



EMPLOYMENT TRIBUNALS

Claimant: Ms M Kaminska

Respondents: (1) BII World Limited
(2) Mr N Firzli

Heard at: East London Hearing Centre (by Cloud Video Platform)

On: 3 – 5 February 2021

Before: Employment Judge McLaren
Members: Mrs B Saund
Mr R Bianco

Representation
Claimant: In Person
Respondent: Mr L Betchley, Advisor

This has been a remote hearing which has not been objected to by the parties. The form of remote hearing was by Cloud Video Platform. A face to face hearing was not held because the relevant matters could be determined in a remote hearing.

JUDGMENT

The unanimous decision of the tribunal is that: -

1. The claims for detriment and automatic unfair dismissal arising from protected disclosures are struck out.
2. The claimant is entitled to accrued but untaken holiday amounting to 12.5 days and is awarded £2,884.6 (less PAYE as appropriate) calculated as 12.5 x a daily rate of £230.77(gross).
3. The claim for wrongful dismissal does not succeed.
4. The claimant was not provided with written particulars as required by s1 ERA 1996 and the claimant is awarded £2,307.00 gross being 2 weeks' pay, as compensation.

REASONS

Background

1. The Claimant was employed by the First Respondent from 7 January 2019 to 25 July 2019 as head of finance. Mr N Firzli was a director of the First Respondent and was the person who dismissed the Claimant. The Claimant brings claims for detriment and automatic unfair dismissal arising from making protected disclosures. The Claimant also claims 15 days unpaid holiday and payment of her notice.

2. The hearing took place remotely via CVP as it was not practicable to have an in-person hearing.

Preliminary application

3. The day before the hearing the respondent had made a written application that the tribunal consider an order for striking out the whistleblowing claim under rule 37 on the ground it had no reasonable prospects of success. The claimant had responded to that letter objecting to the respondent's application.

4. At the outset of today's hearing, we discussed with the parties how best to proceed and agreed that initially the tribunal would adjourn to read the claimant's witness statement and the documents that were relied on as the protected disclosures. Having done so we concluded that it would be within the overriding objective to hear the respondent's application. We accepted that we could make a determination on the basis of the evidence that we had read and in doing so there was a potential to narrow the issues with a commensurate saving of time and resources.

5. The claimant understood the position and confirmed that she had read the respondent's application and was sufficiently familiar with the documents to proceed.

Relevant law

Strike Out

6. The power to strike out all or part of the claim comes from Rule 37 of the tribunal rules of procedure. That rule says that a Tribunal can strike out all or part of a claim or a response for a number of reasons. It includes there being no reasonable prospect of success.

7. Striking out is something to be considered carefully. Whistleblowing cases are often fact sensitive and involve an investigation into why an employer took a particular step and any issues should usually only be decided after all the evidence has been heard (*Ezsias v North Glamorgan NHS Trust* 2007 ICR 1126, CA).

8. The test is not whether the claim is likely to fail, nor is it a question of asking whether it is possible that the claim will fail. It is not a test that can be satisfied by considering what is put forward by the respondent either in the ET3 or in submissions and deciding whether their written or oral assertions regarding disputed matters are likely to be established as facts. It is a high test.

9. In general, tribunals will be expected to assume any key disputed facts in the claimant's favour before concluding that the whistleblowing claim has no reasonable prospect of success and striking it out on that basis. Only in an exceptional case will it be appropriate to strike out claims for having no reasonable prospect of success where the central facts are in dispute – for example, where the claimant seeks to establish facts that are totally and inexplicably inconsistent with the contemporaneous documents. Whenever there are core issues of fact that turn to any extent on oral evidence, these should not be decided without an oral hearing.

Qualifying disclosure

10. We reminded ourselves that Part IVA of the Employment Rights Act 1996 ("the ERA") sets out a regime for protection of whistleblowers in a work context.

11. In summary, there are a number of hurdles a whistle blower must successfully navigate to be given the protection of the legislation. Only workers making qualifying disclosures to those in designated positions receive protection.

12. S 43 B provides a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

- (a) that a criminal offence has been committed, is being committed or is likely to be committed,
- (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
- (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
- (d) that the health or safety of any individual has been, is being or is likely to be endangered,
- (e) that the environment has been, is being or is likely to be damaged, or
- (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed".

What is information?

13. The section refers to the disclosure of information. This was considered in Kilraine v London Borough of Wandsworth 2018 ICR 1850, CA, the Court of Appeal held that 'information' and 'allegation' are not mutually exclusive categories of communication. Allegations can amount to disclosure of information depending on their content and the surrounding context.

14. The test for determining whether the information threshold had been met is that the disclosure has to have "sufficient factual content and specificity such as is capable of tending to show" one of the five wrongdoings or deliberate concealment of the same. Clearly, the more the statement consists of unsupported allegation, the less likely it will be to qualify, but this is as a question of fact, not because of a rigid information/allegation divide.

