



THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH

BEFORE: EMPLOYMENT JUDGE MORTON
Sitting alone

BETWEEN:

Ms Z Tanjong

Claimant

AND

The Tabernacle Global Ministries

Respondent

ON: 18 and 19 March 2021

Appearances:

For the Claimant: Ms M Rukudzo, Solicitor

For the Respondent: Mr A MacPhail, Counsel

JUDGMENT

1. The Claimant's claim of unfair dismissal succeeds but it would not be just and equitable to award the Claimant any compensation for her dismissal.
2. The Claimant's claims of unlawful deduction from wages fails and is dismissed.

Reasons

Introduction

1. By a claim form presented on 18 October 2019 the Claimant brought a claim of unfair dismissal and a claim for unpaid wages. She had first contacted ACAS on 19 August 2019 and received the ACAS certificate on 19 September 2019.
2. The hearing was conducted over two days by CVP. Given the problems of the current pandemic this was a reasonable manner in which to conduct this hearing. The parties consented and the witnesses all gave evidence clearly and could be seen and heard by all parties. I was satisfied that each witness was giving evidence on her own account and there is no question that their evidence was interfered with in any way in the course of giving evidence.
3. There was a bundle of documents consisting of 424 pages including materials relevant to both liability and remedy. References to page numbers in these reasons are references to page numbers appearing on the index to the pdf bundle that was supplied to me before the hearing.
4. The Claimant gave evidence on her own behalf and the evidence of the Respondent was given by Nicola Campbell, the Respondent's operations manager at the time of the Claimant's dismissal and the person who conducted the disciplinary proceedings that led to the Claimant's dismissal and by Yvonne Palmer, a trustee of the Respondent at the time who chaired the hearing of the Claimant's appeal. The witnesses had all prepared written statements, which I read before the hearing began.

The issues

5. The parties had agreed in advance of the hearing that the issues to be determined by the Tribunal were as follows.

Unlawful Deduction from Wages (Section 13(1), Employment Rights Act 1996 ("ERA"))

6. Does the Tribunal have jurisdiction to hear the Claimant's claim:
 - a. Has the Claimant presented her claim in time pursuant to s.23, ERA? The Respondent submits that the date of payment from which the last alleged deduction was made was prior to 20 May 2019, that being a period of three months less a day before the Claimant entered into early conciliation on 19 August 2019. The Claimant submits that the date of payment from which the last alleged deduction was made was after 20 May 2019, specifically with the last salary received on 24 July 2019.
 - b. If not, was it reasonably practicable for the Claimant to present her claim in time, pursuant to s.23(4), ERA?
 - c. Did the Claimant present the claim within such further period as the

Tribunal considers reasonable?

7. Did the Respondent make any unauthorised deduction from the Claimant's wages, pursuant to s.13(1), ERA?
8. If so, what was the extent of such unauthorised deduction?

Unfair Dismissal (Section 98, ERA)

9. What was the reason, or principal reason, for the Claimant's dismissal? The Respondent relies upon conduct.
10. Was that reason a potentially fair reason within the meaning of s. 98(2)(b) of the ERA 1996?
11. Was the dismissal fair in accordance with s.98(4) of the ERA 1996? Specifically: -
 - a. Did the Respondent have a genuine belief that the Claimant was guilty of gross misconduct?
 - b. Did the Respondent have reasonable grounds upon which to hold that belief?
 - c. At the time it formed its belief that the Claimant was guilty of misconduct, had the Respondent carried out as much investigation as was reasonable in the circumstances?
 - d. Was the decision to dismiss one which fell within the band of reasonable responses open to a reasonable employer in the circumstances?
12. If the dismissal was unfair, what sums (if any) should be awarded to the Claimant by way of basic and compensatory awards? In respect of the compensatory award:
 - a. Has the Claimant mitigated her losses?
 - b. Did the Claimant contribute to her dismissal and, if so, should there be any reduction to the sums awarded to the Claimant to reflect that contribution pursuant to s.122(2), ERA?
 - c. If the dismissal is found to be procedurally unfair, should there be any reduction to the sums awarded to the Claimant on the basis that even if the dismissal were procedurally fair, the Claimant would have been dismissed in any event, pursuant to the case of Polkey v AE Dayton Services Limited?
 - d. Did the Claimant or Respondent unreasonably fail to comply with the ACAS code of conduct such that it is just and equitable to reduce or increase the award? If so, what percentage reduction or uplift is appropriate?

Findings of fact

13. I make the following findings of fact on a balance of probabilities based on the evidence of the witnesses and the contemporaneous documents. I have made findings that are relevant to the issues that the parties agreed were to be decided by the Tribunal.

