Case Number: 2405339/2018

EMPLOYMENT TRIBUNALS

Claimant: Ms C McPhillips

Respondent: Beacon Counselling

CERTIFICATE OF CORRECTION

Employment Tribunals Rules of Procedure 2013

Under the provisions of Rule 69, the reserved judgment and reasons sent to the parties on 16 November 2020, is corrected as set out in bold type at paragraph 4 of the judgment and paragraphs 97 and 99 of the reasons.

Employment Judge Slater

Date: 1 December 2020

SENT TO THE PARTIES ON

7 December 2020

FOR THE TRIBUNAL OFFICE

Important note to parties:
Any dates for the filing of appeals or reviews are not changed by this certificate of correction and corrected judgment. These time limits still run from the date of the original judgment, or original judgment with reasons, when appealing.

Case Number: 2405339/2018

EMPLOYMENT TRIBUNALS

Claimant: Ms C McPhillips

Respondent: Beacon Counselling

HELD AT: Manchester **ON:** 9 November 2020 and 10 and 11 November 2020 (in chambers)

BEFORE: Employment Judge Slater

REPRESENTATION:

Claimant: In person
Respondent: Mr B McCluggage, counsel

CORRECTED JUDGMENT

The judgment of the Tribunal is that:

1. The breach of contract claim is not well founded.

2. The complaint of unauthorised deduction from wages, save for the complaint in relation to holiday pay, is dismissed on withdrawal by the claimant.

3. The claimant was a worker as defined in regulation 2 of the Working Time Regulations 1998 and section 230 of the Employment Rights Act 1996.

4. The complaint of unauthorised deductions from wages in respect of the failure to pay in lieu of accrued but untaken annual leave in respect of work done as a worker **in the period 20 March 2016 until 10 January 2018** ~~**in 2017**~~ is well founded and the respondent is ordered to pay to the claimant the gross sum of **£793.90** ~~**£908.92**~~, being the total gross sum unlawfully deducted.

5. The respondent is ordered to pay to the claimant compensation of £2265.83 for unfair dismissal. No uplift is made for a failure to comply with a relevant ACAS Code of Practice. The Recoupment Regulations do not apply to this award.

6. No award of compensation is made under section 38 Employment Act 2002.

CORRECTED REASONS

Summary and background to this hearing

1. This hearing was conducted by video conference (CVP).

2. The claimant is a counsellor. She worked for the respondent as a counsellor, as an employee, on schools' contracts, and on a self-employed basis for other work.

3. The claimant ceased to do any work on schools' contracts in October 2017 and her employment was ended on 20 December 2017. She continued doing other counselling work for the respondent into January 2018. She has done no work for the respondent since January 2018.

4. The claimant presented a claim for unfair dismissal and other complaints on 20 March 2018. The respondent denied she had sufficient service as an employee to claim unfair dismissal. In the alternative, the respondent argued that the reason for dismissal was redundancy, the dismissal was fair, given there was no work available and, even if the procedure was unfair, the claimant would have been dismissed at the same time in any event and had suffered no loss (*Polkey*).

5. At a preliminary hearing, the judgment for which was sent to the parties on 3 January 2020, Employment Judge Warren held that the claimant was an employee from February 2015 to the date of her dismissal on 20 December 2017 under the Priestnall and Hazel Grove contracts and that she was a qualifying employee for the purposes of her unfair dismissal claim. Employment Judge Warren held that, for all other periods when the claimant worked for the respondent, and under any other contract than the Priestnall and Hazel Grove contracts, the claimant was either self-employed or a worker. Priestnall and Hazel Grove are secondary schools where the respondent had contracts to provide counselling services and the claimant was contracted with the respondent to provide those services on behalf of the respondent.

6. Following this judgment, in a letter dated 29 January 2020, the respondent conceded liability for unfair dismissal. The basis for the concession was not explained in the letter. In the same letter, the respondent wrote that issues for the remedy hearing would include *Polkey*, in particular, the inevitability of dismissal due to redundancy and further due to a breakdown of relations. Liability remained in dispute for the remaining claims.

7. The claim was listed for a final hearing on 24 July 2020. However, for reasons relating to the hearing and preparation and the impact of Covid-19, the hearing was converted to a telephone case management preliminary hearing.

Claims and issues

8. At the case management preliminary hearing on 24 July 2020, Employment Judge Allen identified and listed the issues to be determined at this final/remedy hearing. Employment Judge Allen recorded that the claimant was no longer pursuing a claim for unlawful deduction from wages, save for the holiday pay claim. I have recorded this complaint as being dismissed on withdrawal by the claimant in my judgment.

9. I discussed the list of issues with the parties at the start of this hearing and set out below Employment Judge Allen's list, with some amendments arising from this discussion.

10. The claimant, in the course of her evidence, disputed that she was an employee in respect of work at Hazel Grove School. Mr McCluggage said this raised a possible jurisdictional issue as to whether the complaint of unfair dismissal was presented in time. However, when I referred to Employment Judge Warren's judgment that the claimant was an employee in respect of the Priestnall and Hazel Grove contracts, and stated that I considered that I was bound by this judgment, Mr McCluggage accepted this. Despite the claimant's expressed view at this hearing that she was not an employee in respect of the Hazel Grove contract, I proceeded on the basis that she was, since this had been found to be the case by Employment Judge Warren.

11. These are the issues that the parties agreed I was to determine at this hearing.

Breach of contract (notice)

11.1. Did the respondent breach the claimant's contract of employment in respect of notice and, if so, what was the loss arising from the breach? The claimant contends that she was entitled to 12 weeks' notice as a result of her length of service (in which the claimant includes service other than as an employee), the respondent says she was entitled to 4 weeks' notice under her contract (based upon two years' service) and she has been paid for that period. The claimant accepted that she had received payment for four weeks' notice.

Annual leave

Employment Judge Allen noted that the claim relates to the period of two years only. However, when the claimant set out her calculation of holiday pay she is seeking, she relied only on leave accrued in 2017.

11.2. Was the claimant a worker for the times when she was engaged by the respondent when she was not otherwise an employee or volunteer?

11.3. If so, what entitlement does the claimant have to: pay for annual leave taken; and/or pay for accrued but untaken annual leave as at the date when her engagement as a worker ceased (whether as a claim for unlawful deduction from wages, breach of contract and/or under the Working Time Regulations 1998)? The claimant calculates that she is owed £600. The respondent disputed the earnings used by the claimant in the calculation for October and November 2017.

11.4. A possible time limit issue had been identified at the case management preliminary hearing, but Mr McCluggage informed me that the respondent accepted that the complaint was presented in time.

This is not a claim for annual leave for the time when the claimant was employed, as she accepts that she was paid rolled-up holiday pay as part of the pay for her employment.

