



## EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4111348/2021 (V)

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Held via Cloud Video Platform (CVP) on 24 & 25 January 2022

Employment Judge M Sangster

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**Ms N Malcolm**

**Claimant  
Represented by  
Ms A Stobart  
Advocate**

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**Aquarius Thermal Systems Limited**

**Respondent  
Represented by  
Mr S Milligan  
Solicitor**

### JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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The judgment of the Tribunal is that the claimant's complaint of unfair dismissal does not succeed and is dismissed.

### REASONS

#### Introduction

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1. This was a final hearing which took place remotely. This was not objected to by the parties. The form of remote hearing was video. A face-to-face hearing was not held because it was not practicable due to the Covid-19 pandemic and all issues could be determined in a remote hearing.

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2. The claimant presented complaint of unfair dismissal. She also claimed that an award should be made under section 38 of the Employment Act 2002 (**EA 2002**) as a result of the respondent's failure to provide her with a written statement of particulars of employment.

3. The respondent admitted the claimant was dismissed, but stated that the claimant was dismissed for some other substantial reason, which is a potentially fair reason. The respondent maintained that they acted fairly and reasonably in

treating that as sufficient reason for dismissal. They denied that the claimant was entitled to any remedy under section 38 EA 2002.

4. The respondent led evidence from Graham Malcolm (**GM**), the respondent's sole director and shareholder.
5. The claimant gave evidence on her own behalf.
6. A joint set of productions was lodged, extending to 108 pages. A further 2-page document was lodged by the claimant, without objection, during the course of the hearing.

### Issues to be determined

7. The issues to be determined were as follows:
  - a. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 (**ERA**)? The respondent asserts that it was for some other substantial reason.
  - b. If so, was the dismissal fair or unfair in accordance with s 98(4) ERA?
  - c. If the claimant was unfairly dismissed, what is the appropriate remedy?

### Findings in Fact

8. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.
9. The respondent is a company based in central Scotland, specialising in the installation, repair, servicing and upgrades of gas, LPG and oil central heating systems. The respondent company was incorporated on 21 December 2006. It was set up by GM, who is the sole director and shareholder. GM undertakes the role of managing director, as well as carrying out engineering work himself.
10. The claimant and GM met in March 2009. They were married in 2010 and now have two children, who were born in 2014 and 2016.

11. From the start of their personal relationship, the claimant worked informally for the respondent by providing administrative assistance. In February 2016 the claimant started formally working for the respondent, as a Bookkeeper/Office Manager, on a part time basis. She was not provided with a written statement of terms and conditions of employment at that stage, or at any point during her employment. She worked from respondent's office, which was located within the claimant and GM's matrimonial home.
12. Given the nature of the claimant's role, and the location of the respondent's office, she did not require a car to undertake the duties of her employment. GM had a company car from April 2017, which he paid tax on as a benefit in kind. The claimant had use of this, as GM's spouse.
13. GM worked from the office as well as carrying out a field-based role. The proportion of time he spent in the office depended on the time of year, with more field-based work being undertaken in winter months. GM and the claimant were the only two employees who worked from the respondent's office. In the period from 2019 to May 2021, the respondent employed 4 other employees.
14. In October 2019, GM and the claimant met with the respondent's accountants. During that meeting tax efficiency and options for reducing tax liabilities were discussed, including increasing GM and the claimant's salaries and making an additional contribution to the claimant's pension.
15. The claimant increased her salary from £20,000 to £30,000 in February 2020.
16. The claimant was placed on furlough leave from April 2020. She returned to work in August 2020. She was paid 80% of her salary during furlough leave.
17. During the period from April 2020 onwards, the claimant and GM's personal relationship deteriorated. On 25 August 2020, the claimant told GM that she wanted a divorce. The claimant indicated however that she wished to continue

in her role as Bookkeeper/Office Manager for the respondent, stating that she would lodge an employment tribunal claim if her employment was terminated.