15. The Court of Appeal in Kilraine also went on to stress that the word 'information' in S.43B(1) has to be read with the qualifying phrase 'tends to show' The belief has to be that the information in the disclosure tends to show the required wrongdoing, not just a belief that there is wrongdoing.

Submissions/ Evidence before us

16. The respondent, in its application, had identified what it said were the protected disclosures. After some discussion, the claimant confirmed that these were not quite correct. It was agreed that the following had been raised by the claimant as protected disclosures. In relation to the disclosure of alleged embezzlement of \$68,000 facilitating improper settlement, the claimant relied on an email of 8 March at pages 2106 – 2109, 8 March WhatsApp messages, pages 2990 – 3003, emails of 11 March pages 2111 – 2113, and emails 5 April pages 2250 – 2251. The claimant confirmed that she was not relying on any email of 3 April.

17. In her submissions the claimant also identified WhatsApp messages from pages 2986 – 2990, email of 6 March at page 2082, exchanges on 15 March, pages 3004 – 3008, and on 25 March pages 2432 – 2434.

18. The respondent submitted that these documents had not been relied on by the claimant previously, but to the extent that they were now relied on, the same submissions were made. The claimant explained that at the previous preliminary hearing she had been asked to give dates of specific documents and had been doing so from recollection.

19. In relation to the protected disclosure of the immigration wrongdoing, it was agreed that this was by an email of 4 April at page 2247.

20. The respondent's submissions were set out in detail in their written application which we have considered. They can be summarised by saying that none of the statements written by the claimant in the emails or WhatsApp messages, whether read alone or together, whether taken with the additional documentation to which she now refers, either as background or as protected disclosures, either say nothing of significance or fall squarely into the categories of expressions of concern or opinion. It was submitted that they were self-evidently devoid of the necessary specific factual content and could not be said to be disclosures of information tending to show a relevant failure. We were invited therefore to strike out the claim on the ground it has no reasonable prospect of success.

21. The claimant submitted that she is not legally qualified but has done considerable research on what amounts to a protected disclosure. Her letter sets out that her case was a complex one and that she could not explain what a protected disclosure was by providing evidence of one email or one WhatsApp chat. At the time of the escalations, she was not thinking about protected disclosures, she was simply determined to stop wrongdoings.

22. She urged us to read her witness statement in its entirety and to look at all the documents that she had now referred us to. She submitted that we should consider the position in the round and against the background of what was described in her witness statement as going on within the respondent organisation at the time

The documents.

23. We considered each document in turn, starting with the embezzlement allegation. We referred to pages 2106 – 2109, an email of 8 March, which was referred to at page 20 of the claimant's witness statement. We find that in this email the claimant raises a concern about transparency, but there is no specific factual content which could be said to be a disclosure of information tending to show a relevant failure.

24. The WhatsApp messages of 8 March at pages 2990 – 3003, referred to at page 21 of the claimant's witness statement, are a chain of exchanges. We find that they are about completion of the report and the way in which it should be prepared. We find there is nothing that suggests any reference to unlawful action. The closest the claimant comes to this is by saying that she wants "a simple answer to what happened to the £128,000 and how you guys came up with the divorce settlement.". Taking the claimant's case at its highest, this amounts to a request for information, not a disclosure of factual content which could tend to show a relevant failure.

25. While this was additional information which the claimant relied upon, we did also consider pages 2986 – 2990. We did so to taking into account the fact that the claimant is unrepresented and relied upon her memory at the previous preliminary hearing to identify the relevant documents. Having considered this exchange, we also find that it does not have specific factual content which can amount to a disclosure of information tending to show a relevant failure.

26. Page 2111 – 2113 is an exchange of emails on 11 March. This is expanded upon at page 21 of the witness statement. Again, the claimant is referring to lack of transparency. There is insufficient information to tend to show a relevant failure.

27. On 5 March, pages 2250 – 2251, the claimant does raise issues of concern. However, the first two paragraphs of the letter referred to matters which are not before this tribunal. The relevant paragraph, which appears after the red text, are allegations about other companies in the group and not about these respondents. It refers to a wish to investigate past activities and establish what happened to approximately £350,000 unaccounted cash. It is, however, a request for information from individuals, not the presentation of information to the respondent.

28. We also considered the document at page 2082 to which the claimant directed us, but this is an email from Dr Shpak to the claimant. We have considered it as part of the background. We considered pages 3004 – 3008 which appear to be an exchange setting up a meeting time and instructions on how a report should be prepared. Finally, we considered page 2432, which refers to the settlement agreement. We considered that as background, but it cannot, of itself be a protected disclosure.

29. We then turned to the allegation of alleged immigration wrongdoing which was said to be disclosed on 4 April 2019 at page 2247. This says that the claimant does not in any way want to be associated with Dr Shpak or be involved in anything to do with her and asked that her name be removed from the Visa process. It does not provide any information.

