EMPLOYMENT TRIBUNALS

Claimant: **Mr Craig Houston**

Respondent: **RSR Porscha UK Ltd**

Heard at: **East London Hearing Centre**

On: **10 November 2020**

Before: **Employment Judge S Knight**

Representation

Claimant: In person

Respondent: Unrepresented, not in attendance

JUDGMENT

1. **The Claimant was unfairly dismissed by the Respondent.**
2. **The Claimant was wrongfully dismissed by the Respondent.**
3. **The Claimant is entitled to a redundancy payment from the Respondent.**
4. **The Respondent made an unauthorised deduction from the Claimant's wages.**
5. **The Respondent failed to pay the Claimant accrued holiday pay.**
6. **The Respondent is ordered to pay the Claimant a total of £600 (calculated net) plus £12,320.31 (calculated gross), composed of the following:**

    (1) Compensatory Award for unfair dismissal of £600 (calculated net); and

(2) The gross sum of £2,690 (damages for breach of contract) + the gross sum of £2,690 (redundancy pay) + the gross sum of £5,516.13 (in respect of the wages unlawfully deducted) + the gross sum of £1,424.18 (in respect of accrued holiday pay) = £12,320.31 (calculated gross).

7. For the purposes of the Employment Protection (Recoupment of Benefits) Regulations 1996:

(1) The total monetary award for unfair dismissal is £600.

(2) The prescribed element is £0.

(3) The prescribed element relates to 26 May 2020 to 10 November 2020.

(4) The amount by which the total monetary award for unfair dismissal exceeds the prescribed element is £600.

REASONS

Introduction

The parties

1. The Claimant was a vehicle technician employed by the Respondent. The Respondent is a company which carries out motor mechanics.

The claims

2. The Claimant claims that he was unfairly dismissed. He further claims that he was not paid notice pay, and that this was a breach of contract (i.e. wrongful dismissal). He also claims that he was not paid redundancy pay that he was owed. He also claims arrears of pay, and holiday pay.

3. On 8 June 2020 ACAS was notified under the early conciliation procedure. On 12 June 2020 ACAS issued the certificate. On 17 June 2020 the ET1 was presented. On 10 August 2020 the ET3 was received by the Tribunal.

The issues

4. In advance of the hearing I prepared a draft list of issues. Towards the start of the hearing the draft list of issues was emailed to the Claimant and the Respondent. The Claimant agreed the issues. As set out below, the Respondent was not in attendance. The Respondent did not make any representations on the draft list of issues. The finalised List of Issues appears as Appendix 1 to these Reasons.

Proceeding in absence

5. The hearing took place via the Cloud Video Platform. At 10:00 I began the hearing. The Claimant and his witness Tim Martin were present. No director, staff, or representative of the Respondent was present.

The previous application to postpone

6. On 5 November 2020 at 12:55, and again on 6 November 2020 at 08:26, the Respondent's sole director, Yonter Asim, had emailed the Tribunal and the Claimant to apply to postpone the hearing, as follows:

> "To Whom it may concern,
>
> We would like to advise you that unfortunately Mr Yonter Asim has not been feeling well the last few days and has decided to isolate due showing symptoms of a cold and temperature so therefore has decided to isolate and thinks that to the safety of all others he would be unable to attend the hearing on November the 10th and would ask for a later date please.
>
> Thank you,
> Kind regards"

7. On 6 November 2020 Employment Judge Massarella considered the postponement request and refused it. His reasons were as follows:

> "application for a postponement on medical grounds must be accompanied by medical evidence. In order to allay Mr Asim's concerns, the Hearing will take place remotely by video."

8. The refusal of the postponement request was sent to the parties via email and a notice of hearing by video hearing was issued, along with joining instructions.

Efforts to contact the Respondent

9. At 10:00 I checked with the Tribunal staff, who confirmed that no reason had been given for the Respondent's non-attendance. The Claimant informed me that he was not aware of any reason for the Respondent's non-attendance. I adjourned at 10:05 for a telephone call to be made to the Respondent by the Tribunal staff. The call went straight to voicemail. At 10:16 the Tribunal emailed the Respondent, reminding them of the case today. There was no response.

Conclusion on proceeding in absence

10. At 10:30 the hearing resumed. The Respondent was still not present. I considered whether to proceed in the Respondent's absence.

