EMPLOYMENT TRIBUNALS

Claimant: **Mr Harry Simmons**

Respondent: **Mr Mark Brown t/a Strongman Moustache**

Heard at: **Bristol** **On: 10, 11 and 12 January 2022**
16 February, 14, 16 March 2022
(writing)

Before: Employment Judge Midgley
Mrs G Mayo
Mr H Adams

Representation
Claimant: In person
Respondent: In person

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is:

1. The claims of unfair dismissal contrary to s.103A and 111 ERA 1996 are not well founded and are dismissed.

2. The claims of unlawful detriment contrary to s.47B ERA 1996 are not well founded and dismissed.

3. The claim of wrongful dismissal is not well founded and is dismissed.

4. The claim that the respondent made unauthorised deductions from the claimant's pay in respect of the wages due for the period 1 to 21 March 2020 and holiday pay are well founded and succeed.

5. The respondent failed to provide the claimant with a written statement of changes to his terms of employment when his pay was increased; the claimant's hourly wage at the time of his dismissal was £10.20. There are exceptional circumstances which have the effect that it is not just and equitable to make any award under s.38 EA 2002.

REASONS

Claims and Parties

1. By a claim form presented on 17 November 2020, the claimant brought claims of unfair dismissal contrary to sections 103A 1996, 111 ERA 1996, and unlawful detriment contrary to section 47B ERA 1996. In addition, the claimant brought claims for unlawful deduction of wages in respect of the period the 1st to 21st of March 2020 for deductions from his furlough payments and, in his final salary payment, for annual leave outstanding on the termination of his employment. The claims arose out of his employment by the respondent as a stylist at Strongman Moustache, a hairdressing salon in Bristol.

2. In the claim form the claimant did not set out what he alleged happened, but rather attached a document containing the text from a letter of advice which he had received in respect of his potential claims.

3. The respondent resisted the claims through a response presented on 8 January 2021 in which the respondent asserted that the claims were without merit and had been presented with the sole intent of defeating the respondent's claims for breach of restrictive covenants contained in the claimant's contract of employment.

Procedure, Hearing and Evidence

4. The claimant produced a bundle of 371 pages, and the respondent a supplementary bundle of 77 pages.

5. The claimant produced witness statements on his own behalf, and statements from Mr John Hanson and Miss Olivia Nash. In the event, on the second day of the hearing, the claimant confirmed that he was not going to call either Mr Hanson or Miss Nash; the respondent consented to that approach, having accepted that their evidence was not directly relevant to the issues to be decided. The respondent relied on the statement of Mr Brown.

6. Both the claimant and Mr Brown gave evidence on affirmation and answered questions from the other party and from the Tribunal.

7. When the claimant was cross-examined by Mr Brown in respect of his actions which could constitute a breach of the restrictive covenants in his contract of employment, we paused the questioning and warned the claimant of his right against self-incrimination. The claimant was content to continue to give evidence but elected to answer "no comment" to some questions. We address those answers and their effect in our findings below.

8. On the second day of the hearing the claimant disclosed, in accordance with our directions, the original copy of an email he had received from HMRC on 13 July 2020, the meta data for that email, and a screenshot of his inbox showing its receipt. No further questions were asked by the respondent in respect of that additional disclosure.

9. On the final day, the parties provided written submissions. Having read the parties' written submissions, the Tribunal understood that Mr Brown's defence in relation to the claims for unlawful deduction was that he had reviewed that claimant's time sheets and deducted pay in respect each period when the claimant was absent from the Premises, even for short periods. We therefore asked Mr Brown whether he had indicated at the time of those absence that they were to be unpaid. He confirmed that he had not. He further conceded that he had not paid the claimant for the period 1 to 21 March 2020 at full wages, but only at 80% of his pay, despite the claimant having worked his full contractual hours in that period. He accepted he may have made errors in relation to the annual leave payments.

10. We delivered Judgment, in the terms above under the heading 'Judgment' and provided very concise summary reasons for our findings. We expressed the view that it was appropriate to provide written reasons because we had found that the claimant had breach the restrictive covenants in his contract and we understood that proceedings were very likely to be issued in the County Court in respect of those breaches and others by the respondent. The Judge apologises for the time the reasons have taken to produce.

Factual Background

11. We make the following findings on the balance probabilities in light of the evidence we heard and read.

12. The respondent is the owner of the premises operating from 48 Bedminster Road, Bristol, "the Premises," from which he operated a hairdressing salon known as 'Strongman Moustache.' Strongman Moustache was a trading name of the respondent and not a limited company of itself. The business had been trading for approximately 14 years at the time of the events that are the subject of the claim.

13. The claimant was employed as an apprentice barber 30th May 2018. At the time of the claimant's employment, the respondent employed another hairdresser, Miss Olivia Nash, at the Premises; and operated a second hairdressing salon, "Barber Brown," in Broadmead in Bristol, initially through a limited company, Barber Brown Ltd.

<u>The terms of the claimant's contract</u>

14. The claimant's engagement was in accordance with the terms of the standard contract produced by the National Hairdressers Federation. Insofar as is relevant for the purpose of the claims, the contract provided as follows:

15. At clause 4.3:

> *The Employer has the right to deduct from your pay, or otherwise to require repayment by other means, any sum which you owe to the Employer including, without limitation, any overpayment of pay or expenses, loans made to you by the Employer, or any other item identified in this Statement and/or the Employee Staff Handbook as being repayable by you to the Employer.*

16. In addition, the contract provided for 22.5 days holiday, but the parties

agreed that the claimant's annual leave entitlement at time of the events of the claim was 28 days. The annual leave year began on 1 January and ended on 31 December. Clause 6.10 of the contract precluded untaken annual leave from being carried forward from one leave year to the next. By clause 6.11 if an employee were dismissed summarily for gross misconduct, the respondent was entitled to treat the employee as having taken any untaken annual leave in the order of additional contractual annual leave before statutory leave. By clause 6.12, the employer was entitled to deduct from the employee's final salary a sum equivalent to any annual leave taken in excess of the employee's entitlement.

17. The contract referred the employee to the respondent's disciplinary and grievance procedures, and at clause 9.1 identified that the procedures were contained in the National Hairdressers Federation Staff Handbook. At clause 9.2 employees were informed of the right to appeal in accordance with the disciplinary procedure that handbook contained.

18. The contract contained standard prohibitions on the use or disclosure of the respondent's confidential information (see clause 12), and restrictive covenants (clause 13). The covenants which have application to the current proceedings are contained in clause 13.2 ('competition with the employer during your employment'), 13.3 ('competition with your employer after employment'), and 13.4 ('solicitation of clients').

19. The nature of the restrictive covenant contained clauses in 13.3 and 13.4 was a prohibition for a period of six months, the geographical area in respect of the non-compete clause 13.3 was half a mile of the employer's place of work, and the identification of 'clients' for the purpose of clause 13.4 was expressed as follows:

> *"any customer or client of the Employer with whom you have provided professional services during the course of the last 12 months of your employment.*
>
> *For the avoidance of doubt, solicitation includes but is not limited to telling the clients or Customers the identity of any new Employer, providing your personal or new employers contact details and/or allowing your name or photograph to be used in conjunction with any advertising in any media.*
>
> *During your employment you must not:*
>
> *• give to or receive from customers or clients or prospective customers or clients your home, mobile or any other contact number or make telephone contact with customers or clients;*
>
> ** give to or receive from customers or clients or prospective customers or clients any email or social networking contact details or make email or social contact with customers or clients;*
>
> *• inform customers or clients or prospective customers or clients if you are leaving your employment with the Employer or give any information as to your future plans;*
>
> ** inform customers or clients or prospective customers or clients that you*

are working privately with a view to providing services or products to customers or clients in your own time.