- 5 18. The respondent's business banking account and GM's personal banking account were accessed via the same online banking account. Following the discussion which he had with the claimant on 25 August 2020, GM took legal advice. He was advised to change the online banking password, which he did. This meant that the claimant no longer had access to the respondent's bank account. GM advised the claimant of this on/around 26 August 2020. 10 Thereafter, if the claimant required to know the bank account balance or required statements to be printed, to undertake her duties, she asked GM.
- 15 19. In October 2020, GM asked the claimant if her salary had been increased. She responded that it had, due to her returning to work following furlough leave.
- 20 20. On 11 December 2020, GM raised with the claimant, via their respective solicitors, that her salary had been increased in February 2020. He stated that this was not authorised by him and requested an explanation. The claimant responded on 8 January 2021, stating that the salary increase had been 20 authorised by GM during a discussion between them in February 2020. On 12 January 2021, GM indicated to the claimant, again via solicitors, that whilst this had been discussed as a possibility it was not agreed. The letter provided the claimant with the option of decreasing her salary to £20,000, failing which the respondent would consider investigating the matter as potential serious or 25 gross misconduct.
21. No response was received and GM decided not to take disciplinary action, to avoid any further confrontation.
- 30 22. The personal relationship between the claimant and GM continued to deteriorate and became increasingly fraught and hostile. They were undergoing contentious divorce proceedings and both parties had legal representation in relation to this. The issue of GM having contact with the children, and the extent of this, was particularly contentious between the parties. GM raised legal

proceedings in relation to contact arrangements in mid-April 2021. At this stage, the claimant and GM were both still residing in the matrimonial home, with their two children. The claimant's legal representatives had however threatened to take steps to seek to remove GM from the matrimonial home.

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23. GM increasingly tried to avoid attending the office, to minimise contact with the claimant, causing paperwork to build up, which was not sustainable.

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24. On Saturday 24 April 2021, there was an incident in the family home which arose because GM wanted to take their son with him to collect pizza for their dinner. The claimant stated that he could not do so. She stated that she was calling the police, when she was in fact calling her friend. GM sought to video the exchange and the claimant took his phone from him and then stated, '*so what are you going to do now then, eh?*'. GM believed she was goading him to assault her, so she could use this against him. He took the phone back from her and went to collect the pizza on his own. While GM and the children were eating pizza, the claimant called the police and they subsequently attended the matrimonial home, interviewing the claimant and GM. No action was taken by them. GM believed that the claimant called the police with the intention of seeking to have him removed from the matrimonial home and, by default, the workplace and to rely on this in the legal proceedings in relation to GM's contact with the children.

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25. On 25 April 2021, the claimant moved out of the matrimonial home, taking the children with her. She informed GM of this after she had done so. She stated that she would however be at work the following day.

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26. On 26 April 2021, GM got up early and went cycling. On returning home, GM realised the claimant was in the office and felt unable to enter. He did not feel that he could be alone with the claimant going forward, after what had occurred on the Saturday and the police being called. He felt that anything he said or did would be used against him. He called the claimant from outside and it was agreed that she would take a week off, with full pay. He did not go back into the property until he was satisfied that she had left.

27. GM invited the claimant, by letter of 27 April 2021, to a meeting to discuss whether, in light of the ongoing difficult personal relationships and the matters that had arisen both within and outside the workplace, the respondent could  
5 continue to employ the claimant. Seven specific issues were highlighted by GM as being potentially relevant to whether there had been a breakdown of working relationships, as a result of personal and/or work matters. The issues are summarised as follows:
- 10 a. The salary increase, which GM stated was unauthorised and, whilst no disciplinary action had been taken in relation to this, he felt it was a relevant consideration in relation to the ongoing relationship;
- b. The claimant alleging that use of the car was a benefit she was entitled to as a result of her employment;
- 15 c. The incident on 24 April 2021;
- d. The claimant failing to comply with work practices relating to holidays and time off;
- e. The claimant refusing to allow GM unsupervised contact with his children;
- f. The claimant threatening to have GM removed from the matrimonial home  
20 and her provocative behaviour towards GM;
- g. Being unable to work together or discuss any matter civilly; and
- h. GM's fear of being alone with the claimant.
28. The letter stated that, at the meeting, GM would consider whether there had  
25 been an irretrievable breakdown of working relationships. The letter also stated that, if that conclusion was reached, then one outcome of the meeting could be the termination of the claimant's employment, with payment in lieu of notice and in respect of accrued but untaken holiday entitlement.
- 30 29. The letter stated that the claimant could be accompanied at the meeting by a family member as an alternative to an employee or a trade union representative. The claimant requested that a friend accompany her, and that the meeting be delayed, which was agreed.

