



EMPLOYMENT TRIBUNALS

Claimant: Mr. S Williams
Respondent: Office Solutions (SE) Limited
Heard at: London South Hearing Centre
On: 10 February 2022
Before: Employment Judge McLaren

Representation

Claimant: Mr. P McNamee, Solicitor

Respondent: Mr. N Gouldson, Solicitor

JUDGMENT

The decision of the tribunal is that

1. The claim for breach of contract for failure to pay notice does not succeed.
2. The claim for unfair dismissal does not succeed.

REASONS

Background

Issues

1. In his claim form the claimant brings two heads of claim. These are a claim for unfair dismissal and a claim for notice pay.
2. The legal issues that arise are as follows

Unfair dismissal

3. What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 (“ERA”)? The respondent says it was for conduct.
4. If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called “band of reasonable responses”?
5. Did the claimant do something so serious that the respondent was entitled to dismiss without notice?

Evidence

6. I heard evidence today from the claimant on his own behalf, from 3 witnesses for the respondent, Sally Bonaccordo, Director, Mark Gibbs, a self-employed management consultant and Darren Bezani, a self-employed Managing Director. I was provided with a 100-page bundle and a 10-page supplemental bundle. In reaching my conclusion I considered the evidence I heard and the documents I was taken to.

Finding of facts

Background

7. The respondent’s business is a small one, having some three employees including the claimant. It is an office supplies company based in West Wycombe in Kent. The claimant was engaged by the respondent as a print manager and had been employed by them for 20 years prior to his dismissal.
8. Before joining the respondent, the claimant had previously been employed by a Mr Peter Adams and had a gentleman’s agreement with him that once Mr Adams retired, his customers would be passed to the claimant. Both the claimant and Ms Bonaccordo agreed that this possibility had been discussed between them. The claimant’s evidence was as part of this discussion he had talked about his company and the possibility of him being able to generate some profit for his own company via Mr Adams’ customers
9. It transpired that this did not occur, and instead Mr Adams’ customers, to the extent that they came to the respondent, were treated in the same way as all others. Ms Bonaccordo confirmed that she did not during this discussion agree with that the claimant could run his own printing business in tandem with hers. On the balance of probabilities, while I conclude that Ms Bonaccordo was aware that the claimant had set up his own company/trading vehicle, she did not agree that he could trade via this while employed by the respondent. I also reach this finding of fact based on the contract terms discussed below.
10. The business the claimant set up in 2015 was referred to as a company but was never registered at Companies House. It was called Willow Print, Willow after the claimant’s son’s nickname. It was suggested by the respondent that the use of this name was deliberate in order to aid confusion with Willow Magic, a supplier to the respondent, and to allow the claimant to hide his tracks. The respondent had no evidence of this, merely suspicion.

11. Throughout this hearing and the dismissal process the claimant has given a consistent account. He has admitted freely, both in this hearing and during the disciplinary process, that he did do a number of the things which the respondent objected to. In the absence of any opposing evidence, I accept his explanation as to the naming of his trading entity as a coincidence of names.
12. I also accept the claimant's account that he did not make much use of this business until lockdown when he needed to make up his income shortfall. His witness statement specified that there was no bank account nor any turnover at any time. No evidence to the contrary was presented to me.

Contract

13. The claimant signed a lengthy and detailed contract of employment with the respondent on 18 September 2009. It appeared to be agreed that there had been a previous contract and that this new document was introduced because of the need to provide an updated document, reflecting things such as data protection and use of the Internet.
14. This contract included at paragraph 9, under the heading "Other Employment" the following clause.