14. The respondent is a church in Lewisham, South East London. It employs a small staff of approximately 9 employees and is assisted by a number of volunteers in addition to its paid employees. Its management is overseen by a board of five Trustees, some of whom are elders of the church. Its management resources are therefore limited.
15. The Claimant was employed as a finance officer by the Respondent from 1 November 2015 until her dismissal for gross misconduct on 1 July 2019. The reasons for her dismissal as set out in the dismissal letter dated the same date (page 174) were:
 - a. producing a forged job description in an attempt to avoid doing tasks that she did not want to do;
 - b. refusing to carry out tasks which were included in her genuine job description such as processing pension payments.
16. I find that at the commencement of her employment on 16 November 2015, the Claimant was for a short time managed by Monica Knight, who was at the time the Respondent's operations manager. Once Monica Knight left, a few weeks after the Claimant began work on 30 November, the role of operations manager and line manager to the Claimant was taken over by Nicola Campbell. Subsequently the Respondent appointed a business manager, Claudette Brown. From that point both Ms Brown and Ms Campbell had a role in managing the Claimant's work, a state of affairs that caused the Claimant difficulties about which she later complained.
17. I find as a fact that the Claimant applied for her role through an online platform called 'Charity Jobs' in or around August 2015. She said that when she applied for the job online there was attached to the online advertisement a version of the job description that still contained tracked changes (pages 56e-h). I find it improbable that the Claimant would have fabricated that evidence and it is clear from the documents (page 63) that Monica Knight on 25 August 2015 did indeed send a copy of the job description with tracked changes to Charity Jobs and then sent a corrected version, although it is not clear which one. Ms Campbell was not able to give direct evidence of what was sent to Charity Jobs although it was her evidence and the Respondent's case that the document at pages 56i-k was the correct job description for the Claimant and had been sent to Charity Jobs at the time the Claimant's role was advertised in August 2015. Ms Palmer looked at this issue in detail again when considering the Claimant's appeal against her dismissal, but as a result of the way in which the Respondent presented its evidence about the job description and the fact that there were no less than six versions of the job description in the bundle (pages 54- 56, 56aa-56cc, 56b-56d, 56e-56h, 56i-k, and 57-58) I find that the Respondent has not satisfactorily established which version was actually attached when Ms Knight sought to correct her mistake on 25 August 2015. The Claimant's evidence on that specific point, namely that what she retrieved from the job advertisement was a job description with tracked changes, is, I find, more convincing.

18. Whilst Ms Campbell however did not herself send the job description to Charity Jobs, she was involved in interviewing the candidates for the Finance Office role at the time of the Claimant's application and therefore became familiar with the job description for the purposes of that exercise. She confirmed in cross examination and I find as a fact that the job description that was being used for the Claimant's role at the time of the job interview, was the one at pages 56i-k.
19. The Claimant says that Monica Knight gave her the terms of her employment (pages 84-86) and a hard copy job description on her first day of employment on 16 November 2015. She says that she was given the version of the job description at pages 79-81 which she described in her evidence as the ZT JD – I will adopt that nomenclature in this judgment. Ms Campbell gave evidence that that is not what happened, but she was not directly involved in managing the Claimant at the time. I return to this issue later in these reasons.
20. The terms of the Claimant's employment were set out in the document at page 84-86. She was employed for 18 hours per week at a salary of £14,500. There was provision for flexibility in her working hours and provision for TOIL. According to the document there was no pension scheme at the time she commenced work. However it was common ground that an auto-enrolment pension scheme was put in place by the Respondent during the course of the Claimant's employment, its staging date being July 2017, and that from 2017 the Claimant began to administer the payments, as doing so was a finance related task. Ms Palmer's evidence that the Claimant did this without protest from July 2017 to May 2019 was not challenged.
21. The issues that form the background to this claim began to present themselves in early 2018 when, at the Claimant's suggestion, the Respondent began to use a new finance package called Liberty. In essence the Claimant's case was that the introduction of this package led to a significant increase in the range of tasks she was required to perform, and an effective doubling of her working hours from 18 to 36 per week. She said in her witness statement:

In December 2017 a meeting was held between CB and JH where additional tasks were noted minute by minute and came up to a total of 18 additional hours as explained in my email to Michael Clerk (MC) on page 112 of the AJB. CB and JH came up with a list of additional tasks [page 200C] and which CB provided to me in January 2018 and it was agreed at this stage with CB that since the tasks required were significant and required an additional 18 hours, I would be paid for the same in due course. There was no agreement as to the date when the actual payment would be made except that it would be made in future.

From January 2018 therefore I had the ZT JD roles which were performed under my 18 hours part time contract and I had 18 hours additional working time to complete the additional tasks listed on the document on page 200c of the [bundle].

Thus it was her case that whilst she was not remunerated for these additional tasks at the time, it had been promised to her by Ms Brown that she would be remunerated for them at some time in the future. This never happened and it is on this failure to make payment for the additional hours of work that the

Claimant bases her claim for unlawful deduction from wages.

