EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Ms. S. Ghosh	**AND**	**Innvotec Ltd**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT: London Central **ON: 6 December 2019**

EMPLOYMENT JUDGE Mason

Representation
For the Claimant: In person.
For the Respondent: Mr. J. Marsden, director.

JUDGMENT

The judgment of the Tribunal is that:

1. **Unfair dismissal**

1.1 The Claimant's claim of unfair dismissal succeeds and the Claimant is awarded:

(i) Basic Award of **£1,050.00;** and

(ii) Compensatory Award **of £4,406.78**

1.2 These sums are payable without any deductions in respect of Income Tax or employee's National Insurance Contributions as they do not fall within s62 ITEPA 2003 and will treated as a payment made in connection with termination and the £30,000 tax free allowance applies (**s401 ITEPA 2003**).

2. **Statutory Redundancy Payment (SRP)**

2.1 The Claimant's claim succeeds.

2.2 No sum is awarded as this is extinguished by the Basic Award (1.1 (i) above).

3. **Breach of Contract**

3.1 Bonus

The Claimant's claim fails.

3.2 Pension contributions:

(i) The Respondent breached the Claimant's contract of employment by failing to pay pension contributions into the NEST scheme at the rate of 7% of her gross annual salary as follows:

a. 1 February 2017 to 30 April 2018: £3,369.00; and

b. 1 May 2018 to 31 May 2019: £4,929.00

(ii) The Respondent is credited with payment of £398.00 against these sums.

(iii) The Respondent is ordered to pay the Claimant the balance of **£7,900** gross.

4. **Unlawful deductions from wages:**

4.1 The Claimant's claims for unlawful deduction from wages succeed in respect of:

(i) arrears of salary from 10 to 28 February 2019: £3,500;

(ii) arrears of salary from 1 March to 31 May 2019: £16,500; and

(iii) accrued holiday pay: £2,137.00

4.2 The Respondent is credited with payment of £6,250 against these sums.

4.3 The Respondent is ordered to pay the Claimant the balance of **£15,887.00** subject to appropriate deductions in respect of PAYE income tax and employee's National Insurance Contributions (**s62 ITEPA 2003**).

5. **Interest**

5.1 The Tribunal does not have jurisdiction to award interest to date on the above sums.

5.2 However, interest starts to accrue from the date of judgment but interest will not be payable if the awards are paid within 14 days of the judgment.

REASONS

Background

1. On 19 April 2019, the Claimant presented this claim. The Claimant claims:

1.1 compensation for unfair dismissal;

1.2 monies in lieu of 12 days accrued holiday;

1.3 a bonus/ex gratia payment of £9,750;

1.4 arrears of unpaid salary from 10 February 2019 to 31 May 2019;

1.5 a redundancy payment; and

1.6 unpaid pension contributions at the rate of 7% for the period 1 February 2017 to 31 May 2019.

2. The Claimant also initially claimed sex and race discrimination and equal pay but withdrew these claims at a Preliminary Hearing on 2 October 2019

conducted by EJ Deol. The Tribunal has no jurisdiction in respect of her claims of "unjust enrichment" or personal injury.

3. The Respondent lodged a response on 8 August 2019. The Respondent says:

3.1 The Claimant's dismissal was for a fair reason (redundancy) and that a fair procedure was followed.

3.2 It is denied that the Claimant is owed:

(i) any holiday pay; or

(ii) a bonus (payment being subject to conditions which it says were not met).

3.3 It is accepted that she is owed:

(i) arrears of salary; and

(ii) a redundancy payment.

3.4 It is also accepted there has been a failure to make pension contributions but the Respondent says the correct rate is 3.5%, not 7%.

Procedure at the Hearing

4. The Claimant attended in person. Mr. Marsden, Director, represented the Respondent.

5. The Respondent provided a joint bundle of documents [pages 1-74]. We added to this bundle additional document [pages 75-79] provided by the Claimant at the hearing. The Respondent provided a written witness statement for Mr. Marsden. The Claimant did not provide a statement and relied on her statement attached to her Tribunal claim form (ET1).

6. Having identified the Claimant's claims, agreed the main issues with the parties and explained the procedure, I adjourned to read the papers.

7. I then heard from the Respondent. Mr. Kazmi (Director) gave evidence first; he had not provided a witness statement but I allowed him to give evidence as the Claimant did not object and his evidence was brief and focussed mainly on the bonus issue; he was cross-examined by the Claimant. Mr. Marsden then gave evidence on behalf of the Respondent. He adopted his witness statement as his evidence-in-chief and was cross-examined by the Claimant. After lunch, I heard from the Claimant; she was cross- examined by Mr. Marsden. I gave both sides the opportunity to make brief submissions. There was insufficient time for me to give oral judgment on the day and I therefore reserved my decision which I now give with written reasons.