11. Rule 47 of the Employment Tribunal Rules of Procedure provides:

> "Non-attendance

47. If a party fails to attend or to be represented at the hearing, the Tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so, it shall consider any information which is available to it, after any enquiries that may be practicable, about the reasons for the party's absence."

12. I had regard to the Court of Appeal case of *Roberts v Skelmersdale College* [2004] IRLR 69. Although it was decided under the old rules, there is sufficient similarity between the two rules that it remains good law. The following principles emerge (so far as they apply to new rule 47 and the non-attendance of a Respondent):

    (1) The rule confers a very wide discretion (¶ 14);

    (2) The rule does not impose on an Employment Tribunal a duty of its own motion to investigate the case before it, but the Employment Tribunal should consider the material already before it (¶ 15);

    (3) The Tribunal has a discretion to require the present party to give evidence, but no duty to do so (¶ 16);

    (4) Before making a decision the Tribunal shall have regard to the information required under the rule (¶ 16).

13. I also had regard to the Overriding Objective, as set out in rule 2 of the Employment Tribunal Rules of Procedure. I had regard to all factors contained within rule 2, but particularly "*(d) avoiding delay, so far as compatible with proper consideration of the issues*".

14. The Claimant wished to proceed in the absence of the Respondent. He noted that the Respondent had not submitted documents other than those on the file. The Claimant said that the Respondent's sole director, Mr Asim, had returned the Claimant's bundle to the Claimant. The Claimant submitted that he had worked for Mr Asim for 5 ½ years and there had been previous Employment Tribunal cases involving Mr Asim which Mr Asim had not attended. According to the Claimant, all the signs were that Mr Asim would not turn up today. The Claimant also pointed out the late notice of the non-attendance (in fact, there was no notice) and that the Respondent had not provided any update.

15. I considered the Respondent's previous application to postpone the hearing. I considered that no evidence had been provided in support of it or subsequently.

16. The Respondent was clearly informed that today's hearing would be going ahead. The lack of medical evidence that Mr Asim had provided was highlighted in the directions of Judge Massarella. The Respondent took no steps to provide any further information, medical or otherwise, nor to communicate with the Tribunal in response to those directions. Nor did the Respondent ask anyone to contact the Tribunal on Mr Asim's behalf to say that Mr Asim would not be attending. Nor did Mr Asim, or anyone else from the Respondent, make themselves available to respond to telephone or email enquiries from Tribunal staff.

17. I was aware of the narrow contentious issues of fact and law in the claim, as set out in the ET3. I determined that the claim could fairly be determined on the documents submitted by the parties, and the oral evidence on behalf of the Claimant.

18. I therefore permitted the hearing to proceed in the absence of the Respondent.

Post script on proceeding in absence

19. After these Reasons were typed and ready to be sent to the Tribunal staff for distribution to the Parties, on 11 November 2020 at 16:14 the Tribunal received the following email from the Respondent:

> "Hi,
>
> thank you for your email as previously explained Mr Asim was not in a fit condition to attend the hearing and is not sure on the outcome but he will be back next Wednesday, so he can answer any questions that you may require.
>
> Kind Regards"

20. This was not accompanied by any detail of why Mr Asim was unfit to attend, and was not accompanied by any evidence. Therefore, this email did not take matters any further than the position when Employment Judge Massarella considered the postponement request and refused it. It would not have altered my decision to proceed with the hearing in the absence of the Respondent.

Procedure, documents, and evidence heard, etc.

Procedure

21. At the start of the hearing I checked whether any reasonable adjustments were required. Those in attendance confirmed that none were required.

Documents

22. I considered the following material received from the parties:

    (1) From the Claimant, a bundle of papers comprising 63 pages.

    (2) From the Respondent, various pieces of correspondence about the Tribunal's procedure, along with an email from the Respondent on 15 September 2020 at 12:14, which I took as the statement of the Respondent's sole director, Yonter Asim.

Evidence heard

23. At the hearing I heard evidence from the Claimant and his witness, Tim Martin, who both gave evidence under affirmation.

24. The Claimant adopted his witness statement, and confirmed its date as 27 October 2020. The Claimant added to his witness statement as follows:

    (1) He was not paid his pension. He is not worried about that today though. He confirmed that this was not a part of the claim.

    (2) In relation to the date of his dismissal, the first time he was told to come in was 21 May 2020. He and Mr Asim agreed that the Claimant would go in on Tuesday 26 May 2020. That was when the Claimant was told he would be made redundant.

