EMPLOYMENT TRIBUNALS

Claimant: Marielle Brouwer

Respondent: Peter Radelat, t/a PR Employment Law Specialists

Heard at: Cambridge Employment Tribunal
On: 2 and 3 May 2023

Before: Employment Judge Hutchings (sitting alone)

Representation
Claimant: Mr Pickett of Counsel
Respondent: Mr Radelat in person

RESERVED JUDGMENT

1. The claimant's complaint that the respondent contravened section 1 of the Employment Rights Act 1996 by failing to provide the claimant with a statement of initial particulars is well founded.

2. The complaint of unfair dismissal is well founded. The claimant was unfairly dismissed the respondent.

3. The claim for unlawful deduction from wages is dismissed upon withdrawal by the claimant.

REASONS

Introduction

1. The claimant, Mrs Marielle Brouwer, was employed by the respondent, Mr Peter Radelat, t/a PR Employment Law Specialists, as an Administrator, Office Manager and Business Manager and Compliance Officer from 5 September 2011 until 22 August 2021. By a claim form dated 25 January 2022 Mrs Brouwer claims that:

    1.1. She was unfairly dismissed within section 98 of the Employment Rights Act 1996;
    1.2. The reason for her dismissal was redundancy;
    1.3. She is entitled to a payment of statutory redundancy;
    1.4. The respondent failed to provide her with a written statement of her particulars of employment; and
    1.5. The respondent made unlawful deductions from her wages.

2. The claimant has an ACAS certificate dated 27 December 2021.

3. The respondent advises and represents employers and employees in employment law matters. The respondent's business is regulated by the Financial Conduct Authority as a claims management company. The respondent contends that the claimant was not dismissed, but either gave notice to end her employment contract or that her employment was terminated by mutual agreement. The respondent submits that any conversations which took place about making the claimant redundant were speculative, referring to future events and "conditional upon how events unfolded". The respondent denies employment is on-going and that he owes the claimant wages. The respondent considers that the offer letter dated 6 July 2011 satisfied the statutory requirement to provide employees with a written statement of particulars of employment.

Preliminary matters

4. At the beginning of the hearing, before I heard any evidence, I had to deal with the following preliminary matters:

    4.1. The respondent submitted a supplementary hearing file of 68 pages. Noting that the claimant did not consider the contents relevant to points in issue, Mr Pickett did not object. I accepted the file as evidence.

    4.2. Following a short break, Mr Pickett confirmed that the claimant was withdrawing her claim for unlawful deduction from wages.

    4.3. The parties informed me that a telephone case management hearing had taken place but neither party had received a copy of the order and had been told by the Judge at that hearing that it was unlikely they would receive it before the final hearing. At that hearing the claimant's application to amend her claim to include a claim for constructive dismissal was refused. The case management hearing did not confirm a list of issues for this final hearing. Therefore, I discussed the issues arising from the claim and response with the parties at the hearing. I set out below the issues I must determine.

Issues for the Tribunal

5. Whether the respondent breached section 1 of the Employment Rights Act 1996 in failing to provide the claimant with written particulars of employment.

6. The claimant and respondent agree that her employment terminated on 18 June 2021, that she worked a period of 9 weeks' notice, during which she took her outstanding holiday. They also agree that the claimant's effective date of termination was 22 August 2021.

7. The Tribunal must determine:

    7.1. How the claimant's employment terminated on 18 June 2021. The claimant says she was dismissed by the respondent, by reason of redundancy. The respondent says she gave notice to end her employment, or, in the alternative, her employment was ended by mutual agreement.

    7.2. If I conclude that the claimant was dismissed, I must decide whether the dismissal was unfair?

        7.2.1. The claimant says the dismissal was unfair as there was no reason for the dismissal or, in the alternative, the reason for the dismissal was redundancy and the respondent did not follow a fair procedure.

        7.2.2. The respondent says that redundancy was not the reason for any dismissal. In the Grounds of Response, the respondent states there was

"some other substantial reason for dismissal". This is not specified in the response or Mr Radelat's witness statement. At the hearing Mr Radelat told me that the other reason related to health problems with his back which were on-going at the time the claimant left the respondent's employment.

7.3. If I find the reason was redundancy, I must decide whether the respondent acted reasonably in all the circumstances in treating that reason as a sufficient reason to dismiss the claimant. The Tribunal will decide whether:

7.3.1. The respondent adequately warned and consulted the claimant;

7.3.2. The respondent adopted a reasonable selection process, including its approach to a selection pool;

7.3.3. The respondent took reasonable steps to find the claimant suitable alternative employment; and

7.3.4. Dismissal was within the range of reasonable responses. When considering fairness of process, I must not substitute my own view for the employer's view; the Tribunal must decide if dismissal fell within the range of reasonable responses of the employer (mindful of the size and administrative resources of the respondent's business).

7.4. If I find the reason was a substantial reason capable of justifying dismissal, namely Mr Radelat's health and problems with his back I must determine whether the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

Procedure, documents and evidence

8. The claimant was represented by Mr Pickett of Counsel and gave sworn evidence. Mr Radelat represented himself and his business and gave sworn evidence.

9. The hearing was listed for 3 days; prior to the hearing parties were notified by Tribunal administration that the time allocation had to be reduced to 2 days for administrative reasons. Therefore, I heard evidence was on liability only. Given the time allocation I was unable to hear evidence relating to any Polkey deductions (see legal test below).

10. I considered the documents from an agreed 206-page file of documents and the 68-supplementary file, which the parties introduced in evidence. Mr Radelat and Mr Pickett made closing statements. I have also taken account of the respondent's written submissions on redundancy.

Findings of fact

11. First, I make a general finding on the oral evidence presented at the hearing. I found the claimant's evidence clear and consistent. On several occasions she was asked to repeat evidence, for example to ensure parties and the Tribunal had an accurate note. In doing so she was consistent in the evidence she gave on each occasion. Her evidence was also consistent to the record of contemporaneous documents.