The Issues

8. The issues which the Tribunal is required to determine are as follows:

9. Unfair Dismissal

9.1 Reason for dismissal (**s98(2) Employment Rights Act 1996 ("ERA")**).
Was the reason for the Claimant's dismissal a potentially fair reason?
(The Respondent says the principal reason was redundancy which is a potentially fair reason).

9.2 Fairness:(**s98(4) ERA**)

(i) If the Claimant's dismissal was genuinely by reason of redundancy, did the Respondent act reasonably or unreasonably in treating redundancy as a sufficient reason for dismissing the Claimant? This is to be determined in accordance with equity and all the circumstances of the case, having regard to the Respondent's size and resources.

(ii) Did the procedure followed and the decision to dismiss fall within the range of reasonable responses open to a reasonable employer in the same circumstances?

9.3 Remedy: Compensation (**ss128-132 ERA**)

(i) If the Claimant was unfairly dismissed, how much compensation is she entitled to by way of:

a. A Basic Award (calculated in the same way as a Statutory Redundancy Payment (para 10 below); and or

b. A Compensatory Award to compensate her for:
- loss of earnings based on actual net weekly pay capped at the lesser of one year's gross pay and £86,444; and
- loss of statutory rights?

(i) Should there be any reduction or limit to the Compensation Award:

a. because the Claimant failed to take all reasonable steps to mitigate her loss? and/or

b. to reflect the chance that the Claimant would have been dismissed in any event and that any procedural errors accordingly made no difference to the outcome? (***Polkey v AE Dayton Services Ltd*** *[1987] UKHL 8*)?

10. Redundancy payment: (**ss135 and 163(5) ERA**)

10.1 Is the Claimant entitled to a redundancy payment?

10.2 If so, how much is she entitled to given her length of service (2 complete years), her age at date of termination (41 years) and the applicable statutory cap on a week's wages of £525 (**s162 ERA**)?

11. Arrears of salary: Unlawful Deductions from Wages (**ss13-26 ERA**)

11.1 Did the Respondent fail to pay the Claimant salary during the periods:

(i). 10 February 2019 to 28 February 2019?; and

(ii) 1 March 2019 to 31 May 2019?

11.2 If so, how much is she entitled to bearing in mind:

(i) The Respondent says any salary due should be paid directly to HMRC by way of PAYE income tax as previous payments made to the Claimant have not been subjected to proper tax and National Insurance deductions. However, the Respondent has not yet paid these sums to HMRC.
(ii) The Respondent has paid the Claimant the sum of £6,250 towards arrears of salary and says this should be offset against any monies due.

12. Accrued holiday entitlement: Unlawful Deduction from Wages (**s13 ERA 1996 and s30 Working Time Regulations 1998**)
12.1 Did the Respondent fail to pay the Claimant monies in lieu of accrued holiday entitlement?
12.2 If so, how much is she entitled to bearing in mind:
(i) The Claimant says she is owed 12 days holiday pay;
(ii) The parties agree that her contractual entitlement was 28 days per annum (in addition to bank holidays);
(iii) The Contract of Employment provides that the holiday year is 1 January to 31 December but the Respondent argues that the period of 12 months prior to date of termination of employment should be considered;
(iv) The Respondent says the Claimant worked infrequently particularly during her notice period.

13. Bonus: unlawful deductions from wages
13.1 Did the Respondent verbally agree on 16 November 2018 to pay the Claimant a bonus of £9,750 in March 2019?
13.2 If so, what were the conditions of payment?
13.3 Is this payment due given the Claimant received notice of termination of her employment in March 2019 and clause 5.2 of her Contract of Employment provides:
"*You will only be eligible for a bonus payment if you are in active employment with your Employer and are not under notice of termination ...*" [page 3].
13.4 If this claim succeeds, how much is the Claimant entitled to?

14. Breach of contract (**Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 SI 1994/1623**)
14.1 It is agreed that the Respondent failed to pay pension contributions on behalf of the Claimant to NEST (the government run workplace pension scheme) during the period 1 February 2017 to 31 May 2019 and that this claim was outstanding on termination of the Claimant's employment.
14.2 This claim is excluded from the legislation relating to unauthorised deductions and the Claimant's therefore falls under breach of contract.
14.3 The Claimant's remedy is damages caused by the breach of contract. How much is owed?
(i) The Claimant says the Respondent was contractually bound to make contributions of 7% of her gross annual salary; and

(ii) The Respondent accepts it failed to make contributions during the period but says it was contractually bound to make contributions at 3.5%.

