



# EMPLOYMENT TRIBUNALS

Claimant: Ms K Snarska

Respondent: Finanspol Group Ltd

Heard at: Bristol (via VHS)

On: 19 and 20 December 2022

Before: Employment Judge Cuthbert

## Representation

Claimant: In person

Respondent: Ms Inkin (Consultant)

# RESERVED JUDGMENT

## *Liability*

1. The claimant's:
  - a. claim for **unfair dismissal** is well-founded and **succeeds**;
  - b. claim for **wrongful dismissal** is well-founded and **succeeds**;
  - c. claim for **holiday pay succeeds in part** in respect of the 2022/23 leave year only; and
  - d. claim for **unlawful deductions from wages** is well-founded and **succeeds**.

## *Remedy*

2. The respondent is ordered pay the claimant the following sum of **£9,063.83** less appropriate statutory deductions, consisting of the following amounts:
  - a. **£2,539.00** (gross) as compensation for wrongful dismissal.
  - b. **£2,792.90** by way of a basic award for unfair dismissal.
  - c. **£1,874.89** by way of a compensatory award for unfair dismissal.
    - i.
  - d. **£1,450.80** (gross) in respect of unlawful deductions from the claimant's wages.

- e. **£406.24** (gross) as compensation for accrued untaken holiday pay
3. The Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 do not apply in this case.

## REASONS

### Introduction

1. The claimant brought claims for unfair dismissal, wrongful dismissal, unlawful deduction from wages and for holiday pay, following the termination of her employment with the respondent on 25 March 2022.
2. The claimant appeared in person at the hearing and the respondent was represented by a consultant, Ms Inkin.
3. The first language of the claimant and the respondent's witnesses was Polish and an interpreter was used during the evidence of the respondent's witnesses to translate questions and responses. They did not otherwise require an interpreter, Ms Inkin confirmed. The claimant's English was fluent and an interpreter was not required during her evidence.
4. A number of documents in the bundle were also written in Polish and translated into English by the parties. Neither side raised any issues about the accuracy of any of the translations during the hearing and so I relied upon them as drafted.
5. Judgment was reserved, following the conclusion of the hearing during the second day, as there was insufficient time remaining, after the conclusion of the evidence and oral closing submissions, for deliberation and delivering oral judgment, including on remedy if this became applicable (which it did).

### Claims and Issues

6. At the start of the hearing, I identified the issues in dispute, based upon the claim and response. These were agreed by the parties and are set out below.
7. Unfair dismissal (liability)
  - a. What was the reason for dismissal? The respondent asserts that it was a reason related to conduct, which is a potentially fair reason for dismissal under section 98(2) of the Employment Rights Act 1996 (ERA 1996).
  - b. Did the respondent hold a genuine belief in the claimant's misconduct on reasonable grounds and following as reasonable an investigation as was warranted in the circumstances?

- c. Was the decision to dismiss a fair sanction, that is, was it within the range of reasonable responses open to a reasonable employer when faced with these facts?
8. Wrongful dismissal (notice pay)
  - a. The claimant's notice period was seven weeks. Was the claimant paid for that notice period?
  - b. If not, was the claimant guilty of gross misconduct or did she do something so serious that the respondent was entitled to dismiss her without notice?
9. Unlawful deductions from wages
  - a. The claimant's employment terminated on 25 March 2022. She was paid until week-ending 6 March 2022. In withholding the claimant's pay from that date, did the respondent unlawfully deduct the claimant's wages?
10. Holiday pay
  - a. What was the claimant's leave year?
  - b. How much of the leave year had passed when the claimant's employment ended?
  - c. How much leave had accrued for the year by that date?
  - d. How much paid leave had the claimant taken in the year?
  - e. Were any days carried over from previous holiday years?
  - f. How many days remained unpaid?
  - g. What was the relevant daily rate of pay?
11. Unfair dismissal remedy. If the claimant's claim succeeded
  - a. What basic award is payable to the claimant, if any?
  - b. Would it be just and equitable to reduce the basic award because of any conduct of the claimant before the dismissal? If so, to what extent?
  - c. If there is a compensatory award, how much should it be? The tribunal will decide:
    - i. What financial losses has the dismissal caused the claimant?
    - ii. Has the claimant taken reasonable steps to replace her lost earnings?

- iii. If not, for what period of loss should the claimant be compensated?
- d. Is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason? If so, should the claimant's compensation be reduced? By how much?
- e. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply? If so, did the respondent unreasonably fail to comply with it? If so is it just and equitable to increase or decrease any award payable to the claimant and, if so, by what proportion up to 25%?
- f. If the Claimant was unfairly dismissed, did she cause or contribute to dismissal by blameworthy conduct? This requires the respondent to prove, on the balance of probabilities, that the claimant actually committed the misconduct alleged. If so, would it be just and equitable to reduce her compensatory award? By what proportion?
- g. If the respondent did not use a fair procedure, would the claimant have been fairly dismissed in any event and/or to what extent and when?
- h. Does the statutory cap of fifty-two weeks' pay apply?

### **Procedure, documents and evidence**

12. I read witness statements and heard oral evidence from:
  - a. Lidia Kaminska, the managing director of the respondent.
  - b. Agnieszka Borek-Matczuk, an accountant who worked for the respondent.
  - c. Grazyna Homis, a payroll manager, who worked for the respondent.
  - d. The claimant.
13. I was provided with an agreed 171-page bundle. I agreed to allow the claimant to adduce an additional email chain at the start of the second day of the hearing, on a factual issue raised in the respondent's witness statements, and the respondent adduced a further email on the same factual issue. The respondent was able to cross-examine the claimant about the additional document.

### **Findings of fact**

14. I have set out my findings below on the facts relevant to my decision on the issues above. I have not mentioned matters which I did not consider to be relevant.

### ***General employment history with the respondent***

15. The respondent is a small accountancy business. Lidia Kaminska is its Managing Director.
16. The claimant's continuous employment commenced on 6 February 2015. Her employer at that time was Finanspol Umbrella (a company also run by Ms Kaminska).
17. A written contract was in the bundle, dated 6 February 2015, but its content bore little relevance to the way in which the employment relationship between the claimant and the respondent operated in practice in the seven years that the claimant was employed. For example:
  - a. The claimant's job title was stated as "secretary", whereas for most of her employment she worked as an accountant, having learned on the job and also studied accountancy whilst working for the respondent.
  - b. The contract stated that the claimant's place of work would always be in the UK. In fact, she worked remotely from Spain and from Poland for several periods, sometimes for months at a time.
  - c. The contract stated that the claimant could not work for another employer whilst working for the respondent, without prior written consent of a director. I accept the claimant's evidence that she informed Ms Kaminska verbally that she carried out work (both on an employed and self-employed basis) other than for the respondent, during her employment with the respondent and that Ms Kaminska had raised no issue with this (until March 2022). As such, the specified written consent was not required in practice.
  - d. The contract included references to both disciplinary and grievance procedures of the employer being available to the employee. As the disciplinary procedure was potentially relevant but was not in the agreed bundle, I asked Ms Kaminska about it during her evidence. She answered that the respondent had no disciplinary procedure.
  - e. In around 2018, the claimant's employment TUPE-transferred from Finanspol Umbrella to the current respondent. There was no written confirmation of the change in employer (although it was not disputed by either side).
  - f. The contract stated that any variations to its terms would be notified in writing within one month. This clearly did not occur in any of the examples above, where what was written in February 2015 was subsequently varied but not confirmed in writing.
18. As indicated above, the claimant started employment as a secretary but progressed to carrying out the role of an accountant. She worked whilst studying and worked mainly on a remote basis for much of her employment. She worked on a task-completion basis, rather than working set hours. I accepted her evidence that she often worked evenings and sometimes weekends to complete tasks, alongside her studies. Her studies were completed in mid-2020.
19. At the relevant times, the claimant was one of three accountancy staff employed by the respondent – the other two were Ms Borek and Ms Homis. The claimant was paid a fixed weekly wage, £507.80 gross at the time of

dismissal. She worked at times from a Southampton office and at times from Portsmouth but also, as indicated above, remotely for significant periods.