You agree to make your new employer aware of the obligations in this section on commencement of employment."

20. By clause 13.5, a restrictive covenant concluded the solicitation of employees of the respondent. The restriction applied for six months in relation to any employee or individual engaged by the respondent in the previous 12 months prior to termination of the employee.

Reviews

21. The respondent was a certified provider of further education and was therefore subject to Ofsted inspections. In consequence, and in order to satisfy the requirements of the NVQ with which the claimant's apprenticeship was aligned, it was necessary for the claimant's progress under the apprenticeship to be reviewed and recorded. One function of such reviews was to ensure that the claimant understood the contract of apprenticeship and his rights and obligations under it, as well as any restrictions it imposed upon him. In addition, the claimant's work experience, training plan, career expectations and desires were discussed. The reviews were recorded and uploaded using a template document provided by the Virtual Learning Environment; the claimant used the same platform to upload his portfolio of work to complete his apprenticeship.

22. Copies of those reviews were provided to the Tribunal. During his cross-examination of the respondent, the claimant asserted that the respondent had fabricated or altered the reviews for the purposes of these proceedings. He accepted that he had had such reviews, but denied that they were as regular as recorded, and further denied that there had ever been any discussion of his contract or the respondent's disciplinary procedures or staff handbook with him during them. He did not advance any evidence to support the serious accusation he made. We unhesitatingly reject that argument: we are satisfied that the records of the reviews are true and accurate copies of the reviews that were conducted by Lucy Simpson and subsequently uploaded to the Virtual Learning Environment ("VLE") Portal.

23. The discussions recorded within the reviews reflect the claimant's aspiration to be a manager and other matters which he accepts were discussed with him. They do not contain any grammatical or spelling errors which would suggest that they were produced by the claimant, and the claimant could offer no sensible basis for suggesting that they had been altered or manufactured, but merely said that web page had 'edit' in its title, and the sections were in 'windows' that could have been edited. That was a consistent theme of his evidence: whenever a document contained matters which were contrary to his interests or his case, he would allege that it had been manufactured or edited by the claimant. In the event the only individual who had altered a document was the claimant himself; he admitted that he had used a PDF editor to alter a copy of the email of 13 July 2020 from HRMC, erroneous adding the date as 'Monday 12 July 2020.'

24. The VLE review of 8 February 2019 demonstrates that the claimant

received an induction and regular reviews and explanations of his contract, including the nature and effect of the restrictive covenants, and the staff handbook and disciplinary procedure. During a discussion of the claimant's long-term goals, the claimant indicated his desire to obtain qualifications and work towards a manager's role within the salon. The claimant repeatedly reported and the review consequently recorded how supportive and helpful the claimant had experienced the respondent to be, which we note is in stark contrast to the picture of the respondent as someone who was given to bullying and harassing his staff that the claimant seeks to create in his witness statement.

25. The claimant asserts that he was promoted to the position of manager within the premises in approximately January 2020. The respondent maintains that the claimant was still an apprentice at that time, but there were discussions in 2019 and January 2020 about the possibility of the claimant taking on a managerial role after the successful completion of his apprenticeship. Again, we largely preferred the respondent's evidence on this issue (for the reasons detailed below): there was an agreement that the claimant would take over some of the day-to-day management functions of the Premises but was not to become a manager of the business per se with strategic responsibility.

26. It was the respondent's practice to conduct regular one-to-one meetings with its employees. Those one-to-ones were conducted by Mr Brown. In January 2020 Mr Brown conducted a one-to-one with the claimant during which discussed the claimant's need for time off for medical appointments, stating "can we make sure anything like bloods for regular hospital appointments are well organised, or as organised as they can be so as not have lost opportunity inside." [Sic] ('Inside' was a reference to salon appointments for the claimant.)

27. In addition, he discussed the claimant's desire to move into management. Mr Brown noted that the claimant had taken over some responsibility for stock buying and for managing Miss Nash, and that the claimant appeared to believe that those were functions of the manager, but, observed that the claimant could not be a manager until he had completed his apprenticeship, adding that most of the matters which the claimant regarded as management functions were really elements of self-management, rather than the true functions of a manager. He agreed, however, to increase the claimant's responsibilities to assist him with that aspiration and set out the functions that were performed by managers in some depth, discussing the claimant's experience in those fields. Mr Brown said he would be willing to set up a planning day to consider how the claimant could be brought into management, possibly as an assistant manager initially, but only once he had completed his apprenticeship.

28. Lastly, the one-to-one recorded that there was a two-year plan by which the respondent hoped to employ three full-time hairdressers at the premises.

<u>The respondent's social media accounts and client data</u>

29. The respondent had an Instagram and a Facebook account in the name of Strongman Moustache which was used to promote the respondent's business,

providing notice of promotions and pictures of haircuts which had been performed at the premises. Mr Brown was not particularly savvy in terms of the use of and operational those social media platforms. Miss Nash had a significantly larger following for her social media accounts than the respondent's business did. In March 2020 Mr Brown therefore discussed with Miss Nash whether her account could be linked to the respondent's account to increase and expand the numbers exposed to the respondent's business account.

30. As part of the increase in the responsibilities of his role and given his greater understanding of and familiarity with the social media platforms, the claimant was permitted to maintain the respondent's social media accounts, responding to messages, and uploading pictures to the platforms.

31. The claimant had his own Facebook and Instagram accounts, the latter with the handle '@HarrySimmons_Barber.' Without discussing the matter with Mr Brown, the claimant inserted his Instagram handle into the Strongman Moustache Instagram account profile. The handle was not revealed when messages were reviewed unless the profile pane on the Instagram page was clicked upon. In consequence Mr Brown was unaware of the change. In addition, the claimant posted pictures of the haircuts he had performed on the respondent's clients on his Facebook account, which he altered to change the account name to "HarrySimmons (Barber Profile)." Furthermore, the claimant created a Facebook page for 'Skeleton Barbers' on 30 October 2019. He did not inform Mr Brown of any of those matters.

32. The respondent used a software system, known as "Nearcut" to maintain a log of its clients, their contact details, and their bookings. The software enabled the respondent to send SMS messages as a mailshot to all its clients.

33. During his employment the claimant created his own database of client numbers on his mobile phone. In some instances that act was innocent, in the sense that the claimant had contact with clients of the respondent's business for the purposes unconnected to haircuts (for example one such client had a business that provided paint which was used by the respondent's business). However, we are satisfied that the claimant deliberately and knowingly compiled a database of the respondent's clients contact details on his phone.

34. He did not maintain the contact details separately to those of his family and friends but listed them in a single address book on his mobile telephone. The claimant may initially have naively formed the view that if he met someone through the respondent's business, and they subsequently became friends, they were an acquaintance of his, rather than a client of the business. We are entirely satisfied, however, that when he recorded their contact details in his telephone he knew and understood that they were clients of the respondent but nevertheless intended to compile his own database of contact details for his own later use. That is because it was always possible for the claimant to maintain contact with those individuals through the messaging services on the respondent's social media accounts, but he chose not to do so, but rather to use his personal accounts and numbers.

35. Secondly, we are equally satisfied that the client details recorded on the claimant's telephone were not limited to those clients with whom he had

become friendly and/or who had offered the claimant their numbers, but also consisted of those who, like Mr Nick Benger (whose circumstances are addressed below), had not given the claimant their numbers or made contact with him, and whose details the claimant could only have taken from the respondent's Nearcut database. He did that deliberately and without the respondent's knowledge or permission.

