EMPLOYMENT TRIBUNALS

Claimant: Miss K Kovacova

Respondent: Peter Sherwin t/a Henrietta House

Heard at: Bristol **On:** 21-22 November 2017

Before: Employment Judge Mulvaney

Representation
Claimant: In person
Respondent: In person

JUDGMENT having been sent to the parties on 24 November 2017 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The claimant brought claims of ordinary unfair dismissal and automatically unfair dismissal contending that her dismissal by the respondent was because she made a public interest disclosure or was otherwise unfair. The claimant also claimed unlawful deductions from wages in respect of pay and holiday pay.

2. The respondent is the owner of a bed and breakfast premises in Bath. He employs approximately 20 staff. The claimant was employed as co-manager and receptionist.

3. I heard evidence from the respondent, Mr. Sherwin, and from the claimant, Ms Kovakova.

4. The issues that had to be determined at the hearing were identified at the preliminary hearing before me on 2 August 2017 and were as follows:

Unfair dismissal claim

1.1. What was the reason for the dismissal? The respondent asserts that it was redundancy, which is a potentially fair reason for dismissal under section 98(2) Employment Rights Act 1996.

1.2. If redundancy was the reason for dismissal, was the dismissal for redundancy fair in all the circumstances having regard to the following:

1.2.1. Did the respondent have a genuine need to make redundancies?

1.2.2. Did the respondent follow a fair procedure in implementing the redundancy, by:

- Identifying a pool for selection;
- Applying fair and objective selection criteria;
- Engaging in a genuine consultation process;
- Making reasonable efforts to find alternative employment?

1.2.3. Was the decision to dismiss for redundancy within the reasonable range of responses for a reasonable employer?

1.3. If the respondent had adopted a fair procedure can it be shown that the claimant would have been fairly dismissed in any event? To what extent and when?

2. Claim for Automatic Unfair Dismissal as a consequence of making a public interest disclosure (s43B and s103A Employment rights Act 1996)

2.1. Did the claimant make the following disclosures to the respondent?

2.1.1. On the 17 September 2016, the claimant emailed the respondent informing him of problems identified by the staff in respect of steps being taken to deal with the infestation of bedbugs at the premises;

2.1.2. On the 19 September 2016, the claimant emailed the respondent informing him that she had been bitten by bed bugs in the staff bedroom, so informing him that the infestation was present in the accommodation provided to staff to sleep in.

2.2. If so, was information disclosed in those emails which in the claimant's reasonable belief tended to show that:

2.2.1. The health or safety of the respondent's staff had been put at risk by having to sleep in accommodation where bedbugs were present;

2.2.2. The environment had been put at risk by an infestation of bedbugs in the staff sleeping accommodation;

2.2.3. Or that any of those things were happening or were likely to happen, or that information relating to them had been or was likely to be concealed?

2.3. If so, did the claimant reasonably believe that the disclosure was made in the public interest? The claimant relies on the following as going to show the reasonable belief:

2.3.1. The claimant was in a managerial position and the sleeping accommodation was used not only by her but by other employees of the respondent on a regular basis.

2.4. Was the making of any proven protected disclosure the principal reason for the claimant's dismissal?

2.4.1. Has the claimant produced sufficient evidence to raise the question whether the reason for the dismissal was the protected disclosures?

2.4.2. Has the respondent proved its reason for the dismissal, namely redundancy?

2.4.3. If not, does the tribunal accept the reason put forward by the claimant or does it decide that there was a different reason for the dismissal?

2.5. Was the claimant's disclosure made in good faith? The respondent contends that the disclosure was made by the claimant in order to secure compensation and not for the reasons asserted by the claimant. This will be relevant to determination of compensation if the claim succeeds.

3. Unlawful Deduction from wages/Holiday Pay, Breach of contract

3.1. What was the claimant's contractual entitlement to wages?
3.2. What sum was outstanding on dismissal?
3.3. To what extent was any sum due extinguished by the payment made to the claimant at the time of her dismissal
3.4. Is the claimant entitled to the holiday pay she claims?

Findings of fact

4. The claimant commenced her employment with the respondent on the 1st February 2014. She was initially engaged as a breakfast waitress, receptionist and housekeeping assistant but over the course of the next two years achieved promotion and by the date of her dismissal was engaged in the role of co-manager with a colleague, Mr Olkowski. It was agreed between the parties that the claimant was promoted to this role in January 2016.