Conclusion on the preliminary point

30. Based on our analysis of the documents, together with the account given by the claimant in her witness statement, taking this at their highest, for the reasons set out above we find that they do not meet the relevant legal standard to amount to protected disclosures. There is no additional evidence that we would take into account during a full hearing. We therefore consider that this is one of those circumstances where it is appropriate to contemplate striking out whistleblowing claims without a full hearing.

31. We therefore conclude that the claimant's claim for detriments and automatically unfair dismissal for making protected disclosures have no real prospect of success and we conclude it would be appropriate to strike out on this basis.

The remaining issues

Issues

32. There had been a number of preliminary hearings on this matter. The claimant had failed to pay the ordered deposit in relation to a number of matters set out as issues and pleaded in the ET1. As a result of this and our preliminary determination the issues we are asked to decide are as follows.

Wrongful dismissal / Notice pay

Was the claimant guilty of gross misconduct? /did the claimant do something so serious that the Respondent was entitled to dismiss without notice?

Holiday pay

Is the Claimant entitled to 15 days accrued but untaken holiday pay?

33. The claimant asked whether she could bring a claim for pension deduction during her employment. She had set this out within her schedule of loss. This is not, however, a matter that has been pleaded or raised previously. We therefore advised the claimant we could not accept an amendment to her claim at this point. She also asked whether she could bring a claim for failure to be given a statement of employment particulars that is compliant with section 1 of the

Employer Rights Act. Her complaint is that while she was given a contract, he did not include a reference to hours of work or incapacity to work and sick pay.

34. We explained that such a claim can be brought where certain other employment tribunal claims are brought.

Evidence before us on these issues

35. We were provided with a bundle of 3643 pages and heard evidence from the claimant on her own behalf, from the second respondent and from Dr Luliia Shpak on behalf of the respondent.

36. We were assisted by helpful submissions from both parties and in reaching our decision took account of these, the evidence we heard and such documents as we were taken to.

Findings of Fact

37. The first respondent organisation was founded by three separate shareholder groups, this included Dr Shpak. We were told that there were two other investor groups, one led by Mr Mussafi, and the other led by Mr Grasso. The respondent's business specialised in training and continuing education and was a global conference business. The setup is complex with a number of different companies apparently operating within a loose group structure, with various individuals having different shareholdings within these group companies. It was common ground that while it had been anticipated that there would be a legal group structure this was not established. The respondent was a stand-alone company without any subsidiaries of sister companies.

38. While the respondent company (and it appears the potential group structure) was established in 2016, there were some disagreements in the summer of 2018 so that a rift developed between the Indian investor group and the Italian investor group. We were told by Dr Shpak that this breakdown of relations meant that there was a need for a UK based finance manager and so the decision was taken in 2018 to recruit a UK based head of finance.

39. The company had, until this decision, relied on the services of an individual who appears to have been an administration or accounts clerk. She was based in London and was the niece of Mr Mussafi, she is referred to as Zabi.

40. The claimant was interviewed initially by Dr Shpak in person and then by Mr Mussafi by telephone. An offer of employment was made in late December 2018 and the claimant started work on 7 January 2019.

41. The claimant was engaged by the first respondent and was provided with a contract of employment on 6 January 2019 which is at pages 235 to 238. This provided for an initial two-month probationary period and thereafter for a three-month notice period to be delivered in written form via registered mail. The salary was stated to be £60,000 per annum.

42. The contract was with the first respondent but provided that the claimant was to be Head of Finance (Global and UK). The duties included using best endeavours to promote, protect, develop and extend the business of the company and other BII Group subsidiaries and sister enterprises. No reporting

line was specified within the contract. The claimant was adamant throughout her evidence that she was employed by the group and that her reporting line was to Mr Mussafi as the group CEO. She considered that her contract required her to provide services to other group subsidiaries and sister enterprises. We find that as a matter of corporate structure there were no such subsidiaries or sister enterprises. The claimant's employment relationship was with the respondent.

43. The contract provided that all data and documents produced, maintained or stored in the company's computer systems or other electronic equipment remain the sole property of the company throughout the claimant's employment. It also provided that the employee would faithfully and to the best of her intellectual and physical capabilities carry out duties and responsibilities assigned to her by the employer. The contract expressly provided that the employee would comply with all reasonable directions given to her by the company. In all cases "company" was defined as the respondent.

44. The annual holiday allowance was stated to be 26 days. The contract does not contain any reference to hours of work, incapacity to work or sick pay. There was no contractual right to suspend for investigation for any other purpose. We were not provided with a copy of any disciplinary policy which might have had such a right contained within it. The claimant was, however, paid her full salary throughout the period of suspension.

45. We find that the contract does not comply with the requirements of section 1 of the Employment Rights Act as to the particulars which it must contain. We find, as set out in the correspondence between the parties, page 1913, that the contract template was based on a US version. The respondent did not have any UK employees at the time and the contract was drawn up without the assistance of lawyers. On the balance of probabilities, we find that any failure to meet UK legal standards was accidental and reflects the international background of the shareholders and the size of the respondent.