    (3) His transition from one company that employed him, controlled by Mr Asim, to another, was seamless, and he was only made aware of it after the fact, either when new uniforms were ordered, or when bailiffs arrived looking for the old company. Mr Asim had told him each time that everything "*rolled on*". Mr Asim was always his manager, and was always in control of the business.

    (4) In February the Claimant worked a full month. He did not get paid overtime that month. January's wages were paid late, on 4 February 2020 with a payslip under the name of RSR Porscha Ltd, and then February's wages were paid on 29 February 2020, with a payslip under the name of the Respondent. As a result, there was no payslip dated January 2020. This sort of thing happened quite often.

    (5) He originally thought he took 1 ½ days' holiday. In the hearing the Claimant checked on his phone a photo of a calendar that had hung on the wall of the Respondent's premises. It showed half a day's leave on 5 February 2020, half a day's leave on 18 February 2020, and a doctor's appointment for the Claimant on 25 March 2020 at 3:30 pm. However, he recalled that he remained in work until the end of the day on 25 March 2020: "*We shut up and he said he said he had the money to pay us from the end of the month and April onwards would be furlough. I remember being there until the end of the day. I think I didn't go to the doctors because the doctors were shut.*" As such, he now realised he had only taken 1 day's holiday in 2020.

    (6) In relation to the Whatsapp messages between him and Mr Asim in the Claimant's bundle, he is not aware of what the deleted message on page 42 was about. On page 43 Mr Asim is shown asking the Claimant to carry out an MOT. The Claimant did this on 29 May 2020, and was paid £20 in cash by Mr Asim personally. This was not done in the course of his employment with the Respondent. The Whatsapp messages show that he was still employed throughout April and May, on furlough, waiting to be paid.

    (7) He is not claiming for financial loss, which he has suffered, because Mr Asim and he were friends.

    (8) As soon as the Respondent's accountant sent the P45, the Claimant sent an email saying the dates are wrong (Claimant's bundle page 49). When

he rang the accountant and asked her why it shows an employment end date of 31 March 2020, she said that is the last date that he received some wages. He informed her it should say his legal date was 29 May 2020, but she said *"I can't change that without authorisation from Mr Asim, I'll contact you Monday*." However, he never heard anything back. He told his new employer about the wrong date and she said "*you'll have to see what happens in the court*". When he was paid by his new employer, he was doubly taxed because the Respondent hadn't told HMRC he was no longer working for them. He had to send HMRC a copy of his P45.

(9) Mr Asim's name appears on Companies House documents for the companies which employed the Claimant over the 5 ½ year period he worked for Mr Asim. When one company failed, Mr Asim would use another person's name to open a new company.

25. Tim Martin adopted his witness statement, and confirmed its date as 17 August 2020. Mr Martin was questioned by the Claimant, and added to his witness statement as follows:

(1) He met Mr Asim when the Claimant started working for him at Porscha Dynamics. He is local to where Mr Martin lives.

(2) Mr Martin always takes his vehicles to the Claimant, and always has done since he started driving.

(3) Throughout the last 5 years Mr Martin has had other dealings with Mr Asim. Mr Martin's previous employer was friends with Mr Asim. Mr Martin used to do electrical work for Mr Asim's garage. He was fairly good friends with Mr Asim. He and Mr Asim played football together.

(4) The timings given by the Claimant about when he was furloughed are right. They are close friends and talk all the time: furlough is a big issue for everyone, and the Claimant kept him up to date about what was going on.

Closing submissions

26. The Claimant made closing submissions in support of his case. He summarised the evidence and referred to the jurisdictional points set out in the List of Issues. He accepted that the real fault may lie in part with the Respondent's accountant, rather than Mr Asim. However, he pointed out that he had cooperated with the Tribunal and provided detailed documentary evidence in support of his claim, whereas the Respondent had not cooperated, and had not provided evidence aside from Mr Asim's statement. He submitted that this evidence proved all the relevant issues in his claim.

27. As the Respondent was not present or represented, before coming to my decision I took the time to re-read the Respondent's correspondence with the Tribunal in which Mr Asim's evidence was provided, along with the relevant parts of the ET3 which set out the Respondent's case.

Clarification of claims made by the Claimant

28. During the course of the hearing I checked with the Claimant whether he wished to claim for financial loss, or for unpaid pension payments. He very fairly said that he had considered this and decided not to do so, as he was not chasing money, or more than he thought it was right for him to claim.