Contractual position

5. The claimant's contract of employment, of which there were two versions in the bundle, one dated 1 February 2014 and the other dated 5 April 2014, provided for her to be paid at an hourly rate of £8 per hour; the rate rose to £9 per hour and then £10 per hour from January 2016. Her contract provided that her hours of work were between 20 and 40 hours per week but she had signed an agreement on the 6 March 2014 to occasionally work in excess of 48 hours a week if necessary.

6. There was a dispute between the parties about the authenticity of the contract dated 5 April 2014 in which a standard clause included in the claimant's previous contract, which provided that there was no entitlement to overtime payments for hours worked outside normal weekly hours, was omitted. The respondent's evidence was that that this contract had been fraudulently drawn up by the claimant. Mr Sherwin said that it was his practice to initial each page of contractual documents that he signed and that had not been done in this case. Furthermore, the claimant's signature was

contained on a separate page, which he said indicated that she had changed the wording of the contract and then created a separate signature page.

7. The claimant's evidence was that this contract was prepared to deal with other changes introduced to the wording of the contract that were not of particular benefit to her and that this contract had been produced by the respondent for her to sign and was genuine. In any event the claimant was paid by the respondent her hourly rate for hours worked in excess of her normal hours.

8. I was satisfied on the evidence that the claimant had not created this document fraudulently as asserted by the respondent and that it was a genuine contractual document, which meant that the claimant was contractually entitled to be paid for hours worked in excess of her normal hours. In the event it was not disputed by the respondent that the claimant was paid at her relevant hourly rate for hours worked in excess of her normal hours, as were other employees of the respondent.

9. In addition to her wages, the claimant received quarterly discretionary bonus payments from the respondent who said that he was a believer in performance related pay.

10. On 28 August 2016 claimant wrote to Mr Sherwin asking for an increase to her hourly rate by £2 to £12 per hour in the light of the responsibilities that she had taken up since January 2016. In her letter (p55), the claimant said that she thought £12 per hour would be a reasonable start for the next 6 months, with a further pay rise afterwards. She concluded the letter: *"please could you reply to me in writing by 2 PM tomorrow, Monday, 29 August so I can adjust the payroll accordingly*".

11. Mr Sherwin did not respond to the claimant's email in writing but offered to meet the claimant that evening at 9pm. It was the claimant's evidence, which I accepted, that she and Mr Sherwin did meet on the evening of the 28 August 2016 when the claimant was working a late shift. The claimant's evidence was that at that meeting Mr Sherwin discussed with the claimant an enhancement to her pay. He said that he would top up her pay at the end of the year (December 2016) to £30,000. He had calculated her average hours in the previous year as 37 hours per week and said that if she was paid £30,000 per annum this would be the equivalent of £15.60 per hour. She would receive one thousand pounds in quarterly bonus payments. The claimant's handwritten note of this conversation was included in the bundle at page 65.

12. The respondent disputed that this agreement was as stated by the claimant. His evidence was that the £30,000 that was discussed was discretionary and never contractual. I found as a fact that Mr Sherwin did guarantee the claimant that at the end of 2016 her pay would be made up to £30,000. I did not accept Mr Sherwin's evidence that this was discretionary. My reasons for preferring the claimant's evidence were that she made a note of the discussion at the time which I considered to be genuine; Mr Sherwin did not dispute that the figure of £30,000 had been discussed and in fact confirmed it during a recorded conversation on the 26 October 2016 when he said: "*I never knew what your average was, all I said was I guaranteed you guys that you earned at least thirty thousand, and that is what I guaranteed and I am*

doing that." Furthermore, the figure of £30,000 formed the basis of the termination payment made to the claimant at her later dismissal. In his evidence at the hearing, Mr Sherwin stated that one of the reasons for implementing redundancies was because he could not afford the commitment to pay both his co-managers £30,000 per year. This evidence was inconsistent with his assertion that the payment to the claimant was discretionary. Although the payment was not going to be made on a monthly basis, I concluded that it amounted to salary or wages in the sense that it was an agreed sum to be paid to the claimant for performing her work.