Remedy for unfair dismissal

11.5. What was a week's pay for the claimant? The claimant contends that it was £97.80 (she informed me that she had made a mistake in her schedule of loss by using the figure £98.70). The respondent contends it was £82.86. The respondent says that the claimant has incorrectly included travel expenses in the calculation of a week's pay.

11.6. What basic award is the claimant entitled to?

11.7. What is the cap on the compensatory award which the claimant can recover (being 52 times a week's pay)?

11.8. What loss has the claimant sustained in consequence of her unfair dismissal? Has the claimant taken reasonable steps to mitigate her loss and/or has she mitigated her loss?

11.9. Should the compensatory award be capped/reduced to reflect the likelihood that the claimant would have been dismissed in any event (had a fair procedure been followed) (*Polkey*)? The respondent contends that: the claimant would have been made redundant in any event within three weeks if a fair redundancy procedure had been followed; and/or that the claimant remaining in employment would in any event have been unlikely as the relationship had broken down and/or it would have done so when the claimant's self-employed engagement was suspended in January 2018. The claimant denies this is the case.

11.10. Should the compensatory award be uplifted as a result of an alleged failure by the respondent to comply with the ACAS code of practice on disciplinary and grievance procedures, and, if so, by what percentage (up to 25%)? The respondent says that no ACAS Code of Practice was applicable since this was a dismissal for redundancy, which the claimant disputes.

Statement of terms and conditions

11.11. Did the respondent fail to comply with its obligations to provide a statement of employment particulars, and/or an updated statement, which was correct and included the information required? The claimant confirmed that this relates to a mistake in the school identified in a contract produced in February 2015 which was not corrected until further contracts produced in December 2015 and March 2016.

11.12. If so, are there exceptional circumstances which would make an award unjust or inequitable?

11.13. What amount should be awarded (between two and four week's pay)?

Evidence

12. I had a bundle of documents of 269 pages in paper form and in an electronic version. Page references in these notes are to pages in that bundle.

13. Shortly before the hearing, the respondent sent to the Tribunal and the claimant a further electronic bundle including the two witness statements, a note from Mr McCluggage giving an introduction to the case and setting out the respondent's arguments, and a number of legal cases.

14. I had witness statements for the claimant and James Harper, the Chief Executive Officer for the respondent, who both gave oral evidence.

15. During our initial discussion, I had understood from what the claimant was saying, that she had not seen Mr Harper's witness statement until that morning. After Mr McCluggage told me that the statement had been sent to the claimant before the date it was due in accordance with the case management orders, the claimant said she was not saying she had not received the witness statement previously but that she did not recall seeing the appendices to that statement. The claimant told me that she had not prepared any questions to ask Mr Harper. I suggested that she should do so, during the time when I would be reading the statements and documents, and explained that, if Mr Harper said something which she disagreed with, she should challenge this in her questions, putting her version of events so that he could comment on this. I adjourned for just under an hour and a half for reading, after the initial discussion. When it was the claimant's turn to cross examine Mr Harper, she put very few questions to him. Much of Mr Harper's evidence was, therefore, not challenged. Since the claimant was not legally represented, I do not feel it appropriate to conclude, from a lack of challenge in cross examination by the claimant, that all the evidence of Mr Harper which is unchallenged is accepted by the claimant.

16. The claimant informed me that she did not have paper copies of the witness statements but she was able to view these on screen. She had a paper copy of the bundle of documents.

Facts

17. I rely on the facts found by Employment Judge Warren in her judgment and reasons sent to the parties on 3 January 2020 and make further additional findings of fact.

18. The claimant began working for the respondent on a self-employed basis on 1 April 2007.

19. The claimant began working at Priestnall School as an employee of the respondent in February 2015. She was sent a draft contract shortly after that, but this had the wrong school identified. The claimant pointed out the error, but this was not corrected until a later version was sent to the claimant in December 2015. The claimant was not misled by the mistake in the draft contract as to the school she was to attend for work.

She only ever attended the correct school. The claimant did not sign and return the December 2015 contract, which was the same as the February 2015 contract, save for the correction of the name and address of the school. The claimant was provided with a further contract of employment in February 2016, which the claimant signed and returned on 21 March 2016.

20. The contracts contained the provision that the claimant was entitled to four weeks' notice of termination if her length of service was less than four years (pp.121 and 43). Above this length of service, the notice entitlement increased by one week for each additional complete year of service up to a maximum of 12 weeks (which is in line with statutory minimum notice under section 86 of the Employment Rights Act 1996). The contract reserved the right to make a payment in lieu of notice.

21. As noted in Employment Judge Warren's reasons, the respondent mistakenly believed that the claimant did not become an employee until she signed a corrected contract of employment in April 2016. She was paid gross until April 2016 in respect of the work at Priestnall School. In April 2016, she began to be paid under PAYE for the schools' contract work, net of deductions for tax and national insurance contributions.

22. The claimant is critical of the respondent for what she considers to be a lack of training, particularly in relation to the paperwork required for schools, which she asserts led to her making some mistakes. I make no findings as to whether or not the respondent provided the claimant with adequate training as this is not necessary to decide the issues before me.

23. I find, based on the claimant's evidence, that the respondent allocated employees to a particular school to carry out work there and they did not "chop and change". However, it was possible for the respondent to replace an employee with another employee at a school and they did this when Priestnall School asked for the claimant to be removed. There must also have been occasions when an employee would leave the respondent and would need to be replaced on a school's contract.

24. In March 2016, the claimant was given a written warning, following a disciplinary hearing, for unsatisfactory conduct (p.71). Two of the upheld allegations related to

issues in connection with Priestnall School. The claimant did not appeal against the warning. The claimant was informed that the warning would be disregarded for disciplinary purposes after a period of 12 months, provided her conduct reached a satisfactory level.

25. In July 2017, the claimant was advised that, following an issue with a pupil at Priestnall, the school had requested that she should not continue. The claimant was told by Helen, the Children and Young Person's Manager, that the school no longer wanted her to be the counsellor as they had "lost confidence" in her. The claimant got no further explanation about this (p.259). The claimant felt that the respondent should have questioned the school about the reasons for requesting the claimant's removal from work at the school and supported the claimant, who did not feel she had done anything wrong. There is no evidence that the respondent questioned the request, investigated the reasons for this or sought to persuade the school to allow the claimant to continue working there. The respondent arranged for another counsellor, Kirsty, to take over the counselling work at the school from September. Since the respondent took no disciplinary action against the claimant, I find that the respondent did not have any real concern about the claimant's conduct at this stage. Indeed, the claimant in her letter to Mr Harper of 27 November 2017 (p.259) wrote that she had received a lovely supportive email from him at the time. It appears that Helen was also initially supportive, from the reference the claimant makes to the "few chats" with her (p.259). I accept the claimant's evidence that Helen told the claimant she was being used as a
"scapegoat" by the school.

