Case No: 3304690/2020

EMPLOYMENT TRIBUNALS

Claimant: Mr R Saunders

Respondents: 1 Green Your Space Ltd
2 Chic Flower Design Limited (in liquidation)
3 Green Your Space Group Limited

Heard at: Watford Employment Tribunal

On: 2nd and 3rd March 2023

Before: Employment Judge Shrimplin

Representation
Claimant: Litigant in person
Respondent: Mr Buckle (counsel)

RESERVED JUDGMENT

1. The claimant was employed by Chic Flower Design Limited. The claims against the first and third respondents, Green Your Space Limited and Green Your Space Group Limited, are dismissed

2. The claimant's dismissal on 15th January 2020 was unfair.

3. At the time the proceedings commenced, the respondent was in breach of section 1 of the Employment Rights Act 1996 having failed to provide a statement of terms of employment.

4. A remedy hearing, with a time estimate of half a day will be listed and a separate case management order issued.

REASONS

Preliminary matters

5. The claimant made his claim of unfair dismissal by Green Your Space Limited in May 2020 and also claimed owed holiday pay, arrears of pay, and unspecified other payments. Chic Flower Design Limited (in liquidation) (Chic) and Green Your Space Group Limited were also named as respondents. The claim was later amended to include failure to provide the claimant with a statement of initial employment particulars in accordance with s1 Employment Rights Act 1996

6. At a preliminary hearing on 22nd April 2021, Employment Judge Allen ruled that the claimant was an employee following an agreement by the parties at a meeting on 3rd July 2019 that the claimant should transfer under the TUPE regulations with the rest of the company employees. The effective date of termination was the 15th January 2020 and the claim was therefore made within the statutory time limits.

Hearing

7. The claim was heard via common video platform on 2nd and 3rd March 2023. Judgment was reserved.

The Evidence

8. For the claimant, I was provided with his own witness statement and a statement from Matthew Saunders, his son. For the respondent, I was provided with statements from Mr Lidgett, Director of Chic and also the owner of Green Your Space Ltd and Green Your Space Group Ltd, Mr Malcolm Smith, CEO of that group of companies, who also provided a second updating statement, and three employees of Chic, Ms Ettridge, Ms Holland and Mr Jones. The hearing bundle comprised 472 pages and one additional page provided by email on 1st March 2023 and added as page 472A. A further bank document from Chic was to be added to the bundle but was not sent to the Tribunal.

9. Mr Lidgett attended via CVP but remained in France. No permission had been provided by the sovereign state of France to hear his oral evidence. Mr Buckle invited me to proceed to hear oral evidence from Mr Lidgett. I declined that application having considered the overriding objective, the case of Agbabiaka (evidence from abroad: Nare guidance) [2021]UKUT 286 (IAC) and the Presidential Guidance dated April 2022 by which I was not bound but must have regard to. Mr Buckle did not seek an adjournment to arrange for Mr Lidgett's attendance.

10. Mr Buckle, for the respondents, accepted that there had been a dismissal and the respondents presented evidence first. Mr Smith, Ms Ettridge, Ms Holland and Mr Jones for the respondent gave evidence and were cross examined. The claimant and Mr Matthew Saunders gave evidence and were cross examined for the claimant.

The issues

11. A list of issues was set out in the Notice of Adjournment issued by District Tribunal Judge Shields following the hearing on 13th June 2022 as follows:

    12.1 Who is the correct respondent
    12.2 Was the claimant dismissed?
    12.3 What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.

12.4 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:

12.4.1 there were reasonable grounds for that belief;
12.4.2 at the time the belief was formed the respondent had carried out a reasonable investigation;
12.4.3 the respondent otherwise acted in a procedurally fair manner;
12.4.4 dismissal was within the range of reasonable responses.

Findings of fact

12. In submissions, both the claimant and counsel for the respondent drew my attention to portions of the evidence given in both statements and in cross examination. I have not addressed each submission on each piece of evidence as it would take a disproportionate amount of time to record. However, I have considered each submission, compared the quotes from the evidence and summaries with my own notes, and my conclusions are reflected in the findings of fact stated below.

13. References to page numbers in this judgment refer to the hearing bundle unless otherwise stated and may refer to the first page of a document or to a particular page within a document.

