that she gave up a directorship and shareholding to become a 'supervised employee'. We considered that the prospect of the respondent establishing the claimant was not an employee was slight, and it would add significant time to the hearing by considering the issue.

ISSUES

10. The tribunal required to decide the following legal issues arising out of the claim:

1. Was the termination of the claimant's employment on 31 March 2021 by way of dismissal or otherwise?

2. If the claimant was dismissed, was her dismissal fair in terms of section 98 of the Employment Rights Act 1996 ('ERA'), and in particular was there a fair reason for dismissal and did the respondent act reasonably in all the circumstances by treating that reason as sufficient to dismiss the claimant?

3. If the claimant was dismissed, was she entitled to notice, and if so how much and was she given it?

4. If the claimant was dismissed, did she make a request for written reason(s) for her dismissal and did the respondent provide its reason(s)?

5. Had the claimant accrued any days of annual leave by the date her employment ended?

6. Was the claimant provided with a written statement of necessary particulars of employment under section 1 ERA?

7. Was a deduction made from the claimant's pay and if so was it an unlawful deduction in terms of section 13 ERA?

RELEVANT LAW

Unfair dismissal

11. By virtue of Part X of ERA, an employee is entitled not to be unfairly dismissed from their employment. The right is subject to certain qualifications based on matters such as length of continuous service and the reason alleged for the dismissal. Unless the reason is one which will render termination automatically unfair, the employer has an onus to show that it fell within at least one permitted category contained in section 98(1) and (2) ERA.

12. An employee may terminate the contract but claim that they did so because their employer's conduct justified the decision. This may be treated in law as a dismissal under section 95(1)(c) ERA, commonly referred to as constructive dismissal. The onus is on the employee to show that their resignation amounted to dismissal in that way. The employer's conduct prompting the resignation must be sufficiently serious so that it constitutes a material, or repudiatory, breach of the contract. The breach may take place or be anticipatory, i.e. threatened. It may be way of a single act or event, or a chain of events ending with a 'last straw'. A last straw in this context may not be a breach in itself but it should not be innocuous. The employee must resign in response to the breach, and not delay unduly in doing so or they may be deemed to have accepted or affirmed the breach.

13. Whether a dismissal is direct or constructive, a tribunal must consider whether the employer acted reasonably in relying on that reason to dismiss the individual. That must be judged by the requirements set out in section 98(4) ERA, taking in the particular circumstances which existed, such as the employer's size and administrative resources, as well as equity and the substantial merits of the case. The onus of proof is neutral in that exercise.

Notice of termination of employment

14. An employee is by default entitled to an amount of notice of termination of their contract by their employer. The period required may be agreed

between them, whether in writing or verbally, or by reference to external factors such as terms negotiated by a representative trade union.

15. Minimum notice periods are guaranteed by section 86 ERA. This means that if nothing has been agreed, or any agreed terms are less generous than those in section 86, it is the statutory amount which should be given.

Annual leave entitlement

16. Under the Working Time Regulations 1998 each worker is entitled to a minimum amount of annual leave. For a full time worker that entitlement is 28 days per year. The employer can decide when a holiday reference period will begin and end, provided that period is a full 12 months.

17. Employees generally can request when to use their leave, and they must be paid at their normal rate in full for leave days taken. However, within reason and subject to conditions discussed in more detail below, an employer can refuse a holiday request for a given date or dates, or dictate that workers should use their accrued leave on given dates. Workers should not agree to receive payment instead of taking leave as a rule, but at the point when their service ends they are entitled to be paid for any accrued leave not taken at the same rate.

18. The right to be paid for accrued holidays on termination of employment and the method of their calculation are set out in Regulation 14(2) and (3). If a worker does not receive the pay they are due they can submit a claim to the employment tribunal under Regulation 30.

Written reasons for dismissal

19. If an employee has served at least two complete years with their employer and is dismissed, they have the right to be given a statement of the reason or reasons for their dismissal in writing within 14 days of making a request – section 92 ERA.

Written particulars of employment

20. Under section 1 ERA every employee is entitled to be provided with certain key details relating to their role in writing. This should be given not later

than the date their employment begins. If no such statement is given, or the terms provided are incomplete or believed to be inaccurate, an employee can seek a reference to an employment tribunal. The tribunal can decide any of the necessary terms and make a declaration that a compliant statement has not been provided.

