EMPLOYMENT TRIBUNALS

Claimant: **Mr J Jamaldin**

Respondent: **GKF Ltd**

Heard at: **Birmingham Employment Tribunal**

On: **16 and 17 January 2019**

Before: **Employment Judge Cookson**

Representation

Claimant: In person with Mr Rahimi interpreting
Respondent: Mr Singh (director)

RESERVED JUDGMENT

1. The Claimant's complaint that he was unfairly dismissed contrary to section 94 of the Employment Rights Act 1996 ("ERA") is upheld.
2. The Claimant's complaints of unlawful deduction from wages under the ERA and in relation to unpaid holiday pay under the Working Time Regulations 1998 ("WTR") and as unlawful deduction from wages under the ERA are not upheld and are dismissed.
3. Remedy is to be determined at a one day remedy hearing, notice of which is sent separately.

REASONS

The claim

1. This is a claim by Mr. Jamshid Jamaldin (the Claimant) against his former employer, GKF Ltd (the Respondent), for unfair dismissal and unlawful deduction from wages.
2. The Claimant is now 40 years of age. He worked for the Respondent as a sample machinist. The period of employment is a matter of dispute. The Claimant says that he commenced employment on 15 June 2010 and was employed until 10 July 2018 with several periods of time when he was laid

off because there was insufficient work to do. The Respondent says the Claimant left employment voluntarily in 2013 and then came back and began working for the Respondent again on 19 January 2015. It asserts that his continuity of service was broken. This may be relevant to compensation, but the Claimant has the necessary 2 years qualifying service to claim unfair dismissal.

3. The Claimant commenced early conciliation on 17 July 2018 and this ended on 17 August 2018. He submitted his claim to the Tribunal on 4 September 2018.

4. The Respondent applied for an extension of time for filing the response form and this was granted. The response form was filed on 27 December 2018. The case was initially listed for hearing on 6 and 7 June 2019 with case management orders set out in the notice of claim dated 12 September 2018.

Case management and the hearing on 16 January 2020

5. When the case came before Employment Hindmarch on 6 June 2019 the Claimant did not attend because of a confusion over the dates. The Respondent did attend but it was apparent to Employment Judge Hindmarch that the case could not have gone ahead in any event because the parties had not complied with the directions and the case was not ready for hearing. She adjourned the case to the 16 and 17 January 2020 and she converted the full hearing to a preliminary case management hearing. She made a number of case management orders which are set out in the order dated 26 June 2019, including for exchange of documents, the production of an agreed bundle and exchange of witness statements.

6. In the meantime, the Claimant contacted the tribunal to explain that he would require a Farsi interpreter. This was arranged and the Claimant was accompanied by a tribunal appointed interpreter, Mr Rahimi at this hearing. I am grateful for Mr Rahimi's assistance.

7. Unfortunately, when the parties attended before me on 16 January 2020 the situation faced by Employment Judge Hindmarch in June 2019 had not significantly improved. The Claimant sent the documents that he wants to rely on to the Respondent in October 2018. Mr Singh says he did not receive these although the Claimant did produce Post Office proof of posting to the correct address. The Claimant had also sent a letter which he relies upon as his witness statement to the Tribunal and to the Respondent. This does not deal with the issues and did not follow the instructions given by Employment Judge Hindmarch. The Respondent had not produced a bundle but instead had with him an unnumbered collection of papers. He had not provided the Claimant with a copy of these. His statement consisted of no more than a handful of unnumbered paragraphs, only one of which could be described as setting out any evidence.

8. I determined that the hearing on the 16 January 2020 could not go ahead. Faced with the confusion of papers in circumstances where there are significant and basic disputes of evidence, effectively no witness statements and a claimant who only understands basic English and requires an

interpreter to follow proceedings, it was clear to me that conducting a fair hearing would not be possible.

9. I canvassed with the parties whether to adjourn again. The Respondent wanted to do this, but the Claimant had taken 2 days holiday from his new job for this hearing. There has already been substantial delay in this case and it is consistent with the overriding objective for me to continue with the case if I possibly could. I was satisfied that some relatively limited steps could allow me to proceed to hear the case and I was satisfied I could hear the evidence in a single day. I therefore adjourned the case to 10 am on 17 January 2020. I required the Respondent to spend the rest of the day preparing and copying a bundle of documents in accordance with the directions previously given. I showed him an example of a bundle from another hearing so that he could see what was required. There are only a limited number of documents so this was not onerous and this approach would be just, fair and proportionate. I also suggested to each party that they consider producing a new witness statement setting out in detail what happened on the day the Claimant's employment ended and dealing with all areas of dispute between them. I also explained briefly how the hearing the next day would proceed.