Background

14. The claimant was the director of Seasonal Transformations Limited, a company which installed and then removed seasonal decorations, especially at Christmas time. That company entered liquidation and on 19th July 2019 its business was sold to Chic Flower Design Limited (Chic) by written agreement, for which Peter Lidgett was guarantor (p88). The business was continued by Chic under the trading name Seasonal Installations. The directors and shareholders of Chic were Mr Lidgett and Ms Amy Roberts. On 7th February 2023, Chic entered creditors' voluntary liquidation.

15. It was agreed that the claimant was dismissed on 15th January 2020. No letter was provided to the claimant on that day. On 1st February 2020, Mr Smith sent the claimant a copy of an email which he said had been sent on 26th January 2020 (p430), which read as follows: -

> "With reference to our telephone conversation, I would comment as follows; Chic Flower Designs bought Seasonal Transformations Ltd from the liquidator in 2019. You were employed as a consultant.
>
> The reason your consultancy was brought to an end was for the following reasons.
> 1. During the installations I told you that I would be down to see you and you asked if I could leave it a week due to the high level of installations needing completing, I agreed. During that week Ami received telephone calls and emails from your installers complaining about pay and not being able to contact you with installation problems. Ami called me to update me on the situation and I tried to call you, but it kept going to your voicemail. I then emailed you but did not get a response until late that evening. We spoke the next day where you informed me that you was tired and had decided to take most of that week off as "holidays". I asked why you had not

requested a holiday in the normal manner or telephoned me with your intentions. You could not answer, but apologised. I told you that the installers had been trying to get hold of you with their queries regarding their installations and you replied that you could not understand this as your phone was always on. I also said that it unacceptable for you to take a holiday during Seasonal's busiest time of the year.

2. After the installations I asked for the cost against budget for the Installation process 367 430 and you could not tell me. You said you needed a few days to work this out. This surprised me as you were the man controlling the process. Once you had finished the costing, you informed me that it was approximately 25k over budget. I told you that this was totally unacceptable, you replied that we would still make a profit. I can accept that there might have been a small uplift due to operational issues, but not one of 25k.

3. After the installations, I asked for the warehouse to be sorted out and any old or dead stock to be disposed of. I was made aware of two loads being taken to a scrap yard by you and that the payment for the aluminium waste were paid into your personal account. I checked our business account each day to see if the monies were paid in, they were not.

4. I came to see you on the 8th or 9th January where we discussed points one and two further. I told you that I was not happy with your performance during the installations and that I did not think you were worth the 100k per year you were costing me. I waited to see if you mentioned the aluminium waste sent to the scrap yard, when you did not I raised it. Your answer was that you were going to take the monies received off your next expense claim. I questioned why you had not emailed me or the office that you had received these monies. I told you that I found your actions unacceptable and that if I had not raised it I was not certain you would have come forward about the monies you had received.

I then left the office saying I would be back in one weeks time. Having thought through our conversations and discussed the situation with the Group Chairman, Peter Lidgett, as the trust had gone, I could see no other alternative but to bring your consultancy to an end."

Findings of fact

The correct respondent

16. At the hearing on 22nd April 2021, EJ Allen found that the claimant had transferred as an employee under the TUPE regulations with the rest of the company employees and was therefore entitled to bring his claim. It is clear from the sale agreement of 19th July 2019 that the employees, including the claimant, were transferred under TUPE to Chic (p126 onwards). Chic continued the business under the trading name Seasonal Transformations.

17. The claimant was not provided with a new contract. He submitted invoices for £6,000 for "consultancy services" to "Seasonal Transformations" each month to receive payment. Notably the first invoice was for July 2019, even though the transfer had not been completed until the middle of that month. (p125, 205, 269, 333, 364, 378 and 422).

18. The reason for the submission of these invoices was disputed. Mr Smith for the respondents asserted that it was because the claimant was indeed a consultant, not an employee. The claimant asserted that he had been asked to submit invoices from the start of his employment by Mr Smith who had told

him it would assist with cashflow and it would make payment simpler for the administrative staff. The claimant also said in his statement that Mr Smith had asked him to consider moving to self-employed status, although this was never completed, and that Mr Smith had said he would provide details for the accountant to discuss the impact of such a move (email p141-143).

