EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mrs K Scislowska **V** **Fairtax Accounting Limited**

Heard at: Birmingham **On**: 28 to 30 August 2024

Before: Employment Judge Broughton

Appearances:
For Claimant: Mr P O'Callaghan, counsel
Respondent: Ms P Zdanowicz, legal representative

JUDGMENT

The respondent's application for strike out, based on late compliance with a couple of directions was refused. There were delays on both sides and it was accepted that the case was ready for hearing and there was no prejudice to either side.

The claimant's claim for unfair dismissal succeeds.

The claimant's claim for breach of contract, unpaid notice pay, also succeeds.

The claimant was not provided with a statement of statutory terms and conditions.

There will be a remedy hearing by video on 23 October 2024 where further submissions will be considered on matters including all those listed at 2.6 below.
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The facts

1. The claimant was employed by the respondent, a small accounting practice, as a payroll clerk.

2. Initially, she was employed from May 2019 until January 2020 when she said she was dismissed due to a downturn in work arising, in part, from the changes to IR35.

3. The respondent suggested that it was actually due to performance failings resulting from the claimant being diverted by significant events in her personal life.

4. Either way, it seems that they parted on good terms. When work picked up once more after covid, the respondent was, again, looking for someone to help with payroll for their clients and Marta Glen, the owner and director, approached the claimant.

5. This was on the recommendation of other staff and so, to the extent that there may have been issues with the claimant's prior performance, they were unlikely to have been substantial.

6. The claimant recommenced employment on 11 August 2021. It was not in material dispute that she was not provided with a written contract of employment, albeit the respondent said that a proforma, used for clients, was available on their intranet. At one point they appeared to suggest it was the claimant's responsibility to complete her own.

7. On the claimant's case, all went well until a new payroll system was to be introduced in early 2023.

8. The respondent's case was that there had been performance issues prior to this but these had largely been covered by Rafal Matwijec and not brought to the attention of Marta Glen, who was not regularly present in the office.

9. It was suggested that, below Marta Glen, all staff were equal and on the same level, such that it would not have been appropriate for any of them to manage the claimant's performance while, at the same time, Ms Glen was unaware of any issues and, as a result, could not have done so.

10. However, it transpired, during the course of the hearing, that Mr Matwijec, was titled Assistant Manager and earnt around double the amount paid to the claimant.

11. Mr Matwijec had supported re-employing the claimant, albeit no longer worked for the respondent by the time he came to give evidence before me.

12. In those circumstances, I accept his evidence that there were some performance issues that he didn't bring to the attention of Ms Glen as he liked the claimant, felt responsible for her recruitment and hoped that she could improve.

13. That said, for reasons I will expand on later, I do not accept that such concerns were as numerous, or as serious as subsequently claimed. If they had been, it seems likely that matters would have been escalated sooner.

14. It was clear from the numerous WhatsApp messages before me that all staff, including Ms Glen, remained in regular, friendly and informal contact throughout.

15. Indeed, in November 2022, the claimant received a £2000 pay rise, more than 10%, as well as an increase to her travel allowance. It was unlikely, therefore, that there were serious concerns about the claimant's performance at that stage and that this step would have been taken without any recourse to Mr Matwijec.

16. I also saw, as one would expect, examples of occasional errors by others, including Ms Glen.

17. In fact, in March 2023, the claimant was overpaid by Ms Glen and, when the claimant pointed this out, she was told that she could keep it.

18. As mentioned, in early 2023, the respondent was looking to introduce a new payroll system for clients. This was being rolled out in March 2023 and the idea was that, ultimately, the claimant would, using the new system, have full responsibility for all client payroll and pension matters.

19. This obviously involved transferring client information onto the new system which was a task to be shared by the claimant and Mr Matwijec, albeit the vast majority ended up being completed by him due, in part, to the claimant having a couple of short sickness absences that month.

20. The claimant said that she was having difficulties with the new system and needed more training, whereas the respondent felt that she had adequate support and the training was available online. There was some evidence to support this and Mr Matwijec did try to help.

21. In any event, approaching the end of the financial year, was, inevitably, a busy time of year for all and came on the back of what the respondent described as meetings rasing performance concerns in February and March 2023.

22. On 13 April 2023, the claimant texted Ms Glen saying that she wanted to leave her job, suggesting, perhaps, that she was aware that she was struggling to perform at the required level.

23. However, following a telephone conversation, she was persuaded to stay on. Again, this appears to illustrate that the claimant remained a valued employee and alleged prior performance issues were exaggerated.