26. In September 2017, the claimant did not return to Priestnall but continued to work at Hazel Grove School for one hour per week. Based on the claimant's evidence, I find that this was ad hoc work, in relation to a particular student, and was expected to end in October 2017. The last day the claimant worked on the Hazel Grove contract was 31 October 2017.

27. After the work at Hazel Grove ended, the claimant had no school contract work and, therefore, no work as an employee for the respondent.

28. The claimant was paid an hourly rate for hours worked as an employee, for which she submitted a claim form. Since she was not doing any work as an employee after October 2017, she did not receive any payment after the payment for work done up to and including 31 October 2017, except for the notice pay paid on termination of her employment.

29. On 26 November 2017, the claimant made a complaint to Mr Harper about how the issue with Priestnall School was dealt with (p.259). She raised a particular concern about the respondent failing to organise a smooth transition for the students she had been counselling. She also complained about Helen, the Children and Young People's Services Manager, speaking to other counsellors about a previous incident involving the claimant which the claimant had been told would be removed from her record after a year, alleging that this was a data

breach. The claimant wrote that she had been glared at in the street by the mother of one of the young people she had been counselling, guessing that the mother was angry with her, perceiving that the claimant had abandoned the young person and the claimant was not able to tell her what had really happened. The claimant wrote to Mr Harper that she had done nothing wrong but had lost her job and was now getting glared at in the street by a parent who thought she had let their child down. She asked for this to be addressed by the respondent.

30. It appears, from correspondence following the claimant's suspension from selfemployed work on 11 January 2018 (p.103), that a response to the claimant's complaint was still outstanding at that time. An email from David Best to the claimant dated 16 March 2018 (p.89) refers to a report attached to that email into allegations made in the claimant's formal complaint, but the report is not included in the bundle. It appears from the statement in the email that "our conclusions may not be your desired outcome", that the outcome of the investigation was not in the claimant's favour. The claimant's email response on 16 March 2018 (p.88) alleges that there are a lot of inaccuracies in their findings and alleges that they did not take her complaints seriously at all. The claimant also refers to having started legal proceedings by then, as she had not heard from them. Mr Best replied that they did not plan to reopen the matter.

31. The claimant believes that she was viewed as a troublemaker from the time she made the formal complaint in November and that concerns were manufactured, leading to her suspension from self-employed work in January 2018.

32. The claimant asserts that other schools' work was offered to other employees in December 2017 but not to her. The claimant is unable to give any details of which school(s) the work related to and who was given this new work. The respondent disputes that there was any new schools' work offered to anyone in December 2017. The claimant asserts that another employee, Fiona, who was given her P45 at the same time as the claimant, remained employed. However, she could not comment on what Fiona continued to do for the respondent. She gave evidence that Fiona's picture still appeared on the respondent's website and I accept this evidence, which was not challenged. I do not consider that the inclusion of Fiona's picture on the respondent's website proves that she was an employee, rather than a self-employed counsellor. The difference in the letters to Fiona and Lauren (pp.57 and 58), in which Lauren is told that the respondent will not be processing her P45 because of the recommencement of the Evolve project in the New Year but Fiona is simply given notice of termination is consistent with Lauren being retained as an employee but not Fiona. I find that Lauren was retained as an employee but Fiona ceased to be an employee at the same time as the claimant but remained working for the respondent in a self-employed capacity. I find, therefore, that Fiona was not given new schools contract work, since this would have been done as an employee. The claimant has not satisfied me, on a balance of probabilities, that others were given new schools' work in the period September to December 2017, other than Kirsty replacing the claimant at Priestnall School, following the school's request to remove the claimant from work at that school.

33. The respondent had a telephone audit by HMRC in December 2017. HMRC wanted the respondent to ensure clarity as to who was still an employee or not, so the respondent decided to dismiss the employees who had no work to do.

34. Mr Harper, the Chief Executive of the respondent, believed that the claimant had been employed for less than 2 years, at the time the decision was made to dismiss her. This belief was based on the information in their payroll system (which indicated PAYE had been operated since April 2016 for payments to the claimant) and other records.

35. I accept Mr Harper's evidence that the respondent did not consult with the claimant about her dismissal because he believed she had less than 2 years' service as an employee.

36. At the time the claimant was dismissed, in December 2017, there were 3 other employees of the respondent who also had no work to do as employees (JH11).

37. The respondent sent dismissal letters to 4 employees, including the claimant. Mr Harper's evidence was that the other three employees dismissed had less than 2 years' service at the time (JH 11). However, one of those dismissed was "Sacha" (p.56). In Appendix 1 to Mr Harper's witness statement, he identifies three employees as having less than 2 years' employment but those identified do not include Sacha. Either the evidence in the body of Mr Harper's witness statement about Sacha is incorrect or the information in Appendix 1 is incorrect.

38. The claimant was sent a notice letter from the respondent dated 20 December 2017 (p.48), confirming the ending of the employed work at the respondent and informing her that a payment was being processed to cover the notice period and that she would be sent a P45. The letter informed her that this action was in line with a telephone audit that month by HMRC and conversations with their accountancy and payroll service. The letter confirmed that the claimant would continue to carry out work for the respondent as a self-employed counsellor, delivering sessions for the respondent's private practice and EAP work.

39. Letters in similar terms were sent to the three other employees who did not have any work to do (pp. 56, 57 and 58), save for the letter to Lauren which referred to the recommencement of the project she was working on in the New Year and that her P45 would not be processed and she would be issued with a contract variation to reflect this (p.58).

40. One of the employees sent a notice letter (Lauren) was, in fact, retained in employment. Mr Harper gave evidence that this was because of last minute funding announced just after the dismissal letters had been written (JH12). However, Mr Harper's evidence that the funding was announced after the dismissal letter had been written is inconsistent with the letter to Lauren (p.58). The letter informed Lauren that the project was to recommence in the New Year so they would not be processing her P45 and she would be provided with a contract variation to confirm that. I find, based on this letter, that the respondent

had already secured funding for the recommencement of the project when the letter was written and Lauren was informed that her employment would be continuing, although she had not been working as an employee since the Evolve project had ended in September 2017. Mr Harper gave evidence that this project required specialist skills and experience the other employees did not have (JH12). Mr Harper wrote in Appendix 1 to his statement that Lauren's role on the Evolve project was a specialised role ending in December 2017 so should not be counted in a redundancy selection exercise. The information provided by Mr Harper in his witness statement (JH12) is inconsistent with the information in the Appendix and p.58. The letter of termination to Fiona (p.57) also refers to the ending of the Evolve project in September and the ending of her employed work at the respondent. It appears from the letters that both Fiona and Lauren had been working on the Evolve project, which appears inconsistent with Mr Harper's explanation for the retention of Lauren, that she had specialist skills and experience others did not have (JH12).