12. Mr Radelat's recollections of events in May, June and July 2021 were, at times, confused. In making this observation I am mindful that at the time of these conversations he was experiencing health difficulties with his back for which he was waiting for a medical procedure and that, by his evidence at the Tribunal, he was limited in the amount he could correspond by email at that time. However, I am also mindful that in several places Mr Radelat's witness statement and his recollection of oral evidence do not align with contemporaneous documents, including an agreed transcript of a recording of a conversation between the parties. Mr Radelat's witness

statement does not reflect the recorded conversation. What his witness statement purports he said is not what he is recorded as saying. In oral evidence Mr Radelat sought to explain this discrepancy by telling the Tribunal that the words transcribed meant something different than what they appeared to mean; his explanation was an attempt to align the meaning with that in his witness statement. I refer to specific discrepancies in his evidence in my findings of fact below.

13. In his closing statement Mr Pickett reminded me that the respondent trades as an *"employment law specialist"* and that while normally the Tribunal makes allowances for small business owners and small traders, the fact the respondent is an employment law specialist advising employers and employees means I should hold him to a higher account in reaching my conclusions. I agree. In oral evidence Mr Radelat told me that he took some of exams to focus on employment law, completing legal executive training and taking the LPC employment law module. Mr Radelat told the Tribunal that, while he was not a qualified solicitor, for all intents and purposes he was qualified in employment law, this was his area of expertise, and his profession was advising others in employment situations. Indeed, when Mr Pickett asked Mr Radelat if it was reasonable for the Tribunal to hold him to a higher account than other employers given his qualifications and professional experience, Mr Radelat agreed it was.

14. The relevant facts are as follows. Where I have had to resolve any conflict of evidence, I indicate how I have done so at the material point; in doing so I am mindful of the consistency of the claimant's evidence and the inconsistencies in the respondent's evidence.

15. The claimant, Mrs Brouwer, was employed by the respondent, from 5 September 2011 until, the parties are agreed, her employment terminated on 22 August 2021. She was employed as an Administrator, Office Manager and Business Manager and Compliance Officer, her role confirmed in an offer letter dated 6 July 2011. The claimant has never received an employment contract or full statement of her terms of employment. Mrs Brouwer worked part time and flexible hours, starting on 24 hours a week in 2011. When her employment ended in August 2021, she was working on average 16 hours a week.

16. During summer 2020 Mr Radelat was experiencing severe back pain and waiting for a medical procedure. Indeed, at the hearing, while he had not requested any reasonable adjustments, I was aware that, on the second day, Mr Radelat had a back support, which he put on when he left the hearing room. By January 2021 Mr Radelat was no longer able to do client work. At this time his ability to type was also limited and his wife typed some of the emails he sent.

17. In a telephone conversation on 17 May 2021 Mrs Brouwer told me that Mr Radelat made it clear to her that he had decided to close the business for the foreseeable future as he did not know when he would be able to work again due to the uncertainty surrounding his back condition. When she asked about furlough, he told her he could no longer use the furlough scheme for this reason. Mrs Brouwer's evidence reflects the concerns Mr Radelat expressed in emails with his work consultant and sister in January and February 2021. In his witness statement the respondent says he had no intention of temporarily or permanently closing his firm, raising in a telephone conversation the possibility of reducing her hours. This does not align with the contemporaneous correspondence I have seen in which he, understandably, expresses concerns about his health and the ability to keep working. The respondent's attempt to recruit a second fee-earner (Mr Radelat being the only fee earner at that time) were not successful.

18. Mindful that, by his own admission, Mr Radelat's back condition at this time was severe, the date for treatment uncertain, the fact was the only fee earner at this time, that his business' source of income was one of giving advice, the concerns expressed in emails to his work consultant and his sister in preceding months about costs and his

ability to work, my findings on the accuracy of Mrs Brouwer's recollections, I find that in the conversation on 17 May 2021 Mr Radelat told Mrs Bouwer he did not know when he could work again, and as a result, that he was considering closing the firm.

19. In her evidence Mrs Brouwer refers to Mr Radelat asking her to go onto a "zero hours contract". In cross examination Mrs Brouwer accepted that Mr Radelat did not use the words "zero hours" telling me that Mr Radelat "explained that from the start of July he could no longer give me any work as business due to the ongoing difficulties with his back". I find that this exchange is one of substance of what was being offered not form of what was said. In the telephone call on 17 May 2021, by his own admission to the Tribunal, Mr Radelat asked Mrs Brouwer to consider reducing her hours; indeed, in his witness statement he says "….I felt it necessary to reduce her hours without her agreement". By his own admission the respondent did not offer the claimant a minimum number of hours, saying he "did not get that far". The substance is that, in the absence of certainty of the reduced number, Mrs Brouwer assumed that the reduction could mean no guaranteed hour, hence her applying the term "zero hours" to Mr Radelat's suggestion. This is a fair assumption. I find that Mr Radelat offered revised contractual terms without a guaranteed minimum number of hours. By not suggesting a fixed or minimum number of hours Mr Radelat's proposed solution amounts to an option of a zero-hours contract even if he did not use that term.

20. Further, it is a matter of settled contract law that one party to an employment contract cannot amend the terms of a contract without the agreement of the other party (unless there is an express provision in the employment contract, which there is not). Amendments to an existing contact must be mutual to satisfy the contractual requirement for consideration. The proposal to reduce her hours was not accepted by Mrs Bouwer, who explained to Mr Radelat that she needed certainty of hours and income.

21. In the same telephone conversation (17 May 2021) Mr Radelat told the claimant to cancel contracts required for the operation of the business. I have seen the emails by which Mrs Brouwer discharges this instruction:

    21.1. On 19 May 2021 the claimant emails the company providing business insurance to notify them "…our firm is temporarily suspending business operations and we will therefore <u>not</u> be renewing our policy". Mr Radelat is copied to this email.

    21.2. On 19 May 2021 the claimant emails the company with whom the respondent had a virtual office agreement to notify them "…our firm is temporarily suspending business operations and we therefore need to cancel our virtual office agreement with immediate effect". Mr Radelat is copied to this email.

    21.3. On 27 May 2021 the claimant emails the company providing the respondent with IT software / support to notify them "Due to a chronic back problem Peter very regrettably has to temporarily suspend business operations…" Mr Radelat is copied to this email.

    21.4. On 1 June 2021 the claimant emails the Thomson Reuters to notify them "…our small firm is temporarily suspending business operations…" Mr Radelat is copied to this email.