19. There are a number of quotes for clients and correspondence in the hearing bundle. These are in the name of Seasonal Transformations and note that this is a trading name of Chic. The claimant signs these initially as a director (p143, 159, 175, 188, 210, 246, 262 and 264). Similarly, the claimant signed emails as a director. I note that similar documents at p273 and 280 do not include the Chic name and that the claimant stopped signing as a director. In his witness statement he stated this was on the advice of the liquidator.

20. The documents also show that the claimant required approval and information from Mr Smith, for example in late July and August the claimant was confirming whether payments had been made and certificates extended (at p133, 135 and 136).

21. The claimant asserted that, because he had negotiated with Mr Lidgett and Mr Smith, he had been employed by Green Your Space Limited or Green Your Space Group Ltd. He also highlighted the existence of central administrative and finance functions rather than Chic specific ones, indeed submitting his own invoices to the central finance team.

22. There are no documents to support that the claimant played any role in Green Your Space Ltd or Green Your Space Group Limited, nor indeed within Chic. The claimant did not assert that he played such a role. The emails show that he was asking for payment authority from Mr Smith and was unable even to secure debit cards.

23. I conclude on a balance of probabilities, that the claimant was employed by Chic following the sale of the assets of the claimant's former company. He held himself out as the manager of Seasonal Transformations and indeed, he and Mr Smith effectively carried out a seamless transition from the claimant's former company to Chic, using the same trading name, and the claimant continued very much as he had done before. (p87, 208).

24. I therefore dismiss the claims against Green Your Space Limited and Green Your Space Group Limited.

Terms of employment

25. Following the liquidation of the claimant's company, there was a meeting on 3rd July 2019 between Mr Lidgett and the claimant, arranged by Mr Stickland of Marriott & Co, the auctioneers which were dealing with the assets in the liquidation. I was referred to a note of that discussion contained in an email from Mr Stickland (p82-83). The conversation discussed their respective backgrounds, the reasons behind the liquidation and staffing and overheads. The note specifically includes:

"Peter asked what Roger wanted – Roger wants to work and get a nest egg – work for 2 more Christmas' and then become a consultant – Roger is looking for 80k pa plus 750-800 payout after 2 years"

26. The conversation ended with Mr Lidgett indicating It would be a good fit for his business and that they would try to come to an agreement themselves and Marriott & Co would agree assets with Mr Lidgett.

27. A letter dated 10th July 2019, signed by Mr Lidgett and sent to the claimant referred to their meeting. Mr Lidgett stated that he understood the claimant's desire to retire with a pension pot in four to five years' time of £350-400k. He stated this was achievable but they could not afford to pay him as he had been previously. The offer was to pay him £72k plus expenses as a consultant, a four-year growth target which would provide the pension pot when the company was sold in five years. Malcolm Smith would arrange a meeting to discuss the finer details and agree a joiner's fee.

28. The claimant asserted that this letter was forged for the purposes of the hearing. The respondents produced p472A which is a screen shot of a folder list of pdf documents which is the letter on Green Your Space Group Ltd headed paper and a "date modified" of 10th July 2019 at 10.35 although the page does not show the whole letter.

29. The claimant asks me to find that a document dated 1st October 2017 (p66) was his contract of employment at his former company and was therefore his contract when he moved. His evidence was that this was a standard contract used by him and his former partner and director when the business was started and that it was on its 6th Revision. That contract specified he was to be paid at £108,000 payable in monthly instalments (which is £9,000 gross per month), together with overtime and expenses, and 25 days leave a year.

30. The claimant also produced a table of what he asserted were the discussions held with Mr Lidgett and Mr Smith and the outcomes of those discussions (p86). That sets out that what was agreed was £70k net or £5,700 per month, a joining fee of £10,000 and details of sales and bonuses. The claimant was clear that he had financial commitments to meet and would not have accepted less. This document was not accepted by Mr Smith. The respondents maintained that a salary for the claimant which amounted to £6,000 net per month was not affordable and whilst retirement and sale of the company were discussed, there was nothing specific agreed

31. In cross examination, it was put to the claimant that the document at p66 was a recent creation for the purposes of these proceedings. The claimant did not accept that assertion.

