



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4105990/2022

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Held in Glasgow by Cloud Video Platform (CVP) on 14 November 2023

Employment Judge B Beyzade

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Miss Charlene Wilson

**Claimant
Represented by:
Mr R Bright,
Lay representative
(claimant's partner)**

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**The Nail & Beauty Zone Ltd
Pure Spa & Beauty**

**Respondent
Represented by:
Mr M Lumsden,
Director**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

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1. The judgment of the Tribunal is that:

1.1. The claimant's complaints of breach of contract (notice pay) and wrongful dismissal are not-well founded and they are hereby dismissed.

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REASONS

Introduction

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2. The claimant presented a complaint of unfair dismissal, direct disability discrimination, discrimination arising from disability, arrears of pay (statutory sick pay) and breach of contract (notice pay) and wrongful dismissal, which the respondent denied.

3. A Preliminary Hearing was held on 11 August 2023 before Employment Judge M Kearns, following which Judgment was issued to parties on 17 August 2023 dismissing the claimant's complaints of disability discrimination and arrears of pay (statutory sick pay). In addition, the Tribunal concluded that the claimant
5 did not have sufficient qualifying service to claim unfair dismissal and that the Tribunal has no jurisdiction to hear such a claim.
4. The claimant's complaints for breach of contract (notice pay) and wrongful dismissal were therefore the only remaining complaints before the Tribunal.
- 10 5. A Final Hearing was listed on 14 November 2023. This was a hearing held by Cloud Video Platform ("CVP") video hearing pursuant to Rule 46 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. I was satisfied that the parties were content to proceed with
15 a CVP hearing, that it was just and equitable in all the circumstances, and that the participants in the hearing were able to see and hear the proceedings.
6. The parties prepared and filed a Joint Inventory and File of Productions in advance of the hearing consisting of 122 pages.
- 20 7. At the outset of the hearing the parties were advised that the Tribunal would investigate and record the following issues as falling to be determined, both parties being in agreement with these (having held detailed discussions with parties in relation to the issues at the start of the hearing):
- 25 (i) What was the claimant's notice period? Parties agreed that the claimant's contractual notice period was one month (£798.00 gross pay), that her hourly rate of pay was £9.50 before tax and national insurance were deducted and that the claimant's normal weekly working hours were 21 hours per week.
- 30 (ii) Was the claimant paid for that notice period? It is not disputed that the claimant was not paid for that notice period.
- 35 (iii) Was the claimant asked to work any period of notice, did she work her period of notice, and if not, why not?
- (iv) Was the claimant guilty of gross misconduct? Did the claimant do something so serious that the respondent was entitled to dismiss

without notice? The respondent contends that the claimant breached the confidentiality provisions in her contract of employment by sharing a confidential letter addressed to her from the respondent with her colleagues.

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8. The claimant gave evidence at the hearing on her own behalf and Miss T Zaheer, Spa Manager PURE Silverburn and the claimant's line manager gave evidence on behalf of the respondent. A written statement was filed by the respondent on behalf of Miss T Zaheer, Spa Manager.

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9. The claimant was represented by Mr R Bright, lay representative and the claimant's partner, and the respondent was represented by Mr M Lumsden, Director of the respondent.

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10. Both parties made closing submissions.

Findings of Fact

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11. On the documents and oral evidence presented the Tribunal makes the following essential findings of fact restricted to those necessary to determine the list of issues –

Background

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12. The claimant was employed by the respondent as a Spa & Beauty Therapist between 03 January 2022 and 14 October 2022.

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13. The respondent, The Nail & Beauty Zone Ltd, is a private limited company which has its registered office at Pure Spa & Beauty, 134 Rose Street, Edinburgh, EH2 3JD.

Claimant's terms of employment

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14. The claimant's statement of terms of employment dated 01 January 2022 indicated that her start date was 03 January 2022, and that the claimant's place of work was in Silverburn.

15. The claimant's pay was £9.50 per hour payable in monthly instalments on or before the last working day of the month.

16. Although the claimant's contract of employment stated that she will be rostered to work 24 hours per week, in fact, the claimant's normal working hours were 21 hours per week.

5 17. The claimant's contract of employment stated under the heading of confidentiality:

"While you are employed by the Company, you will have access to and may be entrusted with information that is or may be secret or confidential.

You must not disclose secrets or confidential information except:

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- Where required in the proper course of your duties, or
 - Where disclosure is permitted under the Public Interest Disclosure Act 1998.