"You are expected to devote your whole time and attention to the business of the company and may not be actively engaged, concerned otherwise interested in any other business without the written consent of the Directors of the Company"
15. The contract also attached a disciplinary policy, and this set out a list of examples of matters that would amount to gross misconduct. That included *"accepting unauthorised incentives from traders and/or customers"* and separately *"Engaging directly or indirectly in any business or employment which is similar to or in any way prejudicial or detrimental to the interests of the company"*.
16. The claimant gave evidence that his contract had been varied without his consent in 2009 to impose a pay reduction. Despite this, he continued working and I find therefore that this unilateral action did not breach the contract or release the claimant from its terms.
17. The claimant suggest that because Ms Bonaccordo was aware from the date that he started employment with the respondent that the claimant had potentially other customers, that this knowledge meant that the contract was in some way varied to permit his being interested in another business.
18. I find that Ms Bonaccordo did not agree any such variation and did not agree to this by being aware of the existence of the claimant's trading entity. Throughout his employment the claimant was bound by a contractual clause which prevented him, without the written consent of the company, from being engaged in any other business whatsoever.
19. This clause did not limit him to not competing with the business, but was much wider than that and in effect prevented him carrying out any activity, whether it was for a customer of the respondent's business or not and whether it involved a similar activity to the respondent or not.

Furlough

20. Like many other businesses, the respondent was affected by the global pandemic. It shut its premises on 24 March 2020 in accordance with government guidance that staff should work from home wherever possible. Arrangements were made to place the claimant and Ms Harris, a part-time office staff member, on furlough.
21. Ms Bonaccordo sent the claimant and his colleague an email dated 31st of March explaining that they would remain on the payroll at 80% of the usual remuneration or being temporarily laid off and not required to work. The contract did not include any contractual right to lay staff off. The respondent did not enter into a written furlough agreement with staff and to that extent potentially had no right to impose this layoff. Nonetheless, the claimant accepted the position and therefore I find that his contract remained in full force and effect. He did not seek to treat the imposition of layoff as a breach of contract.
22. The claimant was sent a Q&A document explaining the arrangements which said that a furloughed employee must not work, although they can take up voluntary work. It appears to reflect government guidance at that time. This guidance was later varied, but the claimant was not issued with an updated variation.
23. The regulations that govern furlough, which at some point permitted employees to take on second remunerated roles, could not overwrite clear contractual terms which prevented that. Whatever may have been permitted under the furlough regulations, throughout his period of furlough and flexi furlough, the claimant was subject to a clear contractual restriction on being involved in any other business of any sort. He could have sought the respondent's consent to be involved in other businesses but did not do so.

The investigation

24. Ms Bonaccordo carried out the investigation into the matters that ultimately led to the claimant's dismissal. Her suspicions were first aroused that something was not quite right when she received an invoice for quarterly charges for a piece of Xerox equipment. These were referred to as click charges. She received this on around 19 June 2020. It covered the previous quarter, but Ms Bonaccordo confirmed that these invoices were not completely up-to-date and therefore it covered the period just before furlough on 24 March.
25. Ms Bonaccordo was puzzled because she felt this invoice was unduly high given the business had been closed for most of the period the invoice covered. She was asked how busy the respondent had been just before it closed on 24 March. She confirmed that on the 19th or 20th of March they had not been that busy. One customer, Primo, came in at the last minute and spent £700 with them, probably for about 500 leaflets. This was invoiced by the respondent and the money paid to them. This did not, in her mind, account for the size of the click charges and so she began to investigate further and look into her computer records. In doing so she discovered that one of her clients, Inaga, had ordered some products just prior to lockdown which had not been invoiced by the respondent.