Performance concerns

46. Both Mr Firzli and Dr Shpak gave evidence that from mid-February 2019 onwards there were many concerns about the claimant's professional performance and behaviour. We were taken to page 255 – 258 which are emails and then an exchange of WhatsApp's between internal shareholders which criticised the claimant for sending what are characterised as stupid emails. These raise a concern that the claimant is not of CFO calibre.

47. We were taken to page 291 – 292, an exchange of emails of 7 March 2018 in which Mr Mussafi complains about the way the claimant writes emails, and her attitude and approach are criticised and considered to be wrong. Mr Firzli described this as a crescendo of professional performance concerns which accelerated the end of March and early April 2019.

48. Mr Firzli gave evidence that he had been on a business trip in the USA at the end of March/early April, but he was in daily communication with both Dr Shpak and Mr Mussafi. As a result of these concerns, the three had a conversation on the Friday afternoon during which Mr Firzli told us Mr Mussafi was happy for the claimant to be fired. Dr Shpak agreed, but Mr Firzli wanted to

ensure that this was properly investigated and therefore he took the decision to suspend the claimant.

49. The claimant was unaware of most of this criticism as she was not party to the exchanges. She believed the suspension was a reaction to the concerns that she was raising about the proposed settlement with the Italian shareholders. We find that the three founders objected to being questioned about how they had arrived at the price for the Italian settlement. We find that the decision to suspend and to investigate her was sparked by the issue of the report which created a significant rift between the parties. We accept, however, that there had been issues with the claimant's performance prior to this.

Suspension

50. The claimant was suspended by letter dated 4 April 2019 at page 367. The suspension letter referred to a failure to follow reasonable work instructions, insulting the director of the company and the majority shareholders, verbally abusing them on several occasions, contacting several of the company's long-standing suppliers, service providers and institutional partners and propagating viciously false, slanderous and defamatory comments regarding the majority shareholders of the company and its directors.

51. The claimant was advised that her actions were being investigated and therefore she was suspended with full pay pending the outcome of these investigations. It was anticipated in the letter that the investigations would last until 29th of April. The claimant was advised that during her suspension she should remain contactable during normal working hours and refrain from engaging in any unlawful activity.

52. A second letter of 25 April was sent to the claimant at page 386 – 387. This expanded the scope of the investigation in two ways. First it suggested that the claimant may have failed to attend work on the 3 – 5 of April without permission. Second it suggested that the respondent's office had been emptied of all folders, binders and dossiers and a brand-new PC monitor had been removed. From viewing the key card logs it was believed that the claimant was the last to enter the premises before the theft occurred. The claimant was asked to return missing items if they were in her possession immediately and was advised that the matter was also being investigated. It was now expected that the investigation would last until 17 May.

53. The claimant responded to this letter stating that she had been authorised to work from home and had retrieved the work equipment that she needed to do her job. She said that Mr Mussafi was fully aware of this and directed Mr Firzli to take the matter up with him.

54. A further letter dated 15 May was sent to the claimant, pages (394 to 397), setting out some further matters that come to light and providing the claimant a consolidated and detailed list of matters under investigation. This contained seven allegations.

55. The claimant responded to this letter by an email of 17 May – page 2225. She stated that the only conclusion that she could draw from the letter is that he was continuing to attempt to manipulate the company as part of ongoing civil disputes in which he was involved. She fully reserved her position, pending legal

advice from her solicitors. The claimant did agree the suggestion of appointing an independent person to consider the allegations.

56. On 14 June the claimant was sent a further letter regarding another matter which had come to light. This referred to a VAT return not being filed for the company. The letter concluded that their investigator, Mr Andreos, would like to meet her and set a date 25 June at the Holiday Inn.

57. The claimant replied to the respondent via her solicitors with a letter of 21 June 2019 at pages 415 – 417. This rebutted the allegation relating to VAT and stated that all the allegations were without basis, and in several instances contained false allegations which were defamatory. It asked a number of questions about the investigator and raised various data issues.

58. On 5 July the respondent wrote to the claimant noting that she had not attended 25 June meeting. The letter said that the investigation was now concluded and that she was required to attend a disciplinary meeting on Monday, 15 July (page 2231). It was the respondent's position that on 10 July the claimant was sent the 14 documents gathered by the independent investigator during his enquiry that corroborated the various allegations of misconduct against her.

59. The claimant was adamant that she had not received these documents. The bundle contained evidence that the documents had been sent by registered mail and courier and had not been accepted, which we find means it had not been received and opened by the claimant. Mr Firzli said that a further copy had been sent by royal mail and that had not been returned; the claimant had therefore seen the documents. The claimant stated that she had not. There was a confusion as to the claimant's address and whether or not the documents had been sent to the correct address. It was pointed out that the individual the claimant had identified as her friend had signed for these documents. The claimant explained that was because she had been out of the country. Whether she should have received them or not, we find that the claimant had not received or reviewed this evidence prior to the termination of her employment.