Apart from circumstances 1 and 2 above you must not disclose to any person or make use of or permit to be used in any way any trade secret or any other confidential information received or made by you in the course of your employment or in connection with your employment concerning:

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- The finances or transactions of the Company,
 - any business or activity carried on by the company,
 - any plans or proposals regarding any business or activity to be carried on by the Company,
 - the business or activities of any persons on whose behalf the Company supply any goods or services to the public,
 - the personal details and transactions of customers of the Company
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These restrictions apply during the time you work for us and at any time after your employment with us comes to an end."

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18. The claimant's contract of employment stated that the claimant was entitled to receive from the respondent one month's notice in writing of the termination of her employment, following her probation period. The claimant's probation period had ended on 03 April 2021.

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19. The termination provisions within the claimant's contract of employment also stated:

“If your employment is terminated for reasons of a disciplinary nature or act of gross misconduct, you will receive one week's notice of termination of employment which will override the above requirement for notice and is regardless of length of service with the company. There are certain acts that the company regards as gross misconduct where you could be summarily dismissed with no notice period. These are detailed in the Company Manual and include theft, deliberate failure to attend for work, deliberate negligence of duties and verbal or physical abuse to any party connected with the Company.”

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Claimant's line manager

20. Until July 2022 the claimant's line manager was Ms C Lennon. From July 2022, Miss Zaheer was the claimant's line manager.

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Claimant's sickness absence

21. Following a period of sickness absence in September 2022, the claimant provided a fit note to the respondent. Accordingly, the claimant expected to be paid Statutory Sick Pay in her September 2022 salary payment. She did not receive her payment in respect of Statutory Sick Pay as expected in her salary payment (which was due to be paid on 30 September 2022).

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22. The claimant returned to work on 11 October 2022.

Meeting on 11 October 2022

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23. Miss Zaheer scheduled a meeting with the claimant on 11 October 2022. The claimant noticed that her calendar was blocked off for 1 hour by Miss Zaheer on that day.

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24. When the meeting time had arrived, Miss Zaheer met the claimant, took her to her office and asked how the claimant was feeling. The claimant explained that she was annoyed in terms of everything that had been taking place. Miss Zaheer stated that she understood this.

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25. Miss Zaheer advised the claimant that the investigation in relation to her attendance had been concluded, that it was not good news, and that the

respondent had decided to terminate her employment. She advised the claimant that she had sent her a letter of termination by email.

5 26. The claimant read the letter of termination dated 11 October 2022 on her mobile telephone during the meeting. That letter, a copy of which is provided at page 115 of the File of Productions was marked “strictly private and confidential” and the opening line of the letter stated, “As discussed, sadly, I must inform you that your position at PURE is being terminated, giving one month’s notice of termination of your employment.”

10 27. That letter further advised:
“Since starting in the role of therapist at PURE your job performance, attendance and behaviours have been consistently under the standard expected for a PURE employee, and unfortunately, we do not wish to
15 continue with your employment with the company.”

20 28. It was further stated that the claimant had within the last 26 weeks worked 47 days and had 32 days’ sickness absence (sickness rate of 68%) which was not acceptable to the respondent, that the claimant’s absences had been sporadic, for many different reasons, and contributed to the respondent being unable to rely on the claimant in terms of her ability to attend work. It was explained that this caused the respondent to lose revenue and added to unacceptable burdens on other staff (and cancelled client bookings). In addition, the letter advised that the claimant’s
25 performance was poor and key performance indicators data was provided in support of the respondent’s position in respect thereof.

30 29. In the same letter the claimant was notified that she was required to take any accrued holidays during her one month notice period. However, it was recorded that the claimant had 72 hours accrued holiday to take from the start of the holiday year until her leaving date of 10 November 2022 (all of which she had taken previously).

30. In addition, the letter advised that the claimant was also required to return any property belonging to the respondent.

5 31. Having read the letter of 11 October 2022, the claimant became emotional and upset. She asked if she could go outside and compose herself, and Miss Zaheer agreed to the claimant's request. Miss Zaheer waited for the claimant to return in order to conclude the meeting. However, the claimant had left the workplace, and the meeting did not continue.