32. There was an exchange of emails on 5th August between the claimant and Mr Smith (p140-141). There was to be a meeting on the 6th August and they were to discuss the budget. The claimant also wanted to discuss his draft contract, "proposed transfer fee Peter suggested and we have discussed", and other matters. He also asked for a meeting "with the accountant you suggested to deal with my tax affairs, if I am to base my income on the self-employed status that you want me to accept". On p141 a five-year budget plan also set out turnover, costs, profit and had lines noting "achieve budget % sale of Co" and

"beat budget 15% of additional profit". A follow up email dated 7th August simply says it was a productive day and asks for Fuel and debit cards.

33. There were numerous emails and documents concerning expenses (p122, 301, 332, 338, 394, 396, 404). It is clear that there were significant expenses and purchases in excess of £1000 made by the claimant each month between July and December which were reimbursed at the end of the month.

34. I have carefully considered the evidence provided. After the company was purchased in July 2019, I find that the claimant's employment was essential to continue the work of Seasonal Transformations, enabling the smooth running of the contracts which had been purchased by Chic. He was employed as a manager of the business of Seasonal Transformations for his knowledge and relationship with the clients and the staff. and, apart from central finance functions approving expenses, was left to run the business as he saw fit. Although Mr Smith stated that he acted as Mr Lidgett's agent, the evidence showed that he made the decisions relating to the company finances with considerable autonomy.

35. The claimant was not provided with written particulars of employment. On a balance of probabilities, I do not accept that the contract at p66 is a true reflection of the terms on which the claimant transferred under TUPE I find the claimant's evidence about his salary convincing and supported by the documents. I find that he was employed by Chic at a salary of £6000 per month net, was be paid a joining fee in the July 2019 invoice, was entitled to recover his expenses and to regularly work from home. I also find that there were discussions about if and when the claimant would participate in bonuses if profits over a certain threshold were achieved and, ultimately, that he would participate in the proceeds of sale of the business in a number of years' time as set out in the tables provided by Mr Smith on p141-142 for their meeting in August, possibly as part of a move towards self-employed or consultant status. However, I do not find that these terms were agreed.

The reason or principal reason for dismissal

36. It was agreed that the claimant was dismissed on 15th January 2020. Mr Smith's evidence was that he sent the claimant an email on 26th January setting out the reasons for the dismissal which is set out in full above. A copy of this was emailed to the claimant on 1st February. The claimant stated he did not receive the email on 26th January. I will consider each of these reasons which I summarise as unauthorised leave of absence, budget management and payment of scrap metal monies into personal account.

Unauthorised leave

37. There was no evidence provided by the respondents of a set procedure to apply for leave by the claimant or any other employee. There are a few emails within the hearing bundle where the claimant informs others of his working pattern, for example where the claimant emails Mr Smith's assistant with his October diary (p296).

38. On Monday 2nd December the claimant sent a text to Ms Ettridge as follows "I am going to be working from home this week. Today was holiday as will be

Wednesday and Friday" (p372). In evidence the claimant said that he had booked Monday and Wednesday as leave, although he did not explain how he had done that. He said that he had had to cancel his leave on Monday to work in London and that he drove home on Tuesday and then took Friday as leave instead. His message to Ms Ettridge is consistent with that, as is his expense claim (p395).

39. On Thursday 5th December Mr Smith asked by email if there was a problem with the claimant's phone. The claimant replied the next morning saying that there were connectivity issues and that he had booked a day's holiday and there would be a poor signal where he was going (p375).

40. In the email of 26th January and in his statement, Mr Smith said that Ami Roberts had had to deal with telephone calls and emails from installers complaining about pay and an inability to contact the claimant. No emails were produced to confirm this. Evidence from Ms Ettridge, Ms Holland and Mr Jones confirmed that on Monday 2nd December there was an issue with a site in Romford and there were difficulties getting in touch with the claimant. Mr Jones attended the Romford site.

41. Mr Smith's evidence was that after the email of 6th December, the claimant subsequently rang him and they spoke about the claimant's absence.

42. In his statement, Mr Smith's evidence was that he called a meeting on the 9th or 10th January 2020 to discuss three things, including the unauthorised absence for which the claimant apologised. He ended the meeting by telling the claimant that he was not happy with the answers given and that they would meet again in one week's time.