13. Whilst I accepted that there was a commitment by the respondent to pay the claimant the equivalent of £30,000 in 2016, taking account of pay that she had already received, there was a dispute between the parties about whether overtime payments and discretionary bonuses would be taken into account when calculating the sum due at the end of the year.

14. I did not accept the claimant's assertion that overtime payments would not be included in the calculation of payments received at the end of the year. The claimant's argument was that the respondent's commitment to make up the claimant's wages to £30,000 per year was based on her working an average of 37 hours per week which was the case in 2015. The claimant's evidence was that in 2016 she had worked in excess of an average 44 hours per week. She contended that as the agreement to top up her pay to £30,000 was based on an average working week of 37 hours, the pay she had received in 2016 for hours worked in excess of that average should be discounted when calculating the top up payment due. I found that the claimant's note did not suggest that the respondent was guaranteeing to pay the claimant £15.60 per hour for all hours worked. He was illustrating based on the claimant's hours in 2015 what a salary of £30,000 per annum might equate to as an hourly rate. I found that any payments for hours worked in excess of the claimant's normal hours were to be included in the balancing calculation.

15. It was not disputed by the respondent that payment for night shifts which the claimant worked in addition to her normal hours would be part of a separate calculation and would not be included in the £30,000.

16. As regards the bonus payments, it was agreed that these were discretionary payments and as such I found that they did not form part of the claimant's basic wage or salary calculation on termination. The claimant's note of her discussion with the respondent on the 28 August 2016 recorded:

"guarantee: £30k
£1k quarterly"

Later in the note the calculations of the hourly rate are done on the basis of £30,000, not £30,000 plus the £4,000 paid as quarterly bonus. This, together with the respondent's statement that he believed in performance related pay and the constant use of the word 'discretionary' when discussing bonuses supported my conclusion that bonus payments were separate and additional to the £30,000 pay agreement.

Public Interest Disclosure

17. It was not disputed that in the latter part of 2015 and through 2016, Henrietta House had an infestation of bedbugs. This was being addressed by Mr Sherwin who had taken steps to eradicate the infestation where it was found.

The claimant considered that he had not taken sufficient steps to deal with the problem which continued to give rise to complaints from guests. On the 17 September 2016, the claimant emailed Mr Sherwin providing her suggestion as to how the problem should be dealt with. She said in the letter that three floors were affected; that it was demotivating for staff; and there was a danger of their own homes becoming infested. She said that there was a risk to the health of guests.

18. On the 19 September 2016, the claimant again emailed Mr Sherwin having previously had a discussion with him to say that she had been bitten the night before by bedbugs in the staff bedroom. She said that there would be likely to be more cases soon and asked him how he intended to deal with the situation. She asked him what compensation she would be entitled to for her discomfort and the marks on her face.

19. In his evidence at the hearing, Mr Sherwin admitted to being irritated by the claimant's emails, particularly by her reference in the 19 September 2017 email to wanting compensation which, together with the request for an increase in her pay made in the email of the 28 August 2016, he considered to be 'pushing him against the wall'. He said that he was already doing what he considered necessary to deal with the bedbug problem and he carried out additional measures in the staff bedroom in response to the claimant telling him that bedbugs were present there.

20. It was Mr Sherwin's evidence, which I accepted, that the bedbug problem had caused him additional expense in having to pay people to address the issue; in having to decommission guest rooms which were infested; and in repaying guests who had been affected. These measures had affected the business' bottom line. In addition, the business had suffered due to the effect of Brexit on the value of the pound as against the dollar and a consequent rise in its loan interest rates.

21. Mr Sherwin's evidence was that the net result of these financial issues was that he decided in October 2017 that he could not afford to continue to pay his two co-managers salaries of £30,000 after January 2017 and that he would need to step back into the business and take on the role of manager. He decided that he needed to address that issue straight away so that his employees would not be taken by surprise in January when he implemented a reduction in their salaries. His evidence was that he decided that Mr Olkowski and the claimant should revert to their previous roles and that he would speak to them both asking them to revert to their previous roles or if they did not wish to do so, to tell them that they would be made redundant.