10 Events after the meeting on 11 October 2022

12 32. At 1.10pm that day, the claimant advised her colleague, a receptionist known as Jenna by way of a WhatsApp message that her employment had been terminated. The claimant's colleague enquired about what Miss Zaheer had said to her. The claimant sent a screenshot of the letter dated 15 11 October 2022 by WhatsApp to her colleague on the same day at 1.57pm. That letter was sent to the claimant's colleague, Jenna bearing the claimant's caption "Just so u all know y I'm being sacked!" As her colleague commented that the letter was blurry, the claimant re-sent a further copy of the screenshot of the letter to her at 2.04pm that day.

20 33. Two other members of staff who were beauty therapists were also provided with a copy of the letter of 11 October 2022 by the claimant on the same day.

25 34. One of the Beauty Therapists known as Jessica came into Miss Zaheer's office later that day to advise that the claimant had sent her a WhatsApp message, which included a screenshot of Miss Zaheer's letter dated 11 October 2022 (which was marked "strictly private and confidential"). In addition, other members of staff had advised Miss Zaheer that they had 30 received a copy of the same letter from the claimant by way of a WhatsApp message.

Correspondence after the meeting on 11 October 2022

35 35. By letter dated 12 October 2022 the claimant was invited to attend a meeting with Miss Zaheer and Ms S Cairney, Regional Manager to discuss the

following matters which occurred after the claimant was notified by letter dated 11 October 2022 that her employment will be terminated with notice:

“After this was given to you, you walked out the spa unannounced and shared the letter around other staff members which is in breach of your employment contract. Both acts are considered gross misconduct subject to company disciplinary processes which could result in summary dismissal from the company.”

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10 36. The letter stated that as the claimant remained an employee of the respondent, and she was required to make every effort to attend the meeting which was due to take place on 13 October 2022 at 1.00pm.

15 37. The claimant sent an e-mail dated 13 October 2022 at 12.07pm advising that she authorises Mr R Bright as her current representative in terms of contact, that under the advice of her GP (the claimant referred to the fact that she was suffering from depression) she must ask for any direct contact with herself to be halted, and further that, if the respondent felt the need to respond to the letter attached to that email they should direct all contact to Mr Bright.

20 38. A letter was provided by Mr Bright dated 13 October 2022 on his company headed paper advising that the claimant was not given sufficient notice of the meeting on 13 October 2022, and explaining that in relation to the meeting on 11 October 2022, “After reading the letter Miss Wilson asked Thara Zaheer if she was to leave the business immediately and Thara Zaheer confirmed this to be correct. Miss Wilson gathered her personal belongings and left the premises as advised.”

30 39. The letter also referred to an email from the respondent advising that the claimant’s Statutory Sick Pay relating to September 2022 would not be honoured as it was not believed that the claimant experienced workplace stress despite confirmation from her GP and a prior payment being made in August 2022.

40. The letter pointed out that the claimant did not have any performance related discussions with management and that she had been praised on multiple occasions for her efforts. It was suggested that after the claimant had raised issues with her sick pay, the respondent had terminated her employment due to poor performance and behaviours. The letter made reference to the claimant's health, it indicated that the claimant required all contact with the claimant to be made in writing to avoid any further discrepancies, and that the claimant had been in contact with an employment solicitor.
41. The claimant was sent a letter dated 14 October 2022 advising that the outcome of the respondent's investigation of the three issues were as follows:
- In response to your grievance concerning the payment of SSP in September we agree to pay you SSP for the day's sickness covered by a fit note signed by a doctor. The payment will be made in our next pay run at the end of this month.
 - In response to the unauthorised absence where you left work mid shift, the version of events differs considerably between what you have reported versus the account provided by your colleagues who were present. However, given the circumstances we are prepared to accept that there may have been a misunderstanding around the notice which had been given and the requirement for you to work your notice period. On this issue there is no disciplinary action taken.
 - In response to the disclosure to work colleagues at Silverburn by you of a private and confidential document, which was clearly headed 'Strictly Private and Confidential' and addressed only to you, we note that your letter does not refer to this disciplinary matter. In the absence of any explanation or denial from you on this breach of your employment contract, we assume on balance of probability that you intentionally committed this breach."
42. The letter quoted the confidentiality provisions within the claimant's contract of employment. Thereafter, it was concluded that the respondent considered the claimant's breach of confidentiality to be both serious and deliberate, and that they could not see any reason why the claimant needed to share the letter

with her colleagues "...leaving us to believe it was done with malicious intent, hoping to cause dissent and unrest amongst other members of the team."