20. The claimant was content working for the respondent during her employment and found the respondent and Ms Kaminska to be a supportive employer, prior to the events below in March 2022. When the claimant's mother in Poland became seriously and terminally ill, Ms Kaminska was supportive and sympathetic.
21. Likewise, there was no evidence of any alleged issues or concerns about the claimant on the part of the respondent prior to March 2022. The claimant was given significant flexibility and freedom in carrying out her role and the respondent placed considerable trust in her. This was entirely consistent with the respondent being completely satisfied with her performance of her duties during the vast majority of the claimant's employment.
22. In March 2020, the claimant had been based primarily in the Southampton office at that time, but with the onset of the COVID pandemic, she started working fully remotely.

***Other work undertaken by the claimant outside of her employment with the respondent***

23. The claimant undertook other work whilst working for the respondent. She was saving for a deposit on a house and I accept her evidence that Ms Kaminska was aware of this other work. I reject the evidence of Ms Kaminska that she was not aware of the claimant undertaking other work. I did not find Ms Kaminska's evidence on to be credible or reliable on this and a number of other issues and I return to this below.
24. At page 47 of the bundle was an exchange of messages from July 2020 between the claimant and Ms Kaminska which supported the claimant's account that Ms Kaminska had arranged an interview for the claimant with a business run by a friend of Ms Kaminska – the claimant did not take up the additional role and explained this to Ms Kaminska in the messages. This did not support Ms Kaminska's position in March 2022 that she was opposed to the claimant undertaking other work outside of her employment for the respondent and suggesting that the claimant having done so had detrimentally affected the respondent's clients (of which there was no evidence).
25. In 2020, the claimant started another job as an accountant, working in-house for Pioneers Construction Ltd alongside her employment with the respondent. I again accept the claimant's evidence that Ms Kaminska was aware of this employment, which ended during October 2021. Ms Kaminska was a good friend of the owner and of partner of Pioneers and Pioneers was also a client of the respondent at all relevant times. Ms Kaminska's suggestion in her evidence that she only found out during 2022 about this other role of the claimant was not credible.
26. I find that Ms Kaminska was also aware, despite her denials, that the claimant undertook some other self-employed work at the same time as working for the respondent. She accepted in cross examination that, in

January 2021, when the respondent was having some financial difficulties and had less work, she told the claimant to look for additional income outside of her work with the respondent. An exchange of messages at the time, at page 49 of the bundle, showed that Ms Kaminska was also aware that the claimant was registered with HMRC as an agent (in her own right).

27. The claimant undertook some accountancy work on a self-employed basis, alongside her work for the respondent, which she explained was for businesses run by friends, when asked about some examples during cross examination. The claimant denied competing with the respondent and there was no clear evidence of her having done so during her employment.
28. Ms Borek and Ms Homis both also had other concurrent roles as directors in other companies than the respondent, as a bookkeeper and accountant respectively, registered with Companies House. This also indicated that Ms Kaminska was comfortable with the respondent's employees having other roles outside of the respondent.
29. During 2020, at the same time as completing her studies, the claimant started to consider developing her career in accountancy, although she did not plan to leave the respondent. She came up with an idea of a website linking social media with tax and accountancy information bought a domain name "taxpage.co.uk". Although the name was purchased in 2020, the claimant did not operate the website until after she was dismissed by the respondent, from April 2022.

***Events leading to the claimant's dismissal***

30. In August 2021, the respondent closed its Southampton office. The claimant was working remotely from Poland at that time.
31. In December 2021, after the claimant's mother's health deteriorated, Ms Kaminska told the claimant she could continue to work remotely for as long as she needed, to support her mother.
32. At the end of January 2022, the claimant was back in the UK to collect some documents. She and Ms Kaminska met at the claimant's home in the UK and discussed work. There were no concerns raised and some messages exchanged at the time in the bundle were friendly and gave no indication of any issues on the part of the respondent with the claimant or her work. It was later suggested that Ms Kaminska did in fact have concerns about the claimant by this point in time, but the contemporaneous documents did not support her position.
33. On 4 February 2022, Ms Kaminska sent an email to the claimant, Ms Borek and Ms Homis:

*Unfortunately, I am forced to inform you that our situation is very hard. We have lost many companies and there is almost no payroll.*

*For your information, the gross invoices issued for February this totals £4734, for comparison February 2020 totals £6003. I will not even compare payroll. Autoentry has already issued an invoice for*

over £100 a month. Sage £321, tax filler £38. So you can clearly see that it is very bad.

*Unfortunately, the company cannot afford to keep you on PAYE, because the tax from PAYE costs £3000/£3500 per month. My proposal is that you should switch to self-employment from next week. You will be paid your net salary and such invoice you will issue.*

*I think that you should register from April because you can work three months without registration. If the situation improves then it might change. You will also not have the right to paid holidays, sick pay, you known, to be paid by the government about £100 per week.*

*You know very well that I have always met you halfway and tried to help, now unfortunately the situation is very bad. I know that one of you may decide to quit your job, I will be very sorry but I will understand that.*

It was the claimant whom Ms Kaminska had anticipated may decide to leave, referenced in the final sentence of the email above.

34. The claimant said that she could not afford to take a reduction in her pay, on the basis offered by Ms Kaminska of being self-employed but only receiving a sum equivalent to her net pay as an employee. The claimant replied as follows on 8 February 2022 with a counter-proposal:

*I would like to accept your proposal on the terms given by law in the event of termination of the employment contract, i.e.*

*- termination of the employment contract in accordance with the statutory notice period - 7 weeks*

*- payment of an equivalent for this year's unused leave 28 days - 5 days of leave = 23 days, i.e. £2562.2*

*- equivalent for termination (redundancy payment), i.e. £ 2992 tax free*

*- the remainder of the outstanding leave from last year (£780) and outstanding weekly payments of £50 (£280), i.e. a total of £1060*

*- entering into a new cooperation under the terms of a contract for service with my current gross salary, i.e. £557.*

35. The claimant did not receive a reply from Ms Kaminska. Ms Borek and Ms Homis gave evidence that they readily accepted the new arrangement offered and that they and Ms Kaminska were upset that the claimant had not done so. Ms Homis said in cross examination that she was ordered by Ms Kaminska to find errors with the claimant's work. Ms Borek said she was likewise ordered to "find any mistakes" with the claimant's work.