Law

TUPE

29. The Transfer of Undertakings (Protection of Employment) Regulations 2006 ("**the TUPE Regulations 2006**") provide as follows insofar as is relevant as follows:

"3.— A relevant transfer

(1) These Regulations apply to—

(a) a transfer of an undertaking, business or part of an undertaking or business situated immediately before the transfer in the United Kingdom to another person where there is a transfer of an economic entity which retains its identity; […]

(2) In this regulation "economic entity" means an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary. […]

(6) A relevant transfer—

(a) may be effected by a series of two or more transactions; and

(b) may take place whether or not any property is transferred to the transferee by the transferor. […]"

"4.— Effect of relevant transfer on contracts of employment

(1) Except where objection is made under paragraph (7), a relevant transfer shall not operate so as to terminate the contract of employment of any person employed by the transferor and assigned to the organised grouping of resources or employees that is subject to the relevant transfer, which would otherwise be terminated by the transfer, but any such contract shall have effect after the transfer as if originally made between the person so employed and the transferee.

(2) Without prejudice to paragraph (1), but subject to paragraph (6), and regulations 8 and 15(9), on the completion of a relevant transfer—

> (a) all the transferor's rights, powers, duties and liabilities under or in connection with any such contract shall be transferred by virtue of this regulation to the transferee; and
>
> (b) any act or omission before the transfer is completed, of or in relation to the transferor in respect of that contract or a person assigned to that organised grouping of resources or employees, shall be deemed to have been an act or omission of or in relation to the transferee. […]"

Effective date of termination ("EDT")

30. S 97 Employment Rights Act 1996 ("**ERA 1996**") defines the effective date of termination ("**EDT"**), as follows:

> "(a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,
>
> (b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect […]"

31. The Court of Appeal in *Stapp v Shaftesbury Society* [1982] IRLR 326 held that, where the date of dismissal is unclear from the dismissal letter, the preferred meaning should be the one that works against the interests of the party who provided the wording (i.e. it should be construed "*contra proferentem*").

Unfair dismissal (redundancy)

32. S 94 ERA 1996 provides that an employee with sufficient qualifying service has the right not to be unfairly dismissed by their employer.

33. S 98 ERA 1996 provides so far as relevant:

> "(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show –
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it 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.
>
> (2) A reason falls within this subsection if it— […]
>
> (c) is that the employee is redundant …
>
> […]

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason 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."

34. A redundancy situation is defined by s 139 ERA 1996.

"(1) For the purposes of this Act 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."

35. An employee may argue that a dismissal for redundancy was unfair either because redundancy was not the real reason; or because, although a redundancy situation existed (and the employee was not selected for an automatically unfair reason) the dismissal was nevertheless unreasonable under s 98(4) ERA 1996.

36. In *Murray v Foyle Meats Ltd* [1999] ICR 827, Lord Irvine approved of the ruling in *Safeway Stores plc v Burrell* [1997] ICR 523 and held that s 139 ERA 1996 asks two questions of fact. The first is whether there exists one or other of the various states of economic affairs mentioned in the section, for example whether the requirements of the business for employees to carry out work of a particular kind have ceased or diminished. The second question, which is one of causation, is whether the dismissal is wholly or mainly attributable to that state of affairs.

37. It is not for Tribunals to investigate the commercial reasons behind a redundancy situation (*Hollister v National Farmers' Union* [1979] ICR 542).

38. Where the employer has shown the reason for the dismissal and that it is for a potentially fair reason, the determination of whether the dismissal was fair or unfair 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 must be determined in accordance with equity and the substantial merits of the case.

39. In many redundancy dismissals, the starting-point will be the guidance in *Williams v Compair Maxam Ltd* [1982] IRLR 83 EAT (at ¶ 18 onwards) which can be summarised as follows:

    (1) The employer should give as much warning as possible of impending redundancies in order to enable the employee to take early steps to inform themselves of the relevant facts, consider possible alternative solutions, and find alternative employment in the Respondent's undertaking or elsewhere;

    (2) The employer must adopt a fair selection pool for redundancy;

    (3) The employer must engage in meaningful consultation as to the best means by which the desired management result could be achieved fairly and with as little hardship to the employee as possible;

    (4) The employer must consider alternative employment for the employee.

40. In *R v British Coal Corporation* [1994] IRLR 72, the Divisional Court endorsed the test proposed by Hodgson J in *Gwent County Council ex parte Bryant* [1988] Crown Office Digest 19 HC, namely that fair consultation means; (a) consultation when the proposals are still at a formative stage; (b) adequate information on which to respond; (c) adequate time in which to respond; and (d) conscientious consideration by an authority of the response to consultation.

