



EMPLOYMENT TRIBUNALS

Claimant: Miss M Bristow

Respondent: Wilmslow Kitchen Interiors Limited

HELD AT: Manchester

ON: 2 May 2023 (and
chambers
consideration on 12
July 2023)

BEFORE: Employment Judge Johnson

REPRESENTATION:

Claimant: unrepresented

Respondent: Ms E Mayhew-Hill

JUDGMENT

The judgment of the Tribunal is that:

- (1) The complaint of unfair dismissal contrary to section 104 Employment Rights Act 1996 was presented out of time in accordance with section 111 Employment Rights Act 1996 and the complaint is dismissed.
- (2) The complaint seeking the payment of notice pay in accordance with section 3 Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 was presented out of time in accordance with section 7 Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 and the complaint is dismissed.
- (3) The complaint seeking payments in lieu of untaken holiday pay in accordance with regulations 14 Working Time Regulations 1998 was presented out of time in accordance with regulation 30 Working Time Regulations 1998 and the complaint is dismissed.
- (4) The complaint of unlawful deduction from wages contrary to section 13 Employment Rights Act 1996 was presented out of time in accordance with section 23 Employment Rights Act 1996 and the complaint is dismissed.

- (5) Accordingly, all 4 complaints brought in this claim are determined to have been presented out of time in accordance with their relevant legislative provisions.
- (6) In relation to each of these complaints, it was determined that it was reasonably practicable for the complaints to be presented within the normal requisite time limits and it was not appropriate to extend time. This means that all of the complaints are unsuccessful because the Tribunal does not have jurisdiction to hear them.

REASONS

Introduction

1. These proceedings arose from the claimant's employment by the respondent from 31 March 2021 until her dismissal on 9 August 2021.
2. She presented a claim form to the Tribunal on 4 January 2022 following a period from 20 October 2021 to 30 November 2021 and brought complaints of unfair dismissal, breach of contract/notice pay, holiday pay and unpaid wages.
3. The respondent presented a response on 4 July 2022 which was well out of time, but permission was given for an extension of time by Employment Judge Ross on 9 February 2023.
4. This was the final hearing on liability and as insufficient time was available to complete the hearing of the case (having only heard the evidence and respondent's final submissions plus the parties' written submissions), the following reserved judgment with reasons is provided.

Issues

5. The list of issues was identified by Employment Judge Ross at the preliminary hearing case management on 9 February 2023. It was noted that the claimant had not worked continuously for a period of 2 years when she was dismissed and contrary to section 108 Employment Rights Act 1996 ('ERA'), she does not have sufficient continuous to bring a complaint of ordinary unfair dismissal contrary to Part X ERA.
6. However, she was permitted to proceed with a complaint of automatic unfair dismissal on grounds that she asserted a statutory right contrary to section 104 ERA. This complaint is not subject to the requirements of section 108 ERA and the Tribunal has jurisdiction to consider it at this hearing.
7. The more significant issue however, and one which I warned the claimant may cause her difficulties was the question of whether her complaints had been

presented to the Tribunal in time and if not, whether it was not reasonably practicable for the statutory time limits to be complied with, thereby justifying an extension of time to the date when the claim form was presented on 4 January 2023. The actual issues are considered in this section below.

8. Time limits

- a. Given the date the claim form was presented and the effect of early conciliation, any complaint about unfair/wrongful dismissal may not have been brought in time.
- b. Was the unfair dismissal / unauthorised deductions complaints made within the time limit in section 111 and/or 23 of the Employment Rights Act 1996? The Tribunal will decide:
 - i. Was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the effective date of termination / date of payment of the wages from which the deduction was made etc?
 - ii. Was there a series of deductions and was the claim made to the Tribunal within three months (allowing for any early conciliation extension) of the last one?
 - iii. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
 - iv. If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within such further period as the Tribunal considers reasonable?

9. Unfair dismissal

- a. Can the claimant prove facts that suggest the reason for dismissal was that she was automatically dismissed for asserting a statutory right? The claimant says she was dismissed for requiring a witness and a recording at a suspension meeting
- b. Which statutory right is the claimant relying upon? It must be listed at section 104(4) ERA 1996. Note the statutory right to be accompanied (section 10 Employment Relations Act 1999), is not included at section 104(4) ERA 1996.
- c. Can the respondent show the real reason or dismissal? Was it a potentially fair reason?

10. Wrongful dismissal / Notice pay

- a. What was the claimant's notice period?

- b. Was the claimant paid for that notice period?
- c. If not, can the respondent prove that the claimant was guilty of gross misconduct which meant that the respondent was entitled to dismiss without notice?

11. Holiday Pay (Working Time Regulations 1998)

- a. Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?
- b. What was the claimant's leave year?
- c. How much of the leave year had passed when the claimant's employment ended?
- d. How much leave had accrued for the year by that date?
- e. How much paid leave had the claimant taken in the year?
- f. Were any days carried over from previous holiday years?
- g. How many days remain unpaid?
- h. What is the relevant daily rate of pay?

12. Unauthorised deductions

- a. Were the wages paid to the claimant less than the wages she should have been paid?
- b. How much is the claimant owed?

13. Breach of Contract

- a. Did this claim arise or was it outstanding when the claimant's employment ended?
- b. Did the respondent do the following: fail to pay the claimant commission agreed?
- c. Was that a breach of contract?
- d. How much should the claimant be awarded as damages?