22. The Respondent disputes that there was ever any agreement to pay the Claimant additional remuneration for hours worked over and above her contractual commitment. It was the Respondent's case that the introduction of the Liberty package resulted in new tasks being distributed between the Claimant and the Respondent's external accountants and that some of the 'new' tasks were replacements for tasks that the new package made unnecessary. A list of the relevant tasks and their distribution was set out at pages 200c. The Respondent did not accept that the Claimant was actually working the number of additional hours that she claimed to be working and I note from the correspondence between her and Michael Clarke, an elder of the church who endeavoured to resolve the Claimant's various complaints in March and April 2019, that she never clearly explained the basis of her claim to him. On the contrary her style in correspondence was elliptical and seemed designed to obfuscate rather than clarify her concerns (pages 106-166u). Irrespective of the Claimant's explanation at page 112 and the document which I understood her to be referring to, which was at page 200c, I find that there was a complete absence in the bundle of any actual record of hours worked, produced by either party. It is for the Claimant to establish on a balance of probabilities, with clear evidence, the number of hours she was working and a contractual promise by the Respondent to remunerate her for those hours. In my judgment the Claimant has wholly failed to do that.
23. I also find as a fact that regardless of the number of additional hours the Claimant actually worked, which has itself not been established by evidence, there was no evidence other than the Claimant's disputed assertion, of any agreement, written or oral, for the Claimant to be remunerated for an additional 18 hours of work per week, or indeed any number of additional hours. The Claimant has not proved facts that show when the additional hours were worked or how the remuneration claimed for those hours was calculated. Having considered the available evidence I regard as no more than fanciful the Claimant's assertion, that she was told that she would be remunerated at some point in the future if she continued to work the additional hours she claims that she worked. Although I did not hear evidence from Ms Brown, the Claimant's case in this respect is inherently improbable.
24. It was similarly fanciful for the Claimant to send the Respondent an invoice in the early part of 2019 for the use of her personal computer at work. Ms Brown responded to this request on 23 January 2019 (page 97) with the observation that any discussion of allowing the Claimant to charge for the use of her personal laptop had been undertaken in jest, which I consider to be a credible position to have taken. It was the Claimant who was acting in an unusual manner by unilaterally deciding to make a charge of £50 per day for the use of her personal laptop at work and expecting the Respondent to accept the charge.
25. Around the same time the Claimant had begun to express to Ms Campbell dissatisfaction about her working hours, her line management and the carrying out of tasks that she said were not part of her job description. The Claimant

was particularly exercised about the Respondent's refusal to pay her invoice for her computer, which she regarded as the Respondent's failure to honour a promise it had made to her. This issue was considered at some length by the Respondent and Sharon Grant, another of the Respondent's trustees endeavoured to deal with it without the need for a formal procedure. Her letter of 22 February 2019, dealing with the issue and making a proposal for resolving it was at page 95-98. On 18 March there was a meeting between the Claimant, Ms Campbell, Ms Grant and Mr Clarke at which they had endeavoured to address the Claimant's other concerns, but as the Claimant insisted on returning to the matter of the laptop, little progress was made on those. Subsequent to that meeting Mr Clarke tried to engage with the Claimant to understand and resolve the issues she was complaining about. As I have noted at paragraph 22, the Claimant was remarkably difficult to engage with and resistant to giving a clear account of her concerns.

26. As she remained dissatisfied with the response she received from Ms Grant the Claimant raised a formal grievance on 23 April. The grievance was handled by Ms Campbell as the Claimant's line manager. It was during the course of the grievance investigation that Ms Campbell discovered what she came to regard as a "forged" job description, leading to the first of the disciplinary charges to be put to the Claimant. However the Claimant's grievance was first discussed informally and there were meetings between the Claimant and Ms Campbell, recorded as supervision meetings, on 13 and 28 May 2019. The notes of the meeting of 13 May (page 125) record that going forward the Claimant would be working with the job description given to her in November 2015 of which copies were "already to hand", but that the job description would be reworked as the Claimant now had more work than could be completed in 18 hours per week. In the notes of the meeting on 28 November it was recorded:

In regards to the payroll and nest pension NC will speak to Michael Clarke, HR Trustee, about changing the items on Tan's JD in order for her to incorporate that in her duties as in a recent meeting she had with him where he asked her whether she wanted to continue to do pensions she stated it was not part of her JD and that if it was to be so that other items would need to be omitted for the hours (18) she has to complete everything. Tan submitted the actual note of that conversation had between them after the meeting "*Was there a more recent job description issued to you where Nest was mentioned? If not, if a 2015 job description is the only one issued to you and as such is your current one and if there was no other subsequent job description issued to you then I would have to agree that you managing pensions information would not be in your current job description*".