43. In contrast, the claimant said that at the meeting the discussion only concerned whether he should be paid overtime for the installations he had done, and that there was no discussion about his performance. The claimant sent an email later that day, thanking Mr Smith for his time (p403).

44. There was no reply produced by Mr Smith nor an email summarising the discussion, noting that the claimant's answers were unsatisfactory or arranging the meeting for the following week.

45. On the balance of probabilities, I find that there was no specific process for the claimant, who was in a senior position, to ask for leave. He was absent on Wednesday and Friday of the first week of December and there is no evidence of specific calls or issues caused as a result. I therefore also find that there was no significant disruption to the business due to the claimant taking leave on those two days.

46. I find that the claimant's unauthorised absence was not discussed at the meeting on the 8th January.

Budget management

47. In his witness statement at paragraph 17, Mr Smith mentions that by October 2019 he knew the budgeted purchases but then there was an unexpected invoice for about £9000. In reply to an email of 17th October (p299) from Ms

Ettridge asking for payment, Mr Smith wrote "This is a shock Why wasn't this detailed on the original costs??? ". No response or follow up to that question was provided in Mr Smith's statement or in the hearing bundle.

48. On 9th December, Mr Smith emailed the claimant (p376) and said he would be in the office "first thing Wednesday and I would like us to work out our actual install costs against the budgeted costs. I would also like us to agree how we can get rid of the dead stock and finally the accident in a Kelly van". The claimant's evidence was that on the 11th December, the budget was discussed and he was to work on it, once the installations and take down arrangements were completed.

49. As noted above, on 2nd January 2020, Mr Smith requested a meeting with the claimant by email (p400) to discuss how the installations and take downs went, the effectiveness of adverts and invoice for labour. He suggested a meeting on the 8th January.

50. In his witness statement, Mr Smith's evidence was that he called a meeting on the 9th or 10th January 2 to discuss three things, including budget management which was discussed and to which the claimant responded that the company would still have made a profit.

51. As also noted above, the claimant's recollection of the meeting was very different. In cross examination, the claimant explained that he was finalising the budget and making adjustments required for example for additional staff costs and recouping losses for issues which had not been of the company's making. Again, I note the email sent later that day (p403) and the lack of response or email by Mr Smith.

52. Management of budgets is of course important to a company's business and it was certainly an issue on which Mr Smith as CEO of Chic would have been focussed. I accept that, as the removal of the decorations was completed, there would be adjustments to the actual costs and how they compared to the budget. On a balance of probabilities, I find that there was a meeting on the 8th January at which Mr Smith and the claimant discussed a number of matters in general terms, however, there was no discussion about the costs being significantly higher against the budget nor that this was any reflection on the claimant's abilities.

Scrap metal monies

53. At the meeting on 11th December, Mr Smith and the claimant discussed the removal of excess metal and other stock from the warehouse. The claimant's evidence was that Mr Smith agreed any proceeds could be put towards the staff Christmas lunch on 23rd December. Mr Smith in cross examination said that he could not remember that discussion.

54. Two receipts for scrap metal were included within the hearing bundle (p472-473). I accept that, whereas in the past, it was possible for scrap metal to be sold for cash, that is no longer possible and payments may only be made into a bank account.

55. On 11th December a payment of £78.00 was made and the home address of the claimant was provided. On 19th December a payment of £498.90 was made and Matthew Saunders' home address was provided. It was not disputed that the claimant received both amounts.

56. It was not disputed that Ms Ettridge confirmed she had provided Chic bank details at the claimant's request on the 11th December and that no Chic bank card had ever been provided to her or the claimant. However, she did not recall conversations about cash not being accepted nor did she confirm that Mr Smith had told the claimant any proceeds could be used for the Christmas meal as the claimant suggested. Mr Smith did not recall that conversation with the claimant either.

57. The evidence concerning the number of trips and who precisely was on them was not clear. Ms Holland, Ms Ettridge and Matthew Saunders each described a number of visits by various people at different times. It is not necessary for the purposes of this case to make specific findings of fact on those matters.

