EMPLOYMENT TRIBUNALS

Claimant: Miss J Hawthorne

Respondent: Miss J Sutherst

HELD AT: Middlesbrough **ON:** 25-26 July 2019

BEFORE: Employment Judge Aspden

REPRESENTATION:

Claimant: Ms A Hemsley-Kaine
Respondent: Mr J Cavana

JUDGMENT

JUDGMENT having been sent to the parties 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

Claims and issues

1. The claimant brought claims alleging that:
   1.1. The respondent unfairly dismissed her.
   1.2. She was entitled to a redundancy payment.
   1.3. The respondent breached her contract of employment by failing to pay notice pay.
   1.4. The respondent failed to pay to her holiday pay due under the Working Time Regulations 1998 (WTR).

2. The parties both agreed that the claimant was dismissed by notice which expired on 12 December 2018. The respondent said the reason for the claimant's dismissal was redundancy. The claimant did not accept that there was a genuine redundancy situation.

3. So far as the unfair dismissal case is concerned, the claimant contended that she was dismissed because she had insisted on being paid for holidays and that, therefore, her dismissal was automatically unfair pursuant to either section 101A or section 104 of the Employment Rights Act 1996. The claimant's alternative case was that her dismissal was unfair applying 'ordinary' unfair dismissal principles in section 98 of that Act.

4. The respondent accepted that at the time of her dismissal the claimant was an employee of hers. However, the respondent's case was that the claimant's period of continuous employment did not begin until April 2017 and, therefore, the claimant did not have long enough service to bring a claim of ordinary unfair dismissal or a claim for a redundancy payment. The respondent accepted that the claimant was continuously employed from that date. The respondent's case was that although the claimant had done some work for her before that date, she did not become an employee until April 2017 and, even if she was an employee before that date, her employment was not continuous. The claimant's case was that she was continuously employed from July 2016.

5. So far as the redundancy pay claim was concerned, the respondent defended this on the basis not only that the claimant did not have the required two-year service to qualify for a redundancy payment but also on the ground that the respondent had sent the claimant a cheque in respect of redundancy pay shortly before the termination of her employment.

6. The claim in respect of notice pay was also opposed on the grounds that the respondent had sent the claimant a cheque in respect of notice pay prior to termination.

7. As for holiday pay, the claimant contended that until July 2018 the respondent had failed to pay holiday pay when leave was taken. She claimed to be entitled to a payment in respect of such leave. She also claimed that, in any event, she was entitled to a payment under regulation 14 of the WTR in respect of accrued but untaken leave for the leave year in which her employment ended. The respondent contended that it had paid everything that was due to the claimant. She said she had made a retrospective payment of £600 in July 2018 to cover previously taken unpaid leave. In addition, the cheque sent to the claimant before her dismissal included a sum to cover accrued but untaken holiday year for the final year's employment.

8. The issues, therefore, for me to determine were as follows.

Continuous employment

8.1. Whether the claimant was an employee of the respondent before April 2017.

8.2. If so, whether she was continuously employed from July 2016, as contended for by the claimant.

Unfair dismissal

8.3. If the claimant had two years' continuous employment, whether she was unfairly dismissed. This would entail consideration of the following issues:
  8.3.1. Whether the reason for dismissal (or the main reason) was that the claimant was redundant.
  8.3.2. If so, whether the respondent acted reasonably in dismissing the claimant for that reason.
8.4. In any event, whether the claimant's dismissal was automatically unfair i.e. :
  8.4.1. Whether the claimant had refused to forego her right to paid leave under the Working Time Regulations 1998 and/or had asserted that the respondent had infringed that right.
  8.4.2. If so, whether that was the only, or the main, reason for dismissal.
8.5. If the claim of unfair dismissal was made out, the appropriate remedy.

Redundancy pay

8.6. If the claimant had two years' continuous employment, whether the reason for dismissal (or the main reason) was that the claimant was redundant.

8.7. If so, whether the respondent had already satisfied the requirement to pay the claimant a redundancy payment by sending her a cheque shortly before employment ended.

Notice pay

8.8. What amount the respondent should have paid the claimant in respect of her notice period.

8.9. Whether the cheque tendered by the respondent satisfied, in full or in part, the sum owing.

Holiday pay

8.10. Whether any of the claimant's periods away from work on leave before July 2018 constituted leave under reg 13 or reg 13A of the WTR.

8.11. If so, whether the claimant was entitled to any further payment in respect of leave taken before July 2018. If so, whether the claimant's claim for payment in respect of such leave were out of time.

8.12. Whether the claimant was entitled to a payment on termination in lieu of untaken reg 13 and reg 13A leave that accrued in years prior to the leave year in which the claimant's employment ended, under WTR reg 14 or, if not, under reg 16.

8.13. Whether the claimant was entitled to any further payment under WTR reg 14 in respect of leave that accrued to her in the final leave year of her employment.

Evidence and findings of fact

9. I heard evidence from the claimant herself who had prepared a written statement and a timeline of key dates. I also heard evidence from the respondent who had prepared a written statement. In addition, I was referred to a number of documents in a bundle of documents. I allowed the claimant to rely upon to additional messages which were held on her phone and which were not contained in the bundle.

10. The respondent owned and ran a kennels business along with Mr Glen Lynas.

11. Both the claimant and the respondent to give evidence as to the circumstances in which the claimant began working for the respondent and the work the claimant did. On that issue the claimant's evidence can be summarised as follows:

    11.1. She was introduced to Miss Sutherst when she was working as a kennel-hand at a different kennels for a Mr Strike. She was working there as a volunteer at the time. Miss Sutherst knew Mr Strike. Mr Strike asked the claimant if she would help the respondent out at the track.

    11.2. Some time later the respondent offered the claimant a job at her own kennels to work for 16 hours a week over two days a week. The respondent agreed to pay the claimant the minimum wage. She was told that she would be paid cash, which she was until July 2018. The claimant was aware that other staff employed at the kennels were working cash in hand 'of the books'. She told the respondent at the time she was recruited that she wanted her employment to be above board and did not want to be employed 'off the books'. The respondent and Mr Lynas agreed to this and Mr Lynas even handed the claimant his mobile phone so that she could talk to the firm's accountant and give him her national insurance number, name and address. This is the claimant did.

    11.3. From 11 July 2016 the claimant worked continuously until she was dismissed in December 2018. The only time she had off work was when she took holidays. In support of her evidence on this issue, the claimant referred me to numerous messages concerning work issues which passed between her and either the respondent or Mr Lynas or other people who worked at the kennels over this period. One example was the message on page 154 between the claimant and a work colleague in which the claimant said 'I'll still have two days off most weeks if that's okay with everybody'.