The closure of the respondent's business

36. The relationship between the claimant and the respondent was a positive and convivial one, as is evidenced by the WhatsApp messages which were presented to us. The claimant was a hard and organised worker with a busy 'column' of clients. In March 2020 the respondent was forced to cease trading because of the Covid-19 pandemic. The claimant had worked his usual hours between 1 and 21st of March of approximately 39 hours a week.

37. The claimant attended a further VLE review on 31 March 2020 which was again conducted by Lucy Simpson. At that stage the claimant had completed his NVQ and was working to complete his EPA. The claimant again confirmed that he was aware of his rights and obligations under the contract, including the disciplinary policy. He identified his specific medium target as management of the shop and described his long-term target as setting up his own barbershop, indicating that he was researching what was required to do so; a target of 30 June 2020 was agreed for that research.

The first alleged protected disclosure

38. As the likelihood of a national lockdown was recognised as likely in the UK, Mr Brown and the claimant discussed its potential effects on the business. On approximately the 20 March 2020, the claimant and the respondent spoke by telephone and by WhatsApp in that context. At that stage the exact details of the furlough scheme had not been released to the public but there was discussion of the possibility in the media. In the telephone call Mr Brown suggested to the claimant that he would backdate the claim for furlough payments to the 1 March 2020 (which his accountant advised was permitted, although he did not discuss that with the claimant) with the result that the employees would be paid 80% for March in the March pay round which was due on 5 April 2020. The claimant respondent angrily, stating that was 'fraud' as he should be paid 100% for the days that he had worked, but both men understood that the claimant was also suggesting that backdating an application for furlough would be fraud.

39. Between the end of March and early April 2020, Mr Brown spoke with all members of his staff to discuss the implication of the lockdown on their salaries. Mr Brown and the claimant spoke again on 30 or 31 March after the national lockdown had occurred. Mr Brown confirmed that staff would be furloughed and paid at 80%. The claimant was unhappy, saying he had children to feed, and should be put 'at the top of the queue' and paid first as he was managing the shop, and that he should be paid 100% of his wages and, if it were necessary to do so to achieve that end, the respondent should not pay Olivia Nash. Mr Brown called the claimant a 'prick' and ended the call.

40. On 1 April 2020 the claimant sent a WhatsApp message to Mr Brown

apologising, stating, "sorry mate stressful time atm just needed clarity with everyone didn't mean to cause you stress." Mr Brown responded, accepting the apology, and stating that he "did not appreciate being put on for what I'm doing but accept this is stressful and hard for everyone. I will update you as soon as I know what and how this works."

41. By 1 April 2020, Mr Brown had completed discussions with all his staff in relation to their using annual leave to be paid the 20% shortfall in wages they would experience when they were placed on furlough. All the respondent's staff, both at the Premises and at Barber Brown, agreed to that suggestion.

42. On 3 April 2020, Mr Brown emailed all his staff confirming that arrangement and how staff would be paid until he received the further payments. He wrote,

> *"I've booked sometime next week with the accountants and Bill to go through cash flow and get some professional advice and support…*
>
> *What that means is that the cash flow for two shops is reliant on my pot of savings. Therefore I shall be taking that amount, dividing it by the number on both pay roll including me, and paying whatever % this works out to. This is the fairest way to distribute the money available to all, as we are all equally at the top of the list. When the Grant money hits the accounts I will make an immediate payment that brings your wages up to the full furlough amount*."

43. The reference to all staff being "at the top of list" was reference to the claimant's comment during his discussion with Mr Brown in March.

44. On or about 17 June Mr Brown delivered a PowerPoint presentation to all staff via Zoom in which he addressed pay, the plan for the resumption of work in July 2020 and the measures that would be put in place to ensure their safety. The presentation confirmed that the staff would be paid 'for holiday time during furlough,' and in one slide noted "you lot have been paid 80% and some holiday at 100%.'

45. On 25 June Mr Brown and the claimant discussed by WhatsApp pricing for the cuts and services which they were permitted to offer in anticipation of the Premises reopening on 4 July 2020. The claimant was not happy with the pricing, regarding it as too expensive.

46. On 30 June the claimant and the respondent had a prearranged one to one meeting which had been delayed from 23 June; it was conducted by telephone. During the discussion the claimant told Mr Brown that he had discussed the proposed prices with clients who had said that they thought they were too high, and he suspected that whilst they might come for one cut they would not return for a second. Mr Brown told the claimant that the decision on pricing was his responsibility, not the claimant's, and that he should not be discussing pricing with the clients or generally talking to them outside of the business as that "crosses a serious line." Mr Brown then explained that top up holiday payments would be recorded as holiday pay. The claimant agreed to that approach.

47. Mr Brown produced a record of the call which the claimant alleged had

been fabricated, although he accepted that all the matters detailed in it had been discussed with him, save the references to his discussion with clients about pricing. However, we find it to be a true and accurate record – it is clear from the WhatsApp messages that the claimant was concerned about pricing, and that all the other matters recorded in the note were previous discussed between the two men and were by admission discussed on the day. The claimant had not suggested at any stage prior to cross-examination that the document was not a true record or that it had been altered.

48. On 1 July 2020 at 11:32 Mr Brown informed the claimant by WhatsApp that he had sent an SMS to all clients. At 12:12 that day, the claimant sent an SMS to all the contacts in his phone which read as follows:

> *"Hi it's Harry Simmons from strongman moustache this is my personal number so delete the old number you had for me (anoying having 2 phones) hope your all okay , the website for strongman moustache is up and running sorry for the price increase this was out of my control, if you have any questions or concerns give me a message hope to see you all soon."* [sic]

49. The message ended with a skull emoji. The claimant did not tell Mr Brown that he intended to or had sent the message.

The second protected disclosure

50. On 12 July 2020 the claimant completed an online HMRC furlough fraud report in which he complained that the respondent had backdated the claim for furlough. The claimant did so largely if not entirely for personal motives: first and primarily because he was intending to leave the respondent's employment and set up in competition and was seeking a mechanism to avoid the restrictive covenants contained in his contract; secondly because he was disillusioned with the respondent as a consequence of their discussion on 30 June 2020 and the respondent's proposal in the PowerPoint presentation that commission would be calculated across the Premises' receipts (rather than individual employee's receipts), which would lead to a reduction in the claimant's earnings. He hoped that if the respondent were found to have committed fraud, he would be able to argue that that was a repudiation of his contract, which would release him for the obligations in the restrictive covenant. He did not tell Mr Brown that he had completed the referral. The claimant received an automated response by email on 13 July 2020.

51. In preparing the documents for the bundle, the claimant oddly elected not to print the email or convert it to a PDF but to create a screen shot which removed the date of the document. He then used PDF editing software to add the date back into the PDF but in error recorded the date as "Mon 12 July 2020."

The respondent's discovery of the claimant's conduct

52. On 21 July 2020, Jessica Rendle, one of the stylists at the Barber Brown premises resigned, giving notice which expired on 11 August 2020. Her resignation letter stated that one of her options was renting a chair in a salon "closer to home," and she repeatedly thanked Mr Brown for his support and assistance; she made no complaint of bullying or harassment.