58. Matthew Saunders confirmed that he had left the receipts in the van and had not given them to anyone or made anyone aware of the sums involved. He not seen the receipts, since that day. The claimant and Mr Smith also said that they had not seen the receipts until they were included in the hearing bundle

59. I find that Matthew Saunders told Ms Holland that at least one payment had been credited to the claimant's account for about £70 and that she passed that information to Ms Ettridge who informed Mr Smith.

60. The date that information was passed on is not clear. As noted above, there was a meeting on 8th January between the claimant and Mr Smith. Mr Smith 's evidence was that he was waiting to see if the money was paid in and checked the company bank account every couple of days. He did not mention whether he had checked expenses claims. In cross examination he said that he was aware of two sums of money. As it had not been paid in, he raised it at the meeting on 8th January 2020 and on the 15th January.

61. The claimant said that he intended to set off the money when he did his expenses at the end of January but was dismissed before he was able to do so. In cross examination he said that he would only offset against his petty cash expenses not his motoring expenses and had not looked at his bank account details at all and would not have noticed an additional £500. He would have dealt with it once he got the receipts.

62. The evidence also showed that the claimant incurred significant expenses each month, both for car travel and cash expenses, ie items he had to pay for and then seek reimbursement. In some months, these expenses totalled several thousand pounds and were not always paid promptly. For example, in October in an email he again asked for the Chic debit card as he could not afford to buy from his personal account and wait to be refunded (p398).

63. On a balance of probabilities, I find that the claimant was aware that he had received money for scrap metal into his personal bank accounts and had not made any effort before his employment was terminated to inform Chic via Mr Smith. On his own account, he had not even checked his bank statements to

see what the involved were and was unaware of them until the receipts were produced in the hearing bundle. He had had the opportunity to offset the funds against his motoring expenses on 7th January 2020 and did not do so.

64. I also find that Mr Smith was aware of only one payment made into the claimant's personal account in the sum of around £70 at some time before Christmas.

65. On a balance of probabilities, I find that this issue was not discussed at the meeting of 8th January.

Meeting on 15th January

66. I have dealt with the meeting of 8th January above and found that, whilst a meeting did take place, the issues discussed did not include unauthorised absence or payment of scrap metal monies, although the issue of budget management was discussed as noted above.

67. Mr Smith's witness statement stated that following that meeting, he spoke to Mr Lidgett about the three matters and that

> "it was decided that the trust and confidence had gone in our relationship with Roger.especially as he had fraudulently paid monies due to the company into his personal bank account. and that we had no other alternative but to end Rogers consultancy services with the company".

In response to my question, Mr Smith said this meant that it was a joint decision and that the issues were discussed and the decision made.

68. Mr Smith then met with the claimant on the 15th January, waiting until all the staff had left before talking with him. He informed the claimant that he had had a discussion with Mr Lidgett. Mr Smith was not happy with the claimant's performance and that he "had no alternative but to cease his services as a consultant with immediate effect for significant performance and monetary irregularities."

69. The claimant agreed that Mr Smith waited until everyone had gone home but said that Mr Smith simply walked in and said words to the effect that he was there with "bad news", and that the claimant was "no longer needed" as he was "too expensive" and "not worth the money he was paid. He was required to empty his desk and hand over property there and then.

70. On 31st January 2020, the claimant emailed the Chic Director, Ami Roberts, concerning a call they had had that morning as Mr Smith had been ignoring the claimant's messages (p426). In that email, the claimant repeats the same version of events.

71. Mr Jones' evidence is that he took on a role as a manager, similar to that of the claimant's, at the start of February 2020, having been approached in late January.

72. I find that Mr Smith made the decision to dismiss the claimant independently of Mr Lidgett and consistent with his management role within Chic. On a balance of probabilities, I find that there was no discussion about unauthorised

absence, budget management or the scrap metal monies on 15th January. I also find that Mr Smith did make the comments put forward by the claimant on the 15th January and find that the reason for the dismissal was that the claimant was too expensive and the company no longer wished to employ him.

Investigation

73. There was a complete disregard of the ACAS Code of Practice on disciplinary and grievance procedures. I find that the claimant was given no verbal or written notice of any allegations prior to the meeting on 15th January 2020. There was no investigation of any of the matters put forward in the email terminating employment of the claimant sent on 1st February and dated 26th January 2020 (p430). The claimant was not informed of any appeal procedure and none was held.