26. Ms Bonaccordo spoke to the owner of the restaurant, Inaga, and he confirmed that that he had ordered a number of flyers just before lockdown. The owner told her that he had spoken to the claimant about the matter and that the claimant, via the respondent's business, had produced approximately 2,500 to 3000 flyers but that Ms Bonacordo should invoice him for 5000 leaflets.
27. Ms Bonaccordo therefore met with the claimant on 15 October 2020 and asked him about the increased click charge. He was unable to give any explanation. She continued to investigate and spoke to Willows Magic, who ran the respondent's larger print jobs. As she had also seen a flyer at Primo which she did not recognise as the respondent's work, she spoke to Primo's owner about this. He told her that he had used a friend for the print job.
28. On 19 October Mr Williams from Willows Magic provided the respondent with a list of jobs that the claimant had asked Willows Magic to print on his own account and which Mr Williams believed were customers of the respondent. These were for Goodfellas, Omega café and Primo. The date range was from 24 June to 12 October.
29. As a result of this investigation, Ms Bonaccordo concluded that the matter should move to a disciplinary hearing. The claimant was sent a letter dated 16 October which confirmed that the claimant was suspended on contractual pay and that there were three allegations.
30. These three allegations were
- Fraudulently using company clients for private business,
 - Undertaking work for our clients that are being put to the company/invoiced and
 - Using company printing equipment to undertake personal work.
31. The letter enclosed the evidence on which the respondent relied. This was a witness statement from a Mrs Nina Bowdery which related to Inaga, photos of the Primo flyers not done by the respondent, the invoice showing the click charges, the list of print jobs from Mr Williams at Willows Magic, a note of the discussion that Ms Bonaccordo had with the claimant on 15 October together with a memo he had been sent on 1 August 2020. This latter document was not provided to me. The letter also included a copy of the disciplinary procedure, although not the claimant's contract.
32. The letter explained that the claimant was entitled to have someone accompany him to the disciplinary meeting. It appointed an independent third party, Darren Bezani as notetaker and decision-maker. Mr Bezani had these documents sent to him in advance of the meeting that he was to chair, and he based his decision on these documents and his meeting with the claimant.

The nature of the allegations

33. In cross-examination a number of questions were put to Ms Bonaccordo as the investigator about what exactly the allegations were. Ms Bonaccordo provided the claimant with evidence from Willows Magic of work for one customer she believed to be a customer of the respondent, that is Primo, and sent a copy of a picture of a Primo leaflet. The information from Mr Williams

of Willow Magic mentioned other names. These were said by Willow Magic to be customers of the respondent and were Omega and Goodfellas. Ms Bonaccordo had evidence from her conversation with the owner of Inaga of work which had not been invoiced by the respondent prior to her conversation and which she therefore believed had been paid to the claimant directly. This allegation related to Primo, Omega, Goodfellas and Inaga.

34. Allegation two, undertaking work for clients that had not been put through the computer/invoiced also related to work for Inaga. As referred to above, Ms Bonaccordo provided evidence in the form of a written statement recording a conversation between herself and the restaurant owner that work had been done before lockdown and there was no invoice raised for the respondent until she discovered this work had been done in a chance conversation. This was the only incident put to the claimant in the investigative meeting that relates to allegation two.
35. Allegation three, using company printing equipment to undertake personal work also related to the flyers for Inaga. While Ms Bonaccordo did not believe that the claimant had been in the premises during lockdown, she provided the click charge invoice as evidence that he had undertaken the printing for Inaga just before lockdown on her equipment. This tallied with the written statement from Mrs Bowdery which she had obtained documenting her own conversation with the owner of this Indian restaurant and the emails that she referred to that sparked her suspicion. She was clear that this had occurred a few days prior to lockdown, and this is supported by the wording that she put on the invoice which Inaga then paid.
36. These then were the matters that the claimant was to answer in the disciplinary hearing and the documents he was sent in advance were intended to relate to these allegations.

The disciplinary hearing.

37. The disciplinary meeting took place on 22 October 2020 and notes of that meeting were in the bundle at pages 57-60. They show that the following was discussed.
38. In relation to allegation one, the claimant agreed that he had carried out work for Primo while the respondent was closed during lockdown. He explained that while they were a customer of the respondent prior to lockdown, he had been approached by the owner who made it clear beyond doubt that he would never use the respondent's services again. As the claimant understood that Primo were no longer a client of the respondent, the claimant offered to do the work for Primo himself. It is clear that the claimant has always believed that he was doing nothing wrong in taking this step and believed that he was acting honestly and appropriately in providing printing services to a former client of the respondent.
39. In relation to the same allegation, that is carrying out work for company customers on his own account, the claimant was asked about Omega as they had been on the list provided by Mr Williams of Willows Magic. The claimant explained that it is a local café. He provided scrap paper for them and sometimes had breakfast sandwich from them, and he also provided leaflets to them through Willows Press, his own company. The claimant was not asked

about Goodfellas, and I conclude that they were not a customer of the respondent.