Hearing on 17 January 2020

10. When the hearing reconvened on 17 January 2020 both parties submitted revised witness statements, although neither was detailed. The Respondent presented a collection of loose numbered papers (numbered 1 to 80) with an index. I allowed the Claimant a short adjournment to look over that bundle and read it myself. When the hearing reconvened I raised my concern that the Respondent had failed to include the Claimant's documents in the bundle despite the instruction given by Employment Judge Hindmarch in June 2019, the fact that I had read out that part of the order to the parties on 16 January 2020 and then explained in my own words what was required. I consider the Respondent's action in this regard to be unreasonable and obstructive. I ordered a further short adjournment for the Respondent to get the additional pages numbered and copied and to prepare an updated index

The issues

11. There are 2 claims: (1) unfair dismissal and (2) a money claim which combines a claim for unpaid holiday pay and for other sums the claimant says that he is owed. I have treated these as claims for unlawful deductions from wages and to paid annual leave under WTR insofar as it is not clear if it is alleged that holiday pay was not paid or not paid in full, or that the Claimant was not allowed to take paid leave.

12. The claim form raises a serious allegation of illegality about the Claimant's working arrangements. That is very strongly denied by the Respondent. I explained to the Claimant that he could pursue that allegation if he wished but if I found that he was aware of steps to avoid payment of tax and national insurance and that it was illegal, his contract of employment would be tainted with illegality and his claim would not be able to proceed. The Claimant chose not to pursue those allegations.

13. The Respondent denies that the Claimant was dismissed. It says that the Claimant resigned and walked away from his employment. It is not claimed that any procedure was followed, and the Respondent does not put forward any fair reason for dismissal in its response in the alternative. The key issue for me to determine is whether the Claimant was dismissed or whether he resigned. If he was dismissed it follows that because the Respondent has not suggested it had a fair reason and no procedure at all was followed by its own admission, that the dismissal will be unfair. I will also have to determine if there was contributory conduct or if the Claimant would have been dismissed in any event if a fair procedure had been followed.
14. It is necessary for me to determine as a matter of fact when the Claimant's employment began for the purposes of this claim, and whether he received a statement of employment particulars.

The Law

Unfair Dismissal

15. An employee who wishes to claim unfair dismissal must first show that he has been dismissed within the meaning of S.95 of the Employment Rights Act 1996 (ERA). S.95 states that an employee will be treated as dismissed if:
    a. his contract of employment is terminated by the employer, whether that is with or without notice — S.95(1)(a)
    b. he is employed under a limited-term contract and the contract expires by virtue of the limiting event without being renewed under the same terms — S.95(1)(b), or
    c. he has been constructively dismissed — S.95(1)(c). A constructive dismissal occurs when an employee resigns, with or without notice, because of a repudiatory breach of contract by the employer.
16. Claims where an employer says the employee resigned will often fall under category c of paragraph 13, but that is not the case here. The Claimant is adamant he did not resign and that he was dismissed. This means that I am only concerned with paragraph (a) above and whether I am satisfied that the Claimant has shown, on the balance of probabilities, that he was dismissed.
17. I note that a resignation is the termination of a contract of employment by the employee. It need not be expressed in a formal way, and there are times when resignation may be inferred from the employee's conduct[1].

    If an employer dismisses an employee with more than two years qualifying service it is up to the employer to show the reason for dismissal and that it was a potentially fair one, that is one that falls within the scope of s98(1) and (2) of ERA and was capable of justifying the dismissal of the employee. However, the burden of proof on employers at this stage is not a heavy one. The employer does not have to prove that the reason did justify the

[1] Johnson v Monty Smith Garages Ltd EAT 657/79

dismissal. That is a matter for me to determine when I consider the reasonableness of the decision. The Respondent here says that there had been an altercation between Mr Singh and the Claimant, but perhaps unusually, it has not asserted in the alternative that there was any conduct which justified dismissal.

18. Even if a respondent shows that the reason for dismissal is a fair one, for example misconduct, such a dismissal will not normally be treated as fair unless the reason was one which can be viewed as justifying dismissal, looking at the possible responses a reasonable employer could take, and unless certain procedural steps have been followed. Without following such steps, it will not, in general, be possible for an employer to show that it acted reasonably in treating the conduct reason as a sufficient reason to dismiss. Those essential steps are:

    a. a full investigation of the conduct, and

    b. a fair hearing to consider what the employee wants to say in explanation or mitigation.

19. In addition the ACAS Code of Practice on Disciplinary and Grievance Procedures ('the ACAS Code') sets out basic requirements for fairness that will be applicable in most conduct cases. Although not in itself legally binding, the ACAS Code is admissible as evidence before a tribunal and I must take its requirements into account.

20. The ACAS Code's section on handling disciplinary issues (paras 5—31) sets out the steps employers must normally follow including:

    a. carry out an investigation to establish the facts of each case;

    b. inform the employee of the problem;

    c. hold a meeting with the employee to discuss the problem;

    d. allow the employee to be accompanied at the meeting;

    e. decide on appropriate action;

    f. provide employees with an opportunity to appeal.

21. Section 207A(2) Trade Union Labour Relations (Consolidation) Act ("TULCRA") provides that: *'If, in any proceedings to which this section applies, it appears to the employment tribunal that — (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice [in this case the ACAS Code above] applies, (b) the employer has failed to comply with that Code in relation to that matter, and (c) the failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25 per cent*.'