    21.5. In an email dated 16 June 2021 the FCA confirms receipt of the notification of the "decision to suspend your business". In evidence the respondent confirmed that in order to operate legally the business had to be authorised by the FCA.

    21.6. In an email dated 5 July 2021 the insurance company confirm that the business' professional indemnity insurance "has now been cancelled with effect from 30 June 2021". The nature of the respondent's business means that it cannot operate

without professional indemnity insurance. On 6 July 2021 the claimant emails Mr Radelat to confirm this termination, telling him she is still chasing Thomson Reuters regarding early termination of the Practical Law Package. By email Mr Radelat responds, "Well done Marielle, I appreciate it".

22. In oral evidence Mr Radelat accepted he may have used the term "suspend" in instructing the claimant to send these emails. He also accepted he did not challenge what was written in these emails, saying his only focus at this time was on cutting costs while maintaining it was not his intention to close the business. He told me it was always his intention to restart the business and therefore the claimant's role could not be redundant.

23. The respondent's explanation is simply not legally practical or credible. The nature of the respondent's business, an "employment law specialist", meant the business could not legally operate without the authorisation of the FCA and without professional identity insurance. In cancelling these by its very nature the business simply could not operate. Therefore, I find that in instructing the claimant to cancel these agreements the respondent in effect closed the business. This may have been a temporary closure, but it was a closure of the business in any event, which the respondent recognises in his evidence that he intended to "restart the business by taking on new clients", something he could not do given the nature of his business without setting up new policies. I have also seen 3 screenshots from the website of "PR Employment Law Specialists" dated 7 November 2021, 20 December 2021 and 23 January 2022. In large print across the centre of the webpage are the words: "This firm is temporarily closed". Based on the sum of evidence there is no doubt that the respondent closed his business, albeit it possibly temporarily, although he did not identify at that time how long the closure might be. I find it was his intention to close the business and he expressed this intention to the claimant in May 2021. Whether he intended to restart it at some point in the future was a matter for him. There is no information in May, June, July as to when this might happen. Indeed, in late December 2021 the website still stated the business was closed. I find that at the times relevant to this claim it was his intention to close the business as it could not feasibly or legally operate, and it was subsequently closed and remain so over 6 months later in January 2022.

24. On 26 May 2021 the claimant and respondent had a further telephone call during which the Mrs Brouwer updated Mr Radelat on her progressing with cancelling agreements as instructed. In this call the claimant says Mr Radelat agreed that he had no option but to make her redundant and asked her to confirm if this was her preferred option. I find at this time the only other option the respondent had put forward was an undefined number of reduced hours.

25. On 10 June 2021 the claimant and respondent exchanged emails. The claimant sought clarification as to her position in light of the instructions to cancel the various agreements. The respondent replied, "I am happy to make you redundant …if that is your preference", the claimant having concluded from the fact she had been instructed to terminate the agreements that the business was going to cease operating. Again, Mr Radelat language is speculative: "if the business did restart in the future and I offered you permanent employment again." He also agrees that redundancy then "does not mean that we can't agree for you to do some work for me again on an ad hoc basis". Parties have a subsequent telephone conversation which the claimant seeks to summarise in her email the following day, writing on 11 June 2021 that they had agreed her current role will no longer exist after 30 June 2021 and that she will be made redundant and entitled to statutory redundancy pay.

26. The respondent's witness statement and his evidence to the Tribunal is that he had not made a decision to make the claimant redundant but decided to go along with the claimant's desire to agree notice arrangements. At this time Mr Radelat made a "claw-back offer" such that he "proposed a solution whereby the claimant would be guaranteed a payment equivalent to her statutory redundancy entitlement unless,

following termination of her employment, I was able to re-engage her on normal hours within a certain period". This statement is troubling in 2 respects:

26.1. First, it does not accord with Mr Radelat's email of 16 June 2021 in which he sets out the figure the claimant would receive as redundancy pay, entitlement to notice pay, her notice period and the possibility of future "re-engagement.…after your employment has terminated".

26.2. Second, as an "employment law specialist" Mr Radelat fundamentally misunderstands the law of termination of contract and redundancy. If an employee's employment is terminated, it comes to an end. If it is termination as a business ceases to exist, temporarily or permanently, that employee is redundant and entitled to a statutory redundancy payment. If at a point after termination new employment is offered, that create a new contract of employment. The employer must pay the redundancy payment in these circumstances unless the employee agrees not to receive (the law of contract and the requirement for consideration to go both ways by a mutual exchange of promises).

27. At the hearing Mr Radelat told me his email of 16 June 2021 is clear that it was not his intention to make the claimant redundant. I disagree. It is wholly unclear. I find that find that the exchange of emails and telephone calls between the claimant and respondent from 10 June 2021 centred on a discussion about the future of the claimant's role, in light of the instructions she had received to cancel contracts fundamental to the legal operation of the respondent's business and that the parties explored options. The respondent's proposals included making her job redundant as the business was closing (whether temporarily or permanently at that time is not relevant, the employment contract would have ended) and the tasks she carried out fell away. The respondent's evidence that the task sheet showed that there was still lots of work for the claimant to do is simply not credible. I have reviewed that task sheet; most of the work is historic and not on-going at that time. There is no evidence before me that Mr Radelat was asking her to do or chasing her on any of these tasks at this time. Further his evidence to the Tribunal that she had lots of work to do simply does not accord with the documentary evidence and Mr Radelat's oral evidence that one option was an offer of reduced hours. Why would an employer ask an employee to consider reducing their hours if that employee had lots of work to do?

28. In making this finding I have also taken into account the evidence presented by the respondent that he was continuing to advise key clients. This evidence is not credible as at that time the key contracts legally required for operation of this business were being cancelled, the professional indemnity insurance having been cancelled on 30 June 2021. Given these reasons and my finding as to the lack of consistency in Mr Radelat's recollections, I prefer the claimant's evidence (recorded contemporaneously in her email to Mr Radelat of 23 June 2021) that "there is not much work to be undertaken".