41. The claimant was sent an email on 21 December 2017 by the Operations Manager, which read as follows:

> "Following advice from HMRC, we are legally obliged to have clarity with all employees and people contracted to carry out work for Beacon. This has affected you in terms of your work within schools which came to an end in October. This has also affected other counsellors within Beacon who had employed work that has come to an end.
>
> "You do not have work within schools at the moment so it is important for us to be clear about whom we employ and who has work with Beacon on a selfemployed basis."

42. The claimant's P45 was issued on 15 December 2017. This gave a leaving date of 1 November 2017.

43. On 6 February 2018, the respondent made two payments into the claimant's bank account to cover the notice periods for the Priestnall School contract (£391.20) and the Hazel Grove contract (£48.90). The Operations Manager sent the claimant an email on that day to inform her that these payments had been made (p.50). The claimant accepted, in the case management hearing in July 2020, that she had been paid for 4 weeks' notice in relation to each of these contracts.

44. The dismissal did not affect the claimant's continued self-employed work for the respondent on work other than the schools' contracts. She continued to do this work until 11 January 2018. Mr Harper informed the claimant by letter incorrectly dated 11 January 2017, sent by email on 11 January 2018 (pp.94-95) that the respondent was suspending contracting with her for counselling services. Mr Harper referred to issues of concern about the claimant's fitness to practice and difficulty in managing her. He wrote that he felt there needed to be a "a period of self-reflection" on the claimant's part before the respondent could contract with her

further. The claimant did not receive any self-employed work from the respondent after 11 January 2018.

45. Mr Harper has given evidence about the claimant's conduct, making allegations about unprofessional conduct, which I understand to be hotly contested by the claimant. The notes the claimant has included in the bundle (pp.247-250) suggest she would have had points to make about the allegations, had she been given an opportunity to address them. The claimant considers that the allegations are linked to her making a complaint in November 2017. I accept that Mr Harper had genuine concerns at the time, which is supported by his contemporaneous note dated 12 January 2018 in which he set out his rationale for the suspension (p.96). The note states that issues involving the claimant developed over a period of time starting with the complaint raised by the claimant on 27 November 2017. There is no evidence to suggest that the respondent followed a complaints procedure in addressing concerns about the claimant, as would be expected in accordance with the service level agreement (p.116). The letter of suspension (p.94) did not indicate there would be any investigation of the issues of concern or opportunity for the claimant to comment on the issues raised.

46. The claimant was asked, in cross examination, whether she thought it would have been workable to return to the respondent. The claimant said she did not; she would not want to work for a dishonest charity like the respondent. I find that this view is held now by the claimant. I do not consider that the claimant held this view at the time she was dismissed. Although the claimant considered the relationship between her and the respondent to be deteriorating after she put in her formal complaint towards the end of November 2017, it had not got to the extent by 20 December 2017 that the claimant felt she could no longer work there. The claimant was seeking to resolve matters by having her formal complaint addressed. I consider that the claimant's suspension in January 2018, the delay in dealing with her complaint (which did not have an outcome until March 2018) and the outcome of the complaint process all contributed to the view now held by the claimant that she would not want to return to work for the respondent.

47. The claimant provided copies of her tax returns for the financial years 2016/2017, 2017/2018 and 2018/2019. Extracts from these were included in the bundle. In the tax years 2016/2017 and 2017/2018, the claimant included employed income from the respondent and, within her self-employed income, income from self-employed work for the respondent. The claimant's employment with the respondent and her selfemployment with the respondent ended during the tax year 2017/2018. All the income declared in the 2018/2019 tax return, therefore, is from work other than for the respondent. The net profits for self-employed income for the tax years 2016/2017, 2017/2018 and 2018/2019 were £934, £1695 and £2520 respectively. The claimant's employed income in the tax year 2016/2017 was £3623. The extracts from the tax returns included in the bundle do not show me the claimant's employed income for 2017/2018 but the claimant's P45 (p.66) shows her total pay to date in that tax year (i.e. her employed income from the respondent) to be £2216.51.

48. I omitted to ask the claimant during the hearing whether she had made any claim for benefits following her dismissal. In correspondence following the hearing, the claimant informed the Tribunal that she had not made any claim for jobseeker's allowance or universal credit.

49. The claimant worked as a counsellor on a self-employed basis for the respondent before, during and after the period when she was an employee.

50. The claimant provided her services to the respondent on a self-employed basis under the terms of a service level agreement. An example of this is at page 115 of the bundle.

51. The claimant was paid gross in respect of the self-employed work and accounted for her own tax and national insurance contributions. She took out her own insurance for work carried out.

52. The claimant was under no obligation to accept any work that was offered and the respondent was under no obligation to offer the claimant any work. The claimant chose when she made herself available for work. However, there were service level agreements between the claimant and the respondent for certain types of work, an example being page 115, so I find, based on this, that there was some level of expectation that, if there was work falling within the scope of the service level agreement, the respondent would offer the claimant at least some of that work and the claimant would agree to do at least some of that work.

53. If the claimant had agreed, on a self-employed basis, to provide counselling services to a particular individual at a particular time, she was required to attend personally to carry out that work. The service level agreement at p.115 states that subcontracting is not permitted, unless by prior and specific consent of the General Manager.

54. The claimant was free to work elsewhere, in addition to her work for the respondent. There is a dispute of evidence as to whether the claimant did, in fact, work for other clients during the time when she was providing services to the respondent. The claimant says she chose not to, since she received sufficient work from the respondent to be able to work part-time to the extent she wished to, alongside her childcare responsibilities. Mr Harper believed, based on what the claimant had told him, that she did do work for others. I do not find it necessary to make a finding of fact about whether or not the claimant did work for others since it is sufficient to find that she had the freedom to do so, if she wished to do so. Other self-employed counsellors did provide their services to other organisations and individuals in addition to their work for the respondent.

55. There is no evidence that the claimant was actively marketing her services to other organisations or individuals during the time she was working for the respondent. The marketing material in the bundle relates to periods after the claimant's work with the respondent ended.

56. I accept the claimant's evidence that the respondent had policies which the claimant and others engaged on a self-employed basis had to comply with, relating to how they provided services on behalf of the respondent, although I was not shown copies of any relevant policies. There is reference to respondent policies to be followed by the claimant in the service level agreement (p.115). Aside from this, the claimant was not directed by the respondent as to how she was to carry out the counselling of any particular individual. Clinical supervision was provided, during which the claimant could discuss, in a confidential space, her cases, tackle tricky issues and develop her skills. Line management was not exercised through clinical supervision. The claimant did not, as a self-employed counsellor, receive line management, annual reviews or team meetings. There was much less control of counselling done on a self-employed basis than that done on an employed basis under the schools' contracts, where methods of counselling were controlled by the respondent.