53. On the same day, 21 July 2020, the claimant sent a second SMS to all the contacts in his telephone, stating,

> *"To all my clients, I will be doing home cuts for anyone who doesn't want to pay marks prices. Available upon request, times and dates negotiable, but will still be working in the shop if that's preferred."*

54. Mr Benger, who received the message, tried to raise his concerns with Mr Brown; he sent Mr Brown a Facebook message, attaching the text messages of 1st and 21 July 2021. He wrote,

> *"I'm one of the regulars at Strongman. I want to let you know about this because as a fellow small business owner this kind of stuff infuriates me... and maybe I've got the wrong end of the stick and Harry's sent me this with permission. If so, my apologies.*
>
> *I've attached texts Harry's sent me suggesting I book with him privately instead of through Strongman and offering to do it cheaper."*

55. Mr Brown did not see the message because he did not monitor the respondent's Facebook account.

23 July 2021

56. On 23 July 2021, Bess Wood contacted Mr Brown (using the respondent's Instagram messenger) asking whether the respondent had any vacancies for hairdressers. On the same day, Mr Benger emailed Mr Brown directly raising his concerns about the claimant's conduct in identical terms to those on 21 July. Mr Brown saw the message and called Mr Benger, who explained that he had never given the claimant his mobile number. He confirmed that in an email on 23 July 2021 and provided the Harry Simmons (Barber) Facebook page profile which Mr Simmons had added him to, again without any request or permission to do so from Mr Benger.

57. Consequently, Mr Brown sent the claimant a text message, pretending to be a prospective client asking for a haircut at his house, hoping to obtain evidence confirming that position reflected in the text message which Mr Benger had received. The claimant suspected that Mr Brown was the sender and so did not offer to do so, but instead suggested he book through the shop.

58. Mr Brown therefore sent the claimant an email that day, 23 July 2021, suspending him and inviting him to a disciplinary hearing by zoom the following day. The disciplinary allegations were clearly set out in the email (as detailed below) but the claimant was not reminded of his right to be accompanied. In relation to the allegation Mr Brown wrote:

> *"It has come to my attention that you have been soliciting clients outside of the workplace who are current clients with Strongman moustache, your employer. It is clear to me that you have used your position to gain their details through the salon appointment system. This is a breach of GDPR, in addition, as per you contract, which you have indicated on several occasions that you have read, this is a clear breach."*

59. We note that Mr Brown recorded that the claimant had confirmed on

several occasions that he had read his contract. That was a reference to the discussions during the reviews and 1:2:1s as detailed above.

The disciplinary hearing

60. The disciplinary hearing took place on 24 July 2021 by zoom. It was recorded. Mr Brown produced a transcript of the discussion which we accept as being both accurate and complete. During the hearing the following relevant matters were discussed: when Mr Brown informed the claimant that was a serious issue to discuss, the claimant merely replied "cool". The claimant confirmed that he had read and understood his contract, but the that the contract was not reasonable and that he should have been permitted to obtain independent legal advice before signing it. The claimant also sought to suggest that this was in the contract was not "the law" and that he would test it in court. The claimant challenged the process that Mr Brown had followed and argued that he should have been invited to an investigation meeting before the disciplinary hearing. All he accepted that he had contacted clients during lockdown through Instagram, but refused to disclose details, arguing he could speak to who he wanted. He argued that as he had set up the respondent's Instagram account it was his he was entitled to use it as he wished. He denied that he had invited the respondent's clients to follow him on any other social media platform that he had contacted them through any other form of social media, including by email. That was of course untrue.

61. The claimant suggested that Mr Brown knew that he had been contacting clients through the respondent's Instagram account, and that he was only making an issue of it at this stage because at the start of lockdown the claimant had alleged that he was fraudulent.

62. Mr Brown asked the claimant whether he had contacted the respondent's clients and conducted haircuts outside work; the claimant insisted that he had only cut his friends' and children's hair. Mr Brown showed the claimant the messages from Mr Benger. The claimant accepted that he had sent the text messages to all the contacts in his telephone. The claimant argued that Mr Benger had given the claimant's details because he was a dog trainer, and the claimant was interested in training his dog, and that was why his details were in his telephone. Mr Brown pointed out that that was not consistent with Mr Benger's account to him, and the claimant then suggested that he had taken the number from Mr Benger's business website.

63. The claimant reverted to arguing that the terms of his contract which precluded him from approaching clients were unenforceable and lawful. When Mr Brown informed him that the contract was a standard contract, the claimant then sought to argue that Mr Brown had edited it. If he was seeking to suggest that Mr Brown had added the covenants or altered them, the allegation was as wild as it was unfounded. The claimant then became abusive, and referred to the fact that two employees had resigned from Mr Brown's employment (that was right; each of them was to rent a chair with the claimant at the premises which held itself out as Skeleton barbers, as detailed below).

64. Mr Brown informed the claimant that he was summarily dismissed for gross misconduct. The claimant insisted that he would do what he wanted

and invited Mr Brown to sue him. There was a brief discussion of payment of outstanding annual leave, less deductions for the leave paid to top up wages during furlough, before Mr Brown ended the meeting, Mr Simmons laughed and held up his thumb at Mr Brown.

65. Mr Brown's evidence, which we accept, was that had the claimant accepted what he had done and apologized, Mr Brown would have tried to find a way to maintain his employment; the claimant was, as Mr Brown, suggested a good and well-organized worker and the business needed such workers. However, given the claimant's aggressive and abusive responses, his complete lack of contrition or remorse, which he described as the worst he had experienced in twenty years of business and which we accept was striking, he lost of trust and confidence in the claimant, and so concluded that the only possible option was to dismiss him.

66. Mr Brown therefore wrote a letter to the claimant notifying him of his dismissal for gross misconduct with effect from 24 July 2020. He detailed the way the claimant had breached the restrictive covenants in his contract and the claimant's reaction when those matters were raised with him. He encouraged the claimant to take legal advice about those matters and clauses 12 and 13 of his contract of employment. The letter did not advise the claimant of his right of appeal.

The claimant's post termination actions

67. On 4 August 2021 the claimant set up an Instagram account in the name of Skeleton Barbers, which read "coming soon – Bedminster".

68. In approximately September 2021 he commenced work as a hairdresser at premises at East Street, Bedminster, which are within 100 metres of the Premises, under the business name of "Skeleton Barbers". The premises are let by Mr P Reeves, a former client of the respondent. The claimant, Miss Nash (and possibly Miss Rendle) all rented chairs from Mr Reeves. He cut the hair of several individuals who had formerly been clients of the respondent whose hair he had previously cut.

69. On 2 October 2021 Mr Brown wrote a letter before action to the claimant in relation to his breach of the restrictive covenants.

70. On 7 October 2021, the claimant replied by letter. In the letter he suggested for the first time that "my employer has committed repudiatory breaches of contract, thereby causing the contractual restrictions to fall away." The claimant did not draft the letter, did not understand this and was unable to explain what a "repudiatory breach" was when asked by the Tribunal. In our view the letter was clearly written to protect the claimant from the consequences of his breach of the restrictive covenants.

The Issues

Unfair dismissal

71. What was the reason for his dismissal? Mr Brown says that it was on grounds of his conduct in contacting clients of the business.

72. If so, did Mr Brown act reasonably in all the circumstances in treating that as a sufficient reason to dismiss him? The Tribunal will usually decide, in particular, whether:

72.1. Mr Brown had a genuine belief in his misconduct;

72.2. made on reasonable grounds;

72.3. following a sufficient investigation and a fair process; and

72.4. dismissal was 'within the range of reasonable responses' open to an employer in the circumstances?

73. If the dismissal was unfair, did Mr Simmons contribute to the dismissal by his conduct? This requires Mr Brown to prove, on the balance of probabilities, that he actually committed the alleged misconduct.

74. If the procedure was unfair, what difference would a fair procedure have made to the outcome?

Public Interest Disclosure

75. What did Mr Simmons say or write? He relies on:

75.1. a phone call to Mr Brown in late March 2021 taking issue with the decision to put him on furlough from 1 March. He says that he accused Mr Brown of fraud for only paying 80% of his wages from 1 March, despite him working to 21 March, and removing all information from the computer system of work done in this period.