60. The claimant replied, via her lawyers on 12 July, stating that she could not attend such a meeting because she had not been given sufficient notice and further, she was currently out of the country. While they were aware of this absence, Mr Firzli gave evidence that the claimant was not entitled to be absent in this way. During her suspension she had been instructed to remain at home and was being paid full pay and they therefore went ahead with the disciplinary hearing without the claimant.

61. At page 442 on 25 July the claimant was sent the outcome of the disciplinary hearing which concluded that she was to be dismissed.

The allegations

62. The investigation letters had ultimately chronicled nine allegations. The outcome letter went through each of these and provided a conclusion. Mr Firzli confirmed that he was the sole decision maker and that the conclusions in the letter were his. All but one of these allegations were upheld by him.

Allegation one

63. The first allegation was that the claimant had failed repeatedly to follow reasonable management instructions and prepare to an acceptable standard and within a reasonable period of time an internal report estimating, based on realistic interpolations, the probable cost structure incurred by the two companies controlled by the Italian investors group.

64. The decision letter concludes that this allegation was upheld based on statements made in letters from the claimant's lawyers and emails and what's app conversations between the claimant Mr Firzli, Dr Shpak and Mr Mussafi.

65. This allegation referred to the report the claimant was asked to prepare she says by Dr Shpak. At page 2082 there is an email from Dr Shpak to the claimant copied to Mr Mussafi and Mr Firzli headed 'BII Europe report/exit settlement of former Italian shareholders.' This email goes on to give details of the terms of settlement with the Italian shareholders and talks about the need to conduct an internal exercise (produce a report) on the respondent's finances.

66. Later the email goes on to say that report is for internal purposes only, to explain to minority shareholders the rationale behind Mr Firzli, Mr Mussafi, and her own reasoning in respect of the terms of the settlement. Dr Shpak encloses what is described as a master file of data and the claimant is asked to prepare a draft report that captures four very specific things. It concludes that once the claimant has a preliminary version of the report there would be a phone call to discuss it, and once it was agreed that the key information is captured, then the claimant and Mr Firzli can explain and answer questions the shareholders in Bangalore might have in respect of the legal, strategic and finance consideration in respect of this settlement.

67. The claimant concluded that she was being asked to provide a report to support the rationale behind the settlement with the Italian shareholders. Dr Shpak in evidence to the tribunal said that that was not the purpose of the report. It was entirely an internal report and was needed because due to the fallout with the Italian shareholders the other founders had been unable to access bank accounts are a period of time. They needed to reconstruct missing data and had asked the claimant to do so. Mr Firzli also gave evidence that the purpose of the report was an interpolation, that is joining up the dots from the data file to fill in the gaps left by the absence of bank statements because of the Italian fallout. We prefer the claimant's account of the purpose of this report as it is supported by Dr Shpak's contemporaneous email which differs from the account given by both her and Mr Firzli in oral evidence to this tribunal.

68. Having received the master document on 7 March the claimant sent a WhatsApp message to Dr Shpak and Mr Mussafi (page 2986) saying that there was a lot of unaccountable revenue and she needed a full bank statement. Mr Mussafi appears to accept this, replying "fair enough Monica, let's go through everything."

69. On 8 March the claimant sent her report which she had prepared on the data that she told us that she had. The report was at page 2109. It was sent with a cover email which explained that she only had bank statements up to July

2018, the master file is not properly updated and therefore contained unreliable data and the deal log had no clarity about what happened to refunded cash.

70. Dr Shpak, at page 2113 sent the claimant some information that she had and asked the claimant to use this in the report. The claimant was unhappy with this data because she did not feel it was sufficiently evidence-based. The claimant stated in her email that she was simply asking questions which any accountant would ask. The founders were clearly unhappy with the claimant's response and in an exchange of WhatsApp's on 10 March at page 309 express a view that she has not followed instructions. In emails of 11 March Dr Shpak asks a number of questions about the report, pointing out its shortcomings. Dr Shpak and Mr Firzli gave evidence that there were then a series of conversations on WhatsApp and telephone calls on 11 March about this response. This was followed by an email of 15 March from Mr Firzli, at page 320, stating that she was expected to follow these instructions. This email set out a number of steps that the claimant was required to take. On 22 March Mr Firzli, at page 320 writes an email to the claimant asking her to follow the instructions she has been given and to draft a short memo for internal use.

71. The claimant does not amend her report. The allegation is that the claimant failed to follow reasonable management instructions. We find that the purpose of the report was related to the Italian settlement. Nonetheless, we find that the claimant was given reasonable management instructions to prepare a report. The claimant has suggested that she could not do so because of the inadequate data she was given. The claimant also directed us to page 2036 being an email from Mr Mussafi to the claimant stating that the CFO should check on the bank statements and verify it before she committed to any dates of payment. She relies on this in support of her position that she should only provide verifiable data in her report.