40. The claimant was also asked about Inaga, that the investigator believed he had in effect poached. The claimant could not recall printing any flyers for them as the respondent suggests. He did not accept that he had done the printing for Inaga on his own account. He thought that any printing had been done it would be around £20-£30 worth and would have been in cash.
41. In relation to allegation two, the notes of the disciplinary hearing indicate that this was asked in general terms and not about the Inaga account. The claimant confirmed that he did not always charge some non-account customers, giving them the benefit of the doubt, but was adamant that any cash payments that he did take were always put in the appropriate drawer and he did not take these himself.
42. The claimant confirmed that he had not used the respondent's equipment to carry out work done for Primo and had instead used two other suppliers Pixart Print and Willow Magic. He could give no explanation for the click invoice being high.

The outcome of the disciplinary hearing

43. Mr Bezani set out his conclusions in the outcome letter dated 28 October which was at page 64 to 65. In his witness evidence he also expanded on the reasons why he concluded that the allegations were upheld.
44. His decision noted that the claimant had set up his own trading entity in 2015 and had done so, he concluded, without informing his employer. The outcome letter states that the claimant had been trading through it ever since which was a conflict-of-interest, prejudicial and detrimental to the company. That allegation had not been part of the investigation process, nor had it been put to the claimant. The allegations that were being considered at the disciplinary hearing related to work just before and during the lockdown period.
45. The first allegation was addressed in the outcome letter, that he had used company clients for private business. This was upheld because Mr Bezani concluded that Primo were a client of the respondent. The outcome letter states that since the last job the claimant did for them, Primo has continued to be a customer of the respondent.
46. On balance of probabilities, I conclude that Mr Bezani would be in a position to know this. The claimant was of course suspended and then dismissed and so had no access to the business and it follows no knowledge of what work it was doing. I therefore find that Primo was an ongoing client of the respondent, although the owner chose to have some of this printing work done during lockdown by the claimant.
47. The decision letter and Mr Bezani's statement also references Omega. In his witness statement Mr Bezani described them as a client of the respondent and refers to a reciprocal exchange of the respondent's scrap paper for food and to the claimant's admission that he provided printing work to Omega through his own business. The outcome letter refers to the contract of employment which prohibits that.

48. In his witness statement Mr Bezani explained why scrap paper was not something that could be given away. The claimant had volunteered this and had referred to the paper as scrap. In cross examination Mr Bezani accepted that if it was truly scrap then this would not be an issue. He appears, however, to have concluded at the time that it was not truly scrap and was used for interleaving. This was not something that he was aware of himself but had gained this understanding by talking to the respondent. No evidence of that conversation was ever put to the claimant. The claimant was the only individual who would understand exactly what paper he had given away. This was a new allegation.
49. The outcome letter referred to the Inaga flyers and accepts the evidence of Mrs Bowdery over that of the claimant. Mr Bezani concludes that the flyer print job was for some 2,500 to 3000 flyers and not the small number the claimant suggested. The outcome letter stated that the office computer had the files in the document library. This evidence was not shared with him. I find it is reasonable for Mr Bezani to prefer the respondent's evidence. The owner of the restaurant clearly accepted that work had been done at the respondent's premises as he paid an invoice for it and it was reasonable for Mr Bezani to conclude this would not have been invoiced to the respondent had there not been the chance conversation with the restaurant owner which uncovered this work.
50. Mr Bezani's witness statement expands allegation two, failing to invoice work and states that he made the decision based on the claimant's admission that he sometimes allowed clients the benefit of the doubt and did printing on the understanding they would come back and pay later but they did not always do so. The claimant had not told the respondent about this. The decision-maker also upheld this allegation on the basis that the claimant had admitted he did work for non-account customers without taking a deposit. Neither of these allegations had been part of the investigation. This allegation was put in relation to Inaga only.
51. The decision letter does not expressly address using the respondent's equipment for the claimant's own business. The witness statement expands on this allegation of using company materials for personal work and makes reference to the click invoice. In answer to cross examination questions Mr Bezani clarified that he understood this allegation to be that the claimant had carried out printing work at the respondent's premises during lockdown. This was not the allegation that had been investigated or had been put to the claimant. While the claimant had no suggestions as to how anyone else could have caused the recorded use of the leased equipment, Mr Bezani concluded on the balance of probabilities that it was more likely than not that the claimant was responsible.
52. Mr Bezani believed the biggest issue was the claimant competing with the respondent, doing work for clients of the business and putting it through his own enterprise. That was the primary issue for him. He believed the claimant had done this intentionally and, in his mind, this on its own i.e., allegation 1, amounted to gross misconduct. As the claimant had admitted to putting some work to his own business, Mr Bezani concluded that the gross misconduct had occurred. He had a genuine belief that the claimant had carried out acts of gross misconduct. He reached this belief by considering the investigation material and his meeting with the claimant.