43. The letter further advised that:

5 "As a result, after consideration of this serious employment contract breach, we regret to inform you that your employment with PURE Spa & Beauty is now terminated for reason of gross misconduct. Your final date of employment is 14 October 2022."

10 44. Mr Bright sent an email to Mr Lumsden on 14 October 2022 setting out a number of points of dispute on behalf of the claimant, including but not limited to an explanation in terms of why the claimant's letter of termination was disclosed. He stated that it was expected that the claimant's sick pay would be paid before close of business that day, that the claimant received advice
15 from an employment solicitor and would be proceeding to an Employment Tribunal.

45. The claimant's employment ended on 14 October 2022.

20 46. The claimant started ACAS Early Conciliation on 11 October 2022 and the ACAS Early Conciliation Certificate was issued on 25 October 2022.

47. The claimant presented her claim to the Tribunal on 11 November 2022.

25 **Observations**

48. On the documents and oral evidence presented the Tribunal makes the following essential observations on the evidence restricted to those necessary to determine the list of issues –

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49. The Tribunal observed that in terms of the witness evidence it heard, different witnesses were able to assist with or comment on specific aspects of this case. The documentary evidence and the correspondences in the File of Productions was informative in terms of explaining the key events that took

place which were not in dispute including the claimant's terms of employment and the correspondences between 11 and 14 October 2022. Where there was a conflict of evidence, the Tribunal made findings of fact on the balance probabilities based on the documents, and having considered the totality of the witness evidence, and accepted the evidence that set out the position most clearly and consistently.

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50. I found that Miss Zaheer's explanation of what happened during the meeting between her and the claimant on 11 October 2022 after the claimant had read the letter of 11 October 2022 on her mobile telephone to be credible and consistent. The respondent sent a letter to the claimant on 12 October 2022 to address (in addition to the breach of confidentiality matter) the issue of the claimant leaving the workplace on the previous day. It was not clear from the claimant's email dated 13 October 2022 why the claimant had left the spa and whether this as related to ill health (albeit a letter was sent from the claimant's partner dated 13 October 2022 seeking to provide an explanation in terms that the claimant left after Miss Zaheer confirmed that she had to leave the business immediately). The claimant's oral evidence was "I said to Thara what does that mean that I have to go? To which her reply was yes. At that point I just left the office and collected my belongings and went." I considered the account provided of the meeting on 11 October 2022 by the claimant in her oral evidence and compared this with the content of the letter from the claimant's partner dated 13 October 2022.

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51. In addition, I noted that the claimant's oral account of events relating to what happened after the meeting on 11 October 2022 was not consistent with the contemporaneous documents. The claimant stated in her oral evidence that she thought she had sent a partial screenshot of Miss Zaheer's letter dated 11 October 2022 to her work colleague.

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52. Additionally, the claimant stated that she had showed the letter dated 11 October 2022 to the two Beauty Therapists, but one of the therapists, Jessica had told Miss Zaheer that the letter was sent to her by way of a WhatsApp message. The claimant's caption on the WhatsApp message sent to the

receptionist stated ““Just so u all know y l’m being sacked!” This suggests that the claimant sent a copy of the letter by way of a WhatsApp message to employees other than the receptionist.

5 53. The claimant confirmed in her oral evidence that she did not believe that she disclosed the letter of 11 October 2022 because she was required to do so in the proper course of her duties, and further, that she had not disclosed that letter pursuant to the provisions of the Public Interest Disclosure Act 1998 (“PIDA”).

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54. In relation to whether the claimant believed she had breached the confidentiality provisions within her contract of employment by disclosing the letter dated 11 October 2022 to her colleagues, which the claimant was asked about during cross examination, the claimant replied, “at the time, no”. The claimant accepted that she did not disclose the letter of 11 October 2022 in the proper course of her duties or pursuant to PIDA. Following the claimant’s response, the claimant was asked whether based on the fact that she accepted that she did not disclose the letter of 11 October 2022 in the proper course of her duties or pursuant to PIDA, the claimant agreed that she was in breach of the confidentiality provisions in her employment contract, and in response to which, the claimant replied “yes”.

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55. As the letter dated 11 October 2022 was marked “strictly private and confidential”, it was difficult to decipher why the claimant had disclosed the letter in question to her colleagues, taking into account the explanation provided in the claimant’s partner’s email dated 14 October 2022, taking account of the circumstances.