22. Although I accepted Mr Sherwin's evidence as to the financial pressures faced by the business, I did not accept Mr Sherwin's evidence on his decision to implement redundancies. His evidence was unclear and contradictory. There was no pressing need to implement his decision since, according to his own evidence, he did not intend to make any change to the claimant's and Mr Olkowski's salary arrangements until January 2017. He was not giving advance warning; he was simply delivering bad news and implementing a decision earlier than he needed to. He said that he treated both the claimant and Mr Olkowski in the same way but I found that the evidence suggested that he did not. I appreciated Mr Sherwin's honesty in stating, in answer to my question, that his preference was that the claimant would go rather than

Mr Olkowski, because he was irritated by her emails to him asking for money. He said that this did not influence the way he approached his two co-managers but I found that it did.

23. Mr Sherwin's diary note of the 3 October 2016, included a note that he should speak to Mr Olkowski about redundancy or reverting (to his previous role). Mr Sherwin said that he had that conversation with Mr Olkowski, who agreed that he would revert to his previous role. Mr Olkowski did not lose any salary by doing so. Inserted at a later time in the note, as conceded by Mr Sherwin, was a record *"*walked *w Katarina in the park and told her about the management changes – we agreed to the end of October."* In different writing, which suggested that this was added later and as an afterthought, the note recorded: *"offered her her old job as a receptionist but was turned down flat."*

24. It was the claimant's evidence that the discussion between her and Mr Sherwin in the park was simply Mr Sherwin telling her that he was going to take on the manager role and that her role was redundant. When she asked why Mr Olkowski was staying, Mr Sherwin said: "*that's not the point*". She was not given an option of staying beyond the end of October and no alternative role was offered. She emailed Mr Sherwin asking him to put his offer in writing, which he, by return email, agreed to do. On the 6 October 2016, Mr Sherwin provided the claimant with a memorandum of understanding which confirmed that she was redundant with effect from 31 October 2016. (p81) There was no mention in the document of the claimant having been offered and having refused an alternative role. The memorandum stated:

> "*This is to confirm that the statutory two weeks' notice has been given in regard to the redundancy of Katarine Kovakova at Henrietta House. Her position as co-manager and administrator will become redundant on 31 October 2016 and consolidated amongst other employees. Peter Sherwin will resume his role as manager.*
>
> *You will be paid the 2 weeks' redundancy pay which you are entitled to after more than 2 years of service. This will be based on your average weekly hours worked since 01/01/2016 at your normal rate of pay £10.00*
>
> *The arrangements will be as follows for the rest of your employment.*
>
> *You will work your normal hours at your normal rate of pay.*
> *You will carry out your normal duties and the training of other reception/bookkeeping staff to an acceptable standard.*
>
> *If the training is carried out to a standard which I consider effective, and there are no further disagreements with fellow members of staff, the you will be paid a discretionary bonus which will bring your salary up to the pro rata equivalent of £30,000 pa for the last 10 months of your employment including the 2 weeks redundancy pay."*

25. Included in the bundle was a memorandum of understanding apparently of the same date relating to Mr Olkowski which confirmed the reversion of his role which the note recorded that he had accepted instead of redundancy. It

concluded *"your salary will remain the same and your bonus will be discretionary"*.(p80)

26. On balance, I preferred the claimant's evidence as to the events that led to the confirmation of her redundancy on the 6 October. I did not believe that Mr Sherwin offered the claimant any alternative to redundancy. His record of having done so in his diary, I concluded was added as an afterthought. The claimant's evidence, that had she been offered her receptionist role on the same salary she would have accepted it, was credible and reasonable. The memorandum of understanding did not refer to any alternative to redundancy having been offered. There was no evidence of any consultation taking place. Mr Sherwin had simply informed the claimant that her employment would come to an end at the end of October. At the hearing and in his witness statement, Mr Sherwin sought to rely on subsequent conversations that took place with the claimant as amounting to consultation but these conversations took place after the claimant had been given notice of termination and were principally concerned with the calculation of the claimant's termination payments.

27. The claimant wrote to Mr Sherwin on the 10 October 2016 informing him of her concern about the redundancy and stating: "*if the role of co-manager and administrator is no longer required I'm legally entitled to be returned to my home role of receptionist."* This supported the claimant's evidence that she had not been offered the opportunity to revert to that role as contended by the respondent.