29. I find Mr Radelat's emails confused, unclear, and inaccurate in terms of the legal position. Reasonably and understandably the claimant sought clarification of her position. In my judgment Mr Radelat was seeking to hedge the position given the uncertainty of his health and the impact that was having on his business. His response to the claim is centred on a position that any redundancy situation after the notice period started was "conditional upon how events unfolded." I find that it was Mr Radelat's intention to terminate the claimant's employment at this time to reduce costs (which by his own evidence was foremost in his mind at that time), while trying to keep open the possibility of retaining the claimant if his health, and in turn business, improved. As an employment specialist I find that Mr Radelat should have known what he was proposing was not legally viable and that he had a professional obligation in these circumstances to provide clarity as to the claimant's employment position. He did not.

30. In an attempt to clarify her position, on 17 June 2021 the claimant confirmed she would take her 8.3 days (4 weeks) leave during her notice period and work the remainder in full (16 hours a week). She also states, "I struggle to understand why the business may consider that redundancy does not apply".

31. A further telephone conversation took place between Mrs Brouwer and Mr Radelat on 18 June 2021 during which the claimant says the respondent confirmed that she was redundant. The respondent says that in this telephone conversation he told her he had not made that decision. The claimant and respondent discussed the unclear claw-back proposal, which was rejected by Mrs Brouwer as not workable. I agree. This was an unclear, uncertain and, as it is a long-held principal of contract law that certainty is key to being able to reach an agreement, not a viable option. The claimant was left in a vacuum of certainty with no details of an alternative role now or in the future. I find that parties continued along the path that the claimant's employment would terminate due to the business being closed and the fact there was no work for her and agreed her notice period. In oral evidence the claimant told me, "… there was a clear understanding that the business had closed, redundancy reflected reality of the situation of an indefinite business closure and if the business was closed, I did not have a job". I find this is an accurate description of the reality of the situation at that time; the respondent clearly held out hope that he could restart the business but by doing so lost sight of what was happening at that time and the need to provide certainty to his employee. In the conversation on 18 June 2021 employment ended as the business was shutting down (due to Mr Radelat's health) and there was no work for the claimant at that time.

32. Parties agreed the notice period during this conversation. There is no evidence of any other terms being agreed. When asked in cross examination when the claimant gave her notice Mr Radelat was unable to direct me to a letter of resignation or the date on which he says the claimant told him she was resigning or the words she used. Her oral and email exchanges with Mr Radelat had one purpose, to clarify her position in light of the business closing at that time.

33. It is agreed that the claimant's notice period started on 21 June 2021. During this time Mr Radelat gave Mrs Brouwer the option of working full or reduced hours. She chose to work full hours as he would be paid for the same and was facing a period of uncertainty of employment.

34. On 7 July the respondent's accountant confirmed to the claimant that he had received the final payroll information from the respondent, and this included a figure for redundancy pay.

35. On 19 July 2021 Mr Radelat confirms that the medical procedure for his back had taken place. He also confirms that he agrees the salary and redundancy figures the claimant sent to him on 16 July 2021, stating, "in respect of your August salary and redundancy payment, I will make arrangements to pay these myself when they fall due *if indeed your position is redundant at the end of your notice period"* [Tribunal emphasis]. In oral evidence the respondent asked the claimant. "Would you agree with what I am saying is that the redundancy is conditional and on updating you further about back condition and whether the position is redundant and depends on the outcome". Mindful these statements are made after parties have agreed notice, I make 2 findings:

    35.1. First, the claimant, by her own admission in oral evidence, found the statement in the email confusing. I agree; it is. It does not make sense to speculative about whether a role is redundant midway through a period of notice.

    35.2. Second, the statement is made by an employment law specialist who, given his expertise, in my judgment should have been aware that this was not a viable option and should have been able to provide the claimant with clarity about her

employment once he had made decisions to terminate key contracts necessary for the operation of the business, notwithstanding the uncertainty surrounding his health.

36. Parties are agreed that the claimant's notice period started on 21 June 2021. Events which took place after this date cannot, as a matter of chronology, inform the basis on which (dismissal no reason, dismissal redundancy, dismissal some other reason, mutual agreement, resignation) the employment ended as by 21 June 2021 the relevant events had taken place triggering the notice period and termination of employment. Therefore, the following findings of fact are relevant as context.

37. Through July (during her notice period) the respondent continued the line that the claimant's role was not redundant but at the same time told her several times he could not guarantee her a role. I find that the respondent was operating on the basis of wait and see and this was confusing for the claimant who reasonably required certainty as to the payments she would receive at the end of her notice period.

38. On 26 July 2021 the claimant contacted the respondent to update him with progress about her outstanding tasks, stating "as you know over the last two months, I have focused diligently on winding up the business for the foreseeable future" and asking to discuss handover. The parties spoke about this on 10 August 2021; the claimant recorded this telephone call. Mr Radelat was not aware the conversation was being recorded and did not become aware until after he had prepared his witness statement. The respondent agreed to the transcript of the recording being disclosed to the Tribunal. He told me that he accepts the transcript is accurate. I note that Mr Radelat's witness evidence does not align with the recording. A number of times in oral evidence Mr Radelat referred to phases in the transcript and told me "what I meant was….", an example being *"I can't guarantee your role still to be there…..So that will make your role redundant….you'd be welcome to apply for the* [admin role] *yourself but it'd be almost half the pay…."* telling me that these words make it clear he never intended to bring the claimant's employment to an end.

39. Mr Radelat's account of this part of the conversation in his witness statement is simply not accurate. In making this finding I am mindful of the passage of time between the conversation taking place and Mr Radelat preparing his witness statement and that the transcript was not available to him when he did so. However, Mr Radelat's account of the conversation is very different from the conversation that took place; his explanation of what he meant is simply not credible. I find his explanations were not accurate reflections of the recording, do not align to the transcript or could the words recorded in the transcript be reasonably interpreted to have the meaning he says he intended.

40. In an email to the respondent on 13 August 2021 the claimant summarised the conversation. Mindful of the transcript and that the email is contemporaneous to the conversation, and that these 2 sources of evidence align, I find this email is an accurate reflection of what was said in the conversation on 10 August. For the reasons stated, I prefer the claimant's evidence about this call that the firm may restart soon but the respondent could not afford for the claimant's position to continue and therefore could not guarantee the alternative role at end of the notice period.

41. On 17 August 2021 the claimant and respondent met to complete a handover pending her departure. Parties are agreed that her effective date of employment was 22 August 2021. On 6 September 2021 the claimant received her August pay; it did not include her redundancy pay. On 7 September 2021 the claimant telephoned the respondent's accountant, who confirmed that he had received a figure for redundancy pay from the respondent. Having not received her statutory redundancy payment the claimant raised a formal grievance. She has not received a reply to this grievance.