57. The service level agreement (p.115) requires the claimant to attend internal meetings as appropriate.

58. The service level agreement (p.116) states that concerns and complaints about the self-employed counsellor should be raised with management in line with the complaints procedure. I was not shown the complaints procedure.

59. The fact that Fiona had her photo on the respondent's website when she was no longer an employee but was a self-employed counsellor, shows that the respondent puts photos of at least some self-employed counsellors who do work for them on their website.

60. Mr Harper, in preparation for this hearing, carried out a hypothetical redundancy selection exercise, details of which he included in his witness statement and Appendix 1 to that statement. On the basis he explained, Mr Harper asserts that, had he carried out a fair redundancy selection process, he would have selected the claimant for redundancy.

61. The claimant said in evidence that she was unable to comment on whether any of the other employed counsellors should have been chosen for redundancy instead of her. She did not consider it appropriate to bump any other counsellor out of their role in a school for her to take their place but noted that Kirsty had not been in a school until she was put into Priestnall in the claimant's place.

62. The claimant did not have experience of working as a counsellor in primary schools. However, she is a qualified nursery nurse and covered counselling in primary schools in her MA in counselling.

63. The claimant was paid an hourly rate for hours worked as an employed counsellor. She completed a claim form, showing the hours worked. The forms for 2017 are included in the bundle. The same type of form was used to claim payment for work done on a self-employed basis, although separate copies were completed for

employed work and self-employed work for a month in which the claimant did both employed and self-employed work for the respondent.

64. The claimant did no schools contract work in August, September, November or December 2017. Excluding months when she did no employed work other than attending employee team meetings (which the respondent has suggested be excluded from calculations of a week's pay), the claimant earned the following in the last 3 months in 2017 from employed work for the respondent. Reimbursement of travel expenses is excluded from the figure for pay.

    October 2017 - £65.20 (p.204)
    July 2017 - £448.25 (p.203)
    June 2017 - £480.85 (p.202)

65. The claimant asserts that the respondent would not provide her with a reference and that this has hampered her in applying for jobs. Mr Harper says that the respondent was asked for a reference by one potential employer, but that potential employer then said it was no longer required. I was not shown any documentary evidence to support the claimant's assertion or the respondent's account. I find, on a balance of probabilities, that the respondent did not refuse to provide a reference. I accept that the claimant may have been fearful that the respondent would either not provide a reference or would not provide a "good" reference, given the allegations made at the time the respondent suspended the giving of work to the claimant in January 2018.

66. The claimant has given no evidence about specific jobs which she applied for. I find that she has not been offered and accepted any employment since being dismissed by the respondent.

67. The claimant seeks payment in respect of holiday accrued in the calendar year 2017 (p.263).

68. The claimant's self-employed monthly earnings from January to September 2017 are agreed to be as follows:

January	£374.90
February	£309.50
March	£472.70
April	£211.90
May	£407.50
June	£342.30
July	£358.60
August	£146.70
September	£456.40

69. There is a dispute about the earnings for October and November 2017 inclusive. The claimant has taken figures from claims she submitted for payment. However, it appears there were minor reductions before authorisation, relating to the

applicable rate payable for attending a meeting and attending training for which the respondent did not agree a fee was payable. I find that the claimant's earnings were as amended on the applicable sheets (pp. 214 and 215) i.e. £595.12 for October 2017 and £619.40 for November 2017. The earnings for December 2017 are agreed to be £570.50

(p.228).

70. The claimant was challenged on her method of calculation of holiday entitlement, which she had done on the basis of working 3 days per week. Various pay claim forms showed that the claimant had not worked 3 days per week each month but, for many months, had worked 2 days per week (e.g. pp 205-213).

71. The claimant worked for 3 days in January 2018, earning £228.20.

72. The claimant has worked as a self-employed counsellor since leaving the respondent. From the tax return for 2018/2019 referred to above, it appears that her self-employed income for that tax year exceeded her private practice income from the previous tax year, although she had also lost her employed income with the respondent. In a letter to the Tribunal dated 12 June 2020, the claimant wrote that she was working online in her Private Practice from home at that time. In her schedule of loss, she wrote that she had four private clients.

Submissions

73. Mr McCluggage provided written arguments before the start of the hearing and made oral closing submissions. The claimant made oral submissions. I address the parties' principal submissions in my conclusions.

Law and conclusions

74. I deal with the relevant law and my conclusions in relation to each of the complaints in turn.

Breach of contract

75. The claimant argues that she was entitled to notice based on service including her service as a self-employed counsellor as well as the two complete years' service as an employee. The respondent argues that the claimant is only entitled to notice relating to her service as an employee. I agree with the respondent for the following reasons.

76. A complaint of breach of contract can only be brought by an employee in respect of a breach of the contract of employment.

77. The claimant had completed two years' service as an employee. The claimant cannot add on years when she worked for the respondent other than as an employee for the purposes of calculating her notice entitlement. In accordance with the terms of her contract, she was entitled to four weeks' notice of termination. The respondent had

the right under the terms of the contract to make a payment in lieu of notice. The claimant has accepted she was paid in lieu of four weeks' notice. I conclude that the respondent has complied with the terms of the contract and the complaint of breach of contract is not well founded.

Annual leave

78. The claim relates only to time when the claimant was working other than as an employee. She has accepted that she was paid holiday pay for her service as an employee.

79. The respondent argues that the claimant is not entitled to any payment for holiday in relation to work done as a self-employed counsellor because she was not, they say, a "worker". They accept she performed some personal service but argue that the respondent's status was that of a client of the claimant's professional counselling service. There is also some dispute as to the amount that would be payable if the claimant was entitled to holiday pay.

80. The claimant did not make any arguments specifically relating to the "worker" issue. She claims £600, calculated as set out in the document at page 263.

81. Whether the claimant was entitled to annual leave under the terms of the Working Time Regulations 1998 (the 1998 Regulations) for periods of work done other than as an employee depends on whether the claimant satisfied the definition of "worker" in the 1998 Regulations during those periods. If she did not, she was not entitled to annual leave and, therefore, was not entitled to pay in lieu of annual leave.

82. A "worker" is defined in regulation 2 of the Working Time Regulations 1998 as being "an individual who has entered into or works under ….(a) a contract of employment; or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual."

83. This is the same definition of "worker" which appears in section 230(3) of the Employment Rights Act 1996 (ERA). Workers can bring complaints of unauthorised deductions from wages, which includes complaints about failure to pay holiday pay.

84. I conclude that the claimant worked under a contract (other than a contract of employment) between the respondent and the claimant when carrying out selfemployed work. An example is the service level agreement at p.115.

85. I conclude that the claimant was required to perform personally the work or services. The service level agreement states that subcontracting is not permitted, unless by prior and specific consent of the General Manager.