Findings of fact

15. The Respondent is an Authorised Alternative Investment Fund Manager (AIFM) operating in the Financial Services sector and is regulated by the Financial Conduct Authority (FCA). Mr. John Marsden is an executive director and, until 15 July 2019, was the majority shareholder and Executive Chairman.

16. The Claimant was employed by the Respondent from 1 February 2017 to 31 May 2019. Initially the Claimant was employed on a part-time basis and her salary was £36,000.

17. On 1 February 2017, the Respondent provided the Claimant with a Job Specification [pages 12-14] which concluded with a written summary of her remuneration. This summary states (insofar as relevant to this case):
"Salary: £38,500"
"Pension contribution: 7%"
"Days: 3 days a week"
Holiday Entitlement: 4 weeks/28 days
Notice period: 3 months, either party"

18. On 20 February 2017, the Claimant received her payslip and emailed the Respondent with some queries [page 75] including:
"*John [Mr. Marsden] has said there would be a 7% contribution on top of my salary for workplace pension. How do we proceed with that?"*

19. From May 2017, the Claimant was on a Tier 2 General Work visa sponsored by the Respondent and her salary increased to £38,500 in order to reach the minimum salary threshold set by the Home Office in respect of Tier 2 General Work Visa applicants.

20. In January 2018, the Claimant was appointed Head of Marketing and in May 2018, her hours increased to full time (40 hours per week) and her salary increased to £65,000 per annum gross.

21. On 24 April 2018, the Claimant emailed the Respondent [page 76] and mentioned :
"*PS. My 7% pension contribution is also overdue since 1 February 2017 (15 months). The recent NEST account opened covers only 1%. Please advise on how best to reconcile the difference*."

22. The parties then signed a Contract of Employment [pages 1-11] ("the Contract") to take effect from 1 May 2018. The relevant terms in the Contract for the purposes of this case are as follows:

22.1 Clause 2: Commencement, Duties and Probation
The Claimant's job title is stated to be "*Head – Marketing & Investor Platform"* [page 2].

22.2 Clause 5: Salary and Bonus
5.2 "*You will only be eligible for a bonus payment if you are in active employment with your Employer and are not under notice of termination ..."* [page 3].

22.3 Clause 7: Pension
This provides that the Claimant will be enrolled as a member of the National Employment Savings Trust (NEST) pension scheme:.
7.2: "*The Employee and the Company will pay 7% contributions to the NEST and/or as may be required from time to time and the Company will also pay the minimum contributions to the NEST scheme as may be set by legislation and/or as it may designate from time to time. The Employee's contributions to the scheme will be deducted from his or her salary and paid into the scheme*" [page 4]

22.4 Clause 9: Holiday
This provides that the holiday year is 1st January to 31st December; the Claimant is "*entitled to 28 days holiday in each calendar year ...*"; on termination of employment the Claimant will be "*entitled to holiday pay in lieu of holiday entitlement outstanding in the holiday year*" [page 5].

22.5 Clause 14: Termination of Contract on Notice
This provides that the Contract may be terminated by not less than three months' notice in writing given by either party to the other [page 9].

23. Around May/June 2018, I accept that the Respondent's financial position deteriorated as anticipated revenue and investment failed to materialise. As a result, the Respondent's employees (six at that time including the Claimant) were not paid salary after May 2018.

24. In June 2018, Mr. Marsden notified the FCA of the Respondent's financial problems.

25. In July 2018, the Claimant was informed of the Respondent's financial difficulties (ET1). Mr. Marsden and Mr. Tofiq Qureshi (Director) met with the employees (including the Claimant) and Mr. Marsden explained the Respondent's financial plans and hopes, both in the immediate and the longer term. Mr. Marsden followed this up with an email dated 28 July 2018 [page 24-25].

26. On 28 August 2018, Mr. Marsden again emailed all employees (including the Claimant) [page 27] to keep them abreast of his plans and hopes for the Respondent's financial survival.

27. From August 2018, the directors of the Respondent sought advice from insolvency practitioners. They were advised not to put the Respondent company into administration at that point as there was still a prospect of incoming investment.

28. From the end of August 2018 onwards, employees' attendance understandably decreased and any work was largely carried out from home.