53. The decision-maker concluded that dismissal was the only appropriate penalty, despite the claimant's unblemished disciplinary record and 20 years of service. This was because the claimant did not believe he had done anything wrong and so there could be no certainty the same would not occur in future.

The Appeal Hearing

54. The claimant appealed against his dismissal. The appeal letter set out a number of grounds of appeal. These were not all focused on the reasons for dismissal. They were

- there was no intention for the claimant to leave the respondent to set up on his own
- at no time since he set up Willows print until lockdown did he ever put private work through the respondent
- the respondent was aware he had set up his own trading enterprise
- Primo were not a client of the respondent
- it was disputed that 2,5000 to 3,000 flyers were printed for Inaga
- the scrap paper provided to Omega would have been thrown away
- the respondent did not lose business because it was done while the respondent was closed, and customers chose the claimant's business over the respondent's
- there was nothing in the contract preventing him having secondary employment
- the Coronavirus Job Retention Scheme does not prevent him from undertaking additional work and he was not instructed that he was not to do so.

55. The claimant also raised a grievance that Ms Bonaccordo obtained private and personal information about the claimant from a third party and that Ms Bonaccordo made malicious accusations about him when reporting theft of tools to the police and both his grievance, and the appeal were dealt with together.

56. The appeal was held on 13 November 2020 by Mark Gibbs. In advance that meeting he was provided with the same information given to the disciplinary decision-maker, together with the notes of the claimant's disciplinary hearing and the appeal letter. The appeal letter referred to the fact the claimant had a signed letter from the owner of Primo Café, but it does not appear to have been provided to Mr Gibbs until after he had made his decision as its being enclosed is referred to in the claimant's letter after he was sent the outcome.

57. The notes of the meeting show that the grievance were addressed first and then the appeal points, although separate outcome letters were sent in relation to both. The grievance outcome letter dated 18 November 2020 dismissed the grievance.

58. The appeal outcome letter was dated 19 November 2020. It addressed the points in turn. The appeal dismissed the evidence on each point and each ground was dismissed. Mr Gibbs gave additional evidence on his reasoning in his witness statement. I accept Mr Gibbs evidence as set out in his witness statement as to his thought processes and the matters that he considered in relation to all the grounds of the appeal.
59. On the second appeal point, which relates to dismissal allegation, that the claimant had put private work through the respondent's business, Mr Gibbs was satisfied that this had happened. The claimant provided a handwritten ledger for Primo which showed that he had done work for them during lockdown. In relation to Omega, Mr Gibbs found that they were not a customer of the respondent, which was contrary to the finding of the disciplinary decision-maker. I prefer the evidence of Mr Gibbs because his witness statement gives far more detail on this point. His finding is to do with the fact that the claimant uses the respondent's resources, that is scrap paper, to win himself a customer. I find that Omega were not a customer of the respondent
60. On the dispute of the number of flyers printed for Inaga, Mr Gibbs referred to the fact that they were invoiced and paid for 5000 flyers. He also preferred the evidence provided by the respondent to the claimant's recollection and concluded that on the balance of probabilities it was more likely than not that the claimant had run the job for Inaga without informing the respondent or arranging payment to it.
61. Mr Gibbs' evidence dealt with the scrap paper given to Omega which had formed part of the dismissal decision but had not been part of the investigation. He concluded that the absence of any evidence from the claimant that he was granted permission to give scrap paper away he had made a conscious choice to giveaway the respondent's property in order to cultivate a relationship a personal gain and receive both payment in kind in respect of food and work for his private company on the back of this.
62. The claimant's appeal and indeed his evidence before the tribunal, made much of the fact that the respondent was closed due to the coronavirus lockdown they had not lost any business through his actions. Mr Gibbs found that the claimant had undercut the respondent in price in relation to Primo which remained a client of the respondent. I have already accepted that Primo were an ongoing client of the respondent. The claimant had done work for Primo on the 1,9 and 12 of October 2020 when the respondent was open. Mr Gibbs also concluded there was clear evidence that the claimant was not entitled to undertake secondary employment.