22. A similar provision in respect of any failure to comply by an employee is set out in S.207A(3), such a failure will lead to a reduction in compensation. This reflects the fact that the Code is aimed at encouraging compliance by both employers and employees, so an employee's failure to follow the Code in respect of disciplinary action commenced by the employer or in respect of a

grievance raised by him or her is as likely to lead to a compensation adjustment as a failure by the employer to follow the correct procedures.

23. The potential for adjustment to the compensatory award under S.207A only applies if the employer's or employee's failure to comply with the provisions of the Code is 'unreasonable'.

24. If I find that there has been an unreasonable failure to comply with the Code, I may increase or reduce the award if I '*consider it just and equitable in all the circumstances to do so'*. This gives me a broad discretion, but the relevant circumstances which I should take are confined to those which were related in some way to the failure to comply with the ACAS Code. When considering to uplift or decrease I must consider the following:

    a. whether the procedures were applied to some extent or were ignored altogether;

    b. whether the failure to comply with the procedures was deliberate or inadvertent, and

    c. whether there were circumstances that mitigated the blameworthiness of the failure to comply.

25. The size and resources of the employer are also capable of amounting to a relevant factor in the tribunal's consideration of whether an uplift was appropriate and, if so, how much. Relevance would depend on whether that factor aggravated or mitigated the culpability and/or seriousness of the employer's failure. However, that does not mean that failures by small businesses should be regarded as always being forgivable or trifling.

26. If I find that the Claimant's dismissal is unfair, I must consider making what is known as a "Polkey reduction" whenever there is evidence to support the view that the employee might have been dismissed if the employer had acted fairly. In reaching my conclusion, I need to consider both whether the employer could have dismissed fairly and whether it would have done so. Furthermore, the enquiry is directed at what the particular employer would have done, not what a hypothetical fair employer would have done.

27. I must also consider whether the compensatory element of an award should be reduced to take account of a claimant's conduct and how that contributed to a dismissal. Section 123(6) ERA states that: *'Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding*.' This ground for making a reduction is commonly referred to as 'contributory conduct' or 'contributory fault'.

28. Conduct by the employee capable of causing or contributing to dismissal is not limited to actions that amount to breaches of contract or that are illegal in nature, it can include conduct that was 'perverse or foolish', 'bloodyminded' or merely 'unreasonable in all the circumstances'. Whether the conduct is unreasonable will depend on the facts. S.123(6) can cover wider forms of conduct where, for example, the employee manages to aggravate a situation or precipitate the dismissal.

29. I must consider whether to make a reduction on the ground of the employee's conduct must be made to the basic award. This must be done where *'the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent*' S.122(2) ERA.

30. Section 38 of the Employment Act 2002 states that tribunals must award compensation to an employee where, upon a successful claim being made under any of the tribunal jurisdictions listed in Schedule 5, which includes unfair dismissal, it becomes evident that the employer was in breach of its duty to provide full and accurate written particulars under S.1 ERA. An award under S.38 is not dependent on a claim having been brought under S.11 ERA for a breach by the employer of the duty imposed by S.1 ERA. It is sufficient that the tribunal make a finding at the hearing that the employer was in breach of S.1 at the time the main proceedings were begun.

The Holiday Pay Issue

31. Regulation 13(1) of WTR provides that:

    '... a worker is entitled to [4 weeks] annual leave in each leave year[2].'

32. Regulation 13(9) of the WTR provides: *'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.'

33. Regulation 16 of the WTR provides:

    'A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13, at the rate of a week's pay in respect of each week of leave.'

34. Regulation 30 of the WTR provides:

    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(1); or (b) has failed to pay him the whole or any part of any amount due to him under regulation 16(1).

35. Section 23 (4A) of the Employment Rights Act 1996 provides:

    An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.

[2] This is increased to 5.6 weeks by virtue of Regulation 13A

36. However in the case of King v Sash Windows C-214/16 the CJEU held that European law does not allow Member States to exclude the right to paid annual leave or for national measures to provide for the right to paid annual leave of a worker, who was prevented from taking that leave, to be forfeited at the end of a period fixed by those national measures (paragraph 51): *"Article 7 of Directive 2003/88 must be interpreted as precluding national provisions or practices that prevent a worker from carrying over and, where appropriate, accumulating, until termination of his employment relationship, paid annual leave rights not exercised in respect of several consecutive reference periods because his employer refused to remunerate that leave*".
37. This means that I must take a different approach if I find that leave has been unpaid, in which case the 2 year rule applies, or if I find the employee was refused leave, when the Sash Windows approach applies.

The evidence

38. I received oral evidence from the Claimant himself and for the Respondent from Mr Singh, who is a director. I received documentary evidence which I marked as exhibits as follows:
    a. C1 Claimant's witness statement
    b. C2 a certificate of posting dated 1 October 2018 sending documents to the Respondent
    c. R1 a bundle of documents prepared by the Respondent which, after my interventions, contained the Claimant's documents.
    d. R2 A witness statement by Mr Singh.