28. Mr Sherwin did not respond in writing to the claimant and referred to this statement of the claimant's in a subsequent discussion with her on the 11 October 2016. This and other subsequent discussions were covertly recorded by the claimant without the agreement of Mr Sherwin, which is conduct that is not condoned by the Tribunal. Nevertheless, I am satisfied that the recording of the conversation between the claimant and Mr Sherwin on the 11 October 2016 does not establish, as contended by Mr Sherwin, that he had offered the claimant her receptionist role as an alternative to redundancy. It is clear from the recording that when he raised a query about that, he was referring to the comment made in the claimant's email of the 10 October 2016 which was under discussion at the meeting.

29. The claimant continued to work for the respondent for the remainder of October. Her last day of employment was the 3 November 2016 and she took 4 days holiday from the 31 October to the 3 November leaving her with 2 days untaken holiday for which she sought payment.

30. Mr Sherwin had informed the claimant in the memo of understanding, which had not been signed as agreed by the claimant, that he would pay her "a discretionary bonus which will bring your salary up to the pro rata equivalent of £30,000 per annum for the last 10 months of your employment including the two weeks redundancy pay. Based on my findings as to the contractual position, I found that the claimant was entitled to have her salary made up to the contractual equivalent of £30,000 per annum pro rata and for the redundancy payment to be made in addition.

31. The claimant's last pay slip which was the only breakdown she received of her termination payment showed: *Holiday Hours: 6 hours, Termination bonus £2,385.00 and Statutory redundancy £958.00*.

32. A breakdown of those figures provided by the respondent at a later date for the purposes of these proceedings (p39) shows that the respondent calculated that the pro rata amount of £30,000 per annum for the 10 months worked by the claimant was £25,000. This figure was agreed by the claimant as the correct starting point for the calculation. The respondent's breakdown showed that the claimant had to the date of termination been paid £29,531 gross including all the payments in her last payslip. The respondent's calculation showed that after deducting Night shift pay, Night Shift Back Pay, Night Shift Holiday Pay and the redundancy payment, amounting in total to £4,531, the remaining figure was £25,000, the amount that had been agreed as due to the claimant in respect of pay up to the date of her dismissal.

33. Discretionary Bonus payments amounting to £3,500 paid to the claimant in 2016 up to the date of her dismissal were included by the respondent as wages and so were included in the £25,000 figure. Although the payment of £2,385 was expressed in the payslip as a termination bonus, for the reasons given earlier, I did not accept that it was a discretionary payment as asserted by the respondent but part of her guaranteed salary of £30,000 per annum agreed to be paid by the respondent.

Conclusions

34. In reaching my conclusions I considered all the evidence I heard and the documents to which I was referred and which I regarded as relevant.

35. Taking the issues in turn:

Wages claims

36. I was satisfied on the facts found that there was an agreement that the claimant would have her 2016 wages made up to the equivalent of £30,000 per annum. There was no agreement that discretionary bonus payments paid to the claimant, based on her performance and that of the business, would be included in what was a basic wage calculation. For that reason, I concluded that the claimant is owed £3,500 by the respondent in wages unlawfully deducted from her final salary payment.

37. I concluded that overtime payments were properly included in the calculation on termination and that the claimant is not due any additional payment for these.

38. I concluded, based on the claimant's evidence, that she is entitled to 2 day's pay for holiday untaken at the date of termination amounting to £180. I find that payment for the other four days that she claimed was included in her wages on termination.

Public Interest Disclosure

39. I firstly considered whether the claimant's emails of the 17 and 19 September 2016 amounted to qualifying disclosures under s43B Employment Rights Act 1996 (ERA). Using the words of the section: Were they disclosures of information which, in the reasonable belief of the claimant were made in the public interest and tended to show that the health or safety of any individual is being or is likely to be endangered.

40. In her emails of the 17 and 19 September 2016, the claimant was informing Mr Sherwin, her employer that the bedbug infestation was risking the health of the guests staying at the B&B (email 1) and also the health of the staff (emails 1 and 2). Although Mr Sherwin was aware of the bedbug problem and already taking steps to deal with it, the legislation does not require that the disclosure necessarily be new information. The disclosure related to the fact that the problem was a continuing one which, in the claimant's opinion, was not being dealt with by current action. I was satisfied that the first disclosure was in the public interest given the danger to the health of members of the public. I concluded that the claimant held a reasonable belief that the information was in the public interest given the risk to members of the public.