The Law

74. The Employment Rights Act 1996 (the Act) provides (as far as is relevant for this case) as follows:

> **"98 General.**
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held."

75. It is often the case that an employer dismisses an employee for what could be regarded as several "reasons". In Abernethy v Mott Hay and Anderson [1974] IRLR 213, [1974] ICR 323, at 330B-C, Cairns LJ said this:

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee."

76. Paragraph DI [821] of Harvey on Industrial Relations and Employment Law summarises the position in this way:

> "These words, widely cited in case law ever since, were approved by the House of Lords in W Devis & Sons Ltd v Atkins [1977] AC 931, [1977] 3 All ER 40 and again in West Midlands Co-operative Society v Tipton [1986] AC 536, [1986] IRLR 112, HL where the rider (important in later cases) was added that the 'reason' must be considered in a broad, non-technical way in order to arrive at the 'real' reason. In Beatt v Croydon Health Services NHS Trust [2017] EWCA Civ 401, [2017] IRLR 748, Underhill LJ observed that Cairns LJ's precise wording in Abernethy was directed to the particular issue before the court, and it may not be perfectly apt in every case. However, he stated that the essential point is that the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which causes them to take the decision – or, as it is sometimes put, what 'motivates' them to do what they do."

Conclusion on grounds for dismissal

77. Mr Buckle submitted that that the grounds for dismissal were those set out in the email dated 26th January 2020 which was sent on 1st February 2020 (p430) and that together the claimant's conduct in respect of unauthorised leave, budget management and retention of scrap metal monies was such that the respondent had lost all trust and confidence in the claimant and that the claimant had therefore been fairly dismissed for "some other substantial reason" falling within s98(1)(b) of the Act.

78. I reject that conclusion. I find that the matters set out in the email sent to the claimant on 1st February (p430) were not the real reasons for dismissal. The dismissal was therefore unfair.

Remedy - Polkey Reduction and Contributory Conduct

79. Having decided that the claimant's dismissal was unfair, it is necessary to consider whether it would be just and equitable to reduce the amount of the claimant's basic and compensatory awards because of any blameworthy or culpable conduct before the dismissal (section 122(2) of the 1996 act) and if so to what extent and whether the claimant by his blameworthy or culpable conduct caused or contribute to his dismissal to any extent, and if so, by what proportion, if at all (under section 123(6) of the 1996 act). This is also known as the principle in Polkey v A E Dayton Services Ltd [1987] IRLR 503.

80. In the light of the findings of fact made above, it is appropriate to deal with the issue of remedy and potential reduction of any award separately. The case will be relisted and a case management order issued.

Additional claims

81. Section 1(1) of the Act provides that "Where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment". Section 38 of the Employment Act 2002 provides that where the Tribunal finds in favour of an employee in any claim listed in Schedule 5 of that Act and the employer has not complied with sections 1(1) or 4(1) of the Act and provided the employee with full and accurate written particulars of employment, the Tribunal shall make an award to the employee of a minimum of two weeks' pay and if just and equitable, four weeks' pay.

82. The claimant did not receive a written statement of his particulars of employment. The amount of the award will be decided in the remedy hearing.

83. The claimant also made a claim for notice pay. A contract of employment for an indefinite term may be terminated by either party giving proper notice. The notice period might be set out in a contract of employment or s86 of the Act sets out a minimum notice period or it must be a "reasonable period" which is not less than the statutory minimum. An employee who commits gross misconduct will, generally, lose the right to a notice period. The issue of notice pay will be decided in the remedy hearing.

84. Lastly, the claimant also claimed holiday pay as set out in his schedule of loss. The claimant only provided the contract (p66) which, as noted above, I do not

believe was accurate. The schedule of loss claims an annual entitlement to accrued leave of 10 weeks. There was no evidence to support that assertion.

85. The Working Time Regulations 1998 (WTR) provide workers with a right to paid holiday. There are two elements to that right: a right to four weeks' leave in each leave year under reg 13 and, separately, a right to an additional 1.6 weeks' leave in each leave year under reg 13A. This includes bank holidays. The entitlement to paid holiday will be determined in the remedy hearing.

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Employment Judge K A Shrimplin

Date: 19 April 2023

Sent to the parties on:21/4/2023

NG - For the Tribunal Office