Relevant Law

63. There are five potentially fair reasons for dismissal under section 98 of ERA 1996: capability or qualifications, conduct, redundancy, breach of a statutory duty or restriction and "some other substantial reason" (SOSR).
64. Section 98(4) of ERA 1996 provides that, where an employer can show a potentially fair reason for dismissal:

"... 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.

65. By the case of Sainsbury's Supermarkets Ltd v Hitt 2003 IRLR 23 tribunals were reminded that throughout their consideration in relation to the procedure adopted and the substantive fairness of the dismissal, the test is whether the respondent's actions were within the band of reasonable responses of a reasonable employer. In this case the Court of Appeal decided that the subjective standards of a reasonable employer must be applied to all aspects of the question whether an employee was fairly and reasonably dismissed. The tribunal is not required to carry out any further investigations and must be careful not to substitute its own standards of what was an adequate investigation to the standard that could be objectively expected of a reasonable employer.

Remedy

66. s123 of the ERA 1996 provides that 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 insofar as that loss is attributable to action taken by the employer'.

67. The object of the compensatory award is to compensate the employee for their financial losses as if they had not been unfairly dismissed - it is not designed to punish the employer for their wrongdoing. For dismissals occurring on or after 6 April 2019 the statutory cap (where it applies) is calculated as the lower of £86,444- or 52-weeks' gross pay.

68. There is a duty to mitigate. The burden of proof regarding failure to mitigate is on the wrong doer and it is not for the claimant to show that she acted reasonably. The claimant must be shown to have acted unreasonably. Determination of unreasonableness is a question of fact, taking account of the claimant's views and wishes, but the assessment must be objective. The tribunal should not put the claimant on trial losses with their fault, bear in mind the central cause of loss is the act of the wrongdoer.

69. I refer to Polkey v AE Dayton Services Ltd [1987] IRLR 503 (HL) which established the following principles: Where a dismissal is procedurally unfair, the employer cannot invoke a "no difference rule" to establish that the dismissal is fair, in effect arguing that the dismissal should be regarded as fair because it would have made no difference to the outcome. This means that procedurally unfair dismissals will be unfair. Having found that the dismissal was unfair because of the procedural failing, the tribunal should reduce the amount of compensation to reflect the chance that there would have been a fair dismissal if the dismissal had not been procedurally unfair.

Wrongful dismissal

70. The claimant brings a claim for breach of contract – failure to pay notice pay. The tribunal has to consider 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 without payment of notice?

Conclusion

71. Applying the relevant law to the findings of fact I have made; I conclude as follows.

Unfair dismissal

72. The claimant was dismissed for a potentially fair reason that is conduct. I must then decide whether (having regard to the reason shown by the employer) 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.

73. The respondent is a small employer and I conclude that its initial investigation was fair and reasonable. The respondent put together evidence that on the face of it could support the disciplinary allegations. The claimant was then invited to a disciplinary hearing, given all the relevant evidence and advised of his right to be accompanied. I conclude that the process to this point is a fair and reasonable one.

74. There were three allegations put to the claimant. The first was that he did work on his own account for customers of the respondent. Three were relied on by Mr Bezani. Omega, Primo and Inaga. Mr Gibbs found that Omega were not a customer of the business and I have accepted his evidence. To that extent Mr Bezani's decision was flawed in relying on business done by the claimant for Omega.

75. While the claimant was adamant that Primo were not a client of the respondent, he did not produce the letter from the owner of Primo until after the appeal had been dismissed. The disciplinary decision maker did not have the benefit of this evidence. Both the disciplinary decision maker and appeal chair stated that Primo remained a client of the respondent and I have accepted their evidence on this point.