72. We find that this email does not say that, and we can see from the WhatsApp exchange of the Mr Mussafi that he was in agreement with the way in which the report should be prepared. We find that the claimant was given express instructions on how to find missing data and told that the report was to interpolate missing elements and she was provided with such data as was available. We find that the claimant did not obey this reasonable management instruction issued to her by Mr Firzli as the sole director of the respondent and she had both the data and the time in which to do so.

Allegation 2

73. The allegation states firstly that there was a failure to comply with important provisions of UK, EU and UAE banking law, in particular authorising the charging of international client's credit cards from premises other than the company's offices. This allegation of misconduct was upheld. Secondly it was said that the claimant had used Dr Shpak's banking token without permission or authorisation and had failed to comply with the management instructions to return that token.

74. Mr Firzli gave evidence that the independent investigator had carried out a sample review of all credit card transactions that had taken place over a two-week period. He had acquired the data about these and had applied a geolocation method to these and had identified that over a two-week period

almost all of the credit card transactions took place outside the office. The bundle contained limited samples of what was said to be the investigator's conclusions. These were at pages 418 – 421 and show that for these four occasions the credit card processing was carried out in Ilford.

75. Mr Firzli accepted that these transactions must have been carried out by Zabi. He was very unclear as to whether or not the evidence showed any credit card processing being carried out in the office. He appeared to accept that the claimant had not carried out this processing, but he said that the claimant was the de facto line manager of Zabi. He gave evidence that he had told the claimant this at a four hour meeting, including dinner, on 20 January and that she had agreed to line manage Zabi. He also gave evidence that at the same long meeting he had told the claimant that processing credit cards outside the office building was to be the exception and not the rule.

76. He explained that this processing was sending through credit card details of customers who had booked on the respondent's courses or had bought a product from the respondent. They needed to be processed in the office because that had access to a safe and secure server and there was the possibility of data breaches if they were processed from an individual's home. There was a risk that client data would be transferred over systems which the company did not control.

77. Mr Firzli confirmed that there was no written instruction to this effect. He accepted that Zabi had not been in the office as she had some pregnancy related illness, but disputed that had been for the entire period. He also did not accept that the claimant had at the time complained about this individual's work.

78. This is not reflected in Mr Firzli's statement. There is no memo confirming what had taken place at this long meeting. There is, however, an email from the claimant dated 22 January at page 1913 which refers to a meeting that took place "yesterday" the 21st. That seems, however, to have been entirely about the claimant's contract. It makes no reference to any other conversations.

79. On balance we prefer the claimant's account that general matters were not discussed, over the account given by Mr Firzli. We do so because there is no mention of this important meeting in his witness statement and because we find that he generally does send memos recalling important details and had not done so on this occasion. As we have found that the meeting did not take place, we also find that the claimant was not aware of any such instruction in relation to processing credit cards. It follows from our findings that we also find the claimant was not responsible for managing Zabi. We therefore find that this allegation is not made out.

80. The second part of the allegation related to a banking token. Dr Shpak and Mr Firzli told us that Dr Shpak was a 50% shareholder in one of the group companies set up in Dubai. The remaining shares were held by another 50% shareholder and there was a director who was responsible for running the organisation in country. Dr Shpak said that the banking token which gave access to the company bank account had been issued in her name. It was not the company's bank token but hers. She had authorised the claimant to have access to this banking token and to use it on her behalf. After the correspondence between herself and the claimant over the report she had lost trust in the claimant. She told us that she telephoned the claimant on a number of occasions

to ask for the return of this banking token and then on 1 April at page 351 sent the claimant a letter by registered mail requesting its return.

81. The claimant accepted that her response at page 359 was to email Dr Shpak and the other shareholders saying, “seriously this is becoming hilarious.” The claimant disputed that she had been given any telephone instructions to return the token but accepted that she had been sent this written instruction. She had refused to return it because she considered Dr Shpak did not have any right to request return of this token. The claimant authorised payments from the Dubai company on the instructions of Mr Mussafi and the director. The claimant had said that Mr Mussafi had told her not to return the token. Her witness statement referred us to document at page 2570. This does not contain a written instruction from Mr Mussafi. We accept the respondent’s evidence on this point and find that the claimant refused to return property which did indeed belong to Dr Shpak. The instruction to do so did not, however, come from the respondent. It came from a shareholder and related to the bank account of a different company.

82. To the extent that the respondent relies on the claimant’s failure the request was not relevant to the respondent’s operation. To the extent that the respondent considered the actions showed inappropriate conduct on the part of the claimant which damaged the respondent’s trust and confidence in her, we find that is a reasonable conclusion to reach. We find that the claimant was demonstrably taking sides in a shareholder battle and that her conduct amounts to a breach of trust and confidence in her ability to carry out her duties in an appropriate manner.

Allegation four

83. Allegation four was that the claimant was responsible for the removal of property belonging to the company. Mr Firzli suggested that the claimant had removed a large amount of documentation as well as computer equipment. The claimant disputed this but did accept that she had removed a monitor and the documents relating to the affairs of the Dubai company. The claimant had done so relying on permission from Mr Mussafi.