36. Meanwhile, the claimant continued to carry out her work as before, working remotely. She came back to the UK on Sunday 6 March 2022 and informed



Ms Kaminska that she was back until Friday 11 March 2022; she would then be returning to Poland, as her mother was still receiving treatment in Poland.

***Dismissal of the claimant – 10 March 2022***

37. At 1817 on Thursday 10 March 2022, Ms Kaminska texted the claimant to ask when she was leaving the UK. The claimant said the next morning but that she would be back the following week, after her mother's treatment. Ms Kaminska said that she wanted to see the claimant that evening and arranged to drive to the claimant's house. The claimant discovered at around the same time that her access to her work email address and work software with the respondent had been blocked.
38. At around 9pm, Ms Kaminska arrived at the claimant's home and asked to meet with the claimant in Ms Kaminska's car, parked in front of the claimant's house. I accept the claimant's account of this meeting as set out in her witness statement, an account which was not materially challenged by the respondent. Ms Kaminska's 10-page witness statement, on the other hand, contained no reference whatsoever to this important meeting, at which she dismissed the claimant.
39. During the meeting in the car, Ms Kaminska handed the claimant a letter of termination (with notice). This stated as follows:

*As stated in our meeting, the reasons for terminating your employment with us are as follows:*

*Loss of trust is the result of negligence committed by the employee during the employment period, such as:*

- *failure to report a leave;*
- *failure to meet the deadlines for accounts or changes to the accounting periods in order to extend the deadline for the accounts;*
- *backlogs in carrying out current tasks;*
- *failure to terminate the contracts that the employee was obliged to terminate within the deadline - this caused a huge financial loss for the company*

*The employee on 8/02/2022, by e-mail, presented the conditions of notice to which the employer refers in the annex.*

*An employee who is under the notice period is obligated to perform work activities according to the new terms of the employment - some of them have been changed. The changes are described in the appendix that is an integral part of this termination.*

40. The annex/appendix in question included 11 separate stipulations, several purporting to vary the claimant's terms of employment. The stipulations included the claimant being required to agree to relinquish any claims for unpaid holiday, entering into five-year non-compete restrictive covenants and agreeing to either work physically in the Portsmouth office or remotely

on her own laptop computer but logged into her work laptop computer (which she was required to return).

41. In the meeting in the car, Ms Kaminska explained to the claimant that the reason for the termination was the claimant not agreeing to the new terms she had been offered (on 4 February). Ms Kaminska told the claimant that she was surprised with the claimant's reply of 8 February and she was "*the only one who did not accept moving to self-employment work*". She told the claimant to sign the annex but the claimant refused to do so.
42. Ms Kaminska then told the claimant that she would not pay her any redundancy pay, because the claimant was at fault for the termination, which she said that she had checked with the payroll manager (Ms Homis). The claimant told Ms Kaminska that she would check her employment rights. Ms Kaminska asked the claimant if she would "*go to court*". The claimant said she did not know. Ms Kaminska then told the claimant that if she did so, Ms Kaminska would inform HMRC that the claimant's mother had been employed illegally and, as her mother was in poor health, the last thing she needed was being taken to court.
43. Ms Kaminska told the claimant to return her work computer. The claimant readily admitted in cross examination that she lied to Ms Kaminska about whether she had her work laptop in the UK with her, telling her that she did not have it. She explained that she was very shocked by her dismissal, she wanted to take advice about her position, and she knew that she may need information on the computer if she wished to challenge her dismissal.

#### ***Events after the claimant's dismissal***

44. The claimant returned to Poland the following day, 11 March 2022, as planned.
45. Following the claimant's dismissal and during the notice period, a lengthy series of emails followed between Ms Kaminska and the claimant. In summary, the claimant challenged the fairness of her dismissal and submitted an appeal. Ms Kaminska continued to insist that the claimant either work from the Portsmouth office or return her work laptop computer and work remotely onto it.
46. There was a dispute about the claimant's work during the notice period. The claimant said in an email of 14 March (sic):

*It is not true that I refused to work, because I am still working 8 hours a day. Unfortunately, narrowly as you have limited my access to HMRC account, emails and documents sent by clients. Without the access to HMRC account, I cannot submit reports from payroll software or Sage. This is why I have emailed you yesterday, to remind you that the deadline for submission is today (so that the client will not receive a penalty for non-filing CIS report).*

*The conditions indicated by you are, as I suppose, related to working in the Portsmouth office. I did not agree to work in the Portsmouth office as you have never proposed to me such change. Due to cost*

*related closing of the office in Southampton, we have agreed to remote work.*

47. One of Ms Kaminska's emailed replies stated as follows (sic):

*I enable you to perform your professional duties on the terms specified in the written notice of employment and previously sent e-mails. Due to the loss of my trust in you as a result of your insubordination, you are obligated to work under supervision.*

*In connection with the above, you can work in the company's office or - as I have already indicated - connect to the business computer, which you are obliged to return immediately.*

*Due to your abusive behavior, bearing in mind the good of the company, I cannot provide you with the appropriate logins and passwords and therefore you can only work under the conditions already indicated in the notice.*

48. The claimant replied as follows (sic):

*I did not agree to the conditions presented in the annex to the contract of employment, given to me with the termination notice, therefore I continue to work as agreed before the termination of employment contract. As said before, I can return business laptop, but I will not have equipment to continue fulfilling my tasks. The employer has obligation to provide the employee with necessary equipment.*

*I have never been abusive towards you, but oppositely, I feel discriminated and mobbed by you since the moment I have received termination of employment notice.*

*Clearly, you try to evade payment for accrued holiday and redundancy payment, but now I see that you also try to deprive me of payment due for the salary and maybe even 7 weeks notice. You have told me when giving the notice, that I am not due back any redundancy payment and you will do everything not to pay me. It is your behaviour which is out of any norms.*

49. After the claimant challenged her dismissal, Ms Kaminska attempted to bolster her case for having dismissed the claimant. She engaged further assistance from Ms Borek and Ms Homis. A OneDrive discussion group was set up between them, entitled "Wyjebanie Karoliny" which translated into English as "Screwing up Karolina". They did not realise, however, that the claimant was also able to access the folder, and the claimant discovered it at a later date.

50. The claimant continued to do what work she could and emailed a list of tasks undertaken to Ms Kaminska. She was contacted by a client of the respondent who evidently had not been told by the respondent that she was leaving, so she sent a short and innocuous email from her personal email

address to her clients to tell them she was leaving and so they should not try to contact her via her work email address.

51. Correspondence continued until Ms Kaminska summarily terminated the claimant's employment, part-way through the notice period, on 25 March 2022 by letter:

*Please be advised that you have been relieved from your duties as an accountant/bookkeeper from Finanspol Group Ltd. This decision comes as a result of your continuous misconduct and deliberate ignorance to the company policies and procedures. Despite the multiple warnings, you did not show any progress. This decision is final and effective starting 25/03/2022.*

*Due to the fact that for 2 weeks you have not complied with the terms of termination, I dismiss you immediately without the right to a period of notice, leave and severance pay. In addition to the insubordination shown below, you have repeatedly breached the law and terms of employment (under the contract signed on 6/02/2015).*

52. The letter went on to list various numbered assertions and allegations including of "theft" of data and company equipment.