    11.4. When she started to work for the respondent's business in July 2016 she was claiming universal credit and she told the authorities that she was now employed and contracted to work 16 hours a week. She gave them the respondent's name and address as her employer and Witton kennels as her place of work. The universal credits she received from then onwards were adjusted accordingly to take account of her pay from her job. Initially the claimant was under the impression that the accountants would tell the authorities of claimant's income on a regular basis but this did not always

happen so she would phone up herself and tell the authorities of her income every month. The claimant referred me to letters from universal credit as evidence in support.

11.5. The claimant was not given a written contract of employment or any statement containing the main terms of employment at any time and nor did she receive payslips at any time. She did not question this.

12. In her statement, the respondent said the claimant joined the kennels from the kennels of Mr Graham Strike for one week's work of 16 hours in July 2016. The respondent referred me to a payslip in the bundle as evidence of this. In her statement she went on to say that the claimant's next payslip was for the month of April 2017, for working 16 hours per week. She said that in May 2017 the claimant's weekly hours of work were reduced to 10 hours per week.

13. The respondent appeared to be seeking to give the impression in her statement that the claimant had not worked between July 2016 and April 2017, relying on the absence of payslips to support that position. However, I find that the payslips were only produced after the claimant asked for them when her employment had ended. In any event, when I asked the respondent whether she was suggesting that the claimant did not work for her between July 2016 and 6 April 2017 respondent replied that the claimant did work for her 'now and again but not continuously'. When I asked the respondent how often the claimant worked for her in that period the respondent replied 'when we went away on holiday or just to cover when needed'. She said she had no record of the days the claimant worked and no payslips had been produced covering those dates.

14. The respondent said during questioning that the 16 hours in July 2016 were 'like a trial to see how she went and then she had loads of holidays so we just used her to come in when we were struggling or have holidays booked'. The respondent acknowledged that when the claimant started work in July 2016 she told them that she was going away three times that year. The respondent said when they realised how much holiday the claimant had lined up they felt there was no point putting her on the books.

15. During cross-examination the respondent was shown the numerous text messages I have already referred to. The respondent conceded that the claimant must have been working for her on several dates between the dates she worked in July 2016 and when she was put on the books in April 2017, including at least three or four days in each of August, September, October and November 2016; at least eight days in December 2016; and then further days in January, February, March and April 2017. She acknowledged that the claimant had sent texts on 3 and 6 March 2017 in which she commented on things she could not have known about unless she had been work recently.

16. When asked about how the claimant would know when she would be working, the respondent said she (ie the respondent) maintained a calendar or rota in which she'd put the working days. There was no suggestion by the respondent that she asked the claimant from week to week whether she wanted to work or not. This, I find, supports the claimant's case that she was contracted to work 16

hours a week rather than the arrangement being that she would simply work on an ad hoc basis.

17. The respondent said that from 6 April 2017 the claimant was 'continuously on the books.' I asked whether anything about the claimant's work arrangements had changed in April that led her and her business partner to decide to put the claimant 'on the books'. She said there was nothing else that had changed.

18. Both parties agreed that in April 2017 the claimant was working 16 hours per week over two days per week. They also agreed that, at the claimant's request, her hours were reduced to 10 hours per week from May 2017, the agreement being that she would work Mondays and Fridays, for five hours each day. Both parties agree that the claimant also worked some additional hours when asked. At no point before or after her dismissal was the claimant given any documentation setting out the terms and conditions of her employment.

19. Kennel-hands need to be licensed to work in a Greyhound kennel. The respondent paid for the claimant's kennel hand licence to be maintained. An email from the Greyhound Board of Great Britain confirms that the claimant's kennel-hand licence was transferred across from Mr Strike on 11 July 2016 to the respondent and was renewed each year until the respondent cancelled the claimant's licence on 11 January 2019. The respondent paid for the licence to be renewed.

20. I found the claimant to be a reliable and credible witness. Her account of her working hours was plausible and supported by evidence, including correspondence regarding benefits and numerous messages showing she worked regularly.

21. I found the respondent's evidence to be less reliable. As I have said, her statement seemed designed to imply that the claimant had not worked between July 2016 and April 2017. When confronted by numerous messages suggesting otherwise the respondent conceded initially only that the claimant had worked on odd occasions when needed. However, the messages showed, and the respondent conceded when confronted with each of them, that the claimant in fact worked on numerous occasions.

22. That pattern of working is consistent with the claimant's evidence that she was taken on to work 16 hours per week over two days. I do not accept, as was suggested on behalf of the respondent, that the absence of messages from each and every week during that period is evidence that the claimant did not work every week. The claimant's case is also supported by the fact that the respondent concedes that the claimant was engaged as an employee from April 2017. The respondent could point to no change in the claimant's working arrangements or work pattern at that time. I find that this was merely a continuation of the pre-existing arrangement.

23. Looking at the evidence in the round, I find that: in July 2016, the claimant and the respondent agreed that the claimant would work for the respondent as a kennel-hand for 16 hours per week over two days per week on an indefinite, as

opposed to a temporary, basis, being paid at national minimum wage rate; the only weeks the claimant did not work between then and April 2017 was when she was on pre-agreed holiday; that working arrangement continued unchanged after April 2017 except for a reduction in the claimant's working hours which the claimant and respondent agreed to in May 2017.

24. I heard evidence from the claimant and the respondent about matters concerning holidays taken by the claimant and what had been said about payment. I make the following findings of fact about those matters.

25. During her employment, there were times when the claimant took time off to go on holidays, giving plenty of notice and seeking authorisation first. The respondent and Mr Lynas had told the claimant that she could take time off unpaid and that they did not pay holiday pay as other staff were paid 'off the books' and it would not be fair to pay her alone holiday pay. In June 2018 the claimant applied for a college course and as part of the application process they asked her to provide a P60. The claimant had not been given a P60 and asked the respondent and Mr Lynas for one. In July 2018 they gave her a P60 for the year 2017 to 2018. It was then that the claimant realised that she had not paid any tax. However, Mr Lynas had been deducting money from the claimant's pay in respect of tax. The claimant discovered that not only had that not been paid over to HMRC but also that she was not earning enough to have tax deducted. The claimant asked the respondent and Mr Lynas about this and they asked her to sort it out with their accountant. The claimant contacted the accountant and he confirmed that no tax had be paid on her behalf. The claimant asked for this money to be returned to her, which it was eventually. These events prompted the claimant to look into what her rights were as an employee. She discovered she was entitled to paid leave. When the claimant realised she was entitled to paid holiday she asked, in June 2018, to be paid for her annual leave entitlement that she believed she was owed since starting employment in July 2016. The respondent gave her £600, which the claimant believed was less than was owing to her. She was also paid for leave taken after that date. The only kennel hand who was paid holiday pay was the claimant. No one else had ever asked the respondent to pay holiday pay.

26. When asked about holidays during this hearing, the respondent said she did not know how much holiday the claimant had taken. When asked how many holidays the claimant was entitled to she replied 'probably a day every month.' When questioned further about this she said 'I just left it to the accountant'.