75.2. An online report to HMRC on 12 July 2021, also alleging fraud.

76. Did that telephone call or HMRC report disclose information which in his reasonable belief tended to show that;

76.1. a criminal offence had been committed

76.2. Mr Brown had failed to comply with a legal obligation to which he was subject, or

76.3. that information relating to either of these issues had been or was likely to be concealed?

77. If so, did he reasonably believe that the disclosure was made in the public interest? He relies on the fact that if his wages were wrong then others at work were affected too and it was a misuse of the furlough scheme.

78. Has Mr Simmons produced enough evidence to raise the question whether the reason for his dismissal was the protected disclosure(s)?

79. If so, can Mr Brown then satisfy the Tribunal of its reason for the dismissal, namely, breach of restrictive covenants?

80. If not, does the Tribunal accept that it was the protected disclosure(s) or some other reason?

81. Mr Simmons says that he was subjected to a detriment by Mr Brown or

another worker as a result in that:

81.1. he was subject to a disciplinary procedure; and

81.2. dismissed.

82. Dismissal cannot amount to a detriment for these purposes as this is covered by section 103A (above). The disciplinary procedure appears to be confined to the disciplinary hearing itself.

Breach of contract (notice pay)

83. Since Mr Brown dismissed Mr Simmons without notice, can he show that he was entitled to do so because he committed gross misconduct? (

Statement of employment particulars

84. When these proceedings were begun, was Mr Brown in breach of its duty to give Mr Simmons a written statement of employment or of a change to those particulars?

85. If so, absent exceptional circumstances, the Tribunal must award two weeks' pay and may award four weeks' pay.

Unlawful deduction from wages

86. Mr Simmons alleges that there were ` unlawful deductions from his wages:

86.1. the 20% shortfall from 1 to 21 March 2020;

86.2. a shortfall in the subsequent furlough amounts, to be confirmed; and

86.3. a deduction of £765 for overpaid holiday made on termination.

87. Did the respondent pay the claimant less than was properly payable on those occasions, or did the respondent make deductions from the claimant's pay? If the latter, did a term of the claimant's contract permit the deductions to be made or had the respondent provided notice in writing to the claimant of the deduction prior to the deduction(s) being made?

The Relevant Law

Protected disclosures

88. The concept of "protected disclosure" is defined by section 43A of the 1996 Act:

> *"In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H."*

89. A qualifying disclosure is in turn defined by section 43B:

"*In this Part 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."

90. The disclosure must be a disclosure of information. In practice, many whistle-blowing disclosures raise concerns, or complaints, or make allegations. This does not, however, prevent them from falling within the terms of the section. As Sales LJ observed in Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436; [2019] ICR 1850 at para. 35, the question is whether the statement or disclosure in question has "a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in the subsection". He added that whether this is so "will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case" (para. 36). A bare statement such as a wholly unparticularised assertion that the employer has infringed health and safety law will plainly not suffice; by contrast, one which also explains the basis for this assertion is likely to do so.

91. Whether such words are to be regarded as “disclosure of information” within the meanings of ERA section 43B(1) depends on the context and the circumstances in which they are spoken. The decision as to whether such words which include some allegations cross the statutory threshold of disclosure of information is essentially a question of fact for the Employment Tribunal which has heard evidence. Eiger Securities LLP v Miss E Korshunova [2017] ICR 561 EAT at para 35

92. Where a Claimant argues that the information tended to show a breach of legal obligation “Save in obvious cases, if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. …” (see Blackbay Ventures Ltd v Gahir [2014] IRLR 416 per HHJ Serota QC at paragraph 98).

93. However, neither the EAT was not referred to Babula v Waltham Forest College [2007] ICR 1045, CA in either Blackbay or in Eiger Securities, and although it was referred to the case in NASUWT v Harris (2019) UKEAT0061/19, Soole J did not address the potential inconsistency and

tension between the decisions in Blackbay and Babula (see para 62 for his analysis). Blackbay was relied upon by the EAT in Harris and applied by Soole J to allegations of the commission of criminal offences.

94. The identification of the legal obligation "does not have to be detailed or precise but it must be more than a belief that certain actions are wrong. Actions may be considered to be wrong because they are immoral, undesirable or in breach of guidance without being in breach of a legal obligation." The decision of the Tribunal as to the nature of the legal obligation the claimant believed to have been breached is a necessary precursor to the decision as to the reasonableness of the Claimant's belief that a legal obligation has not been complied with" (see Eiger at paras 46 to 47 respectively).

95. In Twist DX v Armes UKEAT/0030/20/JOJ (V) Linden J returned to the issue of disclosures of information. He concluded that it is not necessary that a disclosure of information specifies the precise legal basis of the wrongdoing asserted.

96. The worker does not have to show that the information did in fact disclose wrongdoing of the kind enumerated in the section; it is enough that he reasonably believes that the information tends to show this to be the case. As Underhill LJ pointed out in Chesterton Global Ltd v Nurmohamed [2017] EWCA Civ 979; [2017] IRLR 837 at para 8, if the worker honestly believes that the information tends to show relevant wrongdoing, and objectively viewed it has sufficient factual detail to be capable of doing so, it is very likely that the belief will be considered reasonable.

97. Having reviewed the law we conclude that the following propositions apply when considering whether a claimant has made a protected disclosure;

97.1. First there must be a disclosure of information. That may include allegations, complaints and allegations, provided the combined effect has a "sufficient factual content and specificity" (Cavendish Munro Professional Risk Management Ltd v Geduld [2010] ICR per Sales LJ at para 35;

97.2. Secondly, that information must objectively tend to show, in the claimant's reasonable belief that one of the qualifying grounds exists. The Tribunal's task is to assess the information in context and against the prevailing circumstances. Those circumstances:

97.2.1. Permit a higher objective test where the individual is a professional (see Korashi v Abertawe Morgannwg University Local Health Board [2012] IRLR 4 per HHJ McMullen at para 62);

97.2.2. Permit the Tribunal to read across documents and consider statements to create an objective picture of what would reasonably have been believed to have been understood from a written or verbal statement.

97.3. Thirdly, where the qualifying ground relied upon is a breach of legal obligation: -

97.3.1. ***Either*** the information must identify the legal obligation,

although the "identification of the obligation does not have to be detailed or precise, but it must be more than a belief that certain actions are wrong" (Eiger at paras 46-47; Twist DX).

97.3.2. *Or*, if the obligation is not identified it must be objectively "obvious" from the information disclosed (Blackbay per HHJ Serota QC at para 98);

97.4. Fourthly, it does not matter whether the claimant's belief is wrong, if objectively his/her belief that he/she has identified a breach as detailed above is reasonable (Babula per Wall LJ at para 79 and Jesudason v Alder Hay Children's NHS Foundation Trust [2020] EWCA Civ 73 per Elias LJ at para 21.)

97.5. Finally, the articulation of the breach of legal obligation in that sense is a "necessary precursor" for a claimant to establish a *reasonable* belief that the information tends to show that there had been such breach.

98. ["Depending on the circumstances, it may be permissible to distinguish between the disclosure of the information and the manner or way in which it was disclosed. …" (see Panayiotou v Chief Constable of Hampshire Police [2014] IRLR 500 per Mr Justice Lewis at paragraph 49).]

Public Interest

99. In Chesterton Global Ltd (t/a Chestertons) and anor v Nurmohamed (Public Concern at Work intervening) [2018] ICR 731, CA, the following factors were identified by the Court of Appeal as being relevant to the degree of public interest in a disclosure where the focus of the rights complained about were the private law rights of an employee:

99.1. the numbers in the group whose interests the disclosure served

99.2. the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed

99.3. the nature of the wrongdoing disclosed, and

99.4. the identity of the alleged wrongdoer.