41. As regards the second disclosure about the existence of bedbugs in the staff bedroom, that was information of which Mr Sherwin was previously unaware. Although a smaller group of people were likely to be affected by the second disclosure, specifically the respondent's current and future employees engaged on night shifts, it had an impact on their health and safety which is not a trivial matter, and although not a deliberate action of the respondent, nonetheless a matter which lay in his power to address. Therefore, based on the recent case of ***Chesterton Global Ltd & Anor v Nurmohamed & Anor [2017] EWCA Civ 979***, and considering the four factors identified by Underhill LJ in that case: the numbers whose interests the disclosure serves; the nature of the interest affected; the nature of the wrongdoing; and the identity of the wrongdoer, I concluded that that the second disclosure was also a disclosure which in the reasonable belief of the claimant was made in the public interest.

42. I considered whether the claimant had made the disclosures in good faith. The respondent said that she had made them in order to obtain compensation from him and so was not acting in good faith. I did not find that was the case. Although the claimant mentioned compensation in her second email, she had already spoken to the respondent about the problem and he had been dismissive of it. She was the manager of the premises and had concerns about the guests and the staff and that was the reason that she made the disclosures that she did.

43. The next issue I had to consider was whether the reason or principal reason for the claimant's dismissal was the fact that she had made the disclosures that she had. I was satisfied that the claimant had provided sufficient

evidence to raise the question that her dismissal was because of the disclosures. My reasons for reaching that conclusion were: the timing of the claimant's dismissal, which came only two weeks following her emails of the 17 and 19 September 2016; the fact that Mr Sherwin was irritated by her emails and expressed himself to be so; the fact that there was no immediate need to implement the redundancies given that Mr Sherwin said that his intention was to continue paying Mr Olkowski and the claimant at the agreed rate of £30,000 until January 2017. I also found that Mr Sherwin was untruthful in the evidence he gave about the discussions he had with the claimant about the redundancy and I did not accept that he offered her the alternative of reverting to her previous post on her same salary.

44. I then considered the reason given by the respondent as to the reason for dismissal and whether it had proved that redundancy was the true reason for the claimant's dismissal. Although I accepted that there may have been financial reasons for deciding on a reduction in the workforce and that the workforce was in fact reduced by dismissing the claimant from her role as co-manager, I concluded that redundancy was not the true reason for the claimant's dismissal. Mr Sherwin did not establish that the requirements of the business for staff of a particular kind had ceased or diminished at the time that he implemented the redundancy. Mr Sherwin's evidence as to how the decision to implement the redundancy was arrived at; how it was to be implemented and the impact going forward was so vague and contradictory that I concluded that it was not the real reason for the claimant's dismissal. That was merely the label that he attached to it.

45. If the reason for the dismissal was not redundancy as asserted by the respondent, was it the making of the disclosures? Mr Sherwin, in answer to my questions, said that he felt pushed against the wall by the claimant's demands for money made in her email seeking a pay rise and in her demand for compensation in relation to the bedbugs. He said as much to the claimant in a recorded discussion on the 27 October 2016 (114). He was already aware of and addressing the bedbug infestation and her notifications to him about that did not cause him concern. He was, however, concerned about her demands for money made in the 28 August email and the 19 September email. The approach and the tone of the claimant's emails was demanding, bordering on browbeating, and did not reflect their relative positions as owner and employee in the business. I concluded that the reason that Mr Sherwin dismissed the claimant was not because she made protected disclosures but because he was unhappy about being pushed by her and by her demanding money from him. He did not want her to continue as his employee because of her manner towards him, not because she had made disclosures.

46. In reaching this conclusion which is about the reason for the dismissal, I make no particular criticism of the claimant. The claimant was clearly frustrated with Mr Sherwin's failure to commit to decisions and to set things down in writing. That frustration was justified. Mr Sherwin conceded that he was not a person to put things in writing or to make notes. In this respect, he and the claimant were like chalk and cheese in their different approaches to keeping official records. An employer who fails to commit matters to writing is likely to find itself faced with disputes such as the one that had to be addressed through these proceedings. I hope that Mr Sherwin will learn a lesson from this and understand the necessity of making written records as an employer.