Unauthorised deductions

41. Part 2, ss 13 to 27B ERA 1996 sets out the statutory basis for a claim of unauthorised deduction from wages. ERA 1996 s 13 provides in particular as follows:

    "(1) An employer shall not make a deduction from wages of a worker employed by him unless—

        (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

        (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

    (2) In this section *"relevant provision"* , in relation to a worker's contract, means a provision of the contract comprised—

(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.

(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.

(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.

(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.

(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer."

42. "Wages" is widely defined. According to ERA 1996 s 27(1), it includes "*any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise*".

Coronavirus Job Retention Scheme

43. The Coronavirus Job Retention Scheme ("**CJRS**") is a government scheme funding the wages of workers placed on furlough during the COVID-19 pandemic. The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction of 20 May 2020 at § 9 provided for which transferred employees could be subject to the CJRS at that point.

Findings of fact

Jurisdiction

44. The Claimant asserts that his EDT was 29 May 2020, when his termination was reduced to writing. The Respondent says that it was 31 March 2020, the last day up to which the Respondent paid the Claimant. I find that the EDT was in fact 26 May 2020, the day on which the Respondent orally informed the Claimant that he was being made redundant. This was later put into writing, but the writing merely confirmed what had already happened. The Claimant had unambiguously been informed on 26 May 2020 that he was dismissed.

45. At the EDT the Claimant had not been employed by the Respondent for 2 years. This is clear from the fact that the Respondent company was incorporated on 5 February 2020, only 3 months and 21 days before the EDT.

46. However, I find that the Claimant had been continually employed from 5 January 2015 to the EDT by a series of companies: (1) Porsche Dynamics Ltd; (2) Dynamic Automobiles Ltd; (3) RSR Porscha Ltd; and (4) RSR Porscha UK Ltd. I accept the Claimant's evidence that he found out about the transfer of his employment between the companies only after the fact, on each occasion. I accept his evidence that the transfer was seamless, and came to light in the circumstances he described. I accept that Mr Asim was the Claimant's manager in each of the companies. The Claimant's evidence in this regard is corroborated by the evidence of Mr Martin.

Unfair dismissal

47. The Respondent's case is that the reason for the dismissal was redundancy or some other substantial reason, namely a business reorganisation. The Respondent's position is that the Claimant's dismissal was necessary because the Respondent's business was affected by the COVID-19 pandemic, and the Respondent could not access the Coronavirus Job Retention Scheme ("**the furlough scheme**", or "**the CJRS**"). The Respondent says that it could not access the CJRS because it had not had the Claimant on the payroll, registered through PAYE, for long enough.

48. The Coronavirus Act 2020 Functions of Her Majesty's Revenue and Customs (Coronavirus Job Retention Scheme) Direction of 20 May 2020 at § 9 provides for which transferred employees could be subject to the CJRS at that point. I accept the Respondent's evidence that, because the Respondent's accountant had failed to put the Claimant on the PAYE scheme in time, the Claimant could not be placed on the CJRS. This was wholly attributable to the Respondent's, or the Respondent's accountant's, failure.

49. I accept the uncontradicted evidence of the Claimant that the Respondent gave no warning of impending redundancies before the day on which the Claimant was made redundant. This evidence is supported by the Whatsapp messages between the Claimant and the Respondent, from which it is clear that the Claimant's dismissal was a complete surprise to him. I accept the Claimant's evidence that Mr Asim talked to ACAS about the Respondent's obligations to

pay the Claimant, and then immediately decided to dismiss the Claimant to avoid having to continue to pay the Claimant's wages.

50. Further, the Respondent has not provided any evidence of how the selection pool for redundancy was chosen. The Claimant has provided evidence that other employees continued to work for the Respondent. I find that evidence is correct. I find that the selection pool was determined arbitrarily by the Respondent.

51. Further, given that the Respondent dismissed the Claimant without notice of an impending redundancy situation, I find that no consultation occurred as to the best means by which the desired management result could be achieved fairly and with as little hardship to the Claimant as possible.

52. Further, on the basis of my finding that the Respondent decided to dismiss the Claimant immediately after Mr Asim spoke to ACAS and was told that the Respondent had to continue paying the Claimant, I find that the Respondent did not consider any alternative employment for the Claimant.