30. The meeting took place on 5 May 2021. The claimant stated at the meeting that she would not discuss four of the issues, as she viewed them as personal matters (c, e, f & h above). GM stated that he felt that the matters were adversely influencing the working relationship and sought to engage the claimant in discussion regarding these topics. The claimant however maintained her position. She raised that she felt there was limited contact between them in any event, but any issues could be resolved by her working remotely. The meeting was adjourned to allow GM to consider matters.

31. GM wrote to the claimant on 7 May 2021 to confirm his conclusions. He stated that *'I cannot separate the breakdown of the personal relationship in such a way that would allow a working relationship to continue. As I outlined, there is a breakdown in trust in our personal relationship which has deeply impacted me. Your behaviour in our personal relationship is such that I do not feel, for example, that I can be alone with you, whether in the workplace or home. You declined to discuss these matters with me, as they were personal matters. However, it is my view that it is not possible to separate these personal matters from the working relationship. Your decision not to discuss these matters therefore also illustrates the difficulty I have in the company continuing to employ you. There are also examples we discussed in the working relationship — such as the unauthorised increase to your salary — that means that I do not consider that it is possible to sustain the working relationship. I do not feel that the trust is there for this purpose. This is the case even if it were possible to limit interaction, for example, by you working remotely, which I considered as an option. I therefore feel that the breakdown in the relationships is such that the company cannot continue to employ you with me as director. It is not sustainable that the sole director and shareholder of a company cannot have a working relationship with the individual employed as bookkeeper. I do not feel that I can have this working relationship.'* Given the conclusions he reached he stated that, as an alternative to the claimant's employment terminating, he would sell the company to her at market value and set out a proposed basis for doing so. He asked the claimant to confirm by noon on 14 May 2021 if she wished to do so. He stated that if she did not wish to do so then, *'unless there*

*is any reasonable further alternative*', notice would be given of the termination of her employment.

- 5 32. No response was received from the claimant, so GM wrote to the claimant on 7 May 2021, terminating her employment with immediate effect, due to the breakdown of their working relationship. The letter provided for a right of appeal, indicating that any appeal would be dealt with by GM given that he was the sole shareholder and director. GM indicated in his letter that he had considered appointing an external HR consultant to hear the appeal, but decided this was not appropriate, given the circumstances, particularly the intertwining between the personal and working relationships and the fact that personal information would require to be shared with a third party. He also highlighted that he would ultimately require to take the decision as to how to proceed, irrespective of a recommendation by an external individual.
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- 15 33. The claimant appealed by email of 21 May 2021. An appeal hearing was arranged for 28 May 2021. At the claimant's request, it was agreed that the appeal would be dealt with in writing.
- 20 34. GM considered each of the points the claimant raised in her appeal, but ultimately determined that the claimant's appeal was not upheld. He confirmed his decision in a letter to the claimant dated by 7 June 2021, which set out his response to each of the appeal points raised.
- 25 35. The claimant's employment with the respondent accordingly terminated on 14 May 2021. She was paid in lieu of her 5-week notice period, together with her accrued but untaken holiday entitlement.
36. Early conciliation took place from 5 July to 3 August 2021. The claim form was presented on 10 September 2021.