Detriment

100. The right not to be submitted to a detriment on the grounds of having made a protected disclosure is provided within s.47B ERA 1996. In order to bring a claim under section 47B, the worker must have suffered a detriment. It is now well established that the concept of detriment is very broad and must be judged from the viewpoint of the worker. There is a detriment if a reasonable employee might consider the relevant treatment to constitute a detriment. The concept is well established in discrimination law and it has the same meaning in whistle-blowing cases. In Derbyshire v St. Helens MBC [2007] UKHL 16; [2007] ICR 841 paras. 67-68 Lord Neuberger described the position thus:

"67. … In that connection, Brightman LJ said in Ministry of Defence v

Jeremiah [1980] ICR 13 at 31A that "a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment".

68. That observation was cited with apparent approval by Lord Hoffmann in Khan [2001] ICR 1065, para 53. More recently it has been cited with approved in your Lordships' House in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337. At para 35, my noble and learned friend, Lord Hope of Craighead, after referring to the observation and describing the test as being one of "materiality", also said that an "unjustified sense of grievance cannot amount to 'detriment'". In the same case, at para 105, Lord Scott of Foscote, after quoting Brightman LJ's observation, added: "If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice"."

101. Some workers may not consider that particular treatment amounts to a detriment; they may be unconcerned about it and not consider themselves to be prejudiced or disadvantaged in any way. But if a reasonable worker might do so, and the claimant genuinely does so, that is enough to amount to a detriment. The test is not, therefore, wholly subjective.

"On the ground that"

102. There must be a link between the protected disclosure or disclosures and the act, or failure to act, which results in the detriment. Section 47B requires that the act should be "on the ground that" the worker has made the protected disclosure. The leading authority is the decision of the Court of Appeal in Manchester NHS Trust v Fecitt [2011] EWCA 1190; [2012] ICR 372 where the meaning of this phrase was considered by Elias LJ (atpara.45):

"In my judgment, the better view is that section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistle-blower."

103. As Lord Nicholls pointed out in Chief Constable of West Yorkshire v Khan [2001] UKHL 48; [2001] ICR 1065 para.28, in the similar context of discrimination on racial grounds, this is not strictly a causation test within the usual meaning of that term; it can more aptly be described as a "reason why" test:

"Contrary to views sometimes stated, the third ingredient ('by reason that') does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the 'operative' cause, or the 'effective' cause. Sometimes it may apply a 'but for' approach. For the reasons I sought to explain in Nagarajan v London Regional Transport [2001] 1 AC 502, 510-512, a causation exercise of this type is not required either by section 1(1)(a) or section 2. The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminator act as he did? What, consciously or

unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact."

104. Liability is not, therefore, established by the claimant showing that but for the protected disclosure, the employer would not have committed the relevant act which gives rise to a detriment. If the employer can show that the reason he took the action which caused the detriment had nothing to do with the making of the protected disclosures, or that this was only a trivial factor in his reasoning, he will not be liable under section 47B.

S.103A

105. The right not to be dismissed for making a protected disclosure is contained within section 103A which provides:

> "An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure."

106. "This creates an anomaly with the situation in unfair dismissal where the protected disclosure must be the sole or principal reason before the dismissal is deemed to be automatically unfair. However, it seems to me that it is simply the result of placing dismissal for this particular reason into the general run of unfair dismissal law" see Kuzel v Roche Products Ltd [2008] ICR 799 per Elias J at para 44.

107. The focus must be on the knowledge, or state of mind, of the person who actually took the decision to dismiss, as, "by S.103A, Parliament clearly intended to provide that, where the real reason for dismissal was whistleblowing, the automatic consequence should be a finding of unfair dismissal. In searching for the reason for a dismissal, courts need generally look no further than at the reasons given by the appointed decision-maker. …[however] If a person in the hierarchy of responsibility above the employee determines that, for reason A, the employee should be dismissed but that reason A should be hidden behind an invented reason B which the decision-maker adopts, it is the court's duty to penetrate through the invention rather than to allow it also to infect its own determination." Royal Mail Group Ltd v Jhuti 2019 UKSC 55, SC.

Unfair dismissal s.98 ERA 1996

108. The right not to be unfairly dismissed is governed by section 98 ERA 1996 which provides in so far as is relevant:

> *98 General.*
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

109. The reason for the dismissal relied upon was conduct which is a potentially fair reason for dismissal under section 98(2)(b) of the Employment Rights Act 1996 ("the Act").

110. The principal reason for the dismissal is "a set of facts known to the employer, or it may be beliefs held by him, which cause him to dismiss the employee" (see Abernethy v Mott, Hay and Anderson [1974] ICR 323).

111. We have considered the cases of Post Office v Foley, HSBC Bank Plc (formerly Midland Bank plc) v Madden [2000] IRLR 827 CA; British Home Stores Limited v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Limited v Jones [1982] IRLR 439 EAT; Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR; Nelson v BBC (No 2) [1980] ICR 110 CA and Polkey v A E Dayton Services Ltd [1988] ICR 142 HL. The Tribunal directs itself in the light of these cases as follows.

112. The starting point should always be the words of section 98(4) themselves. In applying the section, the Tribunal must consider the reasonableness of the employer's conduct, not simply whether it considers the dismissal to be fair.

113. In judging the reasonableness of the dismissal, the Tribunal must not substitute its own decision as to what was the right course to adopt for that of the employer. In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might take one view, and another might quite reasonably take another. The function of the Tribunal is to determine in the particular circumstances of each case whether the decision to dismiss the employee fell within the band of

reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band the dismissal is fair: if the dismissal falls outside the band it is unfair.

114. The correct approach is to consider together all the circumstances of the case, both substantive and procedural, and reach a conclusion. A helpful approach in most cases of conduct dismissal is to ask three questions (as to the first of which the burden is on the employer; as to the second and third, the burden is neutral):

(i) whether the employer believed the employee to have been guilty of misconduct;

(ii) whether the employer had in mind reasonable grounds on which to sustain that belief; and

(iii) that the employer, at the stage (or any rate the final stage) at which it formed that belief on those grounds, had carried out as much investigation as was reasonable in the circumstances of the case.

115. The band of reasonable responses test applies as much to the question of whether the investigation was reasonable in all the circumstances as it does to the reasonableness of the decision to dismiss.

116. When considering the fairness of a dismissal, the Tribunal must consider the process as a whole Taylor v OCS Group Ltd.

Contributory conduct

117. Compensation for unfair dismissal is dealt with in sections 118 to 126 inclusive of the Act. Potential reductions to the basic award are dealt with in section 122. Section 122(2) provides:

> "Where the Tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the Tribunal shall reduce or further reduce the amount accordingly."

118. The compensatory award is dealt with in section 123. Under section 123(1)

> "the amount of the compensatory award shall be such amount as the Tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer".

119. Potential reductions to the compensatory award are dealt with in section 123. Section 123(6) provides:

> "where the Tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount

of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

120. A similar power is contained in relation to the basic award in s.122(2) ERA (as quoted above) in relation to any conduct which occurred before the dismissal, however, that provision does not contain the same causative requirement which exists in s.123(6); the Tribunal therefore has a broader discretion to reduce the basic award where it considers that it would be just and equitable (see Optikinetics Ltd v Whooley [1999] ICR 984, EAT).

121. Three factors must be satisfied if the Tribunal is to find contributory conduct (see Nelson v BBC (No.2) 1980 ICR 110, CA):

121.1. the conduct must be culpable or blameworthy

121.2. the conduct must have caused or contributed to the dismissal, and

121.3. it must be just and equitable to reduce the award by the proportion specified

122. Provided these three factors are satisfied, the fact that the dismissal was automatically, as opposed to ordinarily, unfair is of no relevance (Audere Medical Services Ltd v Sanderson EAT 0409/12).