14. Remedy

- a. How much should the claimant be awarded?

Evidence used

15. The claimant attended the hearing and gave witness evidence. She did not call any other witnesses.
16. The respondent relied upon the witness evidence of its director Mr Stephen Wynne.
17. The documents were provided in an agreed final hearing bundle which included the proceedings, a schedule of loss, contracts of employment, staff handbook and conditions of service, emails and extracts from WhatsApp or SMS text message 'conversations' running to almost 200 pages.

Findings of fact

Background to the claimant's employment

18. The respondent is a company which specialises in the selling and fitting of kitchens primarily in the South Manchester and East Cheshire areas. Mr Wynne was the director of the business which is a limited company. I understood that it employed a number of staff who were responsible for meeting customers and designing their kitchens to secure a sale, with other members of staff or contractors actually installing the kitchens. The business had several showroom/offices and I heard evidence of premises being present in Wilmslow and Didsbury.
19. The claimant (Ms Bristow) was employed as a kitchen designer from 31 March 2021 and was understood to have been based in the Didsbury showroom. She was initially recruited with a gross salary of £20,000 and the first contract which she signed, and which was included in the hearing bundle also provided for sales-based commission. There was no dispute that commission was calculated as being 3% on all kitchen sales with the first 1.5% being paid following a customer paying their deposit and the second 1.5% being paid upon payment of the balance of the sale. Ms Bristow worked 5 days a week on a rota which covered the 7 days a week opening hours at the respondent's showrooms.
20. There was a contract of employment which confirmed the start date on 31 March 2021 within the bundle and which was signed by the claimant on the same date, (pp122-5). It was also signed by Mr Wynne and within this document the probation period was 3 months with no scope for extension, but during the period, there was a right for the respondent to unilaterally terminate with 24 hours' notice. Ms Bristow of course remained in employment for more than 3 months and her probation period was passed by 30 June 2021. According to this contract, her notice period would then be one month's notice pay, (pp123-4)
21. The claimant also signed receipt of the staff handbook on 31 March 2021, (p127). The probation period was qualified by this book with appointment being confirmed on the satisfactory completion of 3 months employment. Probation

reviews were mentioned, but no documents were provided or convincing witness evidence provided to me demonstrating that these took place. The possibility of a probation extension, although identified by the respondent, was not supported by documentation to suggest that any extension was communicated to the claimant. Accordingly, Ms Bristow was left with the reasonable belief that her probation period had been completed and the respondent is at fault for failing to communicate any contrary position to her given that a normal probation period would be 3 months in duration.

22. There was an employee handbook in the hearing bundle which post dated the Ms Bristow's commencement of employment, being dated May 2021, (p.78). This allowed for a 3 month probation period and which be extended by the respondent *'if we are unhappy with your progress'*. The expectation would of course be that the respondent would inform new employees if this step was being taken and this reinforces my findings made in the previous paragraph. Salary was to be paid at the end of each month according to the handbook and I understood that this was the normal practice for the respondent. Annual leave was confirmed as 5.6 weeks each year, with the leave year being between the months of April and March. Accordingly, Ms Bristow commenced employment the day before the date when the leave year began in 2021. The notice period in section 9(a) of the handbook identified the claimant as being entitled to one week's notice during the probation period and one month's notice following its conclusion, (p149).
23. The handbook also provided for the disciplinary procedure and that suspension is not a disciplinary action, should give the reason for the suspension, its operation, the timescale of the investigation and the right of appeal, (p151). An investigation was mentioned which should be carried out by a manager not connected with the matters being investigated, (p152). Mention is also made of lesser sanctions that can be considered including verbal warnings and written warnings, with examples of appropriate conduct, (p153). Gross misconduct is identified and when final written warnings and dismissal should be considered, (p154).
24. An email from the respondent to the claimant on 22 May 2021 confirmed that her target sales was 3 sales each month. This letter was understood to include the updated employee handbook and revised contract. This was available for signature on 22 May 2021, but remained unsigned by the claimant, (p121). I accept that the claimant continued to rely upon her existing contract of employment and did not agree to the revised document provided in May 2021. Even if the respondent seeks to argue that it was relying upon the right to revise her terms of employment, her probation period had begun based upon the existing contract and even if the revisions did apply, I did not accept that Ms Bristow had actually been notified of any extension to her probation period.
25. The claimant's leave year was asserted by the respondent to be calculated from January to December each year with the statutory 5.6 weeks annual leave entitlement being provided each year. However, the available contractual documentation indicated that the claimant's belief that the leave year ran from April to March was on balance the correct period which applied to her.
26. There was some discussion as to who Ms Bristow's line manager was and it certainly appeared to be the case that a number more senior members of staff

with the respondent adopted a supervisory role over her activities. However, in principle, we accept Mr Wynne's evidence that her day to day line manager was Paulina Baldygn, who was a sales manager. Ms Bristow did not hold a manager position and was not entitled to manager's levels of pay at any time during her employment. I also accept that Ms Bristow's probation period was initially 3 months and that she had a target of 3 to 4 sales each month.