42. Mr Radelat says the claimant resigned. When asked in cross examination when and how she resigned the respondent could not tell me the date on which she resigned nor produce a letter of resignation or if she resigned orally, telling me that:

    "The claimant consistently, persistently made it clear to me that she did not want to be employed, from her conduct it became clear to me that she did not want to be employed by me anymore."

43. This does not accord with the contemporaneous correspondence the claimant sent to the respondent. At the hearing the claimant told me she "did not want to leave the business, worked 120 years, worked collaboratively, enjoyed the role and had no desire to leave and found it stressful to close it down and it was upsetting to leave the business in those circumstances and was worried about job and looking for other work."

44. Mr Radelat did not acknowledge any resignation in writing or at all, telling me. "No, I have not confirmed in writing, it was clear to me what was happening". It was not clear the claimant. Mindful that, as a matter of contract law, changes to a contract, including terminating a contract of employment) must be communicated in a clear and certain way, something about which Mr Radelat, as an employment law specialist, should be aware, I prefer the claimant's evidence that she did not want to leave the business.

45. The respondent's evidence is that by 24 August 2021 he had made a "speedy recovery" and "was able to take on new clients". This is after the claimant's employment had ended. Therefore, it is context only to the respondent's claim that his business was ongoing. It was not. I have found that in cancelling key contracts required for the legal operation of his business and by his own evidence that he would shut the business temporary or suspend it was his intention (indeed by necessity as the only fee earner was not able to work due to his back condition) that the business had to cease until he had recovered. When on 21 June 2021 the claimant's notice period started the business was not operating. In December 2021 the business remained closed, confirmed by the wording on the website.

Law – statement of initial employment particulars.

46. Section 1 of the Employment Rights Act 1996 provides:

(1)Where a worker begins employment with an employer, the employer shall give to the worker a written statement of particulars of employment.
(2)Subject to sections 2(2) to (4)—
(a)the particulars required by subsections (3) and (4) must be included in a single document; and
(b)the statement must be given not later than the beginning of the employment
(3)The statement shall contain particulars of—
(a)the names of the employer and worker
(b)the date when the employment began, and
(c) in the case of a statement given to an employee, the date on which the employee's period of continuous employment began (taking into account any employment with a previous employer which counts towards that period).
(4)The statement shall also contain particulars, as at a specified date not more than seven days before the statement (or the instalment of a statement given under section 2(4) containing them) is given, of—
(a)the scale or rate of remuneration or the method of calculating remuneration,
(b)the intervals at which remuneration is paid (that is, weekly, monthly or other specified intervals),
(c)any terms and conditions relating to hours of work including any terms and conditions relating to—
(i)normal working hours,
(ii)the days of the week the worker is required to work, and

(iii)whether or not such hours or days may be variable, and if they may be how they vary or how that variation is to be determined.
(d)any terms and conditions relating to any of the following—
(i)entitlement to holidays, including public holidays, and holiday pay (the particulars given being sufficient to enable the worker's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated),
(ii)incapacity for work due to sickness or injury, including any provision for sick pay,...
(iia)any other paid leave, and
(iii)pensions and pension schemes…..

Law – unfair dismissal and redundancy

47. Section 94 of the Employment Rights Act 1996 (the '1996 Act') confers on employees the right not to be unfairly dismissed. Enforcement of the right is by way of complaint to the Tribunal under section 111.

48. Section 95 of the Act sets out the circumstances in which an employee is dismissed and relevantly states:

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

> *(a) the contract under which he is employed is terminated by the employer (whether with or without notice),*
> *…*
> *(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*

49. In Martin v Glynwed Distribution Ltd [1983] ICR 511*,* the Court of Appeal had stated that:

> "… Whatever the respective actions of the employer and employee at the time when the contract of employment is terminated, at the end of the day the question always remains the same, "Who really terminated the contract of employment?".

50. Case law has recognised that in certain circumstances a contract of employment can be terminated by mutual agreement without there being a dismissal for the purposes of section 95 ERA 1996. Such a consensual termination requires freedom of choice on the part of the employee. If there is no real choice, the termination will be a dismissal [Khan v HGS Global Ltd & Anor UKEAT/0176/2015/DM].

51. An employee has burden to show that her dismissal has been communicated to her. An employee must be aware of their dismissal for it to be communicated. Dismissal can be implied by the employer's conduct but that conduct has to be something of which the employee is aware to satisfy the requirement that dismissal must be communicated. In the case of Sandle v Adecco UK EAT/0028/16/JOJ The Employment Appeal Tribunal ("EAT") noted at paragraph 40:

> "A dismissal may be by word or deed, and the words or deeds in question may not always be entirely unambiguous; the test will be how they would be understood by the objective observer. Further, as the case law shows, an employer's termination of a contract of employment need not take the form of a direct, express communication. It may be implied by the failure to pay the employee, by the issuing of the P45 or by the ending of the employee's present job and offer of a new position (as in Hogg -v- Dover College)."

52. The EAT noted that determination of this question will require the Employment Tribunal to consider who really terminated the contract of employment (see per Sir John Donaldson MR in Martin v Glynwed Distribution Ltd [1983] ICR 511 CA, at 519G-H). *Considering the l*aw that permits dismissal to be implied by conduct it is clear certainty is not the only consideration, (see per Lord Hope in Gisda Cyf v Barratt [2010] ICR 1475 SC, at paragraph 43*). A Tribunal must consider: what would a reasonable person conclude about the circumstances?"*

53. Where the question of termination is to be determined in the light of language used by an employer that is ambiguous, the test is not the intention of the speaker but rather how the words would have been understood by a reasonable listener in the light of all of the surrounding circumstances (see Martin v Yeoman Aggregates Ltd [1983] ICR 314 EAT*);* the approach is that of contract law (Willoughby v CF Capital plc [2012] ICR 1038 CA, at paragraph 26).

54. An unfair dismissal claim can be brought by an employee (section 94) with 2 years continuous employment (section 108) who has been dismissed (section 95). This is also satisfied by the respondent admitting that it dismissed the claimant (within section 95(1)(a)) or an employee discharging the burden of proving that they have been dismissed so as to meet the pre-condition for a claim of unfair dismissal.