Failure to pay notice pay (wrongful dismissal / breach of contract)

53. I accept the Claimant's evidence that he was dismissed without any notice. The dismissal took place on 26 May 2020. This evidence is uncontradicted by the Respondent. It is corroborated by the Whatsapp messages.

54. I accept the Claimant's evidence that he was not paid notice pay. This evidence is uncontradicted by the Respondent.

55. I find that the Claimant had 5 years' continuous service.

Failure to pay redundancy pay

56. There is no evidence of any redundancy payment having been made. I therefore accept the Claimant's evidence that he was dismissed without any redundancy pay.

57. I have found that the Claimant had 5 years' continuous service.

Arrears and holiday pay (unauthorised deductions from wages)

58. The Parties appear to accept that the Claimant was a worker.

59. There is no evidence of the Respondent having paid the Claimant for the period of the Claimant's employment after 31 March 2020. The Respondent does not claim to have done so, as it claims that the EDT was 31 March 2020. I therefore find that the Respondent made no payment of wages for the period after 31 March 2020, despite the Claimant's employment continuing until 26 May 2020.

60. I accept the Claimant's candid evidence about the amount of holiday he had taken in 2020. He originally thought he had taken 1½ days' holiday. However, when he checked the calendar on which leave dates had been entered, he found that the last of these half days was on the day on which he was told he

was being placed on furlough. I accept his evidence that he had an afternoon doctor's appointment, but that he remained at work and worked until close. In the light of the COVID-19 pandemic, and its impact on health services, I accept his evidence that the doctor's surgery was probably closed, which is why he did not go to the appointment. The Claimant's account of being told he was being placed on furlough is more consistent with him having worked a full day on his last day in the Respondent's premises than him having worked a half day. I therefore find that the Claimant had taken only 1 day's holiday in 2020.

Conclusions

Jurisdiction

61. I conclude that the EDT was 26 May 2020.

62. I conclude that each of the companies that employed the Claimant was in turn involved in the transfer of a business from one to the next ((1) Porsche Dynamics Ltd; to (2) Dynamic Automobiles Ltd; to (3) RSR Porscha Ltd; to (4) RSR Porscha UK Ltd (which is the Respondent)) under the TUPE Regulations 2006. I conclude that the Claimant's employment by each of these companies was transferred to the next at the same time as the transfer of the business.

63. I am supported in this conclusion by the fact that the Claimant's last payslip for RSR Porscha Ltd was dated 4 February 2020, and covered January's wages in full, whereas the first payslip for the Respondent was dated 29 February 2020, and covered February's wages in full. The Respondent came into existence on 5 February 2020. If the Claimant had only been employed from 5 February 2020, rather than having been transferred under the TUPE Regulations 2006 to the Respondent, then the Respondent would have only paid the Claimant's wages from 5 February 2020. As such, in February, the Respondent was treating the Claimant's employment as having been continuous, from before the Respondent came into existence. By its actions in paying the full month of February's wages, even for the part before which it could not have employed him because it did not exist, the Respondent was treating the Claimant as having been subject to TUPE transfer.

64. The exact date of each transfer does not need to be identified. However, I conclude that the TUPE transfer of the Claimant to the Respondent took place on a date between 5 February 2020 (the date of the Respondent's incorporation) and 29 February 2020 (the date of the Claimant's first payslip from the Respondent).

65. As the Claimant had been continuously employed from 5 January 2015 to 26 May 2020, I conclude that the Claimant had at least 2 years' service at the EDT.

66. I conclude that the Tribunal has jurisdiction to hear the unfair dismissal claim.

Unfair dismissal

67. I found that the Respondent's business was affected by the COVID-19 pandemic. I found that the Respondent could not access the CJRS. I therefore

conclude that the reason for dismissal was redundancy.

68. This is a potentially fair reason for dismissal.

69. Having found that no warning of impending redundancy was given, that no consultation was undertaken, that the selection pool was chosen arbitrarily, and that no alternative employment was considered, I conclude that the Respondent did not follow a fair procedure to select the Claimant for redundancy. I therefore conclude that the complaint of unfair dismissal is well-founded.

70. I have considered whether the Respondent might have dismissed the Claimant, absent any unfairness. In the absence of any evidence from the Respondent on the issue, I have concluded that it is unlikely that the Respondent would have done so. However, even if the Respondent had done so, I conclude that undertaking a fair redundancy procedure would have taken at least 4 weeks, by which time the Claimant had happily found alternative employment.