The claimant's performance during her employment

27. Ms Bristow's evidence was that she made four sales during her short period of time working for the respondent and they can be summarised as follows:
- a) A kitchen in the Heaton Mersey area with a design and sale taking place in April 2021 and the kitchen installation being completed in May 2021.
 - b) A kitchen in the Macclesfield area with a design and sale taking place in May 2021 and installation being completed at the end of June 2021.
 - c) A kitchen in the Wilmslow area with a design and sale taking place in June 2021 and the installation being completed in July 2021.
 - d) A fourth sale was arranged for Mr Wynne's sister's holiday home at Stone in Staffordshire, but as this was supplied to a relative of the owner of the business, Ms Bristow said she was not paid her commission and argued that she did not agree to forgo this payment when designing the kitchen.
28. She explained that she would know when a kitchen was completed as she was normally notified by the Project Manager Luke who would ask her to call round to the customer's home to drop off some flowers or chocolates as a thank you gesture. Once the sale took place, Ms Bristow would not be responsible for the record keeping of the ongoing kitchen sale installation process.
29. The respondent argued that Ms Bristow did not meet her targets and her performance did not improve. They also argued that she refused to attend client appointments on 2 and 3 August 2021 and that she 'disappeared from work' for 3 ½ hours so she could go to the hairdressers.
30. The respondent asserted that it was Ms Bristow's conduct which led to her dismissal in that on 4 August 2021, she had an argument (according to response) and a fight (according to Mr Wynne's evidence) with Andrea Owens (another Sales Designer) and it was so bad, Mr Wynne was informed of the incident while he was away on holiday. It appeared from the evidence that I heard that Mr Wynne was on holiday a great deal during Ms Bristow's employment with the respondent and was not often on site to assume an effective day to day overall management role. I did not hear evidence of an investigation taking place in a way which would be consistent with recommended principles outlined in the ACAS Guide on disciplinary procedures in the workplace and while allegations were made, Mr Wynne did not appear to be in a position to reasonably conclude that the matters happened as alleged .
31. However, on 5 August 2021, it was decided that Ms Bristow and Ms Owens would be suspended and an email message of the suspension notice which was included within the bundle said, (p.161):

“Following recent developments, I regret to inform you that you have been suspended with immediate effect. The suspension will continue until Midday Monday 9 August, where there will be a review meeting at 12pm lunchtime at the Wilmslow Showroom.

Reasons for this suspension are as follows; frequent tardiness, lacking responsibility to rearrange her own client appointment, booking days off without communication to other members of staff.

These reasons will be discussed at the review, in the meantime, any appointments or bookings during the suspension should be re-booked or handed over to another designer.”

It is understood that Ms Owens resigned and left the respondent’s employment before any formal action was taken. It was reasonable for the claimant to assume that the review meeting would be an investigation meeting as part of a disciplinary notice given the overall message conveyed in the suspension email.

32. Ms Bristow decided to reply to the email and made the following enquiry with Mr Wynne:

“Thank you for your recent email as follows.

I hope you are enjoying your holiday in Croatia.

I look forward to receiving some clarification on Monday 9th at 12pm in the Wilmslow showroom on the recent developments that you have indicated.

I would also like to request that the meeting is recorded, for my protection and to establish some documentation of things that re discussed, so we are on the same page.

At this point I would also like to discuss the lack of commission payment in my most recent paycheck, and the raise in payment structure from a basic of £20,000 to £25,000 which was discussed in a meeting on 27 June 2021 which I never received any paperwork for.

I did mention the former in a message to you on 4 July 2021 but have not received a response.

Just to confirm, the points I would like to discuss are:

- *Your point of ‘frequent tardiness’.*
- *Your point of ‘lacking responsibility to arrange her own client appointments’.*
- *Your point of ‘no completing appointments’.*
- *Your point of ‘booking days of with no communication to other members of staff’.*
- *My point of lack of commission payment.*
- *My point of change in payment structure with paperwork to confirm.*

If you would like me to bring anything with me in the meantime, please do let me know.”

While she acknowledged that Mr Wynne did try to call her, she was unwilling to answer as she wanted everything recorded in writing. Given that she had failed to reply to calls, I found it surprising that Mr Wynne decided not to reply in writing.

33. Ms Bristow had of course been invited to a review meeting on 9 August 2021. What happened next was slightly confusing. However, I am satisfied that on balance, although a meeting had been planned with Ms Bristow and Mr Wynne/other members of management on 9 August 2021, Mr Wynne held a management meeting during the morning and a decision was made to dismiss her without notice. This decision appeared to take place without any meaningful investigation into the incident or matters under investigation, without clearly informing Ms Bristow of why they felt dismissal was under consideration and without affording her the opportunity to put her version of events to management and with an employee representative being present. Had the meeting had been intended to include Ms Bristow, I would have expected to have seen or heard evidence from Mr Wynne of attempts being to contact her on the morning of 9 August 2021.
34. The decision was communicated to Ms Bristow by text from Mr Wynne on 9 August 2021 at 10:47 which was of course before the planned meeting with her at 12pm that day. It was very perfunctory and was clearly made with a view of communicating the dismissal without any thought being given to process. It said:
- ‘Following an internal investigation you are not required to attend your suspension meeting and your probation is unsuccessful at an end. And we will forward your [sic] a letter confirmation and your p45. Good luck in the future.’*
- No explanation was given as to why the decision had been reached without the investigation meeting taking place later that day and no right of appeal was provided. She believed she would receive all of her pay by 31 August 2021 which was the usual pay date for each month end, but no payment was received.
35. While Ms Bristow did not attend the midday meeting on 9 August 2021, I do not accept on balance that this meeting would have affected the decision which had already been made to dismiss her. Given the message that she received by text, it is not surprising she did not attend. The respondent asserts that the meeting was an investigation meeting and not a disciplinary meeting, with no statutory right to be accompanied.
36. They asserted that the decision to dismiss was made during Ms Bristow’s probation, which they believed had been extended and in relation to her conduct and performance during the whole of her employment. They submit therefore that the decision was one of conduct and/or capability.
37. While this may be their argument, I did not hear evidence of an investigation taking place in a way which would be consistent with recommended principles outlined in the ACAS Guide on disciplinary procedures in the workplace and while