29. On 5 September 2018, Mr. Marsden emailed all staff including the Claimant [page 28] to thank them for their "*on-going efforts*" and to keep them informed of negotiations with regard to potential incoming investment from an investor syndicate headed by Mr. Amir Kazmi and Mr. Qureshi.

30. In early October 2018, Mr. Marsden notified the FCA that the Respondent was in danger of failing to act in the best interests of its clients. The FCA visited and, until July 2019, the Respondent reported daily to the FCA and was unable to write any new business. I accept Mr Marsden's evidence that the Respondent was "*effectively mothballed*" from October/November 2018 and there were no marketing duties for the Claimant to do. Indeed, any marketing was prohibited by the FCA.

31. On 8 October 2018, Mr. Marsden emailed the Claimant [page 30] to keep her informed; he said he was "*99% confident*" that an agreement for inward investment would be reached soon. Mr. Marsden emailed the Claimant again on 30 October 2018 [page 31] to say he hoped all agreements would be signed by Thursday which would mean staff would "*start getting salary early next week which should mean a return to work from early next week*". Also on 30 October, Mr. Marsden emailed the Claimant [page 32] asking her to come in on the Friday to make sure the phones were covered and plan "*marketing the funds*".

32. In October 2018, Mr. Clarke resigned as Finance Director but continued to work as an employee on an "as needed" basis.

33. On 16 November 2018, the Claimant met with Mr. Amir Kazmi and Mr. Qureshi (Director). At that point, Mr. Kazmi was not a director of the Respondent; he was part of the proposed investment team and assisting the directors as an unpaid consultant.

33.1 It is not in dispute that at that meeting Mr. Kazmi promised the Claimant an "ex gratia" payment equivalent to 15% of her gross salary (i.e. £9,750) payable in March 2019.

33.2 The Claimant says this was a payment in recognition of her services to date and she was required to keep this confidential. She says she made notes of that meeting but these were not included in the Tribunal bundle.

33.3 The Respondent says the payment was conditional on:

(i) the Claimant maintaining a positive attitude; and

(ii) FCA approval for Change in Control being received and the refinancing completed by March 2019.

33.4 On the balance of probabilities, given the serious financial state of the Respondent at this time, I accept that the second condition was attached to payment; clearly, without refinancing, the Respondent did not have the funds to make such a payment and the refinancing required FCA approval.

34. In November and December 2018, the investor syndicate made further attempts to buy into the Respondent but again this did not happen partly due to delay in obtaining FCA approval for Change in Control.

35. By the end of 2018, the number of employees had fallen to three (including the Claimant) and from 1 January 2019, they attended the Respondent's offices infrequently.

36. On 9 January and 10 January 2019, the Claimant and Mr. Marsden exchanged a number of emails:

36.1 On 9 January 2019,

(i) The Claimant forwarded to Mr. Marsden an email from a client/investor regarding an enquiry directed to Dorothy Lefebvre [page 36].

(ii) Mr. Marsden instructed the Claimant to "*have an initial attempt at answering the problem..*" rather than "*just flip on emails*" [page 35].

(iii) The Claimant responded stating: *"I answer multiple emails every day from various investors, clients and IFAs. I only forward emails which I know I need input on"* [page 35].

(iv) Mr. Marsden replied [page 34]; he apologised if his email "*seemed heavy handed*" and concluded that she needed "... *to know more about the day to day running of what is loosely called the back-office so all can cover for each other* ... ".

36.2 On 10 January 2019, the Claimant emailed Mr. Marsden and Mr Clark [page 33]. She expressed extreme dismay at not having been paid since 25 May 2018 despite adapting to different roles and working every day.

37. On the balance of probabilities, I find that the Claimant was doing minimal marketing work from around October/November 2018 onwards. Her attendance at the office was on an "as needed"/ad hoc basis and she carried out a variety of tasks including liaising with clients/investors and some general back-office type duties such as covering the phones.

38. In mid-January 2019, the Claimant contacted Acas regarding her unpaid salary from June 2018 and Acas contacted the Respondent with a view to conciliating.

39. In late January 2019, the Respondent was served with a Statutory Demand by a loan note holder/minority shareholder; this was followed up by a Winding-up Petition. At this point, the Directors sought advice from a

second firm of Insolvency Practitioners (Quantuma) who provided a report [pages 57].

40. Around 3 or 4 February 2019, the Claimant met with Mr. Marsden off site to discuss the winding-up petition.

41. On 8 February 2019, the Claimant and the Respondent entered into an Acas COT 3 settlement agreement [pages 69-70] which provided that the Respondent would pay the Claimant the sum of £49,500 in respect of arrears of wages (excluding accrued pension rights) for the period from June 2018 to date (i.e. 8 February 2019) payable in four equal instalments (on 31 March 2019, 30 April 2019, 31 May 2019 and 30 June 2019).