71. The Claimant did not contribute to his dismissal and his dismissal was not his own fault. I conclude that the Claimant's compensation should not be reduced.

72. The Claimant cannot recover both a Basic Award and a redundancy payment. Nor can the Claimant recover both a Basic Award and damages for wrongful dismissal. As such, no Basic Award will be made.

73. Where an award of damages for wrongful dismissal is made, the Claimant cannot recover as a Compensatory Award for unfair dismissal the lost wages for the notice period, as this would be double recovery.

74. I award the Claimant £400 for loss of statutory protection and £200 for loss of the right to long notice. The total award for unfair dismissal is a Compensatory Award of **£600 (calculated net)**.

Failure to pay notice pay (wrongful dismissal / breach of contract)

75. The Claimant was dismissed without notice. He had 5 years' continuous service. I conclude that he was entitled to 5 weeks' notice pay. He was not paid any notice pay.

76. I conclude that the Respondent was in breach of contract by dismissing the Claimant without notice.

77. For Employment Tribunal awards for failure to pay notice pay, a week's pay is currently capped at £538 gross. The Claimant's weekly pay was above this figure. As such, the capped figure will be used to calculate damages.

78. The Respondent is ordered to pay to the Claimant the **gross sum of £2,690, being damages for the breach of contract**.

Failure to pay redundancy pay

79. The Claimant had 5 years' continuous service. I conclude that the Claimant was entitled to 5 weeks' redundancy pay. No redundancy payment was made.

80. For Employment Tribunal awards for failure to pay redundancy pay, a week's pay is currently capped at £538 gross. The Claimant's weekly pay was above this figure. As such, the capped figure will be used to calculate damages.

81. The Respondent is ordered to pay to the Claimant the **gross sum of £2,690, being the redundancy payment** he is owed.

Arrears and holiday pay (unauthorised deductions from wages)

82. I conclude that the Respondent made a deduction from wages. The Respondent does not say that a deduction was authorised or excepted. I conclude that it was not. I therefore conclude that the Claimant's complaint that there was an unauthorised deduction from his wages is well-founded.

83. The Claimant's case is that he is owed his pay for April and May. The Claimant was last paid for the period to 31 March 2020. The Claimant was dismissed on 26 May 2020. As such, I conclude that the unauthorised deductions were his full wages of £3,000 for April, and a proportion of his wages for May. That proportion of his wages for May is: 26 days employed ÷ 31 days in May = approximately 83.9%. That is £2,516.13.

84. The Respondent is ordered to pay the Claimant the **gross sum of £5,516.13 in respect of the amount unlawfully deducted**.

85. The Claimant's contract of employment entitled him to 5 weeks' holiday per year. However, 5.6 weeks is the statutory minimum. I conclude that the Claimant was entitled to 5.6 weeks' holiday per year.

86. I conclude that the Claimant's leave year ran from the anniversary of his employment. As such his leave year was 5 January to 4 January.

87. The Claimant's leave year began on 5 January 2020; the EDT was 26 May 2020: this is 143 days into the leave year (20.43 weeks). This is approximately 39.3% of a year. The Claimant was entitled to 5.6 weeks' holiday per year. Therefore, the Claimant had accrued 2.2 weeks' holiday by the EDT (this being 39.3% of 5.6 weeks). The Claimant had used 1 day's (approximately 0.143 weeks) holiday. He therefore had approximately 2.057 weeks' holiday he was owed at the EDT. He was not paid for this accrued holiday pay. I therefore conclude that the Claimant's complaint that the Respondent failed to pay holiday pay is well-founded.

88. The Claimant's gross weekly pay was approximately £692.31. The Respondent is therefore ordered to pay the Claimant the **gross sum of £1,424.18 in respect of accrued holiday pay**.

Adjustments to awards

89. No change to any award is made for failure to follow an ACAS Code of Practice.

Final conclusions

90. The total sums payable by the Respondent to the Claimant are:

(1) Compensatory Award for unfair dismissal of **£600 (calculated net)**.

(2) The gross sum of £2,690 (damages for breach of contract) + the gross sum of £2,690 (redundancy pay) + the gross sum of £5,516.13 (in respect of the wages unlawfully deducted) + the gross sum of £1,424.18 (in respect of accrued holiday pay) = **£12,320.31 (calculated gross)**.