27. I consider that to be a statement of the understanding between the parties as at 28 May 2019 – the Claimant was asserting that she had a job description in which there was no mention of administering a pension scheme and that job description – ZT JD - had been issued to her in November 2015 when she started work. Mr Clarke was unclear about the correct JD (and I find as a fact that as he did not have any direct line management responsibilities at the Respondent he would have been reliant on what the Claimant told him as regards the correct version). He was asking the Claimant to confirm the position as the Respondent wanted the Claimant to administer its pension scheme, this being an important finance related task. Ms Campbell was of the

view that administering pension contributions was in the Claimant's job description as she had been involved in the interview process, using a job description that did refer to pension administration. Furthermore, the Claimant had in fact been administering pension payments since 2017 when the Respondent had reached its staging date for pension auto-enrolment purposes. The Claimant was firmly taking the stance that as pensions were not mentioned in the job description on which she was relying, she was entitled to refuse to carry out pension related tasks. This led to the second issue that was put to the Claimant at the disciplinary hearing, namely the matter of her refusal to continue with certain tasks on the basis that they were "not in her job description". Ms Campbell specifically raised the issue with the Claimant in or around May and June, after the Respondent received a notification from NEST that a pension payment had been missed. She asked the Claimant to process the payment and the Claimant refused on two occasions.

28. During the course of the meeting on 13 May, the purpose of which was to try to resolve the Claimant's grievance about her laptop payments informally, Ms Campbell asked the Claimant to give her access to her Google drive so that she could review all of the correspondence about the laptop issue. Whilst reviewing the documents on that drive Ms Campbell came across a version of the job description that struck her as odd as its layout and contents did not accord with what she considered the correct version to be. She realised that this was the version of the job description that the Claimant had shown to Mr Clarke when discussing with him whether processing pension payments (and other tasks such as budgeting) was part of her job description.
29. Ms Campbell investigated the position by putting both versions of the job description to the Claimant at the meeting on 28 May 2019. The Claimant maintained that the ZT JD had been given to her when she started work and that the one at pages 56i-k could not be correct.
30. Ms Campbell subsequently considered the document prepared by the Claimant in November 2017 when she had made an application to carry out more of her work from home (pages 87-89) and on which the Claimant had itemised all the tasks that she performed, seemingly by reference to the tasks listed in the version of the JD at pages 56i- 56k. She began to feel concerned that the Claimant might have deliberately altered her job description in order to support her assertion that processing pension payments and other tasks such as budgeting, fell outside the work she was contracted to do.
31. Ms Campbell tried unsuccessfully to share the Claimant's job description with the Trustees. She inadvertently sent them the Google drive link instead and they were unable to access it. However she then met with Mr Clarke and showed him the ZT JD on the Google drive and they together reviewed the document's properties, noting that it appeared to have been produced on 4 June 2019 (there were screenshots at pages 131a and b). On that last point I note immediately that it was unreasonable for Ms Campbell to rely on the document properties as supporting her concerns as plainly the Claimant had shown the ZT JD to Mr Clarke before 4 June, so there must have been some

other explanation for that date appearing on the document properties. This point was revisited by Ms Palmer when she dealt with the Claimant's appeal against her dismissal and I return to that later in these reasons. Ms Campbell further reviewed the competing versions of the job description and then contacted Ms Knight to ask her for recollection of what she had given to the Claimant at the start of her employment. Ms Knight gave a verbal explanation that she later reproduced in a statement for the purposes of the appeal hearing (page 196-7).

32. Having conducted this investigation Ms Campbell suspended the grievance process and invited the Claimant to a disciplinary hearing by letter at page 138. The invitation letter stated as follows:

We have been asking you to carry out various tasks which you claim are not part of your job description. To support your argument, you have presented a job description which does not include those tasks. There are numerous irregularities with that document including a lack of letterhead, oddly numbered paragraphs and missing paragraphs which coincide with the work you have said you are not willing to do. You claim that you were given that document by the old Operations Manager (Monica Knight) on the first day that you started work. However, we have contacted her and she said that she would not have given a job description on the first day of someone's employment and that the job description would have been given to you in advance of your employment. We have a different version of the job description on file which includes the tasks that you are refusing to do.

We therefore need to ask you to attend a disciplinary hearing in relation to allegations that you have:

- i) Forged your version of the job description in an attempt to avoid doing tasks that you do not want to do.**
- ii) Refused to carry out tasks which are included in the genuine job description, such as processing pension payments.**

33. The disciplinary hearing took place on 27 June and a summary of the minutes was set out at pages 153 – 158. Ms Campbell conducted the hearing, despite the fact that she had also carried out the investigation - a point I return to in my conclusions. The Claimant had chosen to be unaccompanied at the meeting. She did however record the meeting despite being instructed by Ms Campbell not to do so. There was therefore also a full transcript of the disciplinary hearing, based on that recording, at pages 211-257. I am satisfied that the Claimant was given the opportunity at that meeting to put forward her response to the issues Ms Campbell had put to her.
34. Following the meeting Ms Campbell undertook further investigation into the genesis of the job description and considered the evidence before writing to the Claimant on 1 July 2019 confirming that she had come to the decision that the Claimant should be dismissed summarily for the two matters that had been put to her at the hearing. The matters Ms Campbell relied on, as recorded in the letter at page 174-175, were (as regards the job description):
- a. That the job description the Claimant was maintaining that she had been given at the start of her employment could not be reconciled with the document held by the Respondent for that role and was missing the very items that the Claimant was now refusing to do, ostensibly on the

- basis that they were not included in her job description;
- b. The conversation with Ms Knight on 20 June 2019 (the substance of which was later confirmed by Ms Knight as set out in paragraph 36 below;
- c. The format of the document used by the Claimant when she applied to work from home in 2017 and its similarity to the “genuine” job description;
- d. The Claimant’s inability to provide satisfactory responses when challenged on her own account of matters.