55. Section 98 of the Act deals with the fairness of dismissals. There are two stages within section 98. First, the employer must show that it had a potentially fair reason for the dismissal within section 98(2). Second, if the respondent shows that it had a potentially fair reason for the dismissal, the Tribunal must consider, without there being any burden of proof on either party, whether the respondent acted fairly or unfairly in dismissing for that reason.

56. Redundancy (section 98(2)(c) is a potentially fair reason set out on the legislation. Section 139 (1) of that Act defines redundancy; this is the definition the Tribunal must apply in a claim of unfair dismissal. The definition states:

    For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to—
    (a)the fact that his employer has ceased or intends to cease—
    (i)to carry on the business for the purposes of which the employee was employer by him, or
    (ii)to carry on that business in the place where the employee was so employed, or
    (b)the fact that the requirements of that business—
    (i)for employees to carry out work of a particular kind, or
    (ii)for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.

57. Section 98(4) of the Act deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case.

58. The compensatory award if a claim of unfair dismissal is successful must be 'just and equitable'. As a result of the decision in Polkey v AE Dayton Services Ltd [1987] IRLR 503 a Tribunal may reduce the compensatory award to reflect the chance that the claimant would have been dismissed in any event had the dismissal followed a fair process. The Tribunal assesses this possibility by reference to the actual employer in the claim. To substitute the Tribunal's own mindset is an error of law.

Conclusions

59. I set out my conclusions by reference to the issues for determination by this Tribunal.

Statement of employment particulars

60. First, I must decide whether the respondent breached the statutory provision to provide an employee with a written statement of initial employment particulars. I conclude that the respondent is in breach of this legal requirement. The respondent concedes that the only document he provided was an offer letter. I have seen a copy of this document. It does not satisfy the statutory provisions in section 1 of the Act.

61. In his closing statement Mr Radelat told me in not providing full details he was relying on his interpretation of principles of contract law stating that "if something is impossible to agree and can never be agreed it can never become a term of a contact, all the terms of the contract were agreed, then there is a binding contract" telling me that "everything that it was possible to agree was agreed and included in the offer letter document" and on this basis he had satisfied the statutory requirement. Section 1 is a statutory provision from which it is not possible to derogate. It is correct that a term not agreed between the parties cannot be part of a contact. However, Parliament requires that any employment contract must include the terms stated in section 1, and that statement must be provided to a worker. Section 1 places an obligation on an employer to agree, and record in writing, these terms at the start of employment to ensure clarity for both parties. The respondent has failed to comply with this clear statutory provision. It is particularly troubling the respondent did not do so as he operates a business as an "employment law specialist."

Termination of claimant's employment

62. Next, I must decide how the claimant's employment ended. The claimant and respondent agree that her employment terminated on 18 June 2021, that she worked a period of 9 weeks' notice from 21 June 2021, during which she took her outstanding holiday and that her effective date of termination was 22 August 2021. The respondent says the claimant gave notice to end her employment, or, in the alternative, her employment was ended by mutual agreement. Mr Radelat could not tell me when mutual consent was reached or the date on which and how she gave her notice. Indeed, it is curious that the respondent cannot identify which of the 2 scenarios are the basis on which he says the claimant terminated her employment. Consenting mutually and one party (the claimant) giving resignation to the other party (the respondent) are conceptually, legally, and factually very distinct and very different situations.

63. I will address mutual termination first. In his closing statement the respondent referred me to the case of Khan v HGS Global Ltd & Anor UKEAT/0176/2015/DM. I have read the EAT case report. The case is an appeal against a finding that the claimant's contract of employment was terminated by mutual consent and, accordingly, that he had not been dismissed. The EAT found that the Tribunal had duly considered who really terminated the claimant's contract of employment. Having had regard to both the substance and the form of the transaction, the Tribunal was entitled, on the facts, to conclude that this was a mutually agreed, consensual termination of employment. Therefore, I am mindful that I must consider the substantive and form of events in determining whether there was a mutual termination. I have done so in my findings of fact. The substance is that the respondent is unable to tell me when mutual consent that the claimant's employment would end took place. Indeed, the respondent's evidence is that even after the notice period had been agreed it was his intention that her employment would continue. He says this was the case when his back condition improved, and he was contacting clients with a view to restarting the business. I have found the business was still closed in December 2021.

64. The substance of the evidence I have accepted from the claimant is that she did not want her employment to end. Throughout conversations in May and June she was, understandably, seeking certainty about the future of her employment given the uncertainty surrounding Mr Radelat's health and business. but she did want to clarify the situation. This is reflected in the numerous contemporaneous emails she sent to the claimant and was confirmed in her witness evidence. I must acknowledge that, in seeking this certainty, her correspondence with Mr Radelat is warm, supportive and sensitive to his health and business uncertainty.

65. Mindful that it is a matter of settled contract law that one party to an employment contract cannot amend the terms of a contract without the agreement of the other party and amendments to an existing contact must be mutual I have found that Mrs Brouwer did not agree to any changes in her hours or the terms of her employment contract or that she agreed to a termination. The only term I have found to be mutually agreed was notice. Parties agreed the notice period during the conversation on 18 June 2021. There is no evidence of any other terms being agreed. Neither the form or substance of the conversations between the claimant and respondent indicate there was mutual consent. Indeed, after the notice period started, Mr Radelat was seeking to maintain employment was ongoing, and did so in his evidence.