42. Following the report from Quantuma and a further meeting with the insolvency practitioners on Friday 1 March 2019, the Board decided to make all three remaining employees (including the Claimant) redundant. Over the weekend, Mr. Marsden prepared letters which were sent to the employees (including the Claimant) on Monday 4 March.

43. On 4 March 2019 Mr. Marsden emailed the Claimant and the other two employees [page 44] attaching a letter dated 3 March 2019 [pages 15-16] explaining the Respondent's financial position and concluding that "*making all staff redundant is considered the best way* ..." [page 16].

44. A few minutes later on 4 March 2019, Mr. Marsden emailed the Claimant enclosing a letter dated 3 March 2019 [page 17] in which he advised her that "*the Board has decided that all positions in the Company are to be made redundant as of 1st March 2019"*; that it had "*proven impossible to find an alternative position*" for her; that her "*notice period of three months will be honoured in full*"; and that "*the Company would like to think*" that she would work "*as normal (as is possible) during the redundancy period and the Company will allow staff the necessary time off to seek alternative employment*".

45. On 5 March 2019, the Claimant emailed Mr. Marsden [pages 46-47] asking that the redundancy notice be withdrawn, stating that his email had come "*completely out of the blue*" and taken her by surprise as she *"had not been consulted with even once before receiving this notice...*". She argued that there was an ongoing need for her role and furthermore that she had "*performed multiple roles*" at the Respondent during the previous year including client management, coordinating with portfolio companies and liaising with investee companies. She said she was "*very knowledgeable about the business and the back office operations*" which continued "*to be operational for an indefinite period of time*" so there were "*several opportunities"* for her to be placed in another role.

46. Later the same day, the Claimant followed this up with another email to Mr Marsden [page 48] stating that: "*On 16/112018 Amir Kazmi, in his position as an incoming investor, promised me 15% (of my annual salary) as ex gratia (non taxable) payable in March 2019 "as compensation and a good will gesture for my hard work during a tough period and for the distress the non-payment of months of wages had caused me*"".

47. On 7 March 2019, the Claimant met with Mr. Marsden, Mr Kazmi and Mr Qureshi. The meeting was difficult and unfruitful and I accept the Claimant's evidence that she left the meeting knowing "*this was it*".

48. Sometime in February/March 2019, the Respondent engaged a part-time contractor, Amy. She worked from 10.00am to 4.00pm manning the phones. She was paid minimum wage. She remains with the Respondent; Mr. Marsden describes her status as "contractor".

49. Later in March 2019, the Claimant and the Respondent entered into without prejudice negotiations regarding her claims which are the subject of these proceedings; I have disregarded any evidence relating to this as no agreement was reached and such correspondence is privileged.

50. On 26 March 2019, NEST wrote to the Claimant [pages 73-74] to advise that the Respondent had been reported to The Pensions Regulator "*because after several reminders ... they either haven't paid contributions to NEST on time or they failed to notify us that contributions weren't due to be paid. This breached their legal duty as an employer*." No figures are given.

51. In April/May 2019, the Claimant took steps to enforce the terms of the Acas COT3 agreement reached in February 2019.

52. On 31 May 2019, the Claimant's employment ended.

53. On or about 24 June 2019, the FCA gave approval for the Change of Control and the re-financing of the Respondent took place on 15 July 2019.

54. Sometime in June 2019, the Claimant added her name to the winding-up petition as a creditor. The winding-up petition was settled out of court with the main petitioner and did not proceed.

55. In October 2019, the Respondent paid the Claimant the monies due under the February COT3 on a gross basis in respect of arrears of salary from June 2018 to 10 February 2019.

56. Advances of salary (or payments on account of monies owed) were paid by the Respondent to the Claimant as follows:
12.12.2018: £1,100.00

21.12.2018:	£ 900.00
31.01.2019:	£ 500.00
08.02.2019:	£ 500.00
15.02.2019 :	£ 500.00
25.02.2019:	£ 500.00
01.03.2019:	£ 500.00
08.03.2019:	£ 500.00
15.03.2019:	£ 500.00
22.03.2019:	£ 300.00
25.03.2019:	£ 200.00
29.03.2019:	£ 250.00
Total	£6,250.00

57. The Respondent says that monies due to the Claimant under the COT3 and the "advances" having been paid gross, monies are now due to HMRC for PAYE income tax and National Insurance contributions in accordance with advice received from the Respondent's auditors. This together with the advances, more than extinguishes any monies due to the Claimant. However, the Respondent has not paid any such monies to HMRC.