As regards the Claimant’s refusal to comply with reasonable management instructions Ms Campbell relied on the Claimant’s refusal to process the Respondent’s pension payments on two occasions, the most recent being on 14 June 2019.

35. The Claimant appealed against the decision to dismiss her. Her letter of appeal was at page 180-181 and her appeal was dealt with by Ms Palmer at a meeting on 1 August 2019 at which once more the Claimant declined the offer to be accompanied. Minutes of the meeting were at pages 184-188 and a set of minutes with the Claimant’s additions and annotations were at pages 244-250. The grounds of appeal as understood by Ms Palmer from the somewhat discursive letter of appeal were set out in the appeal outcome letter at page 198-200 and were as follows:

- You did not forge the JD and there is no proof that you had forged it.
- The JD that you presented to NC was given to you by Monica Knight (MK) on the first day that you started employment at the Tab.
- There are anomalies with all the JD’s mentioned at the meeting on 27th June 2019 which include numbering, lack of logo and differences in terminology throughout the document. As a result, you query how the Tab can conclude that yours is forged.
- Prior to seeing your JD, Michael Clarke (MC) had agreed that you were not required to complete pensions work because it was not in your JD and you therefore queried where MC got that information from.
- . NC had created both of the JD’s presented at the Misconduct hearing on 27th June 2019.

I have considered the thought processes of which the contemporaneous documents provide evidence rather than some of the more detailed explanations that appeared in Ms Palmer’s witness statement. It is the thought processes of the employer at the time of the dismissal that are relevant in an unfair dismissal claim.

36. Following the meeting Ms Palmer asked Ms Knight for a statement of what she recalled about the Claimant’s job description when she started work. Ms Knight’s statement was at page 196-7 and read as follows:

I have been provided with a copy of a Job Description (ID) which a former employee Zaolefack Tanjong of the Tab Church London, has said that I provided to her on the first day of her employment back in November 2015 (see appendix 1).

This matter was first brought to my attention when Nicola Campbell called me on 20th June 2019.

I have looked at the JD and can confidently say that this is not the JD which I helped to draft with our accountant John Helm back in 2015. I can confidently say this because there are a number of points that differ, [the points of difference were set out and do not need to be repeated here].

.....I have been shown another JD (Appendix 2) and can confirm from memory that this JD is more in line with the Tab house style and what I had created with John Helm, The Tabernacle's Accountant. It was also part of the package of documents sent to Charity Jobs for all applicants to download. The JD was designed for the future development of The Tabernacle, where a dedicated financial post was needed in order to develop the church's financial systems and procedures for the future and providing the support necessary to enable The Tabernacle to fulfil its mission statement.

It was not my practice to give new employees JD's on their first day of work, because any prospective employee would have access to it when applying for the position. Whilst it is a long time ago, from recollection, I believe the job was advertised on the Charity Jobs website. A package was uploaded which included the

- The Application Form
- The Job Description
- The Person Spec
- The Tabernacle's Statement of Belief

Applicants could then download the documents directly from the website for themselves.

From recollection, I believe that I posted to Zaolefack Tanjong 2 copies of her work contract, prior to her start date, and had asked that she sign the documents retaining one copy for her and return the other to me. However on the start date of her employment she informed me that she had not received the contract in the post and so I proceeded to issue her with 2 more copies, which were both signed in my presence.

37. Prior to issuing the appeal letter Ms Palmer was party to an exchange of correspondence with the other Trustees at page 197a, in which the ZT JD and its creation was discussed.
38. Ms Palmer did not uphold the Claimant's appeal and the outcome letter explained her reasoning as follows:
 - a. She considered that the ZT JD was a forgery because there were references to 'excel' in the document instead of 'accounting system'; 'pensions' had been removed; there was no reference to budgeting; the document had no date and Ms Knight had stated that she did not hand the Claimant a job description on her first day of employment;
 - b. The properties of the document relied on by the Claimant suggested that it had been created by her on 4 June using software that the Respondent did not have at the time the Claimant said she received a job description from Ms Knight;
 - c. The similarities between the job description relied on by the Respondent as the correct version and the document the Claimant prepared when making her working from home request suggested that the Claimant was working from the job description relied upon by the Respondent when she prepared that list;
 - d. Although there were anomalies within the various version of the job description that had passed through the Respondent's hands, none

were as different from each other as the version relied on by the Claimant was from the rest;

- e. Mr Clarke had not told the Claimant that she was not required to carry out pensions work as such. What he had said, was that if the version of her job description that did not refer to pension work was in fact the correct version then that would indeed suggest that she was not obliged to carry out pensions work. However he was unaware of the origin of the ZT JD when he said that.