***Ms Kaminska's evidence about her decision to dismiss the claimant***

53. Ms Kaminska's evidence as to why she dismissed the claimant and the relevant events was confused, contradictory and unconvincing. In particular:

- a. Paragraphs 12 and 13 of her witness statement suggested that, in December 2021 (some three months before the dismissal), she had become concerned about the claimant being given too much freedom and so had instructed her to work from the Portsmouth office but the claimant had refused to do so. The refusal to work from Portsmouth which Ms Kaminska cited (with specific reference to an email at page 81 of the bundle) had in fact occurred *after* the claimant had already been dismissed and was on notice, during March 2022. When this apparent error/inconsistency was put to Ms Kaminska by the claimant during cross examination, she claimed that she had instructed the claimant to work from Portsmouth during a telephone conversation earlier in 2022. There was no reference to any such conversation in her witness statement and nor was this mentioned in any of the contemporaneous emails or letters.
- b. In paragraph 17 of Ms Kaminska's witness statement, she stated that, after the claimant had allegedly refused to work from the Portsmouth office (which she claimed was prior to the first dismissal on 10 March), she had started looking into the claimant's work. She set out some alleged issues with the claimant's work and stated that *"all errors and omissions were discovered after the claimant returned the computers"*. The claimant had returned her work computer only **after** her employment had been terminated summarily on 25 March 2022 and so the errors and omissions alleged could not have formed part of Ms Kaminska's rationale for the dismissal of the claimant on

either 10 or 25 March. Self-evidently, she could not have been aware of them at the time of either dismissal because she did not have the claimant's computer at the time.

- c. Paragraph 21 of Ms Kaminska's witness statement said that Ms Kaminska had lost trust in the claimant and so decided to dismiss her with notice. It was entirely unclear what in fact Ms Kaminska had in mind when she decided to dismiss the claimant on 10 March. There was no documentary evidence before the tribunal of the results of *any* prior investigation of the claimant having been conducted before she was dismissed on 10 March. The content of the dismissal letter itself of 10 March (set out above) was extremely vague and was not explained in Ms Kaminska's evidence.
- d. Ms Kaminska gave no account whatsoever of the key dismissal meeting in her car with the claimant at which the claimant was given notice of termination. In her oral evidence, Ms Kaminska suggested that the letter of termination was merely prepared in the event that her conversation with the claimant did not go well and suggested that she did not necessarily intend to give the letter to the claimant or terminate her employment on 10 March. I do not accept that evidence. It was plain that the letter, and the accompanying appendix/annex, was going to be given to the claimant during the meeting, who slightly earlier in the day had her email and other access to the respondent's IT systems suspended.
- e. Paragraphs 22 to 29 of Ms Kaminska's witness statement stated that Ms Kaminska instructed Ms Homis to check the claimant's laptop and set out some of the alleged findings upon it. She went on to indicate that, as a result, she decided to dismiss the claimant "*immediately*" (on 25 March). This again cannot be true or correct, since it was only *after* the termination of the claimant's employment that the respondent was given access to the claimant's work laptop computer, which she returned the evening after she was summarily dismissed. Self-evidently, the investigation into the contents of the hard drive could only have occurred after the claimant's employment had already ended and cannot have been in Ms Kaminska's mind at the time of the second dismissal on 25 March.
- f. Her oral answers at times appeared evasive, stating that she should not remember various details related to the decisions she made or that the answer was in documentary evidence which was not before the tribunal.

***Lack of evidence as to issues of performance or conduct on the part of the claimant – the Skoroda Ltd example***

54. The claimant had no opportunity to provide any input into either dismissal decision (the dismissal on notice on 10 March or the summary dismissal on 25 March), prior Ms Kaminska making up her mind. It was plain from her subsequent emails that she disputed the respondent's allegations against her.

55. One specific example of the respondent's disciplinary case against the claimant was covered in more detail during the evidence at the hearing. It was alleged that the claimant had caused a client of the respondent, Skoroda Ltd, to incur several fines with HMRC totalling £400 during 2021 (page 149). This example was mentioned in the witness statements of both Ms Kaminska and Ms Homis, suggesting that the claimant had "neglected" this company and caused the loss.

56. Ms Kaminska claimed in her witness statement:

*In December 2021, this turned out to be completely wrong. I realised that several companies were very [sic – missing word] with their statements. By way of example – Skoroda Ltd – its CIS reports were neglected for four months, leaving the Client with a £400.00 penalty (Page 149)*

Thus Ms Kaminska appeared to suggest that this alleged failure by the claimant had come to light during late 2021.

57. Ms Homis indicated, however, that this issue came to light *after* the claimant had not accepted the request to become self-employed in February 2022. She said in her witness statement:

*A company served by the Claimant called Skoroda Ltd was penalised for failure to file CIS300 reports four months in a row (Page 149), resulting in a penalty of £400.00*

58. The penalties in question were incurred in May, June July and August 2021. It was clearly apparent from (1) emails during 2021 between the claimant and Skoroda Ltd and (2) the claimant's clear explanation of them that in fact Skoroda Ltd had ceased to be the respondent's client **before** any of the penalties in question were incurred. The company then contacted the claimant once the penalties started to arise, the claimant explained the position to Skoroda Ltd and then duly assisted the company to file the appropriate returns with HMRC during July 2021, whereupon the penalties ceased from August 2021. There was no evidence whatsoever that the claimant was at fault here and the assertions by the respondent's witnesses to this effect were false/mistaken.

***Events subsequent to the claimant's dismissal.***

59. Despite the claimant's various protestations against the fairness of her dismissal, the respondent did not hold an appeal meeting or follow any appeal process.

60. The claimant's evidence was that she applied for one job unsuccessfully (although this was not in the bundle before me), but decided that instead of seeking new employment and the difficulty of explaining having been

dismissed from her previous role, she would pursue her own business. On 6 April 2022 she started to work as an accountant via her www.taxpage website, paying herself a monthly wage of £823 net from April to July 2022 and £1000 in August 2022. She also paid herself a dividend of £900 and received self-employment income of £500 in the same period. From September 2022 her earnings exceeded her previous earnings at the respondent.

61. The respondent did not pay the claimant for the period from 6 March until her dismissal on 25 March 2022 because Ms Kaminska did not consider that the claimant was carrying out sufficient work or working as instructed.
62. The respondent also did not pay the claimant in respect of accrued holiday pay but accepted at the hearing that she was entitled to any accrued holiday in respect of the 2022/2023 holiday year. The claimant contended that she was also entitled to accrued holiday from the 2021/2022 and 2020/2021 holiday year. She accepted that she had not been prevented from taking paid holiday in the previous years but had chosen not to take it because of the COVID pandemic and her mother's ill health.
63. The claimant submitted her ET1 on 14 June 2022.
64. I asked Ms Kaminska about the position of the respondent at the time of the hearing, in terms of other employees. She said that there was a secretary only and that Ms Homis and Ms Borek remained self-employed.