86. Whether the claimant was a "worker", therefore turns on whether the respondent was a client or customer of a profession or business undertaking carried on by the claimant. If it was, then the claimant was not a "worker"; if it was not, then the claimant was a "worker" and entitled to annual leave.

87. I conclude that the claimant's situation was not one of the paradigm cases identified by the EAT in **Cotswold Developments Construction Limited v Williams** [2006] IRLR 181 as falling within the proviso to the definition of worker (see paragraph 53 of the judgment). I conclude that the claimant was not actively marketing her services as a counsellor to the world in general at the relevant time. It appears to me that her situation was closer to the other situation identified by the EAT as falling on the "worker" side of the line i.e. having been recruited to work for the respondent as an integral part of their operations. The fact that the claimant, under the terms of the service level agreement, was required to attend team meetings and to comply with the respondent's policies, suggests a degree of integration into the organisation. The fact that the respondent displays photos of at least some of the self-employed counsellors on its website (see paragraph 32) also suggests a level of integration of self-employed counsellors in the respondent organisation.

88. The Supreme Court in **Bates van Winkelhof v Clyde & Co LLP** [2014] UKSC 32, [2014] 3 All ER 225 (quoted in the **Uber** Court of Appeal decision to which I was referred), considered whether a member of a limited liability partnership was a "limb (b) worker", which is shorthand for the definition of worker in section 230(3)(b) ERA. Lady Hale DPSC said:

> "24. First, the natural and ordinary meaning of "employed by" is employed under a contract of service. Our law draws a clear distinction between those who are so employed and those who are self-employed but enter into contracts to perform work or services for others.
>
> 25. Second, within the latter class, the law now draws a distinction between two different kinds of self-employed people. One kind are people who carry on a profession or a business undertaking on their own account and enter into contracts with clients or customers to provide work or services for them …The other kind are self-employed people who provide their services as part of a profession or business undertaking carried on by some-one else …"

89. I conclude that the claimant was providing her services as part of a business (albeit a charitable one) carried on by the respondent. The claimant and other self-employed counsellors provided the skilled labour through which the respondent organisation delivered its services.

90. I conclude that the claimant was a "worker" within the definition in the 1998 Regulations and section 230(3) ERA. She was, therefore, entitled to annual leave under the terms of the 1998 Regulations and can bring a complaint of unauthorised deductions from wages in respect of the failure of the respondent to pay her in lieu of accrued but untaken leave.

91. The claimant seeks a payment of £600 calculated as set out in the document at page 263 of the bundle. This calculation was done on the basis of the claimant asserting that she had worked 3 days per week. The pay claim forms (pp 205-211) showed that the claimant had not worked 3 days per week throughout the relevant period, but had often worked 2 days per week. The claimant claimed for 2 years' worth of leave.

92. I do not consider the claimant has correctly applied the 1998 Regulations and relevant case law in calculating her holiday pay entitlement. This is, perhaps, not surprising, given the complexity of the Regulations and related case law and the fact that the claimant is no longer legally assisted. The respondent did not provide me with an alternative calculation of holiday pay, in the event that I did not agree with their argument that the claimant was not a worker and, therefore, not entitled to any holiday pay. I consider it in the interests of justice, therefore, that I apply the 1998 Regulations in calculating the holiday pay as I understand it, and award the result of this calculation, whether this be less or more than the amount of £600 set out in the claimant's document at page 263. If the parties consider that I have made a mistake in the application of the Regulations, they may apply for reconsideration of this decision.

93. To calculate the claimant's holiday entitlement in accordance with the 1998 Regulations, entitlement should be calculated for the remaining part of the final leave year plus any leave which may be carried over to comply with relevant case law. The claimant's leave year for her worker holiday entitlement starts on the anniversary of her start date as a worker. The claimant gave this date in her claim form as 1 April 2007. In accordance with this, her leave year begins on 1 April. The entitlement is to 5.6 weeks' leave per annum. She would be entitled to a pro rata amount of this leave for the period 1 April 2017 to 10 January 2018 (the anniversary of her start date to the last day she did work as a worker for the respondent) i.e. 285/365 x 5.6 = 4.37 weeks leave. I will return to the calculation of a week's pay.

94. The claimant is entitled to carry over the 4 weeks' leave of European origin, but not the additional 1.6 weeks of purely domestic origin, in accordance with the principles in **King v Sash Window Workshop** [2018] IRLR 142 ECJ, on the basis that she was prevented from taking that leave by the denial of the right to leave.

95. The claimant can claim for a maximum 2 years of deductions backdated from presentation of the claim, which was on 20 March 2018: section 23(4B) ERA. The claimant can, therefore, seek payment in lieu of leave accrued in the period 20 March 2016 to 10 January 2018.

96. The amount of leave the claimant could carry forward from previous leave years is, therefore, as follows:

    31 March 2016 to 31 March 2017 - 4 weeks
    20 March 2016 to 30 March 2016 – 11/365 x 4 = 0.12 weeks.

97. The total leave for which the claimant can claim is, therefore, ~~**5.6**~~ **4.37** + 4 + 0.12 = ~~**9.72**~~ **8.49** weeks.

98. I now return to the calculation of a week's pay. In accordance with regulation 16(3) of the 1998 Regulations, as amended, and sections 221 to 224 ERA (as modified by the 1998 Regulations) the calculation is to be done over a 52 week period. Strictly, this should be the last 52 weeks worked. However, the claimant has used the calendar year of 2017 for the calculation and the respondent has not taken issue with this, so I adopt the same approach. The claimant's total earnings in this period, adding together the pay for each month set out in paragraphs 68 and 69 above, is £4862.54. Dividing by 52 gives a figure for a week's pay of £93.51.

99. The claimant should have been paid the following amount in lieu of accrued but untaken annual leave: ~~**9.72**~~ **8.49** x £93.51 = ~~**£908.92**~~ **£793.90**. The respondent made an unauthorised deduction from wages by failing to pay this amount to the claimant and is ordered to pay this amount.

Remedy for unfair dismissal

100. The claimant was dismissed from her work on schools' contracts. This was the only work she did as an employee. Although she did no schools work after 31 October 2017, she was not dismissed until 20 December 2017.

101. The respondent has conceded unfair dismissal. The letter conceding unfair dismissal did not explain the basis on which unfair dismissal was conceded, following the judgment which held that the claimant had sufficient service as an employee to claim unfair dismissal. Mr Harper explained the concession in his witness statement as being because there was no consultation based on their mistaken belief as to the claimant's service.