21. If no compliant statement has been provided to the employee, and also a successful claim of unfair dismissal has been brought, then under section 38 of the Employment Act 2002 a tribunal must award the employee a minimum prescribed amount, and may use its discretion to award a higher amount. The minimum amount is two weeks' pay and the higher amount is four weeks' pay.

Unlawful deductions from wages

22. By virtue of section 13 of ERA a worker is entitled not to have unauthorised deductions made from their wages. Therefore, subject to specific exceptions provided for in that part of the Act, there will have been an unauthorised deduction if the worker is paid less than they have earned, depending on how their earnings are calculated, or not paid at all for their work. The date of the deduction is deemed to be either the day when less is paid to them than they have earned, or when they would normally have been paid but were not.

23. A worker who has suffered one or more unlawful deductions from their wages may submit a claim to the employment tribunal under section 23 ERA.

FINDINGS IN FACT

24. The tribunal found the following facts based on the evidence before it. The parties will note that we have not recorded factual findings in relation to every piece of evidence led. This is because we have focussed on the above legal questions which we had to determine, and some evidence was not relevant to those. That included evidence which would go to issues of remedy rather than liability.

Background

25. The claimant is an accountant by profession and a Chartered Accountant. She was an employee of the respondent, an accountancy firm operated as a limited company. Her dates of employment were 1 August 2016 to 31 March 2021.

26. The respondent was incorporated in October 2013 and traded under the name 'Evolve Accountancy' with company number SC461770. Between the dates 4 March and 9 June 2021 it changed its name to Kerr Accountancy Limited, before reverting to its original name from the latter date onwards.

27. The respondent started out as a company owned by the claimant and her spouse. At some point after that Ms Kerr came on board and also became a director and shareholder. The claimant and Ms Kerr had been friends and this was instrumental in the venture being set up.

28. Initially the claimant was both a director and a shareholder of the respondent. Around August 2016 the claimant began the steps necessary to qualify as a Chartered Accountant. A requirement for commencing the required training was that she could not be a director of her employer. Nor could she hold 5% or more of its issued share capital. Therefore it was agreed that she would assume employee status from 16 August 2016 onwards. She relinquished her directorship and her share in the respondent, and was paid a monthly salary for her work when before she had been paid by way of dividends. Ms Kerr remained a director and shareholder of the respondent. As such she became the individual with the more power of the two. The claimant's husband retained a share.

29. On becoming an employee the claimant was not provided with a written statement of her key employment particulars as set out in section 1 ERA. All of her terms were agreed verbally with Ms Kerr or by implication. Other employees had received a written statement.

30. The claimant was latterly paid a salary of £1,750 per month gross, equating to £1,447.78 in net terms. The respondent paid the sum of £2,500 into her bank account each month, which covered her net salary

with the balance being treated as a dividend payable to her husband in respect of his share of the respondent. The claimant said that he paid corporation tax on those sums.

31. It was not unusual for the respondent to make the above payment in two amounts on different days in a given month.

32. Matters appeared to be harmonious between the parties until around December 2020. By that point the claimant had given birth to her second child and was working 28 hours per week, in the pattern of seven hours per day on each weekday, except Tuesdays. The claimant took some annual leave around Christmas, beginning on Friday 25 December and returning on Monday 4 January 2021. She also decided to pay herself for some additional days of leave which she had not taken in that year. The claimant had retained responsibility for managing the respondent's monthly payroll and so took this decision and actioned it herself.

33. Ms Kerr was unhappy with the claimant's decision to take that number of leave days and to pay herself for the balance. It was the culmination of a situation in which Ms Kerr saw that the claimant was not as fully committed to the business of the respondent as she remained. This was essentially correct, as the claimant was giving more priority to her young family. The situation led to the beginning of discussions in early January 2021 which continued up to the end of March that year about changing how the respondent would operate. Ms Kerr's initial proposal was that she and the claimant would have their earnings based more on the profit that each had personally generated. That was not agreed on and the plan became that the practice would be divided and the parties would go their separate ways.

34. A number of aspects of the split had to be agreed and implemented. This was particularly so because although by this time Ms Kerr owned a share and was a director, and the claimant was simply an employee, there was still a degree of recognition by the parties that the claimant had previously been an equal partner to Mr Kerr, and so was due something out of the arrangement. In addition, as stated the claimant's husband still retained his share in the respondent, for which he received monthly dividends.