### **Relevant law**

65. Section 94 of the Employment Rights Act 1996 (ERA 1996) confers on employees the right not to be unfairly dismissed. Section 98 ERA 1996 Act deals with the fairness of dismissals. There are two stages within section 98:
  - a. Firstly, the employer must show that it had a potentially fair reason for the dismissal within section 98(2).
  - b. Secondly, if the employer shows that it had a potentially fair reason for the dismissal, the tribunal must consider, without there being any burden of proof on either party, whether the employer acted fairly or unfairly in dismissing for that reason under section 98(4).
66. A 'reason for dismissal' has been described as "*a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee*" (*Abernethy v Mott, Hay and Anderson* [1974] ICR 323, CA). (Mis)conduct is a potentially fair reason for dismissal under section 98(2).
67. Section 98(4) then deals with fairness generally and provides that the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend 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 shall be determined in accordance with equity and the substantial merits of the case.

68. In misconduct dismissals, there is well-established guidance for tribunals on fairness within section 98(4) in the decisions in *BHS v Burchell* [1978] IRLR 379 and *Post Office v Foley* [2000] IRLR 827. The tribunal must decide:
- a. whether the employer had a genuine belief in the employee's guilt;
  - b. if so, whether the employer held such genuine belief on reasonable grounds and after carrying out a reasonable investigation; and
  - c. if so, whether the decision to dismiss was reasonable.
69. The reasonableness or otherwise of the employer's approach, with reference to the above guidance in *Burchell* and *Foley*, is assessed with reference to the "range" or "band" of reasonable responses test. In *Iceland Frozen Foods Ltd v Jones* [1983] ICR 17, EAT, Mr Justice Browne-Wilkinson summarised the law concisely as follows:

*We consider that the authorities establish that in law the correct approach for the... tribunal to adopt in answering the question posed by [section 98(4)] is as follows:*

*(1) the starting point should always be the words of [section 98(4)] themselves;*

*(2) in applying the section [a] tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the... tribunal) consider the dismissal to be fair;*

*(3) in judging the reasonableness of the employer's conduct [a] tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;*

*(4) in many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;*

*(5) the function of the... tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case 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.*

70. The tribunal must not therefore substitute its own view for that of a reasonable employer (see also *Sainsbury's Supermarkets Ltd v Hitt* (2003)



IRLR 23 and *London Ambulance Service NHS Trust v Small* [2009] IRLR 563).

71. As part of a fair procedure, an employee accused of misconduct must be informed of the charges against them so that they have the opportunity to put their case: *"It is a fundamental part of a fair disciplinary procedure that an employee know the case against him. Fairness requires that someone accused should know the case to be met; should hear or be told the important parts of the evidence in support of that case; should have an opportunity to criticise or dispute that evidence and to adduce his own evidence and argue his case."* (*Spink v Express Foods Ltd* [1990] IRLR 320).
72. *Taylor v OCS Group Ltd* [2006] IRLR 613(CA) established that if there are procedural flaws in the process followed by the employer, they should be considered alongside the reason for dismissal, when the tribunal comes to assess whether in all of the circumstances, the employer acted reasonably in treating the reason as a sufficient one for dismissal.

#### *Polkey*

73. In *Polkey v AE Dayton Services Ltd* [1987] IRLR 503, the House of Lords held that a compensatory award may be reduced or limited to reflect the chance that the claimant would have been dismissed in any event and that the employer's procedural errors accordingly made no difference to the outcome. A tribunal should make a realistic assessment of loss according to what might have occurred in the future. The chances of the **actual** employer, not a hypothetical reasonable employer, dismissing the employee have to be assessed.
74. In *Software 2000 Ltd v Andrews and others* UKEAT/0533/06 the suggested approach to Polkey was as follows:

*The question is not whether the Tribunal can predict with confidence all that would have occurred; rather it is whether it can make any assessment with sufficient confidence about what is likely to have happened, using its common sense, experience and sense of justice.*

75. In *O'Donoghue v Redcar and Cleveland Borough Council* [2001] IRLR 615 (CA) the Court of Appeal stated:

*An [employment tribunal] must award such compensation as is 'just and equitable'. If the facts are such that [a tribunal], while finding that an employee/applicant has been dismissed unfairly (whether substantively or procedurally), concludes that, but for the dismissal, the applicant would have been bound soon thereafter to be dismissed (fairly) by reason of some course of conduct or characteristic attitude which the employer reasonably regards as unacceptable but which the employee cannot or will not moderate, then it is just and equitable that compensation for the unfair dismissal should be awarded on that basis.*

#### *Contributory conduct*

76. A tribunal may reduce the basic award if it finds that the employee's conduct before dismissal was such that it would be just and equitable to reduce it (section 122(2), ERA 1996).
77. Furthermore, where a 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*" (section 123(6), ERA 1996).
78. In *Steen v ASP Packaging Ltd* UKEAT/23/13, the EAT held that a tribunal must consider the following four questions:
- a. What was the conduct which was said to give rise to possible contributory fault?
  - b. Was that conduct blameworthy, irrespective of the employer's view on the matter?
  - c. For the purposes of section 123(6), did the blameworthy conduct cause or contribute to the dismissal?
  - d. If so, to what extent should the award be reduced and to what extent would it be just and equitable to reduce it?

### ***Wrongful dismissal***

79. In *British Heart Foundation v Roy* UKEAT/0049/15/RN, the distinction between a claim of unfair dismissal and wrongful dismissal was set out:

*Whereas the focus in unfair dismissal is on the employer's reasons for that dismissal and it does not matter what the Employment Tribunal thinks objectively probably occurred, or whether, in fact, the misconduct actually happened, it is different when one turns to the question either of contributory fault for the purposes of compensation for unfair dismissal or for wrongful dismissal. There the question is, indeed, whether the misconduct actually occurred.*

*In a claim for wrongful dismissal the legal question is whether the employer dismissed the Claimant in breach of contract. Dismissal without notice will be such a breach unless the employer is entitled to dismiss summarily. An employer will only be in that position if the employee is herself in breach of contract and that breach is repudiatory...*

80. The relevant questions for the tribunal are whether the employee has committed an act of gross misconduct and whether s/he was dismissed as a result by the employer. The burden of proof is on the employer to prove on the balance of probabilities that the employee was guilty of gross misconduct.

### ***Unlawful deductions from wages***

81. Section 13(1) of ERA 1996 provides that an employer shall not make a deduction from wages of a worker unless 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 the worker has previously signified in writing his agreement or consent to the making of the deduction.

82. An employee has a right to complain to a tribunal of an unauthorised deduction from wages pursuant to Section 23 ERA.

**Holiday pay**

83. In relation to holiday pay, employees are entitled to be paid in lieu of accrued but untaken holiday on termination of employment under Regulation 14 Working Time Regulations 1998 (WTR). This sum is payable whether under the employment contract or otherwise (section 27(1)(a) ERA 1996).

84. The general rule under the WTR is that the employee is only entitled to be paid in lieu of holiday accrued but untaken in the final leave year (Regulation 13(9)(a)). The Working Time (Coronavirus)(Amendment) Regulations 2020 SI 2020/365 introduced a temporary relaxation of this general rule. Under Regulation 13(10), where it was '*not reasonably practicable*' for the worker to take some or all of their leave in the relevant leave year as a result of the effects of Covid-19, then they were entitled to carry forward such untaken leave.

85. Regulation 13(3) provides that a worker's leave year, for the purposes of this regulation, begins:

- a. on such date during the calendar year as may be provided for in a relevant agreement; or
- b. where there are no provisions of a relevant agreement which apply—
  - i. if the worker's employment began on or before 1st October 1998, on that date and each subsequent anniversary of that date; or
  - ii. if the worker's employment begins after 1st October 1998, on the date on which that employment begins and each subsequent anniversary of that date.