allegations were made, Mr Wynne or other managers did not appear to be in a position to reasonably conclude that the matters happened as alleged .

38. The respondent argues that Ms Bristow was only entitled to 1 week's statutory notice at the time of her dismissal on 9 August 2021.
39. At the date of termination, the respondent also argued that Ms Bristow had taken more than her accrued annual leave entitlement, having taken 11 days leave plus 4 bank holidays and that at the point of her dismissal, her accrued annual leave entitlement was 10.5 days.
40. Ms Bristow referred to photograph extracts from her diaries included within her 'response' to the response which indicated that she did not take any leave on the days relied upon by the respondent. There was a period from 25 to 27 June 2021 which the respondent believed was leave, but where Ms Bristow included extracts of NHS Test and Trace messages which supported her argument that she was actually self-isolating, in accordance with government's requirement of those who tested positive for Covid at that time.
41. Interestingly, Ms Bristow did not appear to ask about booking leave until 21 July 2021 when she asked Mr Andrew Cunningham who was connected with the respondent's accountants about how to do this. There was some challenge by the respondent as to whether Ms Bristow was referring to Adrian Cunningham (accountant) or Andrew Cunningham (son and bookkeeper), but I was unable to conclude that this distinction was material to the issues before me. However, Ms Bristow appeared to be communicating with Andrew Cunningham and the messages of 21 July 2021 revealed that he had a connection with the respondent and was aware of policies and procedures. She intended to book leave later in August 2021, but she was dismissed before this took place.
42. On balance, I was not satisfied that the respondent's evidence was correct concerning Ms Bristow's leave and accordingly, I feel that she gave a more credible and reliable account of the circumstances concerning her annual leave entitlement. While some of the screenshots within the bundle were slightly blurry, they were sufficiently clear so that when Ms Bristow read out what the original said, I was able to conclude that her version of events was more likely to be true. Accordingly, she did not take any of her accrued annual leave entitlement before her employment terminated.
43. They dispute that Ms Bristow's annual salary increased from £20,000 to £30,000 and that all designers were paid £20,000 with the higher salary only being applied to managers. The confusion they argue, is related to the provision of a revised contract to all staff when the respondent instructed a new HR provider and the incorrect salary level had been included within the contract sent to Ms Bristow. Given the reliance placed upon the original contract by Ms Bristow, I concluded that the correct salary remained £20,000 as described on page 122 of the contract of employment signed on 31 March 2021.
44. Ms Bristow argued that she was not paid her full pay during her suspension, despite being available to work.

45. Ms Bristow says that although she was aware of her dismissal from 9 August 2021, she did not take any action immediately even though she felt that she had been unfairly dismissed. Her rationale behind waiting was that she felt her outstanding payments due in respect of annual leave, unpaid wages, commission and notice pay would be paid to her at the end of her contractual notice period which she believed would be one month and expire on or around 9 September 2021.
46. She did not receive any further payments and then began making enquiries with the respondent. Unfortunately, at this point, Mr Wynne had been bereaved and understandably was not focusing upon the day to day running of the business. Ms Bristow was able to speak with Mr Cunningham, whom she said continued to reassure her that Mr Wynne would want to resolve these payments amicably without her having to resort to litigation. There was no documentary evidence of such conversations taking place during this period within the hearing bundle, although I accept, they took place and were intended to be reassuring rather than deliberately designed to delay Ms Bristow in bringing a claim. Indeed, she approached ACAS to begin early conciliation on 20 October 2021 (according to the early conciliation certificate). Ms Bristow says she actually began early conciliation on 25 October 2021, but as she conceded that she contacted ACAS on the earlier date, I find that certificate indicating the date of presentation of 20 October 2021 is correct.
47. Early conciliation unfortunately did not result in any resolution and a certificate was issued by ACAS on 30 November 2021. Although Ms Bristow argued that this date should be 1 December 2021, I was unable to accept that this was correct in the absence of any documentary evidence between ACAS and her concerning this alleged error. She said that further communication took place between Mr Cunningham and her and she eventually decided to present her claim to the Tribunal on 4 January 2021. I accepted that she believed the effective date of termination was 9 September 2021 as she relied upon her belief that the contractual notice period was 1 month.
48. While I appreciated that Ms Bristow was not legally qualified, there was no suggestion that she did not know that she could bring a claim in the Employment Tribunal and her relatively early reference to ACAS in October 2021, was evidence of that. Other than her belief that the relevant date for the calculation of time limits was 9 September 2021, Ms Bristow provided no other reason which suggested it was not possible for her to present a Tribunal complaint on or shortly after 30 November 2021 when the early conciliation certificate was issued by ACAS.
49. Overall, Ms Bristow gave credible evidence although at times her recollection was not particularly reliable. Mr Wynne's evidence was at times vague, and the respondent's case was not assisted by the absence of witness evidence from employees who managed Ms Bristow and who would have been better placed to give evidence concerning the day to day management of the business during the claimant's employment. I did note however, that Mr Wynne's personal circumstances may well have affected his recollection and do not criticise him for the quality of evidence which he gave.