84. The claimant did not provide any proof that such instruction was given. We accept that on the balance of probabilities the claimant had been given this general authority. We find, however, that the instruction was given to remove property belonging to the respondent by an individual who had no authority to do so. We find that it was appropriate that this allegation was upheld. We also find it was appropriate that it was categorised as gross misconduct because it involved sensitive third-party data and confidential client information being taken to a private home, imperilling the integrity of the data for which the respondent was responsible.

Allegation five

85. This concerned the claimant’s absence from work which was said to be without permission or prior authorisation on 3rd to 5 April 2019. The claimant accepted that she was not in the office having returned from India. She explained that she had told Mr Mussafi that because of the bullying and harassment that she was receiving from Mr Firzli and Dr Shpak, she was not prepared to work in the office. Again, we accept the claimant did have this

permission (and she provided at page 2261 an email of 1 May from Mr Mussafi confirming the same) but that Mr Mussafi had no authority to instruct the claimant as an employee of the respondent not to attend for work. Only the respondent could do so, and it had not given such permission.

Allegation six

86. This allegation was that the claimant had paid her April salary to herself twice. We were referred to a document at page 2203 of 2 April which was an email from the claimant to Mr Mussafi and the other Indian shareholders. It explained that the claimant had paid her salary for April as she was concerned about Mr Firzli cancelling her access to the bank account. She states she has agreed this with Mr Mussafi. The memo also says that she would transfer all-cash to India until the situation is resolved. The claimant accepted, in answer to cross examination questions, that she paid herself her April salary early and before it had accrued to her. She also accepted that she had intended, although she said she did not do it, to transfer all the money in the respondent's bank accounts to the Indian company. We accept that Mr Mussafi had authorised her to do this but find he did not have authority to direct how the funds of the respondent should be spent.

87. This allegation was upheld as gross misconduct as Mr Firzli concluded that the claimant had paid her salary twice without proper authorisation when she knew or ought to have known this was not permitted. This was a matter of grave concern given her position as chief financial officer and access to the company's bank accounts. We find that this is indeed a grave concern given the claimant's position, experience, and qualifications.

Allegation seven

88. This allegation was that the claimant had failed to carry out her duties with proper care and diligence, making mistakes such as miss converting currencies and making payments to incorrect bank accounts. Mr Firzli told us that the currency error was clearly shown on the report of 10 March. We accept that this document does not make it clear what currency is being described and we accept that as an international business in different currencies this is important information that should be included and so this was therefore at its worst poor work. The dismissal letter also refers to 4th of February transfer of £20,000. Mr Firzli told us that this was in fact one of many mis-payments to the bank account but there was no evidence provided to us of any others. The WhatsApp exchange at pages 2904 - 2908 responds to this £20,000 payment at the time and finds it is not very significant. We do not find that the respondent has provided sufficient evidence to uphold this allegation.

Allegation eight

89. This was said to be the claimant's failure to file with HMRC the VAT return for 1 December to 20th February 2019. The claimant had responded to this and had originally stated that the deadline for submission was 10 April which was after she had been suspended. She then confirmed that the deadline was in fact 7th of April, that is before she was suspended, but that the accounting system was not working at the relevant time.

90. The claimant told us that when she had given the first reply, that the submissions was after the date she suspended, this had been a mistake. She accepted that the VAT return should have been completed prior to her suspension. The claimant explained that she could not do so because she could not access the appropriate records. She said that she had been shut out of the system. She could not therefore access the records.

91. Mr Firzli had made enquiries with the accounting systems technical support group who confirmed that there was no disruption to their online services. This allegation was upheld as gross misconduct because the claimant had changed her account which was not considered credible. Mr Firzli concluded that the claimant had attempted to rewrite facts and fabricated an account to justify breaches of her most basic duties as a financial officer. As chief financial officer of a very small organisation a great deal of trust and responsibility was placed on the claimant to carry out her duties properly. We accept the respondent's account on this occasion. We find that on the balance of probabilities the claimant could have completed the VAT return and had failed to do so.

Allegation nine

92. This allegation related to share transfer forms. It was said that was that the claimant had failed prepare the required companies house share transfer forms 22 January 2019 to transfer three shares between two individuals, and yet had assured both Dr Shpak and Mr Firzli that she had done this. The claimant disputed this and said that she had in fact informed Dr Shpak that a board resolution would be required and that she had made it clear that she did not have the time to complete a stock transfer form.

93. Mr Firzli relied on an email sent by the claimant to Dr Shpak on 22 January 2019 in which it stated that she had transferred the shares. The allegation was therefore upheld as one of misconduct. We find that it is unclear whether the claimant's response meant that all parts of the necessary documentation had been prepared or simply, as she states, that all she had done was to deal with the information on the companies' house website. On the balance of probabilities, we prefer the claimant's account and did not accept the respondent's conclusion that the claimant had not acted appropriately and had misled individuals by her actions.