27. I asked the claimant to provide details of when she said she took holiday, which the claimant did at the beginning of the second day of this hearing. The parties then agreed that the claimant took holiday on the following dates:
    - 27.1. 11 to 17 July 2016 (16 hours i.e. one week on the claimant's account);
    - 27.2. 17 to 21 August 2016 (16 hours);
    - 27.3. 15 to 28 October 2016 (24 hours i.e. three days on the claimant's account of her working hours);
    - 27.4. 11 to 18 July 2017 (10 hours i.e. two days)
    - 27.5. 31 July to 7 August 2017 (10 hours i.e. two days);
    - 27.6. 15 to 22 August 2017 (10 hours i.e. two days);

27.7. 20 to 28 August 2018 (15 hours i.e. three days);
27.8. 24 September 2018 -five hours i.e. one day;
27.9. 28 September 2018-five hours i.e. one day.

28. There was no written agreement about the dates of the claimant's leave year.

29. The claimant and the respondent both gave evidence about the termination of the claimant's employment. I make the following findings of fact about those matters.

30. In November 2018 there was a change in the business. The business had until that point been split into two blocks. The respondent trained greyhounds for the Sunderland track whilst her business partner, Mr Lynas, trained greyhounds for the Doncaster track. Regulations covering Greyhound racing meant that the dogs registered to race at different racetracks had to be kept in separate blocks of the kennels and looked after and trained by different staff. Everything had to be kept separate including the kitchen and paddock. The claimant worked in the Sunderland block with the respondent who held the licence at Sunderland. Before the claimant was dismissed a decision was taken by Mr Lynas to relinquish his licence at Doncaster. Instead he became assistant trainer to the respondent racing at Sunderland. The two separate blocks were effectively merged to be one kennel, with the dogs racing at Sunderland. Some of the dogs that had been racing at Doncaster remained with the kennels and raced at Sunderland.

31. Shortly before the claimant was dismissed, the respondent discussed with the claimant that the kennels were losing money. They were trying to make cost savings, including by having two dogs share a kennel, which was a less expensive way of operating.

32. 0n 19 November 2018 the claimant was due to work but was unwell so called in sick. She spoke to the respondent on the phone. The claimant gave a detailed account of this conversation Her evidence was that the respondent said to her that Stacey was leaving and asked if she would be prepared to work more hours and work 'off the books' like the other employees. The claimant said she replied that she was unable to as she had other commitments at home, whereupon the respondent said that 10 hours was not good enough for them and asked her if she would 'walk away' to make it easier for everyone. The claimant said she replied that it was not her fault that circumstances had changed due to Stacey leaving and the respondent responded by saying that she was no good to them she was going to be on the sick a lot, to which the claimant responded that it was the first time she'd been off sick. When asked in cross-examination about this conversation, the respondent acknowledged that a conversation had taken place but said but what she'd said was 'it wouldn't be so bad if you could do more hours…be flexible.' I accept the claimant's account of the conversation, which was detailed and plausible.

33. The respondent's evidence was that, that night, she and her business partner discussed the situation and that the greyhound industry was going downhill and that it was easier to downsize because there were losing dogs.

34. The following day the respondent telephoned the claimant and said she had spoken to ACAS and the accountants and they were making her redundant.

35. The claimant remained off sick into the following week. On 29 November she received a message from the respondent telling her that some paperwork was in the post. On 30 November the claimant received a letter from the respondent dated 28 November. The letter said 'I regret to inform you that I will have no other option but to end your term of employment with myself on 12 December 2018 (two weeks notice). This is due to downsizing the operation as it is no longer profitable. I would like to thank you for your efforts and wish you success in the future.'

36. On 3 December the respondent sent another letter to the claimant. The claimant did not receive this until 6 December. That letter said 'as you were ill as of Monday 19 November I could not consult you in person regarding your redundancy. It was therefore conducted via a telephone conversation on Tuesday, 20 November 2018 between you and myself. This is your written confirmation of your redundancy dated 28 November 2018 with effect on 13 December 2018, this includes your two weeks notice. Unfortunately I have to make you redundant as of 13 December 2018 for the following reasons, we are downsizing the operations as it is no longer profitable.' A cheque was enclosed with that letter for the sum of £391.50 which was said to cover one week's holiday pay, two weeks' notice and redundancy.

37. On 5 December, the day before she received this letter, the claimant emailed the respondent challenging her dismissal and asking the respondent to confirm in writing her 'proposed redundancy package'. The respondent then sent her an email telling her to ignore the letter she had just received, saying 'the letter you received from yesterday… You will have to ignore, as that was sent before I received your email on Wednesday night after I got back from the track'. As a consequence of receiving that email claimant did not cash the cheque she had been sent.

38. A number of other people worked as kennel-hands at the respondent's kennel. The respondent appeared to divide them into two categories. There were those who were 'on the books' and others who the respondent described as 'volunteers'. The respondent confirmed that someone by the name of John who had worked a lot of hours at the kennels had died just before she took the claimant on in July 2016. John had been an employee and so has somebody called Mary who also worked a lot of hours. Mary left around about the time the claimant started work at the kennels. Another kennel-hand called Grant was taken on after Mary and John but no longer works at the kennels. He was 'on the books'. He had to leave before the claimant's employment ended because he was poorly. There was also somebody by the name of Ellie who was 'on the books' doing 16 hours per week but she had also left by the time the claimant was dismissed.

39. As for those the respondent described as 'volunteers', the respondent said a kennel-hand by the name of Simone was a volunteer who was not paid for the work she did at the kennels. This was disputed by the claimant who referred me

to certain messages between herself and Simone to support her evidence that Simone was paid and was not simply a volunteer. One of those messages was a message from the claimant referring to a reduction in pay that Simone had. I note that Simone herself did not say anything in those messages about her pay having been reduced but, based on the messages to which I was referred, I find that the claimant believed, during her employment, that Simone was being paid and I also find, based on the messages I was shown, that the claimant and Simone worked closely together. I was shown a message from Simone that implied she didn't have any choice but to work. That would be strange thing for her to say if she was truly an unpaid volunteer who could clearly walk away any time. I find that Simone worked regularly at the kennels, based on the large number of messages passing between the claimant and Simone and texts from Simone apologising when she was running late for work. I was told that a kennel-hand called Stacey was also an unpaid volunteer. The claimant told me, however, that she had seen Stacey being paid cash on numerous occasions. The claimant said she was the only one paid by cheque.

40. I prefer the claimant's evidence on this matter and I find that some of those that the respondent categorised as volunteers and who were not 'on the books' were in fact paid for working and had regular hours, including Simone and Stacey. I accept the claimant's own evidence and the messages I was pointed to in relation to Simone support that finding. I also accept that the conversation between the claimant and the respondent in November 2018, when the respondent asked her to go off the books, supports a finding that there were paid staff who were not formally acknowledged as employees by the respondent, as does the fact that, when the claimant first started working for the respondent, she was told she would not be paid holiday pay as others were paid 'off the books' and were not paid holiday pay.