Relevant law

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56. To those facts, the Tribunal applied the law –

57. In terms of the claimant’s contract, the starting point is that contracts of employment which give rise to the entitlement to pay (or notice pay) are a

matter of contract: based upon an agreement between the parties, employer, and employee, although it is recognised that those two parties rarely have the same bargaining power. Many forms of employment protection have been established by Parliament over the years to ensure that employers deal properly and in accordance with minimum contractual entitlements with their employees. In short, employers will not be acting lawfully if they act on a unilateral basis. The statutory provisions dealing with the relevant employment protection rights are set out in the *Employment Tribunals Act 1996*, at Section 3 read with the *Employment Tribunals Extension of Jurisdiction (Scotland) Order 1994/1624* for the breach of contract (notice pay) complaint. The Tribunal had regard to its overriding objective at Rule 2 of the Employment Tribunals Rules of Procedure 2013 to deal with cases fairly and justly.

58. In relation to her complaint of notice pay, the claimant relies on the relevant contractual provisions (set out in the findings of fact above).

59. The respondent did not give notice to the claimant following her dismissal with immediate effect on 14 October 2022. It has the onus of proving that it was entitled to do so on account of the repudiatory breach of contract by the claimant. The standard of proof in that regard is the balance of probabilities. If the respondent does not discharge the onus the claimant succeeds in her claim for breach of contract. These principles were confirmed, if that be needed, in the EAT in *Hovis Ltd v Louton EA-2020- 00973*. An entitlement to a minimum period of notice is established in section 86 of the Employment Rights Act 1996 and is for one week of notice for each year of continuous employment up to a maximum of 12 weeks.

60. Wrongful dismissal is dismissal in breach of contract. Fairness is not an issue. The sole question is whether the terms of the contract, which can be express or implied, have been breached by the employer. The employee will have a claim in damages if the employer, in dismissing them, breached the contract and caused them loss.

61. Dismissing an employee without notice may be justified where the employee has committed a repudiatory breach of contract. An employer has a choice whether to accept the repudiatory breach or whether to affirm the contract. Where the employer decides to terminate the contract, then they have
5 accepted the repudiatory breach by the employee. The question of what level of misconduct is required for an employee's behaviour to amount to a repudiatory breach is a question of fact for the court or Tribunal.
62. The classic exposition of the concept of repudiatory breach of an employment
10 contract was by Lord Evershed in *Laws v London Chronicle (Indicator Newspapers Limited)* [1959] 285 at 287 where he set the question out as being "whether the conduct complained of is such as to show the servant has disregarded the essential conditions of the contract of service".
- 15 63. More recently, this was put in another way, namely whether the conduct "so undermines the trust and confidence which is inherent in the particular contract of employment that the employer should no longer be required to retain the employee in his employment" – *Neary v Dean of Westminster* [1999] IRLR 288.
- 20 64. Rule 41 of the Employment Tribunal Rules provides that Employment Tribunals are not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts. In the circumstances, hearsay or documentary evidence, or other types of evidence, of whatever nature, are
25 not, as such, inadmissible, and if such evidence is sufficiently relevant to what the Tribunal has to decide, then it can be considered. However, the assessment of such evidence by a Tribunal faced with a wrongful dismissal claim, involves particular considerations, *Hovis Limited v Louton* UK EAT 2020-000973-LA, per HHJ Auerbach at para 25 – 27, namely:
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- Is it reliable?
 - Is it credible?
 - How much weight should be attached to it?
 - To what extent is the hearsay account capable of being tested?

- What is the nature of the written record kept?

65. In *Jagex Limited v McCambridge* [2020] IRLR 187, EAT the claim arose out of the employee's dismissal for disseminating confidential information that he came by when a fellow employee's salary details were found by him on a printer and which he then discussed internally with other employees. As HHJ Mary Stacey said, upholding the Tribunal's decision that the employee had not acted in repudiatory breach of contract:

"If we step back a little from the detailed analysis of individual words in the contract, what has happened here is that an employee of the Respondent, Mr Muddasir, has inadvertently left details of his own salary on the office printer, which was embarrassing for the Respondent when the details became known about in the office."

66. In determining whether an employee is entitled to be paid for a period during which they have not worked, the terms of the contract are the starting point. As Lord Justice Coulson said in the case of *North West Anglia NHS Foundation Trust v Gregg* [2019] EWCA Civ 387, [2019] IRLR 570: "the starting point for any analysis of [whether the employer is entitled to withhold pay] must be the contract itself... Was a decision to deduct pay for the period [in question] in accordance with the express or implied terms of the contract?"