30 **Submissions**

*Respondent's submissions*

37. Mr Milligan, for the respondent, gave an oral submission. In summary he submitted that:



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- a. GM's evidence was more credible than that of the claimant.
  - b. The claimant was dismissed for some other substantial reason. It is clear that GM felt that there was an irretrievable breakdown in the relationship. While the claimant may not have agreed, GM is the sole director and shareholder, so matters require to be considered from his perspective.
  - c. Dismissal fell within the band of reasonable responses open to a reasonable employer in these circumstances.
  - d. The process followed was fair. The Acas Code does not apply in the circumstances (*Phoenix House Ltd v Stockman* UKEAT/0264/15).
  - 10 e. If the dismissal is found to be unfair, compensation should be reduced by up to 100% for contributory conduct and/or Polkey deductions.
  - f. While it is accepted that no written statement of particulars of employment was provided to the claimant, no award should be made under s38 EA 2002. There are exceptional circumstances, so the exemption in subsection 15 5 applies.

#### *Claimant's submissions*

38. Ms Stobart, for the claimant, also gave an oral submission. In summary, she submitted that:
- a. The claimant's evidence should be preferred to that of GM.
  - 20 b. The claimant was in fact dismissed for conduct, not SOSR. Her dismissal for misconduct was unfair. There was no investigation and the process followed was unfair: the outcome was predetermined and the appeal process, to GM, was wholly unreasonable.
  - c. If SOSR is accepted as the reason for dismissal, dismissal for that reason 25 was unfair. Objectively, the relationship had not broken down. The claimant could have worked remotely. This ought to have at least been tried. The outcome was predetermined by GM and the process followed unfair.

- d. Any compensation awarded should be uplifted for unreasonable failure to follow the Acas code. An additional award, under s38 EA 2002, should be made.

### Relevant Law

#### 5 *Unfair Dismissal*

39. S94 ERA provides that an employee has the right not to be unfairly dismissed.

40. It is for the respondent to show the reason (or principal reason if more than one) for the dismissal (s98(1)(a) ERA) and that this could justify dismissal.

41. Assessing the reason for dismissal involves considering the subjective state of mind of the employer. As Cairns L J stated in ***Abernethy v Mott, Hay and Anderson*** [1974] IRLR 213, (subsequently approved by Viscount Dilhorne and the House of Lords in the case of ***Devis v Atkins*** [1977] ICR 9620):

15 *'A reason for the dismissal of an employee is set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee. If at the time of his dismissal the employer gives a reason for it, that is no doubt evidence, at any rate as against him, as to the real reason, but it does not necessarily constitute the real reason. He may knowingly give a reason different*

20 *from the real reason out of kindness or because he might have difficulty in proving the facts that actually led him to dismiss; or he may describe his reasons wrongly through some mistake of language or of law.'*

42. 'Some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held', is one of the

25 permissible reasons for a fair dismissal (section 98(1)(b) ERA).

43. If satisfied of the reason for dismissal, it is then for the Tribunal to determine, the burden of proof at this point being neutral, whether in all the circumstances, having regard to the size and administrative resources of the employer, and in accordance with equity and the substantial merits of the case, the employer

30 acted reasonably or unreasonably in treating the reason as a sufficient reason to dismiss the employee (s98(4) ERA).

44. In applying s98(4) ERA the Tribunal must not substitute its own view for the matter for that of the employer, but must apply an objective test of whether dismissal was within the range of reasonable responses open to a reasonable employer in those circumstances. It is accordingly not for the Tribunal to decide whether it would have dismissed for that reason. That would be an error of law, as the Tribunal would have 'substituted its own view' for that of the employer. Rather, the Tribunal must consider the objective standards of a reasonable employer and bear in mind that there is a range of responses to any given situation available to a reasonable employer. It is only if, applying that objective standard, the decision to dismiss (and the procedure adopted) is found to be outside that range of reasonable responses, that the dismissal should be found to be unfair (***Iceland Frozen Foods Limited v Jones*** [1982] IRLR 439).