Legal framework

Unfair dismissal

41. An employee has the right under section 94 of the Employment Rights Act 1996 not to be unfairly dismissed.

42. The dismissal of an employee in certain circumstances set out in the Act is regarded, automatically, as an unfair dismissal. Those circumstances include a dismissal where the reason (or, if more than one, the principal reason) for the dismissal is that the employee—
    - 42.1. refused (or proposed to refuse) to forgo a right conferred on him or her by the Working Time Regulations 1998 (section 101A(1)(b)); or
    - 42.2. alleged that the employer had infringed a right of his or hers conferred by the Working Time Regulations 1998 (section 104).

43. The Working Time Regulations 1998 give workers the right to paid annual leave, amongst other things.

44. Where a dismissal is not 'automatically' unfair, an employee can only complain of unfair dismissal if they had been continuously employed for a period of at least two years as at the effective date of termination (section 104). The concept of 'continuous employment' is described further below. Where such a complaint of is made, it is for the employer to show that it dismissed the claimant for a potentially fair reason i.e. one within section 98(2) of the 1996 Act, or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position the claimant held. If the respondent fails to show that it dismissed for a potentially fair reason or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position the claimant held, then the dismissal will be unfair.

45. Dismissal for redundancy, as defined in section 139, is a reason for dismissal falling within section 98(2), and so is a potentially fair reason. The definition in section 139 provides that, "an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to the fact that the requirements of the business for employees to carry out work of a particular kind, either generally or in the place where the employee was based, have ceased or diminished or are expected to cease or diminish".

Remedy for unfair dismissal

46. If a claim of unfair dismissal is well founded, the claimant may be awarded compensation under section 112(4) of the Employment Rights Act 1996. Such compensation comprises a basic award and a compensatory award, calculated in accordance with sections 119 to 126 of the Act.

Basic award

47. The basic award is calculated in accordance with the formula set out in section 119 of the 1996 Act.

Compensatory award

48. Section 123(1) ERA provides that, subject to certain other provisions, the compensatory award shall be such amount as is just and equitable having regard to the loss sustained by the claimant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

49. The same rule concerning the duty of a person to mitigate her loss applies to the compensatory award as applies to damages recoverable under the common law: ERA s123. The duty to mitigate requires a claimant to take all reasonable steps to mitigate the loss to her flowing from the dismissal and she cannot recover compensation for any loss which she could have avoided but has failed, through unreasonable action or inaction, to avoid.

50. An employment tribunal may, if it considers it just and equitable, increase any award to an employee by up to 25% if it appears to the tribunal that the employer has unreasonably failed to comply with the ACAS Code on Disciplinary and

Grievance Procedures. In the case of Holmes v Qinetiq Limited [2016] IRLR 664, [2016] ICR 1016, Simler P observed that the Code is limited to internal procedures relating to disciplinary situations that include misconduct or poor performance and potentially other situations that involve the correction or punishment of culpable behaviour of some form or another.

51. An employment tribunal must increase the award by the minimum amount of two weeks' pay and may increase the award up to the 'higher' amount of four weeks' pay where, at the time the claim was begun, the respondent was in breach of its obligation under section 1 of the Employment Rights Act 1996 to provide an employee with a statement setting out the main terms of employment: Employment Act 2002 s38. The amount of a week's pay for these purposes is subject to a statutory cap, although that does not affect these proceedings as the claimant's weekly pay was below that upper limit.

52. In cases of 'ordinary' unfair dismissal, section 124 of ERA caps the amount of any compensatory award. That cap does not apply to dismissals that are automatically unfair under the provisions outlined above.

Redundancy

53. With certain limited exceptions, an employee with at least two years' continuous employment is entitled to be paid a redundancy payment if he or she is dismissed by reason of redundancy (Employment Rights Act 1996 s135). Redundancy is defined in section 139, as explained above. When a tribunal is considering whether an employee is entitled to a redundancy payment 'an employee who has been dismissed by his employer shall, unless the contrary is proved, be presumed to have been so dismissed by reason of redundancy': Employment Rights Act 1996 s163(2).

Notice pay

54. Section 87 of the Employment Rights Act 1996 provides that, when an employer dismisses an employee on notice, the employee is entitled to be paid certain minimum remuneration during their notice period provided they are ready and willing to work out their notice or would be but for specified reasons, which include sickness. In those circumstances the employee is entitled to be paid a 'week's pay' for each week of their 'statutory' notice period.

55. The statutory notice period is provided for in section 86 of the Act and depends on the length of the employee's period of continuous employment. An employee with two years' continuous employment is entitled to 2 weeks' statutory notice. An employee with one year's continuous employment is entitled to statutory notice of one week.

56. The rights conferred by sections 86 and 87 are implied terms of a contract of employment. A failure to pay the notice pay provided by the Employment Rights Act 1996 constitutes a breach of contract.

Continuous employment

57. The concept of continuous employment is addressed in chapter I of part XIV the Employment Rights Act 1996.

58. Section 211 provides as follows:

> (1) An employee's period of continuous employment for the purposes of any provision of this Act—
>
> (a) (subject to [subsection] (3)) begins with the day on which the employee starts work, and
> (b) ends with the day by reference to which the length of the employee's period of continuous employment is to be ascertained for the purposes of the provision.

59. Section 212 says:

> (1) Any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employee's period of employment.
> …
>
> (3) Subject to subsection (4), any week (not within subsection (1)) during the whole or part of which an employee is—
> (a) incapable of work in consequence of sickness or injury,
> (b) absent from work on account of a temporary cessation of work, [or]
> (c) absent from work in circumstances such that, by arrangement or custom, he is regarded as continuing in the employment of his employer for any purpose,
>
> counts in computing the employee's period of employment.
>
> (4) Not more than twenty-six weeks count under subsection (3)(a) … between any periods falling under subsection (1).

60. Section 210(5) provides that a person's employment during any period shall, unless the contrary is shown, be presumed to have been continuous.

61. A 'contract of employment' is defined in section 230(2) as 'a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.'

62. Determining whether someone is employed under a contract of service is a two stage process. The first stage requires the Tribunal to ask the question: was there a contract between the individual and their alleged employer? If the answer to that question is 'yes' the Tribunal must go on to the second stage, which involves asking the question of whether the contract was a contract of service.

63. The question of whether a contract has been created is decided by applying normal common law principles. There must be: an agreement between the parties on essentials with sufficient certainty to be enforced; an intention to create legal relations; and consideration. For a contract to be capable of being one of

service the following elements must be present: mutuality of obligation, personal service and control. If all three elements exist, whether or not the contract is one of service will depend on the circumstances of the particular case: all the terms of the contract must be considered in order to make an informed, considered, qualitative appreciation of the whole. This test was first articulated in the case of Ready Mixed Concrete (South East) v Minister of Pensions and National Insurance [1968] 2 QB 497 and has subsequently been approved by the Court of Appeal and the House of Lords.