123. In determining whether conduct is culpable or blameworthy, the Tribunal must focus on what the employee did or failed to do, not on the employer's assessment of how wrongful the employee's conduct was (Steen v ASP Packaging Ltd [2014] ICR56, EAT).

Unauthorised deductions from wages

124. Section 13 ERA 1996 provides:

(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.

(2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly

payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion

125. In order for a payment to fall within the definition of wages properly payable,' there must be some legal entitlement to the sum (New Century Cleaning Co Ltd v Church [2000] IRLR 27, CA).

Discussion and Conclusions

Unfair dismissal

126. We first consider the the reason for the dismissal. The respondent argues that it was misconduct, namely the claimant's actions in contacting its clients breached the restrictive covenants in his contract of employment, and his actions during the consequent disciplinary hearing destroyed the respondent's trust and confidence in him. The claimant alleges that it was the protected disclosures.

127. We are satisfied that the reason was the claimant's conduct as described in our findings above. We reject the claimant's argument that the reason or principal reason was the protected disclosures: the respondent was unaware of the second protected disclosure at the time of the dismissal, and whilst it was aware of the first protected disclosure, it is clear to us from the content of the WhatsApp messages the two men exchanged that their relations remained positive after the disclosure, and they continued to work together productively. Whilst they disagreed about prices that were to be offered when the Premises were able to reopen, the respondent had not planned for the claimant to leave, which we find he would have done had the dismissal been contrived from the point of the first disclosure in March 2020 as the claimant argues.

128. The claimant argued that the fact that Mr Brown had interviewed Miss Wood and sought to have the locks changed on the Premises prior to his dismissal demonstrated that the disciplinary process was a sham and was predetermined. We reject that argument; we accept Mr Brown's evidence that Miss Wood was interviewed because he had always planned to have three hairdressers operating from the premise, that had been discussed in the 1:2:1 between the two men in January 2020. Similarly, we preferred Mr Brown's evidence that the lock to be replaced was not one of the shop's locks but at his home address; the claimant's argument rested on a snippet of conversation overheard by another hairdresser: there was no direct evidence to support it save for a text message relaying the little that she heard to the claimant.

129. We accept the respondent's argument that the true reason for the instigation of the disciplinary process and the claimant's consequent dismissal was the discovery of the breaches of the restrictive covenant in the first instance, and the claimant's conduct at the subsequent disciplinary hearing on 24 July in the second. Mr Brown was first alerted to the breaches as a result of Mr Benger's email to Mr Brown on 23 July 2021, and immediately attempted to entrap the claimant to obtain further evidence of those breaches before summoning him to a disciplinary hearing.

130. Misconduct is a potentially fair reason for dismissal in accordance with section 98 (4)(2) ERA 1996. Was dismissal for that reason within the range reasonable responses open to a reasonable employer? We remind ourselves of the need not to substitute our own view of the facts for that of the employer. We are satisfied that Mr Brown had a genuine belief in the claimant's misconduct because of the message received from Mr Benger and the claimant's subsequent acceptance that he had sent the text message of 21 July 2022 to the respondent's clients. In addition, he had reasonable grounds for that belief because of the content of the text message and the claimant's conduct during the disciplinary hearing on 24 July, both of which demonstrated that the claimant had no regard for the restrictive covenants and no intent to be bound by the terms of his contract.

131. We also satisfied that the extent of the investigation was reasonable having regard to the size and resources of the respondent, and in light of the claimant's concession that he had sent the text messages, which when coupled with his responses during the disciplinary hearing when he suggested that the terms of the contract were unlawful and he was not bound by them, negated the need for further enquiry as to whether he had committed the misconduct alleged.

132. Was dismissal for that reason within the range of reasonable responses open to a reasonable? Again, we are entirely satisfied that it was. The sector in which the respondent operated is a very competitive area, where the goodwill of clients is central to a business' success. The restrictive covenants are intended to protect that goodwill. The claimant deliberately and knowingly breached the restrictive covenants and did so with intention of setting up a business in direct competition with the respondent. That conduct was in breach of the terms of his contract relating to confidential information and those containing the restrictive covenants (specifically the non-competition covenant in clause 13.3, and the non-solicitation covenants in 13.4 (clients)), the common law duty of confidentiality, and Regulation 16 of the Copyright and Rights in Databases Regulations 1997. It is possible that he was also in breach of Clause 13.5 prohibiting the solicitation of employees, by encouraging, inciting or inviting Miss Nash and/or Ms Rendell to join him he rent a chair in premises leased by Mr Reeves, but we make no finding in that regard, not having heard direct evidence on that point. Any reasonable employer would have regarded that conduct as gross misconduct, potentially meriting summary dismissal.

133. We accept Mr Brown's evidence that if Mr Simmons had agreed to continue to work for him and apologised for directly contacting his clients, he would, hesitantly, have considered alternatives to dismissal, such as whether he would have allowed the claimant to continue to work whilst removing his access to and responsibility for the respondent's social media accounts, and possibly agreeing a plan by which the claimant could progress to assistant manager over time as an incentive to maintain his loyalty. It was certainly within the range of reasonable responses to decide that the appropriate sanction was summary dismissal given the claimant's conduct during the disciplinary hearing which Mr Brown concluded demonstrated absolutely no remorse and conversely that the claimant had every intention of continuing to use the data he had illegally obtained to undermine the respondent's business and further his own.

134. Did the respondent follow a fair procedure? The claimant alleges that the procedure was unfair because he was not advised of his right to be accompanied to the disciplinary hearing and the outcome letter did not advise him of his right of appeal. In addition, he complains that there was no investigation meeting prior to the disciplinary hearing.

135. We bear in mind that the respondent is a small employer, and that it was operating in the restrictions of the Covid-19 pandemic. In addition, there was a need for Mr Brown to act quickly given the potential for significant damage to the business through the continued production of the restrictive covenants. There was no need for a separate investigation meeting in that context, it was sufficient and well within the range of reasonable responses to merge the investigation and disciplinary processes into a single meeting. In the meeting, Mr Brown asked relevant questions of the claimant and the claimant was able to provide his account.

136. Secondly, the claimant was always in possession of the respondent's Staff Handbook which notified him both of his right to be accompanied to the disciplinary and of his right to appeal. This is not a claim under section 11 or 12 EReIA 1999. The issue for us is not whether a claim under section 11 is well founded, but rather whether the failure to inform the claimant of his right to representation or appeal meant that the process adopted by the respondent fell outside the range of reasonable responses. In the circumstances of this case, we are satisfied that it did not. Not only was the claimant aware of his right to representation and of his right to appeal, but he had clearly sought advice from someone trained in human resources, if not someone legally qualified, and he did not seek at any stage during the hearing to suggest that he could not continue in the absence of representation, nor critically did he seek to appeal after the decision to dismiss. The claimant was able to make the arguments that he wished and did so forcefully and clearly, irrespective of his lack of representation. Consequently, whilst the respondent did not demonstrate best practice, we are satisfied on balance that the omission was not so serious as to render the dismissal procedurally unfair.

Polkey

137. Furthermore, if we are wrong about that, and the omissions had the effect of rendering the dismissal procedurally unfair, we are satisfied that it was inevitable that the claimant would have been fairly dismissed on 24 July 2021 had a fair process been followed. The claimant would still have argued that he was not bound by the contract, and/or that he did not breach it, he would still have acted in a dismissive and contemptuous manner towards Mr Brown, and he would still have continued to set up a business in competition to the respondent's and to solicit clients from the respondent using the data which Mr Simmons had stolen. There was nothing that could sensibly be said at appeal that would have altered the outcome, indeed if the appeal had occurred within seven or 14 days of the dismissal, there would be further evidence of the claimant's breach of contract (and therefore of gross misconduct) in the form of the claimant's Instagram account which revealed that he proposed to carry on business from premises within a hundred metres of the Premises.