102. Because the claimant was unfairly dismissed, she is entitled to a basic award, which is calculated according to a statutory formula based on the claimant's age at dismissal (49), completed years of service (2) and weekly pay. It is only the amount of weekly pay which is in dispute. The area of dispute is whether the claimant has, incorrectly, included travel expenses in the calculation of a week's pay. I conclude that she has. I agree with the respondent's calculation of a week's pay as being £82.86. This is based on the last 12 weeks' for which pay being received being payments of £65.20, £448.25, and £480.85 for October, July and June 2017 (see paragraph 64). This makes a total payment for the 12 weeks of £994.30 which, divided by 12 is £82.86. The calculation of the basic award is, therefore, as follows:

    2 x 1.5 x £82.86 = £248.58.

103. I turn next to the compensatory award. The respondent argues, applying the *Polkey* principle, that the claimant would have been dismissed for redundancy, if the respondent had carried out a fair process, and it would only be appropriate to

give a few weeks' compensatory award to allow for the consultation period, but that would be nil, given that the claimant was not earning at the time she was dismissed. Additionally, the respondent argues, again applying the *Polkey* principle, that the claimant's employment would have come to an end by reason of a breakdown of relations. The respondent also argues that the claimant should have been able to mitigate much of her alleged loss by private counselling.

104. In the claimant's closing submissions, she argued that things had turned sour after she made her complaint in November 2017 and that she would have been given new schools' work and not dismissed if she had not made that complaint. I am not clear whether the claimant is asserting that there was no redundancy situation or that the reason she was selected for redundancy was because she had made the complaint. I will, therefore, address both possibilities.

105. The power to make a compensatory award for unfair dismissal is set out in section 123(1) Employment Rights Act 1996. This provides that the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer.

106. In accordance with principles set out by the House of Lords in **Polkey v AE Dayton Services Limited** [1988] ICR 142***,*** a tribunal may reduce a compensatory award for unfair dismissal by up to 100% if there is evidence to suggest the claimant might have been fairly dismissed, either at the time the claimant was dismissed or at some later date. The onus is on the respondent to persuade the Tribunal that there was a chance of a fair dismissal if the respondent had acted fairly. In some cases, there will be circumstances where the nature of the evidence which the employer wishes to adduce, or on which he seeks to rely, is so unreliable that the tribunal may take the view that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made.

107. The claimant, in her schedule of loss, included loss of self-employed counselling work as well as lost earnings for Priestnall school work.

108. Although liability has been conceded and this is a remedy hearing in respect of the unfair dismissal complaint, I have to address the issue of the reason for dismissal in reaching my conclusions on remedy because what the remedy should be depends to some extent on the reason for dismissal.

109. I conclude that the dismissal was by reason of redundancy. The respondent did not have enough schools' work for all its employees. The HMRC audit had prompted the respondent to clarify who were employees, by dismissing employees who had no work to do and were not being paid (see paragraph 33). Three employees, including the claimant, were dismissed because of the lack of work. The fourth who had no work to do, Lauren, received a notice of termination about her employment on the Evolve project having terminated in September but

was informed in the same letter that the project was to recommence in the New Year and told her P45 would not be issued and she would be given a contract variation.

110. I accept that the claimant was one of those selected for redundancy because the respondent, incorrectly, thought she had less than 2 years' service and, therefore, did not have the right not to be unfairly dismissed. I have been given pause for thought about the respondent's reasons for selecting her for redundancy, given the inconsistency in Mr Harper's evidence about those other than the claimant being dismissed because they had less than two years' service; Sacha was dismissed yet he is not included in the list in Appendix 1 of counsellors with less than two years' service. I do not consider this inconsistency sufficient, however, to draw an inference that the claimant was dismissed not because of the combination of not having any work and being thought to have less than two years' service but because she had made the formal complaint in November 2017. Fiona also had no work to do and less than two years' service and was dismissed at the same time as the claimant. In any event, whatever the reason for the claimant's selection for redundancy in December 2017, I have to go on to consider what would have happened if the respondent had acted fairly, within the band of reasonable responses.

111. A fair redundancy selection process would include identifying a pool of employees from whom to select those to be made redundant, applying appropriate criteria for the selection of employees to be made redundant, and consulting with the claimant and others affected about the proposed redundancies.

112. I conclude that the respondent could reasonably have used a pool for selection of all employees engaged in schools counselling or only those engaged in counselling in secondary schools.

113. Most of the criteria suggested by Mr Harper in his hypothetical redundancy selection exercise are unobjectionable. However, Mr Harper provides no explanation for how "record of successful delivery in schools" would be assessed. There is potential in this criterion for subjectivity in the assessment and overlap with disciplinary record. Also, the scoring for "disciplinary record" is not explained. The claimant, I was told, had one written warning for a disciplinary matter. I assume (although this has not been expressly explained) that those with a score of 5 have no previous disciplinary warnings. How one disciplinary warning has meant the claimant lost 3 possible points is not explained. The relevance of a specific qualification as a young person's counsellor or a children's counsellor, since the respondent employed counsellors in the roles without such a qualification, is not explained.

114. Four employees were without work and this was the number of employees the respondent initially sought to make redundant. Lauren and the need for one of the redundancies was taken out of the equation because further funding was secured for the project she was working on, leaving 3 people to be made

redundant. Mr Harper, in appendix 1, says that people with less than 2 years' service would be automatically made redundant, leaving one further person to be selected for redundancy. He lists Lauren, Fiona and Anthony (although, as noted above, Lauren and the need for one of the redundancies is then taken out of the equation). However, Mr Harper's evidence had been that those sent letters had less than two years' service (with the exception of the claimant who was believed to have less than two years' service). Sacha had been sent a letter. If Sacha is added to the list in appendix 1 of people with less than two years' service (excluding Lauren), there are three people with less than two years' service. The respondent could, therefore, dismiss the number of employees required, without the need for a redundancy selection process selecting between those employees with at least 2 years' service. This is borne out by the lists of counsellors in Appendix 1. The list on page 22 of 30 lists 17 people, including Lauren and Sacha, of whom it is said 4 need to be made redundant. The list on page 23 is of 13 employees and does not include Lauren and Sacha, so it appears that the number of people has already been reduced by the number required.

115. It appears, therefore, that there would not have been a need for a redundancy selection process. If all those with less than 2 years' service were dismissed, as is Mr Harper's evidence would be the case, the respondent is left with the number of employees it requires. This includes the claimant who would not, under this scenario, have been dismissed, but would have been reallocated schools work from one of the dismissed employees (presumably Anthony Grainger, since he was not amongst those dismissed on 20 December 2017 for having no work and having, or being perceived to have, less than two years' service).

116. If I am wrong on that, the issues I have identified with Mr Harper's hypothetical redundancy selection exercise are such that I consider that the nature of the evidence on which the respondent seeks to rely is so unreliable that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made. I do not, therefore, consider that any reduction to compensation under the *Polkey* principle, is appropriate to reflect the chances that the claimant would have been fairly dismissed because of redundancy.