## Discussion & Decision

### *Reason for Dismissal*

45. The Tribunal referred to s98(1) ERA. It provides that the respondent must show the reason for the dismissal or, if more than one reason, the principal reason and that it was for one of the potentially fair reasons set out in s98(2). At this stage the Tribunal was not considering the question of reasonableness. The Tribunal had to consider whether the respondent had established a potentially fair reason for dismissal.

46. Section 98(1)(b) does not prescribe any particular reason for dismissal as being potentially fair. In principle, any reason for dismissal may be relied on by an employer provided it is a *substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held*. A reason which is trivial or frivolous could not qualify as a 'substantial' reason.

47. The respondent asserted that the reason for the claimant's dismissal was due to the breakdown in working relationship between the claimant and GM. The respondent asserted that this amounted to some other substantial reason to justify the dismissal of an employee in the same position as the claimant. This is a potentially fair reason under s98(1)(b) ERA. The claimant asserted that this was a pretext for dismissal and the reason, or principal, reason for dismissal

was conduct. The Tribunal was mindful that, in cases where SOSR is asserted as the reason for dismissal, it requires to carefully consider whether the employer is using SOSR as a pretext to conceal the real reason for the employee's dismissal (*Ezsias v North Glamorgan NHS Trust* [2011] IRLR 550). The Tribunal did not however accept the claimant's assertion. The Tribunal was satisfied that the reason asserted by the respondent, namely the breakdown in working relationship between the claimant and GM, was the true reason or operative cause for the claimant's dismissal. The Tribunal reached this conclusion for the following reasons:

a. GM could have instigated disciplinary proceedings in December 2020 in relation to the allegation that the claimant increased her salary without his authorisation, had he wished to do so. There was no requirement to use another event as the pretext or cover for instigating proceedings in relation to this. He decided however not to do so and continued to pay the claimant at the higher rate.

b. Similarly, in relation to compliance with work practices regarding holidays and time off, no disciplinary action was taken or instigated in relation to these matters. If the respondent had wished to take disciplinary action in relation to this, it could have done so. There was no requirement to use another event as the pretext or cover for instigating proceedings in relation to this.

c. The Tribunal accepted that the principal reason for the claimant's dismissal was GM's belief that the relationship between him and the claimant had irretrievably broken down, following the gradual deterioration in the relationship, culminating in the events on 24 April 2021. This is clear from the timing of the action taken and the evidence heard by the Tribunal. Had GM not believed that the relationship between him and the claimant had irretrievably broken down, the claimant would not have been dismissed

48. The Tribunal accordingly found that the respondent had established that irretrievable breakdown was the reason for the claimant's dismissal. Such a

breakdown could amount to SOSR under S.98(1)(b) ERA. Accordingly, the reason for the claimant's dismissal was potentially fair.

49. The Tribunal then considered s98(4) ERA. The Tribunal had to determine whether the dismissal was fair or unfair, having regard to the reason as shown by the respondent. The Tribunal was mindful of the guidance given in cases such as *Iceland Frozen Foods Limited v Jones* that it must not substitute its own decision, as to what the right course to adopt would have been, for that of the respondent.

#### *Procedure*

50. Given the Tribunal's findings in relation to the reason for the claimant's dismissal, the Tribunal accepted that the Acas Code of Practice on Disciplinary and Grievance Procedures did not apply in the circumstances. In the case of *Phoenix House Ltd v Stockman* UKEAT/0264/15, the EAT made it clear that the Acas Code does not apply to SOSR dismissals based on a breakdown in the working relationship.

51. In relation to the procedure which was adopted by the respondent, the Tribunal noted that the respondent set out its position to the claimant in writing, highlighting that it was felt that there may be an irretrievable breakdown in the working relationship, such that the claimant's continued employment may not be possible. The claimant was invited to a meeting to discuss this and to make representations. The claimant attended that meeting and the representations she made were considered. The alternative she suggested was considered and a response provided, setting out why the respondent believed this was not viable. The claimant was informed of the decision, and the reasons for this, in writing. She was also afforded the opportunity to appeal.