86. On termination of employment, a worker is entitled to pay in lieu of unused statutory holiday in accordance with Regulation 14. The payment is calculated in accordance with either a relevant agreement or, where there is no such agreement, the pay the worker would have received if they had taken a period of holiday calculated in accordance with the following formula:

$$(A \times B) - C$$

Where:

A is the period of statutory leave to which the worker would have been entitled for the whole of the leave year in which employment ends, calculated in accordance with Regulations 13 and 13A.

B is the proportion of the worker's leave year which expired before the termination date, expressed as a fraction.

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

### **The Parties' Closing Submissions**

87. I heard oral closing submission from Ms Inkin and from the claimant.

#### *The respondent's closing submissions (in summary)*

88. In summary, Ms Inkin, submitted that the claimant was not permitted to work for anyone else without the respondent's written consent under the written contract of February 2015. The respondent imposed premises (work location) and working hours on the claimant under that contract and changes had to be agreed in writing. That contract remained binding.
89. The claimant had worked for seven years with flexibility and freedom. She had received a bonus for a time for new clients – this was not covert competition but a joint goal.
90. In February 2022, the respondent contacted the claimant and asked her to become self-employed due to its bad financial situation. The claimant replied and said she would be owed payments if it was agreed. The respondent decided to continue her employment.
91. The respondent became concerned that the claimant had been negligent in her duties, Ms Inkin submitted. It found out about her employment with Pioneers without the respondent's knowledge. That employment was on a full-time basis. The respondent would not have consented as it took away her hours from the respondent. Ms Inkin submitted that the respondent had explained about negligent omissions by the claimant when working for the respondent.
92. The claimant said that others took employment outside of the respondent but Ms Borek was self-employed then joined a company and disclosed this to the respondent at the outset of her employment. Ms Homis was a co-director with Ms Kaminska and was in a construction firm which posed no threat to the respondent.
93. The respondent decided to dismiss the claimant with seven weeks' notice. Ms Inkin said there had been a "*failure to meet deadlines*" and "*backlogs*" by the claimant.
94. Ms Inkin indicated that the respondent admitted there was "*not a full dismissal procedure*" but that Ms Kaminska felt emotional and hurt and that the claimant had "*acted in very hurtful way*". Ms Kaminska requested that the claimant undertake duties from the respondent's office or remotely but claimant rejected this and did not agree.

95. When the claimant returned her equipment, the respondent was shocked to find out that she had been working for Pioneers and providing self-employed services in direct competition to the respondent. The claimant had set up her own internet domain and the respondent obtained records to show the claimant had been undertaking additional accounting work. The claimant was dishonestly acting in competition with the respondent, Ms Inkin asserted.
96. Ms Inkin submitted that the claimant had contacted the respondent's clients without its permission and informed them that her employment ending. Some left the respondent. The respondent ended the claimant's employment with immediate effect for gross misconduct.
97. Ms Inkin submitted that conduct was the reason for dismissal and was a fair reason. The first dismissal was for negligence and the claimant setting up a new business. The claimant then refused to work at her base and the respondent found out that she had been behaving in dishonest way. She had poached some of the respondent's clients and this led to her summary dismissal.
98. Ms Inkin referred to *Burchell*. She submitted that although there was "*not a proper investigation*", the claimant had spent the prior three months abroad. Ms Kaminska could only meet the claimant in her car. She had provided the claimant with seven years of help, support and mentoring and Ms Kaminska was very emotional. She felt abused, cheated and betrayed.
99. Ms Inkin referred to duties of fidelity and good faith. She submitted that an employee should not work in competition or make secret profit and should act in the best interests of the employer. An employee was not permitted to take preparatory steps to compete.
100. She challenged the claimant's work during the two weeks of her notice period and submitted that the claimant worked for her own clients and failed to supply a detailed list of work undertaken. She submitted that the claimant's "gross misconduct was so bad" that the respondent could not be expected to employ her any longer. She had breached the duty of trust and confidence and duties of fidelity and good faith.
101. If the claimant's claim were, successful, Ms Inkin submitted that her basic award should be reduced pursuant to section 122(2) ERA. She further submitted that the reduction could apply "*whether or not*" the respondent knew of the conduct at the time of dismissal – it would be just and equitable to reduce the basic award. The claimant had been negligent with her duties and taken on additional employment in breach of her contract. Dishonestly undertaking other work justified a 100% reduction.
102. The compensatory award was claimed for a period of 26 weeks – Ms Inkin submitted that the claimant had overlooked an "*abundance of available*

*positions*” and the tribunal should only award up to 13 weeks. She had failed to mitigate by opening a limited company and only earning £823 per month.

103. She further submitted that there should be a 100% *Polkey* reduction and that the claimant would have been dismissed fairly in any event for being negligent, taking on additional employment, refusing to work in the office and dishonestly undertaking work on a self-employed basis.
104. If the tribunal found that the respondent failed to follow the Acas Code, a minimum increase should be applied, on the basis that the respondent had been a supportive employer for seven years and granted the claimant freedom. The respondent’s failure to apply procedure was “*not malicious*”.
105. Ms Inkin referred to section 123(6) ERA and submitted that the claimant had been the “*author of her own misfortune*” and compensation should be reduced on the basis of contributory fault.
106. Annual leave was claimed back to 2020. There was no mention of the leave year in the contract and so Regulation 13(9) applied. The claimant had four weeks’ annual leave and this had not carried over. There was no long-term sickness, the claimant was fully aware of the procedure for booking leave and had worked for seven years. Requests had been made and granted and paid for. She was not furloughed during 2020/21 and had failed to provide any evidence that the respondent had refused leave. The respondent accepted that the claimant was entitled to payment for the period between 6 February and 25 March 2022.
107. Ms Inkin submitted that the respondent was entitled to terminate the claimant’s employment without notice as she did not work in the office during her notice period.
108. The respondent had not paid the claimant between 6 – 10 March as the claimant had not provided evidence of work completed during those days and further the respondent’s case was that the claimant did not undertake work between 6 and 25 March 2022.

*Claimant’s closing submissions (in summary)*

109. The claimant submitted as follows, in summary.
110. The respondent’s witness statements were inconsistent with their witness testimony (in oral evidence).
111. There were no procedures from the beginning of the claimant’s employment. The respondent had not followed the Acas code. All matters were verbally agreed including the claimant’s self-employment. Other witnesses did not have signed agreements for their other work.

112. There was no evidence that the claimant was asked to come back to the Portsmouth office (before her dismissal). There was a verbal agreement that she could work abroad due to the health of her mother.
113. Because the claimant would not agree to self-employment and lesser pay, Ms Kaminska tried to find evidence against her and included other employees in this. She was trying to “*get out of the unfair dismissal process*”.
114. There was no warning or invite or any chance to explain her process of book-keeping. She was taken by surprise in a meeting at 9pm and given a dismissal letter. There was no chance to question errors in the letter, which she included in her emailed appeal. She would never have been dismissed if the respondent had followed procedures.
115. The respondent was aware of her other employment and self-employment. Her book-keeping of her clients of the respondent was done on time – there was no evidence of any complaints by the clients about her. The claimant was never told to do anything differently before she was dismissed.
116. The respondent knew she had other work and even helped in her search for additional income.
117. There was no evidence of any wrongdoing by the claimant in the documents – just assertions in the respondent’s witness statements. Any issues could have been resolved if Ms Kaminska had talked to the claimant but she just wanted to dismiss the claimant as soon as possible.
118. There were no procedures and the reason for dismissal was not fair. The claimant said that she should be awarded the full compensation in the schedule of loss.