67. In the case of *Gregg*, Coulson LJ went on to say this: "*If the contract did not permit deduction then... the related question is whether the decision to deduct pay for the period... was in accordance with custom and practice. If the answer to both these questions is in the negative, then the common law principle – the "ready, willing and able" analysis... falls to be considered.*"

Submissions

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Respondent's submissions

68. Both Mr Bright and Mr Lumsden made oral submissions, which I found informative and fully considered prior to reaching my decision.

69. Mr Lumsden submitted that the claimant was initially, on 11 October 2022, provided with one month's notice of termination of employment in line with her contract of employment, and she had walked out of the meeting with Miss
5 Zaheer (and did not return). He also said that on the same day the claimant had breached the confidentiality clause in her employment contract by sharing the letter of 11 October 2022 received from the business marked "strictly private and confidential" and she admitted that she had breached her contractual confidentiality obligations in cross examination. He pointed out
10 that the claimant did not attend the meeting on 13 October 2022 and failed to provide any written explanation in respect of her conduct regarding the alleged breach of her confidentiality obligations. The respondent, he submits, therefore were entitled to take the view that they had the right to dismiss the claimant for gross misconduct in accordance with the provisions of her
15 contract of employment.

70. In the alternative, he argued that if the Tribunal did not find that the claimant's actions amounted to gross misconduct, the Tribunal should award one week's notice pay on the basis that the termination provisions in the claimant's
20 contract of employment stipulate this in the event that an employee's employment is terminated for reasons of a disciplinary nature.

Claimant's submissions

71. Mr Bright submitted that the claim for notice pay should succeed and that the
25 initial termination of the claimant's employment on 11 October 2022 was unfair. He pointed out that there was no dialogue from the respondent in terms of the claimant's attitude, behaviour, or performance prior to the termination of her employment. He also referred to the key performance indicators being incorrect and the fact that at least four holiday dates of the claimant were
30 counted as sick days in error (which would have inflated the respondent's figures).

72. Mr Bright said that after the 11 October 2022 meeting, the claimant was not contacted by the respondent and requested to return to work, and that the

letter of termination of the claimant's employment did not expressly state that the claimant was required to work during her notice period. He stated that the claimant experienced mental health issues following the 11 October 2022 meeting.

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73. Mr Bright also stated that the claimant did not dispute that what she had done (in terms of sharing the letter dated 11 October 2022 with her colleagues) could be classed as a disciplinary breach. He explained that the claimant conceded that having been provided with details of the relevant provisions of her contract, she believed that sending the letter in question to her colleagues was an error. He explained that at the time, the claimant believed the information she was divulging was personal to her, that she was entitled to and able to disclose this to her colleagues, and that there was no malice intended on her part. He stated that the WhatsApp messages show that the letter was sent to her work colleagues and friends, and that it was not sent with a view to incite unrest.

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Respondent's submissions in reply

74. In terms of the respondent's reply, Mr Lumsden stated that the claimant's representative appeared to be focussing his submissions on points that might be relevant to an unfair dismissal claim, which was dismissed at the Preliminary Hearing in August 2023. Mr Lumsden did not believe that that certain parts of Mr Bright's submissions were relevant, and he submitted that if the claimant's unfair dismissal complaint was being heard at today's hearing, it would have been a completely different type of hearing.

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Discussion and decision

75. On the basis of the findings made the Tribunal disposes of the issues identified at the outset of the hearing as follows –

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76. I considered the claimant's complaint in respect of breach of contract arising from non-payment of her notice pay.

- 5 77. As a matter of contract, the relevant provisions of which are set out in the findings of fact above, in the event that the respondent terminated the claimant's employment they were normally required to provide one month's notice whereas the claimant could be dismissed from her employment for an act of gross misconduct without notice.
- 10 78. The respondent dismissed the claimant by a letter dated 11 October 2022, giving one month's notice of termination of the claimant's employment. The letter indicated that the claimant's leaving date was 10 November 2022. The claimant was advised that her job performance, attendance, and behaviours had been consistently under the standards expected of the respondent's employees and data was provided in support of the respondent's decision. The claimant disputed some of the data.
- 15 79. The claimant's representative submitted that the termination of the claimant's employment was unfair. I have reminded myself that the fairness of the claimant's dismissal is not in issue in the context of a breach of a wrongful dismissal complaint. The sole question is whether the terms of the contract, which can be express or implied, have been breached by the employer.
- 20 80. Taking into account all the circumstances, including but not limited to the respondent's reasons for dismissal and the claimant's position in relation to some of the data that was relied on by the respondent being incorrect, I do not find that the claimant's dismissal on 11 October 2022 with one month's notice was in breach of contract or that this amounted to wrongful dismissal.
- 25 81. Thereafter, by letter dated 14 October 2022 the claimant was advised that her employment had been terminated by reason of gross misconduct and that, accordingly, her final date of employment would be 14 October 2022.
- 30 82. Firstly, in respect of the claimant's alleged unauthorised absence, it was accepted that there may have been a misunderstanding around the claimant's notice which had been given and the requirement for the claimant to work her