Law

Unfair dismissal

50. Part X of the Employment Rights Act 1996 ('ERA') deals with complaints of unfair dismissal. Section 94 of the ERA confirms that an employee has a right not to be unfairly dismissed.
51. Section 104 ERA provides that an employee who is dismissed shall be regarded as unfairly dismissed if the reason (or if more than one, the principal reason) was (under section 104(1)(b) ERA), that they alleged the employer had infringed a statutory right. It is immaterial that the employee has the right in question or whether the right has been infringed, providing it is asserted in good faith, (s104(2) ERA). Relevant statutory rights are identified in section 104(4) ERA.
52. Section 108 ERA provides that in order to bring an ordinary complaint of unfair dismissal, an employee must have worked continuously for the employer for a period of not less than two years ending on the date of termination. However, section 108(3) confirms that this requirement does not apply to complaints brought (amongst other things), under section 104 ERA.
53. Under section 98(1) of the ERA, it is for the employer to show the reason for the dismissal (or if more than one the principal reason) and that it is either a reason falling within section 98(2) or for some other substantial reason of a kind such as to justify the dismissal of the employee holding the position he held. A reason relating to conduct is a potentially fair reason falling within section 98(2).
54. Under section 98(4) of the Employment Rights Act 1996, where the employer has shown the reason for the dismissal and that it is a potentially fair reason, the determination of the question whether the dismissal was fair or unfair depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and must be determined in accordance with equity and substantial merits of the case.
55. When determining the fairness of conduct dismissals, according to the Employment Appeal Tribunal in British Home Stores v Burchell 1980 ICR 303, the Tribunal must consider a threefold test:
- a. The employer must show that he believed the employee was guilty of misconduct;
 - b. The Tribunal must be satisfied that he had in his mind reasonable grounds upon which to sustain that belief; and
 - c. The Tribunal must be satisfied that at the stage at which the employer formed that belief on those grounds, he had carried out as much investigation into the matter as was reasonable in the circumstances.

56. However, it is not for the Tribunal to substitute its own decision as to the reasonableness of the investigation. In *Sainsburys Supermarkets v Hitt* [2003] IRLR 23 the Court of Appeal ruled that the relevant question is whether the investigation fell within the range of reasonable responses that a reasonable employer might have adopted.
57. The requirement for procedural fairness is an integral part of the fairness test under section 98(4) of the Employment Rights Act 1996. When determining the question of reasonableness, the Tribunal will have regard to the ACAS Code of Practice of 2015 on Disciplinary and Grievance Procedures. That Code sets out the basic requirements of fairness that will be applicable in most cases; it is intended to provide the standard of reasonable behaviour in most cases. Under section 207 of the Trade Union & Labour Relations (Consolidation) Act 1992, in any proceedings before an Employment Tribunal any Code of Practice issued by ACAS shall be admissible in evidence and any provision of the Code which appears to the Tribunal to be relevant to any question arising in the proceedings shall be taken into account in determining that question.
58. In *Polkey v Dayton Services Ltd* [1988] ICR 142, it was stated that if an employer could reasonably have concluded that a proper procedure would be “utterly useless” or “futile”, he might be acting reasonably in ignoring it.
59. Section 122(2) of the Employment Rights Act 1996 provides that where the Tribunal finds that any conduct of a Claimant before the dismissal was such that it would be just and equitable to reduce the amount of the Basic Award, the Tribunal must reduce that amount accordingly.
60. Section 123(6) of the Employment Rights Act 1996 provides that where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the Claimant, it must reduce the amount of the compensatory award by such proportion as it considers just and equitable.

Holiday pay

61. Regulations 13, 13A and 16 of the Working Time Regulations 1998 (as amended), when read together provide that a worker is entitled to 5.6 weeks (up to a maximum of 28 days) paid leave in any leave year. A worker’s contract may provide an entitlement in excess of this statutory minimum. Regulation 14 provides that a worker is entitled to be compensated for accrued but untaken leave upon the termination of their employment. The leave entitlement may only be taken in the leave year in which is due, subject to any relevant workforce agreement.

Unlawful deduction from wages

62. Section 13 ERA provides that an employer must not make a deduction from a worker’s wages employed by him unless the deduction is required by statute, under a relevant provision in a worker’s contract, or the worker has previously signed their written agreement or consent to the making of the deduction in question.

Notice pay

63. The Employment Tribunals Extension of Jurisdiction Order 1994 provides that proceedings for breach of contract may be brought before a Tribunal in respect of a claim for damages or any other sum (other than a claim for personal injuries and other excluded claims) where the claim arises or is outstanding on the termination of the employee's employment.
64. A claim for notice pay, is a claim for breach of contract; Delaney v Staples 1992 ICR 483 HL.
65. In Neary v Dean of Westminster [1999] IRLR 288, it was held that conduct amounting to gross misconduct justifying summary dismissal 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.
66. In cases of wrongful dismissal, it is necessary for the Respondent to prove that the Claimant had actually committed a repudiatory breach of contract.