Contributory Conduct

138. The claimant's conduct was both culpable and blameworthy for the reasons we have detailed above. We have rejected the claimant's reasons for dismissal, and we are satisfied that the sole reason the claimant was dismissed was his conduct; he would not have been dismissed but for his breach of covenant and his attitude during the disciplinary hearing. Therefore, had we found the dismissal to be procedurally unfair, we would have made an additional reduction to any award under section 122(2) ERA 1996 and section 123 (6) ERA 1996 of 100%.

139. The claim of unfair dismissal contrary to section 111 ERA 1996 is not well founded and is dismissed.

Wrongful dismissal

140. For the reasons given above at paragraphs 127 to 129, the respondent has proved on the balance of probabilities that the claimant committed the gross misconduct alleged. The claim for wrongful dismissal is therefore not well founded and is dismissed.

Unfair dismissal s.47B and s.103A

141. The claimant's claims his dismissal was a detriment contrary to section 47B and automatically unfair dismissal contrary to s.103A ERA 1996, because of his protected disclosures. As set out in our conclusions above at paragraphs 124 to 127, we rejected that claimant's argument that the protected disclosures were the reason or principal reason for his dismissal, finding that the true reason was his misconduct.

142. It is necessary, however, for us to consider whether either of the first or second disclosure was a protected disclosure because the test in respect of the detriment of dismissal differs from that for automatically unfair dismissal: we must ask whether the alleged protected disclosure was more than a trivial influence on the decision to dismissal, rather than whether it was the reason or principal reason for that decision.

143. The second disclosure was not known to Mr Brown when he made the decision to dismiss: it did not therefore influence that decision at all.

144. We consider the first alleged protected disclosure. Whilst the precise date of the conversation which occurred between Mr Brown and the claimant is uncertain, we found that during the conversation the claimant had alleged that backdating a furlough claim was fraud and, separately, that failure to pay him his full wages for the period 1 to 21 March was a breach of his contract. There was therefore a disclosure of information which the claimant believed tended to disclose that a potential criminal offence was likely to be committed, and that there had been a breach of the legal obligation to pay him. It matters not whether those beliefs were accurate, only whether they were objectively reasonable ones for him to hold and whether he reasonably believed them to be in the public interest.

145. In our view, the claimant's belief that backdating a claim for a furlough payment from the Government could constitute fraud was an objectively

reasonable belief on the basis of the facts as the claimant understood them to be – he had worked for a period in which Mr Brown suggested that he would claim furlough. Similarly, it was reasonable when viewed objectively for the claimant to believe that there was a public interest in that matter. Whilst at the stage the claimant formed the view the furlough scheme was in its infancy, allegations of defrauding the public purse by making a fraudulent claim in a government system, particular in times of austerity, are likely to be in the public interest because of the impact of the public at large. There are, after all, many Government hotlines for reporting such suspected frauds. Consequently, applying Chesterton, the claimant reasonably believed that the information was in the public interest.

146. We can address the second qualifying ground much more shortly. The claimant did not reasonably believe that the 20% underpayment of his salary for 21 days was in the public interest. The only individual affected by the alleged breach was him, and it was limited to a breach of his private contractual right to pay. The public interest test was introduced specifically to place such disputes outside the scope of s.43B ERA 1996.

147. Was the proven protected disclosure more than a trivial influence on the decision to dismiss? The respondent has proved that it was not. The protected disclosure had no significant influence on the decision: the impact of the disclosure was that Mr Brown called the claimant a 'prick', the claimant apologised, and the two men continued to work together, devising plans as to how the business was to run once the national lockdown was lifted.

Unauthorised deduction of wages and unpaid annual leave

148. The respondent accepted that it had not paid the claimant his full contractual pay for the period 1 to 21 March 2021, but only a sum equivalent to 80% representing furlough pay. The claimant was entitled to pay at his full contractual rate; the 80% was less than the sums that were properly payable in respect of the 20% shortfall. The claim of unauthorised deductions from wages in that respect is therefore well founded and succeeds. The respondent undertook to agree the appropriate figure with the claimant.

149. In relation to the claim for unpaid annual, in so far as the respondent deducted any hours from the calculation of hours worked (when calculating payment for untaken annual leave) for periods when the claimant was permitted to leave the Premises for medical appointments and other appointments, such deductions were not within the scope of clause 4.3 of the contract. The respondent did not argue that such instances were expressly identified in the staff handbook as being payment which were 'repayable' within the meaning of clause 4.3. The deductions made in relation to those absences were therefore unauthorised because the claimant was not provided with written notice of the deductions before they were made in accordance with s.13(5) ERA 1996.

150. The respondent undertook to recalculate the payment owed to the claimant for annual leave, without deduction for such absences.

151. The claim for unpaid annual leave is therefore well founded and succeeds.

Failure to provide a written statement of changes to employment particulars

152. The respondent provided the claimant with the detailed written contract containing the particulars of employment in satisfaction of the requirement in s.1 ERA 1996. The claimant's case was unclear, initially it appeared to be that when his salary was increased he was not provided with a statement referencing the change in his terms, subsequently, that he was appointed manager and that change in status was not reflected in a statement complying with s.4 ERA 1996. However, the claimant did not identify when the alleged changes took place.

153. The claimant was not promoted to manager and the claim predicated on that basis fails. However, the parties agree that the claimant's wages increased from £4.00 an hour to £10.20 an hour at the time of his dismissal. The claimant suggested that the increase was gradual between 2018 and 2020, that evidence was unchallenged. Mr Brown argued that the claimant was sent letters reflecting the changes, although none were produced in evidence. In that limited sense only, the claim is well founded.

154. The contingent right in respect of any breach of s.4 ERA 1996 is through s.11 ERA 1996 which entitles the claimant to a declaration under s.12 ERA 1996 of the contractual terms which ought to have been included in the statement of change. There is no right to compensation in either ss 11 or 12; although the declaration of terms may trigger a further declaration that there has been a deduction from wages in circumstances where the employee has been paid less than he should have been using the figures in the Tribunal's declaration of terms. That is not the case here.

155. The claimant has a contingent right under s.38 EA 2002 to an award of between two or four weeks' pay where the claim under s.11 is made at the same time as a claim detailed in Schedule 5 (which includes a claim for unlawful deduction of wages) and that claim succeeds. Section 38(5) provides that that increase does not need to be made if there are "exceptional circumstances which would make an award or increase … unjust or inequitable." Here, the claimant's claim for unlawful deduction of wages has succeeded, and he is entitled to an award of at least two weeks pay pursuant to s.38 EA 2002, unless there are exception circumstance which would make such an award unjust or inequitable.

156. In our view there are such exceptional circumstances here: the claimant was at all times aware of his rate of pay: his witness statement reflects that knowledge; there was no attempt to conceal the rate of pay from him and, save in respect of the claim for wages in March, there is no suggestion that prior to his termination he was ever paid less than he was due. Furthermore, there was no suggestion from the claimant that he did not know his rate of pay, or that he told the respondent that he did not know or asked at any stage for it to be confirmed in writing. Lastly, we considered that the claimant's fragrant breach of his restrictive covenants and the losses those breaches caused to the respondent render it unjust and inequitable to make any award to the claimant.

Employment Judge Midgley
Date 24 March 2022

Judgment sent to parties: 25 March 2022

FOR THE TRIBUNAL OFFICE