Unfair Dismissal

47. Having concluded that the reason for the claimant's dismissal was not redundancy for the reasons set out above and that the reason was the respondent's dissatisfaction with the manner in which the claimant communicated with him, I concluded that the dismissal was unfair as the reason found is not a fair reason for dismissal under s98(4) ERA. For the sake of completeness, I will add that had I concluded that redundancy was the reason for dismissal, I would have concluded that the dismissal was unfair in any event, no proper procedure having been followed: there was no selection process adopted to identify whether Mr Olkowski or the claimant should be made redundant, no consultation process; and no consideration of alternative employment.

48. To summarise, I concluded that :

48.1. The claimant's claim of unlawful deduction from wages succeeded and the respondent is ordered to pay the claimant the sum of £3,680 (£3,500 unlawful deduction of discretionary bonus and £180 unpaid holiday)

48.2. The claimant's claim of automatic unfair dismissal because of making a protected disclosure did not succeed, as the disclosure was not the principal reason for her dismissal.

48.3. The claimant's claim of unfair dismissal succeeded and consideration of the remedy to which the claimant is entitled follows.

Remedy

49. In considering remedy, I had to consider what compensation to award the claimant for her losses following the termination of her employment. I gave credit for the fact that the respondent had paid the claimant a sum equivalent to a statutory redundancy payment (£958, based on the claimant's age at the date of dismissal:30; her length of service: 2 years; and the statutory limit on a week's pay: £479) which extinguishes the claimant's entitlement to a basic award. No credit was given for the so-called termination bonus which was part of the sum due to the claimant in respect of wages based on her salary of £30,000.

50. In considering the award to be made in compensation to the claimant for unfair dismissal I had to consider what it was just and equitable to award, having regard to the loss sustained by the claimant in consequence of the dismissal in so far as that loss was attributable to the action taken by the respondent (s123(1) ERA).

51. The claimant produced a schedule of loss and restricted her loss of earnings claim to the period from the date of dismissal, 3 November 2016, up to the 20 April 2017 when she succeeded in obtaining new employment.

52. The claimant's losses for that period, the calculation of which was not challenged by the respondent, were based on a weekly wage of £648.92, comprising her normal salary of £576.92 (£30,000/52) together with weekly

night shift wage of £72. The number of weeks for which her loss continued was 25 so that her loss amounted to £16,223 in total.

53. The respondent questioned whether the claimant had taken sufficient action to mitigate her loss. The claimant provided evidence of a considerable number of applications that she had made for employment following her dismissal. She gave evidence that she had applied for numerous jobs, primarily in the hospitality industry, although she had also applied for roles in retail and other sectors. She had not been successful in achieving an appointment until April 2017, although she had got to interview stage on several occasions.

54. The claimant's evidence was that she thought that the lack of a reference from the respondent may have affected her and led to her not being successful following interview in some cases. I made no finding on that point, there being no evidence that her lack of success was due to the lack of a reference.

55. On the evidence that I heard, I concluded that the claimant had taken sufficient and appropriate action to mitigate her loss following her dismissal. I therefore awarded her compensation for her loss of earnings for the period 3 November 2016 to 20 April 2017. I also awarded the sum of £350 in compensation for the loss of statutory rights.

56. I considered whether a deduction should be made from the compensatory award under ***Polkey v AE Dayton Services Ltd 1988*** and on just and equitable principles for the possibility that the claimant might have been dismissed fairly by the respondent within the period 3 November 2016 – 20 April 2017. However, as I found that the reason given for the dismissal by the respondent, namely redundancy, was not the true reason for dismissal, there was no evidence to support a conclusion that the claimant might have been fairly dismissed at a date prior to 20 April 2017 and I concluded that no deduction should be made.

57. I therefore awarded the claimant the following sums:

£ 3,680 for unlawful deduction from wages;

£16,573 compensation for unfair dismissal.

_____

Employment Judge Mulvaney

JUDGMENT SENT TO THE PARTIES ON

24 NOVEMBER 2017

FOR THE TRIBUNAL OFFICE