Ms Palmer went on in the letter to deal with various questions raised by the Claimant at the appeal hearing and she rejected a suggestion by the Claimant that Ms Campbell herself had created both versions of the job description that were presented to the Claimant at the disciplinary hearing.

Submissions - Claimant

39. Both representatives made helpful submissions. For the Claimant Ms Rukudzo submitted that Ms Campbell essentially predetermined the issue of the Claimant's culpability by making up her mind that the copy of the job description in the Claimant's Google drive was forged as soon as she saw it. She also suggested that the Respondent itself was in disarray about which version of the job description was the correct one and was not therefore entitled to take the view that the Claimant had forged her version. She submitted that Ms Campbell had not investigated the position properly and specifically that she had not raised it with other trustees – although I have found as a fact that she raised it with both Ms Knight, who remained a trustee, despite having left her paid post, and with Mr Clarke. She made a broader point about the adequacy of Ms Campbell's investigation, submitting that Ms Campbell had been confused about a number of things, including precisely which job description was the correct one and the means by which the job had been advertised at the time of the Claimant's recruitment, meaning that the basis of her belief in the Claimant's guilt was flawed.
40. She questioned the impartiality of Ms Palmer, who as a trustee had sat in a number of meetings at which the Claimant and her various issues had been discussed. Ms Rukudzo also pointed to the email correspondence at page 197 as indicative that Ms Palmer had not reached her appeal decision independently. However that correspondence was not put to Ms Palmer during cross examination and I have therefore treated that submission with considerable caution.
41. She suggested that the Claimant was not being insubordinate by refusing to resume pensions work when asked because there was a genuine discussion going on about whether she should do it (and other tasks she said she did not have time to do).

Submissions - Respondent

42. Mr MacPhail submitted that the Claimant's case as regards deductions from

her pay lacked credibility and was inherently improbable.

43. As regards the unfair dismissal claim he submitted that this was plainly a case in which the reason for dismissal – misconduct – was potentially fair and that the test in **British Home Stores v Burchell** was met. Ms Campbell had sufficient grounds for her suspicion that the Claimant had fabricated a job description in order to support her argument that she should not be required to undertake certain tasks. If there were procedural defects these were not fatal to the overall fairness of the process and allowance should be made for the fact that the Respondent is a small employer. It was also clear that the Claimant had failed on more than one occasion failed to follow a management instruction where the instruction was within the purview of her role as a finance officer, and where her refusal had potentially serious ramifications for the Respondent. In the circumstances the sanction of dismissal was within the band of reasonable responses.

The relevant law

Unlawful deductions

44. Section 13 ERA 1996 provides as follows:

“13 Right not to suffer unauthorised deductions.

(1)An employer shall not make a deduction from wages of a worker employed by him unless—

(a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker’s contract, or

(b)the worker has previously signified in writing his agreement or consent to the making of the deduction.

Unfair dismissal

45. The burden of proof is on the Respondent to show that it had a potentially fair reason to dismiss the Claimant. The Respondent’s case is that it dismissed her for what it regarded as gross misconduct on her part. Misconduct is a potentially fair reason to dismiss under section 98(2)(b) Employment Rights Act 1996 ("ERA"). The question of whether the Respondent is entitled to rely on the alleged misconduct to dismiss the Claimant fairly involves consideration of the test in **British Home Stores v Burchell [1980] ICR 303** namely whether the Respondent at the time of the dismissal had a reasonable belief in the employee's guilt based on reasonable grounds after conducting such investigation as was reasonable in the circumstances. The standard to be applied to the investigation carried out by the Respondent in a misconduct case is also a standard based on what a reasonable employer might have done (**Sainsbury's Supermarkets v Hitt [2003] IRLR 23**).
46. The case of **Iceland Frozen Foods v Jones [1982] IRLR 439** states that the Tribunal must not, in reaching a decision on the reasonableness of the Respondent's decision to dismiss, substitute its own view as to what it would have done in the circumstances. Instead it must consider whether the Respondent's response fell within a band of responses which a reasonable

employer could adopt in such a case.

47. Further issues then arise under section 98(4) ERA which provides that the question of whether the dismissal was fair or unfair involves the consideration of whether, having regard to the reasons shown by the Respondent, in all the circumstances of the case, including the size and administrative resources of the Respondent's undertaking, the Respondent acted reasonably or unreasonably in treating the reason relied on as a sufficient reason for dismissing the Claimant. The question must be determined in accordance with equity and the substantial merits of the case.
48. In order to meet the test in section 98(4) the Respondent must also follow a procedure that is fair in all the circumstances. That will ordinarily involve compliance with the provisions of the ACAS code of practice on grievances and discipline and with the Respondent's own written procedures.
49. In a case in which a dismissal is found to be procedurally unfair consideration must also be given to the principles in the case of **Polkey v A E Dayton Services [1988] ICR 142** and if it appears that the Claimant would have been fairly dismissed in any event had a fair procedure been followed then any compensation awarded must be reduced to reflect the percentage chance of that being the case.
50. In a case in which the Claimant is found by the Tribunal to have been unfairly dismissed for misconduct the Tribunal must if it has found that the Claimant has to any extent caused or contributed to her own dismissal reduce any compensation by such amount as the Tribunal considers just and equitable having regard to that finding (section 123(6) ERA). A finding of contributory fault can only be made if the Tribunal forms the conclusion that the Claimant has on the balance of probabilities been guilty of misconduct.