### **Conclusions**

119. My conclusions are as follows.

#### ***Unfair Dismissal***

##### ***Reason for dismissal***

120. On the first question, namely whether there was a potentially fair reason for dismissal, I am **not** satisfied that the respondent established that it dismissed the claimant because it considered that the claimant had committed misconduct, which was the only potentially fair reason that it relied upon.
121. I find that the true reason in the mind of Ms Kaminska when she dismissed the claimant on 10 March was the claimant’s prior recent refusal to agree to self-employment and a reduction in pay. That was the reason Ms Kaminska gave to the claimant verbally in the meeting in the car on 10 March, telling

the claimant that her employment was being terminated because she would not agree to the self-employment arrangement which Ms Kaminska had proposed in February. I find that this was the reason Ms Kaminska had in mind, and **not** the vague allegations of misconduct set out in her letter of 10 March, which were unsupported by evidence. That reason was **not** a potentially fair reason for dismissal.

122. I have nonetheless gone on to consider, if the potentially fair reason **was** misconduct (or if the true reason was in fact a potentially fair reason), whether the dismissal would in any event have been fair, for the purposes of section 98(4) ERA 1996, based on the *Burchell* guidelines.

*Did the respondent carry out a reasonable investigation?*

123. It is plain that the respondent's investigation in this case was not reasonable, that is it fell outside the range of reasonable responses.
124. There was no documentary evidence as to what matters were investigated before the claimant's dismissal – the respondent's evidence as to what it thought it knew and when was inconsistent and muddled, as noted above, and included many factual assertions based on details which the respondent only discovered after termination on the claimant's computer (details about her self-employment, of which I have found that the respondent was aware).
125. The allegations set out in the letter of dismissal were extremely vague and unparticularised. They were not put to the claimant before the dismissal decision was made. The claimant had no proper opportunity to put her case. There was no right of appeal. The respondent had no disciplinary procedure in place.
126. The respondent had closed its mind to any possibility other than the claimant's dismissal, as evidenced by the "*screwing Karolina*" OneDrive folder in which Ms Kaminska, Ms Borek and Ms Homis discussed how best to dismiss the claimant.
127. The respondent was a small employer but nonetheless I find that any reasonable employer, of the size of the respondent and with its resources, would have:
- a. Told the claimant before making any decision about what specific misconduct was believed to have occurred and when.
  - b. Provided the claimant with a reasonable opportunity to respond and produce evidence in rebuttal.
  - c. Held a proper meeting, either in person or via video link, to discuss the allegations fully (rather than a meeting at 9pm in a dark car in the road).
  - d. Conscientiously considered and weighed up the evidence before making a decision.
  - e. Provided the claimant with an opportunity to appeal any outcome adverse to her.



This respondent did none of the above and its investigation was clearly **outside** the range of reasonable responses in the circumstances.

*Did the respondent have a reasonably-held belief that the claimant had committed misconduct?*

128. I reminded myself that, in considering this question, the issue for me is **not** whether I would have believed the claimant to be guilty based on the material before the respondent, but whether the respondent has acted reasonably in forming its belief. The question of whether the respondent acted reasonably and had reasonable grounds for its belief is to be judged objectively.
129. I have concluded that the respondent did not reasonably believe that the claimant had committed misconduct. Ms Kaminska was aware of the claimant's other employment/self-employment well before the events leading to the claimant's dismissal, despite her assertions to the contrary. Those matters cannot therefore have reasonably formed the basis of the claimant's dismissal.
130. The other matters relied upon by the respondent in dismissing the claimant were not evident from the correspondence or documents in the bundle or the respondent's witness statements. The respondent's case essentially amounted to mere assertions by the respondent's witnesses against the claimant, effectively of gross negligence, which were not clearly or cogently explained at the time of dismissal or in the evidence before the tribunal. There was no evidence whatsoever of any complaints or concerns having been raised about the claimant by any of the respondent's clients whom she had served, which was surprising given the assertions by the respondent that she had been substantially failing a number of them. The respondent asserted that a number of clients left the respondent to join the claimant after her dismissal, which strongly suggests that they were entirely satisfied with the service she had been providing on behalf of the respondent.
131. The one specific example of a criticism of the claimant which was explored in more detail in evidence was Skoroda Ltd where the respondent's witnesses firmly asserted that the claimant was at fault and caused this client to incur £400 in HMRC penalties. Those assertions were clearly and firmly rebutted by the claimant with reference to contemporaneous emails, as explained earlier in these reasons. The assertions by the respondent about the claimant in respect of Skoroda were clearly without any reasonable foundation.
132. I have also found that the real reason why the respondent dismissed the claimant in March 2022 was the claimant's refusal to accept self-employment and a reduction in pay in February 2022. Ms Homis and Ms Borek were then ordered by Ms Kaminska to find evidence to support the claimant's dismissal, but there was no reasonably clear or cogent evidence forthcoming from their efforts. There was no credible evidence whatsoever of the respondent having any concerns about the claimant's conduct (or performance) prior to her decision to decline the offer of self-employment in early 2022.

133. Given all of the above, I find that the respondent's conclusions that the claimant had committed misconduct, based on the evidence before it at the time of (either) dismissal, were **not** genuinely or reasonably held ones.

*Reasonableness of sanction*

134. Given that I have found that there was no genuine or reasonably held belief in misconduct, this final issue effectively falls away, since it cannot have been within the range of reasonable responses for the respondent to have dismissed the claimant on the basis of the information which was before it.

*Conclusion on unfair dismissal*

135. In summary, the respondent has not proven that it had in mind the potentially fair reason for dismissal of conduct when it dismissed the claimant and so **the claimant's claim for unfair dismissal succeeds**.
136. Even if I **had** found that the respondent did have conduct in mind when it dismissed the claimant, I would have found that the dismissal was both procedurally and substantively unfair, given the serious procedural failings identified and the lack of a reasonably-held belief that the claimant had committed misconduct. The claimant's dismissal for misconduct would have been outside the range of reasonable responses, and therefore unfair in any event.