66. I conclude that here was no mutual consent between the claimant and respondent to terminate her employment. In reaching this conclusion I have considered the case of Khan v HGS Global Ltd & Anor UKEAT/0176/2015/DM. In this case the claimant volunteered to be dismissed during a TUPE transfer process and voluntarily expressly accepted a full redundancy package from the employer. In these circumstances the Tribunal concluded that employment was terminated by mutual consent. The facts can be distinguished from the case; before me. I have not found that the claimant volunteered to end her employment nor that the respondent made her an offer of a full redundancy package. Indeed, it is Mr Radelat's case that he did not make Mrs Brouwer redundant. Mr Radelat told the Tribunal he had made several offers, including an offer to claw back any payment if he was able to restart the business before the end of the claimant's notice period. I have accepted that offers were made. However, I have found that the offers are not clear and certain and therefore not offers which, as a matter of contract law (that offers must be clear and certain and acceptance must be a mirror image), could be accepted. In Khan the EAT noted that if a dismissal is to be 'mutual' then there must be freedom of choice on the employee's part to take an option offered and those options must be clear and capable of being accepted such that the employee has real choice. If there is not real choice, then the dismissal will be by reason of termination by the employer. In Khan the EAT concluded that the claimant's employment had ended by mutual termination as he had been offered several clear options and had opted to take a comprehensive redundancy package which he had understood; therefore, he had been able to make an informed decision. I have found that the options put to Mrs Brouwer were not clear or defined (hours, salary, start day) or clearly communicated. Indeed, at the hearing the Tribunal had difficulty establishing the basis of the options the respondent says he put forward.

67. I have found that there is no evidence that the claimant resigned. For a resignation to be legally effective it requires clear written wording or spoken terms. There is no letter of resignation. The respondent could not tell me the date on which he says the claimant resigned or the exact words she used to end her employment, telling me that her resignation was implied by the circumstances and her reference to being made redundant. These circumstances were ambiguous. I have found that the respondent did engage in conversations about the claimant being made redundant, including confirming the figure for her redundancy pay. Where an alleged resignation is ambiguous, as here, a Tribunal must consider the circumstances at the time of the alleged resignation and how a reasonable employer would have understood the words in the circumstances. I conclude that no reasonable employer in the respondent's

circumstances (an employment law specialist) would conclude that the claimant had resigned. He should be aware that for a legally effective resignation under a contract of employment parties should be clear and concise and make reference to the termination date when the relationship will cease. The respondent was unable to tell the Tribunal the date on which he alleges the claimant resigned and the wording she used. This is because she did not resign.

68. In reaching the conclusion the claimant did not resign, I am mindful that the respondent is an employment law specialist who should have a clear understanding of the law on resignation; this is reflected in documents disclosed in the second hearing file which includes marketing materials covering the respondent's area of employment law expertise.

69. Further, the EAT has held that when there is ambiguity, it will be construed against the person who is seeking to rely on it. Applying this test in the context of unclear conversations about redundancy, the fact that the respondent cannot identify to the Tribunal details of when and how the resignation took place, mindful he has also alleged the employment terminated by mutual consent (a very different concept to mutual resignation) and that the respondent is an employment law specialist, I conclude there was no resignation, actual or implied.

70. A Tribunal will not conclude that an employee has resigned if they have been "forced" to do so by the employer; this principle is established by the Court of Appeal in Martin v Glynwed Distribution Ltd 1983 ICR 511, including when an employee is told that they have no future with the company. The claimant was told to terminate key contracts, that the business was being suspended without reference to a date when it would restart, and that she could apply for an administrative role on half her salary. In circumstances where an employer discusses closing a business or alternative roles case law directs that there is likely to have been a dismissal not a termination.

71. Reminding myself that the key issue I have to decide is "Who really ended the contract of employment?" on 18 June 2021 (per Sir John Donaldson in Martin v Glynwed Distribution Ltd [1983] ICR 511*),* having concluded that the claimant did not resign nor was the contract terminated by mutual consent I am now tasked with determining the claimant's claim of unfair dismissal.

72. Section 95 is the gateway to an unfair dismissal claim. It is a precondition for such a claim that the employee has been dismissed. Therefore, my next question is, was the claimant dismissed under section 95 of the Act. Mrs Brouwer has burden to show that her dismissal has been communicated to her as she must be aware of her dismissal for it to be communicated. In Sandle v Adecco UK EAT/0028/16/JOJ the EAT noted that a dismissal by an employer may be by word or deed, and the words or deeds in question may not always be entirely unambiguous.

73. To the extent the claimant is saying that determining whether an employer has terminated a contract of employment for the purposes of section 95(1)(a) should allow that to be implied from an employer's conduct, I do not disagree. The real issue, however, is communication. Mr Radelat says he did not communicate a dismissal, that he did not want Mrs Brouwer to leave his business and that he speculated what might happen if he did not recover quickly from his operation. As part of this speculation, he calculated the redundancy figure, while saying that there was no redundancy only an offer to reduce hours or a claw back offer.

74. I have found that in the period up to and on 18 June 2021 the respondent was in the processing of closing the business. He engages in discussion about possible redundancy and provides information on the amount of a redundancy payment. At the hearing he repeatedly told me that it was never his intention to make the claimant redundant. Therefore, I ask why he was discussing redundancy and confirming a redundancy payment (as an employment law specialist) if it was never his intention to

make the claimant redundant. Simply, as a matter of common sense, these do not align. This intention, explained to the Tribunal, does not accord with his instructions to the claimant to cancel key contracts, suspending the business, the uncertainty he tells her about her role at the notice period, confirming a redundancy payment. Indeed, at the hearing Mr Radelat accepted he discussed redundancy but told me this and use of certain other words during these discussions (for example "suspend the business") meant something other than their ordinary meaning when he used them. I have found that Mr Radelat's language and what he now says was his intent simply do not accord nor does the intention he now expresses align with contemporaneous emails and the telephone transcript. Overall, the conversations Mr Radelat had with Mrs Brouwer about the future of her employment were ambiguous at best.

75. In reaching this conclusion I draw on the guidance in the EAT case of East Kent Hospitals University NHS Foundation Trust v Levy UKEAT/0232/17/LA. In answering a question whether the words are ambiguous, regard must be given to the natural meaning of the words and how they were understood by the recipient. I also note the Court of Appeal decision in Sothern v Franks Charlesly & Co [1981] IRLR 278 and Lewison on the Interpretation of Contracts at Chapter 5 where it is stated: "The words of a contract should be interpreted in their grammatical and ordinary sense in context, except to the extent that some modification is necessary in order to avoid absurdity, inconsistency or repugnancy." The EAT noted there is no reason to adopt a different approach when looking at the termination of an employment contract to that applicable to the construction of a contract more generally.