58. With regard to holiday pay, Mr. Marsden accepts that the Respondent's contractual holiday year mirrors the calendar year but says it is "*more appropriate*" to consider the 12 month period prior to termination of the Claimant's employment i.e. June 2018 to May 2019 during which period the Claimant took 17 days holiday and only 3 days is outstanding. I accept the Claimant's evidence that she did not take any holiday during the period 1 January to 31 May 2019.

59. Since termination of her employment, the Clamant has been unable to find new employment and has had no income or state benefits. In view of her Tier 2 visa status, she accepts she would have been unable to accept alternative employment with the Respondent unless paid at least £38,000 per annum; she could work less hours but would be unable to accept a job paying minimum wage. She is unable to take on freelance or consultancy work unless she finds a new sponsor. She is starting a PhD in April 2020.

The Law

Unfair dismissal claim

60. **Reason for dismissal**

60.1 **S98 (1) ERA:**

In determining whether the dismissal of an employee is fair or unfair, it is for the employer to show:

(i) the reason (or if more than one the principal reason) for the dismissal

(ii) that is either a reason falling within subsection 2 or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

60.2 **S98(2) ERA:**

"*A reason falls within this subsection if it—*

(a)relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b)relates to the conduct of the employee,

(c)is that the employee was redundant, or

(d)is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment."

60.3 **S139(1) ERA**:

"... an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to –

(a) the fact that his employer has ceased or intends to cease –
- *(i) to carry on the business for the purposes of which the employee was employed by him, or*
- *(ii) to carry on that business in the place where the employee was so employed, or*

(b) the fact that the requirements of that business –
- *(i) for employees to carry out work of a particular kind, or*
- *(ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer,*

have ceased or diminished or are expected to cease or diminish"

60.4 Once the Tribunal has determined that the reason was genuinely redundancy, it will not look behind the employer's decision or require it to justify how or why the diminished requirement has arisen.

61. **<u>Reasonableness of Dismissal</u>:**

61.1 **S98(4) ERA:**

"*Where the employer has fulfilled the requirements of s98(1), the determination of the question whether the dismissal is fair or unfair (having regard to the reasons shown by the employer):*

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and

(b) shall be determined in accordance with equity and the substantial merits of the case."

61.2 In deciding whether an employer has acted reasonably in dismissing for redundancy, the Tribunal's function is not to ask whether it would have thought it fairer to act in some other way; the question is whether the decision lay within the range of conduct which a reasonable employer could have adopted (***Williams v Compair Maxam Limited*** *[1982] ICR 156).*

61.3. "*In the case of redundancy, the employer will normally not act reasonably unless he warns and consults any employees affected or their representative, adopts a fair basis on which to select for redundancy and takes such steps as may be reasonable to avoid or minimise redundancy by redeployment with his own organisation*" (***Polkey v AE Dayton Services Ltd*** *[1988] ICR 142).*

61.4 Consultation will only be meaningful when it happens at a formative stage rather than when there is a fait accompli (***R V British Coal Corporation and Secretary of State for Trade and Industry, ex parte Price*** *[1994] IRLR 72).*

61.5 Where no consultation about redundancy has taken place, the dismissal will normally be unfair unless the Tribunal finds that a reasonable employer would have concluded that consultation would be an utterly futile exercise in the particular circumstances. It is a question of fact for the Tribunal to consider whether consultation as so inadequate as to render the dismissal unfair. Lack of consultation in any particular respect will not automatically lead to that result. The Tribunal must view the overall picture, to the date of termination. The essential obligation is to give the employee the opportunity of being consulted (***Mugford v Midland Bank Plc*** *[1997] IRLR 208*).

62. **Unfair dismissal Compensation:**

62.1 In addition to a Basic Award (**s119 ERA**), **s123(1) ERA** provides for a Compensatory Award**:** "*... the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer*".

62.2 Mitigation:

Section 123(4) ERA requires a Claimant to mitigate their loss and a Claimant is expected to explain to the Tribunal what actions they have taken by way of mitigation. This includes looking for another job and applying for available state benefits. The Tribunal is obliged to consider the question of mitigation in all cases. What steps it is reasonable for the Claimant to take will then be a question of fact for its determination.