76. Mr Bezani had a reasonable belief that the claimant had carried out work for at least one customer of the respondent and he had reached this belief based on a reasonable investigation and on the claimant's admission that he had worked for Primo. He also had a reasonable belief that the claimant had intended to benefit by doing private work for Inaga. He reached this belief based on reasonable investigation.

77. The second allegation was that the claimant had failed to invoice work. I have found that this allegation was intended to be about the Inaga account. I conclude that the decision maker had a reasonable belief that the claimant had failed to invoice work. His decision to prefer the respondent's evidence on what happened with the printing for Inaga is within the reasonable range of responses open to an employer. In the disciplinary hearing the claimant

also made an admission that he had done failed invoice work on occasions. The disciplinary decision was therefore based on the claimant's admissions as well as Mr Bezani's reasonable conclusion on the work for the Indian restaurant.

78. The third allegation related to use of company printing equipment to undertake personal work. I have found that Mr Bezani had not understood the allegation as Ms Bonaccordo had intended it to be put. I have found that he concluded that the claimant had done some unauthorised work because the click charges were high, and he believed the claimant had therefore done some private work during a period when the office was closed and yet there was no evidence for this at all. He did not link this to work done for the Indian restaurant or conclude that the Inaga work had been done on the respondent's equipment. This is a conclusion that would have been open to him, but not one he reached.
79. On that basis, I find that Mr Bezani's belief that the claimant had used company printing equipment to undertake personal work was not a reasonable one that he could reach on the basis of the evidence in front of him. He made a finding based on an entirely different allegation to the one intended to be put to the claimant with little evidence other than a click invoice.
80. The dismissal letter expands the charges against the claimant and brings in matters that were not part of the investigation or disciplinary allegations, although they were admissions made by the claimant. In relation to Omega, I find that the process was unfair. Mr Bezani accepted the respondent's description of the scrap paper donated by the claimant without giving the claimant the opportunity to understand what was being said or to comment on this. While the claimant had admitted giving away scrap paper, I conclude that the decision maker did not carry out a sufficient investigation so as to reach a belief that this was an act of misconduct. I've also found that Omega were not a customer of the respondent. I conclude that Mr Bezani had not carried out sufficient investigation to form a reasonable belief that they were.
81. The dismissal letter evolves the scope of the allegations to competing generally, rather than doing work for customers of the respondent. Despite the increased scope of the dismissal letter compared to the disciplinary allegations, nonetheless, I conclude that overall, this was a fair process considering the size and resources of this employer.
82. There was sufficient evidence to reasonably conclude the claimant was guilty of some acts of misconduct and I conclude that Mr Bezani had a genuine and reasonable belief that the claimant was guilty of two acts of gross misconduct, he had done work on his own account for customers of the respondent and had failed to invoice work. I conclude that he had reasonable grounds for forming this view based on a full and proper investigation.
83. I am satisfied that either one of the first or second allegations on its own amounts to gross misconduct and therefore my conclusion that the third allegation was not reasonably upheld and my conclusion that the grounds for dismissal were expanded, does not alter the validity of the dismissal.

84. I also conclude that dismissal was within the reasonable range of responses open to this employer because, as the decision-maker identified, the claimant did not believe he had done anything wrong.

85. For these reasons I conclude that the claimant was fairly dismissed.

Wrongful dismissal

86. I have found that the terms of the claimant's contract were clear. He was not entitled to carry out secondary employment of any sort. The coronavirus regulations cannot overwrite clear contractual terms and the fact that they at some point permitted secondary employment does not vary the claimant's contract.

87. The claimant admitted that he undertook secondary employment and therefore was in breach of his contract. This included doing work for customers of the respondent's business. Not only is this a breach of an express contractual term, was also breach of the implied term of fidelity. I conclude that the claimant had therefore carried out an act of misconduct which was sufficient to amount to a repudiatory breach of contract, entitling the respondent to dismiss without notice pay.

88. For these reasons the claims are dismissed.

Employment Judge McLaren
Date: 17.2.22