52. The claimant sought to challenge the procedure adopted by the respondent in a number of respects. The Tribunal's conclusions in relation to each are set out below:

a. **Failure to carry out a fair, reasonable or objective investigation.** The Tribunal did not accept this assertion. There was no requirement to carry out any investigation, given that the proposed reason for dismissal was not

related to conduct. The Tribunal did not identify any issues which ought, reasonably, to have been investigated, but were not.

5 b. **Failure to carry out a fair, reasonable or objective procedure.** The Tribunal did not accept this assertion. The procedure adopted by the respondent, as outlined above, was fair and reasonable in the circumstances. GM provided reasons to the claimant as to why he would require to consider her appeal. The Tribunal accepted that, given the size and administrative resources of the respondent, it fell within the band of reasonable responses open to a reasonable employer in these  
10 circumstances for him to do so.

15 c. **The decision to terminate the claimant's employment being pre-determined.** The Tribunal did not accept that the decision to terminate the claimant's employment was predetermined. It was clear from the evidence that GM was open to discussing matters with the claimant at the hearing, but she did not wish to do so. He was also open to considering alternatives to dismissal. In particular, he considered the claimant's proposal to work remotely, but discounted this as not viable, as this would not resolve the fundamental issue. He also proposed a further alternative, namely the claimant buying the business, which was not taken up by the claimant. In  
20 his outcome letter he made it clear that he was open to considering any further alternative put forward by the claimant, stating that if the claimant did not wish to take up the offer to buy the company, then '*unless there is any reasonable further alternative*' notice would be given. No reasonable further alternative was suggested by the claimant, either in response to that  
25 letter or in the proceedings before the Tribunal.

53. Given the above, the Tribunal found that the procedure adopted by the respondent was fair and reasonable in the circumstances. It cannot be said that the procedure adopted by the respondent fell outside the band of reasonable responses open to a reasonable employer in these circumstances.

*Decision to Dismiss*

54. The Tribunal then moved on to consider whether the decision to dismiss the claimant for some other substantial reason fell within the band of reasonable responses available to a reasonable employer in the circumstances.
- 5 55. Having considered all the evidence, the Tribunal concluded that GM did genuinely reach the view that the relationship between himself and the claimant had broken down and could not be retrieved. As a result of the gradual deterioration of the relationship, culminating in the events of 24 April 2021 and the police being called, he believed he could no longer be in the same room  
10 alone with the claimant, or have any discussions with her on a one-to-one basis, for fear of this being used against him in the legal proceedings which were ongoing between the parties. As a result, he believed that the relationship had entirely broken down. This was, by necessity, based on GM's perspective. The Tribunal required to consider whether, having genuinely concluded that the  
15 relationship between himself and the claimant had irretrievably broken down, GM acted reasonably in treating this as sufficient reason to dismiss the claimant.
56. GM concluded that it was not possible for him and the claimant, given their respective positions as Managing Director and Bookkeeper/Office Manager, to  
20 continue to work together, even if the claimant worked remotely. The Tribunal concluded that, considering:
- a. the nature of the roles undertaken, as Managing Director and Bookkeeper/Office Manager, GM and the claimant would require to interact when undertaking their roles, even if the claimant worked remotely;
  - 25 b. the fact that, given the size of the respondent's business, there was no possibility of structuring the business so that the respective parties did not come into contact; and
  - c. the fact that no other viable alternatives had been identified

dismissal of the claimant for some other substantial reason, namely irretrievable breakdown of the relationship, fell within the band of reasonable responses open to the respondent in the circumstances.

*Conclusions re s98(4)*

- 5 57. For the reasons stated above the Tribunal concluded that the respondent acted reasonably in treating the breakdown in the relationship between GM and the claimant as a sufficient reason for dismissal. The claimant's dismissal was accordingly fair.
- 10 58. In light of this finding, the Tribunal has no jurisdiction to make an award under section 38 EA 2002.

Employment Judge: Mel Sangster  
Date of Judgment: 31 January 2022  
Entered in register: 07 February 2022  
15 and copied to parties