Holiday pay

64. The Working Time Regulations 1998 (WTR) provide workers with a right to paid holiday. There are two elements to that right: a right to four weeks' leave in each leave year under reg 13 and, separately, a right to an additional 1.6 weeks' leave in each leave year under reg 13A.

65. In the absence of a "relevant agreement", as defined in regulation 2, a worker's leave year for these purposes begins on the date on which their employment begins and each subsequent anniversary of that date.

66. Reg 13 provides as follows:
13(9) Leave to which a worker is entitled under this regulation may be taken in instalments, but— (a) it may only be taken in the leave year in respect of which it is due, and; (b) it may not be replaced by a payment in lieu except where the worker's employment is terminated.

67. A similar, albeit modified, 'use it or lose it' rule applies to the additional 1.6 weeks' leave under reg 13A. In respect of that additional leave reg 13A provides:
13A(6) Leave to which a worker is entitled under this regulation may be taken in instalments, but it may not be replaced by a payment in lieu except where—(a) the worker's employment is terminated;…
(7) A relevant agreement may provide for any leave to which a worker is entitled under this regulation to be carried forward into the leave year immediately following the leave year in respect of which it is due.

68. Provisions relating to the taking of leave under both reg 13 and 13A are contained in reg 15, which says 'A worker may take leave to which he is entitled under regulation 13 and regulation 13A on such days as he may elect by giving notice to his employer in accordance with paragraph (3), subject to any requirement imposed on him by his employer under paragraph (2).'

69. Payment for leave taken is dealt with by reg 16, which says:
(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 and regulation 13A, at the rate of a week's pay in respect of each week of leave.
(2) Sections 221 to 224 of the 1996 Act shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation, subject to the modifications set out in paragraph (3).

70. On termination of employment, a worker is entitled to a payment in lieu of leave that has accrued but remains untaken as at the termination date, by virtue of Reg 14. That provision says:
    14(1) This regulation applies where— (a) a worker's employment is terminated during the course of his leave year, and (b) on the date on which the termination takes effect ("the termination date"), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.
    (2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).
    (3) The payment due under paragraph (2) shall be—… (b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula— (A x B) – C
    where—
    A is the period of leave to which the worker is entitled under regulation 13 and regulation 13A;
    B is the proportion of the worker's leave year which expired before the termination date, and
    C is the period of leave taken by the worker between the start of the leave year and the termination date.

71. The Employment Appeal Tribunal (EAT) has held that the 'leave year' referred to in paragraph (1)(b) is the leave year in which the worker's employment is terminated and that, accordingly, the exception on the face of regulation 14 to the principle that the entitlement to leave not exercised in the appropriate leave year expires, is limited to the leave year in which the worker's employment is terminated: The Sash Window Workshop Ltd & Anor v King [2015] IRLR 348 (EAT).

72. Regulation 30 of the WTR sets out remedies that are available to a worker who considers their rights under regs 13 – 16 have been breached. It says:
    31 (1) A worker may present a complaint to an employment tribunal that his employer—a) has refused to permit him to exercise any right he has under—(i) regulation … 13 or 13A;…or (b) has failed to pay him the whole or any part of any amount due to him under regulation 14(2) or 16(1).
    (2) Subject to regulations 30A and 30B, an employment tribunal shall not consider a complaint under this regulation unless it is presented— (a) before the end of the period of three months … beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made; (b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three or, as the case may be, six months.

73. In the alternative, a worker who considers his employer has failed to pay him any sum due to him under reg 14 or 16 can bring a complaint under s23 of the

Employment Rights Act 1996 (ERA) that the employer has made an unlawful deduction from wages. A claim that the employer has refused to permit the exercise of rights under WTR reg 13 or 13A cannot, however, be brought under ERA 1996: King (EAT).

74. The time limit for bringing a claim under ERA 1996 in respect of unlawful deductions from wages is dealt with in ERA s23, which provides that:
23(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made…
(3) Where a complaint is brought under this section in respect of (a) a series of deductions or payments, …the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.
(4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable…

The Working Time Directive

75. Regulation 13 of the WTR implements within Great Britain what is now provided for by the Working Time Directive of 4th November 2003 (2003/88/EC, replacing Directive 93/104/EC) (the "WTD").

76. Article 7 of the WTD provides:
"Member States shall take the measures necessary to ensure that every worker is entitled to paid annual leave of at least four weeks in accordance with the conditions of entitlement to, and granting of such leave laid down by national legislation and/or practice.
2) The minimum period of paid annual leave may not be replaced by an allowance in lieu, except where the employment relationship is terminated."

77. The Court of Justice of the EU has held that a worker who does not exercise his right to paid leave under the WTD because his employer refuses to pay for such leave must be permitted to carry over and, where appropriate, accumulate until termination of his employment relationship, paid annual leave rights not exercised because his employer refused to remunerate that leave: King v The Sash Window Workshop Ltd: C-214/16 [2018] ICR 893. This is the case even if the employer considered (wrongly) that the worker was entitled to paid annual leave. In its reasoning the CJEU emphasised that the WTD treats the right to annual leave and to a payment on that account as being two aspects of a single right and that the purpose of the requirement that the leave be paid is to put the worker, during such leave, in a position which is, as regards salary, comparable to periods of work. As the CJEU put it 'The very purpose of the right to paid annual leave is to enable the worker to rest and to enjoy a period of relaxation and leisure … However, …, a worker faced with circumstances liable to give rise to uncertainty during the leave period as to the remuneration owed to him, would

not be able to fully benefit from that leave as a period of relaxation and leisure, in accordance with Article 7 of Directive 2003/88.'

78. This ruling expanded on earlier CJEU decisions to the effect that a worker must be permitted to carry forward the leave provided by the WTD where he or she has been unable or unwilling to take it due to illness and is entitled to an allowance in lieu of such untaken leave on termination: Schultz-Hoff v Deutsche Rentenversicherung Bund [2009] IRLR 214 (CJEU); Pereda v Madrid Movilidad SA [2009] IRLR 959 (CJEU).

79. In Marleasing S.A. v. LA Comercial Internacional de Alimentacion S.A. (Case C–106/89) [1992] 1 CMLR 305 the CJEU held '… in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, so far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 EEC.' It follows that the WTR must be interpreted and applied compatibly with the WTD if it is possible to do so. I conclude that the right to four weeks' annual paid leave under the WTR – and to a payment in lieu of untaken leave on termination - must be interpreted, so far as possible, so as to conform with the WTD as interpreted by the CJEU in King.