62.3 **Polkey v AE Dayton Services Ltd [1987] ICR 142 ("Polkey")**:

Where evidence is adduced as to what would have happened had proper procedures been complied with, there are a number of potential findings a Tribunal could make. In some cases it may be clear that the employee would have been retained if proper procedures had been adopted. In such cases the full Compensatory Award should be made. In others, the Tribunal may conclude that the dismissal would have occurred in any event. This may result in a small additional Compensatory Award only to take account of any additional period for which the employee would have been employed had proper procedures been carried out. In other circumstances it may be impossible to make a determination one way or the other; it is in those cases that the Tribunal must make a percentage assessment of the likelihood that the employee would have been retained.

63. Unlawful deductions from wages:

S13 ERA 1996 gives workers the right not to suffer unauthorised deductions from their wages and s**s.23-26 ERA 1996** sets out provisions relating to complaints to employment tribunal.

64. Breach of Contract
Article 4 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 gives the Employment Tribunal jurisdiction to hear claims for damages for breach of contract provided the claims arose or are outstanding on termination of the contract of employment and have been brought in time.

Conclusions

65. Applying the relevant law to the findings of fact to determine the issues, I have reached the following conclusions.

66. Unfair dismissal

66.1 Reason for dismissal:**s98(2) ERA** .

(i) The Respondent has shown a potentially fair reason, specifically redundancy.

(ii) I am satisfied that the Claimant's dismissal was by reason of redundancy as defined in **s139(1)(b)(ii) ERA**. Applying the principles established in ***Safeway Stores Plc v Burrell*** *[1997[ICR 523,* it is of little relevance that the nature of the Claimant's duties changed. The Respondent only needs to show:

a. that its requirement for employees to do work of a particular kind ceased or diminished (not necessarily the kind of work for which the Claimant was employed); and

b. that her dismissal was caused wholly or mainly by that cessation or diminution.

This is sufficient to show a redundancy situation and it is not for the Tribunal to determine whether or not it was a sound commercial decision or to require the Respondent to justify how or why the diminished requirement has arisen; there is no need to show economic justification or a business case.

66.2 Fairness: **s98(4) ERA**

(i) In accordance with equity and all the circumstances of the case, having regard to the Respondent's limited size and resources, the Respondent acted reasonably in treating redundancy as a sufficient reason for dismissing the Claimant. The precarious and uncertain future of the Respondent at that time justified the Claimant's dismissal.

(ii) It was fair to select the Claimant for redundancy; the only other two employees were made redundant at the same time. It may be the case that Amy was also in fact an employee at that time but she was in an entirely different role to the Claimant.

(iii) I accept that there were no alternative vacant positions and that It was within the range of reasonable responses for the Respondent not to consider "bumping" Amy out taking into account its limited size and resources and the difference in the roles. I have also concluded that even if bumping out had been considered, the Claimant would not have accepted

Amy's role because it would have represented a significant reduction in pay which would not meet the Tier 2 visa requirements.

(iv) However, the procedure followed did not fall within the range of reasonable responses open to a reasonable employer in the same circumstances. The Claimant was not consulted (or given the opportunity to be consulted) prior to the decision being taken to make her redundant. I accept that the Claimant was aware of the Respondent's financial concerns but this is not the same as consultation which, in order to be meaningful, must take place prior to the decision to dismiss. Furthermore she was not given a right of appeal.

66.3 Therefore, whilst the Respondent has shown a fair reason for dismissal (redundancy) it did not follow a fair procedure as the Claimant was not consulted and was not given the right of appeal; I have therefore concluded that the Claimant was unfairly dismissed.

66.4 Remedy: Compensation:

(i) Basic Award:

The Claimant is entitled to a Basic Award of **£1,050.00** which is calculated in the same way as a Statutory Redundancy Payment based on her age at the effective date of termination (41 years), length of service (2 years) and gross weekly wage capped by statute at £525.00. In accordance with the statutory scheme, the Claimant is entitled to 1 week's pay for each full year worked when between the ages of 22 and 41.

(ii) Compensatory Award:

a. I accept that the Claimant has taken all reasonable steps to mitigate her loss. The Respondent has not sought to argue otherwise.

b. If a fair procedure had been followed, dismissal would have occurred in any event (***Polkey***). This therefore results in only a small Compensatory Award to take account of any additional period for which the Claimant would have been employed had proper consultation been carried out and the Claimant given a chance to appeal. I believe meaningful consultation would have taken 2 weeks in an organisation of this size followed by a further 2 weeks for an appeal.

c. The Claimant is therefore entitled to a Compensatory Award of **£4,406.78** calculated as follows:

- 4 weeks net pay which equates to £3,556.78 (using default tax code 1250L);
- 4 weeks pension contributions at the rate of 7% (see para. 69 below) which equates to £350.00; and
- an additional sum of £500 for loss of statutory rights.