notice period. As a result, the respondent decided not to take any disciplinary action against the claimant in respect of this matter.

5 83. Secondly, the respondent determined that the claimant had failed to provide any explanation or denial in terms of the breach of her contract of employment with regards to the claimant's disclosure of the respondent's letter dated 11 October 2022 to her work colleagues which was marked "strictly private and confidential" and addressed to the claimant only. The respondent stated that in the absence of any explanation or denial, it was assumed that on the
10 balance of probabilities the claimant intentionally committed that breach.

84. The letter dated 14 October 2022 sets out the relevant confidentiality provisions within the claimant's contract of employment, which are recorded in the findings of fact above.

15 85. Whilst there is no definition of information that is or may be "confidential" or "secret" in the claimant's contract of employment, the letter dated 11 October 2022 was marked "strictly private and confidential" and it was addressed to the claimant only. There was no explanation provided in relation to the
20 claimant's disclosure of the letter dated 11 October 2022 to her colleagues in either her email dated 13 October 2022 or in her partner's letter sent on her behalf dated 13 October 2022.

86. Although this was sent after the respondent's decision was made to dismiss
25 the claimant for gross misconduct, Mr Bright's email dated 14 October 2022 states, "You claim Miss Wilson sharing her termination letter is a breach of confidentiality, yet the only information provided on this letter are details personal to Miss Wilson and as such her information to disclose as she sees fit." Although it is not clear from the content of the email, I have assumed that
30 Mr Bright was seeking to provide the claimant's explanation based on instructions he had received from the claimant. In any event that email did not address the issue in terms of whether there was a breach of the claimant's confidentiality obligations by reference to the provisions of the claimant's contract.

87. The claimant confirmed in oral evidence that she did not believe that she was in breach of her confidentiality obligations with regards to the provisions of the claimant's contract at the time she disclosed the letter dated 11 October 2022 to her colleagues. The claimant said in oral evidence that she believed that the letter was private and confidential to herself and that she did not see it as confidential to the workforce as it contained her private information.
88. It was not clear why the claimant did not provide an explanation in those terms to the respondent either in her email dated 13 October 2022 or in the claimant's partner's correspondence dated 13 October 2022.
89. In any event, I noted that the details provided in this letter included the respondent's reasons for terminating the claimant's employment, data that the respondent relied upon (including absence and performance information), details of the arrangements relating to termination of the claimant's employment (notice period, annual leave, return of company property, and the claimant's leaving date), and in addition, the claimant's targets, including with respect to revenue targets. Although, I accept that taking a step back, some of this information was personal data relating to the claimant, and whilst the claimant's performance data and targets (and the reasons for termination of her employment) may have been personal to her, there was no indication that the claimant was entitled to share this information with her colleagues. I also note the respondent's reasons in their letter dated 14 October 2022 in terms of why they considered the disclosure of the letter of 11 October 2022 to the claimant's colleagues and the potential consequences to be serious.
90. In the circumstances, the confidentiality provisions in the claimant's contract of employment are relevant to the claimant's disclosure of the letter dated 11 October 2022. I have taken into account the fact that the claimant accepted in her oral evidence that based on the fact that she accepted that she did not disclose the letter of 11 October 2022 in the proper course of her duties or pursuant to PIDA, the claimant agreed that she was in breach of the confidentiality provisions in her employment contract. It was not suggested by

the claimant that the information she disclosed to her colleagues did not fall within one of the five further bullet points identified in the contractual confidentiality obligations in terms of the categories of confidential information.