Employment Judge S Knight
Date: 16 November 2020

Appendix 1: List of Issues

Jurisdiction

1. When was the Effective Date of Termination ("**EDT**")?
   The Claimant says it was 29 May 2020.
   The Respondent says it was 31 March 2020.

2. At the EDT, had the Claimant been employed by the Respondent for 2 years?
   The Claimant says he either had been, or he had been transferred under TUPE.
   The Respondent says that the Claimant had not been.

3. If, at the EDT, the Claimant had not been employed by the Respondent for 2 years, had his employment been transferred from another employer to the Respondent (either directly, or through a third employer) under "**TUPE**"?
   The Claimant says that his employment was transferred from: (1) Porsche Dynamics Ltd; to (2) Dynamic Automobiles Ltd; to (3) RSR Porscha Ltd; to (4) RSR Porscha UK Ltd (which is the Respondent).
   The Respondent says that the Claimant's employment was not transferred from another employer to the Respondent.

4. Was the Claimant employed by the Respondent, and any employer which transferred his employment to the Respondent, for 2 years at the EDT?
   The Claimant says that he had 5 years' service.
   The Respondent says "no".

Unfair dismissal

5. Has the Respondent shown what the reason for dismissal was?
   The Respondent says that the reason was redundancy or some other substantial reason, namely a business reorganisation.

6. Was the reason for dismissal a potentially fair one?
   The Respondent says the answer is "yes".

7. If "yes", did the Respondent follow a fair procedure to select the Claimant for redundancy? In particular, did the Respondent:

   (1) Give as much warning as possible of impending redundancies in order to enable the Claimant to take early steps to inform himself of the relevant facts, consider possible alternative solutions, and find alternative employment in the Respondent's undertaking or elsewhere?

   (2) Adopt a fair selection pool?

   (3) Engage in meaningful consultation as to the best means by which the desired management result could be achieved fairly and with as little hardship to the Claimant as possible?

   (4) Consider alternative employment?

8. If the dismissal was unfair, might the Respondent have dismissed the Claimant, absent any unfairness? (See the case of *Polkey*.)

9. If so:

   (1) What chance was there of the Claimant having been dismissed anyway?

   (2) Alternatively, when would the Claimant have been dismissed anyway?

Failure to pay notice pay (wrongful dismissal / breach of contract)

10. Was the Claimant dismissed without notice (or less notice than he was entitled to under the employment contract)?
    The Claimant says "yes".
    The Respondent has not said.

11. Did the Respondent pay the Claimant notice pay?
    The Claimant says "no".
    The Respondent has not said.

12. How many weeks' notice pay should have been paid?
    The Claimant says 5 weeks'.
    The Respondent says 0 weeks.

13. How much notice pay is owed?
    The Claimant says £3,461.54 gross.
    The Respondent says £0.

Failure to pay redundancy pay

14. Was the Claimant entitled to redundancy pay?
    The Claimant says "yes".
    The Respondent says "no".

15. If so, how many weeks' redundancy pay should have been paid?
    The Claimant says 5 weeks'.
    The Respondent says 0 weeks'.

16. How much redundancy pay was paid?
    The Claimant says £0.
    The Respondent has not said.

17. How much redundancy pay is owed?
    The Claimant says £3,461.54 gross.
    The Respondent says £0.

Arrears and holiday pay (unauthorised deductions from wages)

18. Was the Claimant a worker?

19. Is the claim in respect of wages (under s 27 of the Employment Rights Act 1996 ("**ERA 1996**"))?

20. Has the Respondent made a deduction from wages (under s 13(3) ERA 1996)?

21. Was any deduction of wages authorised (under ss 13(2) and 13(3) ERA 1996)?

22. Was any deduction an "excepted deduction" (under s 14 ERA 1996)?

23. If an unauthorised deduction from wages was made:

    (1) How much arrears of pay is owed?
    The Claimant says 2 months, giving a total of £6,000 gross.
    The Respondent says £0.

    (2) How much holiday pay is owed?
    The Claimant says 10.5 days, giving a total of £1,453.85 gross.
    The Respondent has not said.

        (a) What was the Claimant's leave year?

        (b) How much holiday had the Claimant accrued in the leave year to the EDT?

        (c) How much holiday had the Claimant taken?

    (3) How much financial loss did the Claimant suffer, which is attributable to the non-payment of wages?

Remedies

24. Should any award be increased or reduced due to failure to follow ACAS Code of Practice?

25. Should any award be reduced because of the Claimant's conduct or contributory fault?