Discussions about splitting the practice

35. The parties discussed a number of aspects of the arrangement including the following.

36. They decided relatively early on, i.e. in January 2021, that the split would be timed to take place on 31 March 2021 so that with effect from the new tax year each would be operating separately of the other.

37. It was agreed that Ms Kerr would retain her shareholding in the respondent company and remain a director. However, she would allow the claimant to use the name 'Evolve' and as such own that brand and any goodwill attached to it. The claimant would therefore set up a new company to operate using that name and Ms Kerr would change the name of the respondent to 'Kerr Accountancy' or similar.

38. Ms Kerr would continue to employ two of the three other staff of the respondent, with the third leaving. She would also retain the respondent's interest in the office premises and furniture, equipment and so on. The parties however discussed an arrangement whereby the claimant could engage those staff to assist her on a job by job basis, on payment to the respondent for their services based on an hourly rate. The full terms of that were not however agreed.

39. Ms Kerr would sign over to the claimant any licences to operate software packages that the respondent was using at the time.

40. Ms Kerr would also authorise ownership of the respondent's website, contact email addresses, telephone numbers and social media accounts to be transferred to the claimant, so that she could continue to operate as 'Evolve'.

41. Ms Kerr prepared a list of the respondent's clients in January 2021 and went through it with the claimant to agree which clients would be retained by Ms Kerr and which the claimant could approach to take with her.

42. Later on in the negotiations, around early March 2021, there was discussion about the sharing of some debts and liabilities of the

respondent. The claimant offered in principle to pay Ms Kerr 50% of the following:

a. The balance of a government sponsored bounce back loan, which was approximately £7,000 (i.e. the initial loan balance of £25,000 less some £18,000 still retained in the respondent's bank account);

b. A Corporation tax payment for the year to 31 March 2021;

c. A VAT bill for the quarter ending 31 March 2021; and

d. A PAYE income tax bill for the quarter up to 5 April 2021.

43. The claimant's evidence was that the discussions began to cause strain and her relationship with Ms Kerr deteriorated over the period. She had initially been upset at comments made by Ms Kerr on her return from her Christmas holiday about her level of commitment. Relations appeared to have settled down for a spell and then became more of an issue again towards the end of March as the agreed separation date became imminent.

44. A particular cause of upset to the claimant was that in mid-March Ms Kerr sent an email to every client, including those previously earmarked as being the claimant's. A copy was not produced but it emphasised that Ms Kerr would be continuing to practice and was designed to secure their ongoing instructions. It said little or nothing about the claimant continuing herself using the Evolve name. The claimant saw this as Ms Kerr 'walking back' from what had been agreed. As a result of the email the claimant sent a number of emails herself to her clients to explain that she was also offering her services.

45. Ms Kerr's position on what she had done, although we did not hear evidence from her, appeared to be that she had given the claimant since effectively January 2021 to contact any clients agreed to be hers. The claimant had not done so and so Ms Kerr considered she was entitled to offer her own services at that late stage. The claimant's counter to that if so was that she was reluctant to tell clients she was leaving the respondent before all of the details were properly finalised.

46. As regards the Evolve brand name, Ms Kerr changed the respondent's name to 'Kerr Accountancy Limited', thereby removing any reference to 'Evolve' in early March and told the claimant verbally she had done that. This was intended to allow the claimant herself to set up a new company (or re-name one which she already owned) to contain that name.

47. The claimant had her own company ready to operate by mid-March. The company's formal name was GCSeven Limited. The claimant and her husband owned its issued share capital. She began issuing invoices from that company to clients from 19 March 2021 at the latest. Any invoices were issued to clients that Ms Kerr had confirmed the claimant was free to approach. The invoices were agreed with the clients and were for services to be rendered from 1 April 2021 onwards. The invoices contained the company details of the claimant's company but using the existing Evolve logo.

48. The claimant intended to change her company's name to Evolve Accounting Limited or similar. However, owing to technical issues which resulted in email communication breaking down, she was not able to complete that process with Companies House by 31 March 2021. By then other factors, described below, led her to decide against the idea. She later decided instead to trade as Bespoke Accountancy. Ms Kerr changed the respondent's name back to Evolve Accountancy Limited in June 2021. It continues trading under that name.