24. Before me, the respondent described this conversation as if it were a performance discussion. Whilst performance was inevitably discussed, this must have been in the context of the respondent offering support and encouraging the claimant to stay on given the interaction started with an.

25. Nonetheless, the claimant's productivity remained a concern, as was confirmed by all witnesses on behalf of the respondent.

26. Whilst denied by the claimant, she was, on the one hand, saying she was struggling with the new system and wanted to resign, whilst, on the other hand, saying there were, literally, no issues with her capability.

27. I accept that, increasingly, there were performance concerns, and an increasing awareness of the same by all concerned, although the extent to which they were related to the new system, the claimant's health and / or a lack of application was unclear. It seemed probable that all of those matters were playing a part.

28. The claimant was falling further behind and went off sick on 2 May 2023. She was subsequently signed off for 4 weeks with "depressed mood", returning on 7 June 2023.

29. On her return, she had a discussion with Marta Glen, which the claimant felt was simply a return to work welfare meeting, with Ms Glen struggling to understand how she could better support her. The respondent, however, again, characterised this principally as a further performance discussion.

30. It is likely, in the context already explained, that it was a bit of both.

31. Over the next few weeks, further concerns arose, including a mistake that the claimant made in applying for statutory maternity pay for a client as well as ongoing issues with her productivity which the respondent illustrated by producing a schedule of telephone calls answered.

32. In relation to the latter, the respondent's claims in the notice of appearance were overstated but it was clear that the claimant had very little phone activity across the month of June 2023.

33. I would acknowledge that much of the claimant's work was done by email and that she may have had a technical issue with her phone for a short time. Moreover, she was only third in the chain to receive incoming calls, such that she would inevitably have lower activity levels in this area than those with priority.

34. That said, there only appeared to be 3 calls out from the claimant in the month of June, compared to 10 or 20 in each of the first three months of the year. As a result, whilst exaggerated, I accept that the respondent's concerns were, at least, based on an objective reality.

35. The claimant had a couple of weeks planned annual leave in July 2023.

36. On 1 August 2023, Ms Glen met with the claimant, although the contents of that meeting were significantly in dispute. As with all previous meetings,

there was no formal invite, no notes taken and no formal outcome, at least not immediately.

37. The respondent said that many of their performance concerns were raised along with the effect these were having on others in the office. Ms Glen said the claimant was sent home on full pay to allow her to investigate these further, whilst also saying that the claimant was effectively dismissed on notice at this meeting, subject to the outcome of the investigation.

38. Meanwhile, the claimant suggested that she had basically been told there were problems in the office with other members of staff, referencing an alleged altercation between a colleague and Ms Glen. She said that she was told to go home on full pay while those matters were resolved and that she should return to work on 1 September 2023. The claimant reluctantly agreed.

39. Neither of those recollections seemed likely or plausible.

40. The claimant's observations in her claim form were, perhaps, nearer the reality. There she said the discussion was around other people doing the claimant's job. The respondent said this was because the claimant wasn't doing it. The claimant, however, said that she felt she was being made redundant as other people were taking over her tasks.

41. It appeared, therefore, that there was, at least, agreement that the claimant wasn't doing her full role and that this played a part in the respondent's decision to send her home on paid leave.

42. In fact, the claimant said in evidence that she would have accepted it if the respondent had simply made her redundant at that time. Indeed, if they had done so, she would have fallen short of 2 years' continuous service and been unable to bring a claim.

43. In any event, it must be the case that there was some discussion of performance and productivity issues and that the claimant was aware that these played a part in her being sent home. It made no sense for the claimant to be sent home to enable the respondent to resolve completely separate issues with other staff.

44. There was no evidence to support the fact that any meaningful investigation followed, beyond a suggestion of an informal discussion at some stage between Marta Glen and Rafal Matvijec. For example, Patrycya Tomczac, a colleague who gave evidence before me, said that she was not involved at all.

45. It seemed to me that Ms Glen ran her small company on a friendly and informal basis with everyone expected to help each other out. In happier times that worked well. However, the disagreements over the reasons the claimant's first employment ended, the contents of alleged performance discussions, the return to work meeting and the meeting on 1 August

2023, suggested to me that she was not so well equipped to deal head-on, let alone more formally, with problems when they arose.

46. It may be that issues were initially concealed from Ms Glen and that, even when made aware, she hoped matters would improve. Thereafter, she would, perhaps, soften the blow, or say one thing but mean another in order to avoid conflict.