Time Limits

67. Section 111(2) provides that a Tribunal shall not consider such a complaint unless it is presented to the Tribunal: (a) before the end of the period of three months beginning with the date of termination; or, (b) within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
68. Section 23 ERA provides the same requirements for wages claims, article 9 of the Employment Tribunals Extension of Jurisdiction (E&W) Order 1994 for breach of contract and regulation 30 under the Working Time Regulations 1998, for holiday pay.
69. Section 207B ERA provides for the extension of time limits to facilitate conciliation before the institution of proceedings. Section 207B(2) identifies date A as the date when a claimant notifies ACAS of a potential claim and date B is the date when an early conciliation certificate is issued. These dates are provided on an early conciliation certificate. The period between these dates does not count for the calculation of time limits. If the time limit period, however, would expire at a point from date A when early conciliation is notified and one month after date B, the time limit expires one month after that date.

Respondent's submissions

70. Ms Mayhew-Hill on behalf of the respondent submitted that they were entitled to extend the probationary period. She said that the case was about a fight between two executives and the claimant was dismissed during her probation period, she

was not meeting her targets, she left her showroom early and the respondent did not need to justify its decision to dismiss her.

71. She said that even if the claimant was dismissed in connection for asserting a statutory right, significant contributory fault should be considered and in any event the claimant had a notice period of 1 week in accordance with the periods provided in the contract of employment, (p120).
72. In relation to time limits, she that the claim form had been presented out of time and it was reasonably practicable for the claimant to present her claim as she could be expected to know her dismissal took place on 9 August 2021 and that she needed to notify ACAS as soon as possible. She also noted that she had raised the issue about outstanding pay before 4 August 2021.
73. In response to the claimant's written submissions, she said that the claimant was waiting for her August paycheque to arrive, but that does not explain the delay in the claim being presented. She submitted that there was no exceptional reason for the delay.

Claimant's submissions

74. In her written submissions, Ms Bristow asserted that in relation to annual leave that while the respondent said she had taken 4 different holidays, there was no evidence of any holiday having been taken during her employment.
75. In terms of her probation period, that she was contractually entitled to £30,000 from 22 May 2021. She said that the new contract only mentioned a probation period for new employees only and as she had completed her probation, these provisions did not apply to her. She says she had completed her probation.
76. She noted that she met with Mr Wynne to assert her pay increase one week before she was suspended and the lack of payment of commission despite it being mentioned in her payslip.
77. She noted that her suspension took place one day after the request for payment of commission and the allegations referred to in the suspension notice had never been raised previously with her. She also disputes that she failed to attend the suspension meeting on 9 August 2021 as she was dismissed before the meeting actually took place at the agreed time.
78. In terms of her presentation of the claim on 4 January 2022 she says that it was based upon an understanding that the claim can only be brought following the date that the unlawful deduction from wages took place. She thought that these payments were due on 31 August 2021, but given that her notice period ran into September, she believed 30 September 2021 was the payment date.
79. She says evidence was heard that she allowed additional time because of Mr Wynne's bereavement. She only became aware of the right to bring an automatic unfair dismissal complaint when she referred the matter to ACAS.
80. She concludes by saying that the 'clock started' on 9 September 2021 and was stopped on 25 October 2021 while waiting for ACAS certificates. The early conciliation certificate was in her view issued on 1 December 2021 and this gave

her until mid January 2022 to present the claim. She believes that she presented her claim on time on 4 January 2022.

Discussion

Time limits – were the complaints presented in time?

81. This was a case where the application of time limits was a significant part of the issues to be considered by the Tribunal and it is appropriate to consider them first as part of the discussion.
82. In her claim form, Ms Bristow identified in section 5.1 that her employment ended on 9 August 2021. In her grounds of complaint provided on a separate document with her claim form, she referred to a text message from Mr Wynne which said that her probation was unsuccessful, was at an end and a letter was promised enclosing her P45. It did not formally state that her employment had ended, but I accepted that Ms Bristow understood her employment had ended but expected her contract to end on 9 September 2021 given that she believed she had a month's notice.
83. I accepted that the for the purposes of bringing a complaint of unfair dismissal, Ms Bristow was dismissed on 9 August 2021 without notice and this was effectively a summary dismissal. However, the dismissal in the text was attributed to an unsuccessful probation which had not been extended beyond the 3 month period and which no longer applied. There appeared to be no disciplinary process taking place because an internal investigation was described as having taken place and no requirement was placed upon Ms Bristow to attend the suspension meeting with no reference being made to the probation being connected with any of the allegations made in the initial suspension email.
84. Under section 86 ERA, an employee who has been employed for at least one month but less than two years, is under s.86(1)(a) entitled to one week's notice. The effective date of termination for the purposes of the unfair dismissal complaint is therefore the statutory notice period under s.86 and not the contractual period, (by application of section 97(2) ERA). This means for the purpose of section 111 ERA, the calculation of time limits begins on 16 August 2021 and not 9 August 2021 as asserted by the respondent.
85. This means that in accordance with section 111 ERA, the claim must have been presented by no later than 15 November 2021. Date A for the purposes of early conciliation began on 20 October 2021 and therefore Ms Bristow was in time at this point. As the time for the purposes of section 207B ERA would expire before date B arose when the early conciliation certificate was issued, she would have until 30 December 2021 to present her claim of unfair dismissal. Unfortunately, this was not presented until 4 January 2021 and is therefore out of time under section 111(2)(a) ERA.
86. I will deal with the question of extensions of time on reasonable practicability grounds once I have dealt with the other complaints and their primary time limits as the arguments are likely to be broadly similar for each.