Conclusions on the issues

Unlawful deduction from wages

51. In my judgment there is no contractual basis for the claim of unlawful deduction from wages that the Claimant has put forward. A deductions claim can only be based on a failure by an employer to pay the wages that are properly due, either by reference to a statutory right such as the National Minimum Wage or holiday pay under the Working Time Regulations 1998, or by reference to a provision in the contract of employment. The Claimant has advanced her claim only by reference to the provisions of her contract. She has not shown that the terms of her contract provided for additional remuneration for hours worked over and above 18 hours per week, or were ever varied to make such provision. Furthermore she has not shown what additional hours she worked and has not therefore shown how in principle any right to further payment was calculated. Accordingly her claim of unlawful deduction from wages must fail and is not necessary for me to consider the issue of whether the claim was presented in time. The unlawful deductions claim is dismissed.

Unfair dismissal

52. The Claimant was dismissed for gross misconduct, misconduct being a potentially fair reason for dismissal under the ERA. As set out above, where the reason relied on is misconduct, the question the Tribunal must address is whether the Respondent had a reasonable belief in the Claimant's misconduct based on reasonable grounds after a reasonable investigation. It is the reasonableness of the Respondent's belief that is the issue, and the Tribunal must be careful not to substitute its own view by deciding the case on the basis of what it would have done in the Respondent's shoes.
53. There were two grounds for dismissal: the "forged" job description and the insubordination. Beginning with the job description, Ms Campbell formed the view that the Claimant had deliberately set out to mislead the Respondent as to the contents of her job description and had produced a document that she labelled a "forgery". In her evidence in chief she said "I therefore had grave concerns that Tan had altered her job description". It appeared to me that she based these concerns on the following:
- a. Her own knowledge of the job description derived from her involvement in the interview process in 2015;
 - b. The document prepared by the Claimant in November 2017 when she had made an application to carry out more of her work from home (pages 87-89) on which she itemised all the tasks that she performed, seemingly by reference to the contents of the version of the JD at pages 56i-56k. This indicated to Ms Campbell that she must have been aware that that was the job description to which she was expected to be working;
 - c. The evidence that the document referred to as ZT JD had in fact been created by the Claimant on 4 June 2019 (Ms Campbell deduced this from the document properties);
 - d. The verbal statement made by Ms Knight;
 - e. The Claimant's lack of a compelling response when Ms Campbell put these points to her at the disciplinary hearing.
54. The adequacy of Ms Campbell's investigation was challenged by the Claimant and I accept that there were defects in it and that it was problematic that the Respondent itself was unclear exactly which version of the job description had been supplied to the Claimant either at the start of her employment or subsequently. Overall however I consider that the investigation carried out was reasonable in the circumstances. Ms Campbell sought verification from Ms Knight, who had no reason to give an account that was anything other than truthful and she relied on her own knowledge of the job description from which she had conducted interviews when the Claimant was recruited. She also relied on the compelling fact that when the Claimant drew up a list of the tasks she performed when she made an application to work from home, the list appeared to have been drawn from the contents of the job description that the Respondent believed was the correct version, indicating that the Claimant knew that the requirements of her role were different from those on which she

purported to rely when discussing her role with Mr Clarke.

55. I have considered carefully whether the belief that there had been forgery on the Claimant's part, which connotes dishonesty and deceit, was really borne out by the facts. The Claimant was in some ways being perfectly transparent, as she copied Ms Campbell into the email by which she sent the ZT JD to Mr Clarke. Ms Campbell did not open the attachment at the time and did not notice the characteristics of the ZT JD that made her suspicious until she was looking on the Claimant's Google drive. If the Claimant was trying to deceive the Respondent it seems to me that she was not trying very hard to disguise her actions.
56. My focus for the purposes of the unfair dismissal claim is on the reasonableness of the belief held by the Respondent. For the purposes of deciding whether summary dismissal was warranted or whether the Claimant contributed to her own dismissal, I must focus on whether I consider whether the Claimant really did do what she was accused of. In my judgment that Respondent formed a belief that overall was reasonable in the circumstances and it cannot be said that no reasonable employer could have reached that view. However I am in some doubt as to whether the degree of dishonesty implicit in the accusation was really established on the facts.
57. Turning however to the other issue that led to disciplinary action, I am not in any doubt that the Claimant's conduct was insubordinate. Not only did she refuse to follow reasonable management instructions, she also recorded the disciplinary hearing contrary to an express instruction not to do so. Even if not actually dishonest, her attempt to pass off the ZT ZD as her genuine job description amounted in my judgment to a strenuous attempt to force her point of view onto the Respondent. Characterised in that way it was another example of a strikingly insubordinate attitude.
58. As for the procedure adopted, there were some defects in it that have in my judgment affected the overall fairness of the dismissal for the following reasons:
 - a. Ms Campbell should not have conducted the disciplinary hearing as well as investigating the Claimant's misconduct. Although the Respondent is a small organisation, this is a very clear breach of the standards expected by the ACAS Code of Practice. The Respondent did not persuade me that it had no alternative to appointing one individual to investigate and conduct the disciplinary hearing and that no other member of staff or trustee of the organisation was available as an alternative.
 - b. Ms Campbell and Ms Palmer were both unreasonable in relying on document properties that suggested that the Claimant had created the ZT JD on 4 June as this was a date falling after the date on which the Claimant had sent the document to Mr Clarke and the other trustees. There was an explanation in Ms Palmer's witness statement that elaborated on her thinking about the genesis of the ZT JD, but that was written after the event and in reviewing the fairness of the dismissal I am concerned with what was in the minds of the decision makers at the