80. The position is different, however, in relation to the right to additional leave under WTR reg 13A. The cases of Dominguez v Centre informatique du Centre Ouest Atlantique and another [2012] IRLR 321 and Neidel v Stadt Frankfurt am Main C-377/10; [2012] IRLR 607 (CJEU) confirm that there is no EU obligation on Member States to make a payment in lieu on termination of any leave in excess of the 4 week WTD minimum. In the case of Sood Enterprises Ltd v Healy [2013] IRLR 865 (EAT), the EAT cited these cases as authority for the proposition that it is for the national law to set requirements as it thinks fit for additional leave. Therefore, the treatment of r13A additional leave is purely a matter of domestic law. It follows that, in the absence of a relevant agreement, additional leave under r13A must be taken in the year in respect of which it is due and additional leave not taken in that year will be forfeit even if the worker is unable to take their leave: Sood Enterprises. The remedy available to the claimant who is denied the right to take their leave is to claim under WTR reg 30(1)(a) that the employer has refused to permit him to exercise his right under reg 13A.

81. Returning to reg 13 leave, the question is whether the WTR can be read so as to conform with the WTD.

82. In relation to leave that has not been taken, the principal issue here is that, on its face, reg (9) prevents untaken leave from being carried forward. In the case of NHS Leeds v Larner [2012] ICR 1389, a case involving leave untaken due to sickness absence, the Court of Appeal considered that the WTR could be interpreted to give effect to the WTD both to ensure that annual leave could be taken in a later year and to ensure that compensation would be payable on termination of the employment for accrued annual leave. Mummery LJ observed at paragraphs 90-92:

> 90 First, in relation to the carrying forward of unused annual leave, regulation 13(9) would be construed to read as follows: “Leave to which a worker is entitled under this regulation may be taken in instalments, but— (a) it may only be taken in the leave year in respect of which it is due, save where the worker was unable or unwilling to take it because he was on sick leave and as a consequence did not exercise his right to annual leave”.
> 91 Secondly, in relation to payment on termination of employment, regulation 14 would be read and interpreted to include the following insertion: (5) Where a worker's employment is terminated and on the termination date he remains entitled to leave in respect of any previous leave year which carried over under regulation 13(9)(a) because of sick leave, the employer shall make him a payment in lieu equal to the sum due under regulation 16 for the period of untaken leave.”

83. This approach was followed by the EAT in Plumb v Duncan Print Group Ltd [2016] ICR 125 (EAT). The EAT there also considered the interpretation of Regulation 30(1)(b) and 30(5) of the Regulations which is the means by which a remedy is given in respect of a failure to pay a worker payment in lieu of unused annual leave and held that it is also necessary to interpret Regulation 30(1)(b) and 30(5) of the Regulations as if they included the words “14(5)” after 14(2) in each sub-regulation.

84. I can see no reason why the same approach should not be taken to leave under reg 13 that has not been taken because the employer refuses to pay for such leave. The WTR can be interpreted to give effect to the WTD, as interpreted by the CJEU in King, by construing reg 13(9) as permitting such untaken leave to be carried forward, construing reg 14 as requiring an employer to make a payment in lieu of any such leave as remains untaken on termination, and construing reg 30 as including claims for non-payment of such lieu pay. Such an interpretation does not go against the grain of the WTR and is, therefore, one I should adopt in light of Marleasing.

85. A separate question is whether a worker who exercises their right to take leave under reg 13 but does not receive any payment for such leave can rely on the CJEU’s ruling in King to dis-apply the normal time limit for bringing a claim, whether such claim is brought under WTR reg 30(1)(b) or ERA s26, of three months from the date payment should have been made or, in the case of a claim under ERA involving a series of non-payments, three months from the last of those non-payments. Related to that is the question of whether, in light of King, the ruling in Bear Scotland v Fulton [2015] ICR 221 (EAT), to the effect that a gap in underpaid holiday of more than three months interrupts the series of deductions, is still good law in so far as it relates to claims such as that pursued in these proceedings. In light of my conclusion that the claimant did not in fact exercise her right to take paid leave under the WTR I have not had to answer those questions.

Conclusions

Continuous employment

86. In July 2016, the claimant and the respondent agreed that the claimant would work for the respondent as a kennel-hand for 16 hours per week over two days per week on an indefinite, as opposed to a temporary, basis, being paid at national minimum wage rate; the only weeks the claimant did not work between then and April 2017 was when she was on pre-agreed holiday; that working arrangement continued unchanged after April 2017 except for a reduction in the claimant's working hours which the claimant and respondent agreed to in May 2017.

87. It is clear that in July 2016 the claimant and the respondent had a verbal agreement under which the claimant agreed to work a certain number of hours each week for the respondent and the respondent, in return, agreed to pay the claimant the minimum wage. This was a verbal contract.

88. There was no suggestion by the respondent that the claimant could send somebody else in her place to do the work she was expected to do. There was no suggestion that the claimant was not working under the direction of the respondent. The essential components of a contract of employment were present from July 2016 i.e. mutual obligations to work and to pay, a requirement of personal service and sufficient control. Therefore, that contract was one that was capable of being a contract of employment.

89. The respondent concedes that the claimant was working under a contract of employment from April 2017. I have found that there was nothing in the relationship between the claimant and the respondent that changed at that time. If the contract was a contract of employment in April 2017 then it was a contract of employment from the outset. That being the case, I find that the claimant and the respondent entered into a contract of employment in July 2016 and the claimant worked under that contract of employment (subject to the variation of hours in May 2017) until it was terminated by notice given in November 2018 and which expired in December 2018.

90. Section 212 of the Employment Rights Act 1996 says that any week during the whole or part of which an employee's relations with his employer are governed by a contract of employment counts in computing the employees period of employment. I have found that the entire period from July 2016 to December 2018 was a period during which the claimant's relations with the respondent were governed by a contract of employment. It follows that the entire period counts as continuous employment regardless of when the claimant worked during that period and whether there were any weeks during which she was not working. Even if I had found that the claimant was engaged on separate contracts each time she worked for the respondent until April 2017 then I would have found that she was continuously employed on account of the presumption in section 210(5) of the Employment Rights Act 1996, which says that somebody is employment is to be presumed to have been continuous unless the contrary is shown.

91. It follows that the claimant was continuously employed from July 2016. She was dismissed in December 2018. At that point she had more than two years' continuous service. Therefore, she had the right not to be unfairly dismissed and also the right to redundancy payment if dismissed by reason of redundancy.

Unfair dismissal

92. It is for the respondent to show the reason for dismissal. The respondent says the reason was redundancy. Redundancy is defined in section 139 of the Employment Rights Act 1996, which says dismissal shall be taken to be by reason of redundancy if it is wholly or mainly attributable to the fact that the employer has ceased to carry on the business for the purpose of which the employee was employed… or the requirements of the business for employees to carry out work of a particular kind of ceased or diminished or are expected to cease or diminish.