87. The breach of contract complaint was made in respect of the failure to comply with the asserted contractual notice of 1 months, which Ms Bristow argues applied as she had completed her probation period of 3 months and no notice of extension had been given. As I have already mentioned, this is something which I agreed with and the respondent failed to convince me that she had been placed in a position where she was notified of an extension to that probation.
88. Section 7 of the ETs Extension of Jurisdiction (E&W) Order 1994 (Order 1994) which allows breach of contract complaint for notice pay to be brought, provides as similar time limit calculation of 3 months as section 111 ERA for unfair dismissal. In this case, time is calculated under section 7(a) within the period of 3 months beginning with '*the effective date of termination*' of the contract giving rise to the claim. This provision does not fall within part X of the ERA but uses terminology similar to that used within the ERA concerning the effective date of termination. However, whether the termination takes effect on 9 August 2021 when the dismissal was communicated to the claimant or on 16 August 2021 by applying her minimum statutory notice period, for the reasons given above in relation to unfair dismissal, the claimant will have presented her claim out of time.
89. The wages complaint is subject to section 23 ERA when time limits are considered. Section 23(2) provides that the date of payment of wages is the relevant time from which the 3 month period should be calculated for the purposes of time limits. Given that Ms Bristow was notified of her dismissal on 9 August 2021, for the purposes of this complaint, she had 3 months from this date in which to present her claim to the Tribunal, being 8 November 2021. While she notified ACAS with Date A being 20 October 2021, for the reasons given above, the claim form not presented before 30 December 2021 and the claim would therefore appear to have been presented out of time.
90. Regulation 30(2) of the WTR provides a similar basis of calculation as section 23 ERA, but in relation to holiday pay claims. The pay in lieu of the holiday pay untaken became due on 9 August 2021. However, for the reasons given already, whether the relevant date was 9 August 2021, (or indeed a week later on 16 August 2021 as described above), the claim was presented out of time.

Is an extension of time appropriate on grounds of reasonable practicability?

91. This does of course leave me with the question of whether any of the complaints can be subject to an extension of time to 4 January 2022 for the purposes of presenting the claim, so that the claim could be accepted as having been presented on time. All of the relevant provisions identified above concerning time limits for the complaints brought do permit me *limited* discretion to extend time if I am satisfied that it is not reasonably practicable for the claim form to have been presented on an earlier date. However, this is a decision which cannot be taken lightly, and consideration must be taken with the primary consideration that time limits are there to be complied with by parties.
92. Ms Bristow's argument when she gave her evidence was that she was unable to present her claim form at an earlier date than she did, because although aware of her dismissal from 9 August 2021, she felt that she had been unfairly dismissed and she waited for her payments due in respect of annual leave, unpaid wages,

commission and notice pay to be paid at the end of her contractual notice period which she believed was 9 September 2021. However, this was still some time before the end of the initial 3-month period.

93. I acknowledged her patience and thoughtfulness following Mr Wynne's bereavement, but Ms Bristow was aware that she could speak with other representatives or employees of the respondent as she was able to speak with Mr Cunningham, for example. While he may have been reassuring concerning payments eventually being made, Ms Bristow was clearly aware of the need to contact ACAS and she did so on 20 October 2021 for the purposes of commencing early conciliation.
94. The early conciliation certificate was issued by ACAS on 30 November 2021 and the provisions of section 207B ERA still provided her with a month until 30 December 2021 in which to present the claim in time. Although I appreciate that Christmas would have intervened and for many this can be a significant diversion, Ms Bristow would have still been expected to progress her claim and had several weeks in December 2021 in which to do so. There was nothing preventing. While she believed the effective date of termination was 9 September 2021 as she relied upon her belief that the contractual notice period was 1 month, but she could have made enquiries to see whether this was correct or indeed simply present proceedings before Christmas 2021 to protect her position.
95. Even if she believed that the early conciliation certificate was dated 1 December 2021 (and I was unable to see any convincing evidence that this was the case given the available certificate before me was dated 30 November 2021), a difference of 1 day would have still resulted in the claim form being presented out of time on 4 January 2022.
96. I acknowledged in my findings of fact that Ms Bristow was not legally qualified, but there was no suggestion that she did not know that she could bring a claim in the Employment Tribunal and her relatively early reference to ACAS in October 2021, was evidence of that. Other than her belief that the relevant date for the calculation of time limits was 9 September 2021, Ms Bristow provided no other reason which suggested it was not possible for her to present a Tribunal complaint on or shortly after 30 November 2021 when the early conciliation certificate was issued by ACAS.
97. The burden of proof in showing that it was not reasonably practicable to present the claim in time rests upon Ms Bristow as claimant. In Asda Stores Ltd v Kauser EAT 0165/07, Lady Smith described the reasonably practicable test as follows:
- "the relevant test is not simply looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done"*.
98. In considering this test, factors which may need to be considered include:
- a. The manner and reason for the detriment;