My findings of fact

39. I make my findings of fact on the basis of the material before me taking into the account the very limited documents, which unfortunately contain no contemporaneous documents, and the conduct of those concerned before me. I have resolved conflicts of evidence as arose on the balance of probabilities and I have taken into account my assessment of the credibility of witnesses and the consistency of their evidence with the surrounding facts.
40. The Respondent is a clothing manufacturer which makes women's clothing. It was set up 13 years ago. At its peak it employed 25 staff but due to difficult market conditions it now employs only 6 full time staff.
41. The Claimant made sample garments. He was initially employed on a fulltime basis working 40 hours per week, but in January 2018 this reduced to 24 hours per week. The Respondent says that this was at the Claimant's request. The Claimant says that he was given no choice about the reduction. It is not necessary for me to make a finding about the reason.
42. The Claimant says that he commenced employment on 15 June 2010 and was employed until 10 July 2018. However, even on his evidence, there

were several lengthy periods of time when the Claimant was laid off because there was insufficient work to do. The Respondent says the Claimant left employment voluntarily in 2013 but chose to come back and began working for the Respondent again on 19 January 2015. Whether the Claimant was laid off or resigned voluntarily in 2013 (and no documentary evidence is offered to me by either party on this) on the evidence of the Claimant his continuity of service was broken at that time and no evidence for any finding that there was an agreement for continuity to be maintained has been offered. I find that for the purposes of this claim the Claimant's employment began on 19 January 2015.

43. There was a significant factual dispute before me. There are no contemporaneous documents relating to the incident which led to the ending of the Claimant's employment and there is no letter issued to the Claimant referring to the circumstances of the termination of his employment. I have set out my findings in relation to the 9 July 2018 in paragraph 63.

44. In the bundle there are number of documents which are the subject of dispute: a number of pay slips and a copy of a signed contract of employment which the Respondent produced for the first time on the second day of the hearing with the explanation that it had been found overnight but which the Claimant vehemently denies receiving. He denies the document produced shows his signature. The pay slips produced by the parties for the same dates are also different. Both accuse the other of falsifying their documents.

45. The Claimant has produced a small number of pay slips because he says that he could not find them all. The Respondent has not produced a complete set of pay slips and it was not explained to me why the Respondent chose the selection of pay slips that it did and did not simply produce two years' (or more) worth of pay slips.

46. The Claimant had referred to a contract of employment in his claim form. In his evidence he explained that the claim form and a letter to the the Respondent had been prepared by a friend because he speaks very little English. He says that he did not receive a contract of employment in writing and this was a misunderstanding between him and the person who helped him. He had trusted to his friend to express the position correctly. Certainly the form and letter (which uses the same wording) are confusing in that they say "*according to the terms of employment contract that is signed by GKF owner, I am enclosing the confirmation letter*". That confirmation letter is in fact simply a "to whom it may concern" letter which was apparently prepared to support an application to bring the Claimant's wife to the UK in May 2016. It does not refer to a contract of employment but to dates of employment, hours of work and pay. The claim form says that the contract refers to the disciplinary procedure requiring three warnings before dismissal and that it refers to 28 days holiday. The confirmation letter says no such thing. When I asked the Claimant to show me the contract of employment which says that, he referred to the confirmation letter. He says he would not have needed that letter for the Home Office if he had had a written contract. He had relied on his friend in terms of UK law and this seemed to be a genuine misunderstanding.

47. The contract of employment produced to me by the Respondent refers to 28 days holiday, which is of course simply a statement of the statutory entitlement, and to a separate disciplinary procedure which is not disclosed. More significantly there is no reference in the document to three warnings.

48. The contract of employment produced to me by the Respondent is signed by the Claimant and the Respondent. The Claimants says the signature is not his. The signature which is said to be the Claimant's on the contract is noticeably different to the Claimant's signature in his passport (p68 in the bundle) and that on the letter of 1 October 2018 (p90), and although these signatures are not particularly similar to each other to the untrained eye, they are more similar to each other than the signature on the contract, which seems to be totally different. It is noticeable that the date of the Claimant's signature seems to have been written with the same hand as the date on the employer's signature.

49. In putting to the Claimant that the signed contract document was genuine Mr Singh referred to the fact that he has a copy of the Claimant's passport and that is attached to the contract. In the documents following the contract in the bundle there is a document which the Respondent has indexed as part of the contract (page 67). On the following page is a copy of the Claimant's passport (p68). However, the Respondent's suggestion that the pages from 63 to 68 are part of a single document makes no sense. The top of page 67 which follows the contract signature page, begins "finally" and it sets out a risk assessment at "Section B". There is no Section A and there are clearly missing pages. The appearance of that document shows that it is a photocopy and that the original was hole punched. It is wholly different in appearance from the contract which shows no hole punches. It appears likely that the copy of the passport was taken when the Claimant started employment. That may have been attached to the document of which page 67 but there is no indication that page 67 is part of a contract of employment or that the contract of employment produced by the Respondent is in any way linked to page 67 or page 68. No original documents were shown to me and the Respondent's arguments in this respect seem to be entirely misconceived. When I take this together with the fact that the signed contract mysteriously appeared and was seen for the first time by the Claimant on the second day of the hearing with no meaningful explanation for late disclosure, I have concluded that the signed contract document is not genuine. In light of this I cannot find that the Claimant was given this document at all because he denies that in strong terms and I am wholly unconvinced by the Respondent's evidence in this regard.