93. I accept that the respondent was looking for ways to cut costs. However, the day before the respondent told the claimant she was being dismissed, she asked the claimant to increase her hours of work because another individual, Stacey, was leaving. She also asked the claimant to go 'off the books'. I do not believe this is consistent with the respondent's claim that there was a redundancy situation. The fact that the claimant was asked to increase her hours suggests that the requirements of the business for employees to carry out kennel-hand work had not reduced and were not expected to reduce. Had the claimant agreed to increase her hours and go off the books as asked, it is clear that she would not have been dismissed. It seems to me that the respondent was seeking to cover Stacey's work whilst reducing her costs by having the claimant work 'off the books'. The respondent did not explain why going off the books would help but I infer the respondent thought this could achieve a cost saving and I infer this was because she felt she wouldn't have to honour employment rights such as holiday pay in relation to the claimant if she was not on the books.

94. I, therefore, do not accept the claimant's dismissal was for the potentially fair reason of redundancy and as the respondent has not put forward any other potentially fair reason for the dismissal it follows that the claimant's dismissal was unfair.

95. I have also considered whether the claimant's dismissal was automatically unfair on the ground that the main reason for dismissal was either that the claimant had refused to forego a right conferred on her by the Working Time Regulations 1998 or had alleged that the employer had infringed a right of hers conferred by the Working Time Regulations 1998

96. The claimant was dismissed in circumstances in which the respondent was trying to make cost savings. Her dismissal came only a few months after the claimant insisted on her right to paid holiday. She was the only worker to whom the respondent paid holiday pay. There is no evidence of any of the respondent's other paid workers having been dismissed to make costs savings. Before dismissing her, the respondent gave the claimant the option of going 'off the books'. As noted above, I infer that the respondent wanted the claimant to work 'off the books' because the respondent thought this could achieve a cost saving because she felt she would not have to honour employment rights, including holiday pay, in relation to the claimant if she was not 'on the books.' Had the claimant agreed to work 'off the books' she would not have been dismissed.

97. It is clear to me that the claimant had refused to forego her right to paid annual leave under the 1998 Regulations, both in July 2018, when she tackled the respondent about the fact that she was not being paid for holiday leave and insisted on being paid in future, and in November 2018, when she refused to go 'off the books'.

98. In all the circumstances, I am satisfied that the main reason for the claimant's dismissal was that she refused to forego her right to paid annual leave, which was a right conferred on her by the Working Time Regulations 1998. The claimant's dismissal was, therefore, automatically unfair.

Remedy for unfair dismissal

Basic award

99. The parties agreed that the claimant should be awarded a basic award of £156.60 (equivalent to 2 weeks' pay, the parties having agreed that a week's pay for the claimant was £78.40).

Compensatory award

100. I heard uncontested evidence from the claimant as to her current level of earnings and the benefits she is receiving. The claimant has a new job. She is currently on a zero-hours contract but her employer has said she is going to be offered a permanent contract. As yet the claimant does not know how many hours she will be offered under a permanent contract, nor when that contract will begin. In July 2019 she worked for 23 hours although in previous months she had worked fewer hours. Her income is supplemented by Universal Credit. The amount she receives in benefits is dependent upon how much she receives by way of earnings: when her earnings increase, her benefits go down and vice versa.

101. After hearing evidence from the claimant about the extent of her financial losses caused by the dismissal, Mr Cavana agreed that, had the claimant not been dismissed, she would have earned £2570.20 net from working for the respondent between the date of termination and the date of this hearing and that, in that period, the claimant has in fact earned £438.32 net from new employment. Based on those figures, the claimant's financial losses amounted to £2131.88 as at the date of this hearing, ignoring the benefits received by the claimant to date.

102. As far as future loss is concerned, based on the evidence given by the claimant I suggested that the claimant appears to be receiving roughly £125 less per month than she would have been earning had she continued to be employed by the respondent. Both parties agreed that this was a fair estimate of the claimant's ongoing financial losses.

103. Mr Cavana, for the respondent, submitted that an appropriate amount of compensation to reflect likely future losses would be £500, equivalent to a further four months' lost earnings. He submitted that the claimant should be able to find

alternative work earning the equivalent to that which she earned with the respondent within four months. Ms Hemsley-Kaine submitted on behalf of the claimant that the claimant's losses of £125 per month were likely to continue for six months rather than four months and I should, therefore, award £750 to compensate the claimant for future lost earnings. On this issue I preferred the submissions of Mr Cavana. When employed by the respondent the claimant was working for 10 hours per week at the minimum wage rate. There is no reason to think the claimant will not be able to find an alternative job that would give her 10 hours' work per week at the minimum wage rate within four months.

104. I decided that the claimant should also be awarded £165 (roughly 2 weeks' pay at the current minimum wage rate) to reflect her loss of statutory rights.

105. The respondent failed to provide the claimant with a statement of the main terms of her employment, as required by section 1 of the Employment Rights Act 1996. After hearing submissions on behalf of both parties I decided that I should increase the compensatory award by £313.20 pursuant to section 38 of the Employment Act 2002, i.e. four weeks' pay, in respect of that failure given that the respondent had shown a wholesale disregard for the claimant's rights under section 1, as evidenced by the respondent's wish to keep the claimant 'off the books' which, appears to have been motivated by a desire to avoid the need to comply with employment rights.

106. The claimant sought a further increase in the compensatory award on the ground that the respondent failed, unreasonably, to follow the ACAS Code of Practice on Discipline and Grievances. I declined to increase the compensation as I find that the Code did not apply to the claimant's dismissal, which did not come about because of any culpable behaviour by the claimant.

107. Having reached the conclusions set out above, I explained to the parties that I would make a compensatory award comprising compensation for financial loss to the hearing date, compensation for future financial loss, compensation for loss of statutory rights and an uplift under section 38 of the 2002 Act. At the hearing I calculated the compensatory award as £3548.40. In the process of drawing up these written reasons, however, it appears to me that, in calculating that amount I included a figure for past financial losses of £2570.20, rather than the amount after deduction of the claimant's earnings in new employment, which would have been £2131.88. Neither of the parties appears to have spotted this error during the hearing: my notes of the hearing record that, as I was totalling the compensatory award, both parties agreed that compensation for past financial loss was £2570.20. Any application for the award to be reconsidered must be made within 14 days of these written reasons being sent to the parties.

Redundancy pay

108. The claimant's claim for redundancy payment does not succeed because the claimant has proved that the reason for her dismissal was not redundancy but was the fact that she refused to forego her right to paid annual leave.

Notice pay

109. The claimant was continuously employed from July 2016. As such, she was entitled, under the Employment Rights Act 1996, to two weeks' notice of termination, for which she was entitled to be paid at the rate of a week's pay for each of those weeks.