76. In the present case, the respondent had used the phrase "suspend" in relation to his business and does not correct the claimant when he is copied to several emails in which she writes to cancel key contracts using the word suspend to explain why the respondent was terminating them. "Suspend" is commonly used and understood by people in everyday language, the plain, ordinary and popular meaning to end, to stop, to cease for a time. The use of the word is ambiguous without the caveat of an end date to the suspension. Indeed, the respondent's evidence to Tribunal is that in using this word he did not mean suspend, that the business was ongoing albeit less active while he was incapacitated. That explanation is nonsensical to a reasonable person given the cancellation of contracts and the message on the website. Furthermore, as an employment law specialist he should have known the importance of certainty of language in communicating terms of an employment contract and any possible end to that contract.

77. Where the question of termination is to be determined in the light of language used by an employer that is ambiguous, as here, the test is not the intention of the speaker but rather how the words would have been understood by a reasonable listener (Martin v Yeoman Aggregates Ltd [1983] ICR 314 EAT) or the objective observer (Sandle v Adecco UK EAT/0028/16/JOJ) in the light of all of the surrounding circumstances. The approach which a Tribunal must take is that of contract law (Willoughby v CF Capital plc [2012] ICR 1038 CA).

78. Further an employer's termination of a contract of employment need not take the form of a direct, express communication. It may be implied by conduct, including the offer of a new position *(*Hogg -v- Dover College [1990] ICR 39 EAT*)*. The conduct replied on by an employee has to be something of which the employee is aware to satisfy the requirement that dismissal must be communicated. Considering the law that permits dismissal to be implied by conduct it is clear certainty is not the only consideration, (per Lord Hope in Gisda Cyf v Barratt [2010] ICR 1475 SC, at paragraph 43). The conduct relied on by the claimant is:

    78.1. Mr Radelat instructing her to cancel contracts fundamental to the continuing existence of the business, copying him into her emails referring to the business ceasing and him not correcting her to reflect what he says was his intension at the time not to close the business.

78.2. Mr Radelat putting a notice on the business website stating the firm was closed;

78.3. The email confirmation from the respondent's accountant's that Mr Radelat had notified him of the amount of the claimant's redundancy payment.

79. By her own evidence she was aware of this conduct and has discharged the burden of knowledge. Therefore, I must consider: what would a reasonable person conclude about the circumstances?

80. Applying the test of a reasonable, objective observer to the Mr Radelat's words and conduct from 17 May 2021 to the start of the claimant's notice on 21 June 2021, I conclude that, whatever Mr Radelat's intent at that time, a reasonable "listener" to the exchanges, written and oral, between the claimant and respondent and objective observer of the respondent's conduct (for example anyone looking at his website or learning that he had cancelled contracts key to the legal operation of his business) would conclude from Mr Radelat's words that he was closing down the business. A reasonable employee being offered reduced hours, but not given information as to how many, told there may not be a job for them at the end on their notice period (which as a matter of contact law is a nonsense once the notice period has started), that they could apply for an alternative role which would be half the pay, that they should cancel key contracts, being given a figure for a redundancy payment, would conclude that they were being dismissed. I conclude the claimant was dismissed by the respondent.

81. As I have concluded that the claimant was dismissed, I must decide whether the dismissal was unfair. The claimant says the dismissal was unfair as there was no reason for the dismissal or, in the alternative, the reason for the dismissal was redundancy and the respondent did not follow a fair procedure. The respondent says there was no dismissal or in the alternative that redundancy was not the reason for any dismissal. In the Grounds of Response, the respondent states there was "some other substantial reason for dismissal". This is not specified in the response or Mr Radelat's witness statement. At the hearing I sought clarification. Mr Radelat told me that the other substantial reason related to his health problems with his back which were on-going at the time the claimant left the respondent's employment.

82. I have found that Mr Radelat did not tell the claimant prior to her notice period the reason she was being dismissed, maintaining she was not dismissed until this hearing. He did not provide her with a substantive reason for her dismissal within section 96 of the ERA 1996 nor did he follow any procedure. However, while not pleaded specifically, I will consider this reason as it is accepted by the claimant that Mr Radelat was experiencing health problems with his back; indeed, she was very sympathetic to his situation.

83. Based on my findings of what Mr Radelat said and wrote to the claimant from 17 Mau 2021 to 18 June 2021 and his evidence at the hearing, I conclude that the respondent was hedging the future of the claimant's role in a self-interested manner throughout this period as he was concerned that his health may or may not improve, that the business may or may not start, there may or may not be reduced hours for the claimant. As an employment law specialist Mr Radelat should have known that certainty is imperative in employment contracts; this is clear from section 1 of the ERA 1996; certainty of terms. It is clear from the case law on certainty of contractual terms, from the case law on the need for certainty of resignation, from the case law on certainty of dismissal and the statutory duty on an employer to ensure any dismissal is substantively and procedurally fair. Mr Radelat failed to establish any certainty surrounding the claimant's role during this period.

84. What was certain is that in the period prior to the claimant's notice key contacts were cancelled, a notice was placed on the firm's website and the only fee earner was unable to work due to his health. Thankfully his health did improve, and he was able

to work again. However, this was after the claimant's notice had started on 21 June 2021. For her to continue, as a matter of fundamental contract law, both parties would have to agree the terms and conditions of employment or that the claimant was no longer in her period of notice. This did not happen. An employer cannot unilaterally decide when an employee is working their notice period that because things have improved for the employer everything should go back to how it was before the notice period started. "Hedging your bets" (whatever the circumstances, and this was a difficult time for Mr Radelat given the uncertainty with his health and ability to work) is not an option in an employer / employee relationship. As an employment law specialist Mr Radelat should have known that.

85. On the evidence before me I conclude the reason for the dismissal was that the business was ceasing to trade at that time with no guarantee that it would start up again in the future. Therefore, I conclude that the claimant was redundant. To take this as a substantial reason brings in the rules on procedural fairness. The respondent did not follow any procedure in dismissing the claimant. Therefore, I conclude the dismissal was unfair.

86. The parties will be notified by the Tribunal of the date for the remedy hearing, and I will issue a case management order setting out the list of issues the Tribunal will consider at the remedy hearing and a timeframe for parties to provide evidence to each other and the Tribunal when this date is confirmed. Of course, it is always an option for parties to settle. If they do so, they must inform the Tribunal in writing.

Employment Judge Hutchings

19 May 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

26th May 2023
GDJ

FOR EMPLOYMENT TRIBUNALS