(iii) Both the Basic and the Compensatory Award are payable without any deductions in respect of Income Tax or employee's National Insurance Contributions as they do not fall within **s62 ITEPA 2003** and will treated as a payment made in connection with termination and the £30,000 tax free allowance applies (**s401 ITEPA 2003**).

67. Statutory Redundancy Payment (SRP)

67.1 As I have concluded that the reason for termination of the Claimant's employment was redundancy, this claim succeeds.

67.2 However, no sum is awarded as this is extinguished by the Basic Award (above).

68. Unlawful deductions from wages

68.1 Holiday Pay

(i) The holiday year is clearly stated in the Contract to run from 1 January to 31 December. Therefore the correct period to consider in this case is 1 January 2019 to 31 May 2019 (date of termination of employment. Mr. Marsden's view that the 12 months' prior to termination should be considered is simply wrong and an attempt to unilaterally change the terms of the Contract.

(ii) I have accepted the Claimant's evidence that she did not take any holiday during this period; there is no evidence before me to contradict this. I accept that she may have worked on an ad hoc basis and often from home but this is not the same as holiday and does not justify refusing to pay her monies in lieu of accrued holiday.

(iii) The parties agree that the Claimant's entitlement was 28 days per annum. On a pro rata basis this equates to 12 days during the period 1 January to 31 May 2019 and I have accordingly awarded the Claimant **£2,137.00** representing 12 days pay.

68.2 Arrears of salary:

(i) The Respondent accepts that the Claimant is owed salary for the period 10 February to 31 May 2019. Mr. Marsden says this has not been paid because the Respondent has received advice from its accountants that this should be paid to HMRC as previous payments have been paid without appropriate deductions for PAYE income tax and NICs. However, this is not a defence as the Respondent and in fact payment has been paid to HMRC.

(ii) The Claimant is therefore awarded:

a. Salary from 10 to 28 February 2019: £3,500; and

b. Salary during the period of notice 1 March to 31 May 2019: £16,500.

68.3 The Respondent is credited with payment of £6,250 against these sums leaving a balance due from the Respondent of **£15,887.00** (gross). The Respondent is ordered to pay the Claimant this sum subject to appropriate deductions in respect of PAYE income tax and employee's National Insurance Contributions (s62 ITEPA 2003).

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69. Pension contributions:

69.1 It is agreed that the Respondent failed to pay pension contributions on behalf of the Claimant to NEST (the government run workplace pension scheme) during the period 1 February 2017 to 31 May 2019 and that this claim was outstanding on termination of the Claimant's employment.

69.2 I have concluded that the Claimant was entitled to a contribution to her NEST pension at the rate of 7% from the Respondent for the following reasons:

(i) The Job Specification dated 1 February 2017 [pages 12-14] which states *"Pension contribution: 7%"* (para. 17 above)

(ii) The Claimant's email dated 20 February 2017 [page 75] in which she made it clear it was her understanding that "...*there would be a 7% contribution on top of my salary for workplace pension" (*para. 18 above*).* I have not been provided with any evidence that the Respondent responded to correct the Claimant's understanding.

(iii) The relevant clause in the Contract is ambiguous and poorly drafted but (1) must be read in light of the above and (2) any ambiguities should be construed against the Respondent who created the Contract.

69.3 The Respondent therefore breached the Claimant's contract of employment by failing to pay pension contributions into the NEST scheme at the rate of 7% of her gross annual salary as follows:

(i) 1 February 2017 to 30 April 2018: £3,369.00;and

(ii) 1 May 2018 to 31 May 2019: £4,929.00.

69.4 The Respondent is credited with payment of £398.00 against these sums.

69.5 The Respondent is ordered to pay the Claimant the balance of **£7,900** subject to deductions (if any) in respect of PAYE income tax and employee National Insurance Contributions (s62 ITEPA 2003).

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70. For the purposes of rule 62(5) of the Tribunals Rules of Procedure 2013, the relevant issues are at paragraph 9 - 14; all of these issues which it was necessary for me to determine have been determined; the findings of fact relevant to these issues are at paragraphs 15 - 59; a statement of the applicable law is at paragraphs 60 -64; how the relevant findings of fact and applicable law have been applied in order to determine the issues is at paragraphs 65 - 69.

Signed by _____ on 11 December 2019
Employment Judge Mason

Judgment sent to Parties on

12 Dec. 19