relevant time. It was quite clear from the appeal outcome letter that the Respondent had in mind the properties of the document when it formed the view that the Claimant had fabricated it.

- c. With that last point in mind, in my judgment Ms Campbell and Ms Palmer did not act reasonably in concluding that the ZT JD was a forgery. The evidence before Ms Campbell suggested that the Claimant was relying on a document that she knew or ought to have realised was not a version of the job description that was endorsed by the Respondent for her current role. However, describing the document as a “forgery” with all the connotations of dishonesty and deceit that that entails was not in my judgment borne out by the evidence, particularly as it was clear that there had been various iterations of the job description in existence during the Claimant’s employment.

59. I have considered and rejected the submission that Ms Palmer’s independence in conducting the appeal was prejudiced by her participation in trustee meetings at which the Claimant was discussed. That is inevitable in an organisation of this size. I was satisfied that Ms Palmer put any prior knowledge of the Claimant to one side in dealing with the appeal. She also took steps to verify independently what Ms Campbell had relied on, by examining the evidence and asking Ms Knight for a written statement.

60. Nevertheless, despite my conclusion that there were defects in the procedure the Respondent adopted that are sufficient to have undermined the fairness of the dismissal, I do not consider that it would be just and equitable to award the Claimant any compensation for unfair dismissal for these reasons:

- a. Refusal to obey a reasonable management instruction clearly constitutes misconduct in and of itself and in this instance the Claimant was quite clearly insubordinate in refusing to carry out Ms Campbell’s instructions to resume administration of the Respondent’s pensions payments. This was an obdurate and unreasonable position for her to have taken, particularly as she had been administering the pension payments since 2017 and her failure to do so on instruction from Ms Campbell was exposing the organisation to the risk of penalties from the Pensions Regulator.
- b. It was unreasonable of the Claimant to adhere slavishly to the terms of a written job description that she knew, or ought to have known did not contain a complete list of the tasks that formed part of her role for the Respondent (the list of tasks she produced at the time of her homeworking application included a number of items, including pension administration, that she was already performing and did not appear on the ZT JD.) This conveyed an inflexible and uncooperative attitude that was making her almost impossible for the Respondent to manage. The tone of her communications with the trustees and her managers was similarly confrontational and uncooperative. A further notable example of the Claimant’s insubordinate attitude was her decision to record the disciplinary hearing despite Ms Campbell’s express instruction that she should not do so. In my judgment the Claimant was egregiously insubordinate by the time of her dismissal, to the extent that she was

indicating by her conduct that she no longer intended to be bound by the implied term of trust and confidence that is a key term of every employment contract.

- c. Hence although I have concluded that Ms Campbell went too far in concluding that the Claimant had actually forged her job description, and that there were a number of defects with the procedure the Respondent adopted, the Ms Campbell's belief that the Claimant was refusing to work to a job description that she ought to have known was the one that was applicable to her was reasonably held. That being the case, and taken in conjunction with the Claimant's insubordinate behaviour, the Claimant was in my judgment entirely responsible for her own dismissal, notwithstanding that Ms Campbell had unreasonably identified the Claimant's wrongdoing as involving forgery. Accordingly I consider that the Claimant's compensation should be reduced by 100 per cent, to reflect the contribution that her own conduct made to her dismissal.
- d. Furthermore, the procedural unfairness I have identified has made no practical difference in this case. Given the Claimant's attitude and unwillingness to engage constructively with her managers in the latter stages of her employment it was clear that the employment relationship had broken down and that the inclusion of the procedural safeguards that were lacking in this case would have made no difference to the outcome.
- e. For all those reasons I conclude that although the Claimant was unfairly dismissed for procedural reasons she is not entitled to be compensated and she was not in the circumstances wrongfully dismissed as her overall conduct was repudiatory of the employment relationship.

Employment Judge Morton
Date: 27 May 2021

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