47. It also appears that she was unsure how to deal with the claimant's health issues, which also seemed to play a potentially significant part in the respondent's concerns. The claimant's absences were, for example, referenced in the notice of appearance as contributing to the problems experienced by the respondent.

48. I accept, however, that the issue of productivity and the effect on other staff was both significant and raised with the claimant and, to a degree, acknowledged by her in her actions and words at the time.

49. I do not accept that much of the detail of the apparent inefficiency, nor claimant's alleged errors, or delays or timekeeping issues were ever raised formally with her. There was certainly no written evidence of the same although, doubtless, some of these would have been picked up with her as they arose.

50. It was not in dispute that the respondent was unaware of many of their legal obligations, the requirements of the ACAS code etc and, it appears that, having tried a friendly, informal approach, not knowing how to deal with the claimant's health issues and with matters increasingly affecting others in the office, Ms Glen simply sent the claimant home, on full pay, to solve the immediate problem and give her time to reflect.

51. I do not accept that, at this stage, she in any way effectively communicated a dismissal. Rather, having had time to reflect and, perhaps, seeing that the office was functioning effectively without the claimant, she simply decided to avoid any further conflict or difficult conversations by sending the claimant a letter of dismissal on 25 August 2023, received the next day.

52. No reasons were given, nor was there any reference to the alleged prior dismissal on 1 August 2023.

53. This was something of an iron fist, following a velvet glove approach prior to this point and came, I accept, as a shock to the claimant, albeit not as much as claimed.

54. The claimant had not, for example, felt any need to clear her desk when leaving the office earlier that month but, equally, she was aware that she was, at least, perceived as a significant part of the problems in the office. She was likely, therefore, to have been aware that her employment was at risk, albeit not necessarily imminently.

55. The letter simply stated that the claimant's employment would end on 31 August 2023. She was to be paid up to that date and was to return all company property.

56. No right of appeal was offered, or exercised.

57. A lot of the trial was spent going through evidence that was said to demonstrate poor performance, productivity, timekeeping, attendance, work errors and delays.

58. It was not in dispute that much of this had never been put, formally at least, to the claimant.

59. The vast majority of the evidence was disputed by the claimant, sometimes with validity but, at other times, illustrating what the respondent considered to be an approach of denial and blaming others, whether staff or clients.

60. What was produced was sometimes vague, incomplete or without context but, nonetheless, did enough to show that there were at least some genuine concerns that appeared to escalate from the time of the introduction of the new payroll system in March 2023.

61. As is probably apparent, there were significant differences on the facts in this case and very little contemporaneous evidence of what would normally be considered to be an appropriate procedure. The evidence on both sides was, at times, inconsistent, exaggerated, or otherwise unreliable.

62. For example, it was unclear when the claimant was having personal problems. The evidence of the respondent's witnesses was contradictory on this, including regarding whether they were resolved before her second period of employment.

63. The claimant's witness statement regarding what happened on 1 August 2023 differed significantly from her claim form and was, at best, implausible.

64. She also said that she hadn't made any errors, although she ultimately accepted a couple (regarding the maternity pay issue already mentioned and entering an incorrect NI number for a client's brother), albeit only when she seemingly had no alternative.

65. It seemed unlikely that there would be so many examples of client's chasing for payroll related items, for which the claimant, as the payroll clerk, bore no responsibility as she claimed. The claimant's attitude, therefore, appeared to confirm the respondent's suggestion that she

would, on occasion, simply deny responsibility or blame others when challenged over her performance.

66. A particular example was that the claimant denied being responsible for an HMRC fine applied to Mtronic Limited, a client. She said it was not actually a fine for late filing but, rather, a fine for late payment which was the responsibility of the client.

67. That appeared to me to be, at best, a misreading of the documentation. The reference to non – payment was in relation to not paying the fine, as opposed to the original liability. Moreover, late filing fines are fixed amounts, as here, whereas late payment fines are usually calculated as a percentage with interest subsequently accruing.

68. This likely demonstrated, therefore, either

    a. a worrying lack of awareness regarding how payroll compliance works which could, perhaps, explain some of the respondent's performance concerns, or
    b. the lengths to which the claimant would go to deny, or evade, responsibility for her own failings

69. The claimant's activity levels did appear to be decreasing, as evidenced by the phone records. Moreover, she acknowledged that others were picking up her work and there was no reason for them to do so, if she was performing well and productively.

70. The respondent's case that the claimant was a very poor performer throughout, however, also lacked credibility given that they re-employed her, gave her a payrise and persuaded her to retract her resignation.