50. Turning then to the pay slips there are small but significant differences between the 2 sets of documents. The Respondent's copies of the pay slips are found at pages 34 to 62 of the bundle. The pages in the bundle prepared by the Claimant show his pay slips and the Respondent's pay slips for the same weeks on the same page and these are most helpful for comparison purposes.

51. Page 91 sets out 2 pay slips for the week of 12 January 2018. The pay slip produced by the Respondent shows a payment of 1 day's bank holiday

(presumably for the new year bank holiday) and the box at the bottom of the pay slip it says "1 day bank holiday paid". The pay slip the Claimant says he received does not refer to holiday.

52. There is a similar issue with the pay slips on the next page. The Respondent pay slip shows one day's bank holiday being paid in the week of 8 April 2016, the Claimant's does not. The Respondent pay slip shows an amount of holiday pay is £74.09 but there is no explanation of calculation.

53. The pay slips for 13 May 2016 are at page 93. In the box at the bottom of the page both slips refer to bank holiday being paid but the Respondent's pay slip shows a sum for holiday pay separately and the Claimant's does not.

54. The pay slips for 10 June 2016 are at page 94. In the box at the bottom of the page both slips refer to bank holiday being paid. However, the Respondent's pay slip shows that sum separately and the Claimant's does not, simply referring to basic pay. There are very small differences in the amounts shown for deductions, but as with all the pay slips the net amount is the same.

55. The pay slips for 2 September 2016 are at page 95. In the box at the bottom of the page the Respondent's pay slip shows a payment of 5 days holiday. The Claimant's pay slip shows only basic pay. Again there are very small differences in the amounts shown but the net amount is the same.

56. The pay slips for 28 August 2015 (p96) does not refer to holiday pay in the box at the bottom of the page but shows all pay that week as holiday pay. The Claimant's pay slip shows only basic pay. This is also true of the pay slips for 4 September 2015, and so on.

57. I asked Mr Singh to explain why information on the pay slips, even in the copies produced by the Respondent, seems to be inconsistently set out from pay slip to pay slip and to explain certain entries. Mr Singh told me that these were matters dealt with by his accountants and he was unable to answer my questions.

58. The documents produced by the Respondent include pay slips for weeks during 2017 and 2018 but there are a large number of pay slips missing. The bundle does not include any pay slips produced by the Claimant after 2016 except the one for 12 January 2018.

59. In relation to the disputed pay slips it seems improbable to me that the Claimant has "manipulated" the pay slips that he produced as alleged by the Respondent. This is asserted to me by the Respondent which presumably would be able to produce other evidence to show its pay slips are correct if it wished. It has chosen not to do so, and this seems odd. On the other hand, it would seem likely that it would be much easier for a Respondent to manipulate what pay slips show. There may be an innocent explanation for the differences but this has not been suggested to me. In the absence of any credible explanation from the Respondent and in light of its failure to produce any corroborating evidence which must have been available to it to show its pay slips were in fact correct, I find that the Claimant was provided with the pay slips he produced for the relevant periods.

60. Pay slips are not necessarily conclusive on the issue of holiday. It is possible that pay slips will not show that an individual has been paid for all their 28 days statutory holiday in a year because that individual has chosen not to take all their holiday leave. There would be nothing unlawful about that if the individual is free to take holiday if they wish. Further, pay slips do not tell me when holiday has been taken. The documents which would tell me most about whether an employee has taken holiday or not are holiday records and records showing holiday requests. Unless an employer operates fixed closure dates across all holidays, and that is not suggested here, it is not credible that any employer could manage holiday without keeping records of some sort. This respondent says it does have holiday records but they have not been produced to this Tribunal. What is more the Respondent is obliged to keep records of all employees' working time by WTR. Such records will also show holiday and other absence. They have not been produced to the Tribunal. The working time and holiday records are clearly relevant documents to the issues to be determined and they should have been disclosed. This failure by the Respondent to cooperate with the Claimant and the Tribunal is both extremely unhelpful and surprising.

61. The nature of the evidence in this case makes it essential that I determine whose evidence I prefer on the balance of probabilities because the conflict between the parties is so acute. The fact that I am not satisfied about the Respondent's explanation for the late appearance of a contract of employment, the discrepancies between the pay slips and the failure to disclose holiday records or working time records of any sort are all factors which lead me to conclude that the evidence of the Claimant is more credible. However, I am not satisfied that I can accept the allegations made by the Claimant about working unpaid overtime or being required to repay tax and national insurance without some sort of supporting evidence which was not produced to me. I was not wholly satisfied with the evidence of either witness in this case so although I have preferred the Claimant's evidence on the events of 9 July 2018 as well as on the issue of pay slips, that does not mean that I preferred or accepted his evidence in all matters.