117. I turn, then, to the respondent's alternative *Polkey* argument i.e. that the employment relationship would have come to an end because of the deteriorating relationship. I note that this argument was not advanced in the response to the claim, although the *Polkey* argument about selection for redundancy was included. The argument arose for the first time in the letter in which the respondent conceded unfair dismissal, following the judgment that the claimant was entitled to claim unfair dismissal.

118. Mr Harper's witness statement suggests that the claimant's employment would have come to an end at some point because of "behavioural concerns", although he cannot say exactly when things would have "come to a head" (JH71). This suggests an argument that the claimant would have been fairly dismissed at some point because of "behavioural concerns".

119. Mr McCluggage, in his oral submissions, put it differently, suggesting that the relationship was heading for an end because of a breakdown of confidence, relying on the claimant's evidence that she was not prepared to work for a charity she considered dishonest.

120. I have accepted that Mr Harper had genuine concerns about the claimant's conduct when she was suspended from self-employed work on 11 January 2018 (see paragraph 45). However, he recorded in his contemporaneous note that issues had only arisen since the claimant's formal complaint at the end of November 2017. This could be consistent with the claimant's assertion that life was made difficult for her after her formal complaint. Equally, it could be consistent with the claimant being disaffected after making her complaint. The respondent did not take any action against the claimant under the applicable complaints procedure. The claimant would have put forward explanations for her actions, had she been given an opportunity to do so. What the outcome would have been, had the claimant remained employed and the respondent acted fairly, which, for an employee (as she would have been still, if not dismissed) would include use of the disciplinary process if there were serious concerns, is highly speculative. I consider the evidence on which the respondent seeks to rely, is so unreliable that the whole exercise of seeking to reconstruct what might have been is so riddled with uncertainty that no sensible prediction based on that evidence can properly be made as to whether the claimant would have been dismissed fairly, because of behavioural concerns, at some point after 20 December 2017.

121. I do not consider the evidence suggests that the claimant would have resigned because of dissatisfaction with the respondent within the period for which compensation is sought (see paragraph 46).

122. I, therefore, reject the respondent's second *Polkey* argument.

123. If the claimant had not been dismissed, she would have been reallocated schools work from another employee who had been dismissed. She would, therefore, have started earning again, as an employee with the respondent. I conclude that this would most likely have happened from the start of the school term in early January 2018. Had the respondent acted fairly, I conclude they would have managed a transition for the claimant to take over work in one of the other schools by the start of the term in January.

124. I have no information as to what amount of work would have been required under one of the other school contracts so work on the basis that it would have been equivalent to the work at Priestnall School. The only tax year for which I have information and during which the claimant was working for the whole tax year at Priestnall School is 2016/2017. I take the earnings from this year as a fair estimate of what the claimant would have earned per annum at another school i.e. £3623. It is the loss of these earnings with which I am concerned in calculating compensation for unfair dismissal. The claimant carried on working on a self-

employed basis for the respondent after being dismissed. The later loss of self-employed earnings cannot be attributed to the unfair dismissal.

125. The claimant is under a duty to mitigate her loss i.e. to take reasonable steps to replace the lost earnings, by seeking other employment or additional self-employed income. It appears that the claimant has increased her self-employed income which makes up to some extent the lost employed income. In 2018/2019 (a tax year in which she had no income of any kind from the respondent), she earned £2520. The claimant does not set out in her witness statement or her schedule of loss, what income she has been able to earn, since her dismissal. I would expect it to have taken some time for the claimant to get her private practice earnings to this level after being dismissed.

In the absence of more specific information, I estimate that the claimant would not have been able to replace her earned income for a period of 3 months and then started to earn income from private practice at the rate of £2520 per annum. I would expect, with reasonable efforts at mitigation, that the claimant would have been able to expand her practice to increase her income beyond the level earned in 2018/2019. The claimant, in her schedule of loss, claimed for a period of 9 months following dismissal. In line with this, I conclude that her level of earnings from private practice reached the equivalent level of her earned income i.e. £3623, by approximately 9 months after her dismissal. I concluded the claimant was unlikely to have started at another school, and started earning again, until the beginning of the January term. The amount of time between 20 December 2017 and the start of the January term is minimal and the calculation of loss is a rough estimate, so I award loss of earnings for 9 months, without deducting a period without earnings before the start of the January 2018 term.

126. The calculation of loss of earning is, therefore, as follows:

3 months at £3623 p.a.	=	£905.75
6 months at £(3623-2520) p.a.	=	£551.50
Total loss of earnings	=	£1457.25

127. The claimant claimed job seeking expenses of £60. This was not challenged by the respondent and I award that amount.

128. I award £500 for loss of statutory rights, to reflect the time which it would take for the claimant to build up employment rights again, were she to get other employment.

129. I do not consider that any uplift can be made to the award for failure to follow an ACAS Code of Practice. The dismissal was for reason of redundancy and there is no applicable ACAS Code for such a dismissal.

130. The total compensatory award is as follows:

Loss of earnings	£1457.25
Job seeking expenses	£60.00

Loss of statutory rights	£500.00
Total compensatory award	£2017.25

131. Adding together the basic award (£248.58) and the compensatory award (£2017.25) gives a total award for unfair dismissal of £2265.83.

Failure to provide an accurate statement of terms and conditions

132. An award of two or four weeks' pay must be made by a Tribunal under section 38 Employment Act 2002 if a Tribunal finds in a claimant's favour on a claim listed in Schedule 5, which includes unfair dismissal, and the respondent was in breach of their duty to the claimant under section 1(1) or 4(1) of the Employment Rights Act 1996 when the proceedings were begun, unless section 38(5) applies. Section 38(5) applies if there are exceptional circumstances which would make an award or increase in compensation unjust or inequitable.

133. The respondent has not argued that there was not a failure to comply with section 1(1) but relies on the exception in section 38(5).

134. The initial contract of employment provided to the claimant was deficient in that there was a mistake as to the place of work, giving the wrong school. I conclude that the respondent did not comply with section 1(1) fully, because of that mistake.

135. However, the respondent did provide the claimant with a written statement of employment particulars. I have been told of no other deficiencies in the statement. The claimant was not misled by the statement and, indeed, pointed out the mistake to the respondent.

136. I conclude that these circumstances are exceptional circumstances which would make an increase in the award unjust or inequitable and, therefore, make no such award.

Employment Judge Slater

Original date: 11 November 2020
Corrected judgment and reasons: 1 December 2020

ORIGINAL RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON 16 November 2020

CORRECTED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
16 November 2020

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: 2405339/18
Ms C MePhillips v Beacon Counselling

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant decision day" is: 16 November 2020

"the calculation day" is: 17 November 2020

"the stipulated rate of interest" is: **8%**

MR S ARTINGSTALL
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at
www.gov.uk/government/collections/employment-tribunal-forms

If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.