Company Response

94. Mr Firzli concluded that he had found the claimant had committed acts of misconduct and gross misconduct and in view of the seriousness of the matters he concluded that the claimant's employment should be terminated for gross misconduct without notice. In reaching this conclusion he balanced the comparatively short length of service together with the seniority of the claimant's position and the fact that the respondent was a very small organisation who had to have absolute trust and confidence in the claimant. He concluded that the claimant had been misleading and untruthful.

Relevant Law

Written Particulars

95. The remedy for a breach of the statutory rules regarding written statements is by means of a reference to an employment tribunal under S.11 ERA. Tribunals have the power to award compensation under S.38 of the Employment Act 2002 (EA 2002) where, upon a successful claim being made under any of the tribunal jurisdictions listed in Schedule 5 to that Act, it becomes evident that the employer was in breach of its duty to provide full and accurate written particulars under S.1 ERA.

96. These claims include

- breach of contract arising on termination of employment
- breach of the Working Time Regulations — Reg 30 Working Time Regulations 1998 SI 1998/1833.

97. Where the tribunal finds that the employer breached its duty to provide full and accurate employment particulars, it must award the 'minimum amount' of two weeks' pay (subject to exceptional circumstances which would make an award or increase unjust or inequitable), and may, if it considers it just and equitable in the circumstances, award the 'higher amount' of four weeks' pay — S.38(2)-(5).

Wrongful Dismissal

98. An action for wrongful dismissal is a common law action based on breach of contract. The reasonableness or otherwise of an employer's actions is irrelevant, all the court has to consider is whether the employment contract has been breached. The tribunal is concerned with the factual question: Was the employee guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract?

Holiday pay

99. The Working Time Regulations 1998 provide workers with a statutorily guaranteed right to paid holiday. Subject to certain exclusions all workers are entitled to 5.6 weeks' paid holiday in each leave year beginning on or after 1 April 2009 — comprising four weeks' basic annual leave under Reg 13(1) and 1.6 weeks' additional annual leave under Reg 13A(2). The entitlement to 5.6 weeks' leave is subject to a cap of 28 days. Reg 13(1).

100. Compensation related to entitlement to leave is set out in regulation 14

14.—(1) This regulation applies where—

(a) a worker's employment is terminated during the course of his leave year, and

(b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13(1) differs from the proportion of the leave year which has expired.

(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).

(3) The payment due under paragraph (2) shall be—

(a) such sum as may be provided for for the purposes of this regulation in a relevant agreement, or

(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula—

where—

A is the period of leave to which the worker is entitled under regulation 13(1);

B is the proportion of the worker's leave year which expired before the termination date, and

C is the period of leave taken by the worker between the start of the leave year and the termination date.

(4) A relevant agreement may provide that, where the proportion of leave taken by the worker exceeds the proportion of the leave year which has expired, he shall compensate his employer, whether by a payment, by undertaking additional work or otherwise.

Conclusions

101. Having made the findings of fact set out above, applying the relevant law, we conclude as follows. The claim for holiday pay succeeds. This was conceded by the respondent. We have calculated it based on agreed figures taking into account that the claimant had not worked the three bank holidays that fell during her employment.

102. The respondent accepted that the statement of particulars were deficient in two respects. We accordingly find this to be the case and award two weeks' pay. We have not awarded the maximum of four weeks' pay as we have not found that the respondent was a small organisation without any UK staff and the contract was based on the US template. There was no intention not to comply.

103. Turning then to the main claim of wrongful dismissal. We have found that a number of the allegations on which the company relied did occur. We have found that the claimant failed to follow reasonable management instructions in the preparation of the report, that she removed property belonging to the respondent without authority to do so, was absent from the workplace without authority to do so, paid herself early without authority to do so, and failed to complete and file a VAT return.

104. We conclude that failure to prepare a report, prepare a VAT return, and removing property breach express terms of the contract of employment which specified that the claimant would carry out the duties and responsibilities communicated to her by the employer and also specifies that property is that of the employer.

105. We also conclude that payment of salary without authorisation is a breach of the implied term of trust and confidence. We are satisfied that this latter breach on its own insufficient to bring the contract to an end. We also find that the other breaches collectively are also sufficient to bring the contract to an end. We therefore conclude that the respondent was entitled to dismiss the claimant. The employee was guilty of conduct so serious as to amount to a repudiatory breach of the contract of employment entitling the employer to summarily terminate the contract

106. While we have not upheld the claim and have found that the respondent was justified in its dismissal, we nonetheless feel sympathy for the claimant. The party's relationship clearly became very hostile at an early point. We conclude that the claimant was caught up in a difficult situation in which she took a side rather than acting as an employee. We also conclude that her reason for taking the actions she did were from a desire not to break the law or to be involved in matters that she considered to be unlawful. While we do not doubt that her motives or intentions were good, she was not permitted to do what she did. The respondent was in fact a stand-alone company and the claimant was obliged to obey the instructions of its director, Mr Firzli, and not those of Mr Mussafi.

Employment Judge McLaren
Date: 4 March 2021