62. Resolving the conflicts of evidence about events on 9 July 2018:

a. The witness statements of Mr Singh and the Claimant provide me with scant information but they still present a complete conflict of evidence . Cross examination and my questions drew out a little more information. This is not a case where there are slight differences which may be explained by failings of memory.

b. One of the arguments which the Respondent repeatedly used to suggest that the Claimant was not telling the truth is that if the Respondent was such a bad employer the Claimant would not have continued working there. I do not find that argument persuasive. The Claimant says that he struggles with English, which is supported by his need for an interpreter in these proceedings and the issues apparent in his claim form, and that as a result it was hard for him to find other employment. The Claimant says that he had brought his wife over from Afghanistan and he had no choice but to continue working for the Respondent. It took him 8 months to find employment after he left the Respondent's employment which is consistent with that concern. It seems unlikely to me that an individual in the Claimant's circumstances would simply walk away from his employment in a fit of pique or temper, which is the Respondent's case.

c. It is also curious why an employer in the circumstances put forward by Mr Singh would not write to the employee to confirm what happened or at the very least make some sort of note about the incident. The Respondent is not a large employer of course, and I have taken that into account. It does not have a designated personnel function, but it is not very small, and it has been reasonably substantial in the past. Mr Singh presents himself as an experienced businessman and an intelligent man. He told me that he employs a number of well-paid designers in another company. I do not find it plausible that Mr Singh was as naïve as he now seems to suggest. It seems unlikely to me that an employer which found itself in the situation which Mr Singh describes would not take some steps to make a contemporaneous record of what happened.

d. The unfair dismissal case here turns on whose evidence I prefer about what happened on 9 July. The detail provided in the Claimant's evidence about what he did, at what time, who he spoke to and so on, coupled with the lack of evidence offered by the Respondent and the issues highlighted above, leads me to prefer the evidence of the Claimant of what happened that day.

63. The Claimant started work on 9 July 2018 at about 8am. He was told there were 6 samples to make up. When he arrived at work Mr Singh's parents were there but Mr Singh himself was not. Mr Singh's father told him to not worry about the buttons on one garment, these would be sorted out by other workers. The Claimant took the samples to the pressman at around 12.30 and then did other factory duties. The Claimant spoke to Mr Singh's father about taking his daughter to the GP and left the factory at around 1.15pm.

64. The Claimant returned at 1.55pm. When he returned to work he was met by Mr Singh who told him to go to the office where he was asked why he had not done what he had been told. This related to putting the buttons on the garment. The Claimant tried to explain that he had done what Mr Singh's

father had told him to, but Mr Singh was angry and would not let him explain. Mr Singh swore at the Claimant and told him he had no job. The Claimant was ordered off the premises and not allowed to go upstairs to collect his headphones and slippers. The Claimant explained that this conversation took place in Punjabi and this was not disputed by the Respondent.

65. The Claimant had no other contact with the Respondent except to collect his P45.

66. In relation to holiday the Claimant told me that he could take holiday by informing the office which days he wanted off but says that this was unpaid. Initially the Claimant said that the factory was not closed over the Christmas period as the Respondent says, but then corrected himself and confirmed that it is closed at this time. His evidence on this was unclear and the Claimant did not give me evidence of any specific time when he had asked for holiday and this request had been refused.

67. The Respondent has produced just one pay slip which relates to a Christmas period, that is a pay slip for 5 January 2018 which shows 1 week's holiday pay being paid. The Respondent also produced its own bank account records for the period Feb 2015 to 23 July 2018. Those bank records of the Respondent (p78) show a regular standing order being made to the Claimant which remains constant from week to week, going up and down slightly with pay changes and when the Claimant's hours changed. If holiday was unpaid as suggested by the Claimant this could be expected to fluctuate. I find that the Claimant has received the sums shown by the Respondent's bank records even if the Respondent did not provide pay slips to the Claimant showing separate holiday pay, which may explain the Claimant's belief he has not received holiday pay.

Submissions

68. Neither party made any substantial submissions on the law, both simply insisting to me that they had told the truth.

My conclusions and reasons Unfair dismissal

69. On the basis of my findings of fact above, the Claimant was unfairly dismissed. The Respondent failed to make any attempt at all to follow any disciplinary procedure at all. Any belief that Mr Singh had the Claimant was guilty of misconduct was not based on reasonable investigation but he does not seek to claim that he had such a belief in any event. In those circumstances having found that the Claimant was dismissed the Respondent has failed to show that the reason or principal reason for dismissal was one which falls within s98(2) of the Employment Rights Act 1996. As a result s98(4) is not engaged and I am not required to find whether the dismissal was fair or unfair in all the circumstances of the case, it is automatically unfair.