49. The parties discussed having the terms of their agreement drawn up by a solicitor but that was not implemented due to cost. Ms Kerr drafted a document herself designed to serve the same purpose but the claimant considered it did not properly capture all of the necessary terms, and would not sign it. The draft agreement was emailed to the claimant on 18 March 2021 [157-158] along with a share transfer form to allow the claimant's husband to transfer his share in the respondent to Ms Kerr. In the email she listed *'a couple of things that still needed decisions'*, which were stated to be:

    a. 'Accountancy Manager' - i.e. transfer of ownership of the licence in software of that name to the claimant;

b. 'Website division' – i.e. giving ownership of the majority of the respondent's website to the claimant but allowing Ms Kerr to retain some client testimonials and similar content personal to her;

c. 'Your proposal for the corporation tax' – this was to do with the claimant's contribution to debts of the respondent as referred to above;

d. 'Holiday accruals and pay for the end of March'; and

e. 'Work being billed to the end of March'.

Ms Kerr was proposing to catch up with the claimant the next day or early in the following week.

50. The claimant replied to Ms Kerr's email on 22 March 2021 [186]. She said that it was best from that point that the parties communicate by email, an indication of how much their relationship had broken down. She went on to repeat Ms Kerr's list of outstanding matters with her own comments on what needed to be resolved by 31 March. In summary those were as follows:

a. Accountancy Manager – she requested to retain the use of that software, as Mr Kerr did not like it and had arranged to purchase an alternative package. Ms Kerr was to remove her clients from the AM system and notify the provider that the claimant would take over as licence holder;

b. Website – the claimant had spoken to a third party and it was not anticipated that anything further needed to be discussed. Implicit in this was that ownership would transfer to the claimant from Ms Kerr;

c. Corporation Tax – the claimant indicated she would settle any tax liability on her dividends (properly her husband's) by way of an invoice;

d. Holidays – the claimant intended to use up her remaining annual leave before 31 March. She assumed an annual entitlement of 24

days, meaning that she would have accrued 6 days by that date; and

e. Work to be billed – her access to the respondent's internal client management system 'Evolve Xero' had just been revoked by Ms Kerr. This would have rendered it difficult or impossible for her to create client invoices. She proposed that she would not render any bills in March and in return she would not seek compensation for any retainers paid by her clients to the respondent from April 2021 onwards;

51. The claimant added some additional matters she wished to have resolved as follows:

a. The brand – the claimant reminded Mr Kerr that it had been agreed she (the claimant) would retain the 'Evolve' brand whilst Ms Kerr kept on the business premises and furniture. She therefore required Ms Kerr to notify two external parties responsible for administering the respondent's website and other online accounts that ownership and access was to be transferred to her;

b. 4sbid – the claimant required to be granted access to this platform, which assists with preparing tender responses;

c. Brightpay – the claimant needed to be given access to this payroll software application; and

d. Share transfer form – the claimant would send a scan of the necessary form transferring her husband's share of the respondent when all of the preceding matters had been dealt with.

52. On receipt of the above email, Ms Kerr replied to the claimant the following day [188]. She said that she would not action any of the tasks listed until she had the stock transfer form gifting the claimant's husband's share to her.

53. In that email Ms Kerr also wanted the claimant to commit to paying half of the bounce back loan, namely £12,500 and a 50% share of any other

debts of the respondent as at 31 March 2021. As noted above, the respondent had not used up all of the loan.

54. The next communication between the parties appears to be an email from the claimant on 31 March 2021 [201]. She apologised for the delay in replying and said she had sought legal advice. She said that Ms Kerr had no legal grounds to ask her to pay a share of the bounce back loan or any of the respondent's corporation tax liability. She also said that her monthly remuneration for March was £500 short. She asked for her access to 4sbid to be restored, believing that Ms Kerr had revoked it. She wished her Xero subscription to be restored also. She also said that as a result of being excluded from the respondent's online systems she could not access her own payslips or other employment documents, and asked that either her access be restored, or copies of those documents be sent to her.

55. The claimant then set out four conditions for her husband to transfer his share to Ms Kerr, namely:

    a. Control of Evolve branding, email addresses, facebook account, LinkedIn account, twitter account and *'any other assets associated with the Evolve name and logo'* to be relinquished to her *'as agreed'*;

    b. Ms Kerr agreeing not to charge any of the claimant's clients for unbilled work on the respondent's system;

    c. Ms Kerr would not revoke the claimant's access to BTC and Accountancy Manager whilst she got herself set up on those systems in her own right – expected to take up to a month; and

    d. Ms Kerr would send no further communications to her clients.

56. The claimant had received her salary for March 2021 and as stated above she believed she had been paid short. This was because she had received two payments of £1,000 each in that month – on 25 and 31 March - rather than £2,500 as she expected.