71. They blamed the claimant for not getting all their client's P60s in by the end of May 2023, even though the claimant was off for the whole of that month, couldn't have known that would be the case, nor could she have reasonably been expected to complete them all in April.

72. It was suggested that the claimant was already late on these when she offered her resignation on 13 April but, due to Easter, that was only 3 working days into the new financial year.

73. The respondent made much of the claimant's alleged lateness and the timesheets did indicate that it was not unusual for her to be a few minutes late. However, there was at least some evidence that the time was, on occasion, made up later and, in any event, it seemed that timekeeping was not raised as an issue at all until the notice of appearance was filed.

74. Many of the email responses in the bundle did show the claimant promptly responding to clients, despite the respondent's claims to the contrary.

75. The claimant's phone activity was low, but not as low as claimed in the ET3.

76. There was no evidence that matters had ever reached formal customer complaint stage.

77. There were also significant credibility challenges, not least in relation to the respondent's attempts to create a defence to the wrongful dismissal and section 38 claims.

The issues and the law

1. Unfair dismissal

    1.1 What was the reason or principal reason for dismissal? The respondent says the principal reason was capability (performance) whilst also identifying other potential elements that lead to their decision, such as conduct.

    1.2 If the reason was capability, did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that as a sufficient reason to dismiss the claimant?

    The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case. The considerations may include whether the respondent:

    1.2.1 adequately warned the claimant and gave the claimant a chance to improve;
    1.2.2 genuinely believed the claimant was no longer capable of performing their duties;
    1.2.3 adequately consulted the claimant;
    1.2.4 carried out a reasonable investigation, including finding out about any medical position;
    1.2.5 could reasonably be expected to wait longer before dismissing the claimant;
    And, in particular, whether
    1.2.6 Dismissal was within the range of reasonable responses.

2. Remedy for unfair dismissal

    2.1 Does the claimant wish to be reinstated to their previous employment?

    2.2 Does the claimant wish to be re-engaged to comparable employment or other suitable employment?

2.3 Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

2.4 Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the claimant caused or contributed to dismissal, whether it would be just.

2.5 What should the terms of the re-engagement order be?

2.6 If there is a compensatory award, how much should it be? The Tribunal will decide:

- 2.6.1 What financial losses has the dismissal caused the claimant?
- 2.6.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
- 2.6.3 If not, for what period of loss should the claimant be compensated?
- 2.6.4 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?
- 2.6.5 If so, should the claimant's compensation be reduced? By how much?
- 2.6.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
- 2.6.7 Did the respondent or the claimant unreasonably fail to comply with it by [specify alleged breach]?
- 2.6.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?
- 2.6.9 If the claimant was unfairly dismissed, did they cause or contribute to dismissal by blameworthy conduct?
- 2.6.10 If so, would it be just and equitable to reduce the claimant's compensatory award? By what proportion?
- 2.6.11 Does the statutory cap of fifty-two weeks' pay apply?

2.7 What basic award is payable to the claimant, if any?

2.8 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?

3. Wrongful dismissal / Notice pay

3.1 What was the claimant's notice period?

3.2 Was the claimant paid for that notice period?

3.3 If not, did the claimant do something so serious that the respondent was entitled to dismiss without notice?

4. Section 38 Employment Act 2002

4.1 When these proceedings were begun, was the respondent in breach of its duty to give the claimant a written statement of employment particulars or of a change to those particulars?

4.2 If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.

4.3 Would it be just and equitable to award four weeks' pay?

5. The legal principles to be applied are well established and were not in material dispute.

Decision

78. Taking the wrongful dismissal / notice pay claim first, it was not in dispute that the claimant was entitled to a statutory minimum notice period of 2 weeks.

79. I do not accept that the claimant was effectively given notice on 1 August 2023. She did not understand that to be the case and did not clear her desk. Moreover, even on the respondent's case, it was only a conditional notice, subject to the alleged pending investigation.

80. There was no dispute that the actual date of dismissal was 31 August 2023.

81. In those circumstances, notice of dismissal was received on 26 August 2023 and so the claimant only received 5 days' notice.

82. She was, therefore, dismissed wrongfully and in breach of contract, being entitled to a further 9 days' notice.

83. As a result of having a successful claim, section 38 Employment Act 2002 comes into play.

84. It was not in dispute that the claimant had not been provided with a written statement of terms and conditions of employment.

85. The respondent's suggestion that a template was available on their intranet, that the claimant could, or even should, have completed for herself, and this somehow met their obligation was untenable.