70. There is nothing in the facts that I have found which could be described as contributory fault by the Claimant, nor is there any suggestion that he could have been fairly dismissed if a fair procedure had been followed. It appears

that the Claimant was dismissed because there had been a miscommunication of instructions between father and son when the Claimant was told what to do by Mr Singh's father and Mr Singh's annoyance that something had not been done was taken out on the Claimant. I find no basis for applying any reduction to the unfair dismissal award on the basis of the Claimant's conduct.

71. The Respondent did not comply with the ACAS Code in any way whatsoever. I find it is just and equitable and appropriate to make an adjustment to the compensation to be paid to the Claimant so that the compensatory award is increased by 25% under s207A of TULCRA. The Claimant did not appeal but he was not offered the opportunity to appeal and I have not been shown any disciplinary procedure given to the Claimant which would have told him what to do. In those circumstances it is not equitable to reduce the compensation because of this omission by the Claimant.

72. I do not believe that the Claimant was given the contract of employment produced by the Respondent at the hearing as I have explained in my findings. There is no evidence that the Respondent had otherwise provided the Claimant with a statement of employment particulars before these proceedings were begun and therefore at that time the employer was in breach of its duty under s1(1) and (4) of ERA and I must increase the award to the Claimant by the minimum amount, that is an amount equal to 2 weeks' pay under s38(3) of the Employment Act 2002.

73. I have also considered whether it is just and equitable to increase that to 4 weeks' pay under that same statutory provision. That is a matter for my discretion. I have explained why I am dissatisfied by the Respondent's evidence in my findings. I am concerned by the Respondent's failure to produce records which it is obliged to keep and I am not convinced by its explanation for this omission. The Claimant does not speak English well and as an immigrant to the UK he is in a vulnerable position in terms of employment. The Respondent must have been aware of that. In the circumstances of this case I find that it is just and equitable to increase the minimum amount to 4 weeks' pay and that the Respondent has failed to show that there are any exceptional circumstances which make an increase to that award in this way to be unjust and inequitable.

Holiday pay and other payments

74. The Claimant has not shown, on the balance of probabilities, that the Respondent failed to pay him holiday pay or that it refused to let him take holiday on any occasion. Although I am concerned about the lack of documents produced by the Respondent in this regard, the burden of proof does lie with the Claimant. The Claimant has neither given or produced evidence of any specific occasion when he was not paid holiday pay and the Respondent's bank records show that he received consistent sums of pay. The Claimant has not suggested any specific occasion when he was refused holiday and was therefore unable to take his statutory leave. Accordingly, these claims are not upheld.

75. Likewise, I do not uphold the allegations made by the Claimant that he was required to repay to the Respondent any sums of money for tax and national insurance or required to work unpaid overtime. Whilst I appreciate that such allegations will be difficult for a claimant to obtain direct evidence to show, they are extremely serious allegations and I would expect a claimant making allegations of this sort to make some effort to produce supporting evidence – for example producing bank statements showing cash withdrawals corresponding with the money he says he was required to give to the Respondent or evidence from his wife or a current or former employee about working hours. The Claimant has failed to meet the evidential burden upon him in relation to these claims and accordingly these claims are not upheld.

Remedy

76. Where a claim for unfair dismissal is successful the Tribunal may:

    a. Order the employer to "reinstate" the dismissed employee. This is to put them back in their old job, as if they had not been dismissed; or to "re-engage" them, which is to employ them in a suitable but different job. In each case the Tribunal may order payment of lost earnings.

    b. If those orders are not sought by the claimant or are not practicable, the Tribunal may order the employer to pay compensation. This is calculated in two parts:

        i. A "Basic Award", which is calculated in a similar way to a statutory redundancy payment and need not be calculated by the Claimant because it involves the application of a formula; and

        ii. a "Compensatory Award", which is intended to compensate the employee for the financial loss suffered.

    c. Mitigation

        i. All persons who have been subjected to wrongdoing are expected to do their best, within reasonable bounds, to limit the effects on them. If the Tribunal concludes that a claimant has not done so, it must reduce the compensation so that a fair sum is payable. The Tribunal will expect evidence to be provided by claimants about their attempts to obtain suitable alternative work and about any earnings from alternative employment.

        ii. The Tribunal will expect respondents, who consider that the claimant has not tried hard enough, to provide evidence about other jobs which the claimant could have applied for. Ultimately the burden of proof is on a respondent to show loss was not mitigated.

77. The claimant has not produced a schedule of loss in this case and I am unable to decide remedy in the absence of further information. The Claimant

has indicated that he seeks compensation only for unfair dismissal on his claim form but it is important that I give the Claimant the opportunity to have the orders which the Tribunal can make explained to him, in particular in relation his right to express a desire for reinstatement or reengagement which he is still entitled to do. **Accordingly this case will be listed for a one day remedy hearing, the date of this hearing will be notified separately to the parties. A Farsi interpreter will be arranged for that hearing.**

78. The attention of parties is drawn to the Employment Tribunal Presidential Guidance on Case Management which can be found at https://www.judiciary.uk/wp-content/uploads/2013/08/presidentialguidance-general-case-management-20180122.pdf. In particular guidance note 6 deals with remedies and explains how loss is calculated which I have quoted from in part above.