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91. In terms of the decision to dismiss the claimant for gross misconduct, the letter of 14 October 2022 concluded that the respondent considered the claimant's breach of confidentiality to be serious and deliberate and they could see no reason why the claimant would need to share the confidential letter with her colleagues. It was also stated that the claimant was hoping to cause dissent and unrest amongst other members of her team.

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92. Mr Bright stated in his closing submissions that the claimant did not dispute that what she had done (in terms of sharing the letter dated 11 October 2022 with her colleagues) could be classed as a disciplinary breach.

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93. I reviewed the termination provisions of the claimant's contract of employment which state that there are certain acts that the company regards as gross misconduct where an employee may be summarily dismissed with no notice period. The contract provides a relatively broad list of categories of what may amount to gross misconduct and refers to the respondent's Company Manual (a copy of which was not provided within the File of Productions). From the list of categories of gross misconduct provided in the claimant's contract of employment, Mr Lumsden relies on "deliberate failure to attend for work" and "deliberate negligence of duties". I do not accept that the respondent is entitled to rely on the claimant's alleged deliberate failure to attend work or that this amounted to gross misconduct in circumstances in which the respondent chose not to take disciplinary action in respect of this (and where the claimant had reported her health condition in written correspondence on 13 October 2022 and the claimant's partner had explained in his correspondence why the claimant had left the office on 11 October 2022).

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94. However, the information disclosed by the claimant within the letter dated 11 October 2022 fell within the scope of the confidentiality provisions in the

claimant's contract of employment. It was accepted that the claimant did not disclose that letter in the proper course of her duties or in line with the provisions of the PIDA (the only categories of permitted disclosure within the confidentiality provision). The letter was marked "strictly private and confidential", and the claimant had deliberately disclosed the letter to three colleagues. The respondent was concerned at the material time that the claimant was hoping or attempting to cause unrest in the workplace, and I accept that may have been a possible consequence of the claimant's actions. Indeed, at least one of the respondent's employees felt that it was necessary to report to Miss Zaheer the fact that the claimant had sent the letter of 11 October 2022 to her by way of a WhatsApp message. In all the circumstances, the respondent was entitled to rely on the claimant's "deliberate negligence of duties" (in terms of breach of the claimant's confidentiality obligations) and that the same amounted to gross misconduct. The category of "deliberate negligence of duties" is specified in the claimant's contract of employment as an example of gross misconduct.

95. In view of the foregoing, I also accept that the claimant's breach of her confidentiality obligations amounted to a fundamental breach of contract, in terms of the implied duty of trust and confidence. Accordingly, the claimant's breach of contract was repudiatory in nature.

96. For the reasons set out above, I find that the respondent has shown that the claimant was dismissed on 14 October 2022 due to gross misconduct. In the circumstances, and pursuant to the provisions in the claimant's contract of employment, I do not find that the respondent was required to pay the claimant any notice pay by reason that her dismissal was due to gross misconduct.

97. In the circumstances, I make no award in terms of notice pay between 11 October 2022 and 14 October 2022, on the basis that the claimant did not attend work and the claimant communicated the situation with regards to her health (and asked the respondent not to contact her directly) by email dated

13 October 2022. I concluded that the claimant was not ready, willing, and able to attend work during that period of time.

5 98. Accordingly, the respondent was not in breach of contract in terms of its decision not to pay the claimant notice pay that was communicated to her by letter dated 14 October 2023.

99. In light of the above and foregoing, in my judgment, the claimant was not wrongfully dismissed.

10 100. For the avoidance of doubt, although section 86 of the Employment Rights Act 1996 provides that an employee is entitled to minimum notice when they are dismissed by an employer, section 86(6) states “This section does not affect any right of either party to a contract of employment to treat the contract as terminable without notice by reason of the conduct of the other party.” The claimant is not awarded statutory notice pay on the basis that the respondent treated the contract as terminable without notice pay by reason of the conduct of the claimant. I have determined that the respondent was entitled to terminate the claimant’s contract without notice in all the circumstances (for 15 the reasons set out above).

20 101. For these reasons the complaints of breach of contract (notice pay) and wrongful dismissal fail and they are therefore dismissed.

25 Conclusion

102. The claimant’s complaints of breach of contract (notice pay) and wrongful dismissal are hereby dismissed.

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B. Beyzade

Employment Judge
07 December 2023

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Date of Judgment

Date sent to parties

8 December 2023

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I confirm that this is my judgment in the case of Miss C Wilson v The Nail & Beauty Zone Ltd 4105990/2022 and that I have signed the Judgment by electronic signature.

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