86. Firstly, the template was available for client usage. As a template, it did not include much of the required information such as the parties' details, pay rates and dates, holiday allowances and cross referencing disciplinary procedures, if any.

87. The suggestion that it was the claimant's responsibility to complete such a document for herself and others lacked credibility. She had not completed the only full contract I saw, being that of Mr Matwijec.

88. In any event, it is the employer's duty to ensure such a contract is provided and, in this case, it wasn't. Accordingly, I am required, save in exceptional circumstances, to increase the award by 2 or 4 weeks' pay.

89. That can be the subject of submissions at the remedy hearing already listed.

90. Turning then to the unfair dismissal claim.

91. Despite what may have been said in the response and submissions, it was the clear evidence of Ms Glen that dismissal was for capability and, specifically, the claimant's alleged poor performance.

92. Capability is a potentially fair reason for dismissal. It may be that the respondent also had in mind issues including redundancy and conduct. Nonetheless, I am satisfied that capability was genuinely the principal reason for dismissal, albeit that reason potentially included considerations of the claimant's ill health absences as well as pure performance matters.

93. I am also satisfied that there were genuine performance concerns about both the claimant's technical errors and her productivity, albeit, as explained in my findings of fact, those were not as widespread and serious as the respondent claimed.

94. It was acknowledged that the respondent had failed to follow what would, ordinarily, be considered the procedural basics of a fair dismissal for poor performance which include:

    a. Establishing the facts by way of an investigation
    b. Notifying the employee in writing that there is a case to answer
    c. Including sufficient information to allow the employee to respond
    d. Providing supporting evidence, where appropriate
    e. Notifying the employee of the date and time of a proposed meeting and, potentially, the right to be accompanied
    f. Allowing the employee reasonable time to prepare
    g. Allowing the employee to respond and considering such response
    h. Where it is determined that action is required, such as a written warning, notifying the employee in writing of the same
    i. Such a warning should set out the
        i. nature of the poor performance
        ii. what improvement is required

iii. in what timescale and
iv. the likely consequences of failure

j. Allowing the opportunity to improve, with support where appropriate
k. A right of appeal

95. I would acknowledge that a failure in any one, or even all, of the above, does not, necessarily, make a dismissal unfair.

96. However, in this case, there was no good reason why most, if not all, of the above could not be observed, nor was there evidence that the issues raised by the respondent were so serious that they would warrant skipping some of those procedural matters.

97. In fact, the disputes over the evidence and lack of clarity over the contents of meetings and the performance issues themselves demonstrate why such procedural safeguards are often required or, at least, advisable.

98. I acknowledge that the respondent is a small employer and may not have encountered performance management issues previously. That said, as a professional services firm, providing accounting and employment related services, there was no good reason they could not have been acquainted with the ACAS Code, the basic employment law requirements or, at the very least, sought appropriate advice on the same.

99. As a result, I am satisfied that, in this case, the procedural failings alone were sufficient to take dismissal outside the band of reasonable responses available to the respondent.

100. Had they followed the recommended procedural safeguards, it would have been far clearer both in regard to the extent of the capability issues and also in relation to the extent to which the claimant would have been willing or able to improve.

101. It may also have identified any specific supportive measures that could have assisted her and, indeed, highlighted whether the claimant's response would have been one of acceptance and determination to improve, or one of denial and blame, or a combination of both.

102. At the very least, the claimant was entitled to clearly understand the case against her and that her job was at risk as well as having an opportunity to respond and improve.

103. Dismissing the claimant by letter, without any formal warnings or meetings, was as unnecessary as it was unfair. Her claim for unfair dismissal, therefore, succeeds. The respondent's failure to offer an appeal compounds this.

104. That said, the claimant could still have appealed but did not.

105. Moreover, there were clearly performance and capability issues that were genuine and regarding which the claimant still appears to be in denial. This will be relevant to considering the extent to which a fair process was likely to result in a different outcome and / or how long such a process would have taken.

106. In those circumstances, I need to consider whether the claimant's conduct was such as to warrant a reduction in the basic and / or compensatory awards. I may also need to consider what would have happened had a fair procedure been followed, whether for capability (performance and / or health), conduct, redundancy or otherwise, as well as other standard matters such as mitigation and accounting for benefits received.

107. It seems to me to be in the interests of justice that, having had the opportunity to read and digest this judgment and these reasons, the parties should have an opportunity to make further submissions on all these outstanding matters and any other potential points that may arise at the remedy hearing, already listed for 23 October 2024.

108. That is, of course, if they are unable to resolve matters before then.

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Employment Judge Broughton

Date: 16 October 2024