79. There is nothing to stop the parties from seeking to resolve the issue of compensation between themselves without a further hearing, if that is possible. The parties are reminded that the services of ACAS remain available to them. If that is not possible the issue of remedy will be determined by me after hearing any relevant evidence and submissions from the parties at the remedy hearing.

80. I consider that it will be useful for me to make the following orders to ensure the efficient conduct of the remedy hearing if it is required. In light of the failure by the parties to follow orders previously made, I remind both parties that:

    a. **Any person who without reasonable excuse fails to comply with a Tribunal Order for the disclosure of documents commits a criminal offence and is liable, if convicted in the Magistrates Court, to a fine of up to £1,000.00.**

    b. **Under rule 6, if any of the above orders is not complied with, the Tribunal may take such action as it considers just which may include: (a) waiving or varying the requirement; (b) striking out the claim or the response, in whole or in part, in accordance with rule 37; (c) barring or restricting a party's participation in the proceedings; and/or (d) awarding costs in accordance with rule 74-84.**

In this case the parties must not depart from the timetable for directions given below without the prior written approval of the tribunal and each must write to the tribunal to confirm compliance with each of the orders or copy the Tribunal as ordered.

ORDERS

The parties are ordered as follows (pursuant to the Employment Tribunal Rules of Procedure):

81. **Statement of remedy / schedule of loss**

The Claimant must provide to the Respondent, copied to the Tribunal, by

4pm on 24 February 2020 a document – a "Schedule of Loss" – setting out the following:

a. The amount of "compensatory award" that he claims – that is what remedy is being sought and how much in compensation and/or damages the tribunal will be asked to award the Claimant at the final hearing in relation to his unfair dismissal and explaining how this has been calculated. The compensatory award can include compensation for past loss of earnings between the date of dismissal and the date of the schedule and the remedy hearing and future loss of earnings, for example even if the claimant is working he may now be earning less than he was before.

b. Loss will be awarded on the basis of net salary, that is after tax and national insurance has been deducted but the calculation should show net and gross pay. Compensation can also be awarded for lost benefits such as employer pension contributions and pay in lieu of notice (where no notice or inadequate notice was given).

c. If the Claimant has a new job he should provide details of his new employer, his new job title and details of pay and benefits in his new job. He should also explain what steps he took to find alternative employment.

d. The Claimant's calculation of loss claimed must set out a calculation showing how each amount claimed has been worked out. For example: x weeks' pay at £y per week.

e. If any other sums are claimed full details should be provided and the Claimant should produce evidence, for example of bank charges or expenses incurred travelling to interviews.

f. If the Claimant has received State or social security benefits, he must set out the type of benefit, the dates of receipt, the amount received and the Claimant's national insurance number in his schedule. This is because for some claims, such as unfair dismissal, if a claimant has received certain benefits from the State the Tribunal is obliged to ensure that the employer responsible for causing the loss of earnings reimburses the State for the benefits paid. In those cases the Tribunal will order only part of the award to be paid to the claimant straightaway, with the rest set aside until the respondent is told by the State how much the benefits were. The respondent then pays that money to the State and anything left over to the claimant. This is called "recoupment".

82. **Counterstatement of remedy / counter- schedule of loss**

The Respondent must provide to the Claimant, copied to the Tribunal, a counter schedule of loss if it disagrees with the Claimant's schedule, by **4pm on 9 March 2020** together with copies of any documents and/or statements of evidence that it wishes to rely upon at the remedy hearing.

83. **Remedy bundle** The Claimant must prepare a page numbered file of documents ("remedy bundle") relevant to the issue of remedy and in particular how much in compensation and/or damages they should be awarded and provide the Respondent with a 'hard' and electronic copy of it by **4 pm on 23 March 2020**. The documents must be arranged in chronological or other logical order and the remedy bundle must contain the up to date schedule of loss and any counter schedule of loss at the front of it.

84. **On the day of the remedy hearing** (but not before that day):

    a. the Claimant must lodge with the Tribunal 2 copies of the remedy bundle,

    b. if either party is relying on witness statements, 2 hard copies of the witness statements (plus a further copy of each witness statement to be made available for inspection, if appropriate, in accordance with rule 44), must be lodged by whichever party is relying on the witness statement in question. If a witness statement is being relied upon a copy must be sent to the other party not less than 7 days before the remedy hearing.

    c. 1 hard copy of any written opening submissions / skeleton argument must be lodged by whichever party is relying on them / it. This must also be provided to the other party at least 2 working days before the remedy hearing.

85. **Public access to employment tribunal decisions**

The parties are reminded that all judgments and reasons for the judgments are published, in full, online at *www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

Employment Judge Cookson
Dated 29 January 2020