57. Ms Kerr did not communicate again with the claimant before the end of March 2021.

Matters after 31 March 2021

58. By 1 April 2021 the various matter discussed as part of the split had not happened or were not in place. Nevertheless the claimant accepted that her employment with the respondent had come to an end. She felt that Ms Kerr had failed to meet the conditions agreed as part of her leaving and that as a result she was out of a job without anything to show for it.

59. She had already made arrangements to have her new company begin trading and she had a list of clients and work ready to undertake from 1 April 2021 onwards.

60. She also received notification from the respondent's pension provider that her employment had ended. She emailed Ms Kerr on 8 April [205] to raise these issues, as well as query about furlough pay. The email said:

> *'I have received notification from NEST that I am no longer an employee of Evolve/Kerr. This doesn't seem like an appropriate way to terminate my employment. Please explain and put in writing.'*

61. The claimant asserts this was her request for written reasons for termination of her employment.

62. Ms Kerr replied by email on the same day [206]. In specific response to the request above Ms Kerr said:

> *'As previously stated above, it is my understanding that you terminated your own employment by giving notice earlier this year. If this is not the case, please let me know as there are a number of issues I would like to investigate if you are still an employee of the business and would require your co-operation in formal investigations.'*

The email specified two issues namely alleged misappropriation of client monies by way of the claimant providing her own bank account for payment – this was a reference to the claimant providing invoicing for future work to be carried out by her own company - and an allegation that

the claimant had processed herself at some point as being on furlough when, presumably, Ms Kerr believed she was not.

63. In the same email Ms Kerr stated that *'£500 has been held from your pay as you have company equipment which you have not returned, and I am waiting on receipt of this equipment.'* The equipment referred to was a laptop computer which the claimant had retained.

64. The claimant was not paid any sums to reflect any entitlement to notice of termination of employment. The respondent's position, for example as stated in Ms Kerr's email of 8 April 2021 and also its closing submissions, was that either no notice was required because it did not terminate her employment, or alternatively the commencement of discussions in January 2021 about the claimant leaving the respondent at the end of March constituted more than adequate notice.

65. Similarly the claimant was not paid anything in relation to accrued but untaken annual leave. The respondent's leave year was the calendar year.

66. At some point the claimant received a payslip for March 2021 [236]. It showed a gross salary payment of £1,041.67 for the month. After deductions for PAYE, National Insurance and pension contributions the net pay figure shown was £994.37. The payslip also indicated that the claimant had received £667.79 gross as holiday pay in the year to date.

DISCUSSION AND DECISION

Was the claimant dismissed?

67. Clearly the parties are in conflict over the issue of whether the claimant was dismissed. The claimant maintains that she was because the terms of her departure were not what she agreed, and the respondent contends that all along she had agreed to leave at the end of March 2021.

68. This was not an easy question to answer, particularly as there were no documents which clearly explained what the parties considered was happening specifically with the claimant's employment status, and also as the situation appeared to change in nature as the leaving date approached.

69. We have considered all of the evidence available and have found that the claimant was dismissed by the respondent on 31 March 2021. We reached the view that at an earlier stage, essentially from January 2021, the agreed plan was that the claimant would leave on 31 March 2021 by mutual agreement. Also early on it was recognised and agreed that this would not simply be a question of the claimant working up to that date and then leaving, as an employee generally would. Rather, in recognition of her originally being a stakeholder in the business with equal status to Ms Kerr, the claimant would receive certain things and give up others. This became the focus of the discussions which took up the parties' time and effort in the lead up to the termination.

70. Leading on from this we found that the claimant's departure was always going to be conditional on other things being resolved and implemented. This was understood on both sides. Some terms were agreed, for example (i) that the claimant was free to approach clients of the respondent which Ms Kerr had agreed she could propose taking with her, (ii) that she could retain the 'Evolve' brand and the website, email addresses, telephone numbers and related social media accounts which went with it, and (iii) that certain software application licences and similar accounts would be transferred to her. Those were not implemented.

71. Equally it is apparent that there was not agreement on everything, or when and in which order the required actions would be carried out. We could see that right up to 31 March the parties were stating and re-stating their positions on what had to be done, and when. This included (i) the question of what financial liabilities of the respondent the claimant would contribute to and in what amount, (ii) how to treat the claimant's unbilled work for the clients she expected to transfer to her, and (iii) the conditions if any attached to the claimant's spouse signing over his share in the respondent.