110. The respondent says this was covered by the cheque the claimant was sent for £391.50. That cheque represented five weeks' pay and was intended to cover two weeks' notice pay, redundancy pay equivalent to 2 weeks' pay, and one week's holiday pay. The claimant did not cash the cheque as she interpreted the respondent's email to her as an instruction not to do so. I accept that was a reasonable interpretation of that email - it is difficult to understand what else the respondent could have meant by it. I also note that the claimant was still employed by the respondent at that time and, as such, could have been expected to comply with instructions from her employer. In all the circumstances, I accept that, as the respondent instructed the claimant not to cash the cheque initially tendered as payment, the respondent cannot now claim to have paid the claimant her notice pay. The respondent failed to pay the claimant. That failure was in breach of the claimant's contractual right to be paid her normal pay. The claimant's claim of breach of contract is, therefore, well founded.

Remedy for breach of contract in respect of notice pay

111. The parties agreed that a 'week's pay' for the claimant was £78.30 per week.

112. I order the respondent to pay to the claimant damages of £156.60, which is equivalent to 2 weeks' pay i.e. the amount the claimant was entitled to be paid during her notice period. Damages are based on gross pay as this award is likely to be taxable as 'Post Employment Notice Pay'.

Holiday pay

113. The claimant was entitled to 5.6 weeks' leave in each leave year under the Working Time Regulations.

114. Because the parties had not entered into a relevant agreement identifying an appropriate leave year, each leave year for her began on the anniversary of her starting employment. Her employment began on 10 July 2016. Therefore, each of her leave years ran from 10 July to 9 July in the following year.

115. In respect of her final leave year, the period of leave to which the claimant was entitled under regulation 13 and regulation 13A was 5.6 weeks. The claimant's final leave year ran from 10 July 2018 to 12 December 2018, when her employment ended. This means that 156 days, or 42%, of the leave year had expired before the termination date. Therefore, the claimant had accrued 42% of her 5.6 week leave entitlement in respect of that final leave year, which amounts to 2.35 weeks' leave ie 4.7 days' leave (based on 2 days' work per week). In effect, therefore, the claimant had accrued 4.7 days' leave for her final leave year. Between 10 July 2018 and 12 December 2018 the claimant in fact took 2.5 weeks', or five days', of her leave entitlement. In other words, the claimant had

taken her entire leave entitlement under the Working Time Regulations if one looks only at the leave that accrued in respect of that final year.

116. To put this in terms of the formula contained in regulation 14(3)(b), 'A' is 5.6 weeks, 'B' is 42% and 'C' is 2.5 weeks. As A multiplied by B is 2.35 weeks, the formula (AxB) - C produces a negative amount meaning that, if one looks only at the claimant's leave entitlement for the leave year in which her employment ended, the claimant would not have been entitled to any further payment under regulation 14.

117. However, this is a case in which the claimant contends that she was deprived of the right to take paid annual leave by her employer and, therefore, the Working Time Regulations should be interpreted in a way that permits her to carry forward leave from previous leave years and regulation 14 should be interpreted as entitling her to a payment in respect of that untaken leave.

118. In determining this issue I considered first whether any of the periods during which the claimant was away from work on unpaid holiday leave constituted leave under reg 13 or reg 13A of the WTR.

119. WTR regulation 15 provides that an individual may take leave to which they are entitled on such days as they may elect. The question is whether the claimant elected to take leave under the WTR on the dates on which she took unpaid leave. In this case the claimant had no knowledge of her right to take paid leave under the WTR until mid-2018, when she started looking into her employment rights. That being the case, when taking unpaid leave she cannot consciously have been electing to take her entitlement to leave under the WTR. Furthermore, neither she nor her employer had any intention or expectation that she would be paid for any of the periods during which she took unpaid leave: the respondent's position was that paid time off was not available – she did not recognise the claimant as having any rights to paid leave under the WTR; similarly, the claimant had no knowledge of her rights under the WTR, at no time asked for paid time off until July 2018 and had no expectation of being paid during the periods she chose to take leave.

120. Taking all these factors into consideration, I find that although there were times during her employment when the claimant elected to take leave, the claimant did not, at any time before July 2018, elect to take leave under reg 13 or 13A of the Working Time Regulations.

121. I reach this conclusion based on my interpretation of the WTR in their own right and their application to the facts of this case. Although I have not felt the need to have recourse to the jurisprudence of the CJEU in reaching that conclusion, my belief that this is the correct decision is fortified by a consideration of the CJEU's case law in this area. In particular, the CJEU has repeatedly stressed that the right to pay and leave under the WTD are effectively bound up as one right; see for example paragraph 35 of the King judgment paragraph 44, where the Court of Justice makes it plain that if an employer grants only unpaid leave that is a denial of the right to leave under the WTD. The claimant in this case had no means of taking paid leave before the respondent changed her

approach in July 2018. That being the case, I conclude that when she did take time away from work before July 2018, that time away from work could not constitute paid leave for the purposes of the WTD. Given the need to interpret and apply the WTR in a way that conforms with the WTR, this reinforces my belief that, in electing to take periods of time away from work before July 2018, the claimant did not elect to take leave under the WTR.

122. Given that the claimant chose to take time away from work on several occasions before July 2018, notwithstanding that she had no expectation of being paid, I am also satisfied that if the respondent had provided the claimant with the opportunity to ask for and take paid leave before July 2018 she would have availed herself of that opportunity. That being the case I am satisfied that the reason the claimant did not exercise her right to paid leave before July 2018 was because her employer refused to pay for such leave. As such, the claimant was prevented from exercising her right to paid leave under the WTR until July 2018.

123. The issue that arises is whether, in light of the CJEU's decision in King, the claimant was entitled to a payment on termination in lieu of untaken leave under reg 13 and 13A.

124. As recorded above, I hold that the WTR can and should be interpreted to give effect to the WTD, as interpreted by the CJEU in King, by, in circumstances such as these, construing reg 13(9) as permitting untaken reg 13 leave to be carried forward. As at the beginning of the leave year which started on 10 July 2018, therefore, the claimant was entitled to an additional eight weeks' leave, being the reg 13 leave from the 2016-17 and the 2017-18 leave years. The position in relation to the additional leave under reg 13A is different, however. There was no relevant agreement providing for leave to be carried forward in this case. Therefore, as noted above, any additional leave under r13A not taken in the year it was due could not be carried forward.

125. The question of whether the claimant was entitled to a payment under reg 14 in respect of the carried forward leave and, if so, the amount of that payment is not a straightforward one given that, early on in the claimant's final leave year, the respondent acknowledged that the claimant should be paid in respect of annual leave, agreed to pay her in the future and paid her £600 in respect of leave taken in previous leave years. This gives rise to questions as to whether the claimant is entitled to a payment in respect of the whole of the carried forward leave, or only a proportion of it equivalent to the proportion of the leave year that had passed and whether, and if so to what extent, the payment of £600 should be offset against the sum due. In the event, I did not need to resolve those issues as, in light of the conclusions reached above, the parties managed to reach an agreement as to the amount owing under regulation 14 of the WTR. The parties agreed that £362.13 was the amount remaining due and I therefore made an order that the respondent pay that sum to the claimant.

_____
Employment Judge Aspden

Date 23 October 2019

Note
Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.