- b. The extent to which the internal grievance process was in use;
- c. Physical or mental impairment (including illness):
- d. Whether the claimant knew of her rights. **Ignorance of the right to make a claim** may make it not reasonably practicable to present a claim in time, but the claimant's ignorance must itself be reasonable. In such cases the Tribunal must ask: what were the claimant's opportunities for finding out that she had rights? Did she take them? If not, why not? Was she misled or deceived? See *Dedman v British Building and Engineering Appliances Ltd* 1974 ICR 54 CA. In other words, ought the claimant to have known of her rights? Ignorance of time limits will rarely be acceptable as a reason for delay and a claimant who is aware of her rights will generally be taken to have been put on enquiry as to the time limits.
- e. Any misrepresentation on the part of the respondent;
- f. Reasonable ignorance of fact;
- g. Any advice given by professional and other advisors (such as the CAB). A claimant's remedy for incorrect advice will usually lead to a remedy against the advisors and the incorrect advice unlikely to have made it not reasonably practicable to have presented the claim within the statutory time limit.
- h. Postal delays/losses
- i. The substantive cause of the Claimant's failure to comply.

99. I did take these factors into account when considering the evidence and submissions which I heard from Ms Bristow and while in many ways, she was exercising patience and indeed some consideration towards the respondent and Mr Wynne in particular, she reached a point when she notified ACAS within the time limits, that she knew there may be a number of complaints arising from the way in which she was dismissed. The delays which took place from August to October 2021 when Date A arose with the notification of ACAS was in many ways unimportant as she was at that point in time. The fact that she had a further month following Date B with the issue of the early conciliation certificate meant I was most interested in what happened during this period and why the claim form was presented late on 4 January 2022.

100. Ultimately, I am simply unable to establish any factors which might she suggest that she was misled by the respondent or her own advisors in December 2021 (or indeed before that date), no illness was relied upon and there was no ignorance of her rights.

101. The '*reasonable practicable*' test is a tough one for claimants and I acknowledge the harsh outcomes that can arise from even the shortest of delays. But as the law currently stands, it is the one which must be applied and for the reasons given above I must find that it was reasonably practicable for Ms Bristow

to have presented all of her complaints identified within the claim form by 30 December 2021 in accordance with Date B of the early conciliation certificate and the claim is therefore out of time. The Tribunal therefore does not have jurisdiction to hear any of the complaints.

A few comments about the substantive complaints

102. MS Bristow's complaint of unfair dismissal was always precarious because of the continuous employment being less than 2 years contrary to section 108 ERA. The claimant had of course presented a complaint of automatic unfair dismissal contrary to section 104 ERA by reason of her asserting a statutory right. She referred to the request to be accompanied and to record the investigation meeting in August 2021 once she received notice of her suspension.
103. EJ Ross noted in the PHCM for this case that the asserted rights were not protected by section 104 ERA and according to my consideration of this section, I must agree. Section 10 Employment Relations Act 1999 affords an employee with the right to be accompanied and with a complaint being possible under section 11 of the 1999 Act. This was not the complaint I was faced with, no application to amend had been made. In any event, it is likely that even if such a complaint had been presented, it would have faced the same time limit difficulties as the other complaints brought, being subject to the same requirements.
104. There is no doubt from my findings of fact that I am not impressed by the way in which the respondent went about ending Ms Bristow's employment. Had she been able to bring an arguable unfair dismissal complaint she would have had good prospects of succeeding with it based upon the flaws in the investigation, the reasons applied to the dismissal, whether the sanction was proportionate or applicable and the overall procedural errors. Mr Wynne simply did not appear to have reasonable grounds with which to dismiss Ms Bristow and cannot have genuinely or at least reasonably believed that this was a case involving an unsuccessful extended probationary period. This did not appear to be a case where a fair process would have ever produced a fair dismissal and the respondent would be well advised to review its employment relations practices to avoid being embarrassed in any future Tribunal proceedings.
105. Similarly, while the respondent believed it was able to dismiss the claimant without notice, it was unable to persuade me that gross misconduct had taken place, had this complaint of breach of contract been in time, the claimant would have succeeded in recovering her notice pay as this was not a situation where the respondent could have dismissed the claimant without notice.
106. In relation to the wages complaint and the holiday pay complaint, it is likely that the claimant would have succeeded in proving her complaints had they been brought in time, although their calculation would have been dependent upon a further consideration of remedy. The bonuses appeared to be contractual in nature and based upon 4 sales (including the one involving Mr Wynne's sister) and would have triggered a bonus payment depending upon how far the sale progressed.

107. It may be that the claimant has other avenues to explore in relation to the recovery of these losses, but it is hoped that to bring this matter to an amicable resolution, the respondent may discuss these losses with claimant to ensure that matters are resolved. However, this is something that falls outside of these proceedings and for the avoidance of doubt, in this Tribunal, the complaints of unlawful deduction from wages and holiday pay are unsuccessful.

Conclusion

108. Accordingly, for the reasons given above, all of the complaints brought by the claimant are dismissed as they were presented out of time and accordingly the Tribunal does not have jurisdiction to determine them.

Employment Judge Johnson

Date 12 July 2023

JUDGMENT SENT TO THE PARTIES ON
18 July 2023

FOR THE TRIBUNAL OFFICE