72. Therefore, we considered that the claimant's departure was subject to some conditions which were not fulfilled, and also in any event was subject to agreement on other aspects for which agreement could not be reached.

73. The consequence of this is that the claimant did not leave on the terms originally envisaged at the outset of the discussions. Her exit from the respondent by the time it came was not mutually agreed. The conditions on which that was to happen either were not agreed, or those which were agreed were not met.

74. We still had to consider whether the claimant could be said to have resigned, or was dismissed. The claimant did not want to leave under the circumstances that prevailed at the end of March 2021, but felt she could no longer go on working with the respondent. The relationship by this point between Ms Kerr and herself had completely broken down. Of the actions which were agreed, those were mainly to have been implemented by the respondent and not her. The respondent took the positive step of notifying its pension provider that the claimant was no longer an employee.

75. We therefore find that the claimant was dismissed on 31 March 2021, because the terms of her departure were not fulfilled or fully agreed, and because the respondent treated her as having left its service nevertheless, for example by notifying its pension provider to that effect.

76. Although that is our finding, we state for completeness that had the claimant not been dismissed, and instead resigned, then she was constructively dismissed. That is to say, she terminated her own contract of employment in direct response to a material breach by her employer. In that scenario, the material breach would have been the respondent's failure to implement the agreed terms attached to her departure.

77. The consequence of an employee resigning in direct response to a material breach of their contract of employment is that they are considered to have been dismissed, and the onus falls on the employer to show that the reason for the dismissal was fair.

What was the reason for dismissal?

78. A dismissal, whether direct or constructive, must be for a fair reason. The set of reasons which qualify as fair is found in section 98(1) and (2) of ERA. Those are conduct, capability or qualifications, redundancy, illegality in an aspect of the contract, and 'some other substantial reason'.

79. The onus falls on an employer to show that its reason was at least one of those listed. This presents a challenge for the respondent, as it did not lead any evidence of its own. Nevertheless the tribunal considered all of the evidence available to see whether a reason was sufficiently clearly established, whether in the documents accepted into evidence or in the claimant's own evidence.

80. It is clear that the claimant was not dismissed by reason of redundancy, capability, illegality relating to the contract or her conduct. Her dismissal was because the conditions of a potentially mutual termination were not fulfilled. The closest the respondent is able to come in establishing a fair reason for dismissal – whether its direct dismissal of the claimant as is our primary finding or a constructive dismissal in the alternative - would be in relation to some other substantial reason.

81. Ultimately we did not find that there was enough evidence to be persuaded that the claimant was dismissed for a fair reason. She was not dismissed for some other substantial reason because there was a lack of evidence and argument by the respondent to support that. The respondent argued throughout that she had resigned freely and would not consider that she had been dismissed.

82. We are also not satisfied that the dismissal fell into this category because we considered in any event that the respondent's own failure to implement the agreed terms was not a 'substantial' reason for dismissing her in the spirit of the statutory provision.

Was the dismissal reasonable in all of the relevant circumstances?

83. As the respondent has been unable to establish a fair reason for dismissing the claimant, the second part of the test for fairness of the dismissal is academic. Nevertheless we record that the claimant's dismissal could not be considered reasonable within the terms of section

98(4) ERA. In particular, no fair process was followed and the claimant was not given the right to appeal her dismissal. The lack of notice given, or paid, similarly is a factor.

84. As the claimant was dismissed unfairly, the question of whether she is entitled to a basic award and a compensatory award, and the amount of each, will need to be determined as a question of remedy.

Notice entitlement

85. Nothing express had been agreed between the parties as to the amount of notice the claimant was due, whether in writing or verbally. She was therefore entitled to her statutory right to four weeks' notice under section 86(1)(b) ERA based on completion of four full years as an employee.

86. She was not given notice of her dismissal and did not receive payment in lieu. She therefore requires to be compensated.

Annual leave entitlement

87. The claimant was entitled to annual leave. Nothing was put in writing between her and the respondent. Under the Working Time Regulations 1998 she would have been entitled to the pro rata equivalent of 28 days per year for a full time employee. That would have equated to four fifths of that number, as she worked four days out of five, therefore 22.5 days. In her evidence the claimant said she believed she was entitled to 28 days, despite recognising that this would have been more generous than her entitlement under the Regulations.