*Polkey and contributory fault*

137. I do not consider that the facts of the case give rise to any basis for reducing any award to the claimant based on contributory fault. The respondent has failed to prove that the claimant committed any misconduct for this purpose. I have found that the respondent was aware of other work being undertaken by the claimant during her employment and so the respondent has **failed** to prove that carrying out such work amounted to misconduct on her part. The respondent has also **failed** to prove that the claimant committed any other acts of misconduct which caused or contributed to her dismissal.
138. I have carefully considered the issue of *Polkey*. Whilst I do not find that there was any basis for the claimant to have been fairly dismissed on the basis of misconduct, the respondent was genuinely having serious financial issues during 2022. Those issues were the reason why the claimant and her colleagues were asked to accept a reduction in pay and to become self-employed. In effect they were being placed at risk of potential redundancy as the respondent was seeking to (and did) reduce its headcount of employees carrying out accountancy work.
139. I consider therefore that, had the respondent not contrived to dismiss the claimant for misconduct, there was nonetheless a material risk that she would have been dismissed for redundancy during the months ahead. I assess that risk at 50% on the available evidence, as it is also possible that the claimant may have remained in employment given that the other two employees had agreed to self-employment. Accordingly, I have **reduced**

**the claimant's compensatory award below by 50% on the basis of Polkey.**

*Breaches of the Acas code*

140. The claimant's claim for unfair dismissal (misconduct) is one to which the Acas Code of Practice on Disciplinary and Grievance Procedures applies. In light of section 207A of TULRCA, I have considered whether the respondent has unreasonably failed to comply with the Code and, if so, whether it is just and equitable to apply an uplift to the claimant's compensatory award for unfair dismissal, and, if so, how much.
141. There have been a number of serious and unreasonable failings by this respondent in respect of the Code, namely:
- a. It failed to investigate and establish facts before dismissing the claimant, in a case where it was clearly appropriate to hold an investigatory meeting with the claimant.
  - b. It failed to notify the claimant of the case against her before dismissing her.
  - c. It failed to notify the claimant of a disciplinary meeting.
  - d. It held a disciplinary meeting without notice and which was wholly inadequate, in a car, late at night, when the decision to dismiss had already been written in advance.
  - e. It failed to advise the claimant of her right to be accompanied at the meeting.
  - f. It gave the claimant no opportunity to present her case prior to dismissing her. The details in the dismissal letter were extremely vague and given to her in a dark car and she could not reasonably be expected to respond to them in those circumstances.
  - g. It failed to permit the claimant to appeal against the decision to dismiss her.

142. I consider, given the number and serious nature of the failings, that it is wholly appropriate to **uplift the claimant's compensatory award for unfair dismissal by 25%**. The Acas procedures did not apply to the other heads of claim on the facts of this case and so there is no uplift in respect of them.

**Wrongful dismissal**

143. The claimant was dismissed with only two weeks' notice (of seven). She brings a wrongful claim in respect of the balance of five weeks' notice. The respondent says that it was entitled to dismiss her without notice for gross misconduct on 25 March 2022. I must decide if the claimant committed an act of gross misconduct entitling the respondent it to dismiss her without notice.
144. In distinction to the claimant's claim of unfair dismissal, where the focus was on the reasonableness of the respondent's decisions, and it is immaterial

what decision I would myself have made about the claimant's conduct, I must now decide for myself whether the claimant was guilty of conduct serious enough to entitle the respondent to terminate her employment without notice.

145. The onus fell on the respondent to convince the tribunal, on the balance of probabilities, that the claimant had committed gross misconduct. I find that the respondent has **not** proved that the claimant committed gross misconduct. As noted earlier, the respondent's case was based primarily on assertions which were not clearly or cogently supported by evidence; such documentary evidence that there was on the specific issue of Skoroda Ltd supported the claimant rather than the respondent; and the respondent was aware of the claimant undertaking other employment and self-employment whilst employed by the respondent and took no issue with this prior to the claimant refusing to work for the respondent on a self-employed basis.

146. The claim for wrongful dismissal **succeeds**.

#### **Unlawful deduction from wages**

147. The respondent withheld the claimant's pay from 6 to 25 March 2022 because it did not consider that the claimant was working during this period. The claimant's case was that, although her access to the respondent's systems was limited by the respondent and she was in dispute with the respondent about where she would work from, she did continue to do some work, and sent a list of this work to the respondent, which it did not refute or challenge at the time.

148. I accept that the claimant did continue to work for the respondent during the period in question; this was not a case in which she was refusing to work altogether.

149. As such, I find that in withholding the claimant's wages, in the absence of any contractual entitlement to do so, the respondent unlawfully made deductions from her wages and this claim **succeeds**.

#### **Holiday pay**

150. There was evidence that the claimant *could* request and *was granted* paid holidays. The contract makes no provision for the carry forward of leave from one year to the next. The question is therefore one of fact as to whether there was a separate oral agreement to carry leave forward such as to amount to an additional contractual term, or alternatively to bring the claimant within an exception to the usual rule under the Working Time Regulations that leave cannot be carried forward.

151. I am not satisfied that such an agreement was made, or that the claimant had been unable to take her leave during the earlier leave years. She could have taken the leave but chose not to do so. The aspect of her claim relating to leave years 2020/2021 and 2021/2022 therefore **does not succeed**.

152. The claimant is entitled to a payment in lieu of accrued and untaken holiday for the period from 6 February 2022 until 25 March 2022 and so her claim **succeeds in part** in this respect.

### **Remedy**

153. My decision and reasons on remedy are as follows.
154. My findings on the issues of *Polkey* and the Acas Code are set out earlier. In terms of mitigation of loss, I find that the claimant has taken reasonable steps to mitigate her losses in setting up her own company, paying herself a wage and dividend and making good her losses from the start of September 2022, around six months after being dismissed for gross misconduct. I consider it highly unlikely in the circumstances that, had she pursued other employed roles more actively, she would have obtained new employment on more favourable terms than this through another employer. I reach this view particularly given the inevitable difficulties she would have faced with other employers as a result of her dismissal by the respondent and the reasons the respondent gave for it.
155. The claimant did not claim state benefits and so the Employment Protection (Recoupment of Jobseeker's Allowance and Income Support) Regulations 1996 do not apply in this case.
156. The respondent shall pay the claimant compensation in the sum of **£9,063.83**, comprising as follows:
- a. **£2,539.00** (gross) as compensation for wrongful dismissal. This is calculated on the basis of 5 weeks' gross pay for the period from 26 March until 30 April 2022, the remainder of the notice period.
  - b. **£2,792.90** by way of a basic award for unfair dismissal (claimant aged 26 when dismissed, seven years complete employment, basic gross pay £507.80 per week).
  - c. **£1,874.89** by way of a compensatory award for unfair dismissal, comprising:
    - i. £500 for loss of the claimant's statutory rights; plus
    - ii. £2,499.83 in respect of the claimant's net loss of earnings from 1 May to 31 August 2022 inclusive (£7,368.83<sup>1</sup> minus £4,869<sup>2</sup>); less
    - iii. a 50% *Polkey* reduction; plus
    - iv. a 25% increase for breaches of the Acas Code.
  - d. **£1,450.80** (gross) for unpaid wages between 6 and 25 March 2022, 20 days @ £72.54 per day.

<sup>1</sup> Net earnings from respondent from 1 May to 31 August 2022 inclusive: 17.571 weeks x £419.33.

<sup>2</sup> Net earnings from new employment 1 May to 31 August 2022 inclusive: (£823 x 3) + £1,000; plus a £900 dividend and plus £500 in self-employment income.

e. **£406.24** (gross) as compensation for holiday pay<sup>3</sup>.

Employment Judge Cuthbert  
Dated: 8 January 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON  
16 January 2023 By Mr J McCormick

FOR EMPLOYMENT TRIBUNALS

---

<sup>3</sup> 4 days' holiday accrued between 6 February and 25 March 2022 at a gross daily rate of £101.56 (based on a 5-day working week)