88. We find that the claimant was entitled to 24 days of annual leave. This is because that is what she said in her email to Ms Kerr on 22 March 2021, and also because Ms Kerr did not dispute that figure when she replied the next day. We take this to be the most reliable evidence of what the parties understood and agreed at the time the issue needed to be dealt with.

89. The claimant's understanding was that the respondent's holiday year was the calendar year. This is consistent with the other evidence such as her own email of 22 March 2021 and the fact that the parties discussed

carrying days over from December 2020 into 2021 (although the claimant did not do so and paid herself instead).

90. We do not make a finding in relation to whether the claimant used any of the six days she had identified before her termination date. This will require to be decided at a future remedy hearing.

Written statement of employment particulars

91. The respondent accepted that the claimant was not provided with a statement of her key employment particulars under section 1 ERA.

92. The claimant is therefore entitled to a declaration to that effect. The claimant did not ask for any particular terms of her employment to be decided and confirmed by the tribunal, and we have only done so to the extent required to decide her other claims.

Statement of written reasons for dismissal

93. The claimant made a request for written reasons for her dismissal by way of her email dated 8 April 2021. As her employment was terminated without notice, and her service period was more than two years, she was entitled to a statement of reasons within 14 days in terms of section 92 ERA. No statement was provided. The respondent's reply to her email was that she had not been dismissed.

94. Under section 93 ERA a tribunal may make a declaration as to the reasons for the claimant's dismissal. In this sense we make a finding that the reason for the claimant's dismissal was the breakdown of her working relationship with Ms Kerr.

95. A tribunal is also bound to make an award that the employer pay the employee a sum equal to the amount of two weeks' pay. As such there is no discretion in relation to the award. The amount will be as determined at a future remedy hearing.

Unlawful deduction from wages

96. We find that a deduction was made from the claimant's salary for March in the sum of £500. This is based on the email of Ms Kerr dated 8 April

2021. She confirmed that £500 was being withheld from the claimant's salary in security for the return of property.

97. Such a right would have to be established in writing between the parties, but never was. As such, and completely aside from the question of whether the claimant was obliged to return property to the respondent, the respondent had no right to hold back a part of the claimant's salary.

98. We find that the date of the deduction was 31 March 2021, which was the last date on which she was paid any salary for that month.

99. Despite the above conclusions we do not go so far as to quantify the final amount of any deduction. This is because it is understood that the claimant may be arguing that the figure is different, relying on her payslip for March 2021. Also, it is the net equivalent in monetary terms which the claimant is entitled to. Therefore any figure will need to be decided at a remedy hearing.

CONCLUSIONS

100. The claimant's complaints of unfair dismissal, failure to provide notice pay, failure to provide written particulars of employment and failure to provide written reasons for dismissal are upheld. The claim for payment of accrued annual leave is not dismissed at present, pending resolution of whether the claimant was able to utilise her accrued leave before her employment terminated.

101. The tribunal will need to consider at a remedy hearing what compensation if any the claimant is entitled to for her remaining claims. We recognise that some of the amounts may be relatively easy to calculate based on agreed figures and/or clear documentary evidence. We can also see that in relation to calculation of any basic or compensatory award for unfair dismissal, there is scope for a range of arguments in relation to an appropriate value. The tribunal has a wide discretion in considering what is 'just and equitable'.

102. The parties are encouraged to explore settlement of the successful claims rather than incur further tribunal time, and personal cost, in having them determined. If that is not possible the following directions are made:

a. Within 7 days of receiving this judgment the parties should each notify the tribunal, copying each other, of any unsuitable dates to attend a one-day remedy hearing at the employment tribunal in person in the months of May, June and July 2022;

b. The claimant will provide an updated schedule of loss to the respondent within 21 days of receiving this judgment;

c. The respondent will provide a counter-schedule of loss within 21 days of receipt of the claimant's schedule, stating which aspects are agreed, which are not and any alternative calculations or values;

d. The parties shall co-operate to prepare a hearing bundle containing only the relevant documents for calculation of remedy in relation to the successful claims, to be finalised not later than 7 days before the remedy hearing date;

e. Four copies of the hearing bundle will be provided to the tribunal for the remedy hearing;

f. The parties will be permitted to give evidence and make submissions at the remedy hearing, insofar as relating to the outstanding issues to be decided and subject to time constraints.

Employment Judge: Brian Campbell
Date of Judgment: 18 March 2022
Entered in register: 18 March 2022
and copied to parties